

STARE DECISIS IN THE INFERIOR COURTS OF THE UNITED STATES

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ABSTRACT

While circuit courts are bound to follow circuit precedent under “law of the circuit” the practice among federal district courts is more varied and uncertain, routinely involving little or no deference to their own precedent. I argue that the different hierarchical levels and institutional characteristics do not account for the differences in practices between circuit and district courts. Rather, district courts can and should adopt a “law of the district” similar to that of circuit courts. Through this narrow proposal, I explore the historical stare decisis practices in federal courts that are not Supreme.

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INTRODUCTION

No matter how sympathetic the party or how clever the lawyer, most litigation is resolved by stare decisis, where the decisions of the past control the future.¹ Generally, courts apply stare decisis in one of two ways. First, courts apply governing precedent by adopting the same legal position as the court previously adopted in an earlier case (horizontal stare decisis). Alternatively, courts also apply decisions of higher courts with supervisory jurisdiction (vertical stare decisis). Because the Supreme Court has remained silent regarding many points of law, the federal appellate and district courts bear the responsibility of developing the judiciary's position on most federal law.

Despite the significant role horizontal stare decisis plays in litigation, legal practitioners and scholars have paid relatively little attention to horizontal stare decisis at levels outside the Supreme Court. Some have studied narrow issues related to appellate courts,² yet the practices of district courts—where most litigation is resolved—have gone virtually unexamined.³ To take the first step towards filling this critical gap in our understanding of the lower courts, I

¹ See *Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 550 F.3d 778, 785 (9th Cir. 2008) (“As every first-year law student knows, the doctrine of *stare decisis* is often the determining factor in deciding cases brought before any court.”); see also Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 956 (2005) (noting the significance of stare decisis, and concluding that “scholarly attention is thus warranted” on the subject).

² Scholarship addressing appellate court stare decisis typically deals with very specific issues. See, e.g., Michael Duvall, *Resolving Intra-Circuit Splits in the Federal Courts of Appeal*, 3 FED. CTS. L. REV. 17, 17–20 (2009); Amy E. Sloan, *The Dog That Didn't Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 FORDHAM L. REV. 713, 713–25 (2009) [hereinafter *Stealth Procedures*]; Phillip M. Kannan, *The Precedential Force of Panel Law*, 76 MARQ. L. REV. 755, 758–59 (1993). Most of it comes from debates over whether certain opinions can be designated non-precedential and the implications of that decision. See, e.g., Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and the New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. REV. 705, 705–14 (2006); Thomas R. Lee & Lance S. Lehnhof, *The Anastasoff Case and the Judicial Power to “Unpublish” Opinions*, 77 NOTRE DAME L. REV. 135, 135–40 (2001); Dean A. Morande, Comment, *Publication Plans in the United States Courts of Appeals: The Unattainable Paradigm*, 31 FLA. ST. U. L. REV. 751, 752–54 (2004); Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235, 1235–40 (2004); Amy E. Sloan, *If You Can't Beat 'Em, Join 'Em: A Pragmatic Approach to Non-precedential Opinions in the Federal Appellate Courts*, 86 NEB. L. REV. 895, 922–27 (2008) [hereinafter *Pragmatic Approach*]; Amy E. Sloan, *A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule*, 79 IND. L.J. 711, 711–15 (2004) [hereinafter *Prohibiting Non-Precedential Opinions*]; Norman R. Williams, *The Failings of Originalism: The Federal Courts and the Power of Precedent*, 37 U.C. DAVIS L. REV. 761, 762–68 (2004). Another source of debate, mostly of more dated scholarship, is over the long-dead proposal to create a national court of appeals to resolve circuit splits. Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 696 (1995). There is also some scholarship that, while primarily focusing on vertical precedent, provides useful analysis of intracourt stare decisis. Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1463–66 (2010); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 820–21 (1994).

³ Cf. Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 VILL. L. REV. 973, 977–78 (2008) (arguing that district courts are understudied by the legal academy).

examine the horizontal stare decisis practices of both circuit courts and district courts. Through a particularly rigid form of horizontal stare decisis, the circuit courts have chosen to adopt “law of the circuit,” where a prior reported decision of a three-judge panel of a court of appeals is binding on subsequent panels of that court. In contrast, the practice among federal district courts is more varied and uncertain, but routinely involves little or no deference to the prior precedent of that same district court.⁴ Deprived of any significant stare decisis effect, district court decisions adjudicate present controversies but do not create law for future cases.

This is a missed opportunity. Despite considering historical practices and institutional characteristics, I am unable to account for the modern disparity in practices between the two court levels.⁵ Instead, I argue that district courts can and should adopt stare decisis practices similar to their circuit court counterparts, based on the policies underlying stare decisis: predictability, fairness, appearance of justice, judicial economy, and collegiality. This narrow thesis provides a lens to examine the broader question of what are and what should be the stare decisis practices of federal courts that are not Supreme.⁶

To this end, Part I lays the groundwork for the rest of the Article by defining the analytical framework for stare decisis and outlining the policies that are typically attributed to stare decisis at the Supreme Court level. In Part II, I explore the historical and current practices of the circuit and district courts. Federal court practitioners and scholars may be surprised to learn that the stark differences between circuit and district courts were not present until relatively recently. In Part III, I argue that district courts have the same legal authority as circuit courts to adopt a horizontal stare decisis policy. In Part IV, I argue that district courts should exercise this authority, notwithstanding the hierarchical and institutional differences between circuit and district courts, and I propose a “law of the district” rule that mirrors the law of the circuit.

I. THE ORIGINS AND PURPOSES OF STARE DECISIS

A. *Stare Decisis and Structure*

Before proceeding further, a few words explaining this Article’s use of legal jargon are necessary.⁷ Put roughly, stare decisis refers to the practice of a court deferring to some set of precedent⁸ for an institutional reason (in contrast

⁴ See *infra* Part II.B.

⁵ See John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 518 (2000) (“For reasons that are hard to identify . . . the federal district courts regard their own precedents as persuasive authority only.”).

⁶ This Article does not purport to resolve this question, but hopes to provide the beginning of a productive discussion.

⁷ Terms in the stare decisis context are often used interchangeably with one another, or with flexibility that drains the terms of meaning. In this Article, I follow the framework of the next few paragraphs, both in terms of language and in conceiving the issues addressed.

⁸ When I say “precedent,” I am using it in a broader sense of not carrying any particular weight. It is the application of stare decisis principles to precedent where a precedent receives any weight. However, I limit the use of precedent to refer only to pronouncements from courts of law, because that is the scope of this Article. Cf. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 571–72 (1987) (using precedent more broadly); Goutam U. Jois,

to considering an issue afresh).⁹ Stare decisis can be vertical or horizontal. Horizontal stare decisis is the practice of a court deferring to its own decisions, while vertical stare decisis is the practice of a lower court adhering to the decisions of courts with supervisory jurisdiction, or courts “with the power to reverse” the judgment.¹⁰ Because this Article focuses on horizontal stare decisis, references to “stare decisis” are to horizontal stare decisis unless otherwise noted.

It is also important to draw a critical yet oft-overlooked¹¹ line between horizontal stare decisis, where a court follows its own decision, and that of comity, where a court defers to a decision of another court with equal jurisdiction.¹² The federal appellate power is subdivided by statute into appellate courts within each of thirteen circuits.¹³ Three-judge panels wield each circuit’s power to “hear and determine” most cases,¹⁴ and a decision of a three-judge panel in a circuit court is generally given deference by later panels in that circuit. This exercise of intracourt horizontal stare decisis is in contrast to any deference extended from one circuit court to a decision from a different circuit court, which is a matter of intercourt comity.¹⁵ The distinction between intracircuit and extracircuit precedent is enormous: circuits are far less willing to extend comity than they are to ignore the demands of stare decisis.¹⁶

Stare Decisis is Cognitive Error, 75 BROOK. L. REV. 63, 65 (2009) (using precedent more broadly).

⁹ Jois, *supra* note 8, at 68 n.19.

¹⁰ Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143, 1179 (2006). It can be much more complicated than that. See Caminker, *supra* note 2, at 823–28.

¹¹ For example, both scholarship and courts have blurred a distinction at the district court level—between intercourt comity and intracourt stare decisis—that I view as critical. See, e.g., Lee & Lehnhof, *supra* note 2, at 168–70 (citing Taylor v. Royal Saxon, 23 F. Cas. 797, 800–01 (C.C.E.D. Pa. 1849) (declining to follow Certain Logs of Mahogany, 5 F. Cas. 374 (C.C. Mass. 1837))).

¹² Mast, Foos, & Co. v. Stover Mfg. Co., 177 U.S. 485, 488 (1900); Consumers Union of U.S., Inc. v. Consumer Product Safety Comm’n, 590 F.2d 1209, 1217–19 (D.C. Cir. 1978) (rejecting as “unworthy of comment” argument that stare decisis required deference to sister circuit, but considering whether comity nevertheless did), *rev’d on other grounds*, GTEsylvania, Inc. v. Consumers Union of U.S., Inc., 445 U.S. 375 (1980); *In re Aspinwall’s Estate*, 90 F. 675, 678 (3d Cir. 1898) (Bradford, J., concurring) (“There can be no doubt that a departure would have been taken with even less hesitation from precedents established solely by other courts possessing only co-ordinate jurisdiction and authority.”); Michael Abramowicz, *Cyberadjudication*, 86 IOWA L. REV. 533, 580 n.140 (2001); David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 732–33 (1968).

¹³ 28 U.S.C. §§ 41, 43 (2006).

¹⁴ *Id.* § 46(c).

¹⁵ United States v. AMC Entm’t, Inc., 549 F.3d 760, 771 (9th Cir. 2008). This was not inevitable: “If the courts of appeals had been conceived from the beginning as wholly separate intermediate appellate courts with nationwide jurisdiction, it is not difficult to envision the decisions of such a court as binding nationwide.” Dobbins, *supra* note 2, at 1466. The same argument has been made for district courts. Allan D. Vestal, *Relitigation by Federal Agencies: Conflict, Concurrence and Synthesis of Judicial Policies*, 55 N.C. L. REV. 123, 171–72 (1977). Perhaps it is conceivable, but the structure of the authorizing statute and the entire history of the courts have been to the contrary: each circuit and each district is its own court.

¹⁶ Compare sources cited *supra* note 12 with *infra* Part II.A.

District courts have a structure similar to that of circuit courts. Congress has established 94 judicial districts, each with one district court and assigned district judges.¹⁷ By statute, “the judicial power of a district court with respect to any action, suit or proceeding may be exercised by a single judge.”¹⁸ Thus, analogous to circuit courts, stare decisis in a district court would attach (if at all) to a decision made by a judge in that district, while comity would govern the deference extended to decisions of other district courts.

To say that horizontal stare decisis applies to a decision is the beginning of the inquiry, as a later court must decide how much weight stare decisis gives a prior precedent.¹⁹ Stare decisis runs the gamut from very strong to very weak.²⁰ At the strong end is precedent that is absolutely binding, as is typically the case among circuit court panels.²¹ A less strong version requires adherence to precedent, even if wrongly decided, unless changed circumstances call into question the viability of the earlier decision.²² For example, the Supreme Court²³ today is willing to revisit precedent only after considering several factors: “workability . . . the antiquity of the precedent, the reliance interests at stake, and . . . whether the decision was well reasoned.”²⁴ The Court is more willing to overturn precedent in constitutional cases where Congress is unable to reverse the Court’s decision,²⁵ and in cases interpreting procedural rules where reliance interests are minimal.²⁶

Weaker forms of stare decisis only require deference to precedent so long as that precedent offers a reasonable interpretation or reaches a plausible view of the legal issue (even if viewed as incorrect).²⁷ The weakest version is when authority is “persuasive” only.²⁸ Confusingly, there is an oft-overlooked difference between precedent that *is* persuasive authority and precedent that is followed *because it is* persuasive.²⁹ To say, as some have done, that precedent should be followed to the extent it is persuasive is to extend no deference at

¹⁷ 28 U.S.C. § 132.

¹⁸ *Id.* § 132(c).

¹⁹ See Pearson, *supra* note 2, at 1267–68.

²⁰ Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 52–54 (2001).

²¹ It is also true for vertical precedent. *E.g.*, *Vujosevic v. Rafferty*, 844 F.2d 1023, 1030 n.4 (3d Cir.1988).

²² See *infra* note 24 and accompanying text.

²³ Because it is already the subject of so much attention, I do not dwell on the Supreme Court’s practices.

²⁴ *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088–89 (2009).

²⁵ *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) (“[W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court’s interpretation of its legislation.”).

²⁶ *Hohn v. United States*, 524 U.S. 236, 251 (1998) (quoting *United States v. Gaudin*, 515 U.S. 506, 521 (1995)).

²⁷ Nelson, *supra* note 20, at 53.

²⁸ To extend no deference is not a particular “stare decisis” policy, but rather a rejection of stare decisis. Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 187 (2006) (noting that stare decisis without a presumption of validity is “virtually meaningless”).

²⁹ *Nat’l Union Fire Ins. Co. v. Allfirst Bank*, 282 F. Supp. 2d 339, 351 (D. Md. 2003) (describing court’s precedent as “persuasive authority entitled to substantial deference”)

all.³⁰ Courts follow litigant's briefs to the extent that they persuade the judges, but this involves no deference. In contrast, precedent that is persuasive authority receives some weight beyond its immediate ability to persuade, perhaps based on the position of the court issuing a decision or the reputation of the authority's author.³¹ As explored in greater detail in later sections, courts have adopted stronger or weaker stare decisis at different times, in different circumstances, and at different places in the judicial hierarchy.

B. Why Do Courts Have Stare Decisis?

"Stare decisis is a 'principle of policy.'"³² While it may be "true that court systems need not have . . . stare decisis to function, nor indeed to function well,"³³ federal courts have relied upon some form of stare decisis since the nation's founding.³⁴ Deference to a court's previous decisions "reflects a policy judgment that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.'"³⁵

The Supreme Court has identified four virtues of the consistency that stare decisis brings: predictability, fairness, appearance of justice, and efficiency.³⁶

(internal quotation marks omitted)); Sullivan, *supra* note 10, at 1201 (noting "[t]he notion of authority being 'persuasive' beyond its inherent power to persuade").

³⁰ Colby v. J.C. Penney Co., 811 F.2d 1119, 1123–24 (7th Cir. 1987).

³¹ Sullivan, *supra* note 10, at 1201.

³² United States v. Int'l Bus. Machs. Corp., 517 U.S. 843, 856 (1996) (emphasis omitted); see also Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1548 (2000) (describing stare decisis as "pure judicial policy"). Although there is some argument that some respect towards precedent is constitutionally required as part of the nature of exercising "judicial power," Anastasoff v. United States, 223 F.3d 898, 901 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054, 1056 (2000), the vast majority of the scholarship views stare decisis as a policy that can be changed at will by the courts. See generally Jed I. Bergman, *Putting Precedent in its Place: Stare Decisis and Federal Predictions of State Law*, 96 COLUM. L. REV. 969, 974 n.28 (1996) (collecting articles); Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43 (2001); Lee & Lehnhof, *supra* note 2; Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81 (2000); Williams, *supra* note 2. Indeed, some have argued that, at least in Constitutional cases, stare decisis is unconstitutional because it represents an abandonment of the judge's duty to follow the Constitution. Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 18–22 (2007); Paulsen, *supra*. Whatever merit these criticisms may have theoretically, stare decisis is well-entrenched in our judicial system.

³³ Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 VAND. L. REV. 1745, 1750 (2008).

³⁴ See generally Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999); see also Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1897 (2009) ("The doctrine is so central to Anglo-American jurisprudence that it scarcely need be mentioned, let alone discussed at length." (emphasis omitted) (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 20 (Yale Univ. Press 1964) (1921))); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 582 (2001).

³⁵ *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (internal quotation marks omitted).

³⁶ *Hohn v. United States*, 524 U.S. 236 (1998) ("Stare decisis is 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integ-

Significantly, none of these depend on the precedent being “correct,” however defined.³⁷

Concern for predictability reflects the recognition that change in the law disturbs the foundation for countless human interactions. Without predictability, contracts and wills drafted under an old legal regime may have different meanings, or no meaning at all.³⁸ Stable law enables the public to know and understand what their civic rights and duties are.³⁹ Stare decisis provides the “moorings so that men may trade and arrange their affairs with confidence.”⁴⁰ Predictability benefits not just the public, but lower courts as well.⁴¹

Although predictability is consistency’s virtue before a case reaches court, fairness is the virtue once in litigation. Inconsistent application of law is unfair because it violates the fundamental premise in our legal system that similar litigants should be treated similarly.⁴² In fact, Justice Douglas observed that “there will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon.”⁴³ Further, stare decisis constrains judicial discretion to established rules of law rather than allowing judges to operate on whim or caprice.⁴⁴

Closely tied to virtue of fairness is the *appearance* of justice. Stare decisis “permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.”⁴⁵ The legitimacy of the courts is enhanced when judges are perceived to be dutifully applying law rather than resolving a set of facts without constraint.⁴⁶

Stare decisis is a policy that also directly benefits the judiciary because reliance on precedent conserves limited judicial resources. As Justice Cardozo wrote: “[T]he labor of judges would be increased almost to the breaking point

ity of the judicial process.” (internal quotation marks omitted)); James C. Rehnquist, Note, *The Power That Shall Be Vested in a Precedent: Stare Decisis, The Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 347 (1986).

³⁷ Paulsen, *supra* note 32, at 1538 n.8.

³⁸ Schauer, *supra* note 8, at 595–97; *see also* William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 735–36 (1949).

³⁹ *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992) (“Liberty finds no refuge in a jurisprudence of doubt.”).

⁴⁰ Douglas, *supra* note 38, at 736.

⁴¹ William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 273 (1976) (“If the U.S. Supreme Court refuses to accord precedential weight to earlier Supreme Court decisions, it thereby undermines the precedential weight of its own decisions.”).

⁴² Rehnquist, *supra* note 36, at 347.

⁴³ Douglas, *supra* note 38, at 736.

⁴⁴ Nelson, *supra* note 20, at 9 (“To avoid an arbitrary discretion in the courts . . . it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them” (quoting THE FEDERALIST NO. 78 (Alexander Hamilton))).

