

NOTE

CONFLICTS OF PRECEDENT

*Henry J. Dickman**

The law of the circuit doctrine requires three-judge panels in the federal courts of appeals to give stare decisis effect to past decisions of the circuit, which can only be overruled by the circuit sitting en banc or by the U.S. Supreme Court. This doctrine presents a recurring dilemma for circuit panels: the applicability of circuit precedent that is undermined by, but not conclusively overruled by, intervening Supreme Court precedent. The circuits have developed disparate approaches to addressing these scenarios: some permit three-judge panels to overrule undermined circuit precedent, others require an en banc proceeding to reject circuit precedent that is not unequivocally overruled by the Supreme Court, and still others have an internal procedure for circuit judges to agree on the proper approach.

This Note explores how federal courts of appeals ought to treat undermined-but-not-overruled circuit precedent. It first rejects the potential argument that horizontal stare decisis in the court of appeals is compelled by the Constitution or by statute. As such, the Note explains how the values of uniformity, institutional legitimacy, accuracy, reliance, and judicial economy are served by the practices of vertical and horizontal stare decisis, and it concludes that those values are better served by following vertical precedent than horizontal. Accordingly, this Note argues that circuit panels should apply a presumption in favor of overruling undermined precedent to align circuit doctrine with recent Supreme Court decisions. Moreover, the Note argues that the strength of this presumption should be tailored to

* J.D., University of Virginia School of Law, 2020. Winner of the Roger and Madeleine Traynor Prize. Special thanks are first owed to my advisor Caleb Nelson, who provided invaluable commentary and direction throughout this project. I would also like to thank those whose feedback further refined the paper, including Hanaa Khan, Jackson Myers, Jonah Panikar, and the rest of the *Virginia Law Review's* hard-working staff. Final and most important thanks are owed to my wife, Allyson Dickman, whose editorial assistance and constant encouragement made this Note possible.

the context of the case. By re-orienting the focus of precedent toward Supreme Court decisions rather than contradicted circuit doctrine, the courts of appeals can bring greater uniformity to the content of federal law, enhance efficiency within the legal system, and better enable the Supreme Court to realize its position atop the judicial hierarchy.

I. INTRODUCTION.....	1347
II. PRACTICES OF THE FEDERAL COURTS OF APPEALS	1350
III. THE RATIONALE BEHIND STARE DECISIS	1357
A. <i>Horizontal Stare Decisis at the Court of Appeals Level Is Not Compelled by the Constitution or by Statute</i>	1357
1. <i>The Constitution and Horizontal Precedent at the Court of Appeals Level</i>	1357
2. <i>Statutory Arguments for Horizontal Precedent at the Court of Appeals Level</i>	1362
B. <i>Pragmatic Arguments for Stare Decisis</i>	1363
1. <i>Pragmatic Rationales for Vertical Precedent</i>	1364
i. <i>Uniformity</i>	1364
ii. <i>Institutional Legitimacy and Equality</i>	1365
iii. <i>Accuracy</i>	1365
iv. <i>Judicial Economy</i>	1367
2. <i>Pragmatic Rationales for Horizontal Precedent at the Court of Appeals Level</i>	1368
i. <i>Uniformity</i>	1368
ii. <i>Institutional Legitimacy and Equality</i>	1369
iii. <i>Accuracy</i>	1369
iv. <i>Reliance</i>	1370
v. <i>Judicial Economy</i>	1376
IV. A PROPOSED APPROACH FOR CONFLICTS OF PRECEDENT	1376
A. <i>Applicability of the Presumption</i>	1376
B. <i>Deciding Cases in the Context of Conflicting Precedent</i>	1378
1. <i>Background Presumption in Favor of Vertical Precedent</i>	1378
2. <i>Special Cases</i>	1386
i. <i>Stronger Presumption: the Intervening Supreme Court Decision Overruled the Court's Own Precedent</i>	1386

2020]	<i>Conflicts of Precedent</i>	1347
	ii. <i>Weaker (or no) Presumption: There Is Extensive Reliance on the Relevant Circuit Precedent</i>	1388
	iii. <i>Relevant Guidance: Sister Circuits Have Weighed in on the Application of Intervening Supreme Court Precedent to the Question Presented</i>	1390
	C. <i>A Word on District Courts</i>	1392
V.	CONCLUSION	1393

I. INTRODUCTION

Recall the classic case of *Flood v. Kuhn*, where the U.S. Supreme Court had to decide whether the Sherman Antitrust Act applied to professional baseball.¹ The Court was not writing on a blank slate in *Kuhn*; fifty years earlier in *Federal Baseball Club of Baltimore Inc. v. National League of Professional Baseball Clubs*, it held that the Sherman Act did not cover professional baseball.² But in the meantime, the Supreme Court had interpreted the Sherman Act to reach professional boxing³ and football.⁴ By the time of *Flood v. Kuhn*, *Federal Baseball Club* was an outlier, and yet the Court adhered to baseball's unique exemption from antitrust liability on the grounds of stare decisis.⁵

Now let's put a twist on that story. Imagine that at Time 1, a federal court of appeals, rather than the Supreme Court, decided *Federal Baseball Club* and held professional baseball to be exempt from the Sherman Act. Subsequently at Time 2, the U.S. Supreme Court held that the Sherman Act *was* applicable to professional boxing and football. At Time 3, the equivalent of *Flood v. Kuhn*, challenging the continued viability of *Federal Baseball Club*, comes before the court of appeals. How should the court proceed in light of the Time 2 Supreme Court decisions that cast doubt on, but do not directly overturn, the appellate court's Time 1 precedent?

¹ 407 U.S. 258, 259 (1972).

² 259 U.S. 200, 209 (1922).

³ *United States v. Int'l Boxing Club of N.Y., Inc.*, 348 U.S. 236, 242 (1955).

⁴ *Radovich v. Nat'l Football League*, 352 U.S. 445, 452 (1957). The Supreme Court had also reaffirmed *Federal Baseball Club*'s holding in *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953) (per curiam), but that case was decided before *International Boxing Club* or *Radovich*.

⁵ *Kuhn*, 407 U.S. at 283–84.

This type of case poses a significant dilemma for stare decisis in the federal courts of appeals. Under the law of the circuit doctrine, circuit precedents are binding on that court unless a majority of active judges in the circuit overturn a decision in an en banc proceeding or the precedent is directly overruled by the Supreme Court.⁶ But in some circuits, when a Supreme Court decision casts doubt on—without directly overruling—a prior circuit precedent, a panel of court of appeals judges can overrule that precedent and bypass an en banc proceeding.⁷ In other circuits, a panel’s authority to overrule circuit precedent under these circumstances is very narrowly circumscribed.⁸ This type of situation commonly arises when the Supreme Court interprets a statute that bears some relation to the one addressed by a circuit precedent. The issue also presents itself when the Supreme Court interprets the same constitutional or statutory provision as the circuit precedent but considers different factual subject matter.

The problem of undermined-but-not-overruled circuit precedent is a recurring dilemma for federal courts of appeals.⁹ The Sixth Circuit, for example, recently faced this dilemma in *Jacobs v. Alam*.¹⁰ The plaintiff filed a *Bivens*¹¹ action against federal law enforcement agents to recover damages for excessive force, false arrest, malicious prosecution, fabrication of evidence, and civil conspiracy.¹² The Sixth Circuit (but not the Supreme Court) had previously recognized *Bivens* claims for damages in all of those contexts.¹³ But after those Sixth Circuit decisions, the Supreme Court decided *Ziglar v. Abbasi*, which concluded that if a case presents a new *Bivens* context that is “different in a meaningful way from previous *Bivens* cases decided by [the Supreme] Court,” then the deciding

⁶ See, e.g., *Lewis v. Humboldt Acquisition Corp.*, 634 F.3d 879, 881 (6th Cir. 2011) (en banc).

⁷ See, e.g., *United States v. Villareal-Amarillas*, 562 F.3d 892, 898 n.4 (8th Cir. 2009).

⁸ See, e.g., *United States v. Staten*, 466 F.3d 708, 717–20 (9th Cir. 2006).

⁹ Andrew C. Michaels, *Implicit Overruling and Foreign Lost Profits*, 25 B.U. J. Sci. & Tech. L. 408, 409 (2019) (“[H]ow might a court choose between following a directly-on-point circuit panel precedent, versus a subsequent Supreme Court case that is less directly on point but arguably overruled that panel precedent? Despite the fact that federal circuit courts (and district courts) are faced with this question on a regular basis, the answer is not clear.”).

¹⁰ 915 F.3d 1028 (6th Cir. 2019).

¹¹ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

¹² *Jacobs*, 915 F.3d at 1033.

¹³ See *Webb v. United States*, 789 F.3d 647, 659–60, 666–72 (6th Cir. 2015) (discussing the merits of *Bivens* actions for malicious prosecution, false arrest, fabrication of evidence, and civil conspiracy); *Burley v. Gagacki*, 729 F.3d 610, 621 (6th Cir. 2013) (explaining plaintiff’s burden for an excessive force *Bivens* action).

court should not make a *Bivens* remedy available if there are “special factors counselling hesitation.”¹⁴ The Sixth Circuit panel in *Jacobs* recognized that had *Abbasi* not been decided, “defendants’ appeal would have no merit” under circuit precedent.¹⁵ But although *Abbasi* did not directly overrule those *Bivens* circuit precedents,¹⁶ the decision called into question whether they were still good law, or whether the court needed to perform a special factors analysis. Ultimately, the *Jacobs* panel did not “deem these Sixth Circuit precedents inconsistent with *Ziglar [v. Abbasi]*,” and thus, it concluded that it was bound to follow them without resort to a special factors analysis.¹⁷

The D.C. Circuit, however, took the opposite tack in the context of *Bivens* claims following *Ziglar v. Abbasi*. In *Loumiet v. United States*, the court considered whether to permit a *Bivens* action for a First Amendment retaliation claim.¹⁸ Although the D.C. Circuit had previously recognized *Bivens* claims in this context,¹⁹ the court held that “those cases have been overtaken by *Abbasi*’s holding that the new-context analysis may consider only Supreme Court decisions approving *Bivens* actions.”²⁰ Instead, the D.C. Circuit panel performed a special factors analysis and held that a *Bivens* remedy was not available for First Amendment retaliation, despite the fact that its own circuit precedents supported a contrary decision.²¹

While the problem of undermined circuit precedent is frequently presented, the circuits have not developed a sufficiently nuanced framework for handling these challenging cases. The courts of appeals take disparate approaches in addressing these situations, and notably, no

¹⁴ 137 S. Ct. 1843, 1857, 1859 (2017) (emphasis added) (quoting *Carlson v. Green*, 446 U.S. 14, 18 (1980)) (internal quotation marks omitted).

¹⁵ *Jacobs*, 915 F.3d at 1036.

