COORDINATING INJUNCTIONS

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Introduction

For a tense six months, it seemed possible that the Trump Administration would be ordered to do the impossible. A clash of injunctions from different federal courts seemed imminent, commanding it both to continue operating part of a program inherited from the Obama Administration—and also to halt the program, full stop. In early 2018, a district court in California and another in New York had issued matching preliminary injunctions ordering the government to continue renewing DACA recipients, thus disallowing it from canceling DACA altogether.¹ But by late that summer, it seemed fairly obvious that a district court in Texas was going to rule that DACA was unlawful to begin with and therefore must end.² In the meantime, a district court in Maryland had found nothing wrong with the government’s rescission,³ while another across the Potomac in DC had made the opposite ruling, that the rescission should be vacated as unlawful.⁴ In this turbulence, everyone braced for a chaotic landing.

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And yet the danger was averted. By the time the Supreme Court granted certiorari on the DACA cases nearly a year later, the government was operating under what had turned out to be a neatly matching set of judicial orders. This was not because the district courts had limited their orders to specific parties or geographies. To the contrary, these orders have been held up by all as prime examples of so-called nationwide or universal injunctions. And it was certainly not because these judges agreed about the legality of either DACA itself or of its rescission. To the contrary, the judge in Texas accepted the government’s arguments that DACA was unlawful; and besides, even those courts ruling against the government diverged on the ideal scope of relief. And yet, a steady state had emerged that lasted for more than a year: two concurrent injunctions were in effect from the judges in California and New York, identical in scope; these orders were matched, in effect, by a partial stay of vacatur by the judge in DC; the judge in Maryland had issued no order at all; and despite his views on the merits, the judge in Texas found reason to deny a contradictory injunction.\(^5\) No appeals court disrupted this arrangement.\(^6\)

How can such consonance emerge among federal judges expressing very different views and, in fact, making contrary rulings? The risk of conflicting injunctions is a familiar beast. It is recognized in the rules of federal civil procedure as a rationale for involuntary joinder or even mandatory class actions.\(^7\) In the discourse on nationwide injunctions, its shadow is invoked as a reason not to grant broad relief.\(^8\) And yet, tracking down actual sightings of this beast has not been easy.\(^9\) The alignment that appeared in the DACA cases seems not to be any sort of rare exception, even if it may be lauded as an exemplary occurrence of judicial comity.

This essay suggests a way of thinking about the threat of conflicting injunctions, one that offers both a story about “how do judges always seem to avoid this problem?” as well as


\(^8\) See, e.g., Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction, 131 HARV. L. REV. 417, 462-64 (2017); Zayn Siddique, Nationwide Injunctions, 117 COLUM. L. REV. 2095, 2143-44 (2017).

a proposal for “how should judges avoid it?” As Part I will elaborate, the starting point is to see the situation facing such judges as a common decision problem known in the social sciences and in legal scholarship as a “coordination game.” Here is an example: Imagine that on a single-lane road, one car is heading east and another west. As they approach each other, the question arises, who keeps going and who yields? Each would prefer the right of way. If neither yields—disaster. And yet, if both politely pull over, neither is satisfied and the question iterates: now who goes and who yields? What each driver does depends on what he expects the other to do, and so the situation resolves when each driver’s expectation happens to align with the other’s decision: one goes (expecting the other to yield), and one yields (expecting the other to go). Altogether, we know there won’t be a crash; instead, one and only one car will yield. But which? And how will the drivers’ expectations converge about who goes and who yields?

In the judicial coordination problem, one might imagine two judges with parallel cases. Each is on the verge of issuing a preliminary injunction that clashes with the other’s. Each has the option to stay her own order (that is, to yield). If both issue injunctions—disaster. Each would rather yield than to clash. And yet, it is unsustainable for both to yield, as each feels compelled to grant relief to the deserving party in her own case if the other judge is going to yield anyway. Whether she does so depends on what she expects the other judge to do. And so, here we are again: We know this situation won’t result in a clash of injunctions. But how will the judges know who should go and who should yield?

A classic solution to such collective indecision is to create a set of shared understandings—call it a convention—that allows one of the possible resolutions to become the obvious focal point around which everyone’s expectations can align. For example, everyone knows that the first car to flash its lights will yield. And so, if the eastbound car

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10 This analogy is sometimes presented as a problem of cars approaching an intersection with no traffic signals (with interesting variations represented by differences in structure of situation). See, e.g., Richard McAdams, A Focal Point Theory of Expressive Law, 86 VA. L. REV. 1649, 1704-13 (analyzing the potential role of law or other focal points in such an intersection game, crediting the original illustration to Professor Sugden); ROBERT SUGDEN, THE ECONOMICS OF RIGHTS, CO-OPERATION, AND WELFARE 34-52 (1986).

11 Note that sorting this out can be tricky even when the drivers can communicate: “Please, you first.” “No, you, I insist.”

12 The vast literature on such focal points begins with the classic exposition by Professor Schelling. THOMAS SCHELLING, THE STRATEGY OF CONFLICT 57 (1963) (“Most situations—perhaps every situation for people who are practiced at this kind of game—provide some clue for coordinating behavior, some focal point for each person’s expectation of what the other expects him to expect to be expected to do.”). See also McAdams, supra note (recognizing Schelling’s contribution and applying the concept of focal points as a possible mechanism for the law’s expressive effect on organizing behavior). [Cite literature on focal points.]
flashes its lights first, it now expects the other to go (and so it had better yield), and the westbound car now expects the other to yield (and so it might as well go). The effectiveness of such a convention is not due to any force of its own, either as a matter of sanctions or of persuasive reasoning. Rather, it works simply by creating compatible expectations about what others will do. That is enough to achieve coordination.13

And thus we arrive at my second task in this essay, which is to propose such a shared convention for judges facing a potential clash of injunctions. I will do so by articulating a principle for judges to adopt when they find themselves in such a situation—a principle for coordinating injunctions.14 Any such principle should be intuitive and easy to imagine, as well as naturally appealing as a matter of judicial integrity and comity. What is needed for it to work, after all, is not only for a judge to be willing to adopt the principle herself, but also for her to expect that other judges will adopt it too.