⁴⁵ Vasquez v. Hillery, 474 U.S. 254, 265–66 (1986).

⁴⁶ Kermit Roosevelt III, *Polyphonic Stare Decisis: Listening to Non-Article III Actors*, 83 NOTRE DAME L. REV. 1303, 1305 (2008) (“If a Court abandons precedent too readily and without adequate explanation, observers may conclude that its decisions are driven by preference rather than principle.”).

if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."⁴⁷

Weighing against all of these goals are the costs associated with upholding precedent. Often such costs are perceived as judicial allowance of "bad" or "erroneous" law. However, the negative consequences of stare decisis can be stated more objectively as the cost of judges not being able to judge. Or, put differently, a decision that is ripe for discarding remains law. As a result, stare decisis can tend to calcify the law, causing age-old precedent to linger despite developments in other areas of law and in society.⁴⁸

II. HORIZONTAL STARE DECISIS PRACTICES AMONG LOWER COURTS

The Supreme Court could have been the only court to choose to defer to its own precedent, but it was not.⁴⁹ Most circuits have gone further than the Supreme Court and adopted very strong rules of intra-court stare decisis for panel decisions.⁵⁰ In contrast, district court stare decisis practices are unclear, and often non-existent.⁵¹ History, however, proves that this was not always the case.⁵²

A. Circuit Court Practices

Without Supreme Court or legislative intervention, though doubtlessly looking to the Supreme Court's example, the appellate courts began to formulate their own horizontal stare decisis policies.⁵³ With the arguable exception of the Seventh Circuit,⁵⁴ each circuit court has adopted some version of "law of

⁴⁷ Rehnquist, *supra* note 36, at 348 (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1928)); *see also* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) ("With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it.").

⁴⁸ *Prohibiting Non-Precedential Opinions*, *supra* note 2, at 733. There is much debate over whether the balance of interests justifies stare decisis. Rather than wade into this debate, I take a narrower approach: I assume the status quo is justified for the Supreme Court and for circuit courts, and ponder why it has not been extended to district courts.

⁴⁹ *See* Part II.

⁵⁰ *See* Part II.A.

⁵¹ *See* Part II.B.

⁵² *See* Part II.B.

⁵³ *See* Harrison, *supra* note 5, at 530; *Stealth Procedures*, *supra* note 2, at 722 ("[T]he corresponding rules regarding stare decisis and the law of the circuit, are rules made by the courts themselves, not by legislative fiat."); *Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 107th Cong. 9 (2002) (statement of Alito, J.) ("The doctrine of precedent (*stare decisis*) was established as part of the common law, and the development of this doctrine has long been committed primarily to the stewardship of the Third Branch.").

⁵⁴ The Seventh Circuit follows a less rigid stare decisis rule, allowing one panel to overrule another. *United States v. Reyes-Hernandez*, 624 F.3d 405, 412–13 (7th Cir. 2010); *see also* 7TH CIR. R. 40(e) ("A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted.").

the circuit.”⁵⁵ A common iteration of the law of the circuit, though one that glosses over its considerable complexity, is that a subsequent panel is bound by the holding of a previously published decision in that circuit.⁵⁶

The adoption of a law-of-the-circuit rule is a “relatively modern judicial phenomenon.”⁵⁷ Historically, some deference was extended, but panels could reject precedent if it was erroneous in the later panel’s eyes.⁵⁸ Moreover, precedent was not followed when a later court believed the earlier decision contained an important factual error.⁵⁹ Circuit courts were also free to disregard their own precedent under various exceptions that swallowed the rule, including constitutional cases⁶⁰ and criminal cases.⁶¹ The later panel always had the discretion (albeit with ostensible limits on that discretion) to decide whether to follow an earlier decision.⁶²

⁵⁵ *Stealth Procedures*, *supra* note 2, at 719 n.29 (2009) (collecting cases).

⁵⁶ *E.g.*, *Hinchman v. Moore*, 312 F.3d 198, 203 (6th Cir. 2002).

⁵⁷ John B. Oakley, *Precedent in the Federal Courts of Appeals: An Endangered or Invasive Species?*, 8 J. APP. PRAC. & PROCESS 123, 127 (2006); *see also* *Hart v. Massanari*, 266 F.3d 1155, 1163–64 (9th Cir. 2001); Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1065–66 (2003) (“The rules that give modern stare decisis doctrine much of its rigor are decidedly modern.”); Lee & Lenhoff, *supra* note 2, at 154. For a contrary view, see Dobbins, *supra* note 2, at 1463–65. Professor Dobbins asserts that circuit courts have always employed binding forms of stare decisis. Unfortunately, Dobbins only cites modern cases which do not shed light on the historical practice. In contrast, I believe the case citations in this paragraph show a different understanding of history, which is consistent with the weight of authority. Notwithstanding this possible oversight, which does not undermine his thesis, Professor Dobbins’s work is a thoughtful, well-reasoned addition to the scholarship on stare decisis.

⁵⁸ *United States v. Cocke*, 399 F.2d 433, 448 (5th Cir. 1968) (“Our law is neither moribund nor muscle-bound. There are justifiable escapes and liberations from the rigidities and inflexibilities of stare decisis.”); *Perrone v. Pa. R. Co.*, 143 F.2d 168, 168–69 (2d Cir. 1944); *Chicago & W.I.R. Co. v. Chicago & E.R. Co.*, 140 F.2d 120, 121 (7th Cir. 1943) (choosing to reconsider prior case); *McKenna v. Austin*, 134 F.2d 659, 666 (D.C. Cir. 1943); *New York Life Ins. Co. v. Ross*, 30 F.2d 80, 83 (6th Cir. 1929); *Johnson v. Cadillac Motor Car Co.*, 261 F. 878, 886 (2d Cir. 1919) (noting that court was free to reject prior decision if substantially wrong); *Pink Supply Co. v. United States*, 32 C.C.P.A. 48, 52, 1944 WL 3662 (Cust. & Pat. App. 1944) (prior decisions should be followed unless “clearly erroneous”); Stephen L. Wasby, *Inconsistency in the United States Courts of Appeals: Dimensions and Mechanisms for Resolution*, 32 VAND. L. REV. 1343, 1346–51 (1979) (discussing inconsistency among panel decisions in the Ninth Circuit in the 1970s).

⁵⁹ *Moore v. United States*, 157 F.2d 760, 764 (9th Cir. 1946); *Bresnahan v. Tripp Giant Leveller Co.*, 99 F. 280, 280 (1st Cir. 1900).

⁶⁰ *Whiteside v. S. Bus Lines*, 177 F.2d 949, 951 (6th Cir. 1949).

⁶¹ *Jones v. United States*, 175 F.2d 544, 551 (9th Cir. 1949) (“[A] criminal case affords no proper occasion for the application of the doctrine of stare decisis.”); *see also* *United States v. Scully*, 225 F.2d 113, 118–19 (2d Cir. 1955) (Frank, J., concurring).

⁶² Stephen J. Powell & M. Linda Concannon, *Stare Decisis in the Court of International Trade: One Court or Many?*, in U.S. TRADE LAW & POLICY 351, 358 (PLI Commercial Law and Practice, Course Handbook Series No. A4-4178, 1987) (“For many years, however, any individual panel had the authority to overrule the decision of another panel.”); *see* William L. Reynolds & William M. Richman, *The Non-Precedential Precedent – Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1190, 1201 (1978).

Weak stare decisis began to change in the 1960s, and the rule removing discretion from panels was solidified through the 1970s.⁶³ Although it is not precisely clear what sparked the change, it can probably be attributed to the confluence of two phenomena: an increase in the number of cases and judges,⁶⁴ and the birth of limited publication practices.⁶⁵ More judges deciding more cases led to more opinions, which threatened intracircuit consistency.⁶⁶ Moreover, the increase in the number of judges tended to make the courts less cohesive, and increased the likelihood of strong disagreements between panels.⁶⁷ The need for intracircuit uniformity thus encouraged a more rigid rule. At the same time, the ability of a panel to explicitly endorse an opinion as “published” enhanced the decision’s status: not only in symbolic effect, but by limiting the number of precedents entitled to heightened deference and by signaling that the precedent is the product of some heightened attention by the deciding judges.⁶⁸

“The ‘law of the circuit’ rule is a subset of stare decisis.”⁶⁹ Though each three-judge panel does not represent all judges on the circuit, it does wield the

⁶³ Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. REV. 29, 35–37 (1988). The D.C. and the Fifth Circuit appear to have been the first to adopt law of the circuit, dating back to perhaps the late 1950s. *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 828 (5th Cir. 1967) (“This Court, unlike some of our sister Circuit Courts who occasionally follow a different course, has long tried earnestly to follow the practice in which a decision announced by one panel of the Court is followed by all others until such time as it is reversed, either outright or by intervening decisions of the Supreme Court, or by the Court itself en banc.”); *Davis v. Peerless Ins. Co.*, 255 F.2d 534, 536 (D.C. Cir. 1958) (“This division of the court is not free to overrule so recent a decision as that in the *Barnard* case, for only by action of the entire court, sitting *en banc*, will such a step be taken.”); *Woolley v. E. Air Lines, Inc.*, 250 F.2d 86, 91 (5th Cir. 1957) (“We hold therefore that the rule of stare decisis requires that we adhere to the *Sigfred* and *Majors* opinions and hold that the complaint did not state a claim against defendants upon which relief could be granted.”). *But see Hunter v. United States*, 323 F.2d 625, 627, n.10 (D.C. Cir. 1963) (“It is significant in this latter regard to recall our established practice to the effect that a division of the court will not overrule a recent decision of another division; that is an appropriate function of the full bench.”); *Nat’l Life Ins. Co. v. Roosth*, 306 F.2d 110, 113 (5th Cir. 1962) (“[T]his rule of practice is not a limit of power.”). This may not have been quite as clear a rule as the opinions suggest. *Cocke*, 399 F.2d at 448 (“Our law is neither moribund nor muscle-bound. There are justifiable escapes and liberations from the rigidities and inflexibilities of stare decisis.”). By 1970, other circuits began to state that they were “bound” by circuit precedent. *Whatley v. United States*, 428 F.2d 806, 807 (5th Cir. 1970); *see Goff v. Pfau*, 418 F.2d 649, 654 (8th Cir. 1969).

⁶⁴ *See* Robert L. Tucker, *Vexatious Litigation as Unfair Competition, and the Application of the Noerr-Pennington Doctrine*, 22 OHIO N.U. L. REV. 119, 119 n.1 (1995) (noting increase in filings and appeals between 1953 and 1983).

⁶⁵ *See Gant*, *supra* note 2, at 708–10.

⁶⁶ *See Oakley*, *supra* note 57, at 127–28 (stating that law of the circuit “is largely a product of the past thirty years’ mounting caseloads”).

⁶⁷ *Wasby*, *supra* note 58, at 1344.

⁶⁸ *E.g.*, *Hart v. Massanari*, 266 F.3d 1155, 1177 (9th Cir. 2001).

⁶⁹ *San Juan Cable LLC v. P.R. Tel. Co.*, 612 F.3d 25, 33 (1st Cir. 2010); *see also* *FDIC v. Abraham*, 137 F.3d 264, 268 (5th Cir. 1998); *Dep’t of the Treasury v. Fed. Labor Relations Auth.*, 862 F.2d 880, 882 (D.C. Cir. 1988) (“The doctrine of stare decisis ‘demands that we abide by a recent decision of one panel of this court unless the panel has withdrawn the opinion or the court en banc has overruled it.’” (emphasis omitted)); *Rebecca Hanner White, Time for a New Approach: Why the Judiciary Should Disregard the “Law of the Circuit”*

circuit's statutory authority to "hear[] and determin[e]" appeals⁷⁰ and, therefore, it "speak[s] on behalf of the circuit."⁷¹ Thus, implementing the law of the circuit, later panels in a particular circuit must follow the decisions of previous panels in the same circuit. The potential difficulty of having some judges bind others is mitigated (though not eliminated) by the practice in several circuits of informally circulating precedential opinions to all judges for comment.⁷²

The modern law-of-the-circuit rules are actually more pliant than they first appear.⁷³ Most circuits allow a later panel to overturn an earlier decision if it was rejected by an intervening decision of a higher authority.⁷⁴ Some circuits even extend this power to situations where other developments in the law, "although not directly controlling, offer[] a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind."⁷⁵ Courts are not bound by "dicta" of earlier decisions,⁷⁶ although it is not always easy to determine what counts as "dicta" and what is actually essential to the holding.⁷⁷ Nor are courts bound by conclusions implicit in the hold-

When Confronting Nonacquiescence by the National Labor Relations Board, 69 N.C. L. REV. 639, 672-73 (1991).

⁷⁰ 28 U.S.C. §§ 46(b) & (c) (2006). If we take seriously the statements that circuit panels are "without power" to overrule earlier precedent, *e.g.*, Phillip v. United States, 229 F.3d 550, 552 (6th Cir. 2000), these rules might violate this section. Kannan, *supra* note 2, at 759. If taken at face value, law of the circuit deprives individual panels of a judicial power that is retained by the circuit as a whole (which, through the en banc court, can overturn published precedent). More likely, courts are simply stating that, although they retain the power, they will not exercise it as a matter of good practice. McMellon v. United States, 387 F.3d 329, 334 (4th Cir. 2004) (en banc) ("[W]e recognize that a three-judge panel has the statutory and constitutional power to overrule the decision of another three-judge panel."). In any event, no court has held law of the circuit rules to be invalid, and if they were, a simple clarification that circuit panels *should* not, rather than *cannot*, ignore prior circuit cases satisfies this objection.

⁷¹ Duvall, *supra* note 2, at 17.

⁷² 3d Cir. I.O.P. 5.5.4; *see also* 3d Cir. I.O.P. 5.7; 6 Cir. I.O.P. 206.

⁷³ *See* Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 545 (1989) ("[E]xperience tells us that the formal rule of stare decisis does not necessarily guarantee consistency within a jurisdiction.").

⁷⁴ Circuits differ in how much the earlier decision must be undermined before it can be overruled. *See* United States v. Villareal-Amarillas, 562 F.3d 892, 898 n.4 (8th Cir. 2009) ("In the Ninth Circuit, a three-judge panel may reexamine a prior panel decision only if a supervening Supreme Court decision is 'clearly irreconcilable.' By contrast, we may reconsider a prior panel's decision if a supervening Supreme Court decision 'undermines or casts doubt on the earlier panel decision.'" (quoting *K.C. 1986 Ltd. P'ship v. Reade Mfg.*, 472 F.3d 1009, 1022 (8th Cir. 2007))); *see also* United States v. Peltier, 505 F.3d 389, 394 n.18 (5th Cir. 2007); Recent Case, *Ninth Circuit Holds that Three-Judge Panels May Declare Prior Cases Overruled When Intervening Supreme Court Precedent Undercuts the Theory of Earlier Decisions*: Miller v. Gammie, 335 F.3d 889 (9th Cir. 2003) (en banc), 117 HARV. L. REV. 719, 722-23 (2003).

⁷⁵ *San Juan Cable LLC v. P.R. Tel. Co.*, 612 F.3d 25, 33 (1st Cir. 2010) (quoting *Williams v. Ashland Eng'g Co.*, 45 F.3d 588, 592 (1st Cir. 1995)).

⁷⁶ *E.g.*, *Fru-Con Constr. Corp. v. Controlled Air, Inc.*, 574 F.3d 527, 542 (8th Cir. 2009).

⁷⁷ *See* *Garcia v. Holder*, 621 F.3d 906, 911 (9th Cir. 2010); *compare* *United States v. Hardin*, 539 F.3d 404, 410-11 (6th Cir. 2008) (Moore, J.), *with id.* at 440 (Batchelder, J.) ("[T]he majority has effectively nullified the *Pruitt*-majority's position (i.e., holding) by calling it 'simply dicta.'"). *See generally* Abramowicz & Stearns, *supra* note 1.

ing that were not briefed or discussed.⁷⁸ And, of course, a panel can distinguish or limit precedent, perhaps unpersuasively.⁷⁹ Notwithstanding these exceptions, the law of the circuit is still quite rigid⁸⁰—far more rigid than the horizontal stare decisis practices of the Supreme Court.⁸¹

However, an entire circuit is not forever bound by a three-judge decision. The en banc procedure allows all active judges to sit and decide a single case. Sitting en banc, circuit judges are not bound by prior panel decisions, but may give some deference to well-entrenched precedent.⁸² In addition, some circuit courts have an informal en banc procedure where a panel can circulate to all circuit judges a proposed opinion overruling precedent and obtain the majority's acquiescence through a vote.⁸³

Modern law-of-the-circuit rules have several interesting features. First, not all decisions of a court have the same stare decisis weight.⁸⁴ Rather, circuits employ a dichotomy between published and unpublished opinions.⁸⁵ Published

⁷⁸ *Gonzales v. Dep't Homeland Sec.*, 508 F.3d 1227, 1235 (9th Cir. 2007).

⁷⁹ *E.g.*, *BellSouth Corp. v. FCC*, 162 F.3d 678, 695 (D.C. Cir. 1998) (Sentelle, J., dissenting); *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1097 (6th Cir. 1987) (Krupansky, J., dissenting); Barrett, *supra* note 57, at 1020–21; Wasby, *supra* note 58, at 1358–59.

⁸⁰ Barrett, *supra* note 57, at 1020–21.

⁸¹ *See also* *Rutherford v. Columbia Gas*, 575 F.3d 616, 625–26 (6th Cir. 2009) (Clay, J., dissenting) (contrasting law of the circuit with the traditional formulation of stare decisis).

⁸² *See* *United States v. Heredia*, 483 F.3d 913, 918 (9th Cir. 2007) (en banc); *see also* Michael Abramowicz, *En Banc Revisited*, 100 COLUM. L. REV. 1600, 1621 (2000). The Ninth Circuit, with 29 active judgeships, also utilizes a limited en banc court where 11 judges meet and decide a case, with the full court having the option of reviewing the limited en banc court's judgment.

⁸³ *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 853 (7th Cir. 2009); *Shipping Corp. of India v. Jaldhi Overseas PTE Ltd.*, 585 F.3d 58, 67 & n.9 (2d Cir. 2009); 7TH CIR. R. 40(e). *See generally* *Stealth Procedures*, *supra* note 2; Michael S. Kanne, *The "Non-Banc En Banc": Seventh Circuit Rule 40(e) and the Law of the Circuit*, 32 S. ILL. U. L.J. 611, 611 (2008).