¹⁶ Accord *Loumiet v. United States*, 292 F. Supp. 3d 222, 229 (D.D.C. 2017) (rejecting the theory that “after *Abbasi*, a district court may no longer rely on circuit court precedent recognizing a *Bivens* cause of action in a context that has not expressly been recognized (or expressly rejected) by the Supreme Court”).

¹⁷ *Jacobs*, 915 F.3d at 1036–39.

¹⁸ 948 F.3d 376, 378 (D.C. Cir. 2020).

¹⁹ See, e.g., *Haynesworth v. Miller*, 820 F.2d 1245, 1255 (D.C. Cir. 1987) (holding that “retaliatory prosecution constitutes an actionable First Amendment wrong redressable under *Bivens*” (footnote omitted)).

²⁰ *Loumiet*, 948 F.3d at 382.

²¹ *Id.* at 382–86; accord *Vanderklok v. United States*, 868 F.3d 189, 198–99 (3d Cir. 2017) (concluding that “[the circuit’s own] past pronouncements are thus not controlling” in the context of *Bivens* claims that had not been addressed by the Supreme Court).

circuit tailors its approach to the specific legal context presented by the case.

In light of the motivations behind vertical and horizontal stare decisis, this Note argues that circuit court panels ought to apply a general presumption in favor of overruling an undermined circuit precedent. Importantly, however, special circumstances justify a stronger or weaker application of this general rule. This Note proceeds in four parts. Part II examines how the federal courts of appeals have handled latent conflicts between on-point circuit precedents and intervening Supreme Court cases that undermine those decisions. Part III explores the practice of stare decisis in the American judiciary. It explains the potential constitutional, statutory, and pragmatic sources of vertical and horizontal precedent at the court of appeals level. Part IV proposes an approach for how courts of appeals ought to handle these conflicts grounded in the justifications behind vertical and horizontal stare decisis. Part V concludes.

II. PRACTICES OF THE FEDERAL COURTS OF APPEALS

The courts of appeals all employ the same general framework with respect to their own precedent: the law of the circuit doctrine. Panels of circuit court judges are bound by the precedents of prior panels or the circuit sitting en banc.²² The en banc circuit still gives deference to prior decisions but is empowered to overrule any of the circuit's precedents.²³ All the circuits have a rule allowing a panel to overrule circuit precedent that is contradictory to an intervening Supreme Court decision.²⁴ The extent of a panel's authority to engage in this kind of overruling, however, varies by circuit.

Several circuits treat circuit precedent as binding unless the Supreme Court *directly* overrules a case, thus taking a narrow view of the scope of Supreme Court precedent. The Ninth Circuit allows panels to overrule

²² Jonathan Remy Nash, *The Majority That Wasn't: Stare Decisis, Majority Rule, and the Mischief of Quorum Requirements*, 58 Emory L.J. 831, 858 (2009) (suggesting that en banc courts give more stare decisis effect to en banc precedents than panel precedents); see, e.g., *United States v. Heredia*, 483 F.3d 913, 919 (9th Cir. 2007) (en banc); *Bolden v. Se. Pa. Transp. Auth.*, 953 F.2d 807, 813 (3d Cir. 1991) (en banc).

²³ Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 Nev. L.J. 787, 798 (2012).

²⁴ *Taylor v. Grubbs*, 930 F.3d 611, 621 (4th Cir. 2019) (Richardson, J., dissenting) ("Every circuit has adopted some version of this rule, albeit with variations on our 'specifically rejected' formulation.").

circuit precedent even when Supreme Court precedent is not identical.²⁵ The Court's decision, however, must have undercut the theory or reasoning underlying the prior Ninth Circuit precedent in such a way that the cases are "*clearly irreconcilable*."²⁶ "It is not enough for there to be some tension between the intervening higher authority and prior circuit precedent, or for the intervening higher authority to *cast doubt* on the prior circuit precedent."²⁷ Rather, if the panel "can apply [its] prior circuit precedent without running afoul of the intervening authority," it must do so.²⁸ The Eleventh Circuit's standards are even more exacting: a Supreme Court decision must be "clearly on point" for the panel to disregard a circuit precedent.²⁹ "[T]he intervening Supreme Court case [must] actually abrogate or directly conflict with, as opposed to merely weaken, the holding of the prior panel."³⁰ It is insufficient for the *reasoning* of the Supreme Court to contradict that of the court of appeals; the Court's *holding* must conflict with the circuit precedent for an Eleventh Circuit panel to overrule it.³¹

Other circuits take a broad view of the scope of Supreme Court precedent. The Second Circuit, for instance, permits a panel to overrule circuit precedent "where there has been an intervening Supreme Court decision that *casts doubt* on our controlling precedent," something that is explicitly not permitted in the Ninth Circuit.³² Furthermore, "the intervening decision need not address the precise issue already decided by [the] Court," but there must be a "conflict, incompatibility, or inconsistency" between the two decisions for a Second Circuit panel to

²⁵ *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

²⁶ *Id.* (emphasis added).

²⁷ *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (emphasis added) (citation omitted) (first quoting *United States v. Orm Hieng*, 679 F.3d 1131, 1140–41 (9th Cir. 2012); then quoting *United States v. Delgado-Ramos*, 635 F.3d 1237, 1239 (9th Cir. 2011)) (internal quotation marks omitted).

²⁸ *Id.* (quoting *Orm Hieng*, 679 F.3d at 1140) (internal quotation marks omitted).

²⁹ *Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte Int'l GmbH*, 921 F.3d 1291, 1301 (11th Cir. 2019) (quoting *United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009)) (internal quotation marks omitted).

³⁰ *Id.* (emphasis omitted) (quoting *Kaley*, 579 F.3d at 1255) (internal quotation marks omitted).

³¹ *Atl. Sounding Co. v. Townsend*, 496 F.3d 1282, 1284 (11th Cir. 2007), *aff'd*, 557 U.S. 404 (2009).

³² *Union of Needletrades, Indus. & Textile Emps. v. INS*, 336 F.3d 200, 210 (2d Cir. 2003) (emphasis added).

overrule past precedent.³³ Similarly, the Eighth Circuit permits a panel to “reconsider a prior panel’s decision if a supervening Supreme Court decision undermines or casts doubt on the earlier panel decision.”³⁴ Most notably, First Circuit panels can overrule precedents when there is no intervening decision by the Supreme Court or the circuit sitting en banc. Rather, a panel can overrule a circuit precedent when “non-binding but compelling caselaw convinces [the panel] to abandon it,” although these situations are “exceedingly infrequent.”³⁵ Phrased another way, panels can overrule when “authority that postdates the original decision, although not directly controlling, nevertheless offers a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind.”³⁶ This includes, but is not limited to, Supreme Court precedent; even the reasoning of a state court on an issue of federal law could convince a panel to overrule a circuit precedent.³⁷

The Fifth Circuit falls between these two poles. The circuit’s “rule of orderliness” allows panels to re-evaluate circuit precedent when “the decision is overruled, expressly or *implicitly*, by . . . the United States Supreme Court.”³⁸ But overruling by implication is not to be taken lightly: a Supreme Court decision “must *unequivocally* overrule prior [circuit] precedent; mere illumination of a case is insufficient.”³⁹ A decision can be unequivocally overruled, for example, when the intervening Supreme Court case “shift[ed] [the] focus” of the applicable test.⁴⁰ The inquiry is driven by context: “Sometimes a Supreme Court decision involving one statute implicitly overrules our precedent involving another statute. . . . Sometimes it does not.”⁴¹

³³ *Deem v. DiMella-Deem*, 941 F.3d 618, 623 (2d Cir. 2019) (quoting *In re Arab Bank*, 808 F.3d 144, 154–55 (2d Cir. 2015)) (internal quotation marks omitted).

³⁴ *United States v. Villareal-Amarillas*, 562 F.3d 892, 898 n.4 (8th Cir. 2009) (quoting *K.C. 1986 Ltd. P’ship v. Reade Mfg.*, 472 F.3d 1009, 1022 (8th Cir. 2007)) (internal quotation marks omitted).

³⁵ *AER Advisors, Inc. v. Fid. Brokerage Servs.*, 921 F.3d 282, 293 (1st Cir. 2019).

³⁶ *Williams v. Ashland Eng’g Co.*, 45 F.3d 588, 592 (1st Cir. 1995).

³⁷ See, e.g., *AER Advisors*, 921 F.3d at 294 (considering but ultimately rejecting the reasoning of an Arkansas Supreme Court case and two Texas Court of Appeals cases).

³⁸ *Gahagan v. USCIS*, 911 F.3d 298, 302 (5th Cir. 2018) (emphasis added) (quoting *Cent. Pines Land Co. v. United States*, 274 F.3d 881, 893 (5th Cir. 2001)).

³⁹ *United States v. Petras*, 879 F.3d 155, 164 (5th Cir. 2018) (emphasis added) (quoting *Frazin v. Haynes & Boone, L.L.P.*, 732 F.3d 313, 319 (5th Cir. 2013)) (internal quotation marks omitted).

⁴⁰ *Hoskins v. Bekins Van Lines*, 343 F.3d 769, 775–76 (5th Cir. 2003).

⁴¹ *Gahagan*, 911 F.3d at 302.

Other circuits have not thoroughly grappled with this dilemma and instead rely on vague language that lacks substance.⁴² For example, in the Third Circuit, a panel “may reevaluate the holding of a prior panel which *conflicts* with intervening Supreme Court precedent.”⁴³ But this cursory statement provides no guidance on how much conflict there must be in order for a panel to engage in overruling.⁴⁴ The Sixth Circuit has adopted a similarly vague standard: “An inconsistent decision from the Supreme Court . . . overrules the prior [circuit] decision.”⁴⁵ The high Court decision must “mandate[] modification” of the circuit precedent for a panel to overrule it.⁴⁶ Again: what does “inconsistent decision” or a “mandate[d] modification” mean when facing contrary reasoning from the Supreme Court, but not a directly contradictory ruling?

The Fourth Circuit seemingly faces intra-circuit disagreement on this question. For instance, in *United States v. Hill*, the Fourth Circuit treated Supreme Court precedent broadly: “[Circuit precedent] controls the outcome here unless intervening case law from our court sitting en banc or the Supreme Court has explicitly or *implicitly* overruled it.”⁴⁷ But recently in *Taylor v. Grubbs*, the court stated that its panels “do not lightly presume that the law of the circuit has been overturned,” and the majority then cited *Hill* for the proposition that “circuit precedent ‘controls’ where Supreme Court did not *directly contradict* our prior holding.”⁴⁸ This

⁴² The Federal Circuit has also not provided much helpful guidance on this issue. See *Deckers Corp. v. United States*, 752 F.3d 949, 964 (Fed. Cir. 2014) (“[A] panel of this court . . . is bound by the precedential decisions of prior panels unless and until overruled by an intervening Supreme Court or en banc decision.”).