Here is the proposed principle: Each district judge should issue or stay her injunction in accordance with the outcome she thinks most district judges would choose. That is, if her intended injunction would achieve the outcome that she thinks most district judges would try to achieve if they were ruling on their own (absent any threat of conflicting injunctions), then she should issue it; but if her injunction is incompatible with the outcome favored by the majority, she should stay it.15 Her role is either to implement, or else not get in the way of, that majority view.

This majority principle has several advantages, as Part II will detail. It emphasizes collegiality and takes into account the views of other judges in a way that realizes certain

13 Schelling, at 54 (“What is necessary is to coordinate predictions, to read the same message in the common situation, to identify the one course of action that their expectations of each other can converge on. They must ‘mutually recognize’ some unique signal that coordinates their expectations of each other.”)

14 Throughout this essay I will use the term “injunction” as a shorthand to capture not only preliminary injunctions and permanent injunctions, but also other forms of relief that compel changes in real-world behavior—for example, the mentioned vacatur (and the partial staying of it) by the district court in Maryland in the DACA cases. And for present purposes, I leave aside rulings that do not compel changes to behavior; however, a similar logic to what is articulated here can be applied to inconsistent rulings (in contexts where that may be seen as a problem) as well as to inconsistent obligations (the main concern in this essay).

15 To be clear, the term “outcome” refers to real consequences—a state of the world—rather than a specific ruling or remedial form. It could be a holding pattern achieved by a preliminary injunction (or allowed by a stay); or, it could be a longer-term steady state achieved by a permanent injunction or by vacatur as final relief; or, of course, it can be the status quo. There can be multiple ways for a court ruling to achieve or allow the same state of the world; for example, in the DACA cases, the same holding pattern (in which the government would continue to process renewals but not new applications) was achieved or allowed by various district courts through formally different rulings or remedies (notably, the two preliminary injunctions, a partial stay of vacatur as final relief, and a denial of a contrary preliminary injunction).
ideals of comity, such as equality and parity. It is also a natural answer to the question, “What would we end up doing, if we all decided this together as a group?” Going with the majority view, needless to say, is a thoroughly familiar approach throughout the federal courts. The intuitiveness of the majority principle makes it a salient and attractive focal point for the judicial coordination game, enabling it to smooth the path to a stable set of consonant injunctions and stays.

But wait—if federal judges are already doing rather well in avoiding conflicting injunctions, what’s the problem? There remains the issue of how to converge on the better outcome. Even if we are sure that judges will avoid conflicting injunctions by somehow finding a stable outcome in which one of them yields, one such equilibrium might be better than another. Here the proposed principle offers the substantive benefits of converging on an outcome that reflects the likely majority view, including possibly greater accuracy and legitimacy.

Part II will elaborate on these advantages by comparing the proposed principle with possible alternatives. The most practical comparison is between this principle and an individualistic default in which each judge acts based solely on what she thinks is correct, as if there were no other parallel cases. Under the proposed principle, judges with diverse views will have a better chance of acting in alignment from the very beginning, for the simple reason that their best guesses about the majority view are probably more similar than are their individual views. (This may also translate into less reason for forum-shopping.) Moreover, if any difference appears, convergence should occur more smoothly for two reasons: First, a course correction would not signify abandoning one’s own view of what is right, but rather updating one’s best guess at the majority view. Second, because it will likely be apparent which initial guesses are the outliers, all judges will know who should course-correct and who should hold the course.\footnote{These advantages are just as obvious in a scenario where judges can expressly communicate with each other. Recall that even when communication is possible, it is still useful to have a focal point determined by a principle everyone can readily agree upon.}

Part III addresses a reason we cannot be so sure that the coordinated outcomes we already observe are the result of ideal equilibrium selection. Consider this scenario: One judge decides first. Then another, and another. Even with cases brought around the same time and running in parallel, judges are not generally issuing orders simultaneously. And once one judge has issued an injunction, there is pressure on later judges to act consistently

\footnote{In Part II, I will say more about why noticing the outliers is more effective a prompt for course correction, when judges are guessing at the majority view under the proposed principle, than when judges are expressing their own views under the individualistic default.}
with it (issuing a matching injunction or staying one that is incompatible), given the need to avoid a clash. One might notice that in the DACA cases, the resulting set of coordinated orders exactly match the injunction issued by the first judge.\textsuperscript{18}

The result will still be coordinated and disaster still averted, but that may be due to a path-dependence set by the first injunction issued. I will propose that, in taking on such a responsibility, any judge who thinks she might be the first to issue an order should adopt the same principle already described—acting consistently with her best guess of what most federal district judges would view as the better outcome. Doing so becomes an even stronger expression of comity, in this sequential story, for she would in effect be disavowing her own first-mover advantage relative to her colleagues. (This approach should also reduce incentives for forum-selecting litigants to race to the courthouse.) In essence, this first judge would be acting as if every court were deciding at the same time, a posture of symmetry which resonates with ideals of equality and parity. Her first-mover advantage becomes a form of leadership in announcing a comity-based convention for others to adopt. And even if the stable outcome still results from path dependence, the fact that the first judge was aiming for the majority view should again bring some of the associated substantive benefits of greater accuracy and legitimacy.\textsuperscript{19}

Part III will also address the role of the appeals courts in reviewing the decisions of district judges who are applying the majority principle; and it will acknowledge the limitations of this essay’s analysis, including the crucial assumption that the relevant judges are averse to conflicting injunctions. The Conclusion then raises the possibility that the majority principle proposed here may be what at least some courts are already doing, given how obvious the principle might seem to be.

\textsuperscript{18} Even the judge in DC, whose vacatur seemed initially to go beyond the earlier injunctions, quickly scaled it back to match the others. NAACP v. Trump, 321 F. Supp. 3d 143, 146 (D.D.C. 2018) (Bates, J.) (“The Court is mindful that continuing the stay in this case will temporarily deprive certain DACA-eligible individuals, and plaintiffs in these cases, of relief to which the Court has concluded they are legally entitled. But the Court is also aware of the significant confusion and uncertainty that currently surrounds the status of the DACA program, which is now the subject of litigation in multiple federal district courts and courts of appeals. Because that confusion would only be magnified if the Court’s order regarding initial DACA applications were to take effect now and later be reversed on appeal, the Court will grant a limited stay of its order and preserve the status quo pending appeal, as plaintiffs themselves suggest.”).