⁸⁴ Over the last decade, there has been a vigorous debate over the publication practices of the circuit courts. This debate has fallen into two categories. The first aspect of the debate is whether circuit courts can ignore unpublished opinions. Some argued that precedent is a defining feature of judicial power, and therefore courts must presumptively adhere to precedent, *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054, 1056 (8th Cir. 2000) (en banc), while others have gone to great lengths to refute this argument. *Hart v. Massanari*, 266 F.3d 1155, 1160 (9th Cir. 2001); *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, 260 (5th Cir. 2001); *Symbol Techs., Inc. v. Lemelson Med.*, 277 F.3d 1361, 1367 (Fed. Cir. 2002); *see also* Barrett, *supra* note 57, at 1011 n.1 (collecting articles). This Article assumes that the current practice of extending stare decisis to some, but not all, prior opinions of the court is constitutional, as the weight of authority has held. Even if Article III required that stare decisis must be extended to all opinions, whether published or not, this would further support the thesis that district courts must adhere to their own precedent. There is also a more general debate about whether litigants should be allowed to cite unpublished opinions to the court, Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm und Drang over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429, 1433 n.11 (2005), but the passage of FED. R. APP. P. 32.1, which allows citation of opinions, has ended the debate for now. "Rule 32.1 would not, of course, require courts to treat their unpublished opinions as binding precedent." Schiltz, *supra*, at 1484.

⁸⁵ Published opinions are those included in an official reporter, such as the Federal Reporter (for circuit court opinions) or the Federal Supplement (for district court opinions). Levin, *supra* note 3, at 983. In this era of Westlaw and Lexis electronic databases, referring to

opinions are given conclusive weight, while unpublished opinions are often given minimal (if any) consideration.⁸⁶ The weight given by the circuit to a decision also determines the weight given to it by lower courts. As a result, lower district courts in the circuit need not follow unpublished decisions, but are fully bound by any published pronouncement.⁸⁷ While it is typically up to the judge or judges who issued the decision to designate an opinion as published, local rules often provide criteria to be applied when making publication decisions.⁸⁸ The factors are flexible, and publication practices vary between judges.⁸⁹ Some circuits also explicitly allow counsel to move for publication, although the ultimate decision rests with the judge.⁹⁰ The upshot of this is that the original panel, not a later court, decides the precedential weight of the opinion.⁹¹

Another notable feature of the circuit stare decisis rules is the manner in which the rules are promulgated. Although originally adopted through case law, many circuits have since codified their practices in Circuit Rules or Internal Operating Procedures.⁹² Others have simply relied on case law to establish the circuit's practices.⁹³ Today, judges accept the law-of-the-circuit rules without

opinions as "published" or "unpublished" is inaccurate and downright confusing. *Id.* at 983–84; Morande, *supra* note 2, at 754; *see also* Brian P. Brooks, *Publishing Unpublished Opinions*, 5 GREEN BAG 2D 259, 259 (2002) (noting that, due to recent developments, "the concept of the 'unpublished opinion' is no longer a legal fiction—it is fiction, pure and simple."). Nevertheless, procedural rules preserve this dichotomy.

⁸⁶ *United States v. Master*, 614 F.3d 236, 239 n.2 (6th Cir. 2010) (giving "independent determination" of an issue because earlier decision was unpublished). There is, no doubt, considerable variation in how courts treat unpublished precedent. *See Pragmatic Approach*, *supra* note 2, at 922.

⁸⁷ *E.g.*, *Fonseca v. Consol. Rail Corp.*, 246 F.3d 585, 591 (6th Cir. 2001) ("[U]npublished opinions are never controlling authority."); *GTE Mobilnet of Cal. Ltd. P'Ship v. City and Cnty. of S.F.*, 440 F. Supp. 2d 1097, 1104 n.4 (N.D. Cal. 2006). *But see* *Alshrafi v. Am. Airlines, Inc.*, 321 F. Supp. 2d 150, 159–60 n.9 (D. Mass. 2004); Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 *FORDHAM L. REV.* 23, 69 (2005) (noting argument that "district courts would feel bound to follow" the unpublished opinions of their circuit court). Again, this comment is limited to the stare decisis effect of the opinion, and not law of the case, collateral estoppels, or mandate rules.

⁸⁸ *See generally*, Morande, *supra* note 2; Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 *VAND. L. REV.* 71 (2001).

⁸⁹ *See* Morande, *supra* note 2, at 761–62.

⁹⁰ 4TH CIR. LOC. R. 36(b); 8TH CIR. I.O.P. IV.B.

⁹¹ *Prohibiting Non-Precedential Opinions*, *supra* note 2, at 729–30. This is quite a departure from the traditional idea that the value of precedent should be weighed by the panel considering the precedent. Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 *S. CAL. L. REV.* 755, 772–73 (2003).

⁹² *E.g.*, 3D CIR. I.O.P. 9.1; 4TH CIR. LOC. R. 36(b); 6TH CIR. R. 206(c) ("Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court en banc consideration is required to overrule a published opinion of the court."); 8TH CIR. I.O.P. IV.B; FED. R. APP. P. 35(a)(1).

⁹³ *E.g.*, *Shubargo v. Astrue*, 498 F.3d 1086, 1088 n.1 (10th Cir. 2007). The Eleventh and Federal Circuits, the youngest of the circuits, issued opinions en banc early in their existence deciding what form of horizontal stare decisis they would follow. *S. Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982) (en banc); *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

major objection,⁹⁴ but this was not inevitable.⁹⁵ The difficulty of imposing a new stare decisis rule on an entire court was illustrated by the Sixth Circuit's early experience with the law of the circuit. A panel declared in 1978 that "[o]ne panel of this Court cannot overrule the decision of another panel; only the Court sitting *en banc* can overrule a prior decision."⁹⁶ In 1979, over the dissenter's objections, a panel rejected this precedent and instead declared "there is no rule in this Circuit which requires an *en banc* hearing to overrule a decision of a three-judge panel."⁹⁷ Ultimately, the Sixth Circuit removed any lingering doubt of the rule's validity by codifying stare decisis in its practices and clarifying its application for future courts and litigants.⁹⁸ In any event, the law of the circuit has been in place for enough time that it is unlikely that a circuit court judge would resist the rule at this date.

B. District Court Practices

While circuit courts currently follow a very strong version of stare decisis, there is generally no similar "law of the district" doctrine in federal district court.⁹⁹ Thus, one district judge is not bound by the earlier decision of another judge in the same district. This simple statement masks great diversity in the approaches that district courts have taken, are taking, and could take in the future.

Historically, district judges extended great deference to the prior decisions within their district.¹⁰⁰ Intra-district precedent normally would be followed

⁹⁴ A survey of circuit judges found that "'nearly all . . . felt strongly constrained by the norms of stare decisis.'" Emery G. Lee III, *Horizontal Stare Decisis on the U.S. Court of Appeals for the Sixth Circuit*, 92 KY. L.J. 767, 773 & n.41 (2004) (quoting J. WOODFORD HOWARD, JR., *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS* 163-66 (1981)).

⁹⁵ There is a circular nature to law of the circuit in those circuits which rely only on prior panel case law to establish it. A case says that later panels are bound by earlier panels, but later panels are bound by that assertion only if they accept the premise that they are bound by that case. A similar potential difficulty exists at the Supreme Court. A new Supreme Court justice could, consistent with the obligation to follow the Constitution, reject stare decisis and, by extension, the numerous cases establishing the doctrine. This problem is theoretical, as no justice has adopted explicitly this position. In fact, potential justices are vetted during their confirmation hearings about their view of stare decisis.

⁹⁶ *Timmreck v. United States*, 577 F.2d 372, 376 n.15 (6th Cir. 1978), *rev'd on other grounds*, 441 U.S. 780 (1979).

⁹⁷ *Speigner v. Jago*, 603 F.2d 1208, 1212 n.4 (6th Cir. 1979) (Peck, J.); *see also* *Melamed v. ITT Cont'l Baking Co.*, 592 F.2d 290, 295 (6th Cir. 1979) (rejecting prior Sixth Circuit case), *abrogated by* *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 n.10 (1981). *Speigner*, 603 F.2d at 1217 (Weick, J., dissenting) ("And, of course, if we have any regard for the rule of *stare decisis*, we ought to follow our own decisions. Other panels of the Court should respect them. No panel of this Court has the power or right to overrule the decision of another panel. . . . The overruling should be the function of an *en banc* court, and not that of a single panel, unless a subsequent Supreme Court decision overrules the decision on which the panel relied." (citing *Timmreck*, 577 F.2d at 376 n.15)).

⁹⁸ 6TH CIR. R. 206(c).

⁹⁹ *Threadgill v. Armstrong World Indus.*, 928 F.2d 1366, 1371 (3d Cir. 1991) (collecting cases).

¹⁰⁰ Daniel J. Bussel, *Power, Authority, and Precedent in Interpreting the Bankruptcy Code*, 41 UCLA L. REV. 1063, 1095 (1994) (noting a "long tradition within district courts of devi-

without examination or discussion, absent “unusual and exceptional circumstances.”¹⁰¹ Thus, while disagreement would not provide a sufficient basis to reject an earlier decision, the presumption of following intra-court precedent could be overcome.¹⁰² Therefore, like circuit judges, district judges retained the power to revisit precedent, and significant deference was usually the norm.¹⁰³

Although there is considerable ambiguity regarding horizontal stare decisis in district courts,¹⁰⁴ the modern trend is moving away from extending any

ating from a co-ordinate judge’s prior decision only in ‘extraordinary circumstances.’”(collecting cases)).

¹⁰¹ *Johns v. Redeker*, 406 F.2d 878, 882 (8th Cir. 1969); *Rhodes v. Meyer*, 334 F.2d 709, 717–18 (8th Cir. 1964); *In re Kirk*, 198 F. Supp. 771, 771 (W.D. Pa. 1961); *United States v. Jannuzzio*, 22 F.R.D. 223, 226 (D. Del. 1958) (follow “except in unusual and exceptional circumstances”); *In re Terzich*, 153 F. Supp. 651, 653 (W.D. Pa. 1957); *Sears Roebuck & Co. v. Stockwell*, 143 F. Supp. 928, 932 (D. Minn. 1956) (based on stare decisis, prior opinion “[i]n the absence of palpable mistake or error . . . should be respected as the law until changed by an appellate court.”); *Williams v. Tide Water Associated Oil Co.*, 125 F. Supp. 675, 677 (W.D. Wash. 1954) (stating that “[i]t would be inappropriate” to reconsider earlier district court decisions “in the absence of exceptional circumstances”); *United States v. Harris*, 109 F. Supp. 641, 642 (D.D.C. 1953) (“[O]pinion is *stare decisis*, and will be followed by the court.”), *rev’d on other grounds*, 347 U.S. 612 (1954); *United States v. Firman*, 98 F. Supp. 944, 946 (W.D. Pa. 1951) (“Judges of coordinate jurisdiction should not ordinarily overrule decisions of their associates based on the same set of facts, unless required by higher authority.”); *Mayer v. Marcus Mayer Co.*, 25 F. Supp. 58, 61 (E.D. Pa. 1938) (“The ruling made in that case is authoritative and controls this Court, whatever may be the individual opinion of the sitting Judge.”); *Am. Scantic Line, Inc. v. United States*, 27 F. Supp. 271, 272 (S.D.N.Y. 1938); *Brusselback v. Cago Corp.*, 24 F. Supp. 524, 531 (S.D.N.Y. 1938) (stating court was “require[d] . . . to follow [prior] ruling, even if [it] did not agree with it.”); *In re Markowitz*, 233 F. 715, 715 (E.D. Pa. 1916) (“In the absence of a ruling by an appellate court, we regard the ruling made by this court as binding upon us”); *see also Cepo v. Brownell*, 147 F. Supp. 517, 521 (N.D. Cal. 1957) (supplement to opinion explaining that court contradicted earlier district court precedent in opinion because it was not aware of it at the time the opinion came out); *cf. Williams v. Tide Water Associated Oil Co.*, 227 F.2d 791, 792 n.3 (9th Cir. 1955) (holding that, if split of authority develops within district, district court has to exercise independent judgment); *United States v. Hirschhorn*, 21 F.2d 758, 759–60 (S.D.N.Y. 1927) (noting “general rule that a matter which is decided by any District Judge in this district should be . . . without re-examination by another judge, so decided” but rejecting precedent because it was a criminal case). *Contra White v. Baltic Conveyor Co.*, 209 F. Supp. 716, 722 (D. N.J. 1962). There are also many earlier cases stating that one judge should not overrule another on the same court, but these cases are distinguishable as they deal with litigants asking another district judge to directly review the decision of another. *E.g.*, *Jurgenson v. Nat’l Oil & Supply Co.*, 63 F.2d 727 (3d Cir. 1933); *Commercial Union Bank of Am. v. Anglo-S. Am. Bank*, 10 F.2d 937, 941 (2d Cir. 1925) (collecting cases); *see also United States v. Mathies*, 350 F.2d 963, 964 (3d Cir. 1965) (drawing this distinction).

¹⁰² *But see Charles H. Nalls & Paul R. Bardos, Stare Decisis and the U.S. Court of International Trade: Two Case Studies of a Perennial Issue*, 14 *FORDHAM INT’L L.J.* 139, 146 (1991) (“[M]ost treatises consider a district court judge to be bound by the decisions of his . . . colleagues on the court”); *Powell & Concannon, supra* note 62, at 358.

¹⁰³ *Johns v. Redeker*, 406 F.2d 878, 882 (8th Cir. 1969); *Indus. Models Corp. v. Kurtz*, 93 F. Supp. 336, 340 (E.D. Mich. 1950) (prior decision “is not absolutely binding.”); *Lee & Lehnhof, supra* note 2, at 169.

¹⁰⁴ *Erin O’Hara, Social Constraint or Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis*, 24 *SETON HALL L. REV.* 736, 773 (1993) (“It is unclear whether district courts actually follow a rule of horizontal *stare decisis*.”); *Powell & Concannon, supra* note

deference.¹⁰⁵ For reasons that are not clear,¹⁰⁶ as the circuit courts began to impose stronger versions of stare decisis on themselves, district courts began to depart more readily from their precedent.¹⁰⁷ Today, if intra-district precedent is even noted in an opinion, it is dismissed with little difficulty.¹⁰⁸ Often, courts recite the fact that there is no “law of the district” and do not take the next step of considering whether deference should be extended.¹⁰⁹ The common view today among district courts is that the court’s precedent should be considered only to the extent its reasoning persuades.¹¹⁰ This has led some to describe the stare decisis effect of district court decisions as “negligible.”¹¹¹ Notwithstanding this general trend, some courts do extend deference, either expressly¹¹² or informally.¹¹³

At least one district judge has attempted to articulate a stare decisis practice similar to that of the circuit courts. In *Alexander v. Davis*,¹¹⁴ a judge from

62, at 359 (“An examination of case law reveals varying attitudes toward stare decisis at the district court level.”).

¹⁰⁵ *Vertex Surgical, Inc. v. Paradigm Biodevices, Inc.*, 648 F. Supp. 2d 226, 231 (D. Mass. 2009); *Intamin, Ltd. v. Magnetar Techs. Corp.*, 623 F.Supp. 2d 1055, 1075 (C.D. Cal. 2009); *Clower v. Orthalliance, Inc.*, 337 F.Supp. 2d 1322, 1335 (N.D. Ga. 2004); *In re Oxford Health Plans, Inc.*, 191 F.R.D. 369, 377 (S.D.N.Y. 2000) (“Principles of *stare decisis* do not require this Court to give any deference to decisions of another district judge.”).

¹⁰⁶ See *infra* text accompanying notes 296–99 for one possible explanation.

¹⁰⁷ See *supra* note 104 and accompanying text.

¹⁰⁸ *E.g.*, *Fraction v. Minnesota*, 678 F. Supp. 2d 908, 921 n.6 (D. Minn. 2008); *Disability Advocates & Counseling Grp., Inc. v. Betancourt*, 379 F. Supp. 2d 1343, 1365 (S.D. Fla. 2005); *McCoy v. Gen. Motors Corp.*, 226 F. Supp. 2d 939, 942 n.1 (N.D. Ill. 2002); *Budgetel Inns, Inc. v. Micros Sys., Inc.*, 34 F. Supp. 2d 720, 725 (E.D. Wis. 1999); see also *Anthony v. Small Tube Mfg. Corp.*, 580 F. Supp. 2d 409, 424 n.50 (E.D. Pa. 2008) (reaching same result for different reasons). This does not take into account courts that will not read or consider, much less cite, contrary district court authority. *Cf.* *Hellman*, *supra* note 2, at 709.

¹⁰⁹ *E.g.*, *Benavidez v. Irving Indep. Sch. Dist.*, 690 F. Supp. 2d 451, 462 (N.D. Tex. 2010); *Pears v. Mobile Cnty.*, 645 F. Supp. 2d 1062, 1076 n.18 (S.D. Ala. 2009); *Cactus Corner, LLC v. U.S. Dep’t of Agric.*, 346 F. Supp. 2d 1075, 1105 (E.D. Cal. 2004); and sources cited *supra* note 108.

¹¹⁰ *Cooley v. Bd. of Educ.*, 703 F. Supp. 2d 772, 775 (N.D. Ill. 2009); *Chimie v. PPG Indus.*, 218 F.R.D. 416, 420 (D. Del. 2003) (“[W]hile I have the greatest respect for my colleagues in this district, my duty now is to apply the law as fairly and logically as I understand it.”); *Broadrick v. Exec. Office of the President*, 139 F. Supp. 2d 55, 59 (D.D.C. 2001) (considering district precedent for its “persuasive value” and undertaking an “independent assessment of the law as it is applied to this case”); *IBM Credit Corp. v. United Home for Aged Hebrews*, 848 F. Supp. 495, 497 (S.D.N.Y. 1994) (“District court rulings have influence only to the extent that jurists in other cases find them convincing, as would indeed be the case with other forms of legal analysis.”).

¹¹¹ *Harris v. Bd. of Governors of the Fed. Reserve Sys.*, 938 F.2d 720, 723 (7th Cir. 1991).