⁴³ *In re Krebs*, 527 F.3d 82, 84 (3d Cir. 2008) (emphasis added).

⁴⁴ The Third Circuit has noted that it “adhere[s] strictly to th[e] tradition” of panels not overruling circuit precedent. *In re Grossman’s Inc.*, 607 F.3d 114, 117 (3d Cir. 2010) (en banc).

⁴⁵ *Lindenberg v. Jackson Nat’l Life Ins. Co.*, 912 F.3d 348, 357 (6th Cir. 2018) (quoting *Salmi v. Sec’y of Health & Hum. Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)) (internal quotation marks omitted). But see *Wright v. Spaulding*, 939 F.3d 695, 704–05 (6th Cir. 2019) (refusing to apply reasoning from a past panel decision because it relied on a stipulation by the parties).

⁴⁶ *United States v. Camp*, 903 F.3d 594, 597 (6th Cir. 2018) (quoting *United States v. Moody*, 206 F.3d 609, 615 (6th Cir. 2000)).

⁴⁷ 776 F.3d 243, 248 (4th Cir. 2015) (emphasis added); see also *Qingyun Li v. Holder*, 666 F.3d 147, 150 (4th Cir. 2011) (stating that a circuit decision is not binding if a subsequent Supreme Court decision “specifically rejected the reasoning on which [the prior decision] was based” (quoting *Etheridge v. Norfolk & W. Ry. Co.*, 9 F.3d 1087, 1090–91 (4th Cir. 1993) (internal quotation omitted)) (alteration in original)).

⁴⁸ 930 F.3d 611, 619 (4th Cir. 2019) (emphasis added); see also *United States v. White*, 670 F.3d 498, 516–17 (4th Cir. 2012) (Duncan, J., concurring) (“We do not lightly presume that

seemingly mischaracterizes *Hill*'s broad approach to Supreme Court precedent.⁴⁹

The various standards employed by the circuits reflect more than merely semantic differences; they demonstrate substantive disagreement on how to apply undermined circuit precedent. For example, in *United States v. Villareal-Amarillas*, the Eighth Circuit considered its due process-based sentencing exception.⁵⁰ When the Federal Sentencing Guidelines were mandatory, facts relied upon by the district court in sentencing needed to be proved only by a preponderance of the evidence.⁵¹ But the Eighth Circuit had recognized an exception to this rule: factual circumstances which had an “‘extremely disproportionate’ effect” on a defendant’s sentence needed to be proved by clear and convincing evidence.⁵² In 2005, the Supreme Court held in *United States v. Booker* that the Sentencing Guidelines are advisory, and thus, facts found at sentencing merely inform, rather than determine, a defendant’s sentence.⁵³ For the Eighth Circuit, this decision put to rest concerns about a single fact disproportionately and unfairly extending a defendant’s sentence—a district judge can mitigate such unfairness in the exercise of her discretion.⁵⁴ Accordingly, the panel held that no heightened standard of evidentiary proof is required for facts that disproportionately affect a defendant’s sentence under the advisory guidelines regime, overruling its prior recognition of the due process-based defense.⁵⁵ The Ninth Circuit, however, did not reverse its pre-*Booker* decisions requiring a heightened burden of proof for sentencing in such cases, holding that *Booker* is not “clearly irreconcilable” with those precedents.⁵⁶ The Eighth Circuit, in dividing with the Ninth Circuit on this question, attributed the

the law of the circuit has been overturned,” especially “where, as here, the Supreme Court opinion and our precedent can be read harmoniously.”)

⁴⁹ See *Grubbs*, 930 F.3d at 621 (Richardson, J., dissenting) (describing how the Fourth Circuit has addressed and undermined circuit precedent in other cases).

⁵⁰ 562 F.3d 892, 895 (8th Cir. 2009).

⁵¹ *Id.*

⁵² *United States v. Garth*, 540 F.3d 766, 773 (8th Cir. 2008) (quoting *United States v. Calva*, 979 F.2d 119, 122 (8th Cir. 1992)) (collecting circuit cases recognizing, although not applying, this standard).

⁵³ 543 U.S. 220, 245 (2005).

⁵⁴ *Villareal-Amarillas*, 562 F.3d at 897–98.

⁵⁵ *Id.* at 898.

⁵⁶ *United States v. Staten*, 466 F.3d 708, 718 (9th Cir. 2006) (quoting *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc)).

disagreement to the respective levels of deference that each circuit gives its own precedent:

The conflict may be more apparent than real. 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.”⁵⁷

Thus, the difference in standards among the circuits for applying their own undermined circuit precedent can be outcome-determinative.

Perhaps most interestingly, several circuits have an internal procedural mechanism for dealing with these situations.⁵⁸ The D.C. Circuit, for instance, allows a panel to overrule circuit precedents via an *Irons* footnote⁵⁹ when “the circumstances of the case or the importance of the legal questions presented do not warrant the heavy administrative burdens of full *en banc* hearing.”⁶⁰ One situation in which an *Irons* footnote is appropriate is to “overrul[e] a more recent precedent which, due to an intervening Supreme Court decision, or the combined weight of authority from other circuits, a panel is convinced is clearly an incorrect statement of current law.”⁶¹ The panel must circulate its proposed opinion to the full court, and all active judges not recused must affirmatively agree to overruling the circuit precedent.⁶² If the court is in agreement, the panel opinion overrules the prior decision by including a footnote explaining

⁵⁷ *Villareal-Amarillas*, 562 F.3d at 898 n.4 (quoting *K.C. 1986 Ltd. P’ship v. Reade Mfg.*, 472 F.3d 1009, 1022 (8th Cir. 2007)).

⁵⁸ Although several circuits have a procedural mechanism for informal *en banc* review, it is virtually never used outside of the First, Second, Seventh, Tenth, and D.C. Circuits. See 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, 726–28 (2009).

⁵⁹ The footnote is named after the case of *Irons v. Diamond*, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981).

⁶⁰ *Oakey v. U.S. Airways Pilots Disability Income Plan*, 723 F.3d 227, 232 (D.C. Cir. 2013) (quoting Policy Statement on *En Banc* Endorsement of Panel Decisions (*Irons* Footnote Policy) 1 (Jan. 17, 1996)). Otherwise, a panel can only overrule “circuit precedent that has been eviscerated by subsequent Supreme Court cases.” *Davis v. U.S. Sent’g Comm’n*, 716 F.3d 660, 664 (D.C. Cir. 2013) (quoting *Dellums v. U.S. Nuclear Regul. Comm’n*, 863 F.2d 968, 978 n.11 (D.C. Cir. 1988) (internal quotation marks omitted)).

⁶¹ *Irons* Footnote Policy at 1.

⁶² *Id.* at 2. Furthermore, a majority of the active judges in the circuit must agree, regardless of the number of recusals. *Id.*

the agreement of the active judges.⁶³ The Tenth Circuit also allows a panel to overrule a point of law “through an en banc footnote by obtaining authorization from all active judges on the court.”⁶⁴ The First⁶⁵ and Second⁶⁶ Circuits have invoked a similar rule. The Seventh Circuit’s Local Rule 40(e) is even more permissive: it requires a panel to circulate a proposed opinion that “would overrule a prior decision of th[e] court or create a conflict between or among circuits,” and the overruling panel decision can be published *unless* a majority of active judges votes in favor of rehearing en banc.⁶⁷ Thus, if a panel majority favors overruling a past decision, the Seventh Circuit requires a majority of all active judges to agree to en banc review to *prevent* that decision from being issued.

The practice in the circuits ranges widely when considering undermining-but-not-overruling Supreme Court decisions: some allow panels the leeway to overrule contradicted circuit precedents, others prohibit panels from exercising this authority, and still others lie in between. What the circuits have in common, however, is that they apply a blanket rule in these scenarios, regardless of the nuances presented by the case. In Part IV, I argue that panels ought to apply a background presumption in favor of overruling undermined circuit precedent, but vertical and horizontal precedents should be treated with varying degrees of strength depending on the particular legal context at issue in the case.⁶⁸ That conclusion depends on the constitutional, statutory, and pragmatic justifications for stare decisis, addressed in the next Part.

⁶³ See, e.g., *SecurityPoint Holdings, Inc. v. TSA*, 836 F.3d 32, 35 n.1 (D.C. Cir. 2016).

⁶⁴ *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1060 n.3 (10th Cir. 2018) (quoting *United States v. Atencio*, 476 F.3d 1099, 1105 n.6 (10th Cir. 2007)). This practice seemingly originated with *Murphy v. Klein Tools, Inc.*, 935 F.2d 1127, 1128 n.2 (10th Cir. 1991). Otherwise, a Tenth Circuit panel can only overrule a circuit precedent if the Supreme Court decision “invalidates [its] previous analysis.” *United States v. Shipp*, 589 F.3d 1084, 1090 n.3 (10th Cir. 2009) (quoting *Weitz v. Lovelace Health Sys., Inc.*, 214 F.3d 1175, 1180 (10th Cir. 2000)) (internal quotation marks omitted); see also *United States v. Brooks*, 751 F.3d 1204, 1209–10 (10th Cir. 2014) (stating that a circuit precedent cannot be overruled simply because the Supreme Court decision is not “on all fours with our precedent”).

⁶⁵ *Gallagher v. Wilton Enters., Inc.*, 962 F.2d 120, 124 n.4 (1st Cir. 1992). The court noted that “this practice is to be used sparingly and with extreme caution.” *Id.*

⁶⁶ *United States v. Brutus*, 505 F.3d 80, 87 n.5 (2d Cir. 2007).

⁶⁷ 7th Cir. R. 40(e). See, e.g., *United States v. Luce*, 873 F.3d 999, 1014 n.43 (7th Cir. 2017).

⁶⁸ See *infra* Section IV.B.

III. THE RATIONALE BEHIND STARE DECISIS

The motivations behind stare decisis inform how much deference courts ought to give precedent, whether it be vertical (Circuit Court A deferring to the Supreme Court's decisions) or horizontal (Circuit Court A deferring to its own past decisions). If horizontal stare decisis is a constitutional or statutory obligation, then it must be followed unless it is actually overruled by a higher court precedent; undermining would not be sufficient to deviate from a constitutional or statutory requirement to obey horizontal precedent. But if horizontal stare decisis is grounded purely in pragmatic concerns, then its applicability in the wake of an undermining higher court decision can be questioned.

This Part ultimately concludes that horizontal stare decisis at the court of appeals level is not mandated by the Constitution or statute, and accordingly, it conducts an overview of the pragmatic benefits served by horizontal and vertical stare decisis. Because the values of uniformity, institutional legitimacy, accuracy, reliance, and judicial economy are far better served by vertical precedent than horizontal precedent, a background presumption in favor of following related Supreme Court precedent over on-point, undermined circuit precedent should prevail.