\textsuperscript{19} The possibility that this first judge may have guessed wrong about the majority view, in retrospect as other judges’ guesses become known, will be discussed in more detail in Part II.
I. The Judicial Coordination Problem

Consider this scenario: Two judges with parallel cases are each on the verge of issuing a preliminary injunction, and these injunctions will conflict. Each judge will write an opinion ruling on all the prerequisite merits questions and articulating the injunctive relief she believes is warranted. In light of the potential conflict, however, each judge faces the question, “Should I issue this injunction, or should I stay it?” In each judge’s view, the ideal outcome is for her injunction to be issued while the other’s is stayed; a tolerable outcome is for her to stay her own while the other’s is issued; it is also tolerable if both judges stayed, leaving the status quo in place for now; and the worst result is a clash of the two conflicting injunctions.

This Part elaborates on the suggestion in the Introduction that the structure of such a problem fits what is commonly known in the social sciences and in legal scholarship as a “coordination game.” The following analysis will cover the scenario above as well as several variations: What if each judge believes the status quo to be better (or worse) than the other judge’s injunction? What if one of the injunctions is actually to preserve the status quo? It then reviews the standard logic of such a coordination game, showing that one that two stable outcomes is likely to emerge—in each, one judge issues an injunction, and the other stays. What is unlikely to be observed due to its inherent instability, however, is a set of conflicting injunctions.

A. The Structure of the Problem

The outcomes that result from the four possible combinations of choices by the two judges, in the scenario described above, are shown in Figure 1. Judge A’s options are shown on the vertical axis, and Judge B’s options on the horizontal axis. Judge A’s view of each outcome is listed on the lower left of each box; Judge B’s on the upper right.

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20 See supra note _._ Throughout this essay, the term “coordination” will refer to this framework as applied to the potential clash of injunctions, as distinct from other important questions about overlapping remedies and their interactions. See, e.g., Leah Litman, Remedial Convergence and Collapse, 106 CAL. L. REV. 1477 (2018) (identifying convergence and spillovers in doctrinal constraints across forms of remedies, undermining the possibility that one form might serve as backup for another); Kyle Logue, Coordinating Sanctions in Torts, 31 CARDOZO L. REV. 2313 (2010) (analyzing possible distortions to deterrence due to redundancy between tort damages and regulatory sanctions).
Readers may recognize this as a coordination game (commonly called the hawk-dove game) often used to represent situations in which the key question is, “who yields?” The literature on this game is well-developed, thanks to its applicability to many issues in economics, political science, sociology, and evolutionary biology.\(^\text{21}\) An early, rich, and influential analysis of such situations is that of Professor Thomas Schelling, who emphasized the crucial role that shared expectations of behavior—whether one calls it a convention, norms, precedent, etiquette, culture, or as he did, a focal point—can play in enabling coordination.\(^\text{22}\) In legal scholarship, Professor Richard McAdams has thoroughly studied this game as one means by which the law might promote coordination among parties with

\(^{21}\) See supra note _. [Cite literature on hawk-dove games in particular.]

\(^{22}\) As Professor Schelling articulated the importance for each side to meet the other side’s expectations: “The odd characteristic of all these games is that neither rival can gain by outsmarting the other. Each loses unless he does exactly what the other expects him to do. Each party is the prisoner or beneficiary of their mutual expectations; no one can disavow his own expectation of what the other will expect him to expect to be expected to do.” SCHELLING, supra note, at 60.
conflicting interests, in a variety of contexts, and his joint work with Professor Janice Nadler has offered experimental evidence of the effectiveness supplying a focal point.

For present purposes, there is no need to put numerical values on these outcomes. What matters to the analysis is the relative ordering of the outcomes in each judge’s view—“ideal” is better than “tolerable,” which is still better than “worst.” But for a stylized illustration of what such an ordering might mean, one might imagine assigning point values to those labels, as seen in Figure 2: setting the status quo as zero, the judge gains two units of value if the right outcome occurs because her own injunction is in effect, loses one unit of value if the wrong outcome occurs because the other judge’s injunction is in effect, and loses three units of value if there is a clash of injunctions. For Judge A the resulting value (or “payoff” in the standard terminology) is thus 2 when she issues her injunction while Judge A stays, an outcome we can call \{injunction A, stay B\}. It is -1 if she stays while Judge B issues his injunction, in \{stay A, injunction B\}. It is 0 in \{stay A, stay B\}, where both stay. And it is -3 in \{injunction A, injunction B\}, where the judges issue conflicting injunctions. These are listed in Figure 2, as are the corresponding amounts for Judge B.

Two variations with different illustrative point values may be worth mentioning, to show how the same setup can represent a range of situations with the same underlying logic. In some cases, a judge might believe that the other judge’s injunction actually makes things somewhat better than the status quo (in Figure 2, the -1 could be replaced by a positive value of 1), though not as much as her own would do. Or, in some cases a judge might believe that the other judge’s injunction is no better or worse than the status quo (in Figure 2, the -1 can be replaced by 0 for that judge); for example, the injunction requested of one of the judges may be one that preserves the status quo. In terms of Figure 1, these variations can be seen as allowing for gradations of the meaning of “tolerable.” But what they all have in common is that for each judge the ideal is still to issue her own injunction while the other judge stays, and the worst is still the clash of injunctions. No doubt the reader can imagine further variations which meet these simple conditions.


25 The numerical values are not necessary for analyzing this game in pure strategies (assuming that each player’s expectation about the other’s strategy is binary rather than probabilistic). Mixed strategies are not considered because they are unrealistic both as a matter of judicial practice and as a matter of judges’ expectations about what other judges will do.
Given the assumption of this relative ordering, both judges would prefer any other outcome over the one with conflicting injunctions. Thus, if Judge B expects Judge A to issue her injunction, then he would prefer to stay because he prefers \{injunction A, stay B\} to \{injunction A, injunction B\}; and the same logic applies for Judge A. But both judges would also prefer to issue an injunction if the other is expected to stay. If Judge B expects Judge A to stay, he will issue his injunction because he prefers \{stay A, injunction B\} over \{stay A, stay B\}; and the same logic applies for Judge A. In this sense, both \{injunction A, injunction B\} and \{stay A, stay B\} are inherently unstable. Should either of these unstable outcomes happen to materialize, or seem imminent, at least one of the judges would prefer to switch to a different choice.²⁶

²⁶ For readers who are fluent in game theory, I should note that although the problem has been characterized so far as a simultaneous-move one-period coordination game, in my storytelling I am implying that the single period includes enough time for some adjustments before arriving at a Nash equilibrium. I find this to be a convenient shorthand suitable to the context. (An alternative formulation might be to consider such adjustments as occurring during additional periods in an iterated Hawk-Dove game, but for present purposes that would complicate the analysis in an unnecessary way.)
By contrast, the \{stay A, injunction B\} and \{stay B, injunction A\} combinations are stable and self-reinforcing. Once the judges have arrived at either combination, by chance or by design, neither will have any reason to switch on their own—in fact, each has good reason to hold the course. (Such a combination is known in the literature as a Nash equilibrium.) Each judge would only switch if she expected the other judge to switch too. In effect, to depart from such a stable outcome, the judges would have to do so in concert.

