"LET SLEEPING LEGAL DOGS LIE": DECODING THE SUPREME COURT'S TREATMENT OF CIRCUIT COURT CONSENSUS ABOUT FEDERAL STATUTORY MEANING

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In the vast majority of federal cases, interpretive decisions by the U.S. Courts of Appeals are never reexamined by the U.S. Supreme Court. Over time, the circuit courts may also come to reach a longstanding, substantial consensus about the meaning of the words in a particular federal statute. Practically speaking, these circuit court decisions become the last word. For decades, the public and the legal community rely on these interpretations as they shape their behavior in society and in litigation settings.

Despite the odds, in several cases, the Court has chosen to reexamine such a consensus about federal statutory meaning. In these cases, the Justices have often acknowledged the existence of some form of consensus, without providing clear guidance as to how the consensus served as an indicator of meaning among other tools of statutory interpretation.

This Note argues that under certain circumstances, the use of circuit consensus as one indicator of meaning promotes stability, predictability, and coherence in the development of the law and in legislative–judicial relations. It offers a three-part framework for incorporating circuit consensus into federal statutory interpretation.

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INTRODUCTION

With a unanimous (8-0) opinion, the Supreme Court observed in *New Prime Inc.*:

> "[I]t's a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.'" After all, if judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the "single, finely wrought and exhaustively considered, procedure" the Constitution commands. We would risk, too, upsetting reliance interests in the settled meaning of a statute.[1]

The proposition that words in a statute should take their ordinary meaning from the time that Congress enacted the statute appears to be generally accepted by the modern Court.[2] But the federal district courts and the federal courts of appeals engage in methods of statutory

1. New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019) (alterations in original) (citations omitted) (first quoting Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018); then quoting Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983)).

2. Justice Brett Kavanaugh took no part in the case. Id. at 535. Justice Ruth Bader Ginsburg concurred. She agreed with the Court's proposition but noted that "[w]ords in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic." Id. at 544 (alteration in original) (internal quotation marks omitted) (quoting West v. Gibson, 527 U.S. 212, 218 (1999)). Justice Elena Kagan has observed that "we're all textualists now." Harvard L. Sch., The 2015 Scalia Lecture: A Dialogue With Justice Elena Kagan on the Reading of Statutes, YouTube, at 08:29 (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg (on file with the *Columbia Law Review*).

interpretation as well. And, practically speaking, "in all but a miniscule number of cases," the Supreme Court never gets involved, making the courts of appeals "the final expositors of federal law in their geographical region" in most cases.[3] The Roberts Court heard an average of seventy-six cases each Term between 2005 and 2021, and the Court heard sixty-five cases in 2021.[4] This average has decreased over the past few decades: The Rehnquist Court heard an average of 108 cases each Term.[5] In contrast, the number of circuit court opinions and orders in cases terminated on the merits have increased significantly over the past few decades. In 1990, the circuit courts filed 21,006 opinions and orders, and in 2021, the circuit courts filed more than 30,000.[6] Assuming, arguendo, that all seventy-six cases involved the Court's reexamination of a circuit court decision, the Court would be able to review only 0.25% of roughly 30,000 decisions each year. For the vast majority of cases, circuit court decisions "have become as pure as ivory snow."[7]

In some cases, the circuit courts may reach a longstanding, substantial consensus about the meaning of the words in a federal statute. For decades, the public and the legal community may rely on that meaning as effectively "settled" by this consensus. Individuals might shape their

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3. See Thomas E. Baker & Douglas D. McFarland, The Need for a New National Court, 100 Harv. L. Rev. 1400, 1406 (1987) (observing how the Court in 1984 reviewed only 0.56% of circuit court decisions, which effectively made 99.44% of the decisions "free from review").

4. See FAQs—General Information, Sup. Ct. of the U.S., https://www.supremecourt.gov/about/faq_general.aspx [https://perma.cc/59E3-MLUQ] (last visited Jan. 11, 2022) ("The Court receives approximately 7,000-8,000 petitions for a writ of certiorari each Term. The Court grants and hears oral argument in about 80 cases."); Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger & Sara C. Benesh, 2022 Supreme Court Database, Version 2022 Release 01 (Nov. 2, 2022), http://scdb.wustl.edu/data.php (on file with the *Columbia Law Review*) (presenting data on Supreme Court cases, with consolidated cases and cases with multiple issues or legal provisions included once). The author calculated this average (75.88 cases) using Supreme Court cases heard by the Roberts Court from 2005 to 2021.

5. See Spaeth et al., supra note 4. The author calculated this average (107.58 cases) using Supreme Court cases heard by the Rehnquist Court from 1986 to 2004.

6. U.S. Cts., Table 2.5: U.S. Courts of Appeals—Opinions and Orders Filed, by Type, in Cases Terminated on the Merits After Oral Hearing or Submission on Briefs During the 12-Month Periods Ending June 30, 1990, and September 30, 1995 Through 2021, https://www.uscourts.gov/sites/default/files/data_tables/jff_2.5_0930.2021.pdf [https://perma.cc/SH58-DFHL] (last visited Jan. 9, 2023). The circuit courts filed 30,600 opinions and orders in cases terminated on the merits after oral hearing or submission on briefs from September 30, 2020, to September 30, 2021. Id. The data set excludes the U.S. Court of Appeals for the Federal Circuit. Id.

7. Baker & McFarland, supra note 3, at 1406; see also Peter L. Strauss, One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action, 87 Colum. L. Rev. 1093, 1098–99 (1987) [hereinafter Strauss, One Hundred Fifty Cases Per Year] (finding that a court of appeals judge's "opinions, on average, will come under scrutiny only two or three times in a decade"); About the U.S. Courts of Appeals, U.S. Cts., https://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals [https://perma.cc/P2JX-2DS6] (last visited Jan. 11, 2022) ("[T]he decisions made by the [circuit courts] are the last word in thousands of cases.").

behavior in society and in litigation settings in accordance with this understanding. The geographical scope of this public reliance on a particular meaning may be wide-reaching, perhaps even nationwide.

Despite the odds, the Court has, on several occasions, reexamined statutory meaning that had arguably been settled by the circuit courts. And the Court has found that the settled meaning failed to match the "ordinary . . . meaning . . . at the time Congress enacted the statute."[8] When these two possible meanings differ, are there any circumstances in which the existence of a longstanding interpretation, combined with decades of reliance upon this interpretation, outweigh the argument for strict adherence to ordinary meaning at the time of enactment? The Court has suggested different answers to this question over the past fifty years.

This Note serves to assist in understanding how a "circuit consensus" may be considered as an indicator of meaning in federal statutory interpretation.[9] In this Note, "circuit consensus" means a consensus of U.S. Courts of Appeals to have considered the interpretive issue. A circuit consensus is effectively the opposite of a "circuit split."[10] A "circuit consensus interpretation" means an interpretation of a federal statutory provision that has achieved a circuit consensus.

A close examination of the words of the Justices, the institutional principles underlying the roles of the Court and Congress, and the values that support the orderly development of the law suggests that under certain circumstances, the Court should "let sleeping legal dogs lie."[11] Part I of this Note analyzes how Justices have considered circuit consensus about federal statutory meaning over the past fifty years. Part II examines the tensions that may arise when circuit consensus is unsettled by favoring a different meaning of the statutory language. Unsettling circuit consensus

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8. New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019) (alterations in original) (internal quotation marks omitted) (quoting Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018)).

9. This Note explores the concept of circuit consensus about federal statutory meaning. Circuit consensus about federal statutory meaning is narrower in scope than both circuit consensus about the meaning of all statutes and circuit consensus about any question of law heard by the circuit courts. There may be different considerations for circuit consensus about the meaning of state statutes because the Court's normal practice is to defer to a circuit court's interpretation and application of state law. See Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1415 (2019). It also seems unlikely, if not impossible, that there would be a consensus about the meaning of a state statute. State laws are generally interpreted by courts within their circuit. Further, the Court's treatment of circuit consensus about any question heard on appeal may significantly differ from treatment of consensus about statutory meaning. For example, patent decisions have "usual finality" in the circuit courts. See Westinghouse Elec. & Mfg. Co. v. Formica Insulation Co., 266 U.S. 342, 349 (1924).

10. A "circuit split" occurs when "two or more courts of appeals have decided the same legal issue differently." Jonathan M. Cohen & Daniel S. Cohen, *Iron*-ing Out Circuit Splits: A Proposal for the Use of the *Irons* Procedure to Prevent and Resolve Circuit Splits Among United States Courts of Appeals, 108 Calif. L. Rev. 989, 990 (2020).

11. Milner v. Dep't of the Navy, 562 U.S. 562, 593 (2011) (Breyer, J., dissenting).

may undermine pragmatic rule-of-law values, such as protection of the public's reliance interests; disrupt institutional principles underlying the relationship between the Court and Congress and their respective roles; and exhaust limited legislative and judicial resources. To address these practical and values-based concerns, Part III offers a three-part framework drawn from how the Justices have considered circuit consensus as an indicator of statutory meaning. The first component of the framework identifies four circumstances that help identify a circuit consensus about meaning. The second component examines how circuit consensus could be weighed in statutory interpretation. The third component further incorporates circuit consensus interpretation into statutory interpretation analysis by describing it as a form of "settled meaning," drawing from observations by the Court.

I. THE COURT'S TREATMENT OF CIRCUIT CONSENSUS ABOUT STATUTORY MEANING

This Part analyzes how the Court and individual Justices have discussed circumstances that may favor or disfavor the Court's use of circuit consensus as an indicator of statutory meaning. The Court does not have a uniform approach for how or whether to consider circuit consensus in statutory interpretation. But Justices' opinions reveal hints of overarching principles that the Court may value in theory, even if not in consistent practice. These principles inform how circuit consensus could be used in statutory interpretation moving forward.

A. *Discussions by the Justices*

The Justices' discussions fall along a spectrum delineated by two opposing views: (1) A circuit consensus is not a persuasive factor beyond the strength of the interpretation itself; or (2) the Court should adhere to a circuit consensus interpretation even when there are other plausible interpretations. This spectrum has become increasingly complex over the past fifty years.

1. *Brief Invocations of Circuit Consensus in the 1970s and 1980s.* — In the 1970s and 1980s, the Court referenced or alluded to circuit consensus interpretations to support the Court's conclusions. In *Gulf Oil Corp.*, Justice Lewis Powell cited the "longstanding interpretation" of the circuit courts and "continued congressional silence" over nearly forty years as reasons to support adherence to a statute's "clear language."[12] And in *Blue Chip*, the Court similarly reasoned that "longstanding acceptance" by "virtually all lower federal courts facing the issue . . . over the past quarter century," in combination with Congress's failure to reject an interpretation carrying consensus, "argue[d] significantly in favor of

12. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200–01 (1974).

acceptance" of that interpretation.[13] In that case, then-Justice William Rehnquist observed that a federal agency had twice urged Congress to amend a section of its organic statute in order to override a circuit consensus interpretation and neither proposed change was adopted by Congress.[14] Rehnquist also emphasized that the interpretation was "reasonable,"[15] similar to Powell's description of the "clear language" in *Gulf Oil Corp.*[16] In *Cannon*, the Court similarly cited the "very persistence" of an interpretation among judges, executive officials, litigants, and litigants' counsel, combined with the absence of legislative correction, as evidence that Congress at least acquiesced in the interpretation.[17]

A few years after *Cannon*, Justice Thurgood Marshall wrote in *Herman & MacLean* that "Congress' decision to leave Section 10(b) intact" while enacting the "most substantial and significant revision" of securities law since the passage of the Securities Exchange Act of 1934 suggested that Congress "ratified" the consistent line of judicial decisions by federal courts permitting plaintiffs to sue under Section 10(b) regardless of the availability of express remedies.[18] And soon after, the Court held in *Lindahl* that Congress intended to codify "the *Scroggins* standard," an established judicial interpretation of another law, 5 U.S.C. § 8347, when Congress amended the statutory provision without explicitly repeating this standard.[19] Rather than relying on the "bare force of this presumption," Justice William Brennan pointed to the legislative history of the 1980 amendment as evidence that Congress was "well aware" of the judicial interpretation embodied in the *Scroggins* standard.[20] Similarly, in *Monessen*, Justice Byron White observed that "Congress' failure to disturb a consistent judicial interpretation of a statute may provide some indication that 'Congress at least acquiesces in, and apparently affirms, that [interpretation].'"[21] The federal and state courts had held with "virtual unanimity over more than seven decades that prejudgment interest is not available under the [Federal Employers' Liability Act]."[22] As evidence of Congress's failure to disturb this interpretation, Justice White observed

13. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 731–33 (1975).

14. Id. at 732.

15. Id. at 733.

16. *Gulf Oil Corp.*, 419 U.S. at 200–01.

17. Cannon v. Univ. of Chi., 441 U.S. 677, 702–03 (1979).

18. Herman & MacLean v. Huddleston, 459 U.S. 375, 384–86 (1983). Rather than noting the absence of congressional action addressing the longstanding interpretation, as in *Gulf Oil Corp.*, *Blue Chip*, and *Cannon*, the Court suggested that Congress "ratified" the interpretation. Id. at 386.