A. Horizontal Stare Decisis at the Court of Appeals Level Is Not Compelled by the Constitution or by Statute

1. The Constitution and Horizontal Precedent at the Court of Appeals Level

From the start, it seems unlikely that the Constitution compels horizontal stare decisis; indeed, strict adherence to horizontal precedent in constitutional or statutory cases might even be *unconstitutional*.⁶⁹ The constitutional argument for horizontal stare decisis immediately suffers from the fact that there is no clear textual hook in the Constitution for this practice. There is a plausible textual argument that the Constitution imposes a *vertical* stare decisis requirement, in that the highest Court is called “supreme” and lower courts are labeled as “inferior.”⁷⁰ But there is

⁶⁹ See, e.g., Gary Lawson, *The Constitutional Case Against Precedent*, 17 Harv. J.L. & Pub. Pol’y 23, 27–28 (1994) (“If the Constitution says X and a prior judicial decision says Y, a court has not merely the power, but the obligation, to prefer the Constitution.”).

⁷⁰ See *Winslow v. FERC*, 587 F.3d 1133, 1135 (D.C. Cir. 2009) (Kavanaugh, J.) (“Vertical stare decisis—both in letter and in spirit—is a critical aspect of our hierarchical Judiciary

no constitutional language suggesting that courts are bound to horizontal precedent. Moreover, the constitutional argument for horizontal precedent is particularly tenuous when considering horizontal precedent at the court of appeals level.⁷¹ The only court created by the Constitution is the Supreme Court.⁷² While it is imaginable that the Constitution requires horizontal stare decisis at the Supreme Court level,⁷³ it is hard to say that it requires such a practice at the lower court level, as those courts were created by Congress rather than the Constitution itself.

The best case for constitutionally mandated horizontal stare decisis at the court of appeals level is the Article III Vesting Clause. The “judicial Power of the United States,” which is exercised by all federal courts,⁷⁴ may implicitly include a requirement to obey a court’s own precedent, much like it confers authority for a court to issue final, binding judgments. This argument for an absolute constitutional requirement of horizontal stare decisis was accepted in *Anastasoff v. United States*, a controversial decision of the Eighth Circuit.⁷⁵ Judge Richard Arnold, surveying Blackstone’s Commentaries, other English historical sources, and statements of the Framers, concluded that adherence to the past decisions of a court is an integral feature of “the judicial power.”⁷⁶ Therefore, the

headed by ‘one supreme Court.’” (quoting U.S. Const. art. III, § 1)); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 *Stan. L. Rev.* 817, 832 (1994) (arguing that the words “supreme” and “inferior” create a hierarchy in Article III which requires lower courts to follow the decisions of higher courts). But see David E. Engdahl, *What’s in a Name? The Constitutionality of Multiple “Supreme” Courts*, 66 *Ind. L.J.* 457, 466–75 (1991) (contending that the terms “supreme” and “inferior” do not, by themselves, necessarily denote a hierarchical structure).

⁷¹ See Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 *Geo. Wash. L. Rev.* 317, 318 (2005).

⁷² U.S. Const. art. III, § 1.

⁷³ Compare Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 *N.Y.U. L. Rev.* 570, 596 (2001) (“[S]tare decisis deserves recognition as a legitimate, constitutionally authorized doctrine beyond Congress’s power to control.”), and *Ramos v. Louisiana*, No. 18-5924, slip op. at 2 (U.S. Apr. 20, 2020) (Kavanaugh, J., concurring in part) (“The Framers of our Constitution understood that the doctrine of *stare decisis* is part of the ‘judicial Power’ and rooted in Article III of the Constitution.”), with 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) (“[S]tare decisis is a policy judgment, *not* a rule of law specified in the Constitution or clearly implicit in its provisions or overall structure.”).

⁷⁴ U.S. Const. art. III, § 1.

⁷⁵ 223 F.3d 898, 905 (8th Cir. 2000), vacated as moot, 235 F.3d 1054, 1056 (8th Cir. 2000) (en banc).

⁷⁶ *Anastasoff*, 223 F.3d at 900–03.

court held that Eighth Circuit Rule 28A(i), which “declare[d] that unpublished opinions are not precedent,” was unconstitutional and that court of appeals panels were bound to follow the circuit’s prior decisions.⁷⁷

Anastasoff’s reasoning suffers from several flaws and has generally not been accepted.⁷⁸ First, the English experience, which would have informed the Framers’ understanding of judicial power, took a different view of precedent than that expounded by Judge Arnold. Noted English jurists at the time of the American Revolution disagreed on the role of precedent. While Blackstone had a strong conception of stare decisis, his contemporary Lord Mansfield—who served as Chief Justice of the King’s Bench for thirty years—did not share his view.⁷⁹ He agreed that the rule of law demands certainty and predictability, but if a precedent “created confusion or if another rule would work better, [he] was quick to innovate.”⁸⁰ Even Blackstone did not have an absolutist vision of stare decisis: he asserted that “where the former determination is most evidently contrary to reason,” judges ought to “declare[], not that such a sentence was *bad* law, but that it was *not law*.”⁸¹ Moreover, other legal historians have persuasively argued that English stare decisis did not reach any semblance of its rigid, modern form until the late eighteenth century.⁸² This was for several reasons: (1) the classic English position was to treat precedent as *evidence* of law, not law itself, (2) reporters were inadequate and inaccurate, and (3) conflicting English decisions existed side by side.⁸³ Although the English courts may have begun to adopt the stricter, modern version of stare decisis by the time of the Constitution’s ratification, the fact that this was a novel innovation, rather than longstanding tradition, strongly suggests that the Framers did not

⁷⁷ *Id.* at 899.

⁷⁸ *Hart v. Massanari*, 266 F.3d 1155, 1160 (9th Cir. 2001) (“*Anastasoff* may be the first case in the history of the Republic to hold that the phrase ‘judicial Power’ encompasses a specific command that limits the power of the federal courts.”).

⁷⁹ Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. Va. L. Rev. 43, 70–71 (2001).

⁸⁰ *Id.* at 71.

⁸¹ 1 William Blackstone, *Commentaries* *69–70.

⁸² See Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 Am. J. Legal Hist. 28, 30 n.4, 50–51 (1959).

⁸³ *Id.* at 31.

conceive of *absolute* adherence to precedent being integral to the judicial power.⁸⁴

American judges in the late eighteenth century also took a non-binding view of precedent. Indeed, Gordon Wood has argued that Founding-era judges “were often able to play down the importance of precedents and to emphasize instead reason, equity, and convenience in order to bring the law into accord with changing commercial circumstances.”⁸⁵ Supreme Court Justices did not commonly cite to precedent; indeed, Chief Justice Marshall “often engaged in lengthy doctrinal expositions on settled issues that today would be disposed of with a simple citation,” even when the would-be controlling precedent was his own opinion.⁸⁶ Prominent state court judges often made critical comments on the practice of following precedent.⁸⁷ And to the extent precedent was outcome-determinative, judges in the antebellum period appreciated the difference between a single decision and a consistent line of decisions, treating the latter with precedential force because it was stronger evidence of the correctness of that legal position.⁸⁸

Strictly following precedent was also not feasible at the time of the Founding. Reports of judicial decisions were “few, unofficial, and often unreliable” in the early days of the Republic, which suggests that courts could not have realistically followed binding precedent.⁸⁹ Even at the Supreme Court, the quality of reporting was weak for several decades. In 1789 and 1790, the Justices only delivered their opinions orally.⁹⁰ In 1791, Alexander Dallas began reporting Supreme Court decisions on his

⁸⁴ Thus, even if *some deference* to precedent is required by Article III as a matter of historical practice, it is quite another thing to say that absolute adherence is required. Accord *Ramos v. Louisiana*, No. 18-5924, slip op. at 2 (U.S. Apr. 20, 2020) (Kavanaugh, J., concurring in part) (“The doctrine of *stare decisis* does not mean, of course, that the Court should never overrule erroneous precedents.”).

⁸⁵ Gordon S. Wood, *The Origin of Vested Rights in the Early Republic*, 85 Va. L. Rev. 1421, 1444 (1999).

⁸⁶ Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 Vand. L. Rev. 647, 667 (1999).

⁸⁷ See, e.g., *King v. Hopkins*, 57 N.H. 334, 336 (1876) (noting that Samuel Livermore, Chief Justice of New Hampshire from 1782 to 1790, “paid little attention to precedent” and “when reminded of his previous decision in a similar case [replied] ‘[e]very tub must stand on its own bottom’”); see also *Kerlin’s Lessee v. Bull*, 1 U.S. 175, 178 (Pa. Sup. Ct. 1786).

⁸⁸ Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 Va. L. Rev. 1, 36 (2001).

⁸⁹ John Harrison, *The Power of Congress over the Rules of Precedent*, 50 Duke L.J. 503, 521 (2000).

⁹⁰ Healy, *supra* note 79, at 84.

own initiative, but he and his successor, William Cranch, would often not complete a term until several years after its conclusion.⁹¹ Only in the 1830s, when the Justices began issuing written decisions, did Supreme Court reporting improve in terms of timeliness.⁹² Moreover, no state had a reporting system at the time of ratification. New York was the first state to implement such a reporting system but did not do so until 1804; Maryland did not have one until 1852.⁹³ Without timely evidence of past outcomes and modes of reasoning available to judges or to the bar, it is difficult to imagine that the Framers conceived of horizontal stare decisis as being baked into the “judicial Power.”⁹⁴

And of course, whatever the stare decisis practices of English or American courts in the late eighteenth century might have been, those courts were generally deciding cases under the common law, where judges articulated the content of the law in the first instance.⁹⁵ But federal courts today interpret written law: the Constitution, statutes, and treaties.⁹⁶ Thus, if the federal judiciary’s task is to interpret the written laws of a coordinate branch, rather than to generate its own doctrines, the judicial power may very well require *abandoning* incorrect decisions in favor of a correct interpretation of the written law.⁹⁷

Perhaps the most glaring omission from *Anastasoff*’s analysis is any mention of the historical practices of federal courts of appeals. The practice of rigidly following circuit precedent is a recent phenomenon—one that seemingly did not begin until the mid-1950s.⁹⁸ In the mid-twentieth century, the number of federal court filings grew by a substantial margin. This arose out of the growth of the administrative state and the Court’s recognition of several new constitutional rights.⁹⁹

⁹¹ *Id.*

⁹² *Id.*

⁹³ Wilfred J. Ritz, *Rewriting the History of the Judiciary Act of 1789: Exposing Myths, Challenging Premises, and Using New Evidence* 47 (1990).

⁹⁴ *Id.* at 51 (“[N]o state court in 1789 could have declared what the law of the state was. There was in fact no such authoritative source for the law of a state.”).

⁹⁵ *Gamble v. United States*, 139 S. Ct. 1960, 1983–84 (2019) (Thomas, J., concurring).