**B. The Rarity of Conflicting Injunctions**

There is good reason to focus our attention on combinations that are stable and self-reinforcing the way that \{stay A, injunction B\} and \{injunction A, stay B\} are. As a matter of predicting outcomes, these stable equilibria tell us where things are likely to end up (after some initial adjustment if needed). This is because judges maintain control over their injunctions and stays, and can modify them at any time.

Imagine, for example, that the two judges each choose initially to stay their own injunctions. They write opinions expressing their views of the merits and articulating the relief they believe to be warranted; but their injunctions are stayed, maybe out of an abundance of caution, maybe out of respect for their colleague’s parallel proceedings, or maybe out of an interest in hearing what the other judge has to say. The initial outcome is thus \{stay A, stay B\}. This is tolerable for both, but Judge A would prefer to switch to issuing her injunction, if Judge B is going to stay anyway. Judge B is thinking the same thing about his own injunction. Accordingly, one or both of them will soon lift the stay. If only one judge does so, they have arrived at a stable outcome. If both happen to do so at the same time, then the worst outcome might appear but only for a moment before one yields—and they arrive at a stable outcome.

By the same logic, we also know where things are not likely to end up: with conflicting injunctions. The coordination game described in this Part is a structured story in which we can see that, because judges will yield if necessary, conflicting injunctions do not persist. Even if they might occur for a moment (or seem imminent), we know that one of the judges will soon yield. What we don’t know is, which?

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27 Another technical note: The analysis throughout this essay will be restricted to pure strategies. As mentioned, this is because mixed strategies are unrealistic in this context. Accordingly, attention on equilibria will also be limited to Nash equilibria in pure strategies.
II. The Majority Principle

So far this essay has set out an intuitive, even obvious, story for why conflicting injunctions are rarely seen: they are inherently unstable outcomes if judges would rather stay their own injunction than to allow such a clash. Yet, averting a clash is only half of the problem posed by the threat of conflicting injunctions. Because there are two stable and self-reinforcing outcomes (each with one judge issuing an injunction and the other judge staying), the question arises: Which of the two will occur? Which injunction will be issued, and which stayed? This descriptive ambiguity also implies normative possibility: Is there a way to tip the odds towards the better of the two outcomes? And is there a way to smooth the path toward that equilibrium?

By way of addressing these questions, this essay now proposes a “majority principle” for judges to apply when facing such a coordination problem. It is a principle that enjoys independent appeal as a matter of comity; seems intuitive enough to plausibly serve as a shared expectation of what other judges will do; steers the group of judges toward the stable outcome that brings the likely advantages of accuracy and legitimacy; and encourages convergence on this outcome by lowering the hurdle of justification for those judges who will need to stay their own orders to avoid the clash of injunctions.

A. Applying the Majority Principle

This is the majority principle: Each district judge should issue or stay her injunction in accordance with the outcome she thinks most district judges would choose. It may instantly sound like a rather obvious thing to suggest (and I would hope so). The pervasiveness of majority rule in the federal judiciary makes it a salient answer to the question, “What would we end up doing, if we all decided this together as a group?”

Moreover, in some instances, thinking about what most other judges would do might

28 It serves the purpose so crisply described by Professor Schelling: “What is necessary is to coordinate predictions, to read the same message in the common situation, to identify the one course of action that their expectations of each other can converge on. They must ‘mutually recognize’ some unique signal that coordinates their expectations of each other.” SCHELLING, supra note, at 54.

29 As Professor Schelling observed, “Most situations—perhaps every situation for people who are practiced at this kind of game—provide some clue for coordinating behavior, some focal point for each person’s expectation of what the other expects him to expect to be expected to do.” SCHELLING, supra note, at 54. It is worth emphasizing, as Professor Schelling explained, the preexistence of such a focal point can matter even when open communication is possible, because the logic that makes a focal point so powerful in a tacit coordination game can also exert a pull on the parties’ bargaining in a coordination game with communication. Id. at 67-74.
naturally be a part of a judge’s process in deciding what he himself will do. For present purposes, the more obvious this principle seems to be, the better it will do in creating a focal point for the coordination problem—that is, in creating shared expectations identifying who should go ahead and who should yield.

It should be emphasized that the principle concerns only the decision about issuing or staying an intended injunction. Even while applying this principle, each judge should still express her own views on the merits of the case and articulate the relief that she herself would order (if any), were she the sole judge with such a case. But for her decision whether to issue or to stay her intended relief, the principle counsels her to imagine what most federal district judges would view as the better outcome (if they were ruling on their own). If she believes that her own view of the better outcome accords with her best guess of this majority view, then she should issue her injunction to achieve that outcome. If instead her own view of the better outcome departs from her best guess about the majority view, she would stay her contrary order—explaining that, despite her own reasoned position, she is nonetheless staying it in light of the presence of parallel cases and the risk of conflicting injunctions.

The advantages of this majority principle (as well as potential difficulties in applying it) might be best illustrated by comparing it with possible alternative principles. The most immediately useful comparison is between this principle and the default approach in which each judge acts based solely on what she believes to be the better outcome (as if there were no other cases and hence no possibility of conflicting injunctions). This following analysis will begin with this comparison, before addressing others.

**B. Implementing Comity**

The first relative advantage of the majority principle is its realization of certain ideals of comity, in a situation where such concerns are at the fore. By definition, the majority principle takes account of the views of other judges, whereas the individualistic default approach does not. This is so, even if a judge trying to follow the majority principle is really thinking in a heuristic way about where she stands relative to most other judges (rather than literally counting votes on an imagined en banc court of all federal district judges). However she approaches the task, she would be equalizing her role with other judges in a way that resonates with notions of equality and parity among judges of the same rank.