19. Lindahl v. Off. of Pers. Mgmt., 470 U.S. 768, 781–83 (1985).

20. Id. at 782–83. The Court adopted similar reasoning in *Blau v. Lehman*, citing legislative awareness of the circuit interpretation and subsequent inaction as support for adherence. 368 U.S. 403, 412–13 (1962).

21. Monessen Sw. Ry. Co. v. Morgan, 486 U.S. 330, 338 (1988) (alteration in original) (quoting *Cannon*, 441 U.S. at 703).

22. Id.

that Congress amended the statute several times but never amended it to hold contrary to the judicial interpretation.[23]

Yet in *McNally*, the Court rejected an interpretation of 18 U.S.C. § 1341, the mail fraud statute, that had been applied by each court of appeals to have addressed the meaning of the statutory text, "scheme[] or artifice[] 'to defraud.'"[24] The Court cited the common understanding of "to defraud" to refute the contention that the statute covered a scheme "designed to deprive parties of intangible rights."[25] Justice John Paul Stevens, joined in part by Justice Sandra Day O'Connor, criticized the majority's rejection of this "longstanding, consistent interpretation":

> Perhaps the most distressing aspect of the Court's action today is its . . . rejection of the accumulated wisdom of the many distinguished federal judges who have thoughtfully considered and correctly answered the question these cases present. The quality of this Court's work is most suspect when it stands alone, or virtually so . . . . I am convinced that those 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 longstanding, consistent interpretation of a federal statute.[26]

Most notably, Justice Stevens suggested that even if the judicial interpretation had *not* aligned with Congress's intent, he still would not have rejected it.[27] That same year, in *Fink*, Justice Stevens similarly argued that there are "institutional and reliance values that are often even more important than the initial goal of accurate interpretation."[28]

Soon after, Justice Marshall observed in *Newman-Green* that "[a]lmost every modern Court of Appeals faced with this issue" has reached the same substantive conclusion.[29] The Court was "reluctant to disturb" the "well-settled judicial construction," particularly when there was no evidence that the circuit courts had abused the authority at issue. But the Court did not

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23. Id.; see also Peter L. Strauss, On Resegregating the Worlds of Statute and Common Law, 1994 Sup. Ct. Rev. 429, 435 (1995) [hereinafter Strauss, On Resegregating the Worlds of Statute and Common Law] (observing that *Monessen* "was characterized by attention to contemporary legislative-judicial dialogue").

24. McNally v. United States, 483 U.S. 350, 358 (1987).

25. Id. at 350. Interestingly, one year after *McNally*, Congress enacted 18 U.S.C. § 1346, defining "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346 (2018); see also DOJ, Criminal Resource Manual § 945 (2020).

26. *McNally*, 483 U.S. at 376 (Stevens, J., dissenting).

27. Id. Justice Stevens took a particularly vocal stance in favor of adherence to circuit consensus about statutory meaning, but many other Justices have either favored or more subtly referenced circuit consensus interpretation. See infra Figure 5.

28. Comm'r v. Fink, 483 U.S. 89, 104 (1987) (Stevens, J., dissenting).

29. Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 833 (1989).

clarify when it *would* be appropriate to reluctantly disturb such a judicial construction.[30]

2. *The Emergence of Competing Views in the 1990s and 2000s. — Evans* and other cases in the 1990s signaled the emergence of sharper opposing views among the Justices, between those who favored the use of circuit consensus as an indicator of meaning and those who disfavored it. In *Evans*, the Court held that "an affirmative act of inducement by a public official" was not an element of the offense of extortion "under color of official right" prohibited by the Hobbs Act.[31] The Court noted that nine circuit courts agreed on this interpretation of the Hobbs Act and two circuits held the opposite. Justice Stevens, now writing for the majority, observed that the Court's conclusion was "buttressed by the fact that so many other courts that have considered the issue over the last 20 years have interpreted the statute in the same way."[32] The Court emphasized that the number of appellate court decisions, coupled with the fact that many of these decisions "involved prosecutions of important officials well known in the political community," made it "obvious" that Congress was aware of the "prevailing view" that the Hobbs Act prohibited common law extortion, in line with the majority interpretation.[33] The Court offered two circumstances that make a circuit majority about statutory interpretation a factor that would "buttress" the Court's conclusion: (1) the number of circuit courts endorsing the same interpretation—here, over the course of two decades—and (2) congressional inaction despite its presumed awareness of what were often high-profile circuit decisions.[34]

In his dissent, Justice Clarence Thomas, joined by Chief Justice Rehnquist and Justice Antonin Scalia, lamented the Court's consideration of the circuit majority.[35] Thomas contended that the Court rejected this line of reasoning in *McNally*, several years earlier.[36] He argued:

> The interpretation given a statute by a majority of the Courts of Appeals . . . is due our most respectful consideration . . . . [But] our attention must focus on the *reasons* given for that

30. Id. In the context of the Court's adherence to circuit consensus, *Newman-Green* was a particularly interesting case in that it involved the circuit courts' judgment about their own authority.

31. Evans v. United States, 504 U.S. 255, 256 (1992) (internal quotation marks omitted) (quoting 18 U.S.C. § 1951 (1948)).

32. Id. at 268. Another important factor for the Court was that the interpretation of the majority of the circuit courts was consistent with the common law definition of "extortion." Id. at 259.

33. Id. at 269.

34. Id. at 268–69. While the Court observed that the presence of the circuit majority "buttressed" the Court's ultimate conclusion, the Court, like in *Newman-Green*, did not suggest how much persuasive weight should be afforded to a circuit majority (or circuit unanimity) under similar circumstances. See id.

35. Id. at 290–92 (Thomas, J., dissenting).

36. Id. at 293 n.7.

> interpretation. Error is not cured by repetition, and we do not discharge our duty simply by counting up the circuits on either side of the split.[37]

The dissenting Justices appear to agree with the majority regarding one basic point: The statutory interpretation endorsed by the majority of the circuit courts is due the Court's "most respectful consideration."[38] But the dissent focused on what they perceived as the *substantive* flaws of that favored interpretation. Relatedly, the dissent asserted that the Court should have rejected any argument that congressional silence "implicitly ratifies judicial decisions."[39] This assertion seems to reiterate a broader principle: The Court should review the interpretation itself, not external indicators used to help illuminate statutory meaning.

Soon after, Justice Thomas's position found a majority in *Central Bank of Denver*. The Court diverged from a wide-reaching consensus and held that Section 10(b) did not include "aiding and abetting" liability.[40] The Court asserted that "if Congress intended to impose aiding and abetting liability, we presume it would have used the words 'aid' and 'abet' in the statutory text."[41] Justice Stevens dissented, joined by Justices Harry Blackmun, David Souter, and Ruth Bader Ginsburg. Stevens observed that the law "really was unsettled" in relation to the questions that were presented by the parties, but the Court "*sua sponte* directed the parties to address a question on which even the petitioner justifiably thought the law was settled, and reaches out to overturn a most considerable body of precedent."[42] He noted that "[i]n *hundreds* of judicial and administrative proceedings in every Circuit in the federal system, the courts and the [administrative agency]" have reached the same conclusion about the liability standard under this federal statute.[43] Stevens contended that a "settled construction of an important federal statute should not be disturbed unless and until Congress so decides."[44] Further, while it is true that "Congress may step in and reinstate the old law" when the Court disrupts "settled law," the Court should not "lightly heap new tasks on the

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37. Id.

38. Id.

39. Id.

40. Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 191 (1994); see also Strauss, On Resegregating the Worlds of Statute and Common Law, supra note 23, at 511–12 (arguing that the "static character of statutory law, which courts (and agencies) do not influence, is once again a dominant theme of the majority").

41. *Cent. Bank of Denver*, 511 U.S. at 177.

42. Id. at 194–95 (Stevens, J., dissenting).

43. Id. at 192.

44. Id. at 196 (internal quotation marks omitted) (quoting Reves v. Ernst & Young, 494 U.S. 56, 74 (1990) (Stevens, J., concurring)). Justice Stevens seems to have reiterated his analogous reasoning from *McNally*. See McNally v. United States, 483 U.S. 350, 376 (1987) (Stevens, J., dissenting). Justice Stevens also raised this principle in his dissent in Citicorp Industrial Credit, Inc. v. Brock, 483 U.S. 27, 43 (1987) (Stevens, J., dissenting), as well as in his concurrence in Runyon v. McCrary, 427 U.S. 160, 189 (1976) (Stevens, J., concurring).

Legislature's already full plate," particularly because legislative efforts "to address the problems posed by judicial decisions that disrupt settled law frequently create special difficulties of their own."[45] Justice Stevens also cited evidence suggesting Congress's approval of the interpretation of all eleven circuit courts. He observed that Congress engaged in "comprehensive revision" of the statute and never addressed the issue pertinent to the judicial interpretation.[46] He also asserted that even if there was no affirmative evidence of Congress's ratification of the interpretation, the absence of legislative rejection of a consistent judicial or administrative construction should merit "hesitation" from a court asked to invalidate the construction.[47]

Following this shift from *Evans* to *Central Bank of Denver*, the Court once again favored adherence to a circuit consensus interpretation in *General Dynamics*. The Court held that the Age Discrimination in Employment Act (ADEA) did not prohibit an employer from favoring an older employee over a younger employee, finding that Congress used the statutory phrase "discriminat[ion] . . . because of [an] individual's age" to refer to discrimination "against the older."[48] Justice Souter, writing for the majority, observed that the interpretation of this statutory phrase as "forbid[ding] only discrimination preferring young to old" enjoyed "virtually unanimous accord" among the circuit and district courts.[49] Souter cited "years of judicial interpretation" and asserted that "[t]he very strength of this consensus is enough to rule out any serious claim of ambiguity."[50] Thus, the Court found significance in the fact that the consensus was longstanding, similar to the Court's emphasis in *Evans* that adherence to a particular interpretation had spanned two decades.[51] Further, the *General Dynamics* Court observed that "congressional silence after years of judicial interpretation supports adherence to the traditional view."[52] The Court highlighted that "30 years of judicial interpretation produc[ed] no apparent legislative qualms."[53] The absence of legislative action amid the consensus, coupled with Congress having undertaken efforts to amend *other* portions of the same statute in response to competing interpretations, favored adherence.

Justice Thomas dissented, consistent with his prior agreement with the *Central Bank of Denver* majority's divergence from circuit consensus in favor of what the Court concluded was the clear meaning based on the

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45. *Cent. Bank of Denver*, 511 U.S. at 196 n.7 (Stevens, J., dissenting).

46. Id. at 197.

47. Id. at 196–97.

48. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 591 (2004).

49. Id. at 593.

50. Id. at 593–94.

51. Evans v. United States, 504 U.S. 255, 268–69 (1992).

52. *Gen. Dynamics*, 540 U.S. at 594. Justice Souter asserted that Congress had "not been shy" about revising other judicial constructions of the same statute. Id. at 594 n.7.

53. Id. at 599.

text. He similarly argued that the existence of a "reasonable" and "correct" contrary interpretation indicated that the Court should not have ruled out textual ambiguity in the ADEA so quickly.[54] Justice Thomas argued that the plain reading of the disputed statutory language, particularly the term "age," "clearly allows for suits brought by the relatively young when discriminated against in favor of the relatively old."[55]

The *General Dynamics* debate raised but did not resolve a broader question of whether "virtually unanimous accord" among the circuit courts, together with congressional inaction, foreclose a finding by the Court that the disputed statutory language is still ambiguous and carries a different meaning. If a consensus does not *entirely* foreclose a contrary interpretation, it is unclear how a circuit consensus should then be weighed relative to other considerations. Further, the consensus was absent from the Court's list of the factors informing its holding: the "text, structure, purpose, and history of the ADEA, along with its relationship to other federal statutes."[56]

3. *Identifying More Nuances From the 2010s to the Present.* — From the 2010s to the present, the Court and individual Justices have expanded on prior discussions by drawing new distinctions regarding what might constitute a circuit consensus about meaning and the circumstances favoring adherence to a circuit consensus interpretation. In *Morrison*, the Court did not find it significant that there was longstanding, widespread consensus about a judge-made doctrine originating in the circuit courts. The Court looked to the structure of the statute and applied a "longstanding principle"—that statutes presumptively do not apply extraterritorially—to reach an interpretation contrary to the circuit consensus.[57] Justice Stevens, concurring in the judgment, stressed that he "would adhere to the general approach that has been the law in the Second Circuit, and most of the rest of the country, for nearly four decades."[58] The Court's analysis of the text was "plausible" but "not nearly so compelling . . . as to warrant the abandonment" of how federal courts had long construed the statute:[59]

> The Second Circuit refined its test over several decades and dozens of cases, with the tacit approval of Congress and the

54. Id. at 606 (Thomas, J., dissenting).

55. Id. at 603.

56. Id. at 600 (majority opinion).

57. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 265, 273 (2010). The Court followed the "longstanding principle of American law" that "when a statute gives no clear indication of an extraterritorial application, it has none." Id. at 255 (internal quotation marks omitted) (quoting Equal Emp. Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)). The Court also held that because Rule 10b-5 was promulgated under Section 10(b), it did not extend beyond conduct encompassed by the prohibition in Section 10(b). Id. at 261–62.