⁹⁶ *Id.* at 1984.

⁹⁷ *Id.* (“A demonstrably incorrect judicial decision, by contrast, is tantamount to *making* law, and adhering to it both disregards the supremacy of the Constitution and perpetuates a usurpation of the legislative power.”).

⁹⁸ Amy Coney Barrett, *Stare Decisis and Due Process*, 74 *U. Colo. L. Rev.* 1011, 1066 (2003).

⁹⁹ Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 *Cornell L. Rev.* 1, 50–51 (2009).

Meanwhile, Congress increasingly shifted the Supreme Court's docket from mandatory to discretionary review via the 1925 and 1988 Judiciary Acts, and the Court itself began hearing fewer cases.¹⁰⁰ As a consequence, the courts of appeals gained significant decisional autonomy over their ever-growing number of cases, and the law of the circuit doctrine became an invaluable mechanism to promote judicial economy and intra-circuit uniformity. Thus, the historical experience of the courts of appeals suggests that strict horizontal stare decisis arose out of practical necessity rather than constitutional obligation.

Finally, if *Anastasoff* is correct that the judicial power requires following horizontal precedent, then all federal courts must adhere to their past decisions.¹⁰¹ But district court decisions do not establish binding precedent. Thus, either the modern practice in district courts is unconstitutional, or the judicial power does not impose a horizontal precedent requirement. The latter is the correct conclusion. Contrary to *Anastasoff*, Article III's Vesting Clause does not require rigid adherence to court of appeals precedents.

2. Statutory Arguments for Horizontal Precedent at the Court of Appeals Level

Unlike the Supreme Court, the courts of appeals are established by statute, and that legislation may have some bearing on proper stare decisis practices in those courts.¹⁰² 28 U.S.C. § 46 establishes the structure of the appellate courts. Each circuit court may authorize cases and controversies to be decided by panels of three judges.¹⁰³ Before or after a panel decision, a majority of judges in active service may order the hearing or rehearing of that case en banc, whereby all active judges in the circuit decide on the final disposition of the case.¹⁰⁴ In the Ninth Circuit, however, an en banc court consists of only eleven judges: the Chief Judge and ten active circuit judges.¹⁰⁵

¹⁰⁰ *Id.* at 50; Wyatt G. Sassman, *How Circuits Can Fix Their Splits*, 103 *Marq. L. Rev.* 1401, 1417–18 (2020).

¹⁰¹ Harrison, *supra* note 89, at 518.

¹⁰² See *id.* at 533–39 (discussing Congress's power under the Necessary and Proper Clause to control rules of precedent).

¹⁰³ 28 U.S.C. § 46(b) (2018).

¹⁰⁴ *Id.* § 46(c).

¹⁰⁵ 9th Cir. R. 35-3; Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633 (“Any court of appeals having more than 15 active judges . . . may perform its en banc function by

Although the statute does not speak to the precedential weight of panel and en banc decisions, the Supreme Court, in interpreting Section 46, has emphasized that en banc proceedings serve a larger purpose than merely correcting erroneous outcomes in specific cases. Rather, “en banc determinations make for more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeals will be promoted.”¹⁰⁶ Indeed, the Court concluded that Congress’s “evident policy” in limiting en banc participants to active judges only (not senior status judges) is “to provide that the active circuit judges shall determine the major doctrinal trends of the future for their court.”¹⁰⁷ On the one hand, the implication of this statement may be that en banc decisions are binding precedents.¹⁰⁸ On the other hand, it may simply indicate the Supreme Court’s expectation that en banc decisions would be given special deference as the opinion of the whole court. But this dictum is too weak to suggest that Section 46 affirmatively imposes a horizontal stare decisis effect for en banc decisions. And, in any event, the statute does not speak at all to the precedential force of panel opinions on subsequent panels.

B. Pragmatic Arguments for Stare Decisis

If horizontal stare decisis is not a constitutional or statutory mandate, it is certainly still the law. It is a form of general or common law developed by judges, which means the practice is subject to judge-made refinements and exceptions.¹⁰⁹ For purposes of applying undermined circuit precedent, it is helpful to consider the values served by vertical stare decisis and compare them with those served by horizontal stare decisis. Note that the question is *not* whether vertical on-point precedent trumps horizontal precedent: by definition, that is exactly what vertical precedent does. Rather, the question is whether following a related, albeit not on-point, Supreme Court precedent generates benefits that outweigh

such number of members of its en banc courts as may be prescribed by rule of the court of appeals.”).

¹⁰⁶ *United States v. Am.-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960) (quoting *Textile Mills Corp. v. Comm’r*, 314 U.S. 326, 334–35 (1941)) (internal quotation marks omitted).

¹⁰⁷ *Id.* at 690 (quoting *Am.-Foreign S.S. Corp. v. United States*, 265 F.2d 136, 155 (2d Cir. 1958) (Clark, C.J., dissenting)) (internal quotation marks omitted). The case held that senior circuit judges cannot participate in en banc decisions, absent a statutory exception. *Id.* at 691.

¹⁰⁸ See Harrison, *supra* note 89, at 530–31.

¹⁰⁹ *Id.* at 531; see also 1 Zephaniah Smith, *A Digest of the Laws of the State of Connecticut* 9 (Sherman Converse 1822) (“[S]tare decisis is a fundamental maxim of the common law.”).

the advantages of adhering to an on-point circuit precedent. If so, then perhaps the circuit precedent should be overruled in favor of the Supreme Court precedent. This Section lays the groundwork for that comparison by discussing the values served by both types of precedent.

1. Pragmatic Rationales for Vertical Precedent

i. Uniformity

The primary value served by vertical stare decisis is uniformity in interpretation of federal law.¹¹⁰ While promoting uniformity may not have been a core function of the early Supreme Court,¹¹¹ the modern Court views this task as central to its role: a division among lower courts in the interpretation of federal law is one of the primary bases for a grant of certiorari.¹¹² When the Supreme Court decides a question of federal law, then that issue is treated consistently by lower courts throughout the United States. This promotes predictability of outcome, as litigants who operate in a variety of jurisdictions can expect with certainty that the interpretation set forth by the Supreme Court will be applied in any court.

Uniformity also promotes effective administration in government. If each of the nation's 94 federal district courts developed its own interpretation of the same statutory provision, there could effectively be 94 unique federal statutes. That poses five significant harms: (1) federal law enforcement would be exceedingly difficult,¹¹³ (2) federal agencies could not promulgate rules that have uniform effect throughout the nation,¹¹⁴ (3) any attempt by Congress to legislate would essentially be futile, as some portion of judges will almost certainly deviate from the requirements of the statute, (4) plaintiffs would be encouraged to forum shop,¹¹⁵ and (5) people or entities who operate in multiple circuits would face increased compliance costs.¹¹⁶

¹¹⁰ Caminker, *supra* note 70, at 850.

¹¹¹ Amanda Frost, *Overvaluing Uniformity*, 94 Va. L. Rev. 1567, 1571–72 (2008).

¹¹² Sup. Ct. R. 10(a).

¹¹³ Caminker, *supra* note 70, at 852.

¹¹⁴ Jud. Conf. of the U.S., *Report of the Federal Courts Study Committee* 124–25 (1990).

¹¹⁵ *Id.*

¹¹⁶ *Id.* But see Arthur D. Hellman, *Light on A Darkling Plain: Intercircuit Conflicts in the Perspective of Time and Experience*, 1998 Sup. Ct. Rev. 247, 253 (concluding that “a substantial majority of the unresolved conflicts would have no impact on the legal position of entities whose activities cross circuit lines”).

Thus, uniformity in federal law is a critical value served by vertical stare decisis.¹¹⁷

ii. Institutional Legitimacy and Equality

Another basic value served by vertical stare decisis is equality—the idea that like cases should be treated alike. In other words, if we think of the law as a function, where a set of inputs (the facts) generates a certain output (the decision of the case), the same inputs into the same function should generate the same output. Although the factual and procedural minutiae (inputs) of individual cases vary too widely to always treat like cases perfectly alike, following singular rules handed down by a national entity certainly promotes equality in treatment among cases. But treating similar cases differently (such that the same inputs yield differing outputs) seems to violate a basic moral intuition.¹¹⁸ This, in turn, can jeopardize the perceived legitimacy of the judiciary because judges are viewed as biased partisans rather than faithful adherents to the law established by elected representatives.¹¹⁹

iii. Accuracy

Adherence to vertical precedent may lead to more accurate outcomes.¹²⁰ This depends on the controversial assumption that the

¹¹⁷ But see generally Frost, *supra* note 111, at 1584–1606 (questioning the value of uniformity in federal law).

¹¹⁸ Frederick Schauer, *Precedent*, 39 *Stan. L. Rev.* 571, 596 (1987) (attributing moral intuitions about fairness to Kant’s categorical imperative, Rawls’s veil of ignorance, or The Golden Rule).

¹¹⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 866 (1992) (arguing that judicial legitimacy “depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation”). But see Frost, *supra* note 111, at 1590–91 (arguing that a variety of judicial interpretations does not pose a legal legitimacy problem).

¹²⁰ While the concept of a case having an “accurate outcome” is disputed by some, this Note accepts the premise that legal questions have correct answers. If constitutional or statutory texts are so indeterminate such that they cannot dictate correct answers, then stare decisis as a doctrine would be inoperative, as a judge’s words in a past opinion would likewise be too indeterminate to yield correct decisions. Nelson, *supra* note 88, at 79; Frank H. Easterbrook, *Statutes’ Domains*, 50 *U. Chi. L. Rev.* 533, 533 n.2 (1983). Moreover, the entire basis for judicial review depends on the judiciary’s ability to “say what the law is,” which presupposes a correct answer to a given legal question. *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803); Lawson, *supra* note 69, at 32. The modern Supreme Court implicitly accepts the concept of a “right answer” in law, as well. See *Kimble v. Marvel Ent., LLC*, 135 S. Ct. 2401, 2409 (2015) (“Respecting stare decisis means sticking to some *wrong* decisions.” (emphasis

Supreme Court is generally better at deciding cases than the lower courts.¹²¹ Of course, there is no way to empirically prove this, but there may be legitimate reasons to suppose the proposition is true.

First, the Supreme Court has a much lighter docket than the lower courts. In 2018, the average active circuit judge (excluding the Federal Circuit) participated in about 365 decisions.¹²² In 2016, that number was 499 decisions per active circuit judge.¹²³ By contrast, in the Supreme Court's October 2018 term, only 72 opinions were issued, which means that each Justice participated in 72 decisions (excluding recusals).¹²⁴ Although the Court also sorts through the several thousand petitions for certiorari filed annually and generally decides more difficult cases, the Justices undoubtedly can dedicate more time to their merits cases than circuit judges can.