On the flip side, one possible difficulty is that the principle seems to demand guesswork or even research into what other judges have done in similar cases. Yet, looking
into what other judges have done is typical legal research, a familiar task.\textsuperscript{30} Also, many federal judges are regularly in touch with their colleagues around the country through their work on Judicial Conference committees, sittings by designation, or other collegial communications; they may thus have gained a sense of judicial philosophies among a wide range of colleagues, allowing easier and more accurate estimation.

A greater obstacle may be that the majority principle will require some judges to announce that they are staying relief based on what other judges would do. No doubt this is an unpleasant thing to have to tell the deserving parties in one’s own case. But it is possible to explain forthrightly that, while such a stay is a hardship, it is justified as an exceptional measure by the presence of parallel cases, which create a risk of conflicting injunctions. Explaining such a necessity is not far removed from the common judicial task of ordering a stay of relief pending appeal.\textsuperscript{31}

\textbf{C. A Smooth Path to Stability}

The main practical advantage of the majority principle is that it may promote smoother and more rapid convergence to a well-coordinated, stable, and self-reinforcing outcome. This is for three reasons. First, judges’ best guesses about the majority view are probably more similar than are their individual views. (Think of the difference between asking everyone, “Do you think more people are left-handed or right-handed?” versus “Are you yourself left-handed or right-handed?”) Thus, judges with diverse views will have a better chance of acting in alignment from the get-go if they are following the majority principle, than if they are acting based on their individual views. This is not to suggest that there will be instant unanimity (or there would be no need for any of the analysis of convergence, below), as it seems plausible that each judge’s best guess about the majority view is positively correlated with her own view. But the formal shift in perspective allows some judges to openly notice the gap between their own view and that of most other judges (“look, it’s not me—it’s them”). One might speculate that such a gap may be most readily admitted by those judges who already see themselves as more independent-minded or even

\textsuperscript{30} Moreover, it is possible that some such research would also be suitable under the individualistic default approach, anyway.

\textsuperscript{31} Notably, both types of stays require to some extent superimposing a further calculus over the original weighing of equities that justified injunctive relief in the first place. The standard approach for deciding whether to stay an order pending appeal is articulated in \textit{Hilton v. Braunskill}, 481 U.S. 770, 776 (1987) (”(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.”).
The second reason relates to the dynamics of convergence. As the judges make their initial guesses, it may become apparent which guesses are the outliers, if any. Seeing this, all judges will know who should course-correct and who should hold the course. For example, if four out of five judges initially guessed that a certain outcome would be the majority view, then it becomes fairly obvious that the one judge who guessed otherwise should alter his order. And if there is a seeming tie among the guesses, a tiebreaker may be based on the relative strengths of the guesses, as seen in the articulated reasoning accompanying the judges’ decisions. Each judge is not merely voting on a guess, but also explaining it, and the explanation may evince the degree of certainty of her guess.

By contrast, under the individualistic approach, there is much less useful information to be gained from seeing what other judges have decided to do—precisely because the question there is “what do I believe is the better outcome?” Perhaps in a very close case, observing other judges’ choices could lead a judge to reconsider her own view. And yet, there is likely a general awareness that the particular judges who actually have these parallel cases are a subset carefully chosen by interested parties. Accordingly, a judge might sensibly discount the signals from these colleagues’ individual positions (imagine if they were all left-handed), while having less reason to discount their best guesses about the majority view (as they would still likely say that most people are right-handed).

Finally, there is a more subtle psychological way in which the majority principle promotes smoother convergence. Imagine that the judges in the parallel cases turn out to have different best guesses about the majority view and thus are initially aiming at different outcomes. At this point, a course correction is necessary from one or more judges. Crucially, the initial decision of each judge reflects her best guess about the majority view, not her own view of the better outcome. And thus, altering that decision would not signify abandoning one’s own view of what is correct—but instead, updating one’s estimate of the

\[32 \text{ And they will know that other judges also know, and so forth.}\]

\[33 \text{ In terms of the coordination game described in Part I, this learning effect solves the iterated “who yields” question that arises when the judges happen upon an unstable outcome such as } \{\text{stay A, stay B}\}\text{ or } \{\text{injunction A, injunction B}\}.\]

\[34 \text{ Convergence may happen still more smoothly if judges can expressly communicate about selecting one of the stable outcomes. But note that communication is not by itself a substitute for a focal point. (Again, think of the drivers saying, “please, you first” and “no, you, I insist.”) Rather, it is more useful to think of identifying a focal point as the aim of the communication—and that having an appealing principle to invoke during the talks may more rapidly bring everyone into alignment.}\]
majority view. This shift in framing makes it easier for the judge to justify the change, both to herself and to others.

A set of substantive benefits are intertwined with these procedural advantages. Simply put, they are the benefits of majority rule. There is no need here to rehearse these well-understood advantages—especially as majority rule is already pervasively embedded in how the federal judiciary operates. But to highlight briefly the ones that seem most relevant: Aiming at the majority view of the better outcome may lead to greater accuracy, in the sense of the Condorcet jury theorem or the wisdom of the crowds; it may thus reduce the chances of disruptive alterations later, as the appeals courts take up the cases. It may also be easier for a sense of legitimacy to attach to such an outcome, than one that reflects a judge’s individual view. Such relative legitimacy may be useful for fostering public acceptance or understanding. It may also ease acceptance by fellow judges; by definition, it minimizes the number of federal judges who disagree (and who could disagree with that?).

**D. Alternative Principles?**

Thus far, the comparison has been between the majority principle and the default approach. But other principles are possible as ways of determining “who yields.” This section considers three variations which may also be salient enough to serve as plausible focal points in the coordination game. Despite some salutary qualities to each, however, none seem overall as promising as the majority principle already proposed.