58. Id. at 274 (Stevens, J., concurring in the judgment).

59. Id.

> Commission and with the general assent of its sister Circuits. That history is a reason we should give additional weight to the Second Circuit's "judge-made" doctrine, not a reason to denigrate it. "The longstanding acceptance by the courts, coupled with Congress' failure to reject [its] reasonable interpretation of the wording of §10(b), . . . argues significantly in favor of acceptance of the [Second Circuit] rule by this Court."[60]

Justice Stevens did, however, acknowledge in a footnote that the circuit courts differed in their *applications* of the Second Circuit's general approach.[61] In this sense, the circumstances in *Morrison* may be similar to those in *Global-Tech*. Justice Samuel Alito, writing for the *Global-Tech* majority, had observed that although the circuit courts articulated the willful blindness doctrine in different ways, they agreed on two of its basic requirements.[62] Justice Anthony Kennedy responded that "counting courts in a circuit split is not this Court's usual method for deciding important questions of law."[63] Perhaps a deficiency in both cases was an inconsistency among the circuit courts, whether in the application of a general approach or in the articulation of a doctrine, that impeded what might constitute a true consensus. *Morrison* may be also distinguished as a case addressing circuit consensus about a circuit-made test rather than circuit consensus about the meaning of statutory text. The thrust of Justice Stevens's dissent appeared to be that the text did not specify the geographic reach of the statute, and the Second Circuit test that filled this gap should be followed.[64] The Court took issue with this lack of textual basis.[65] The Court's rejection of Stevens's reasoning suggests that some Justices may refuse to adhere to even decades-long, widespread consensus that they believe significantly deviates from the statutory text.

Shortly after *Morrison*, in *Milner*, the Court held that explosives maps and data did not fall under an exemption to the Freedom of Information Act that protects material "related solely to the internal personnel rules and practices of an agency" from disclosure.[66] Justice Elena Kagan

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60. Id. at 278 (alterations in original) (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 733 (1975)).

61. Id. at 275 n.2.

62. Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 769 (2011).

63. Id. at 774 (Kennedy, J., dissenting).

64. *Morrison*, 561 U.S. at 280 (Stevens, J., concurring in the judgment). Justice Stevens's call to afford "additional weight to the Second Circuit's 'judge-made' doctrine" appears to have been made in the context of the exceptionally open-ended nature of Section 10(b) and Rule 10b-5. Id. at 278. The Court had previously observed that courts may need to "flesh out the portions of the law with respect to which neither the congressional enactment nor the administrative regulations offer conclusive guidance." Id. (internal quotation marks omitted) (quoting *Blue Chip*, 421 U.S. at 737).

65. Id. at 258 (majority opinion). The Court noted that the Second Circuit "confessed" that they would be unable to identify language in the relevant statutes or legislative history that compelled their approach. Id.

66. Milner v. Dep't of the Navy, 562 U.S. 562, 564 (2011).

concluded that Exemption 2, "consistent with the plain meaning of the term 'personnel rules and practices,'" encompassed "only records relating to issues of employee relations and human resources."[67] The majority's only definite conclusion from the legislative history was that Congress never explicitly ratified, approved, or otherwise agreed with a judicial interpretation of Exemption 2.[68]

In dissent, Justice Stephen Breyer offered guidance regarding the appropriate treatment of circuit consensus: "This Court has found that circumstances of this kind offer significant support for retaining an interpretation of a statute that has been settled by the lower courts."[69] First, Justice Breyer asserted that "once 'a statute has been construed, either by this Court or by a consistent course of decision by other federal judges and agencies,' it can acquire a clear meaning that this Court should hesitate to change."[70] The Court should have accepted the D.C. Circuit's interpretation of the statutory language from the *Crooker* decision,[71] which was "consistently followed, or favorably cited, by every Court of Appeals to have considered the matter during the past 30 years."[72] This piece of Justice Breyer's reasoning mirrors the Court's discussions in *Evans* and *General Dynamics*.[73] Second, a Senate Report evidenced that Congress was "well aware" of *Crooker*, and Congress left the interpretation untouched when Exemption 7 was amended.[74]

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67. Id. at 581. The majority found the dictionary definitions of the adjective "personnel" crucial to discerning this meaning. Id. at 570.

68. Id. at 574–75. Justice Kagan observed that that legislative history is "meant to clear up ambiguity, not create it." Id.

69. Id. at 586–87 (Breyer, J., dissenting).

70. Id. at 585 (emphasis omitted) (quoting Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 268 (1987) (Stevens, J., concurring in part and dissenting in part)).

71. Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir. 1981) (en banc).

72. *Milner*, 562 U.S. at 585 (Breyer, J., dissenting). Justice Breyer also observed that the *Crooker* interpretation had guided almost every FOIA case in the past thirty years, including over one hundred district court decisions. Id. at 586.

73. See Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 593 (2004) (observing years of "virtually unanimous accord" among the circuit and district courts); Evans v. United States, 504 U.S. 255, 268–69 & n.21 (1992) (observing agreement among nine circuit courts over two decades).

74. *Milner*, 562 U.S. at 586 (Breyer, J., dissenting) (citing S. Rep. No. 98-221 (1983) (discussing *Crooker*)). Justice Breyer also cited Professors William Eskridge, Philip Frickey, and Elizabeth Garrett, who observed that "[t]he acquiescence rule can also support implicit congressional ratification of a uniform line of federal appellate interpretations." Id. at 587 (citing William Eskridge, Jr., Philip Frickey & Elizabeth Garrett, Cases and Materials on Legislation 1048 (4th ed. 2007)). Justice Breyer's observation of congressional inaction amid judicial interpretation reflects the *General Dynamics* Court's analysis of congressional silence amid the interpretation despite Congress's activity addressing other judicial constructions of the statute. *Gen. Dynamics*, 540 U.S. at 594. The *Milner* dissent also goes further than *General Dynamics* by identifying evidence of congressional awareness. *Milner*, 562 U.S. at 586 (Breyer, J., dissenting). This use of legislative history mirrors the Court's *Lindahl* opinion as well. Lindahl v. Off. of Pers. Mgmt., 470 U.S. 768, 781–83 (1985).

Justice Breyer offered two additional circumstances favoring adherence to the circuit consensus interpretation: when the interpretation involved "careful" analysis and offered a "reasonable" holding. He examined the substantive merit of the textual interpretation itself, observing that "even if the majority's analysis would have persuaded me if written on a blank slate, *Crooker*'s analysis was careful and its holding reasonable."[75] Justice Breyer underscored a practical reality: The Court does not start from scratch when it agrees to hear an interpretive question. From a basic timing perspective, lower court developments precede the Court's involvement.[76] Breyer argued that the *Crooker* interpretation reflected "careful" analysis of the statute's language, legislative history, and precedent, and a "reasonable" holding that Exemption 2 "could be read more broadly as referring to internal rules or practices that set forth criteria or guidelines for agency personnel to follow in respect to purely internal matters."[77] By examining the strength of the interpretation, Justice Breyer supplemented extratextual factors with textual factors supporting adherence.[78] He responded to the majority's criticism that the interpretation was "disconnected" from the text and that the Court "will not flout all usual rules of statutory interpretation to take the side of the bare majority"[79] by responding that the interpretation exhibited "careful" analysis and a "reasonable" holding.[80]

Only months after his *Milner* dissent, Justice Breyer wrote for the *Tinklenberg* majority:

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75. *Milner*, 562 U.S. at 587 (Breyer, J., dissenting).

76. See Aaron-Andrew P. Bruhl, Following Lower-Court Precedent, 81 U. Chi. L. Rev. 851, 852 (2014) ("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."); Peter L. Strauss, The Common Law and Statutes, 70 U. Colo. L. Rev. 225, 246 (1999) [hereinafter Strauss, The Common Law and Statutes] ("Here is where the element of timing comes to bear. Our Supreme Court has only one hundred or so opportunities each year to decide issues of any character. Of necessity, then, many issues percolate through the lower courts for years without reaching it. It may take decades . . . .").

77. *Milner*, 562 U.S. at 587 (Breyer, J., dissenting).

78. Justice Breyer's discussion seems to echo the Court's implicit focus on the "clear language" in *Gulf Oil Corp.* and on the "reasonable" nature of the judicial interpretation in *Blue Chip*, more than three decades prior. See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 731–32 (1975); Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200–01 (1974).

79. *Milner*, 562 U.S. at 577. The debate between the majority and the dissent in *Milner* differed from the debate in *Morrison*, in which Justice Stevens in dissent stressed the importance of adherence to the circuit consensus, and in response, the Court pointed to the absence of any *textual* basis for the circuit consensus approach. See supra notes 64–65 and accompanying text.

80. *Milner*, 562 U.S. at 587 (Breyer, J., dissenting). Justice Breyer also suggested that "a new and different interpretation raises serious problems of its own." Id. at 593. The Court, however, maintained that the judicial interpretation strayed from the text, noting that it has "no warrant to ignore clear statutory language on the ground that other courts have done so." Id. at 576 (majority opinion).

> [W]e are impressed that during the 37 years since Congress enacted the Speedy Trial Act, every Court of Appeals has considered the question before us now, and every Court of Appeals . . . rejected the interpretation that the Sixth Circuit adopted . . . . This unanimity among the lower courts about the meaning of a statute of great practical administrative importance in the daily working lives of busy trial judges is itself entitled to strong consideration, particularly when those courts . . . maintained that interpretation consistently over a long period of time. See *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 593–594 (2004).[81]

The Court's nod to *General Dynamics* is informative. The Court built upon its prior observations by reasoning that the consensus may be "entitled to strong consideration."[82] And the Court raised two circumstances favoring adherence to consensus: (1) consistent judicial interpretation over a "long period of time," and (2) the "great practical administrative importance" of the statute for the lower courts.[83] In *General Dynamics* and *Tinklenberg*, the interpretation of the relevant federal statute enjoyed decades-long consensus, similar to the Court's observation of the consensus spanning two decades in *Evans* and Justice Breyer's observation of a "consistent course of decision" in *Milner*.[84] In contrast, the "great practical administrative importance"[85] of the Speedy Trial Act emerged as a new circumstance in *Tinklenberg*.

Justices Thomas and Scalia again wrote separately. Justice Scalia, joined by Chief Justice John Roberts and Justice Thomas, criticized the Court's consideration of circuit consensus:

> The clarity of the text is doubtless why, as the Court's opinion points out, . . . every Circuit disagrees with the Sixth Circuit's conclusion. 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.[86]

Justice Thomas had similarly reasoned in *General Dynamics* that there was a plain meaning of the disputed text that the Court should follow.[87] But Justice Scalia went further in *Tinklenberg* by rejecting the assertion that

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81. United States v. Tinklenberg, 563 U.S. 647, 656–57 (2011).

82. Id. at 657.

83. Id.

84. See Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 594 (2004) (citing "years of judicial interpretation"); see also *Milner*, 562 U.S. at 585 (Breyer, J., dissenting).

85. *Tinklenberg*, 563 U.S. at 657.

86. Id. at 663 (Scalia, J., concurring in part and concurring in the judgment).

87. *Gen. Dynamics*, 540 U.S. at 603 (Thomas, J., dissenting).

unanimity of circuits, as a factor in itself, provides any insight regarding meaning, even if the underlying interpretation is "correct."[88]

One month after *Tinklenberg*, the Court issued its opinion in *CSX Transportation*.[89] The Court underscored the "uniform view of federal appellate courts" as one factor supporting its conclusion that the Federal Employers' Liability Act (FELA) "does not incorporate 'proximate cause' standards developed in nonstatutory common-law tort actions."[90] In his dissent, Chief Justice Roberts replied that the Court "do[es] not resolve questions such as the one before us by a show of hands."[91]

One distinction between *CSX Transportation* and other Court discussions about circuit consensus rests on the distinction between consensus about statutory meaning and consensus about the correct reading of a Supreme Court opinion.[92] In *CSX Transportation*, the Court highlighted the fact that every circuit court that reviewed judgments in FELA cases rejected "proximate cause" formulations in reliance on the Court's holding in *Rogers*.[93] Chief Justice Roberts replied that citing a circuit court majority is "particularly peculiar" when it was "nurtured and preserved *by our own misleading dicta*."[94]

Relatedly, the Court and individual Justices have rejected arguments that a circuit consensus about statutory meaning even existed as a threshold matter. In *Rehaif*, the Court was urged to adopt the "settled judicial construction" of 18 U.S.C. §§ 921(g)(1) and 924(a)(2) that had been embraced by every circuit court.[95] Justice Breyer replied that there was no consensus, in part because one court held to the contrary and

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88. *Tinklenberg*, 563 U.S. at 666 (Scalia, J., concurring in part and concurring in the judgment).