¹¹² *Peterson v. BASF Corp.*, 12 F. Supp. 2d 964, 970 (D. Minn. 1998) (basing deference on stare decisis); *Flores v. Stock*, 715 F. Supp. 1468, 1471 (C.D. Cal. 1989) (only depart in “unusual or exceptional circumstances” (quoting *Buna v. Pac. Far E. Line, Inc.*, 441 F. Supp. 1360, 1365 (N.D. Cal. 1977))); *Mueller v. Allen*, 514 F. Supp. 998, 1000–01 (D. Minn. 1981); *cf.* *McGinley v. Houston*, 361 F.3d 1328, 1331 (11th Cir. 2004) (“The general rule is that a district judge’s decision neither binds another district judge nor binds him, although a judge ought to give great weight to his own prior decisions.”).

¹¹³ *Bussel*, *supra* note 100, at 1080 (suggesting “the practical reality that even if district courts have the power to depart from prior district court decisions, they are unlikely to do so”).

¹¹⁴ *Alexander v. Davis*, 282 F. Supp. 2d 609 (W.D. Mich. 2003).

the Western District of Michigan concluded that published opinions from the district were stare decisis and should not be readily disregarded.¹¹⁵ The court analogized to the circuit court's stare decisis practices:

In terms of *stare decisis*, the Sixth Circuit has ruled as to its own precedent that the first published decision on an issue should bind later judges until overruled by the Circuit (sitting *en banc*) or the United States Supreme Court. While the Sixth Circuit has not directly applied this rule to district court precedent (precisely because it has had no reason to do so since it is not bound by district court precedent), there is no reason to understand *stare decisis* much differently in the district courts.¹¹⁶

In support, the court identified three policy reasons furthered by district court stare decisis. Without stare decisis, citizens would be “unable to adhere their conduct to the law” in a multi-judge district.¹¹⁷ In addition, legal rules would depend solely on the judges and not on broader principles of law.¹¹⁸ Finally, removing already settled points of law from consideration promotes judicial economy.¹¹⁹ Other judges in that district, however, have not felt bound by district precedent.¹²⁰

There are several surprising things about district court stare decisis practices. First, unlike well-defined circuit court stare decisis practices, there are few clear rules for district courts. Practices are unwritten (or, at best, mentioned briefly through the opinions of individual judges), uncertain, and vary from individual judge to judge.¹²¹ The circumstances under which judges extend deference remain a mystery.¹²²

Second, to the extent that it is discernible, the current district courts have adopted none of the other features that define circuit court stare decisis practices. Generally, district courts do not care whether the decision under consideration was from another judge of the same district, the same circuit, or somewhere else entirely.¹²³ In contrast, for the stare decisis practices of the

¹¹⁵ *Id.* at 611–12; *see also* *Grand Rapids Pub. Sch. v. P.C. ex rel. D.C.*, 308 F. Supp. 2d 815, 818 (W.D. Mich. 2004); *Charter Twp. of Oshemo v. Am. Cyanamid Co.*, No. 1:92:CV:843, 1993 WL 561814, at *2 (W.D. Mich. Aug. 19, 1993) (stating prior decision was “law of [the] district”). Note that all of these decisions were decided by the same judge.

¹¹⁶ *Alexander*, 282 F. Supp. 2d at 611 (citation omitted).

¹¹⁷ *Id.* at 611 n.2.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 612; *see also* *Grand Rapids*, 308 F. Supp. 2d at 818 (“The policy of *stare decisis* is beautiful in both its simplicity and its effect—judicial economy of decision-making and ease of reading and adhering to the law.”).

¹²⁰ *Brown Bark I, L.P. v. Traverse City Light & Power Dep’t*, 736 F. Supp. 2d 1099, 1112 n.4 (W.D. Mich. 2010) (“[D]istrict-court decisions never have precedential force beyond the parties and their privies.”); *In re Livingston*, 379 B.R. 711, 725 n.16 (Bankr. W.D. Mich. 2007), *rev’d on other grounds*, 422 B.R. 645 (W.D. Mich. 2009).

¹²¹ *See* O’Hara, *supra* note 104, at 773.

¹²² *Id.*

¹²³ *E.g.*, *In re Exec. Office of the President*, 215 F.3d 20, 24 (D.C. Cir. 2000); *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1122–23 (7th Cir. 1987); *Mosel Vitelic Corp. v. Micron Tech., Inc.*, 162 F. Supp. 2d 307, 311 (D. Del. 2000) (“[W]hile the opinion of one district judge may be found to be persuasive, it is not binding on another district judge (even if that judge happens to sit in the same district).”). In contrast, at least one district court has made its prior decisions preferred authorities, placing them ahead of authority from other circuits and districts. *See* S.D. OHIO Civ. R. 7.2(b)(2) (“In citing authorities, the Court prefers that counsel rely upon cases decided by the Supreme Court of the United States, the United States Court

circuit courts, the degree of deference extended—and the rationales for extending that deference—hinge on such distinctions.¹²⁴

In addition, the modern approach amongst district courts is to treat published and unpublished decisions alike. Thus, district courts typically do not assign greater persuasive or *stare decisis* value to published opinions, nor less value to unpublished decisions (at least not overtly).¹²⁵ In fact, district judges have rejected requests to publish or not publish a decision for the reason that it has no change on its precedential value.¹²⁶ One district judge, recognizing this trend towards treating publication as irrelevant, even referred to the publication of district court opinions as a “vanity press.”¹²⁷ This practice of deference regardless of publication is in sharp contrast to the enormous significance that circuit courts place on publication.¹²⁸

What explains these differences?

III. DISTRICT COURTS HAVE THE AUTHORITY TO ADOPT A STRONG STARE DECISIS DOCTRINE

In light of the ample, although recent, decisions choosing not to employ strong (or even any) *stare decisis* in district courts, two questions arise: whether district courts *can* give strong *stare decisis* deference to their own decisions, and whether they *should*. The answer to the question of authority is easier: district courts have the same power to set the weight of precedent as any other court. (As will be seen in the next section, the second question is a bit trickier than the first.)

The premise driving *stare decisis* is that the court has already spoken to the issue, and the authority to defer—whether weakly or strongly—comes from that fact. Each time a district judge decides an issue, the judge is speaking on

of Appeals for the Sixth Circuit (or, in appropriate cases, the Federal Circuit), the Supreme Court of Ohio, and this Court.”).

¹²⁴ *E.g.*, *In re Aspinwall’s Estate*, 90 F. 675, 678 (3d Cir. 1898) (Bradford, J., concurring) (“There can be no doubt that a departure would have been taken with even less hesitation from precedents established solely by other courts possessing only co-ordinate jurisdiction and authority.”).

¹²⁵ *Arakaki v. Cayetano*, 299 F. Supp. 2d 1090, 1094 n.3 (D. Haw. 2002) (“[A]n unpublished federal district court decision has no more and no less force and effect than a published federal district court decision.”); *Smith v. Astrue*, 639 F. Supp. 2d 836, 842 (W.D. Mich. 2009) (stating that decision whether to follow “any decisions from outside our circuit, published or otherwise” depends on the same criteria); *Shannon v. Pleasant Valley Cmty. Living Arrangements, Inc.*, 82 F. Supp. 2d 426, 429–30 n.8 (W.D. Pa. 2000) (“It is well-settled that a district court opinion, even when published, has no precedential value . . .”). *Contra In re Phipps*, 217 B.R. 427, 431–32 (Bankr. W.D.N.Y. 1998).

¹²⁶ *Vertex Surgical, Inc. v. Paradigm Biodevices, Inc.*, 648 F. Supp. 2d 226, 234 (D. Mass. 2009); *Welch v. Unum Life Ins. Co. of Am.*, 649 F. Supp. 2d 1220, 1224 (D. Kan. 2009). *But see C & H Sugar Co. v. Solstice Indus.*, No. 05-CV-74265, 2007 WL 2870991, at *1 (E.D. Mich. Sept. 27, 2007).

¹²⁷ *Vertex Surgical*, 648 F. Supp. 2d at 234 (quoting Presentation of Portrait of Hon. William G. Young, 505 F. Supp. 2d XLV, LVII (D. Mass. 2006) (remarks of Young, J.)); *cf.* Andrew P. Morriss et al., *Signaling and Precedent in Federal District Court Opinions*, 13 SUP. CT. ECON. REV. 63 (2005) (arguing that district judges are likely to write opinions as a way of seeking elevation to the circuit court bench).

¹²⁸ *See supra* note 84 and accompanying text.

behalf of the entire district court,¹²⁹ just as the judges assigned to a circuit panel speak for the entire circuit. Judges later exercising the power of the court may look to what the court has previously said when resolving *new* cases. As one district court explained, “In this District, we have five District Judges but only one United States District Court. When the Court speaks through one of the Judges, the decision should be followed by his colleagues unless it is clearly wrong.”¹³⁰

Structurally, circuit courts and district courts occupy analogous positions within the federal judiciary. Both are “inferior courts” under the Constitution, equally dependent on statute for their existence and their jurisdiction.¹³¹ No language in the Constitution or specific statutes gives stare decisis power to circuit courts or forbids such power to district courts. Thus, it follows logically that district courts would be authorized to the same extent as circuit courts to create precedent and assign it whatever weight they deem appropriate, as long as they do not create any conflict with their obligations to adhere to vertical stare decisis.¹³²

The similar historical stare decisis practices of circuit and district courts confirm that both have similar authority to employ stare decisis.¹³³ At one time, both types of courts extended significant, but less than binding, deference to their own precedent on the basis of stare decisis.¹³⁴ There is no reason why stare decisis practices could not converge once more.

¹²⁹ 28 U.S.C. § 132(c) (2006). One court suggested that, in fact, each district judge is its own district court. *See Ramos v. Boehringer Mannheim Corp.*, 896 F. Supp. 1213, 1215 (S.D. Fla. 1994) (“Despite plaintiff’s assertion, we are not the *same* court as Judge Aronovitz.”). This is incorrect (and a little strange—the court even used the royal “we”). By statute, Congress has provided that in each judicial district “[t]here shall be . . . a district court which shall be a court of record known as the United States District Court for the district.” 28 U.S.C. § 132(a). These courts “shall consist of the district judge or judges for the district in regular active service.” 28 U.S.C. § 132(b). These provisions suggest that there is a single district court in each district, notwithstanding the multiple judges that may be on the court. Other opinions have suggested that decisions issued by individual judges are not on behalf of the court as a whole. *See Johnson v. Smith*, 810 F. Supp. 235, 237 (N.D. Ill. 1992) (“Another decision by another district judge is not one ‘decided by this Court,’ either literally or in legal effect.”); *First of Am. Bank v. Gaylor (In re Gaylor)*, 123 B.R. 236, 242 (Bankr. E.D. Mich. 1991) (“[I]t must be recognized that a decision rendered by an individual judge in a multi-judge district simply does not constitute a decision of the district court itself.”). The fact that not all judges do not participate in any particular exercise of judicial power does not mean that it is not on behalf of the court. The statute clearly authorizes individual judges to wield the judicial power vested in the district court, 28 U.S.C. § 132(c) (“[T]he judicial power of a district court with respect to any action, suit or proceeding may be exercised by a single judge, who may preside alone . . .”), just as three-judge panels on the circuit court speak for the circuit court. The entire basis for district judges’ authority comes from their exercise of the district’s judicial power.

¹³⁰ *E.W. Bliss Co. v. Cold Metal Process Co.*, 174 F. Supp. 99, 121 (N.D. Ohio 1959).

¹³¹ Compare 28 U.S.C. § 46, with 28 U.S.C. § 137.

¹³² *Alexander v. Davis*, 282 F. Supp. 2d 609, 611 (W.D. Mich. 2003) (“[T]here is no reason to understand stare decisis much differently in the district courts.”) (emphasis omitted); Harrison, *supra* note 5, at 518 (“The natural inference is that if rules of stare decisis result from the nature of courts or of the judicial power, the rules of horizontal stare decisis should be the same for all federal courts, too.”).

¹³³ *See supra* Part II.

¹³⁴ *Id.*

Thus, “[i]t certainly stands to reason that a district court itself could also adopt a stare decisis policy.”¹³⁵ As Judge Kozinski wrote for the Ninth Circuit:

That the binding authority principle [of law of the circuit] applies only to appellate decisions, and not to trial court decisions, is yet another policy choice. There is nothing inevitable about this; the rule could just as easily operate so that the first district judge to decide an issue within a district . . . would bind all similarly situated district judges, but it does not.¹³⁶

The Supreme Court also has arguably ratified at least some form of a horizontal stare decisis policy at the district court level.¹³⁷ In the course of describing the benefits of a ruling more cited for its implications concerning patent law, the Court suggested that treating a particular “issue[] as purely legal will promote (though it will not guarantee) intrajurisdictional certainty through the application of *stare decisis* on those questions not yet subject to interjurisdictional uniformity under the authority of the single appeals court.”¹³⁸ In another case, the Supreme Court recognized the law-making function of district courts, unanimously concluding that judicial precedents have value to the legal community as a whole, and district court opinions should not be vacated simply because the parties entered into a settlement agreement calling for vacatur.¹³⁹

The matter would seem to be settled, but for authority to the contrary from the Seventh Circuit (which, as noted above, also rejects the law of the circuit).¹⁴⁰ Through Judge Posner, the court stated that “district judges in this circuit must not treat decisions *by other district judges*, in this and *a fortiori* in other circuits, as controlling.”¹⁴¹ It eviscerated the idea of any deference, stating, “Such decisions will normally be entitled to no more weight than their intrinsic persuasiveness merits.”¹⁴²

Though it included needlessly broad language, the opinion did not deal with horizontal stare decisis, but with the distinct issue of whether the district court erred by giving binding weight to an opinion from a *different* district court in a different circuit.¹⁴³ (As dicta, the observations on district court stare decisis enjoy no stare decisis weight themselves.) Notwithstanding, the opinion suggests that district courts may not give any deference to their own precedent because doing so would interfere with the district court’s duty to declare the

¹³⁵ Nat’l Sign & Signal v. Livingston (*In re Livingston*), 379 B.R. 711, 725 n.16 (Bankr. W.D. Mich. 2007), *rev’d on other grounds*, 422 B.R. 645, 658–59 (W.D. Mich. 2009).

¹³⁶ Hart v. Massanari, 266 F.3d 1155, 1174 (9th Cir. 2001); *accord* Johns v. Redeker, 406 F.2d 878, 882 (8th Cir. 1969); Rhodes v. Meyer, 334 F.2d 709, 717–18 (8th Cir. 1964). Omitted from this quote is the suggestion that district judges could bind all other district judges in the circuit. It is true that this could be adopted as a matter of policy, but, as I have argued, it would not be a stare decisis policy.

¹³⁷ Markman v. Westview Instruments, Inc., 517 U.S. 370, 391 (1996).

¹³⁸ *Id.* (emphasis omitted).

¹³⁹ U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship, 513 U.S. 18, 26, 28–29 (1994).

¹⁴⁰ See Colby v. J.C. Penney Co., 811 F.2d 1119, 1124 (7th Cir. 1987).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ In *Colby*, the decision under review came from the Northern District of Illinois, while the precedent came from the Eastern District of Michigan, which is within the Sixth Circuit. *Id.* at 1122, 1124.

law¹⁴⁴ and give each individual litigant a day in court.¹⁴⁵ If true, this would be fatal to any district court stare decisis, but this reasoning does not withstand scrutiny.¹⁴⁶ Litigants come to court encumbered by many legal rules, including Supreme Court precedent and circuit court precedent, yet applying these rules to a litigant's case represents not the abandonment, but the fulfillment, of a judge's duty.¹⁴⁷ Moreover, this objection would be equally fatal to horizontal stare decisis practices at the circuit court level, but circuit court stare decisis practices are universally unchallenged.

Yet it must be conceded that the district court's authority to develop precedent succumbs to the supervisory power of appellate courts, which presumably could insist upon or prohibit a particular horizontal stare decisis practice.¹⁴⁸ Several circuits have indicated that there is no law of the district, but these statements are not to the contrary as they are descriptive rather than proscriptive.¹⁴⁹ In other words, the circuit court opinions note that there is no rule of

¹⁴⁴ See *Chimie v. PPG Indus., Inc.*, 218 F.R.D. 416, 420 (D. Del. 2003) (“[W]hile I have the greatest respect for my colleagues in this district, my duty now is to apply the law as fairly and logically as I understand it.”).

¹⁴⁵ *Colby*, 811 F.2d at 1124; see also *Nw. Forest Res. Council v. Dombeck*, 107 F.3d 897, 900 (D.C. Cir. 1997) (holding that a district court could not be bound to a decision from another district court for due process reasons).

¹⁴⁶ See *Barrett*, *supra* note 57, at 1027–28 (stating that the opinion “raise[s] more questions than [it] answer[s]”).

¹⁴⁷ Some argue that Supreme Court stare decisis in constitutional cases is an abandonment of their duty to follow the Constitution. See *Lawson*, *supra* note 32, at 3–4, 18–22; *Paulsen*, *supra* note 32, at 1540–41. If correct, this could undermine even vertical stare decisis, giving lower courts free reign to disagree with the Supreme Court. See *Lawson*, *supra*, at 8; *Caminker*, *supra* note 2, at 857. In addition, the judicial system could not function if this were the case, with every issue decided anew. *Caminker*, *supra* note 2, at 859–60. Moreover, while it is the judiciary's duty to determine what the law is, that duty applies to the federal judiciary as a whole. *Id.* at 858. It is completely consistent with this duty to have a single court be able to lay down authoritative pronouncements. See *id.* In any event, it is unlikely that any court would reject a practice as integral to the federal judiciary today as vertical stare decisis.

¹⁴⁸ For example, a practice adopted by local rule is subject to review by the judicial council for the circuit and can be challenged on appeal by a litigant. See 28 U.S.C. § 2071(c)(1) (2006).