The first alternative is a sort of variation on the majority principle in which each judge is making a best guess only about the views of the specific judges who are actually deciding the parallel cases (rather than an imagined majority view among all district judges). At first blush, it may seem much easier for a judge to guess what a handful of known colleagues would believe to be better outcome, than to imagine the entire universe of fellow district judges. But the specific-judges approach also seems to demand more precise estimation, whereas the original majority principle may invite the use of heuristics, thus easing the task. Moreover, focusing only on those specific judges with parallel cases may reward forum-shopping; it may even spur the filing of more cases before selected judges in

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35 Perhaps the current criticisms of nationwide injunctions as imposing “the views of a single judge” on everyone might not have the same ring if it were a complaint about “a single judge’s best guess about what most federal judges would do”?

36 As suggested above, it seems plausible that a judge would approach the task by assessing where she herself stood among fellow district judges, either imagined as a general population or represented by a sampling whom she knows.
order to “stack” the relevant population. By contrast, focusing on the whole population should tend to have the opposite effect of deflating the motivation for forum-shopping. And more generally, a population-based guess would not be pushed about by the appearance of newly filed cases or the disappearance of cases dismissed along the way.

Adopting the original majority principle may require greater judicial fortitude, however, if the judges with actual cases were all chosen precisely for holding views known to differ from most judges. Supposing such a lineup of minority-view judges were in agreement with each other, there would be no risk of conflicting injunctions. And yet under the majority principle, all of these judges would be asked to explain that they were staying the relief they believe to be warranted, because they are guessing that most other judges would see things differently. Following the majority principle still entails the advantages noted above, but it may be a lot to ask of judges who already agree with each other.

A second alternative is for each judge to base her action (to stay or to issue an injunction) on her best guess of what most judges think the Supreme Court would do. This formulation might seem to combine the advantages of a majority-based approach with a forward-looking awareness that, for some cases, the Supreme Court will have the final say and thus the lower courts should be approximating that result from the outset. This formulation seems less useful than the original majority principle, however, for a couple reasons. First, district judges often are asked to do things the Supreme Court generally does not do; for example, it may seem somewhat odd to ask what kind of preliminary injunction the Court would issue. Second, in cases where the Court does have a discernible view relevant to the issue-or-stay decision, then this input is already subsumed in guessing what a majority of district judges would do, if one assumes they would follow the Court’s lead.

37 It is a bit ironic that the occurrence of forum-shopping might actually improve a judge’s guesses about what those specific colleagues would believe to be the better outcome.

38 This is not to claim that it will eliminate forum-shopping, of course; among other reasons, as noted, there may be a positive correlation between a judge’s own view and her best guess of the majority view. Moreover, recall that even while applying the majority principle in deciding whether to issue or stay an injunction, judges will still be expressing their own views of the merits of the underlying case in their opinions—and thus forum-shopping may still be valuable, to promote the airing of those judicial views.

39 This seems true even if the Court does sometimes adjust lower-court orders on an emergency basis, and so there might be a bit of suggestive data to consult. [Cite recent examples. Also add historical examples of the Court actually issuing preliminary injunctions; cite Mila Sohoni.]

40 Moreover, if the Court’s position is clear enough on such a determinative issue, then it seems unlikely there would be a danger of conflicting injunctions in the first place.
A third alternative is that all judges should, out of an abundance of caution or as an extreme version of comity, stay any intended injunctions if there is a chance of a clash—until a definitive resolution is supplied by the relevant higher court. But this is, in essence, the unstable outcome of \{stay A, stay B\} already discussed in Part I. It is unstable because each judge would prefer to issue her own intended injunction, feeling compelled to grant relief as long as it will not clash with another order (say, if the other judge is staying, anyway). Thus the appeal of a principle urging this all-stay combination would tend to be undermined by its likelihood of failure, unless the relevant higher courts always weigh in fast enough. It may be more useful to see this all-stay combination as a sensible if cautious starting point for district judges before they collectively shift to one of the stable outcomes, \{stay A, injunction B\} or \{injunction A, stay B\}—ideally, based on the majority principle.

III. Extensions and Limitations

What if one judge issues an injunction first—won’t the others feel a need to act consistently with whatever that judge has ordered? And what happens to an equilibrium when an appeals court reverses a district court? This Part addresses these important extensions. It then acknowledges the limitations of this essay’s analysis, including the crucial assumption that judges care enough about conflicting injunctions to want to avert them.

A. The First-Mover Advantage

Even when parallel cases are brought before multiple courts around the same time, judges do not generally issue orders simultaneously. Thus some judges will already know what at least one of their colleagues has decided to do, by the time of their own decisions. And because of their aversion to a clash of injunctions, there may be a path-dependence in which all later judges match that first injunction. One might note, for example, that in the DACA cases the resulting set of coordinated orders all align with the specific contours of the injunction issued by the first judge in California.\footnote{The contours were that the government would continue to process DACA renewals, but did not need to restart the process of accepting new applications for DACA status. See sources, supra note _._} The judge in New York matched it exactly. After the judge in DC declared that vacatur was appropriate (implying relief going beyond the earlier injunctions), he soon clarified that his vacatur is to be stayed in part, in a way that again matched the earlier injunctions.\footnote{See supra note _._} Even more dramatic, perhaps, was the choice of the judge in Texas; despite having expressed a view on the merits that DACA itself
is unlawful, he nonetheless denied the government’s request for an injunction ending DACA—thereby averting a clash of contradictory injunctions.\textsuperscript{43}

Path-dependence is not inevitable, however, for the simple reason that the first judge (or any judge) can always modify her initial order. That is why the coordination game described in Part I, in which judges are described as deciding contemporaneously, remains a useful analytical device. And yet, it is also possible that in some cases the costs of alteration are perceived to be high, say, because that first injunction creates reliance interests or because a shift to a different equilibrium would create confusion.\textsuperscript{44} If so, the first injunction may have a sticky quality that pulls later orders into alignment. If nobody expects that initial order to be altered, then such an alignment will be stable. But depending on how that first judge approached her decision, both that outcome and the process leading to it might not seem well justified.\textsuperscript{45} And at that point, it may be hard to dislodge unless the judges all agree to change their orders at the same time.

\textsuperscript{43} Texas v. United States, 328 F. Supp. 3d 662, 741-43 (S.D. Tex. 2018) (Hanen, J.) (“This Court does not necessarily agree with some of the reasoning (and the bases given for the decisions made) by the other courts that have addressed the rescission of DACA. Nonetheless, in each case in which an injunction or order of vacatur was issued and in this case in which an injunction is not being issued, the purpose of the orders was to maintain the status quo until a definitive decision could be reached. If this Court were to grant an injunction, it would upset that balance.”). Based on the context, it would appear that the mentioned “status quo” was that DACA renewals (but not new applications) would continue to be processed.