89. CSX Transp., Inc. v. McBride, 564 U.S. 685 (2011).

90. Id. at 688.

91. Id. at 715 (Roberts, C.J., dissenting).

92. See Bruhl, supra note 76, at 872 ("[I]f 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, then a consensus . . . is not very edifying to the Supreme Court." (footnote omitted)). This distinction is comparable to how *Morrison* may be distinguished as a case addressing circuit consensus about a circuit-made test. See supra text accompanying note 64.

93. *CSX Transp.*, 564 U.S. at 698 (citing Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500 (1957)).

94. Id. at 715 (Roberts, C.J., dissenting) (internal quotation marks omitted) (quoting Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 621 (2001) (Scalia, J., concurring)). Beyond dicta, the Court has also declined to follow circuit consensus about the application of the language and reasoning of a Court opinion, in contrast to consensus about statutory meaning. In *Borden v. United States*, for example, the dissent criticized the plurality's decision to "rewrite" the Court's *Voisine* decision, observing that almost all courts of appeals to consider the issue have applied *Voisine* much differently. 141 S. Ct. 1817, 1853 (2021) (Kavanaugh, J., dissenting) (citing Voisine v. United States, 136 S. Ct. 2272 (2016)).

95. Rehaif v. United States, 139 S. Ct. 2191, 2199 (2019).

another court's conclusion could be distinguished from the majority.[96] Justice Alito made a comparable argument in *Home Depot U.S.A.* that there was no consensus about the interpretation of 28 U.S.C. § 1441 because two circuit courts issued contrary decisions.[97] Similar to underlying concerns in *Morrison* and *Global-Tech*,[98] it seems that inconsistencies among individual circuit approaches can fatally impede a finding of a consensus.

Fifty years later, it remains unclear how much persuasive force a circuit consensus carries when a Justice finds that the statutory text is clear. In *Barton*, Justice Brett Kavanaugh observed that "except for the Ninth Circuit, all of the Courts of Appeals to consider the question have interpreted the statute that way."[99] Yet he also noted that "[a]s a matter of statutory text and structure, that analysis is straightforward," and undertook his own analysis of the text.[100] Similarly, the Court in *Collins* highlighted that "[e]very Court of Appeals that has confronted" the relevant statutory text had reached the same interpretation under comparable facts.[101] Although the Court agreed with the consensus, Justice Alito still engaged in a separate analysis of the text to explain *why* the Court substantively agreed.

B. *Visual Synthesis*

Section I.B presents visual aids for Section I.A. Figure 1 is a timeline of cases involving notable discussions of circuit consensus. Figure 2 summarizes circumstances favoring use of circuit consensus as an indicator of statutory meaning. Figure 3 outlines circumstances disfavoring consideration of a purported circuit consensus.

96. Id.

97. Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743, 1758–59 (2019) (Alito, J., dissenting).

98. See supra text accompanying notes 61–63.

99. Barton v. Barr, 140 S. Ct. 1442, 1450 (2020).

100. Id.

101. Collins v. Yellen, 141 S. Ct. 1761, 1776 (2021).

FIGURE 1: TIMELINE OF CASES INVOLVING NOTABLE DISCUSSIONS OF CIRCUIT CONSENSUS

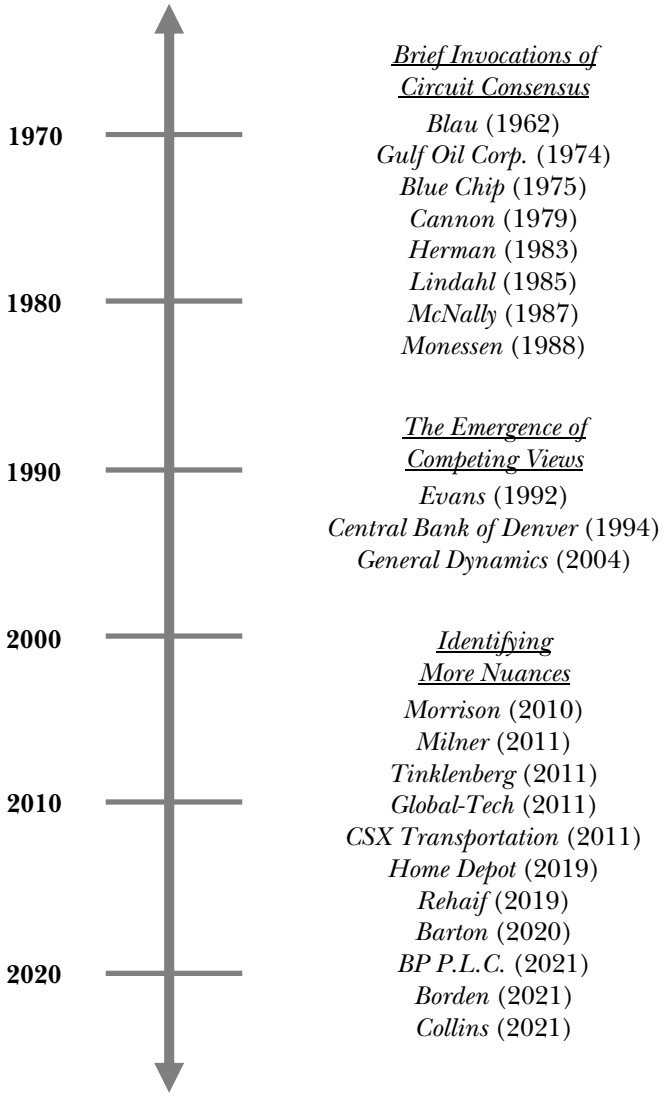

FIGURE 2: JUSTICES' REFERENCES TO CIRCUMSTANCES FAVORING CIRCUIT CONSENSUS

Duration of Consistent Judicial Interpretation (Extratextual Circumstance)	▪ *Gulf Oil Corp.* Court ("longstanding interpretation") (~40 years)[102] ▪ *Blue Chip* Court ("longstanding acceptance") (~25 years)[103] ▪ *Monessen* Court ("over more than seven decades") (~70 years)[104] ▪ *Evans* Court (~20 years)[105] ▪ *General Dynamics* Court ("years of judicial interpretation"; "30 years of judicial interpretation") (~30 years)[106] ▪ *Tinklenberg* Court ("over a long period of time") (~37 years)[107] ▪ *McNally* Dissent ("longstanding"[108] interpretation "over the past few decades"[109]) ▪ *Milner* Dissent (~30 years)[110]

102. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200–01 (1974).
103. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 733 (1975).
104. Monessen Sw. Ry. Co. v. Morgan, 486 U.S. 330, 338–39 (1988).
105. Evans v. United States, 504 U.S. 255, 268–69 (1992).
106. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 594, 599 (2004).
107. United States v. Tinklenberg, 563 U.S. 647, 656–57 (2011).
108. McNally v. United States, 483 U.S. 350, 376 (1987) (Stevens, J., dissenting).
109. Id. at 362.
110. Milner v. Dep't of the Navy, 562 U.S. 562, 585 (2011) (Breyer, J., dissenting).

Degree of Consistent Judicial Interpretation (Extratextual Circumstance)	Interpretation followed by majority of circuit courts: ▪ *Evans* Court[111] Interpretation followed by unanimity of circuit courts: ▪ *Gulf Oil Corp.* Court ("with almost perfect consistency")[112] ▪ *Blue Chip* Court ("virtually all lower federal courts facing the issue")[113] ▪ *Monessen* Court ("courts have held with virtual unanimity")[114] ▪ *Tinklenberg* Court ("every Court of Appeals has considered the question"; "unanimity among the lower courts")[115] ▪ *McNally* Dissent ("The quality of this Court's work is most suspect when it stands alone, or virtually so . . . .")[116] ▪ *Central Bank of Denver* Dissent ("in every Circuit")[117]

111. Evans v. United States, 504 U.S. 255, 256–59 (1992). The description refers to a majority of circuit courts to have considered the interpretive issue. But the Court also observed that the majority interpretation was consistent with the relevant common law definition. Id. at 259.

112. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200–01 (1974).

113. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 731–32 (1975).

114. Monessen Sw. Ry. Co. v. Morgan, 486 U.S. 330, 338–39 (1988).

115. United States v. Tinklenberg, 563 U.S. 647, 656–57 (2011). The description refers to a unanimity of circuit courts to have considered the interpretive issue.

116. McNally v. United States, 483 U.S. 350, 376 (1987) (Stevens, J., dissenting).

117. Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 192 (1994) (Stevens, J., dissenting).

Congressional Inaction Amid Consistent Judicial Interpretation (Extratextual Circumstance)	Where Congress did not address the interpretation when Congress otherwise amended the statute: ▪ *Herman & MacLean* Court[118] ▪ *Monessen* Court[119] ▪ *General Dynamics* Court[120] ▪ *Central Bank of Denver* Dissent[121] Where Congress did not address the interpretation when Congress was urged to amend the statute: ▪ *Blue Chip* Court[122] With evidence of Congress's awareness of the interpretation in the form of legislative history: ▪ *Blau* Court[123] ▪ *Lindahl* Court[124] ▪ *Milner* Dissent[125] With presumption of awareness because the circuit court decisions were high-profile and numerous: ▪ *Evans* Court[126] With presumption of awareness through silence: ▪ *Gulf Oil Corp.* Court[127]

118. Herman & MacLean v. Huddleston, 459 U.S. 375, 385–86 (1983).

119. *Monessen*, 486 U.S. at 338–39 (citing Cannon v. Univ. of Chi., 441 U.S. 677, 703 (1979)).

120. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 594 n.7 (2004).

121. *Cent. Bank of Denver*, 511 U.S. at 197 (Stevens, J., dissenting).

122. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 731–32 (1975).

123. Blau v. Lehman, 368 U.S. 403, 412–13 (1962).

124. Lindahl v. Off. of Pers. Mgmt., 470 U.S. 768, 781–83 (1985).

125. Milner v. Dep't of the Navy, 562 U.S. 562, 586 (2011) (Breyer, J., dissenting).

126. Evans v. United States, 504 U.S. 255, 269 (1992).

127. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200–01 (1974).

The Statute Was of Practical Administrative Importance Among Lower Courts (Extratextual Circumstance)	▪ *Tinklenberg* Court (Speedy Trial Act)[128]
Judicial Interpretation Involved "Careful" Analysis (Textual Circumstance)	▪ *Milner* Dissent (analysis underlying judicial interpretation was "careful")[129]
Judicial Interpretation Offered "Reasonable" Conclusion (Textual Circumstance)	▪ *Gulf Oil Corp.* Court (statute had "clear language")[130] ▪ *Blue Chip* Court (the interpretation was "reasonable")[131] ▪ *Milner* Dissent (holding was "reasonable")[132]

128. United States v. Tinklenberg, 563 U.S. 647, 656 (2011).
129. *Milner*, 562 U.S. at 587 (Breyer, J., dissenting).
130. *Gulf Oil Corp.*, 419 U.S. at 200–01.
131. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 733 (1975).
132. *Milner*, 562 U.S. at 587 (Breyer, J., dissenting).

FIGURE 3: JUSTICES' REFERENCES TO CIRCUMSTANCES DISFAVORING CIRCUIT CONSENSUS

Purported Circuit Consensus Fell Short in Consistency or Uniformity (Extratextual Circumstance)	Consensus embraced a general approach, but the circuit courts differed in their applications of this general approach: ▪ *Morrison* Court[133] Consensus on certain issues, but not the entire doctrine, thus reflecting a circuit split: ▪ *Global-Tech* Dissent[134] A minority interpretation diverged from the majority interpretation: ▪ *Milner* Court (Court "will not flout [the rules] . . . [to side with] the bare majority")[135] ▪ *Rehaif* Court (no "judicial consensus" where one circuit court held to the contrary and another opinion could be distinguished from majority)[136] ▪ *Evans* Dissent (Court will not "count[] up the circuits on either side of the split")[137] ▪ *Global-Tech* Dissent ("[C]ounting courts in a circuit split is not this Court's usual method for deciding important questions of law.")[138] ▪ *CSX Transportation* Dissent (Court should not resolve questions by a "show of hands")[139] ▪ *Home Depot* Dissent (no consensus given two contrary circuit decisions)[140]

133. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 275 n.2 (2010).

134. Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 774 (2011) (Kennedy, J., dissenting).

135. *Milner*, 562 U.S. at 577.

136. Rehaif v. United States, 139 S. Ct. 2191, 2199 (2019).

137. Evans v. United States, 504 U.S. 255, 293 n.7 (1992) (Thomas, J., dissenting).

138. *Global-Tech*, 563 U.S. at 774 (Kennedy, J., dissenting).

139. CSX Transp., Inc. v. McBride, 564 U.S. 685, 715 (2011) (Roberts, C.J., dissenting).

140. Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743, 1758–59 (2019) (Alito, J., dissenting).