¹⁴⁹ *Algoma Steel Corp. v. United States*, 865 F.2d 240, 243 (Fed. Cir. 1989) (“[A]mong trial courts it is unusual for one judge to be bound by the decisions of another and, if it is to occur, such a rule should be stated somewhere.”); accord *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 430 n.10 (1996) (“If there is a federal district court standard, it must come from the Court of Appeals, not from the over forty district court judges in the Southern District of New York, each of whom sits alone and renders decisions not binding on the others.”); *ATSI Commc'ns., Inc. v. Shaar Fund, Ltd.*, 547 F.3d 109, 112 & n.4 (2d Cir. 2008); *Garcia v. Tyson Foods, Inc.*, 534 F.3d 1320, 1329 (10th Cir. 2008); *Fishman & Tobin, Inc. v. Tropical Shipping & Constr. Co.*, 240 F.3d 956, 965 (11th Cir. 2001) (“Unlike circuit court panels where one panel will not overrule another, district courts are not held to the same standard.” (citation omitted)); *Threadgill v. Armstrong World Indus.*, 928 F.2d 1366, 1371 (3d Cir. 1991); *Fox v. Acadia State Bank*, 937 F.2d 1566, 1570 (11th Cir. 1991); *Starbuck v. City & Cnty. of S.F.* 556 F.2d 450, 457 n.13 (9th Cir. 1977); *Farley v. Farley*, 481 F.2d 1009, 1012 (3d Cir. 1973).

binding precedent at the district court level, but at the same time, they do not forbid its creation.¹⁵⁰

Indeed, because circuit courts employ *de novo* review of district court judgments on questions of law, regardless of the reason for the error, they would rarely have an opportunity to *hold* that a law-of-the-district rule is invalid.¹⁵¹ In any event, to the extent that these cases do actually forbid law of the district—only one aspect of horizontal *stare decisis*—they do not interfere with the general power to adopt other, even strong, *stare decisis* practices. When circuit courts have been squarely confronted with district court *stare decisis*—for example when assessing whether a litigant has the authority to intervene as of right because he or she “is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest”¹⁵²—the courts of appeals have recognized that *stare decisis* can exist among district courts.¹⁵³

There are reasons to expect circuit courts to leave it up to districts to determine their own *stare decisis* practices. Notably, circuit courts adopted their own policies without Supreme Court intervention¹⁵⁴ and strongly resisted attempts by others to interfere with the weight given to precedent.¹⁵⁵ This reflects a general principle that *stare decisis* is a decision that is best left to the court at issue, within broad bounds of reasonableness.¹⁵⁶ Each court is uniquely qualified to decide what level of deference to give its own opinions. Each court understands the practicalities and politics present in the district and can weigh the policy considerations accordingly. Thus, unless and until this power is removed from them, district courts have the authority to adopt a wide range of horizontal *stare decisis* practices.

But should they exercise this power?

¹⁵⁰ *E.g.*, *McGinley v. Houston*, 361 F.3d 1328, 1331 (11th Cir. 2004) (noting the “general rule” that *stare decisis* by district courts is not binding but requires that great weight be given to prior decisions).

¹⁵¹ *See Alexander v. Davis*, 282 F. Supp. 2d 609, 611 (W.D. Mich. 2003) (“While the Sixth Circuit has not directly applied this rule to district court precedent (precisely because it has had no reason to do so since it is not bound by district court precedent)”); *cf. Mast, Foss & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 489 (1900).

¹⁵² FED. R. CIV. P. 24(a).

¹⁵³ *See WildEarth Guardians v. Nat’l Park Serv.*, 604 F.3d 1192, 1199 (10th Cir. 2010) (allowing intervention as of right based on *stare decisis* effect of district court judgment); *Stone v. First Union Corp.*, 371 F.3d 1305, 1310 (11th Cir. 2004); *Coal. of Ariz./N.M. Cnty. for Stable Econ. Growth v. Dep’t of Interior*, 100 F.3d 837, 844 (10th Cir. 1996) (“[T]he *stare decisis* effect of the district court’s judgment is sufficient impairment for intervention”); *cf. Fox v. Tyson Foods, Inc.*, 519 F.3d 1298, 1304 (11th Cir. 2008) (disallowing intervention because ruling was factual and would not have *stare decisis* effect).

¹⁵⁴ *Cf. Mast, Foods & Co.*, 177 U.S. at 489 (“It is scarcely necessary to say, however, that when the case reaches this court we should not reverse the action of the court below if we thought it correct upon the merits, though we were of opinion it had not given sufficient weight to the doctrine of comity.”); *Brill v. Peckham Motor Truck & Wheel Co.*, 189 U.S. 57, 60 (1903) (noting that on matters of comity, circuit court “was at liberty to exercise its own judgment”).

¹⁵⁵ *See supra* note 53.

¹⁵⁶ *See Nat’l Sign & Signal v. Livingston (In re Livingston)*, 379 B.R. 711, 724 (Bankr. W.D. Mich. 2007) (“Modern *stare decisis* does not exist apart from the court. It exists only at the court’s pleasure.”).

IV. THE CASE FOR LAW OF THE DISTRICT

There has been virtually no attention by courts, and still less by the scholarship, as to what type of stare decisis a district court should follow.¹⁵⁷ Moving down the federal judicial hierarchy, different institutional characteristics lead to a different balance of goals.¹⁵⁸ Like the Supreme Court, circuit courts believe the benefits of following their own precedents outweigh the costs of allowing a “wrong” decision to remain law. In addition, collegiality, which is not a basis for stare decisis at the Supreme Court, becomes an important rationale for stare decisis at the lower courts where decisions are not made by all judges of the court.¹⁵⁹ Despite differences between the circuit and district courts, these policies also support district court stare decisis practices.

This Part proposes that district courts adopt a particularly strong horizontal stare decisis practice. Predictability, fairness, appearance of justice, judicial economy, and collegiality weigh strongly in favor of stare decisis, while the costs of having an “incorrect” district court decision bind the district court are minimal. The district courts’ position within the federal judicial hierarchy—trial courts most days but appellate courts on others—leaves district courts fully able to exercise the responsibility of creating precedent commensurate with their location.

A. *The Proposal*

For purposes of argument, consider a law-of-the-district rule that mirrors the law of the circuit.¹⁶⁰ Each individual district judge can decide whether to mark that judge’s written opinion for publication, subject to certain criteria. Some courts may allow litigants to have a say in the publication decision, and some courts may ask that opinions be circulated around the bench in advance when feasible, but these features are wholly up to the individual court. Once an opinion is designated as published, every other judge in that district follows its holdings until and unless an intervening circuit or Supreme Court decision upsets it.

A natural complement to a strong stare decisis policy is an en banc procedure that would allow all judges of the court to announce the entire court’s position on an issue.¹⁶¹ Currently, district court en banc proceedings are extremely rare, which could be a reflection of the minimal weight placed on the

¹⁵⁷ See Harrison, *supra* note 5, at 518.

¹⁵⁸ Caminker, *supra* note 2, at 865 (“[M]any courts and scholars erroneously suggest that a single rationale accounts for present doctrine in its entirety. In fact, none is both intrinsically compelling and applicable at every level of the Article III hierarchy. Instead, a persuasive account of the doctrine must mix and match various rationales and employ them at different places in the judicial hierarchy.”).

¹⁵⁹ This is not to say that collegiality is unimportant at the Supreme Court, but that it is not implicated by stare decisis policies.

¹⁶⁰ See *supra* Part II.A.

¹⁶¹ This is not to say that it is a necessary component of strong stare decisis. Senior judges and those judges sitting by designation wield the circuit court power when they sit, and yet they are often excluded from participation in en banc proceedings. *E.g.*, 6th Cir. I.O.P. 35(a).

district's precedent.¹⁶² En banc proceedings vest final control over stare decisis precedent with the court as a whole, and not one particular judge or panel. It provides an opportunity for the court to keep its law in conformity with the views of a majority of its judges and eliminates the inevitable inconsistent opinions.¹⁶³ It also provides a "credible threat" to reverse a decision that strays from the law of the district.¹⁶⁴

There is no doubt that district courts can proceed en banc.¹⁶⁵ While there is no explicit statutory authorizations for district court en banc proceedings like those that exist for circuit courts,¹⁶⁶ courts have the power to proceed en banc unless Congress forbids the practice.¹⁶⁷ There is ample authority that Congress meant to leave this power undisturbed.¹⁶⁸ However, while en banc district courts do occur, the infrequency of en banc district courts has led to an undeveloped procedural terrain, where litigants and judges alike are unaware of "how they are initiated, the reasons why they are convened, [and] the number of judges on them and their effect."¹⁶⁹ With the rise of the law of the district, en banc district court proceedings become more important, and district courts could take the opportunity to detail the circumstances and procedures governing their use. Some districts may want to allow en banc proceedings at any stage of a case to correct serious problems that might otherwise follow if the case is set on the wrong path.¹⁷⁰ Other districts may share the circuit courts' view of en banc proceedings as a disfavored chore¹⁷¹ and only provide for en banc in limited circumstances. Whatever the particular en banc procedure that a

¹⁶² See John R. Bartels, *United States District Courts En Banc – Resolving the Ambiguities*, 73 JUDICATURE 40, 40–41 (1989).

¹⁶³ The court may not want to wait for vertical precedent before proceeding en banc. Cf. *Midlock v. Apple Vacations W., Inc.*, 406 F.3d 453, 458 (7th Cir. 2005) ("Often the different [district court] judges will render inconsistent decisions, and it may be years before the conflict is ironed out by an appellate decision.").

¹⁶⁴ RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 133 (1996) (describing en banc proceedings by circuit courts).

¹⁶⁵ See Bartels, *supra* note 162, at 40–41; see also *United States v. Anaya*, 509 F. Supp. 289, 293 (S.D. Fla. 1980).

¹⁶⁶ Compare 28 U.S.C. § 46(c) (2006), with 28 U.S.C. § 132(c).

¹⁶⁷ *Textile Mills Sec. Corp. v. Comm'r*, 314 U.S. 326, 332–33 (1941) (authorizing circuit courts to proceed en banc even though statute did not explicitly authorize it).

¹⁶⁸ See Bartels, *supra* note 162, at 40–41 (citing legislative history and cases); see also *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 250–51 (1953); *TCF Film Corp. v. Gourley*, 240 F.2d 711, 714 (3d Cir. 1957) ("Every district court has the power to review in banc a decision rendered by one of its individual members and upon such reconsideration by the full bench to overrule the prior decision of the single judge.").

¹⁶⁹ Bartels, *supra* note 162, at 42.

¹⁷⁰ The en banc proceeding in *United States v. Anaya* provides a good example. The court granted dozens of criminal defendants' motions to dismiss charges on the basis that the government's reading of the statute was flawed. *Anaya*, 509 F. Supp. at 293, 299. Reaching this conclusion early in the proceeding is clearly preferable from a perspective of judicial economy (to say nothing of fairness to defendants). Other examples may involve certain discovery issues, e.g., *Hickman v. Taylor*, 4 F.R.D. 479 (E.D. Pa. 1945) (en banc to assess scope of work-product protections), *rev'd*, 153 F.2d 212 (3d Cir. 1945), *aff'd*, 329 U.S. 495 (1947), class certification, or whether statutory prerequisites to filing (like 28 U.S.C. § 1915 (2006) apply to a particular lawsuit).

¹⁷¹ See *infra* note 211.

district adopts, this possibility ensures that the entire court has the final say over its precedent.

B. The Policies

1. Predictability

The law of the circuit provides considerable predictability for all cases where vertical precedent does not bind the circuit court. Once a published decision is issued, all concerned parties within the circuit's scope can safely expect the decision will be applied to their case. Thus, for individuals and courts within the jurisdiction of the circuit, being able to rely on circuit law bolsters informed decision making.¹⁷²

However, circuit law is subject to being overturned by the circuit en banc or by the Supreme Court. As a result, circuit court decisions deserve less reliance than decisions issued by the Supreme Court.¹⁷³ Yet, the infrequency of further review insulates much circuit law for long periods of time.¹⁷⁴

The law of the district would also further predictability.¹⁷⁵ The general practice among district courts of extending little or no deference makes it impossible to predict which legal rule will be applied to one's case when the circuit court is silent on an issue.¹⁷⁶ For a number of relatively minor cases, where the economic incentives to appeal an adverse ruling are not present, the district court may be the only decision maker.¹⁷⁷ Without the law of the district, a litigant will learn which judge is assigned to the case (and, consequently, which law applies) during litigation, far too late to conform behavior to that judge's view of the law.

Moreover, current district court stare decisis practices are unclear to the point of being unpredictable. When stare decisis is applied inconsistently, it provides no assurance to the wary litigant. A clear, public stare decisis rule would benefit both judges and litigants.

¹⁷² Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801, 807 (1990) ("A system in which panels were free to overturn prior panels would allow the law within each circuit to be in constant flux, and would deprive the circuits of their ability to provide clear direction to parties and the lower courts."); Hellman, *supra* note 2, at 698–700; Wasby, *supra* note 58, at 1344 (arguing that intracircuit inconsistency "is a problem because lawyers advising their clients have difficulty deciding which precedents to follow and district court judges are unsure what rules to apply in the cases they must decide").

¹⁷³ Barrett, *supra* note 57, at 1063–64.

¹⁷⁴ Ronald Lee Gilman, *Rookie Year on the Federal Bench*, 60 OHIO ST. L.J. 1085, 1094 (1999).

¹⁷⁵ *Peterson v. BASF Corp.*, 12 F. Supp. 2d 964, 970 (D. Minn. 1998) (stare decisis furthers "considerable interests of consistency, and predictability of result").

¹⁷⁶ See Levin, *supra* note 3, at 993–94.

¹⁷⁷ For example, cases brought under the Fair Debt Collection Practices Act (or for other statutory violations) involve relatively modest damages for each violation. 15 U.S.C. § 1692k(a) (2006) (providing for actual damages and up to \$1000 in additional damages). These cases often involve repeated, highly-similar action (say, a provision in a bill sent to hundreds of consumers) where a definitive district court ruling would provide needed clarity to those trying to comply with their statutory obligations.

2. *Fairness*

Stare decisis by circuit courts is strongly compelled by the desire to treat similarly-situated litigants in the same way, more so than stare decisis by the Supreme Court. Because of the justices' long tenure, the Supreme Court changes its mind slowly and somewhat rarely (even in the absence of stare decisis).¹⁷⁸ Oftentimes, a court composed of the same members will decide the same legal issue in the same way, even when presented with it repeatedly.¹⁷⁹ In contrast, without stare decisis among circuit courts, two identical litigants could have their cases decided in the same week by the same court with different results, solely because of the differing views of the judges.

Both circuit courts and district courts rely on random assignment to match cases with judges.¹⁸⁰ When there is serious disagreement between district judges on a legal issue and there is no horizontal stare decisis, the applicable law depends solely on the judge assigned. This in turn relies on a process functionally the same as a lottery or a flip of a coin.¹⁸¹ “[T]here is something particularly unfair about the outcome of a case turning upon a computer’s random selection of judges within [the] same building.”¹⁸² Stare decisis constrains this arbitrariness by minimizing luck through maximizing precedent. Of course, some differences between judges will remain despite stare decisis, but at least the rule of law would be uniform.¹⁸³

It must be conceded that even under a law of the district, randomness will persist on legal questions. First, unpublished opinions allow similarly-situated litigants to be treated differently, as is the case at the courts of appeals. This is the consequence of a tradeoff of fairness concerns: between equal treatment on one hand and the imposition of ill-considered law on the other. Second, random assignments determine which judge presides over the earliest case presenting a legal issue. However, barring a judge who simply cannot be trusted to fashion fair or reasonable (even if “incorrect”) rules of law, this form of randomness is arguably less invidious because all litigants are at least treated equally, even if the ruling is not ultimately upheld.

¹⁷⁸ See William W. Berry III, *Repudiating Death*, 101 J. CRIM. L. & CRIMINOLOGY 441, 442 (2011).

¹⁷⁹ See *id.* (“It is a rare occurrence for a Supreme Court Justice to reverse his or her stance on a particular issue.”).

¹⁸⁰ *Obert v. Republic W. Ins. Co.*, 190 F. Supp. 2d 279, 290 (D. R.I. 2002) (“[R]andom assignment is an important innovation in the judiciary, facilitated greatly by the presence of computers”); J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1069, 1074 (2000) (“All circuits purport to use a system of random assignment of judges and cases.”); Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 47 (2009) (“Today the process of assigning cases to judges is pervaded with lotteries.”). Many districts have an exception for related cases.

¹⁸¹ See Samaha, *supra* note 180, at 54.

¹⁸² *Brumelow v. Law Offices of Bennett & Deloney, P.C.*, 372 F. Supp. 2d 615, 622 (D. Utah 2005).

¹⁸³ See *infra* Part IV.C.3.

3. Appearance of Justice

Appearance of justice requires that it appear that a court is expounding law separate and distinct from its judges. At the level of the Supreme Court, justices serve on the Court for long periods of time and all justices vote in almost every case. In contrast, generally only a subset of the judges of a lower court decide each case that comes before that court.¹⁸⁴ This makes it more difficult to preserve the idea of a court larger than the individual judge or judges who decide a particular case.¹⁸⁵ The litigant and the public might well question the legitimacy of a legal system whose rules appear to depend on chance and on personality.

The appearance of justice rationale acquires a new force at the district court level. For most cases, a district judge will be the primary—and indeed, may be the only—human face of the judicial system. Through status conferences, settlement negotiations, multiple motions, and oral arguments, district judges are far more engaged with cases and litigants than circuit judges.¹⁸⁶ These numerous interactions provide greater opportunity for the judge's personality to come through, which may make it difficult for the public and litigants to maintain the belief that the judge is deciding the case based on law and not personal preference.

Too often at the district court level, the attention is unduly focused on the judicial officer and not the law. Litigants have been known to manipulate case assignment practices at the district court level through refiling cases,¹⁸⁷ marking them as companion or related cases,¹⁸⁸ or seeking a recusal,¹⁸⁹ when confronted with a “bad draw.”¹⁹⁰ These practices—which are severely criticized by courts—reflect a view among litigants that their case depends on the judge assigned.¹⁹¹ When one judge refuses to follow the decision of another judge on the court, this view is confirmed.

¹⁸⁴ 28 U.S.C. § 46(b) & (c) (2006) (providing for three judge panels at the circuit court); 28 U.S.C. § 132(c) (authorizing a single judge to exercise power of district court); *cf.* Dobbins, *supra* note 2, at 1465.

¹⁸⁵ *See* White, *supra* note 69, at 673 (law of the circuit “helps to avoid a perception that a result depends upon the composition of the panel.”).