\textsuperscript{44} This appears to have been a consideration for the judge in DC, in issuing a partial stay of vacatur two weeks after his initial ruling vacating the rescission. NAACP v. Trump, 321 F. Supp. 3d 143, 146 (D.D.C. 2018) (Bates, J.) (“[T]he Court is also aware of the significant confusion and uncertainty that currently surrounds the status of the DACA program, which is now the subject of litigation in multiple federal district courts and courts of appeals. Because that confusion would only be magnified if the Court’s order regarding initial DACA applications were to take effect now and later be reversed on appeal, the Court will grant a limited stay of its order and preserve the status quo pending appeal, as plaintiffs themselves suggest.”). The “status quo” at that point was the presence of the two matching preliminary injunctions from the judges in California and in New York, requiring the government to continue processing DACA renewals but not new applications. Id. at 150 (“For the foregoing reasons, the government’s motion for a stay pending appeal will be granted in part, and the Court will stay its order of vacatur as it applies to initial DACA applications and applications for DACA-based advance parole.”) Cf. Priscilla Alvarez, The Immigration Fight That May Soon Land in the Supreme Court, \textit{ATLANTIC} (Aug. 23, 2018) (“Immigrant-advocacy groups, such as United We Dream, are encouraging recipients to apply for renewal despite the confusion around current litigation.”).

\textsuperscript{45} Among other possible reasons, this court might be the first to reach the remedial stage because it has been presented with less of a record of evidence to grapple with (say, about the relevant equities and hardships); and more generally, information about the universe of parallel cases may accumulate over time.
I propose that any judge who thinks she might be the first to issue an injunction should adopt the majority principle.\textsuperscript{46} That is, she should act consistently with her best guess of what most federal district judges would view as the better outcome. That way, assuming there is path-dependence after her injunction is issued, it is more likely that the resulting stable outcome reflects the majority view (because that is what she was aiming for) and thus entails the possible substantive benefits of greater accuracy and legitimacy.\textsuperscript{47}

Procedural benefits also follow. If it is clear to this judge that she will be the first to order relief, then adopting the majority principle becomes an even stronger expression of comity. In a sense, this judge is disavowing her own first-mover advantage relative to her colleagues (even if in fact she retains the advantage), because she is not imposing her own view but rather her best guess of what would happen if all district judges were deciding it altogether.\textsuperscript{48} One might say that her first-mover advantage becomes a form of leadership in norm-creation, as she would also be announcing a comity-based convention for others to follow.

Moreover, she should also be willing to change her decision should it become apparent that most of her colleagues with parallel cases are guessing differently about the majority view. This willingness would amount to truly relinquishing her first-mover advantage; in effect it brings the coordination problem back to the simultaneous-move version originally described, restoring a symmetry among the judges (befitting the comity ideals of equality and parity).

One way for this judge to signal such a willingness is to initially stay her order (while also expressing her best guess of the majority view). Other judges might do the same, as they all start to see what everyone else’s guesses are. As we know, such an all-stay outcome is unstable, but here it is intentionally so. From this staging point, the majority principle can guide the group of judges toward agreement on who should be lifting their stays (who goes?) and who should be maintaining them (who yields?)

\textsuperscript{46} This is consistent with the foregoing analysis (which assumed contemporaneous decisions), because any judge who has not yet observed what the other judges will decide is in effect in this position of possibly being the first.

\textsuperscript{47} The possibility that she may have guessed wrong is discussed below; in short, she should be willing to course-correct, in effect fully relinquishing any first-mover advantage.

\textsuperscript{48} And if it were widely known that judges would be adopting this majority principle, even if they were the first to decide, then the incentives for forum-selecting litigants to race to the courthouse might also be reduced.
B. Appeals

Appellate review of equitable relief tends to be limited and deferential—and it should remain so, when the appeals court is reviewing a district judge’s decision (to issue or to stay her injunction) based on the majority principle. This essay’s general prescription for the appeals courts is to aid, or at least not hinder, the district courts in solving their coordination problem. In particular, appeals courts should respect the district courts’ use of the majority principle; more ambitiously, they might even reinforce its use. But at minimum, the appeals courts should rarely if ever upset the stable outcomes that emerge among the district courts. This can be done even while the appeals courts are fulfilling their role in law declaration.

For illustrations, consider the following.

Suppose that an appeals court rules in a way that leans in favor of a preliminary injunction being issued. If it is affirming a district court that has already issued or stayed such an injunction, based on the majority principle, then it should leave that injunction or that stay in place.\(^{49}\) (If the district court has issued an injunction that seems consistent with the majority principle, but without articulating it, the appeals court could affirm on the basis of the majority principle or remand for the district court to consider it expressly.) But if it is reversing a district court that had originally ruled against any relief, then it should remand, in which case the district court would then follow the majority principle in either issuing or staying the injunction implied by the appellate ruling.\(^{50}\)

If the appeals court rules in a way that leans against relief, there is certainly no worry about creating a conflict of injunctions. Yet there is still one instance in which some delicate handling may be needed: Suppose that an appeals court decides to reverse the tentative merits ruling that supports a district court’s preliminary injunction.\(^{51}\) On its own, such a reversal does not worsen the risk of conflicting injunctions (at most it would be lifting an injunction). And if there are matching concurrent injunctions in place, then there should be no change in the real-world outcome, because the courts remain in equilibrium.\(^{52}\) Indeed,

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\(^{49}\) This would presumably be on interlocutory appeal from the district court’s decision articulating an intended preliminary injunction.

\(^{50}\) In the DACA cases, this was the posture of the Fourth Circuit decision, reversing the district court in Maryland and remanding for further proceedings. See supra note _._

\(^{51}\) Again, this would presumably be on interlocutory appeal.