Circuit Consensus Was Not About Statutory Meaning (Textual Circumstance)	Consensus about circuit-made test lacking textual basis was unpersuasive: ▪ *Morrison* Court[141] Consensus about the correct reading of a Supreme Court opinion was unpersuasive: ▪ *Borden* Court (circuit consensus was about application of Supreme Court language/reasoning)[142] ▪ *CSX Transportation* Dissent (circuit consensus may have depended on misleading Supreme Court dicta)[143]

II. CONCERNS TRIGGERED BY UNSETTLING CIRCUIT CONSENSUS

Unsettling a circuit consensus about statutory meaning may threaten the consistent and coherent development of the law, disturb legislative–judicial relations, and exhaust limited judicial and legislative resources. These concerns are often discussed in the context of stare decisis[144] and in debates between "originalist" textualism and dynamic statutory interpretation.[145] But they are also implicated in the Court's treatment of circuit consensus interpretations.[146]

141. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 258 (2010).

142. Borden v. United States, 141 S. Ct. 1817, 1853 (2021) (Kavanaugh, J., dissenting) (criticizing the plurality's decision to "rewrite" the Court's decision in Voisine v. United States, 136 S. Ct. 2272 (2016), observing that almost all courts of appeals to consider the issue have applied *Voisine* much differently).

143. *CSX Transp.*, 564 U.S. at 715 (Roberts, C.J., dissenting).

144. See, e.g., Stephen M. Rich, A Matter of Perspective: Textualism, Stare Decisis, and Federal Employment Discrimination Law, 87 S. Cal. L. Rev. 1197, 1203–05 (2014) (discussing stare decisis as a principle of judicial restraint that preserves the rule of law).

145. For an assessment of "originalist" approaches to statutory interpretation and the foundational model for dynamic statutory interpretation, see generally William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. Pa. L. Rev. 1479 (1987). Professor Eskridge argued that "no good reason compels adherence to traditional originalist doctrine . . . when circumstances have changed and the statutory language is not determinate." Id. at 1481. He proposed that statutes, just like the Constitution and the common law, be interpreted "dynamically," in light of their present societal, political, and legal context. Id.

146. These concerns may be outweighed by other considerations that weigh in favor of disrupting consensus. This Part does not suggest that these concerns *compel* adherence to circuit consensus. Instead, Part II evaluates the values and principles that disruption of a circuit consensus may jeopardize.

A. *Undermining Rule-of-Law Values*

The disruption of a circuit consensus may run contrary to rule-of-law values, including stability, consistency, coherence, predictability, fairness, and protection of reliance interests.[147] Adherence to the rule of law serves as the "critical backbone for sustainable, self-improving self-government."[148] The judiciary has a critical role as the guardian of continuity and predictability in the law.[149] Concerns about these values are often raised in discussions of the Court's adherence to horizontal stare decisis.[150] Stare decisis preserves the rule of law by enforcing consistency, which supports the validity of judicial decisions as fair and credible.[151] These values are considered so essential for precedents about statutory meaning that there is a heightened presumption in favor of adherence to these interpretations.[152]

When the Court concludes that the meaning of disputed statutory text is different from how the circuit courts have interpreted the same language for decades, the stability, consistency, and predictability afforded by the consensus is eliminated.[153] This phenomenon undermines the public and the legal community's understanding of how the statute affects them, raising questions of fairness as well.[154] Justice Stevens alluded to these concerns when he argued that "fairness requires consideration of the effect that changes have on individuals' reasonable reliance on a

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147. John F. Muller, The Constitutional Incompleteness Theorem, 15 U. Pa. J. Const. L. 1373, 1419 (2013); see also Johnson v. Transp. Agency, 480 U.S. 616, 644 (1987) (Stevens, J., concurring) ("There is an undoubted public interest in 'stability and orderly development of the law.'" (quoting Runyon v. McCrary, 427 U.S. 160, 190 (1976) (Stevens, J., concurring))); Randy J. Kozel, Precedent and Reliance, 62 Emory L.J. 1459, 1460 (2013); Rich, supra note 144, at 1203–05.

148. Frédéric G. Sourgens, The Virtue of Path Dependence in the Law, 56 Santa Clara L. Rev. 303, 307–08 (2016).

149. Amanda L. Tyler, Continuity, Coherence, and the Canons, 99 Nw. U. L. Rev. 1389, 1389–90 (2005).

150. See Horizontal Stare Decisis, Black's Law Dictionary (11th ed. 2019) (defining "horizontal stare decisis" as "the doctrine that a court . . . must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself"). "Stare decisis" is a Latin phrase meaning "to stand by things decided." Stare Decisis, Black's Law Dictionary (11th ed. 2019).

151. See Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp. Rels. Comm'n, 427 U.S. 132, 159 (1976) (Stevens, J., dissenting) ("Stability and predictability in the law are enhanced when the Court resists the temptation to overrule its prior decisions."); Rich, supra note 144, at 1203–05.

152. See William D. Popkin, A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens, 1989 Duke L.J. 1087, 1158 n.367 ("Reliance interests are also a major reason for generally applying *stare decisis* in statutory interpretation."); Rich, supra note 144, at 1203–05.

153. See Bruhl, supra note 76, at 855 (assessing stability as a reason why the Court might defer to lower courts more broadly). If the Court diverged from its own longstanding interpretation, the orderly development of the law would be similarly threatened.

154. See Peter L. Strauss, Statutes that Are Not Static—The Case of the APA, 14 J. Contemp. Legal Issues 767, 768 (2005) [hereinafter Strauss, Statutes that Are Not Static].

previous interpretation."[155] The public develops "reliance interests on the basis of earlier judicial opinions."[156] In virtually all cases where there was a circuit consensus about statutory meaning, the consensus had existed for decades by the time that the Court agreed to hear the interpretive issue.[157] Over decades, the public and the legal community may have shaped their behavior based on the circuit consensus interpretation.[158] Laypeople often consult attorneys to help them understand federal laws.[159] Lawyers review case law to understand how the court might interpret the relevant statute. Professor Peter Strauss has suggested that "the more usual interpretive problem . . . does not involve politically explosive" or "exceptional" issues. Instead, the usual problem "arises in routine" circumstances that require lawyers and judges "to reach conclusions . . . grounded in their contemporary understanding of the legal order as a whole" and the matter before them.[160] There is stronger public reliance on a circuit consensus than a sole circuit decision because longstanding consensus suggests that the issue is effectively "settled." The public's reliance is thus "substantially undermined" to an even greater degree when a consensus is unsettled.[161]

One consequence of reliance on circuit consensus is that individuals may have decided to avoid litigating the interpretive issue. For the usual interpretive problem, it seems unlikely that a lawyer would advise their client to stake their personal interests on the arguably small chance that they will overcome a longstanding circuit consensus. Judge Gerard Lynch articulated this point in the context of district court judges' interpretations of narrow statutory issues.[162] Judge Lynch suggested that by the time three

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155. Comm'r v. Fink, 483 U.S. 89, 105 (1987) (Stevens, J., dissenting).

156. Hillel Y. Levin, A Reliance Approach to Precedent, 47 Ga. L. Rev. 1035, 1038 (2013) [hereinafter Levin, A Reliance Approach]. Professor Levin has argued that if the public's reliance "would be substantially undermined were the court to reject the precedent," "[r]ule-of-law principles and the relative institutional competencies of the courts and legislatures require that judges should usually not interfere with these interests by overturning even wrongly decided precedents." Id. at 1038–39.

157. See, e.g., Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 594, 599 (2004) (three decades); Monessen Sw. Ry. Co. v. Morgan, 486 U.S. 330, 338–39 (1988) (more than seven decades); see also supra Figure 2.

158. See David S. Louk, The Audiences of Statutes, 105 Cornell L. Rev. 137, 164–65 (2019) ("Formally, laypeople are a primary audience of many statutes . . . . Numerous federal, state, and local statutes regulate nearly every aspect of daily life . . . .").

159. See id. at 165 (observing how "many statutory schemes ensure that law is legible to the public at large through reliance on various interpretive intermediaries like accountants, lawyers, compliance officers, and government bureaucrats"). Relatedly, public understanding of the law may be shaped "by the guidance and actions of public officials and even by the behaviors of other members of the regulated public." Hillel Y. Levin, Contemporary Meaning and Expectations in Statutory Interpretation, 2012 U. Ill. L. Rev. 1103, 1119.

160. See Strauss, Statutes that Are Not Static, supra note 154, at 784.

161. See Levin, A Reliance Approach, supra note 156, at 1039.

162. Strauss, Statutes that Are Not Static, supra note 154, at 784 (quoting Judge Lynch's remarks from an informal paper, in which Judge Lynch discusses his then-recent opinion in Collette v. St. Luke's Roosevelt Hospital, 132 F. Supp. 2d 256 (S.D.N.Y. 2001)).

district court judges adopted a particular interpretation related to a then-recent opinion of his, it was a "movement," and at some point, it was "almost certainly . . . the law."[163] The issue would only persist if "some bold litigant managed to challenge the consensus by taking the issue to a higher court," and "most lawyers would advise clients against a claim that flew in the teeth of the 'universal consensus' of the decided cases."[164] It is impossible to determine how many lawsuits have *not* been litigated due to assessments that interpretive issues were "settled" by consensus. But this dynamic presents the concern that unsettling a consensus harms reliance interests and notions of fairness and predictability in the law. Unsettling consensus may also inspire litigants to file riskier lawsuits to reap potential benefits, creating administrative and financial costs for courts and clients in the process.

The Court has suggested another way to understand reliance interests. The Court has asserted that the public's reliance rests not on judicial interpretations of the statute, or on their own ordinary understanding of the statute, but instead on the ordinary meaning of the text from the time of enactment. In *New Prime Inc.*, Justice Neil Gorsuch asserted that "words generally should be 'interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.'"[165] Should the Court stray from this meaning, the Court would risk "upsetting reliance interests in the settled meaning of a statute."[166] The thrust of Justice Gorsuch's observation—that the original meaning is essentially the "settled meaning" of the statute—has deeper implications regarding reliance interests. In *Bostock*, Justice Gorsuch again observed that the Court should not deny the people the right to continue relying on "original meaning":

> This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. . . . If judges could . . . update . . . old statutory terms . . . , we would risk amending statutes outside the legislative process . . . . And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations.[167]

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163. Id. (internal quotation marks omitted) (quoting Judge Lynch). Judge Lynch further observed: "It's not a question academics are likely to write about. It's not likely to reach the Supreme Court . . . . It would just be, for lawyers and their clients, the law." Id. (internal quotation marks omitted).

164. Id. (internal quotation marks omitted) (quoting Judge Lynch); see also id. (suggesting that "professional consensus about a point of interpretation is a stabilizing element").

165. New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019). The Court's focus on original meaning in *New Prime Inc.* was observed as a departure from nearly a century of U.S. arbitration law. See William F. Fox & Ylli Dautaj, The Life of Arbitration Law Has Been Experience, Not Logic: Gorsuch, Kavanaugh, and the Federal Arbitration Act, 21 Cardozo J. Conflict Resol. 1, 15–16 (2019).

166. *New Prime*, 139 S. Ct. at 539.

167. Bostock v. Clayton County, 140 S. Ct. 1731, 1738 (2020) (citing *New Prime*, 139 S. Ct. at 538–39).

Justice Gorsuch's suggestion that people rely on original public meaning of a statutory term from the time of its enactment is difficult to imagine in practice. This idea depends on the ability of laypersons to discern ordinary meaning of usually decades-old statutory terms as they were understood at the time of enactment. It seems unreasonable to expect the public to review historical materials, such as a dictionary that was in circulation during the time of enactment, to understand how the federal statute applies to them today. On the other hand, perhaps it is more feasible for laypersons to read the direct statutory text on its face, rather than to expect the public to review, understand, and rely on nuanced circuit-level case law. If "laypeople are a primary audience of many statutes,"[168] it may be reasonable to presume that the public relies on the statutory text, not a circuit consensus interpretation. But unless the ordinary public meaning from the time of enactment matches contemporary understandings of the statutory words, laypersons would be effectively relying on the wrong interpretation if they relied on their own ordinary reading of the text.[169] Further, if a layperson were concerned about their rights, obligations, or interests under a federal statute, it still seems likely that they would consult a lawyer, and it would be troubling for a lawyer to advise their client based on what they conclude was the ordinary meaning that existed at the time of enactment, rather than controlling case law and other developments in the law.

Perhaps, as Professor Strauss has argued, "[W]henever the Supreme Court is considering a return to original understandings it should accord substantial weight to contemporary consensus the profession and lower courts have been able to develop in interpreting law."[170] One crucial form of "contemporary consensus" is circuit consensus.[171] The Court's discussions in *New Prime Inc.* and *Bostock* suggest that the Court values adherence to meaning that people have relied upon, but it is unclear whether a textualist approach is capable of considering everyday reliance on evolving understandings of meaning that emerged *after* enactment.

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168. Louk, supra note 158, at 164.

169. Separately, but relatedly, Professor Cary Franklin has contended that the textualist focus on original public meaning exemplified in *Bostock* presents democratic accountability and rule-of-law concerns. See Cary Franklin, Living Textualism, 2020 Sup. Ct. Rev. 119, 129 (observing that original public meaning evolves over time, and that "[t]he more substantial problem with textualism, from a democratic perspective, is that it vastly aggrandizes judicial power").