Second, the Supreme Court benefits from extensive input on the merits of their cases.¹²⁵ The Court primarily grants certiorari when there is a split in opinion among the circuits.¹²⁶ Those splits are analyzed in detail by the opinions of the circuit courts and also tend to be addressed in academic literature. Thus, the Court is in a better position to examine the arguments of both sides in detail and can more readily determine the correct

added)); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (“[I]t is more important that the applicable rule of law be settled than that it be settled *right*.” (emphasis added)).

¹²¹ Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 *Geo. L.J.* 921, 939 (2016) (suggesting the possibility of such a theory).

¹²² U.S. Cts., *Case Participations in the U.S. Courts of Appeals on Cases Submitted on Briefs or Orally Argued During the 12-Month Periods Ending December 31, 2013 Through 2018* (Dec. 31, 2018), https://www.uscourts.gov/sites/default/files/fcms_na_appcp1231.2018.pdf [<https://perma.cc/ALM7-JQHF>]. There were 61,037 “case participations” by active circuit judges in 2018, excluding the Federal Circuit. A case participation is one judge’s participation in one case; thus, when a panel decides a case, there are 3 case participations. *Id.* Assuming that all 167 circuit judge seats are filled (again, excluding the Federal Circuit), that results in an average of about 365 cases per active circuit judge. Because not all 167 seats are filled at any given time, this number is an underestimate of an average judge’s caseload.

¹²³ *Id.* There were 83,316 case participations by active circuit judges in 2016, excluding the Federal Circuit.

¹²⁴ SCOTUSblog, *Opinions Authored by Each Justice* (June 28, 2019), https://www.scotusblog.com/wp-content/uploads/2019/07/StatPack_OT18-7_30_19-10.pdf [<https://perma.cc/TSB3-396M>].

¹²⁵ Randy J. Kozel, *The Scope of Precedent*, 113 *Mich. L. Rev.* 179, 228 (2014).

¹²⁶ Ryan Stephenson, *Federal Circuit Case Selection at the Supreme Court: An Empirical Analysis*, 102 *Geo. L.J.* 271, 274 (2013) (finding that about 70% of cases granted by the Court present conflicts between federal courts of appeals or state courts of last resort).

outcome.¹²⁷ Additionally, Supreme Court briefs are authored by highly experienced and specialized lawyers,¹²⁸ and they are often buttressed by outstanding amicus briefs. Run-of-the-mill court of appeals cases often lack the benefit of uniquely specialized lawyering or powerful amicus briefs.¹²⁹

Third, certain institutional differences may give the Supreme Court a slight edge in decision-making proficiency. First, nine Justices decide each case, rather than a panel of three at the court of appeals level, and assuming that more input is better, this might mildly improve Supreme Court outcomes.¹³⁰ Second, and more controversially, the Justices might simply be better judges.¹³¹ They are selected from among the most brilliant court of appeals judges, tend to have more experience as jurists, and are vetted through the most demanding nomination and confirmation procedures.

This evidence may loosely suggest that, in the event of a conflict, the Supreme Court's decisions are more accurate than those of the courts of appeals. But on the whole, the value of accuracy is not a strong justification for vertical stare decisis.

iv. Judicial Economy

When the Supreme Court decides an issue, that relieves lower courts of the obligation to decide it; they simply follow binding precedent. Deciding which argument is correct on the merits is a challenging task. It requires debate among the judges, extensive research into the constitutional or statutory context, and much more thorough briefing by

¹²⁷ See *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) (noting the value of percolation in aiding the Supreme Court's decision making).

¹²⁸ Joan Biskupic, Janet Roberts & John Shiffman, *At America's Court of Last Resort, A Handful of Lawyers Now Dominates the Docket*, Reuters (Dec. 8, 2014), <https://www.reuters.com/investigates/special-report/scotus/> [https://perma.cc/CT3E-ZAK9].

¹²⁹ Merritt E. McAlister, "Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals, 118 *Mich. L. Rev.* 533, 536 (2020) (noting that courts of appeals are often able to give more attention to "more complex and well-lawyered civil disputes" than, *inter alia*, *pro se* appeals).

¹³⁰ Caminker, *supra* note 70, at 847. If the circuit sits en banc, then more than nine judges usually decide the case. Thus, this argument may not have much force.

¹³¹ Of course, this assumption may very well not be true. As Justice Robert Jackson memorably quipped about the Supreme Court: "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

lawyers. Applying binding precedent to a set of facts, on the other hand, is much less resource-intensive.¹³²

Judicial economy is especially important for vertical precedent. The binding nature of Supreme Court precedent spares the high Court from having to correct individual decisions to align with its rule. Instead, it lays down a rule for lower courts to follow in all future cases. Because the Supreme Court's resources are far scarcer than those of the appellate courts, it is particularly important for the Court to establish general rules that govern thousands of cases rather than resolve individual cases itself.

2. Pragmatic Rationales for Horizontal Precedent at the Court of Appeals Level

While the values of uniformity, institutional legitimacy, accuracy, and judicial economy inform the rationale for why a lower court should adhere to the decisions of a higher court, similar values form the motivation for why a court should follow its own precedents. This Section discusses those justifications in the context of horizontal stare decisis and lays the groundwork for a comparison between vertical and horizontal precedent.

i. Uniformity

Horizontal stare decisis ensures that different panels answer the same legal question the same way because subsequent panels are bound by prior decisions. When one circuit panel follows the decision of another, that necessarily tends to foster uniform interpretations of the law within a circuit.

On the other hand, uniformity in federal law is also *disserved* by horizontal precedent. Circuits often interpret federal law differently from one another, and because of the binding nature of horizontal precedent, those conflicting decisions prevail until a circuit reverses its decision en banc or the Supreme Court addresses the question. The law of the circuit doctrine thus creates a rigidity that locks in disparate legal conclusions between circuits and complicates the goal of uniformity.¹³³ Therefore, horizontal precedent at the court of appeals level encourages *intra*-circuit uniformity but also promotes *inter*-circuit variation.

¹³² Randy J. Kozel, *Settled Versus Right: A Theory of Precedent* 37 (2017).

¹³³ Sassman, *supra* note 100, at 1431–32.

ii. Institutional Legitimacy and Equality

The values of legitimacy and equality, while served by vertical precedent, are especially important for horizontal stare decisis. At the vertical level, binding precedent ensures that cases in California are treated the same as cases in New York. While this is important, there are no major judicial legitimacy concerns when these cases come out differently. After all, the cases were decided by different courts separated by thousands of miles.

At the horizontal level, however, consistency in decision is particularly critical because the past and present cases are before the *same* court. If both cases present the same issue but are decided differently, observers will blame the difference on the panel of judges twisting the law, as there are no disparities in the court or geography. This presents a legitimacy problem for the judiciary, and equalizing outcomes via precedent helps alleviate that tension.¹³⁴

iii. Accuracy

Horizontal precedent *might* (but also might *not*) lead to more accurate outcomes. On the one hand, stare decisis encourages “judges to think about legal reasoning as a collective enterprise that spans generations.”¹³⁵ Assuming that the collective wisdom of one’s forebearers tends to be more accurate than one’s individual capacity as a judge, following the longstanding decisions of the past rather than one’s own intuitions may, on the whole, tend to generate more accurate outcomes.¹³⁶ Thus, accuracy may very well be served by following a long line of consistent decisions, which have been ratified over time by multiple judges.

On the other hand, stare decisis, by its very nature, requires “sticking to some wrong decisions.”¹³⁷ Following a past decision is justified by the maxim that it is “more important that the applicable rule of law be settled than that it be settled right.”¹³⁸ If the deciding court thinks that a precedent is still correct, then stare decisis does no work as a doctrine (except, perhaps, for serving a judicial economy function); the court will simply

¹³⁴ Schauer, *supra* note 118, at 600 (“If internal consistency strengthens external credibility, then minimizing internal inconsistency by standardizing decisions within a decisionmaking environment may generally strengthen that decisionmaking environment as an institution.”).

¹³⁵ Kozel, *supra* note 132, at 38.

¹³⁶ Cass R. Sunstein, *Burkean Minimalism*, 105 *Mich. L. Rev.* 353, 370–71 (2006).

¹³⁷ *Kimble v. Marvel Ent., LLC*, 135 S. Ct. 2401, 2409 (2015).

¹³⁸ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

employ the same logic as it did in the prior case to reach the same outcome. Stare decisis is only a dispositive judicial doctrine when the prior decision is considered incorrect by the deciding court.

Indeed, there may be good reasons to think a later court has decisional advantages over an earlier court. For example, fewer arguments are presented in a case of first impression, but as more courts and academic commentators consider the issue over time, better arguments may become evident.¹³⁹ Moreover, as a court gains practical experience with its precedent, it is better equipped to assess the benefits and drawbacks of the rule.¹⁴⁰ Additionally, new technologies such as corpus linguistics may enable judges to more accurately discern the original communicative intent of the Constitution or a statute than it previously could have.¹⁴¹ Thus, accuracy may in fact be *curtailed* by strict adherence to horizontal precedent.

iv. Reliance

Protection of the reliance expectations held by would-be litigants is a central rationale for why courts adhere to their past rulings. It fosters the stability needed to safeguard economic interests and also promotes fundamental rule-of-law values.¹⁴² When a court overrules its own precedent, that generates two distinct costs. First, parties affected by the new rule face the transition costs of adapting to and understanding the new legal rule.¹⁴³ Second, when courts frequently overturn precedent, they increase systemic costs based on the general uncertainty resulting from shifting rules.¹⁴⁴ For example, investment and risk-taking may generally be over-deterred as a result of the lack of clarity on the

¹³⁹ Nelson, *supra* note 88, at 57–58.

¹⁴⁰ *Id.* at 59–60; see also Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 *Cornell L. Rev.* 422, 423 (1988) (“Judges often decide cases on the basis of predictions about the effects of the legal rule. We can examine these effects . . . and improve on the treatment of the earlier case.”).

¹⁴¹ Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 *U. Pa. L. Rev.* 261, 296 (2019). But see Evan C. Zoldan, *Corpus Linguistics and the Dream of Objectivity*, 50 *Seton Hall L. Rev.* 401, 419 (2019) (addressing potential sources of inaccuracy in corpus linguistics analysis).

¹⁴² Randy J. Kozel, *Precedent and Reliance*, 62 *Emory L.J.* 1459, 1480 (2013).

¹⁴³ Nelson, *supra* note 88, at 63.

¹⁴⁴ *Id.*

durability of legal rules.¹⁴⁵ This suggests that reliance costs are minimized by strong adherence to past precedent.