¹⁸⁶ Levin, *supra* note 3, at 978.

¹⁸⁷ *In re Fieger*, 191 F.3d 451, No. 97-1359, 1999 WL 717991, at *1 (6th Cir. Sept. 10, 1999) (upholding sanction against attorney for filing thirteen similar lawsuits in a single district, and dismissing all but the suit before the judge he wanted); *Vaqueria Tres Monjitas, Inc. v. Rivera Cubano*, 341 F. Supp. 2d 69, 72 (D.P.R. 2004).

¹⁸⁸ *See, e.g.,* *Rite-Aid Corp. v. Am. Exp. Travel Related Servs. Co.*, 2008 WL 3155063, at *3 (E.D.N.Y. Aug. 4, 2008); *Judicial Watch, Inc. v. Rossotti*, 2002 WL 31100839, at *1 (D.D.C. Aug. 2, 2002).

¹⁸⁹ *In re BellSouth Corp.*, 334 F.3d 941, 956 (11th Cir. 2003) (discussing a litigant who hired a particular law firm to force a judge's recusal); *United States v. El-Gabrowni*, 844 F. Supp. 955, 958–59 (S.D. N.Y. 1994) (“[R]ecusal motions should not be allowed to be used as ‘strategic devices to judge shop.’” (quoting *Lamborn v. Dittmer*, 726 F. Supp. 510, 515 (S.D. N.Y. 1989))).

¹⁹⁰ An extreme example is outright manipulation of the assignment process by a clerk, which has led to criminal penalties. *United States v. August*, 745 F.2d 400, 402–03 (6th Cir. 1984).

¹⁹¹ *See* Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 300 (1996) (“[A]llowing judge-shopping would invite public skepticism of the ability to receive justice in our court system and would cheapen the

The focus on judge-shopping is well illustrated by a case from the Southern District of Florida.¹⁹² Several, but not all, judges of the district court had concluded that an organization (a frequent litigant) lacked standing to bring lawsuits to enforce the Americans with Disabilities Act.¹⁹³ When the organization lost, it would refile a virtually identical case in the hopes of obtaining a judge who felt differently.¹⁹⁴ Although the district had a rule requiring counsel to inform the court if a case was related to an earlier one, the organization did not do so.¹⁹⁵ The district court's failure to articulate a legal rule for the district on the contested issue led the litigant to focus on getting a favorable judge assigned, rather than to focus on the law. The law of the district redirects attention back to the law and away from attempts to manipulate judicial assignment.¹⁹⁶

4. *Judicial Economy*

The concerns of judicial economy identified by the Supreme Court are amplified considerably for lower courts. The Supreme Court—which considers fewer than 100 cases a year—finds it difficult to revisit precedent. This difficulty is multiplied several times over in the circuit court where there are considerably more cases.

It is also costly even to consider overruling precedent.¹⁹⁷ The Supreme Court, which does overrule its precedent from time to time, need not delve into a lengthy analysis of each precedent's viability in every case.¹⁹⁸ Rather, through its certiorari jurisdiction, it selects cases and issues that allow it to reconsider precedent on its own time.¹⁹⁹ When the Court decides that a previous decision may be in jeopardy, it often asks the parties to brief whether pre-

judicial process.”). Such manipulation attempts are rarely seen at the circuit court level, but, at the Supreme Court, they do tend to pop up again through requests for recusal. *See* Sherrilyn A. Ifill, *Do Appearances Matter?: Judicial Impartiality and the Supreme Court in Bush v. Gore*, 61 MD. L. REV. 606, 618 n.61 (2002). A likely explanation is that there is greater room for manipulation of judicial assignments at the district court level than at the circuit court.

¹⁹² *See* Disability Advocates & Counseling Grp., Inc. v. Betancourt, 379 F.Supp.2d 1343 (S.D. Fla. 2005).

¹⁹³ *Id.* at 1345.

¹⁹⁴ *Id.* at 1346.

¹⁹⁵ *Id.* at 1348. The court imposed sanctions on plaintiff for the valid reason that plaintiff violated the local rule in an attempt to judge-shop. But the court also rested its imposition of sanctions on the fact that plaintiff did not appeal adverse rulings, which it considered to be part of the general judge-shopping scheme. *Id.* at 1346, 1362–63. This is not a defensible position. The right to appeal is also the right not to appeal, and litigants should be able to do so for any reason without having nefarious reasons imputed to them.

¹⁹⁶ *Mills v. Apfel*, No. Civ. 99-27-P-H, 2000 WL 761796, at *1 (D. Me. Mar. 16, 2000) (“[I]t is good practice for the judges of a District to follow each other’s decision so as to avoid judge-shopping . . .”).

¹⁹⁷ *See* Paulsen, *supra* note 32, at 1545 (“Unless stare decisis is an absolute rule—relieving courts even of the obligation of *thinking* about the prior thinking—the disposition function of precedent (‘the obligation to *follow* precedent’) does not relieve the judiciary of the need to ‘eye[] each issue afresh in every case’ in which it arises.”).

¹⁹⁸ *See* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1718 n.431 (2000).

¹⁹⁹ *Id.* at 1718 & n.431.

cedent should be overruled.²⁰⁰ The Court must still confront petitions questioning precedent, but it can dispose of these quickly and without explanation if it so chooses through a simple denial of certiorari.²⁰¹

The circuit court accomplishes the same goal through the use of the law of the circuit and discretionary en banc panels. It would be unduly time-consuming for each individual three-judge panel to analyze whether precedent should be overruled or not. By forbidding panels from overturning circuit law, the law of the circuit saves the panels from this expense.²⁰² Those arguments instead must be made to the circuit on rehearing en banc.²⁰³ The en banc court can leave precedent in place without providing an explanation by declining to rehear a case—much as the Supreme Court does with its denials of certiorari.²⁰⁴

Stare decisis by district courts would also further judicial economy. District judges have more cases than circuit court judges,²⁰⁵ and have the added burden of dealing with many litigants' kitchen-sink approach to pleading, where only a few of the many legal theories advanced are promoted with a straight face, and even fewer will be appealed.²⁰⁶ Moreover, district courts must handle the day-to-day burdens of managing a case: scheduling, monitoring discovery, dealing with evidentiary issues, and, if necessary, overseeing trial. As a result of these numerous demands, conservation of judicial resources is particularly important at the district court level. Often, the case will be controlled by vertical precedent; when it is not, requiring each district judge to individually wrestle with questions of law already tackled by a colleague wastes valuable judging time.²⁰⁷

²⁰⁰ See *Citizens United v. FEC*, 129 S. Ct. 2893 (2009) (directing parties to file supplemental briefs on whether the Court should overrule two prior decisions).

²⁰¹ See *Rangel-Reyes v. United States*, 547 U.S. 1200, 126 S.Ct. 2873, 2874 (2006) (Stevens, J., statement) (“The doctrine of *stare decisis* provides a sufficient basis for the denial of certiorari in these cases.”).

²⁰² Some courts have gone so far as to deem as “frivolous” any argument that is foreclosed by binding circuit precedent. *E.g.*, *Labosco v. Purdy*, 232 F.3d 211, No. 00-40187, 2000 WL 1273550, at *1 (5th Cir. Aug. 24, 2000) (per curiam). This practice is unsound, as presenting an argument that will lose at lower courts is required to preserve the issue for appeal to the Supreme Court. Even when the Supreme Court has decided an issue, the chance always exists that the Supreme Court will revisit the issue, and the unhappy litigant who does not raise an argument foreclosed by circuit precedent will not get the benefit if that precedent is overturned. See *United States v. Vanorden*, 414 F.3d 1321, 1323–24 (11th Cir. 2005) (Tjoflat, J., concurring).

²⁰³ See *supra* Part II.A.

²⁰⁴ Cf. *Reynolds & Richman*, *supra* note 62, at 1201 (“The use of the non-publication rule to avoid resolution of difficult issues in effect transforms the courts of appeals into certiorari courts . . .”).

²⁰⁵ In 2010, 335 appeals were filed per circuit court judge, while 417 cases were commenced per district court judge. *Federal Judgeships*, U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx> (last visited Mar. 16, 2012); see ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 6 (2009), available at <http://www.uscourts.gov/statistics/federaljudicialcaseloadStatistics/federalJudicialCaseLoadStatistics2009.aspx> 11).

²⁰⁶ See Ernest E. Svenson & S. Ann Saucer, *Federal Jurisdiction and Procedure*, 40 LOY. L. REV. 697, 708 (1995).

²⁰⁷ Cf. *EEOC v. Pan Am. World Airways*, 576 F. Supp. 1530, 1535–36 (S.D.N.Y. 1984) (“No jurisprudential purpose will be served, and scarce judicial resources on all levels will

Of course, like the law of the circuit, the law of the district would come with its own burdens on judicial resources. Because publication is optional, the added efforts of producing a precedential opinion, if any,²⁰⁸ would be borne only by district judges who have the inclination, time, and other resources to publish.²⁰⁹ Similarly, it would take judges of future disputes time to find additional sources of controlling authority, but this burden would be shared by advocates, who must bring all such controlling authority to the court's attention.²¹⁰ The law of the district also would cost less than building the law from scratch.²¹¹

5. Collegiality

There is one policy that is arguably furthered by stare decisis in the lower courts (where a decision is announced by a fraction of the court's judges) that is not implicated by stare decisis at the Supreme Court: collegiality amongst judges. Some circuit judges posit that collegiality among the court suffers if

be wasted if we, and every other district judge who happens to have an Equal Pay Act or ADEA lawsuit on his or her docket should immediately woo the Muse and set down a lengthy opinion having the same 50–50 chance of being right as the *Allstate* opinion has.”)

²⁰⁸ Although some believe that circuit courts place more effort into binding precedent, *see, e.g.*, POSNER, *supra* note 164, at 165–66; Levin, *supra* note 3, at 1000; *infra* note 243, this view is not universally shared, *see* Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 HARV. C.R.-C.L. L. REV. 109, 124 (1995) (“No empirical study has confirmed the claim that selective publication saves time.”).

²⁰⁹ *See* Caminker, *supra* note 2, at 848. Unlike circuit courts, which by practice today resolve nearly all appeals with some sort of written opinion, however brief, only a tiny fraction of district court legal rulings are memorialized by district judges in reasoned opinions at all, and only a subset of these make it to Westlaw or LEXIS (to say nothing of being reported in a reporter). *See* Levin, *supra* note 3, at 976; David A Hoffman et al., *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 704–05 (2007). When deciding whether to undertake the cost of writing a reasoned opinion, district judges may consider the likelihood that a ruling will be appealed. *See id.* at 704–05 (finding evidence that district judges may be more likely to write opinions in cases likely to be appealed); *see also id.* at 695 (quoting a district judge and a bankruptcy judge, and stating, “If opinions are necessary at all, most [trial-level] judges explain them as persuasive writings directed at higher courts”). For those rulings likely to be appealed, district judges already input the time to create a reasoned opinion to withstand appellate scrutiny. Therefore, it is unlikely that there is any additional cost to making an opinion precedential as well.

²¹⁰ *See* MODEL RULES OF PROF.’L CONDUCT R. 3.3(a)(2) (2006) (attorneys must disclose “legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel”).

²¹¹ Moreover, depending on the precise contours of the policy enacted, district court judges could be forced to review en banc petitions. Many circuit judges disfavor reviewing en banc petitions, and district judges would likely share that sentiment. Richard Arnold, *Why Judges Don't Like Petitions for Rehearing*, 3 J. APP. PRAC. & PROCESS 29, 37 (2001) (“[O]n many days, I confess, I find myself wishing that there were no such thing.”); Wasby, *supra* note 58, at 1354 (quoting a circuit judge stating that proceeding en banc “takes a tremendous number of hours”). Although most litigants aggrieved by final judgment may not bother to seek discretionary en banc when an appeal as of right is available to them, a district court that allows en banc petitions before final judgment during a case could be forced to dispose of petitions challenging every adverse ruling, even on non-dispositive issues. The scope of district court en banc practices is beyond the scope of this Article.

one panel refuses to adhere to another's decision.²¹² Collegiality, in turn, is believed to result in better judging,²¹³ and if nothing else, a more pleasant working environment for the judges.

The threat to collegiality from intracourt disagreement is overstated. Panels ignore unpublished circuit precedent, as they may under the law of the circuit, yet it is accepted that this does not create significant discord. It is also difficult to understand why a subsequent panel's disagreement with an earlier ruling would create greater judicial disharmony than would a dissent in a decided case.²¹⁴ Certainly cordial disagreement amongst judges is to be tolerated, expected, and, indeed, cherished.²¹⁵

The real source of disharmony, then, must be from unrealized expectations.²¹⁶ If one set of judges gives an earlier decision considerable thought, enters a published opinion, and intends it to be the rule going forward, collegiality suffers when another set of judges ignores it. This provides a compelling argument for why the stare decisis rules should be well-defined, in advance, so each judge's opinion about the precedential weight of his or her opinion is the same as later judges'. When the circuit's stare decisis policy—whatever it ends up being—is clearly established, judges are less likely to have unrealized expectations. This is particularly true when there is “buy-in” from the judges of the court, such as through the adoption of a formal rule or an internal operating procedure.²¹⁷

If collegiality requires the law of the circuit, it seems that it would equally require the law of the district. If instead collegiality requires not a particular stare decisis practice, but only that a practice be articulated and followed, this conclusion too applies to district court practices. Absent a clear rule, some judges may believe a certain decision will receive deference while other judges may not. A district judge who takes the time to publish a lengthy exposition may feel frustrated if it is disregarded by other judges.

²¹² Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1680 & n.136 (2003) (“[J]udges have cited collegiality in support of adherence to circuit precedent and the principle of stare decisis.”); see also *Barbour v. Int'l Union*, 594 F.3d 315, 340 (4th Cir. 2010) (Hamilton, J., concurring in part and dissenting in part); *Evans v. Stephens*, 387 F.3d 1220, 1239–40 & n.3 (11th Cir. 2004) (Wilson, J., dissenting) (noting the “great deal of disharmony that might result if panels of the Court were constantly overturning each other's decisions.”).

²¹³ See generally Edwards, *supra* note 212, at 1640; Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335 (1998).

²¹⁴ Perhaps the quest for court harmony might explain the adoption of a bright-line rule, such as law of the circuit or a rule of no deference. With a clear rule, there is arguably less ambiguity about whether a precedent applies or not. Moreover, there may be strain on the court if judges were declining to follow each other's decisions on the ground that they were “clearly erroneous.” Although appealing in theory, in practice even the clear law of the circuit rules are subject to manipulation.

²¹⁵ To the extent that collegiality causes judges to join or not challenge a colleague's opinion, the quality of judging is actually hampered by collegiality.

²¹⁶ See *Atl Thermoplastics Co. v. Faytex Corp.*, 974 F.2d 1279, 1281 (Fed. Cir. 1992) (Rich, J., dissenting from denial of rehearing en banc) (stating that the decision not to follow precedent “is not only insulting to the *Scripps* panel (Chief Judge Markey, Judge Newman and a visiting judge), it is mutiny. It is heresy. It is illegal.”).

²¹⁷ See FED. R. APP. P. 47.

Ideally, the stare decisis policy of a district will be articulated clearly by the court as a whole.²¹⁸ The unilateral assertion by one district judge of a stare decisis policy is a path fraught with peril. Other district judges may not agree with the policy announced, and as the example of the Western District of Michigan illustrates,²¹⁹ they may simply refuse to follow the practice articulated, sabotaging any hope for collegiality.²²⁰

C. *Differences Between Circuit Courts and District Courts*

Although the same policies apply to district courts as circuit courts, there are several distinctions between the levels worth considering in greater detail. First, litigants have an appeal as of right from final district court decisions, and therefore district court opinions are inherently less final. Second, circuits have a broader geographic scope, which increases the ability of potential litigants to predict which law will apply. Finally, there is a common view that consistency is an appropriate consideration only for circuit courts, perhaps based on certain institutional advantages those courts possess. While all of these distinctions call for a different weighing of goals at the district court level, they still support strong horizontal stare decisis by district courts.

1. *Finality*

When the Supreme Court decides an issue, there is no further judicial recourse.²²¹ This finality advises against an immutable rule, lest the nation forever be bound to error. A three judge panel of the circuit court is the highest court a litigant can access of right.²²² In light of the Supreme Court's stingy grants of certiorari and the rarity of circuit court en banc proceedings, this is likely the ceiling for even the most highly motivated litigant. The absence of further error correction makes the law of the circuit a very costly rule.²²³

In contrast, district court precedent can be challenged by any aggrieved litigant through an appeal as of right to a circuit court, which can consider the issue of law de novo. A sufficiently motivated litigant aggrieved by a district court opinion would be sure to exercise this right. Yet this right is not as strong as it first appears. Litigants may only appeal a narrow class of "final" decisions,

²¹⁸ Cf. *Algoma Steel Corp. v. United States*, 865 F.2d 240, 243 (Fed. Cir. 1989) ("[A]mong trial courts it is unusual for one judge to be bound by the decisions of another and, if it is to occur, such a rule should be stated somewhere."); *S. Corp. v. United States*, 690 F.2d 1368, 1370 n.2 (Fed. Cir. 1982) (en banc) ("It is appropriate that the court adopt its substantive law precedents in a judicial decision accompanied by a published opinion.").

²¹⁹ See *supra* Part II.B.

²²⁰ Perhaps judges would view stare decisis as a diminishment of their power, but while it limits the power of individual judges (when they are bound by precedent), it also increases it (when others are bound by their decisions). Thus, we would expect judges concerned with their personal judicial power to be indifferent towards any particular stare decisis policy.

²²¹ See Caminker, *supra* note 2, at 854.

²²² See 28 U.S.C. § 1254 (2006).