170. Strauss, Statutes that Are Not Static, supra note 154, at 768.

171. See Strauss, The Common Law and Statutes, supra note 76, at 246 ("If the Court believes that the only issue for it to decide is what the statute meant as of its enactment, the intervening developments in the lower courts will be irrelevant, and the Court may quite easily reach a different conclusion.").

B. *Disturbing Legislative–Judicial Relations and Exhausting Limited Legislative Resources*

Unsettling circuit consensus about meaning disrupts the relationship between the Court and Congress. One argument is that "Congress is the proper agency to change an interpretation of the Act unbroken since its passage, if the change is to be made"—not the Court.[172] If Congress has not been motivated by "fire alarms"[173] set off by affected or interested groups, industries, agencies, or members of the public calling on Congress to address a decades-long circuit consensus interpretation, Congress has no incentive to amend it. The issue would remain off Congress's plate. For the Court to replace Congress in this legislative function by disrupting consensus may run counter to the principle of judicial subordination to Congress.[174] Justice Stevens similarly argued that the Court should adhere to lower federal court consensus to encourage congressional oversight of the judicial interpretive process by communicating that the Court will not reexamine a consensus absent "extraordinary circumstances,"[175] and that respecting circuit consensus interpretation reflects "respect for Congress's role."[176]

One possible objection is that this reasoning is an abdication of the judiciary's duty to say what the law is.[177] Similarly, Justice Gorsuch has observed that the Court's "duty is to follow the law as we find it, not to follow rotely whatever lower courts once might have said about it."[178] But this objection does not explain why the law as the Court finds it is necessarily or exclusively tethered to the ordinary meaning at the time of enactment. The

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172. Blau v. Lehman, 368 U.S. 403, 413 (1962); see also Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 196 (1994) (Stevens, J., dissenting) (arguing that the "settled construction of an important federal statute should not be disturbed unless and until Congress so decides" (internal quotation marks omitted) (quoting Reves v. Ernst & Young, 494 U.S. 56, 74 (1990) (Stevens, J., concurring))).

173. The notion of setting off fire alarms—in part drawn from the "police patrol" and "fire alarm" models for congressional oversight of agency actions—can be used to describe the role of affected and interested organized groups, individual citizens, and government agencies in alerting Congress that legislative action is needed to address a problem. For a foundational model of congressional choice of oversight policy, see generally Mathew D. McCubbins & Thomas Schwartz, Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms, 28 Am. J. Pol. Sci. 165 (1984).

174. See Strauss, Statutes that Are Not Static, supra note 154, at 773 (discussing how the "faithful servant" metaphor expresses the "inferiority of judicial lawmaking" and "the necessary subordination of judicial judgment to legislative instructions," while noting that it reflects an imprecise description of the legislature as a "master").

175. Comm'r v. Fink, 483 U.S. 89, 104 (1987) (Stevens, J., dissenting). Stevens also generally asserted that there is no need for the Court to revisit an interpretation enjoying circuit consensus. Id.

176. Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 268–69 (1987) (Stevens, J., concurring in part and dissenting in part).

177. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

178. BP P.L.C. v. Mayor & City Council of Balt., 141 S. Ct. 1532, 1541 (2021).

law could involve practical consideration of a consensus that Congress never corrected and that the public has relied upon as settled.[179]

There is also a practical concern: Disturbing a circuit consensus interpretation that has not motivated congressional action can lead to the exhaustion of legislative resources. Professor James Brudney has observed that in recent years, laws have been of "unprecedented length and complexity," and "decisions about which bills are given priority are in large part a function of how Congress manages two institutional resources—time and political capital."[180] A common argument is that if Congress finds the Court's interpretation erroneous, Congress can revisit and amend the statute. When the Court unsettles circuit consensus, however, Congress may need to expend its limited time and resources to simply revert the interpretation of the statute back to how it operated before the Court became involved. Even though "Congress may step in and reinstate the old law" when the Court disrupts it, the Court should not "lightly heap new tasks on the Legislature's already full plate."[181] Additionally, legislative efforts "to address the problems posed by judicial decisions that disrupt settled law frequently create special difficulties of their own."[182] Even if Congress overrides the Court's contrary interpretation, limited judicial and legislative resources would be expended, while the net result would be the same as if neither institution had acted. Justice Breyer raised a comparable concern in *Milner*, where he observed that Congress will now be required to affirmatively act "just to preserve a decades-long status quo."[183] Indeed, shortly after *Milner*, Congress *did* affirmatively act, though the scope of the exemption created was narrower than that of the circuit consensus interpretation.[184]

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179. See Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 196 n.7 (1994) (Stevens, J., dissenting).

180. James J. Brudney, Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?, 93 Mich. L. Rev. 1, 8, 21–23 (1994) (describing "Congress as a complex bureaucratic institution[] seeking to manage limited resources while meeting public expectations for an expanded legislative presence"). Individual members must choose to spend their time on some legislative activities or subjects and not others, and on nonlegislative activities in addition to lawmaking. Id. There is also limited floor time during which bills may be considered. Id.

181. *Cent. Bank of Denver*, 511 U.S. at 196 n.7 (Stevens, J., dissenting).

182. Id.; see also Strauss, On Resegregating the Worlds of Statute and Common Law, supra note 23, at 513 (discussing Justice Stevens's mention of prior congressional correction of the Court's "recent overruling of settled securities law," and observing that Justice Stevens seemed to be strongly suggesting that "the Court has been battling with Congress rather than implementing its decisions").

183. Milner v. Dep't of the Navy, 562 U.S. 562, 593 (2011) (Breyer, J., dissenting).

184. Congress passed the National Defense Authorization Act for Fiscal Year 2012, which included a provision authorizing the Secretary of Defense to exempt Department of Defense "critical infrastructure security information" from disclosure. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1091, 125 Stat. 1298, 1604 (provision authorizing disclosure exemption).

Another issue is that it may not be politically feasible for Congress to reinstate a circuit consensus interpretation in its entirety. Leaving a circuit consensus undisturbed would respect the efficient use of legislative resources by recognizing how Congress functions. A legislature responds to external motivations, such as interested groups pushing Congress to act.[185] If external forces never prompt Congress to correct the consensus interpretation, legislative resources are never expended. A judicial disruption of such a consensus would ignore the signals generated by the absence of amendment and disregard the function of those signals in preserving congressional resources.

A counter-presumption is that Congress is unaware of circuit court developments, so there is no reason to place significance in whether Congress addressed a circuit consensus interpretation. Congress lacks the time and resources to know about tens of thousands of cases decided by the circuit courts each year, and lawmakers are unlikely to care about decisions in circuits far from their own home bases.[186] Then-Professor Amy Coney Barrett observed: "The Supreme Court can hope to elicit a congressional response because it has the last word. The courts of appeals lack the ability to elicit a congressional response because they do not."[187]

While the Supreme Court has the final word in theory, the practical reality is that the likelihood that any given circuit opinion will be reexamined by the Court is "miniscule."[188] Additionally, efforts like the Governance Institute's "statutory housekeeping" project, which was essentially created to elicit legislative responses,[189] suggest that there could be greater "legislative-judicial cooperation and communication" between Congress and the circuit courts.[190] Further, there is empirical evidence that Congress in fact does override, modify, and codify statutory interpretation decisions by lower federal courts.[191] In a study by Professors Stefanie

185. See Strauss, Statutes that Are Not Static, supra note 154, at 784 (arguing that when there is professional consensus about a point of interpretation, "legislative forces are unlikely to gather . . . unless the eventual invocation of a higher court produces results so discordant with the evolved consensus as to reveal a problem where none had previously been perceived").

186. Ethan J. Leib & James J. Brudney, Legislative Underwrites, 103 Va. L. Rev. 1487, 1538 (2017).

187. Amy Coney Barrett, Statutory Stare Decisis in the Courts of Appeals, 73 Geo. Wash. L. Rev. 317, 343 (2005); see also Bruhl, supra note 76, at 877 ("Even when Congress does become aware [of the decisional outputs of the courts of appeals], that same lack of (relative) importance and finality makes it less likely that a failure to respond reflects genuine endorsement.").

188. See supra notes 4–7 and accompanying text.

189. Robert A. Katzmann & Russell R. Wheeler, A Mechanism for "Statutory Housekeeping": Appellate Courts Working With Congress, 9 J. App. Prac. & Process 131, 131 (2007).

190. See infra note 208 and accompanying text.

191. See William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331, 338 (1991) [hereinafter Eskridge, Overriding Supreme Court Statutory Interpretation Decisions] (collecting and analyzing data regarding overrides of

Lindquist and David Yalof, thirty-two percent of Congress's responses to circuit court decisions that were identified were efforts to codify a circuit court's language interpreting a federal statute.[192] And Professor William Eskridge has observed that an increase in overrides of decisions made by lower federal courts may be in part attributed to the proliferation of organized interest groups motivated to bring judicial decisions to Congress's attention.[193] With this observation in mind, perhaps the key question is not whether the courts *can* elicit a congressional response but instead whether groups, industries, citizens, and other interested parties *are* pushing Congress to address circuit court decisions. Relatedly, lawmakers are not and cannot be aware of every circuit opinion, but it seems more likely that Congress would be called to "fix" a longstanding, widespread circuit consensus rather than a lone circuit court decision. If an erroneous interpretation has been in place for decades, there is a longer period of time for interested parties to eventually prompt Congress to act. A circuit consensus also has a larger geographical impact than a sole circuit court decision, so there may be a greater number of interested groups who wish to motivate Congress to act.

C. *Exhausting Limited Judicial Resources*

Since the enactment of the Judiciary Act of 1925[194] and the Supreme Court Case Selections Act of 1988,[195] the Supreme Court has effectively set its own agenda.[196] And judicial resources, particularly at the Supreme Court level, are finite and scarce. The Court receives approximately 7,000 to 8,000 petitions for a writ of certiorari each Term, and the Roberts Court has heard an average of seventy-six cases each Term between 2005 and 2021.[197] As Professor Strauss observed: "Given the steady, if not explosive, growth of the

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decisions by federal district courts, circuit courts, magistrates, military tribunals, and specialized federal courts); see also Stefanie A. Lindquist & David A. Yalof, Congressional Responses to Federal Circuit Court Decisions, 85 Judicature 61, 64 (2001) (collecting and analyzing data regarding the frequency and type of congressional responses to decisions of the circuit courts).

192. Lindquist & Yalof, supra note 191, at 64.

193. Eskridge, Overriding Supreme Court Statutory Interpretation Decisions, supra note 191, at 338.

194. Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936.

195. Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662.

196. See Edward A. Hartnett, Questioning Certiorari, 100 Colum. L. Rev. 1643, 1715 (2000) (assessing whether a court with the ability to select what cases and issues it wishes to decide is exercising judgment rather than will, and whether such a power is "consistent with the rule of law"); Benjamin B. Johnson, The Origins of Supreme Court Selection, 122 Colum. L. Rev. 793, 850–52 (2022) ("For the next forty years, Congress continued to transfer cases from the Court's mandatory 'appeal' jurisdiction to its discretionary certiorari jurisdiction. This process culminated in the Supreme Court Case Selections Act of 1988, which ended all mandatory jurisdiction save cases coming from three-judge panels." (footnote omitted)).

197. See supra notes 4–7 and accompanying text.

Court's potential docket, each of these [cases] represents an increasingly precious opportunity for the Court to perform its supervisory task."[198]

Given this resource scarcity, a core consideration is whether or when the Court should agree to hear a statutory interpretive issue that has been "settled" for decades through consistent interpretation among the circuit courts.[199] Chief Justice Charles Evans Hughes observed that the Court is charged with "securing harmony of decision and the appropriate settlement of questions of general importance so that the system of federal justice may be appropriately administered."[200] Further, the Rules of the Supreme Court provide that a "petition for a writ of certiorari will be granted only for compelling reasons" and list noncontrolling, nonexclusive considerations that "indicate the character of the reasons the Court considers" in granting certiorari: (1) There is a conflict among the courts; (2) a single circuit or state court decides an important question of federal law that should be decided by the Supreme Court; and (3) a single circuit court "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."[201] Reexamination of a longstanding judicial construction with widespread acceptance among circuit courts, the antithesis of a circuit split, diverges from the "character" of these reasons. It also runs contrary to the goals of "securing harmony of decision" and "appropriate[ly] settl[ing]" questions of general importance.[202] Each case or issue that the Court hears also has an opportunity cost. When the Court reexamines a circuit consensus interpretation, the tradeoff is that the Court could have resolved a conflict. It may be most resource-prudent for the Court to prioritize the promotion of harmony in the law. With the orderly development of the law in mind, the resolution of circuit splits may be one of the most compelling reasons for granting certiorari.