Importantly, however, a stronger doctrine of stare decisis may nonetheless generate costs of its own. An overly-robust conception of precedent may motivate courts to confine more cases to their facts if the subsequent judge disagrees with the point of law established by the prior decision.¹⁴⁶ Alternatively, a court that disagrees with a prior decision might minimize the scope of that precedent by “draw[ing] fine distinctions that minimize the precedents’ impact. In the long run, those fine distinctions might produce more uncertainty than a clean break from precedent.”¹⁴⁷ Consider, for example, the Supreme Court’s decision in *Employment Division v. Smith*, which held that facially neutral, generally applicable laws that incidentally burden religion are subject to rational basis review under the Free Exercise Clause.¹⁴⁸ *Smith* is clearly unpopular with several members of the Supreme Court, and great uncertainty exists as to whether it will continue to be good law.¹⁴⁹ The Supreme Court has made a number of doctrinal exceptions to *Smith*’s general rule.¹⁵⁰ Moreover, lower federal courts have undercut *Smith*’s influence by narrowing the scope of “neutral” and “generally applicable” laws.¹⁵¹ For

¹⁴⁵ *Id.*

¹⁴⁶ Daniel B. Rice & Jack Boeglin, *Confining Cases to Their Facts*, 105 Va. L. Rev. 865, 893–94 (2019).

¹⁴⁷ Nelson, *supra* note 88, at 64–65.

¹⁴⁸ 494 U.S. 872, 878–79 (1990).

¹⁴⁹ *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, Thomas, Gorsuch, Kavanaugh, JJ., concurring in denial of certiorari); see also Eugene Volokh, *Will the Court Read the Free Exercise Clause as Often Mandating Religious Exemptions from Generally Applicable Laws?*, Reason (Jan. 22, 2019), <https://reason.com/2019/01/22/will-the-court-read-the-free-exercise-cl> [<https://perma.cc/Y6CN-FB54>] (noting that the statement denying certiorari in *Bremerton* suggested the four Justices’ willingness to overrule *Smith* and that Justice Breyer had echoed this sentiment in *City of Boerne v. Flores*, 521 U.S. 507 (1997)). Indeed, the Supreme Court has granted certiorari on the question of whether to overrule *Smith*. Petition for Writ of Certiorari, at i, *Fulton v. City of Philadelphia*, 140 S. Ct. 1104 (2020) (No. 19-123).

¹⁵⁰ See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1731 (2018) (holding that an administrative adjudication is not neutral within the meaning of *Smith* if the government officials evince animus to religion); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012) (holding that neutral and generally applicable anti-discrimination law does not apply to the employment of ministers); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (holding that a law is not neutral if it was enacted with the purpose of infringing on religious practices).

¹⁵¹ See generally Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 Neb. L. Rev. 1, 6–23 (2016) (explaining how courts have undermined *Smith* by classifying laws as either non-neutral or not generally applicable).

example, in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, the Third Circuit reasoned that a law is not “generally applicable” under *Smith* if it includes a secular exemption, meaning the government must then satisfy strict scrutiny to survive a Free Exercise challenge.¹⁵² This reasoning, while formally respecting *Smith*, nonetheless diminishes its scope considerably and thereby provides minimal stability to would-be litigants. If the Court employed a weaker version of stare decisis, then *Smith* may simply have been cleanly overruled and replaced with a more durable framework for Free Exercise claims, rather than being unpredictably chipped away.

Thus, while adherence to horizontal precedent as a general matter certainly stabilizes the law, a super-strong doctrine of stare decisis may force judges to engage in doctrinal workarounds or draw unprincipled factual distinctions, undermining the systemic certainty that stare decisis purports to protect.

There is a secondary concern about reliance interests in the context of the courts of appeals: to what extent do private actors rely on a circuit precedent? Reliance implies that the actor is *aware* of the precedent in the first place, and while this may be true at the Supreme Court level, it seems far from true at the court of appeals level. Although it is impossible to empirically establish the extent to which private actors are aware of circuit precedent, Congress’s legislative reactions are a useful proxy.¹⁵³ From 1990 to 1998, Congress responded to only 187 courts of appeals decisions, which suggests that it is generally unaware of how those courts are interpreting federal law.¹⁵⁴ Similarly, private litigants may not even be aware of the decisions rendered by lower courts.

Even if would-be litigants were aware of circuit decisions, the extent of their reliance on those rulings is unclear.¹⁵⁵ On the one hand, individuals operating exclusively within a federal circuit might fairly rely on a court of appeals decision, as they likely can only be sued in a district court within that circuit and are thus only bound by that circuit’s precedents. For example, individuals flirting with a violation of federal

¹⁵² 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.).

¹⁵³ See Barrett, *supra* note 71, at 343 (arguing that congressional acquiescence is not a valid basis for justifying statutory stare decisis in the courts of appeals because Congress is generally uninformed of the lower courts’ rulings).

¹⁵⁴ *Id.* at 332; Stefanie A. Lindquist & David A. Yalof, *Congressional Responses to Federal Circuit Court Decisions*, 85 *Judicature* 61, 64 (2001).

¹⁵⁵ Barrett, *supra* note 98, at 1074 (“Reliance on thick horizontal precedent is also relatively rare.”).

criminal law might rely on circuit precedent, as they can only be prosecuted in the district where that offense was committed.¹⁵⁶ Likewise, federal law enforcement agents operating within a single circuit reasonably rely on that circuit's precedents. The Supreme Court recently recognized this in *Davis v. United States*, in which it held that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the [Fourth Amendment's] exclusionary rule."¹⁵⁷ Additionally, qualified immunity jurisprudence illustrates the importance of circuit precedent to law enforcement. Qualified immunity shields a government official from civil damages liability unless the official violated "clearly established" law such that "a reasonable official would understand that what he is doing violates that right."¹⁵⁸ According to the federal courts of appeals, law can be "clearly established" for qualified immunity purposes by home circuit precedent,¹⁵⁹ which necessarily implies that reasonable officers are aware of local court of appeals decisions.

On the other hand, reliance on a single circuit's precedent may not be useful (in civil cases) where an entity operates in multiple circuits.¹⁶⁰ As a result of expansive personal jurisdiction law in the United States, a corporation can be sued in a jurisdiction where it "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."¹⁶¹ Furthermore, if the corporation is the only defendant (or if its co-defendants reside in the same state) then there is proper venue "in any judicial district in which

¹⁵⁶ Fed. R. Crim. P. 18.

¹⁵⁷ 564 U.S. 229, 232 (2011). Although even in this seemingly straightforward context, there may be disputes based on which circuit's law applies if the search occurred in a different place than the offense. See James Durling, Comment, The Intercircuit Exclusionary Rule, 128 Yale L.J. 231, 231 (2018).

¹⁵⁸ *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

¹⁵⁹ Tyler Finn, Note, Qualified Immunity Formalism: "Clearly Established Law" and the Right To Record Police Activity, 119 Colum. L. Rev. 445, 452 (2019). But see *Taylor v. Barkes*, 135 S. Ct. 2042, 2045 (2015) (per curiam) (suggesting that law might not be clearly established in the event of a circuit split).

¹⁶⁰ Todd J. Tiberi, Comment, Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procrastination?, 54 U. Pitt. L. Rev. 861, 885 (1993) (arguing that the need for inter-circuit uniformity dominates in an age where "[m]any corporations and individuals conduct their business nationwide (if not worldwide), and people travel and change address across circuit lines at will").

¹⁶¹ *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)) (internal quotation marks omitted). The State must also have a long-arm statute that reaches the conduct at issue.

[the] defendant is subject to the court's personal jurisdiction."¹⁶² For instance, Walmart, headquartered in Arkansas, cannot legitimately claim reliance on Eighth Circuit precedent for much of its operations. Because the company has extensive operations in every federal judicial district, it has purposefully availed itself of the benefits and protections of the laws in those states.¹⁶³ Accordingly, assuming the applicability of a long-arm statute, every federal district court will be able to exercise specific jurisdiction over Walmart for claims that arise out of contacts that Walmart has deliberately established with the forum state. Provided Walmart is the only defendant, or that its co-defendants reside in the forum, venue will be proper there. And furthermore, even if a corporation has expectations about where it will likely be sued, there is still a great deal of uncertainty about (1) whether the expected location is indeed where a future plaintiff will sue, and (2) if in an unexpected forum, whether the company will be able to successfully assert a personal jurisdiction defense. The lack of foreseeability with respect to jurisdiction makes reliance less valuable in the context of circuit precedents compared to Supreme Court precedents, especially for people or entities operating in multiple circuits.

Circuit precedents are also inherently less stable than Supreme Court precedents and thus cannot generate the same degree of rational reliance. This is because a court of appeals precedent can be overruled in *two* ways, not just one: by the circuit sitting en banc or by the Supreme Court.

The en banc circuit is more likely to overrule the circuit's precedent than the Supreme Court is likely to reject its own, for two reasons. First, circuit courts change in personnel more frequently, and as new judges bring different perspectives to the law, prior decisions are likely to face increased scrutiny.¹⁶⁴ Second, circuit courts have the benefit of persuasive authority from sister circuits, while the Supreme Court has no analogous tribunal issuing contrary decisions. Out-of-circuit decisions might very

¹⁶² 28 U.S.C. § 1391(c)(2) (2018).

¹⁶³ Store Finder, Walmart, <https://www.walmart.com/store/finder> [<https://perma.cc/D897-WS49>] (last visited Feb. 21, 2020).

¹⁶⁴ Christopher P. Banks, *The Politics of En Banc Review in the "Mini-Supreme Court"*, 13 *J.L. & Pol.* 377, 397–403 (1997) (describing the increased use of en banc proceedings to overturn D.C. Circuit precedents as the court's composition shifted during the Reagan era).

well persuade the deciding court that the reasoning of its precedent is flawed.¹⁶⁵

Additionally, a circuit precedent is less stable than a Supreme Court precedent because the high Court is more likely to overrule a circuit precedent than its own—again, for two reasons. First, the Supreme Court generally decides cases where several circuits are split, which means that a Supreme Court decision necessarily overrules at least one court of appeals decision.¹⁶⁶ Second, the Supreme Court does not have to consider *stare decisis* concerns when it evaluates a lower court’s precedent, unlike when it evaluates its own. Thus, if the Court thinks a circuit precedent is wrong, it will simply overturn it, but if it thinks its own precedent is wrong, there must be a “special justification” to overrule it.¹⁶⁷

Circuit precedents which are not overruled are still less reliable because their reach is more likely to be cabined than a Supreme Court decision. One panel’s decision is binding on subsequent panels. But if the second panel, which may be made up of an entirely different set of judges than the first, would have decided the legal question differently were it a matter of first impression, it may limit the precedent’s scope.¹⁶⁸ For example, a subsequent panel can confine the prior case to its facts and refuse to extend the principle of that decision any further.¹⁶⁹ In a dissent, D.C. Circuit Judge Malcolm Wilkey made pointedly clear a court of appeals judge’s ability to do this kind of limiting: “I hope that this as a precedent is confined to its facts: i.e., the precise stipulation entered into here, a defendant named Essex, a lawyer named Goodbread, the offense of heroin possession, etc.”¹⁷⁰ Or, as discussed in the Free Exercise context, the panel might create unwieldy doctrinal exceptions to the precedent.¹⁷¹ This potential for evasion of precedent is especially likely in large circuits,

¹⁶⁵ See *United States v. Rodgers*, 466 U.S. 475, 484 (1984) (concluding that respondent’s reliance on circuit precedent was unavailing because of conflicting decisions from other courts of appeals).