\(^{52}\) For example, in the DACA cases, if the Second Circuit had reversed the judge in New York in a way that required it to lift its preliminary injunction, the same injunction issued by judge in California would still have remained in place, thereby maintaining the stability of the existing outcome.
this may be a good reason for multiple courts to issue matching concurrent injunctions, as we have seen in the DACA cases.53

The trickier situation arises if the district court being reversed is the only court that has issued the injunction. Now the question arises, for any other courts that have been staying a contrary injunction, whether they should lift the stay (after all, there is no longer a danger of conflicting injunctions). The default answer I propose is “no,” if these stays were put in place based on the majority principle. It is possible that another district court with a parallel case (and also based on the majority principle) may yet issue the same injunction erased by the appeals court. Yet, even so, there remains the question whether everyone should now update their best guesses about the majority view, based on the appeals court’s ruling. Again, the default answer I propose is “no,” if what was being corrected in the reversal was not the district judge’s guess about the majority view, but rather her guess about that (sole) circuit court’s view on an underlying merits question in that case.54 An especially helpful appeals court might even make clear in its opinion that it is not disturbing the former.

C. Limitations

An important limitation of this essay’s scope lies in a crucial assumption underlying its analysis: that every judge with one of the parallel cases is averse to a clash of injunctions, seeing it as the worst outcome, and in particular, worse than staying her own intended injunction while a different one is issued. In the present story, this assumed aversion is responsible for inherent instability of a conflicting-injunctions outcome; it is the reason judges always seem to manage to avoid it.

53 Cf. NAACP v. Trump, 321 F. Supp. 3d 143, 148 (D.D.C. 2018) (Bates, J.) (“And although there are currently two preliminary injunctions in place requiring DHS to continue accepting renewal applications, as the Court has previously noted, “those injunctions are both on expedited appeals and hence could be reversed in the not-too-distant future… This Court’s order—which, unlike the preliminary injunctions entered in parallel litigation, is a final judgment—will therefore prevent irreparable harm to plaintiffs and all current DACA beneficiaries should those other injunctions be reversed. Hence, it will not be stayed as to renewal applications.”).

54 One might imagine (perhaps fancifully) that this default might be overridden if an appeals court says that it is in fact correcting the district court’s best guess about the majority view. If so, then one district court’s best guess has officially been changed, and the relevant district judges may wish to assess whether their calls about the majority view were so close that one changed data point is enough to tip them to the other side. But I would urge appeals courts not to interfere in this way. It is not an obvious institutional competence of theirs to out-guess district judges about what most district judges would do. And the risk of creating confusion for other district judges—and, possibly, a disruption to a stable outcome—does not seem to be worth it. After all, the immediate tasks at hand for the appeals court (law declaration and the lifting of this one district court’s injunction) have been accomplished.
To illustrate what may happen if one judge is not much bothered by conflicting injunctions, compare Figure 2 with Figure 3.1. In the latter, Judge B does not suffer a loss of -3 when there is a clash of injunctions, but rather considers it a tolerable 0. Now, Judge B would always rather issue his injunction, regardless of what he expects Judge A to do. Knowing this, and therefore expecting Judge B to issue his injunction, Judge A would rather stay. A single stable outcome is possible, at \{stay A, injunction B\}. Notice that a clash is still averted, but only because Judge A still cares enough to avert it.

The clash might not be averted, however, if both judges are unbothered by it. In Figure 3.2, Judge A as well as Judge B now considers it to be a tolerable 0 rather than a loss of -3. Here, both judges would each always prefer to issue an injunction; accordingly, the only stable outcome is the clash of injunctions.

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**Figure 3.1**

<table>
<thead>
<tr>
<th></th>
<th>Injunction A</th>
<th>Stay A</th>
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</thead>
<tbody>
<tr>
<td>Injunction B</td>
<td>0</td>
<td>-1</td>
</tr>
<tr>
<td>-3</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Stay A</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>-1</td>
<td>0</td>
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**Figure 3.2**

<table>
<thead>
<tr>
<th></th>
<th>Injunction A</th>
<th>Stay A</th>
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<tbody>
<tr>
<td>Injunction B</td>
<td>0</td>
<td>-1</td>
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<tr>
<td>0</td>
<td>2</td>
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</tr>
<tr>
<td>Stay A</td>
<td>2</td>
<td>0</td>
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<tr>
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</table>

55 If he expected Judge A to stay, then he gains the greater value of 2 from issuing his injunction than of 0 from also staying; and if he expected Judge A to issue her injunction, he gains the greater value of 0 from also issuing his injunction than of -1 from staying.

56 The other outcome which had been an equilibrium before, \{injunction A, stay B\}, is no longer stable because in this variation Judge B would then prefer to switch to issuing his injunction.
When one or both judges do not care to avert conflicting injunctions, their situation is no longer a coordination game. There is no need for this essay’s guidance in setting a convention about “who yields?” because either one judge is forced to yield (as in Figure 3.1), or because neither judge will ever yield (as in Figure 3.2). Then the question is whether these scenarios are likely to occur. The latter seems implausible, given how rarely an actual clash of injunctions is ever observed. It is not so easy, based on observational evidence, to reject the former story, in which Judge B will always get his way (clashes be damned). But I would speculate that contemporary norms among federal judges strongly disfavor such an unyielding posture—for now.

That said, it may reward further study to consider heterogeneity among judges, both in their degrees of aversion to conflicting injunctions and in the strength of their beliefs about certain outcomes being better. One normative task for such future work might be to examine the potential role of injunctions that have the quality of compromises, splitting the difference as a way of ensuring that such an outcome remains more tolerable than a clash of injunctions, in every judge’s view.  

[Further limitations and extensions, to be added.]

Conclusion

How do we know that the federal courts, as they seem to coordinate their injunctions without fail, are not already following some approximation of the majority principle proposed here? After all, acting consonantly with the majority view may seem to a good many judges to be a rather obvious approach, in such a situation—one that appeals to comity, mutual respect, fairness, collegiality, and familiarity. Maybe they are. All the better. The modest service of this essay would then be to help the norm-creation along by highlighting this approach and urging judges to articulate its underlying principle, in hopes of making it still more salient for future courts.

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57 Although no judge in the DACA cases characterized the concurrent injunctions from the judges in California and New York as a compromise, and although each judge offered reasons for limiting the relief to the renewal of existing DACA recipients (while not extending it to require the processing new applications), one might notice that this specific injunction happened to sit in the middle of the range of views of the correct outcome, among the five district judges involved—ranging from the judges in Maryland and Texas who believed that the government had the better of the merits, to the judge in DC who would have entirely vacated the rescission and thereby restored the full operation of DACA. See supra note _.