Unsettling consensus may deplete limited judicial resources at the lower court level as well. More than 41,000 cases were filed on the circuit

198. Strauss, One Hundred Fifty Cases Per Year, supra note 7, at 1100.

199. See Bruhl, supra note 76, at 857 (arguing that "[l]ower-court views, particularly when they are unanimous, are . . . honored routinely at the certiorari stage in the sense that they are left alone"). But even if the Court's reexamination of a circuit consensus interpretation is an uncommon phenomenon, it is a worthwhile endeavor to understand arguments regarding how the Court may treat circuit consensus in the future.

200. Address of Chief Justice Hughes at the American Law Institute Meeting, 20 A.B.A. J. 341, 341 (1934); see also Baker & McFarland, supra note 3, at 1401 (quoting Chief Justice Hughes's address); Strauss, One Hundred Fifty Cases Per Year, supra note 7, at 1100–01 (observing that the "premise of certiorari jurisdiction is that the Court will select for hearing those cases whose resolution is likely to make the largest contribution to the uniformity and cohesion of national law").

201. U.S. Sup. Ct., Rules of the Supreme Court of the United States 5–6 (2023), https://www.supremecourt.gov/filingandrules/2023RulesoftheCourt.pdf [https://perma.cc/4EF4-UJTH] [hereinafter Rules of the Supreme Court].

202. See Hughes, supra note 200, at 341.

court dockets in 2022.[203] Respecting a longstanding circuit consensus interpretation respects "the compelling need to preserve the courts' limited resources."[204] Justice Benjamin N. Cardozo observed that "[t]he labor of judges would be increased almost to the breaking point if every past decision could be reopened . . . and one could not lay one's own course of bricks on the secure foundation of the courses laid by others."[205] Preserving circuit consensus conserves judicial resources in a similar manner to stare decisis: If harmony is preserved, no one expends energy reinventing the wheel.[206] These considerations also extend beyond concerns about the administrative and financial resources of the courts. Unsettling consensus may shape litigation behavior in a way that engenders financial burdens on other stakeholders, such as clients involved in such litigation.[207]

III. PROPOSING A FRAMEWORK FOR IDENTIFICATION AND TREATMENT OF CIRCUIT CONSENSUS ABOUT STATUTORY MEANING

Hindering the orderly development of the law, destabilizing institutional roles and the legislative–judicial relationship, and exhausting limited lawmaking and judicial resources serve as concerns that explain why circuit consensus about meaning should be considered in statutory interpretation. To address these concerns, this Part offers a tripartite framework for incorporating circuit consensus into statutory interpretation. First, there are four factors that help identify a circuit consensus: (1) the duration of the consensus, (2) the degree of the consensus, (3) congressional inaction amid the consensus, and (4) the substantive strength of the judicial interpretation. Second, the values-based concerns identified in Part II may be served by affording highly persuasive treatment to circuit consensus. Third, circuit consensus

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203. U.S. Cts., Table B. U.S. Courts of Appeals—Cases Filed, Terminated, and Pending During the 12-Month Periods Ending September 30, 2021 and 2022, https://www.uscourts.gov/sites/default/files/data_tables/jb_b_0930.2022.pdf [https://perma.cc/RV9E-ANXV] (last visited Jan. 22, 2023). The data set excludes the U.S. Court of Appeals for the Federal Circuit. Id. In 2022, 41,839 cases were commenced and 32,512 were pending in the circuit courts. Id.

204. Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 268–69 (1987) (Stevens, J., concurring in part and dissenting in part).

205. Comm'r v. Fink, 483 U.S. 89, 105 (1987) (Stevens, J., dissenting) (internal quotation marks omitted) (quoting Benjamin N. Cardozo, The Nature of the Judicial Process 149 (1921)). Justice Stevens also asserts that "[o]ur readiness to reconsider long-settled constructions of statutes takes its toll on the courts." Id.

206. See Muller, supra note 147, at 1419 (discussing how stare decisis conserves judicial resources); Rich, supra note 144, at 1203 ("Stare decisis . . . performs an institutional role of enforcing consistency and resource efficiency that is unique to the judiciary.").

207. See supra note 164 and accompanying text.

interpretation can be further incorporated into statutory interpretation by describing it as a form of "settled meaning."[208]

A. *Using Four Factors to Identify a Circuit Consensus About Meaning*

As the first component of this Note's framework, there are four basic considerations that help identify a circuit consensus that may serve as an indicator of statutory meaning:[209]

> 1) Duration of the Circuit Consensus: How "longstanding" is the consensus?
> 2) Degree of the Circuit Consensus: Is there a very substantial majority or unanimity among the circuit courts to have considered the interpretive issue?
> 3) Congressional Inaction Amid the Circuit Consensus: Was Congress prompted by affected or interested parties to amend the judicial interpretation?
> 4) Substantive Strength of the Judicial Interpretation: Was there "careful" analysis and is it a "reasonable" holding, notwithstanding other "plausible" interpretations?

1. *Duration of the Circuit Consensus.* — Justices frequently highlight the longstanding duration of a circuit consensus.[210] There are institutional and values-based reasons why duration is an important factor to consider. The longer the interpretation has existed, the longer the public and the legal profession have relied on the interpretation, and the greater the basis

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208. In the absence of a uniform judicial approach for the use of circuit consensus as an indicator of statutory meaning, Congress could engage in efforts to safeguard circuit consensus. For instance, Congress could engage in "legislative underwrites" to endorse specific circuit consensus interpretations. See Leib & Brudney, supra note 186, at 1491 (introducing the concept of "legislative underwrites," defined as "an action that evidences an express legislative endorsement of a judicial reading of a statute"). Interpretations could be flagged for Congress through a mechanism like the Governance Institute's "statutory housekeeping" project, through which courts of appeals identify technical statutory flaws and send them to Congress for "its information and whatever action it wishes to take." Katzmann & Wheeler, supra note 189, at 133. Congress could also enact a general statute constraining judicial interpretation by providing instructions for when a statute should be understood to have acquired a circuit consensus interpretation and, absent unconstitutionality, should therefore not be overruled. The rules of construction in 1 U.S.C. § 1 serve as an example of statutory language that constrains judicial interpretation about the meaning of any federal statute "unless the context indicates otherwise." 1 U.S.C. § 1 (2018).

209. An additional extratextual circumstance identified by the Court in *United States v. Tinklenberg* was that the Speedy Trial Act was of "great practical administrative importance" for the lower courts. 563 U.S. 647, 657 (2011). This circumstance may not be relevant in most instances of circuit consensus, but if a case involves the interpretation of a federal statute that falls under the "expertise" of the lower courts, it may be appropriate to consider the statute's "practical administrative importance" as a supplemental factor favoring persuasive treatment of the consensus. See Bruhl, supra note 76, at 869–70 ("The Supreme Court should hesitate . . . before upsetting a lower-court consensus on a matter of trial procedure about which the Court's knowledge is remote and academic.").

210. See, e.g., Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 733 (1975); Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200–01 (1974); see also supra Figure 2.

to conclude Congress has not attempted to address the interpretation over the decades. Further, as the decades pass, the extent that the interpretation advances stability, consistency, and predictability in the law grows as well. A general consideration of duration would help clarify the degree to which institutional and rule-of-law interests would be damaged if the consensus were disrupted.[211]

2. *Degree of the Circuit Consensus.* — Another extratextual factor to consider is the degree or breadth of the circuit consensus. *Merriam-Webster* defines "consensus" as a "general agreement: unanimity," or "the judgment arrived at by most of those concerned," which seems to cover a majority in addition to a unanimity.[212] Unanimity offers the greatest degree of predictability and coherence in the law. Rule-of-law and institutional concerns are most pressing when there is unanimity among a substantial number of circuit courts. Further, the substantive strength of an interpretation diverging from circuit consensus might be even more questionable when there is longstanding unanimity. As Justice Stevens argued in *McNally*, "The quality of this Court's work is most suspect when it stands alone, or virtually so."[213] And as the *General Dynamics* Court observed, a strong consensus may cast doubt on an argument that the text is truly ambiguous.[214]

To develop a framework guiding treatment of circuit consensus, the question is whether the interpretation must be embraced by a unanimity of the circuit courts that considered the issue or if a majority would suffice. A majority interpretation could also serve as an indicator of meaning even if unanimity is more persuasive. One subtlety, however, is that categorizing *any* majority as an acceptable degree of consensus may invite criticism that the Court is simply counting courts in a circuit split.[215] Labeling any majority interpretation as a consensus would include a "bare majority" that

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211. It seems arbitrary to require a minimum number of years or decades for a circuit consensus. No Justice appears to have suggested that there is a threshold number of years or decades that qualifies a circuit consensus as an indicator of statutory meaning.

212. Consensus, Merriam-Webster, https://www.merriam-webster.com/dictionary/consensus [https://perma.cc/8CP2-W7DJ] (last visited Jan. 11, 2022).

213. McNally v. United States, 483 U.S. 350, 376 (1987) (Stevens, J., dissenting). Justice Alito appeared to invoke a similar argument in his *Bostock* dissent. Justice Alito asserted that the "arrogance" of the Court's finding that the terms of Title VII were unambiguous and could not reasonably be interpreted any other way was "breathtaking." Bostock v. Clayton County, 140 S. Ct. 1731, 1757 (2020) (Alito, J., dissenting). Alito emphasized that until 2017, "every single Court of Appeals to consider the question interpreted Title VII's prohibition against sex discrimination to mean discrimination on the basis of biological sex." Id.

214. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 593–94 (2004). In each case, the circuit consensus had spanned several decades. Id. at 593 & n.6; *McNally*, 483 U.S. at 362 (Stevens, J., dissenting).

215. Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 774 (2011) (Kennedy, J., dissenting). An analogous argument is that the Court should not "resolve questions . . . by a show of hands." CSX Transp., Inc. v. McBride, 564 U.S. 685, 715 (2011) (Roberts, C.J., dissenting); see also supra Figure 3.

scarcely surpasses the minority.[216] In contrast, if an interpretation were embraced by nine circuit courts with only one circuit court adopting a different interpretation, for example, it could be compelling to consider the majority as consensus. A reasonable approach would be to allow a very substantial majority or a unanimity. One criticism could be that allowing a very substantial majority complicates the framework by creating a line-drawing problem, but it would be arbitrary to adopt ex ante a particular threshold for how many circuit courts constitute a very substantial majority in all future contexts. Further, depending on the context, the timing of the majority and minority interpretations could matter. If a minority interpretation occurred first and every subsequent circuit decision fell into a majority, there is less reason to think Congress would be pressured to address the outdated interpretation. Disturbing the majority interpretation at the Supreme Court level would hinder coherence and stability. In contrast, if a minority interpretation followed a long line of decisions embracing the majority, then this recent disturbance could benefit from Court resolution.

3. *Congressional Inaction Amid the Circuit Consensus.* — The most significant variation among the Justices regarding treatment of a circuit consensus pertains to how congressional inaction amid the judicial interpretation should be evaluated. Some Justices cited legislative materials in which Congress discussed the interpretation and never corrected it.[217] Others simply observed that Congress never corrected the interpretation. Within this latter category, the Justices cited various additional circumstances to support their reasoning: (1) Congress did not address the circuit consensus interpretation when Congress amended other parts of the same statute;[218] (2) Congress declined to address the circuit consensus interpretation when Congress was urged to amend it;[219] (3) Congress was aware of the interpretation because there were so many circuit court decisions, especially those involving prosecutions of high-profile government officials;[220] and (4) Congress was silent amid the interpretation.[221] It seems most relevant to examine which approach best comports with the Court's role as subordinate to Congress. The Court should avoid disrupting a consensus that Congress has not corrected.[222]

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216. See Milner v. Dep't of the Navy, 562 U.S. 562, 577 (2011) (observing that the Court "will not flout all usual rules of statutory interpretation to take the side of the bare majority" in the case of a 4-3 circuit split).

217. See id. at 586 (Breyer, J., dissenting); Lindahl v. Off. of Pers. Mgmt., 470 U.S. 768, 782–83 (1985); Blau v. Lehman, 368 U.S. 403, 412–13 (1962).

218. See *Gen. Dynamics*, 540 U.S. at 594 n.7; Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 197 (1994) (Stevens, J., dissenting); Monessen Sw. Ry. Co. v. Morgan, 486 U.S. 330, 338–39 (1988); Herman & MacLean v. Huddleston, 459 U.S. 375, 385–86 (1983).

219. See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 731–33 (1975).

220. See Evans v. United States, 504 U.S. 255, 269 (1992).

221. See Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200–01 (1974).

222. See supra note 174 and accompanying text.

The core issue is not whether Congress has been monitoring developments in the law but whether Congress has been prompted to act. The absence of amendment efforts suggests that Congress was never prompted. Failed amendment efforts may also suggest that Congress was not motivated to act.[223] To require evidence of Congress's awareness of the interpretation might overlook a key consideration underlying the judicial–legislative relationship: If Congress was never prompted to address the interpretation and never acted to correct it, the Court should not take Congress's place.