²²³ Indeed, law of the circuit is perhaps more rigid than we might predict based on the very small likelihood of review by a higher court, and the unavailability of en banc procedures to provide the entire circuit's view on every question of law.

which usually requires waiting until judgment is entered in the case.²²⁴ It is very costly to litigate through an entire district court proceeding, which could take years, and then appeal. Even on appeal, the district law stands at least a reasonable chance of being affirmed.²²⁵ This is why district courts are, for most matters, the court of first and last resort, and most cases terminate where they started.²²⁶

Notwithstanding barriers to appeal, the fact that appeal remains available for any motivated litigant on a dispositive issue of law is certainly a vital distinction between circuit and district courts.²²⁷ Even though incorrect district law imposes a cost of time and money on litigants, this cost is less than incorrect circuit law, which cannot be further challenged by right, no matter how desperately a litigant may want to. The availability of appeal of right allows circuit courts to decide many more cases than does the Supreme Court, and this activity provides greater opportunity for district court precedent to be rejected. “Incorrect” district court decisions—as defined by what the relevant circuit court says on an issue—are unlikely to persist for too long. The cost of lingering district court precedent is, therefore, lower than circuit court precedent, and a bargain price for the values that come from intracourt consistency.

The flip side of the ease with which district law may be overturned is that, while the costs are lower, so are the benefits. How predictable would the law of the district really be? However deeply entrenched district precedent might be, it is always susceptible to being upset by the circuit court on an appeal as of right. Yet the decisions of even the Supreme Court are susceptible to reconsideration, and reliance in them is discounted accordingly. The same is true for circuit courts. Shrewd litigants—the sort of litigant who would be aware of district court precedent when contemplating an action—know the degree to which district court precedent is vulnerable and will take that into account. Moreover, other virtues of stare decisis, like fairness and judicial economy, remain strong at the district court level despite the availability of appeal.

The availability of appeal of right poses a different problem: the proposed rule could systematically bias repeat litigants such as governmental units and major employers.²²⁸ When district courts do not create binding precedent, a losing litigant will exercise the right to appeal only if it makes economic sense

²²⁴ 28 U.S.C. § 1291 (2006). For example, an order dismissing a case is a final order, but an order denying summary judgment usually is not.

²²⁵ *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 16, 28–29 (1994) (noting district courts are affirmed most of the time, while the Supreme Court reverses circuit courts half of the time).

²²⁶ Levin, *supra* note 3, at 979. “[A]s one district judge strikingly put it, ‘[t]he people of this district either get justice here with me or they don’t get it at all . . . Here at the trial court—that’s where the action is.’” *Id.* (quoting C.K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* 1 (1996)).

²²⁷ See O’Hara, *supra* note 104, at 773–74 (arguing that appeal of right changes the likelihood of adopting strong stare decisis).

²²⁸ See Slavitt, *supra* note 208, at 119 (arguing that repeat litigants are able to manipulate selective publication regimes by seeking vacatur or depublication of an unfavorable opinion or requesting publication of a favorable one); cf. Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. MICH. J.L. REFORM 347, 379 n.123 (1988) (arguing that the lack of stare decisis effect among district courts “is the basis of defendants’ frequent disregard of adverse precedent”).

in that particular case: that is, the costs of appeal outweigh the costs of adhering to the district court judgment and the likelihood of losing again on appeal.²²⁹ But under a regime with horizontal stare decisis (of any strength, but particularly the law of the district), a repeat litigant will also consider future cases, and be more ready to appeal adverse rulings in published opinions than a litigant only concerned with the value of the present case.²³⁰ One might hypothesize that district court precedent disfavoring repeat litigants would be appealed more often—and is therefore more likely subject to being overturned by the circuit—than precedent in its favor. Over time, this would lead to district law favoring repeat litigants, and would bind district judges and future one-time litigants. This poses a problem because it exploits an institutional characteristic to artificially obtain legal rules that benefit one class of litigants over another.

Should this hypothesis be borne out empirically, it need not be fatal to the law of the district. First, the costs imposed are relatively minor, almost by definition, since a litigant will appeal any loss that causes sufficient damage. This cost is further minimized because settled district law can expedite the resolution of the matter and set up an appeal more quickly than if it is litigated through a lengthy proceeding. Further mitigating these minor costs are the other virtues of consistency.

2. *Geographical Scope*

Another important distinction is that district courts typically cover a narrower geographic scope than circuit courts. In many cases, venue in a particular district will be clear, and therefore the applicable law will be as well.²³¹ But this will not always be the case: many actions will be challengeable in multiple districts, perhaps because the action covers a broad area,²³² or because the parties to the lawsuit reside in multiple locations.²³³ Consider, for example, a state that wishes to adopt a policy that it believes will be challenged in federal court. Only one circuit court will cover that state, but the state is answerable to potentially multiple districts.²³⁴

Inconsistent district law within the geographic scope of some action will lead to minimal reliance on district precedent. But this will not always be the case, as not every district will weigh in on every issue. Even when districts do weigh in, there is a still measure of predictability, as the number of different legal rules possible is limited to the number of district courts, rather than district judges.

A bigger problem is the possibility of forum-shopping. Under the law of the district, the settled nature of district law gives litigants the opportunity to more readily exploit differences between districts. Without the law of the district, a litigant might attempt to forum-shop by filing in a district believed to have a higher percentage of favorable judges, but he or she will be unable to

²²⁹ *See id.*

²³⁰ *Cf.* Slavitt, *supra* note 208, at 119–20.

²³¹ *See* 28 U.S.C. § 1391(b) (2006).

²³² *Id.* § 1391(b)(2).

²³³ *Id.* § 1391(b)(1).

²³⁴ *See id.* § 1392 (“Any civil action, of a local nature, involving property located in different districts in the same State, may be brought in any of such districts.”).

accurately predict which judge, and by extension which legal rule, will apply to the lawsuit. Courts mitigate these concerns, albeit incompletely, by allowing for consolidation of related cases filed in multiple districts²³⁵ and the discretionary transfer of venue,²³⁶ and by enforcing rules of personal jurisdiction and provisions of contractual clauses.²³⁷ Differences that persist can be viewed either as the inevitable product of a system with many distinct courts or as serving the positive function of allowing experimentation with law.

Moreover, some district courts have become specialty courts, which will attract certain types of cases. For example, the Court of International Trade has exclusive jurisdiction over certain trade disputes,²³⁸ and the District Court for the District of Columbia handles a disproportionate number of challenges under the freedom of information act.²³⁹ The argument for consistency is even stronger among these courts with broad geographic jurisdiction over one particular subject matter.

3. Consistency

Some have posited that consistency is not a proper consideration for district courts, and “the responsibility for maintaining the law’s uniformity is a responsibility of appellate rather than trial judges.”²⁴⁰ The objection does not explain *why* appellate courts exclusively have this responsibility. As detailed below, more persuasive iterations of this argument—institutional advantages of appellate courts and structural advantages of district court disagreement—fall flat.

One possible argument is that there are structural reasons why consistency should only exist at higher levels of judicial review. Consistency between judges is, in general, less prevalent at the district court level.²⁴¹ Even if there were a strong stare decisis policy, district judges retain considerable discretion

²³⁵ *Id.* § 1407.

²³⁶ *Id.* § 1404.

²³⁷ *See* Maxcess, Inc. v. Lucent Techs., Inc., 433 F.3d 1337, 1339, 1339 & n.1 (11th Cir. 2005).

²³⁸ 28 U.S.C. §§ 1581–85 (2006 & Supp. III 2009).

²³⁹ Keith Anderson, Note, *Is There Still a “Sound Legal Basis?”: The Freedom of Information Act in the Post-9/11 World*, 64 OHIO ST. L.J. 1605, 1631 (2003); *see also* 5 U.S.C. § 552(a)(4)(B) (2006).

²⁴⁰ *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1124 (7th Cir. 1987) (discussing comity as it applies to one court following another court’s precedent, and stating: “The reasons we gave for giving some though not controlling weight to decisions of other federal courts of appeals do not apply to decisions of other district courts, because the responsibility for maintaining the law’s uniformity is a responsibility of appellate rather than trial judges and because the Supreme Court does not assume the burden of resolving conflicts between district judges whether in the same or different circuits.”); *see also* *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1381 (Fed. Cir. 2001) (district judges need not “march in lockstep” because “responsibility for maintaining the law’s uniformity is a responsibility of appellate rather than trial judges”). *But see* *TMF Tool Co. v. Muller*, 913 F.2d 1185, 1191 (7th Cir. 1990) (“For a variety of quite valid reasons, including consistency of result, it is an entirely proper practice for district judges to give deference to persuasive opinions by their colleagues on the same court.”).

²⁴¹ *See, e.g.*, footnotes 242–48 and accompanying text.

on a wide range of issues,²⁴² including the scope and timing of discovery,²⁴³ certain evidentiary rulings,²⁴⁴ and the imposition of sanctions.²⁴⁵ In addition to legal rulings, trial courts often are required to make factual findings that depend on highly individualistic assessments of facts such as witness credibility.²⁴⁶ Judges (like juries) differ in how to translate in-court evidence into an assessment of what actually occurred.²⁴⁷ Perhaps the variance between judges is most apparent—and significant—in criminal sentencing decisions, where judges have considerable discretion in fashioning a sentence.²⁴⁸

It would be a mistake to assume that our acceptance of variation among district judges on certain issues implies that consistency on matters of law has no value. The issues where differences are most permitted—factual conclusions and procedural rulings—are areas where stare decisis practices have never applied, at any level. Factual conclusions are not subject to stare decisis because the precise facts are rarely subject to multiple lawsuits (except where another doctrine, claim preclusion, or res judicata, would apply).²⁴⁹ Procedural rulings (another area where variation is most tolerated) usually do not implicate reliance interests, making stare decisis considerations less important.²⁵⁰ Appellate court review is deferential to these types of rulings, but such rulings do not directly affect issues of law, so stare decisis would not come into play.

²⁴² *Beard v. Kindler*, 130 S. Ct. 612, 618 (2009) (“[T]he federal system often grants broad discretion to the trial judge The States seem to value discretionary rules as much as the Federal Government does.”).

²⁴³ *Bracy v. Gramley*, 520 U.S. 899, 909 (1997) (“Rule 6(a) [of the rules governing habeas corpus proceedings under 28 U.S.C. § 2254] makes it clear that the scope and extent of such discovery is a matter confided to the discretion of the District Court.”); *United States v. Nixon* 418 U.S. 683, 702 (1974) (“Enforcement of a pretrial subpoena *duces tecum* must necessarily be committed to the sound discretion of the trial court”).

²⁴⁴ *E.g.*, *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008) (“[C]ourts of appeals afford broad discretion to a district court’s evidentiary rulings.”); *United States v. Abel*, 469 U.S. 45, 54 (1984) (“A district court is accorded a wide discretion in determining the admissibility of evidence under the Federal Rules.”).

²⁴⁵ *E.g.*, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401–405 (1990) (sanctions under Fed. R. Civ. P. 11); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 42 (1991) (sanctions under inherent authority of court).

²⁴⁶ FED. R. CIV. P. 52(a)(6) (“Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”); *Anderson v. City of Bessemer City*, 470 U.S. 564, 574–75 (1985) (extending clear-error deference beyond credibility determinations).

²⁴⁷ *See generally* Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729 (2010); Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009). The unpredictability of juries frequently inspires calls for major reforms to the jury system.

²⁴⁸ *See generally* Stephanos Bibas et al., *Policing Politics and Sentencing*, 103 Nw. U. L. REV. 1371 (2009); *see also* *United States v. Booker*, 543 U.S. 220 (2005); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

²⁴⁹ *United States v. Cardales-Luna*, 632 F.3d 731, 734 (1st Cir. 2011).

²⁵⁰ *Payne v. Tennessee*, 501 U.S. 808, 828 (1991); *see also* *Harris v. United States*, 536 U.S. 545, 572 (2002) (Thomas, J., dissenting) (“[C]onsiderations of stare decisis are at their nadir in cases involving procedural rules”); Note, *Irreparable Injury in Constitutional Cases*, 46 YALE L.J. 255, 264 (1936) (stare decisis does not apply to discretionary decisions).

It also might be asserted that because circuit courts generally have four institutional advantages over district courts that make them better equipped to decide difficult legal issues, and as a result stare decisis is more favored at the circuit level than the district level.²⁵¹ Circuit courts sit in multi-judge panels to resolve appeals, whereas only one judge decides cases at the district court level.²⁵² By the time a case reaches the circuit court, the number of issues has been narrowed to focus on those most in dispute²⁵³ (at least if the parties retained good advocates).²⁵⁴ Litigants in the circuit court have an extended period to brief issues, and do not have the distractions of discovery and other trial court proceedings²⁵⁵ (although emergency appeals can also be adjudicated through precedent-setting opinions).²⁵⁶ Finally, the circuit court and the parties already have had the benefit of one neutral judge working through the legal issue,²⁵⁷ (unless the case is filed directly in the court of appeals). In addition, although not necessarily a structural defect, today's district courts have many cases and legal issues to sort through, which reduces the time judges can spend on developing broad rules of law.²⁵⁸

Assuming that these characteristics enhance a court's ability to declare precedent, they are not exclusive to appellate courts in all cases. District courts function as appellate courts on occasion, and review opinions from magistrate judges or the bankruptcy court.²⁵⁹ In these circumstances, they have the same institutional advantages (except for collegial decision-making) that circuit courts possess. Thus, for example, when functioning as an appellate court, the district court has the benefit of an unbiased judge's reasoning.²⁶⁰ Appeals, whether to district judge or circuit court, typically involve a narrowing of the issues. The appeals often can be dealt with at the court's schedule (or at least without the immediacy of a pending trial).

When district courts review agency decisions, they effectively function as appellate courts, and therefore experience many of the advantages of circuit courts.²⁶¹ Review of an agency decision is typically limited to the factual

²⁵¹ *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231–32 (1991); Bussel, *supra* note 100, at 1086.

²⁵² *See Regina College*, 499 U.S. at 232; John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 998 (2002) (“[T]he development of an appellate hierarchy with collegial courts at the higher levels . . . operates structurally to ensure that no individual judge can, by his or her actions alone, inflict too much damage on the judiciary by making aberrant or overly ambitious decisions.”).

²⁵³ *Regina College*, 499 U.S. at 232.

²⁵⁴ *Cf. Matima v. Celli*, 228 F.3d 68, 81 (2d Cir. 2000) (noting a dozen issues were raised on appeal).

²⁵⁵ *See Regina College*, 499 U.S. at 232.

²⁵⁶ *E.g.*, *Scott v. Roberts*, 612 F.3d 1279, 1281 (11th Cir. 2010).

²⁵⁷ *See Regina College*, 499 U.S. at 232.

²⁵⁸ *See infra* Part IV.D.

²⁵⁹ *See infra* notes 284–83.

²⁶⁰ *Morgan v. Goldman (In re Morgan)*, 573 F.3d 615, 624 (8th Cir. 2009) (considering whether bankruptcy judge was unbiased as a requirement of due process).

²⁶¹ *Cf. Morand Bros. Beverage Co. v. NLRB*, 204 F.2d 529, 532 (5th Cir. 1953) (“The position of any administrative tribunal whose hearings, findings, conclusions and orders are subject to direct judicial review, is much akin to that of a United States District Court.”).

record before the agency, dispensing with the distraction of discovery or factual development.²⁶² Thus, the district court's typical role is to determine what the law is and apply it to the record already compiled, in much the same manner as a circuit court would review a district court decision.²⁶³

In a run-of-the-mill case, though, district courts are trial courts, and thereby lack these four institutional characteristics of circuit courts.²⁶⁴ But this comparative advantage does not make the district court unqualified to articulate precedent.²⁶⁵ Put differently, to state that circuit courts are better able of maintaining uniformity does not mean district courts are incapable of fulfilling this function. Indeed, with limited appeals, considerable discretion, and greater public visibility, arguably "district judges have even greater control over the law than do their appellate counterparts, yet they often operate free from appellate oversight and public scrutiny."²⁶⁶ Despite workload and other hindrances, district courts exercise their decision-making power competently and are reversed less than half as frequently as circuit courts.²⁶⁷

To the extent necessary, district courts also can adopt characteristics to enhance the quality of binding precedent. If busy trial schedules are hindering full consideration of an issue, trial judges can choose to issue opinions in non-precedential form.²⁶⁸ By limiting the number of legal issues a judge can consider, stare decisis may actually allow district judges to put more time into the legal issues decided, perhaps increasing the quality of the decisions. Moreover, district courts can decide issues collegially, whether through multi-judge

²⁶² 5 U.S.C. § 706 (2006) (Administrative Procedures Act); 42 U.S.C. § 405(g) (2006) (review of Social Security Act decisions).

²⁶³ Districts recognize this by exempting such proceedings from the scope of discovery requirements and timing requirements. *E.g.*, D.D.C. LOCAL R. 16.3(b); E.D. MICH. LOCAL R. 16.1(e)(2); S.&E.D.N.Y. LOCAL R. 16.1.

²⁶⁴ They may lack these four characteristics, but they also share many characteristics with appellate courts. For example, judges on both courts have law clerks to aid them in researching legal issues and drafting opinions.

²⁶⁵ It does, however, mean that questions of state law are subject to further review by superior courts, which the Supreme Court held in *Regina College*. See *Salve Regina Coll. v. Russell*, 499 U.S. 225 (1991).

²⁶⁶ Levin, *supra* note 3, at 977.

²⁶⁷ *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 28–29 (1994).

²⁶⁸ Circuit courts do this routinely, and such opinions are viewed as junk law produced by an overworked judiciary. Penelope Pether, *Constitutional Solipsism: Toward a Thick Doctrine of Article III Duty; Or Why The Federal Circuits' Nonprecedential Status Rules Are (Profoundly) Unconstitutional*, 17 WM. & MARY BILL RTS. J. 955, 961–62 (2009). This position is not without controversy. Scholars have argued that certain litigation groups—including minorities, convicted defendants, prisoners, aliens, and pro se plaintiffs—are more likely to have their cases decided via an unpublished opinion. See Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 20 (2007); Stephen L. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. CAL. INTERDISC. L.J. 67, 76 (2004). Those concerned with the treatment of litigants would argue that binding the entire circuit through every opinion is needed to ensure that the deciding panel carefully weighs what it says, which is what every litigant, represented or not, wealthy or not, expects from the court.

panels,²⁶⁹ en banc proceedings, or by circulating the opinion to the bench for input.²⁷⁰

Another challenge that could be lodged against the law of the district is that it will stifle experimentation, and thereby impair appellate court decision making. Just as the Supreme Court benefits from having a split of authority among circuit courts, the circuit court benefits from the different arguments made and sources of authority relied upon by different judges, and can observe the practicalities of different approaches.