The first three supplemental circumstances raised by the Justices may serve as helpful context but not necessary factors. For example, Congress could have remained inactive amid the interpretation regardless of whether *other* provisions were amended. For the fourth supplemental circumstance, the phrase "congressional silence" may overlook the nuance of whether external motivators pushed Congress to act, and it may become confused with a separate concept: deriving congressional *intent* from silence.[224] If amendment efforts are absent or fail, the circuit consensus may serve as an indicator of statutory meaning. Other circumstances are helpful but not necessary.

4. *Substantive Strength of the Judicial Interpretation.* — A framework might also include text-focused factors. It could be beneficial to consider whether the circuit consensus interpretation involved "careful" analysis (e.g., appropriate analysis of the statute's language, legislative history, and precedent) and a "reasonable" holding.[225] If the Court adhered to a *wholly* unreasonable interpretation, consistency in the law would still be advanced, but there could be other reasons to diverge from the interpretation. Examination of the substantive strength of the circuit consensus interpretation would ensure that it has a reasonable textual basis. One objection is that this approach mirrors the reasoning in Justice Thomas's *Evans* dissent, in which he suggested that the Court should only

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223. For example, in *Blue Chip*, then-Justice Rehnquist observed that the SEC had twice urged Congress to amend Section 10(b), which would have expanded the statutory scope beyond the judicial interpretation, but neither change was adopted by Congress. 421 U.S. at 732.

224. For a sampling of the debate about congressional silence, see Brudney, supra note 180, at 66–69 (summarizing the practical difficulties with attributing significance to institutional silence); Bruhl, supra note 76, at 877 (noting the difficulties inherent in attempting to reliably determine intentional congressional acquiescence to lower court decisions); John C. Grabow, Congressional Silence and the Search for Legislative Intent: A Venture Into Speculative Unrealities, 64 B.U. L. Rev. 737, 740–41 (1984) (arguing that "there exists no legal or functional justification for the imputation of any meaning to the necessarily frequent and prolonged silences of Congress"); Daniel L. Rotenberg, Congressional Silence in the Supreme Court, 47 U. Mia. L. Rev. 375, 384–88 (1992) (suggesting that although silence does not constitute a source of law, it may in some cases serve an interpretive function); Paul Stancil, Congressional Silence and the Statutory Interpretation Game, 54 Wm. & Mary L. Rev. 1251, 1255–56 (2013) (applying the economic concept of transaction costs to "the old puzzle of congressional silence").

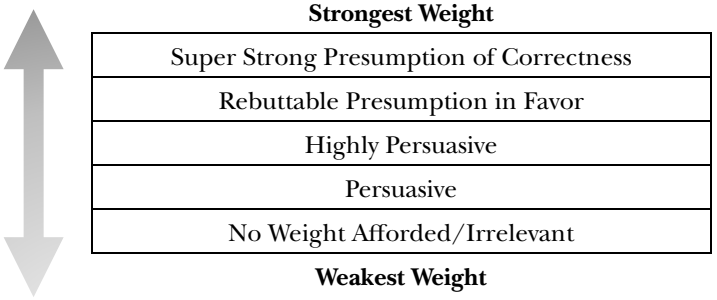
225. Milner v. Dep't of the Navy, 562 U.S. 562, 586–87 (2011) (Breyer, J., dissenting).

consider whether an interpretation comports with the text.[226] But under his approach, extratextual factors, such as the consensus duration, and values-based concerns, such as reliance interests, would have no bearing on the outcome. Instead, the evaluation of the consensus's substantive strength could draw from Justice Breyer's *Milner* dissent. If the interpretation involved "careful" analysis and a "reasonable" holding, the fourth factor for identifying a circuit consensus about meaning is satisfied, even if there are other plausible interpretations.[227]

B. *Evaluating How to Weigh Circuit Consensus in Statutory Interpretation*

After identifying a circuit consensus using the four guiding factors, the framework assesses how a circuit consensus could be weighed in statutory interpretation. Figure 4 organizes basic conceptual options from strongest to weakest forms of persuasive treatment. Figure 5 arranges Justices' discussions from strongest to weakest forms of treatment.[228]

FIGURE 4: BASIC CONCEPTUAL OPTIONS FOR WEIGHING CIRCUIT CONSENSUS



226. See supra text accompanying notes 35–39.

227. This approach also draws from the reasoning of Justice Stevens in his *Morrison* concurrence. See Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 274–76 (2010) (Stevens, J., concurring in the judgment).

228. Figure 5 only attempts to arrange these perspectives along a spectrum. The Justices have not provided express guidance regarding the appropriate weight for circuit consensus in statutory interpretation, so this Note draws from their brief discussions. Additionally, these perspectives do not neatly fit within the conceptual options depicted in Figure 4.

FIGURE 5: JUSTICES' ASSESSMENTS OF TREATMENT OF CIRCUIT CONSENSUS

Strongest Weight

Central Bank of Denver Dissent	The Court should adhere to consensus because only Congress should disturb it.[229]
McNally Dissent	The Court should adhere to consensus, even if the Court finds that the courts did not correctly understand Congress's intent.[230]
Morrison Concurrence	A conclusion contrary to consensus should be "compelling" enough to "warrant the abandonment."[231]
Newman-Green Court	The Court is "reluctant to disturb" consensus.[232]
Blue Chip Court	Circumstances argue "significantly in favor of acceptance."[233]
Milner Dissent	Circumstances merit "significant support" for retaining judicial interpretation.[234]
Tinklenberg Court	Consensus is "entitled to strong consideration."[235]
Evans Court	Circuit majority "buttressed" the Court's conclusion.[236]
Gulf Oil Corp. Court	Consensus supports adherence to "clear language" of the statute.[237]
General Dynamics Court	Consensus supports the Court's conclusion, which also drew from other factors.[238]
Evans Dissent	Circuit majority is due "our most respectful consideration," but the Court "must focus on the *reasons* given for that interpretation."[239]
Tinklenberg Concurrence	Consensus cannot clarify the text.[240]

Weakest Weight

229. Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 196 (1994) (Stevens, J., dissenting) (citing Reves v. Ernst & Young, 494 U.S. 56, 74 (1990) (Stevens, J., concurring)).

230. McNally v. United States, 483 U.S. 350, 376 (1987) (Stevens, J., dissenting).

231. *Morrison*, 561 U.S. at 274 (Stevens, J., concurring in the judgment).

232. Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 833 (1989).

233. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 733 (1975).

234. Milner v. Dep't of the Navy, 562 U.S. 562, 586–87 (2011) (Breyer, J., dissenting).

235. United States v. Tinklenberg, 563 U.S. 647, 657 (2011).

236. Evans v. United States, 504 U.S. 255, 268–69 (1992).

237. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200–01 (1974).

238. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 594, 600 (2004).

239. *Evans*, 504 U.S. at 293 n.7 (Thomas, J., dissenting).

240. *Tinklenberg*, 563 U.S. at 663 (Scalia, J., concurring in part and concurring in the judgment).

Stare decisis refers to the Supreme Court's obligation to adhere to its own opinions.[241] Within stare decisis treatment, the Court's own substantive interpretations of a statute are "generally entitled to a 'super strong presumption of correctness.'"[242] The heightened presumption in favor of statutory precedents "facilitate[s] . . . historical continuity[] with past decisions."[243] For a circuit consensus interpretation, the circuit decisions are not binding on the Court. For the highest court to be bound by the lower courts could be a violation of our basic judicial structure. As a consensus strengthens in scope, however, the argument that reexamining the interpretive issue qualifies as a "compelling reason[]"[244] to grant certiorari may weaken, particularly given that the reexamination could be one of fewer than eighty cases heard that year.[245]

Yet a *presumption* in favor of circuit consensus interpretation may be too strong. One could object that other indicators of meaning, such as text, structure, and statutory context, should be seriously considered.[246] On the opposite side of the spectrum, affording *no* weight to circuit consensus would fail to address any rule-of-law and institutional concerns that emerge when consensus is dismantled. The remaining conceptual options, persuasive treatment and highly persuasive treatment, would promote institutional and values-based concerns while preserving our judicial structure. Relative to highly persuasive treatment, treating a circuit consensus only as "persuasive" could make the consensus more easily outweighed by other considerations, such an "unambiguous" meaning. Treatment of consensus as a highly persuasive indicator of meaning might best convey the importance of maintaining coherence, stability, and predictability in the law and respect for Congress's role.[247]

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241. Jordan Wilder Connors, Note, Treating Like Subdecisions Alike: The Scope of Stare Decisis as Applied to Judicial Methodology, 108 Colum. L. Rev. 681, 681 (2008) ("The Supreme Court considers stare decisis—the obligation to adhere to past opinions—to be 'indispensable' to the 'rule of law.'" (footnote omitted) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992))).

242. Rich, supra note 144, at 1203–05 (quoting William N. Eskridge, Jr., Overruling Statutory Precedents, 76 Geo. L.J. 1361, 1362 (1988)). Statutory interpretation precedents generally enjoy greater protection than constitutional and common law precedents. Id. at 1204.

243. Id. at 1204.

244. See Rules of the Supreme Court, supra note 201, at 5.

245. See supra text accompanying note 4. The argument may be even less compelling if the interpretive question were never presented to the Court in the petition for a writ of certiorari. See supra note 42 and accompanying text (discussing Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994)).

246. See Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004) (providing a list of the factors informing its interpretive holding, including text, structure, purpose, and statutory context). One could also argue that the existence of a longstanding, uniform interpretation outweighs these interpretive considerations.

247. Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 268–69 (1987) (Stevens, J., concurring in part and dissenting in part).

C. *Describing Circuit Consensus Interpretation as a Form of "Settled Meaning"*

Circuit consensus could be further incorporated as a factor in statutory interpretation by describing circuit consensus interpretation as another form of "settled meaning." The Court has cited "settled meaning" in different contexts without providing an exact definition. First, the Court's invocations of the prior construction canon may reflect one notion of "settled meaning," though the Court does not use this phrase explicitly. When Congress adopts language used in an earlier act, Congress "must be considered to have adopted also the construction given by [the] Court to such language."[248] This approach presumes Congress's awareness of the Court's prior interpretive conclusions. Second, the Court has observed that "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."[249] The Court has noted that "congressional silence often reflects an expectation that courts will look to the common law to fill gaps in statutory text, particularly when an undefined term has a settled meaning at common law."[250] Third, Justice Gorsuch has suggested that settled meaning is ordinary meaning from the time of enactment.[251]

In each context, the Court has adhered to the "settled meaning" over other possible interpretations.[252] A longstanding circuit consensus interpretation could be described as a fourth understanding of "settled meaning." "Settled meaning" at common law and this fourth understanding both find significance in congressional inaction. "Settled meaning" at common law presumes, from the absence of legislative action to fill the gap in the text, Congress's expectation that the courts will look to the common law to find meaning. "Settled meaning" from circuit consensus would presume, from the absence of legislative action to correct the consensus, the absence of a reason to unsettle the consensus interpretation. Lastly, both "settled meanings" rely on well-established

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248. Shapiro v. United States, 335 U.S. 1, 16 (1948) (internal quotation marks omitted) (quoting Hecht v. Malley, 265 U.S. 144, 153 (1924)); see also Return Mail, Inc. v. U.S. Postal Serv., 139 S. Ct. 1853, 1866 (2019); Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc., 139 S. Ct. 628, 633–34 (2019); Lightfoot v. Cendant Mortg. Corp., 137 S. Ct. 553, 563 (2017); Equal Emp. Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 781 (2015).

249. Neder v. United States, 527 U.S. 1, 21 (1999) (alteration in original) (internal quotation marks omitted) (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322 (1992)); see also Shon Hopwood, Clarity in Criminal Law, 54 Am. Crim. L. Rev. 695, 745 (2017) (discussing settled meaning at common law).

250. Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 447 (2003). The Court also noted that Congress has overridden judicial decisions that went beyond the common law. Id.

251. New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019). For an analysis of the Court's description of the "reliance interests" depending on this "settled meaning," see supra notes 165–171 and accompanying text.

252. See, e.g., *New Prime*, 139 S. Ct. at 539 (concluding that the Court must abide by the "settled meaning"); see also *Neder*, 527 U.S. at 21.

developments in the law beyond the Court's interpretive judgments.[253] Framing a circuit consensus interpretation as a "settled meaning" would acknowledge the practical significance of such a consensus in the development of the law in the time before the Court decides to review the interpretive question, if it ever does.

CONCLUSION

This Note decodes the phenomenon of longstanding, widespread circuit consensus about federal statutory meaning that is left untouched by Congress and later reexamined by the Court. By offering a framework for identification and treatment of circuit consensus about meaning, this Note contributes to legal scholarship on statutory interpretation, expands the public's knowledge of an issue that may shape their understanding of their rights, obligations, and interests under federal law, and assists lawyers and their clients encountering this issue in litigation contexts. Under certain circumstances, the use of circuit consensus as an indicator of federal statutory meaning promotes consistency, predictability, and coherence in the development of the law and the legislative–judicial relations implicated by how the law is shaped over time.

253. One temporal distinction would be that "settled meaning" at common law examines developments in the law that were in place *during* the time of enactment, whereas "settled meaning" in the form of a circuit consensus interpretation would refer to developments *after* the time of enactment.