Even assuming this argument could be a valid reason for rejecting stare decisis,²⁷¹ it fails in practice. District court stare decisis would limit the number of different rationales to the number of districts instead of the number of district judges. For issues of national scope, there would remain nearly a hundred different districts to pull law from (to say nothing of state courts). Even if limited to those districts within a circuit, each circuit (with the exception of the D.C. Circuit) has multiple districts to consider. For issues of state law, although the number of districts likely to deal with an issue shrinks to those districts within the state at issue, the possibility of conflict still remains. Many states have more than one federal district, and in those that do not, lower state courts are free to provide a different perspective from their federal counterparts. Thus, the sheer number of districts provides plenty of laboratories for new legal ideas.²⁷² And, to ride the laboratory analogy a bit further, committing a district to one legal rule has the added benefit of allowing repetition of the legal experiment on new facts.²⁷³ Circuit splits may aid the Supreme Court, but this does not require intra-circuit splits as well.²⁷⁴

Nor is the idea of district courts developing and applying broad law an unprecedented concept. Indeed, in other contexts district judges are vested with enormous power to impose their legal decisions on others. For example, a single district judge can strike down a federal statute, reverse an agency regulation of nationwide impact, or impose injunctive relief on a national entity (say, a

²⁶⁹ However, having three district judges consider an issue has not been considered sufficient for stare decisis treatment in the past. *See, e.g.,* *Farley v. Farley*, 481 F.2d 1009 (3d Cir. 1973).

²⁷⁰ *United States ex rel. Smith v. Warden of Philadelphia Cnty. Prison*, 87 F. Supp. 339, 346 (E.D. Pa. 1949) (Bard, J., concurring) (explaining that he asked the other judges to join him in hearing a difficult case).

²⁷¹ *Cf. James R. Maxeiner, Legal Indeterminacy Made In America: U.S. Legal Methods and the Rule of Law*, 41 VAL. U. L. REV. 517, 550 (2006) (discussing the argument for allowing circuit diversity to function as a laboratory, and noting “they should have asked the laboratory subjects how they felt”).

²⁷² *Id.* (noting that one of the arguments against a national court resolving circuit splits was that “many circuit courts act as ‘laboratories’ of new or refined legal principles”).

²⁷³ *Id.*

²⁷⁴ *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 27 (1994) (“We have found, however, that debate among the courts of appeals sufficiently illuminates the questions that come before us for review. The value of additional intra-circuit debate seems to us far outweighed by the benefits that flow to litigants and the public from the resolution of legal questions.”).

large employer, or the federal government).²⁷⁵ True, some acts remain subject to appeal, but the safety valve of an appeal is equally available to challenge erroneous district court precedent.

Moreover, another example of district courts' broad authority is their ability to certify a class action and potentially bind millions of individuals.²⁷⁶ Once a class action judgment is entered and any appeals exhausted, class members have no opportunity to revisit the judge's rulings, even if they lacked actual notice of the case.²⁷⁷ Although this is a broader rule with harsher consequences than stare decisis, and therefore has greater procedural safeguards,²⁷⁸ it does undercut any argument that district courts are unqualified to bind more than a few parties through application of horizontal stare decisis.²⁷⁹

D. District Courts as Appellate Courts

There is a cost to binding a district court to the decision of the first district court judge to enter a published opinion on a matter. The fact that courts are currently unwilling to accept this cost shows the courts' lack of confidence in their own decisions. It is not surprising that others—both other courts and non-judicial actors—share this view.²⁸⁰

A similar phenomenon is seen in the circuit court's practices. When a circuit court announces a rule via unpublished opinion, and therefore does not bind itself, that opinion is given much less weight by other courts.²⁸¹ For example, its status as nonbinding precedent is reflected in the general rule that unpublished circuit decisions do not clearly establish law to overcome qualified

²⁷⁵ See, e.g., *Feller v. Brock*, 802 F.2d 722 (4th Cir. 1986) (discussing injunction against Department of Labor that affected rights of non-parties); *Diller & Morawetz*, *supra* note 172, at 824 n.88.

²⁷⁶ *In re Diet Drugs*, 282 F.3d 220, 225 (3d Cir. 2002) (discussing class action of 6 million members).

²⁷⁷ *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984); *Reppert v. Marvin Lumber & Cedar Co., Inc.*, 359 F.3d 53, 57 (1st Cir. 2004).

²⁷⁸ For example, Fed. R. Civ. P. 23 includes provisions designed to maximize notice and an opportunity to be heard. In contrast, district court stare decisis would not provide notice in the same way as class actions, although individuals who may be bound by the decision do have the opportunity to be heard through the intervention mechanism. See FED. R. CIV. P. 24.

²⁷⁹ See *Barrett*, *supra* note 57, at 1036–40 (comparing stare decisis with claim preclusion, including under class action and “virtual representation” theories).

²⁸⁰ *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (“The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court . . .”). It is also possible that binding stare decisis will lead to better district court decisions, at least when published. The idea is that courts will more carefully reason a decision if they know they will be stuck with it indefinitely. I am skeptical of this rationale, but it has been advanced with considerable vigor in the debate over whether to allow circuit courts to remove some of their decisions from stare decisis altogether. *Nash & Pardo*, *supra* note 33, at 1751 (“It stands to reason that a court that knows that its opinions will bind itself, and possibly bind lower courts, will consider more carefully its reasoning before issuing judgments and opinions that announce new rules of law”). I predict that any such improvement is minimal, as most federal judges recognize the importance of their decision for the litigants currently before them and give it appropriate consideration.

²⁸¹ *E.g.*, *Epperson v. Entm't Express, Inc.*, 242 F.3d 100, 106 n.5 (2d Cir. 2001).

immunity for public officials.²⁸² Lower courts in the circuit need not follow it.²⁸³ The issuing court's view of its decision matters a great deal in convincing (or requiring) others to go along.

Currently, district courts are not able to command respect to their pronouncements beyond the immediate parties to a case. This failure is most dramatic in those circumstances where district courts function as appellate courts. In most circumstances, magistrate judges²⁸⁴ and bankruptcy courts²⁸⁵ see their decisions appealed to a district court judge. Yet, unlike the binding nature of vertical precedent elsewhere in the federal system, the majority view is that bankruptcy judges and magistrate judges are free to disagree with and disregard district court precedent.²⁸⁶ The district court's lack of stare decisis is a common rationale for this practice.²⁸⁷ This hinders district courts' efforts to effectively promote predictability and uniformity throughout a judicial district, including its obligation to supervise bankruptcy courts and magistrate judges.²⁸⁸

²⁸² Hogan v. Carter, 85 F.3d 1113, 1118 (4th Cir. 1996) ("Since unpublished opinions are not even regarded as binding precedent in our circuit, such opinions cannot be considered in deciding whether particular conduct violated clearly established law for purposes of adjudging entitlement to qualified immunity. We could not allow liability to be imposed upon public officials based upon unpublished opinions that we ourselves have determined will be binding only upon the parties immediately before the court.").

²⁸³ United States v. Simpson, 520 F.3d 531, 534 n.2 (6th Cir. 2008).

²⁸⁴ 28 U.S.C. § 636(b) (2006 & Supp. III 2009); FED. R. CIV. P. 72.

²⁸⁵ 28 U.S.C.A. § 158 (West, Westlaw through P.L. 112-39).

²⁸⁶ E.g., *In re* Application of the United States for an Order Authorizing the Use of a Pen Register, No. 08-MC-0595, 2008 WL 5255815, *1 n.1 (E.D.N.Y. Dec. 16, 2008) (magistrate judge not bound); *In re* Raphael, 238 B.R. 69, 77 (D. N.J. 1999) (bankruptcy court not bound); Bussel, *supra* note 100, at 1071 (collecting cases from bankruptcy court). The minority position is that such courts are bound, e.g., *In re* Rupp, 415 B.R. 72, 74 (Bankr. W.D.N.Y. 2008) (noting this is the "substantial minority" position); Health Servs. Credit Union v. Shunnarah (*In re* Shunnarah), 273 B.R. 671, 672 (M.D. Fla. 2001); Paul Steven Singerman & Paul A. Avron, *Of Precedents and Bankruptcy Court Independence*, 22 AM. BANKR. INST. J. 55, 56-57 (2003) (collecting cases from bankruptcy court, which can put magistrate and bankruptcy judges in the awkward position of following a district court opinion but being reversed regardless). Cf. Brian E. Mattis & B. Taylor Mattis, *Erie and Florida Law Conflict at the Crossroads: The Constitutional Need for Statewide Stare Decisis*, 18 NOVA L. REV. 1333, 1348 (1994) ("The irony of vertical without horizontal stare decisis is that a trial court may be reversed for doing the 'right' thing (following another district) or affirmed for doing the 'wrong' thing (rejecting precedent from another district)."). With law of the district, the arguments for not following the rulings of the court with supervisory jurisdiction become much weaker.

²⁸⁷ Richardson v. Mich. Bell Tel. Co. (*In re* Lucre, Inc.), 434 B.R. 807, 831-32 n.56 (Bankr. W.D. Mich. 2010); *In re* Ford, 415 B.R. 51, 60 (Bankr. N.D.N.Y. 2009) ("[J]ust as there is no 'law of the district' mandated for district judges to follow, bankruptcy judges are likewise not bound by decisions of a single district court judge.").

²⁸⁸ Seitter v. Guilford Mills, Inc. (*In re* Illig Indus.), No. 01-20189-7, 2004 WL 2044113, at *3 n.6 (Bankr. D. Kan. Jun. 8, 2004) (collecting cases); cf. Mattis & Mattis, *supra* note 286, at 1348 (noting the "logical relationship that ought to exist between vertical and horizontal stare decisis"). It is important not to overstate this point. One can conceive of a regime where lower courts do not follow the rulings of higher courts, as is common in civil law countries. See generally Caminker, *supra* note 2. But this is not the approach that the federal system (with its common law roots) typically employs, and this is a method that is unfamiliar to federal judges and advocates.

Similarly, the actions of administrative agencies are routinely reviewed by courts.²⁸⁹ In such cases, courts expect agencies to adhere to the law governing the circuit with jurisdiction to adjudicate challenges to agency actions.²⁹⁰ Although there are often difficulties in knowing which circuit will ultimately preside over a challenge to administrative action, where there is certainty of venue, agency nonacquiescence is viewed as a challenge to the judiciary's authority as a final arbiter of law.²⁹¹ In addition, nonacquiescence under these circumstances leads to a waste of time and resources, as any aggrieved party will have to go through the steps of challenging the agency in court and, after citing binding circuit law, win a more or less automatic reversal.²⁹²

Although agencies must adhere to settled *circuit* law, they currently need not follow district court precedent even for cases challengeable to a particular district.²⁹³ Why should agencies comply with a rule of law that the issuing court itself treats with little weight? If district courts were to follow their own opinions more regularly, however, the case for agency intradistrict nonacquiescence becomes harder,²⁹⁴ at least when it is clear which court will be reviewing agency decisions.²⁹⁵ District courts would be far better equipped to fulfill their supervisory function over Article I proceedings if Article I actors were compelled to listen to the district court, which would be the case if district judges set district law.

²⁸⁹ There are numerous statutory provisions directing challenges to agency action to the circuit court, but in the absence of one of those, district courts hear the remainder of challenges to reviewable agency action. *Nuclear Info. & Res. Serv. v. U.S. Dep't of Transp. Research & Special Prog. Admin.*, 457 F.3d 956, 958–59 (9th Cir. 2006).

²⁹⁰ See generally Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 *YALE L.J.* 679 (1989) (noting, but criticizing, judicial disapproval of intracircuit nonacquiescence).

²⁹¹ *Id.* at 701–02, 711–13.

²⁹² *Id.* at 750 (“Because a litigant will probably prevail simply through the application of stare decisis, there will be a strong incentive to seek review, since, in balancing the costs and benefits of challenging the agency action, the discount for the risk of not prevailing before the court will be very small.”).

²⁹³ *Wang v. Slattery*, 877 F. Supp. 133, 142 (S.D.N.Y. 1995) (“The BIA correctly noted that . . . it is not ‘bound to follow the published cases of a federal district court in cases arising within the same district’ . . .”).

²⁹⁴ Estreicher & Revesz, *supra* note 290, argue that compelling agency interests in national uniformity justify intracircuit nonacquiescence. This argument is stronger at the district court level, where the potential for a hodgepodge of rulings disrupting the national scheme, and where rulings are less final than circuit law. One answer for this is that this choice is for Congress to make. When Congress has worried about district court review of agency decision, it has provided for direct circuit review. CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, 16 *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS* § 3941 (2d ed.).

²⁹⁵ With many district courts, the potential number of forums increase dramatically, and parties may enjoy greater flexibility choosing where the lawsuit is filed. This will not always be the case, however; sometimes the agency will know where a challenge will be brought. 42 U.S.C. § 405(g) (2006) (providing for judicial review “in the district court of the United States for the judicial district in which the plaintiff resides”).

CONCLUSION

I have argued that district court stare decisis is authorized by law and recommended by policy, and the different position of district courts within the federal judicial hierarchy does not account for the departure from the stare decisis model of their circuit court cognate. But we are now left with a puzzle. If district courts indeed possess the power to either adopt the law of the district or require some other level of deference to precedent, and there are good reasons to do so, why have so few followed this path? I think the answer is not that district courts are choosing not to, but that they have not yet given the matter consideration.

I suspect that at one point a court rejected an argument that *another* district's opinion was *binding*, stating, "[A] decision of one District Court is not binding upon a different District Court."²⁹⁶ This statement was then applied descriptively to intra-district precedent, overlooking crucial differences between the rationales for deference.²⁹⁷ District courts had no cause to scrutinize this statement, and accepted it as a truth. Over time, perhaps, the description of fact became viewed as a mandate. District courts then relied on the non-binding nature of their own precedent, and did not consider whether, despite being non-binding, it was worth any deference.²⁹⁸ This has led to where we are today: amidst a multitude of unconsidered and undefined rules.

Although I have argued for strong stare decisis practice among district courts, my argument applies more broadly than the specific proposal advanced. I hope that a new conversation is started—in the scholarship, and among the courts—about whether district courts should enact some form of stare decisis practice, how this practice is decided, and how it is communicated to the public. I do not expect courts to march in lockstep, automatically following either the specific proposal I have advanced or practices adopted by circuits or other districts. Instead, they should undertake the critical analysis and self-assessment to determine how jurisprudence might be promoted through a stare decisis practice. Any number of local conditions—for example, the state of practice in the district, the relationship among judges, or the size of the court²⁹⁹—might counsel for different characteristics, large or small, in stare decisis. But, as I

²⁹⁶ *Grove Press, Inc. v. Blackwell*, 308 F. Supp. 361, 374 (E.D. Mich. 1969).

²⁹⁷ *Starbuck v. City & Cnty. of S.F.*, 556 F.2d 450, 457 n.13 (9th Cir. 1977) (stating that "[t]he doctrine of *stare decisis* does not compel one district court judge to follow the decision of another" but citing authority that "a decision of one district court is not binding upon a different district court"); Powell & Concannon, *supra* note 62, at 360 n.9 ("While there are to be found in the reports numerous instances where such divisions or departments have rendered conflicting decisions, this has probably been due to a feeling that such divisions or departments were in the same situation as coordinate courts, one of which is not bound by the decision of another" (citing 21 C.J.S. *Courts* § 196 (1966))).

²⁹⁸ *First of Am. Bank v. Gaylor (In re Gaylor)*, 123 B.R. 236, 242 (Bankr. E.D. Mich. 1991) (relying on proposition that there is no law of the district to conclude there was no stare decisis at all); *see also Clower v. Orthalliance, Inc.*, 337 F. Supp. 2d 1322, 1335 (N.D. Ga. 2004).

²⁹⁹ For example, districts with fewer judges are particularly good candidates for a "law of the district" practice. *Cf. Devlin v. Scardelletti*, 536 U.S. 1, 22 (2002) (stating that too many judges on one circuit court would "destroy[] [its] . . . ability to maintain, through en banc rehearings, a predictable law of the circuit"); POSNER, *supra* note 164, at 99 (stating that a

have argued, the law of the district has much to offer, and would be an advantageous choice for many courts.

Yet even if district courts remain unconvinced by my proposal, I hope that they will take the opportunity to consider and articulate publicly what practices they will follow. I would suggest that district courts articulate their stare decisis practice by proceeding en banc and issuing an opinion detailing the policy.³⁰⁰ Subsequently, these districts might amend their local rules to lay out procedures incidental to the rule, such as details concerning publication and en banc practices.³⁰¹ Whatever the substance, and however procedurally implemented, a reasoned and communicated practice would be a tremendous improvement for both bench and bar from the status quo, where non-public, unsettled, inconsistently applied, and apparently unreasoned rules govern.

circuit court can most readily control its precedent through en banc when it has fewer than nine judges).

³⁰⁰ See Nat'l Sign & Signal v. Livingston (*In re Livingston*), 379 B.R. 711, 725 n.16 (Bankr. W.D. Mich. 2007) (suggesting such an order), *rev'd on other grounds*, 422 B.R. 645 (W.D. Mich. 2009); see also *S. Corp. v. United States*, 690 F.2d 1368, 1370, 1370 n.2 (Fed. Cir. 1982) (en banc) ("It is appropriate that the court adopt its substantive law precedents in a judicial decision accompanied by a published opinion."). The involvement of multiple members of the district's judges avoids the ineffectiveness of a single judge acting alone. See *supra* text accompanying note 111.

³⁰¹ See 28 U.S.C. § 2071 (2006). The adoption of stare decisis through local rule may exceed the purpose of local rules. See *S. Corp.*, 690 F.2d at 1370 n.2 ("The Rules of the court are designed to provide procedural guidance and would be an inappropriate locale in which to repose the jurisprudential bases of the court's future decisions."); See Bradley Scott Shannon, *May Stare Decisis Be Abrogated By Rule?*, 67 OHIO ST. L.J. 645, 671 (2006). Perhaps this is why some circuit courts instead rely on "internal operating procedures," an apparently distinct creature from local rules. See *supra* text accompanying footnote 85. *But see* 28 U.S.C. § 2071(f) ("No rule may be prescribed by a district court other than under this section.").