¹⁶⁶ See Stephenson, *supra* note 126, at 274.

¹⁶⁷ *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

¹⁶⁸ Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. Chi. L. Rev. 541, 545–46 (1989) (“[I]t would be naive not to recognize that there *are* cases in which the relevant legal materials could support more than one result. In that situation, the outcome may well depend on the identity of the judges assigned to the case.”).

¹⁶⁹ See *Bhandari v. First Nat’l Bank of Com.*, 829 F.2d 1343, 1352 (5th Cir. 1987) (Higginbotham, J., concurring).

¹⁷⁰ *United States v. Essex*, 734 F.2d 832, 847 n.1 (D.C. Cir. 1984) (Wilkey, J., dissenting).

¹⁷¹ See *supra* notes 147–52.

where there are more judges, more cases, and more opportunities for divergence in perspectives on the proper disposition of a case.¹⁷² Thus, while Supreme Court-level litigants can reasonably speculate as to how the same Justices would approach similar cases to those they have recently addressed, circuit-level litigants, unaware of who will decide their case, cannot anticipate the extent to which a past precedent will be broadened or limited, even if it must be formally respected.

Thus, while reliance interests may have some value for horizontal stare decisis at the court of appeals level, their justificatory force is far more muted than at the Supreme Court.

v. Judicial Economy

Following horizontal precedent promotes judicial economy at the court of appeals level. As with vertical precedent, it spares litigants and judges from having to regularly re-evaluate the merits of any particular argument. Once a question is decided in one case, it is generally settled for future cases, and litigants can focus on developing other, more novel arguments instead. Although the practices of undercutting rather than overruling precedent or confining a case to its facts may impose increased judicial costs,¹⁷³ horizontal stare decisis undoubtedly enhances judicial economy.

* * *

With this description of the values served by vertical and horizontal stare decisis in hand, the next Part articulates a framework for applying a general presumption in favor of overruling undermined circuit precedent.

IV. A PROPOSED APPROACH FOR CONFLICTS OF PRECEDENT

A. Applicability of the Presumption

It is first worth considering when a decision is undermined-but-not-overruled, thus triggering the approach proposed in this Part. Recall the relevant sequence of events:

Time 1: The circuit court decides a case.

¹⁷² Hellman, *supra* note 168, at 546.

¹⁷³ See *supra* notes 147–52.

Time 2: The Supreme Court decides another case, which undermines but does not directly overrule the circuit court's precedent at Time 1.

Time 3: The circuit court hears a case that is squarely governed by its Time 1 precedent, but it must consider whether to overrule that decision in light of the Supreme Court's ruling at Time 2.

A few conditions are required. First, the Time 1 circuit precedent must be directly on-point in the Time 3 case. Otherwise, if a Time 1 circuit court precedent and a Time 2 Supreme Court precedent are both somewhat on-point (although yielding different outcomes), the lower court should apply the higher court precedent. Returning to the modified *Flood v. Kuhn* example, if the circuit court at Time 1 has refused to apply the antitrust laws to baseball and the Supreme Court at Time 2 applies them to boxing, then when the circuit court hears a football case at Time 3, it should follow the Supreme Court's lead and apply the antitrust laws to football. Although both are persuasive authority, the circuit court precedent is no more on-point than the Supreme Court precedent, so the higher precedent controls.

Second, the Supreme Court's precedent must be such that, if the circuit court were deciding the case as a matter of first impression, it would follow the Supreme Court's lead and decide the case contrary to how the prior circuit panel decided it. If this were not the case, then the Supreme Court's precedent does not sufficiently bear on the question presented. In other words, imagine that the circuit court did not decide a case at Time 1. If the circuit court at Time 3 would not feel compelled to follow the Supreme Court's decision at Time 2 in that situation, then that vertical precedent simply does not carry enough weight to justify overruling a circuit precedent.

Third, this approach is unhelpful if the Supreme Court at Time 2 interpreted the same governing law in the context of the same subject matter as the circuit court at Time 3. In that situation, the vertical precedent controls the case, and the contrary horizontal precedent has already been overruled.

Supreme Court precedent would not affect the case as a matter of first impression in the circuit.

Supreme Court precedent would decide the case as a matter of first impression, but does not directly control the case. *Presumption applies.*

Supreme Court precedent directly controls the case.

B. Deciding Cases in the Context of Conflicting Precedent

If the above conditions are all met, then a court of appeals panel should apply a general presumption in favor of overruling its own precedent to align its doctrine with that of the Supreme Court's recent decision. There may be specific cases, however, in which the presumption is strengthened or weakened based on the legal context.

1. Background Presumption in Favor of Vertical Precedent

Based on Section III.B's discussion of the pragmatic values served by adherence to precedent, I conclude that the justifications for vertical stare decisis outweigh those for horizontal stare decisis at the court of appeals level.¹⁷⁴ Thus, panels of circuit judges should generally treat Supreme Court precedent broadly and be more willing to overrule their own. This would produce a variety of benefits to the practical values articulated in Section III.B: uniformity, accuracy, judicial economy, institutional legitimacy, and reliance.

First, if courts of appeals recalibrate their doctrine to align with an intervening Supreme Court decision, uniformity is well-served in two ways: doctrinally and geographically. Doctrinal consistency is promoted because the Supreme Court's decision will be the general rule, with fewer exceptions associated with it. For example, if the Supreme Court holds that the antitrust laws apply to boxing, and if a circuit court reverses its contrary baseball precedent as a result, then the Supreme Court's rule promotes uniformity within athletics at large. Geographic consistency is also enhanced when all circuits harmonize their own case law with the Supreme Court decision. For instance, if the First Circuit had previously held that the antitrust laws *do* apply to baseball, and the Second Circuit held that the antitrust laws *do not* apply to baseball, then a greater willingness to overrule circuit precedent will bring the First and Second Circuits into congruence. This minimizes the potential for circuit splits, which means the Supreme Court will not need to weigh in on legal questions that are peripheral to those which it has already decided.

Moreover, a presumption in favor of overruling circuit precedent gives the Supreme Court, rather than the lower courts, greater control over the content of federal law, which enhances uniformity. If a circuit court preserves its own precedents unless directly overruled by the Supreme

¹⁷⁴ See *supra* Section III.B.

Court, then the scope of Supreme Court holdings is necessarily narrow. On the other hand, a presumption in favor of harmonizing circuit doctrine with that of the Supreme Court gives the high Court the ability to bring broader reaches of federal law into congruity. If the Supreme Court writes a broad opinion, the implication is that courts of appeals will adapt that reasoning to similar (even though not identical) situations.¹⁷⁵ On the other hand, the Supreme Court can intentionally narrow the scope of its holding if it so chooses by saying that its holding or reasoning does not apply to certain cases.¹⁷⁶ Ultimately, by placing control over the extent of Supreme Court decisions in the hands of the Court itself, it is able to perform “its constitutional role in this judicial hierarchy” in supervising the content of federal law generally.¹⁷⁷

Second, accuracy in conclusion may very well be advanced by a stronger presumption. As discussed *supra*, it may be true as a general matter that the Supreme Court answers legal questions more accurately than the courts of appeals.¹⁷⁸ Thus, a general presumption in favor of more deference to Supreme Court precedent might generate more accurate interpretations of federal law. Even if a Supreme Court decision is wrong, however, accuracy is not necessarily diminished by the presumption. First, the relevant court of appeals precedent might not itself be correct—both the Supreme Court and the circuit court could be wrong. The presumption at least allows the court of appeals to reconsider the question presented. Second, a stronger presumption in favor of following a non-binding Supreme Court decision does not mean the lower court *must* follow it; the court of appeals might “narrow” or “distinguish” the Supreme Court precedent—interpreting it not to read on the factual subject matter or law at hand.¹⁷⁹ The presumption in favor of following

¹⁷⁵ See Grove, *supra* note 99, at 59 (advocating for this approach); Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1178–80 (1989) (same).

¹⁷⁶ See, e.g., *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 n.3 (2017).

¹⁷⁷ Grove, *supra* note 99, at 59 (emphasis omitted). But see John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 Harv. L. Rev. 2003, 2008 (2009) (doubting that a constitutionally-favored value (federalism) is a legitimate basis for a court to justify its decision).

¹⁷⁸ See *supra* notes 122–31.

¹⁷⁹ Re, *supra* note 121, at 927–28. Professor Re labels the practice “narrowing” when a higher court precedent is best read to apply, but a court declines to do so; “distinguishing” is when a court does not apply a higher court precedent that is best read *not* to apply. See, e.g., *PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 820 (6th Cir. 1997) (declining to

Supreme Court cases would require a lower court to have an especially high degree of confidence that the Supreme Court decision is wrong, which then might make the contrary circuit decision very likely to be accurate. Third, even if overruling circuit precedent creates an incorrect result in some cases, a presumption in favor of overruling may still lead to more accurate outcomes in the majority of situations.

Third, judicial economy would be well-served by a stronger presumption in favor of Supreme Court precedent. If courts of appeals have more freedom to clean up inconsistent circuit doctrine following a Supreme Court decision, then that minimizes the need for future intervention by the high Court. The Supreme Court can only review a select few cases, and the Court wastes its scarce resources by cleaning up vestiges of old circuit doctrine that do not accord with its more recent decisions.¹⁸⁰ And while the law of the circuit doctrine generally promotes judicial economy by barring re-litigation of the same issues, this presumption would only open a small fraction of circuit precedents up for fresh review and thus would not seriously impair this value.

Fourth, the institutional legitimacy of the judiciary is not undermined by such a presumption. Any difference in outcomes between litigants is solely because of an exogenous change in the underlying law applied by the court, not because of a factor attributable to the court itself. For example, a Time 3 litigant who received an inferior outcome to a similarly situated Time 1 litigant cannot blame the court if Congress amended the applicable law at Time 2. Likewise, a Time 3 litigant cannot claim she was treated unfairly relative to a Time 1 litigant when the court of appeals lacked the benefit of the Supreme Court's Time 2 precedent. In both scenarios, the Time 2 event changed the underlying rules of decision governing the Time 1 and Time 3 cases, and thus, a later-in-time litigant cannot complain that the court has behaved opportunistically to disfavor her claim.

Finally, reliance interests will generally be advanced, rather than inhibited, by a stronger willingness to break with circuit precedent in favor of Supreme Court precedent. As discussed above, the extent to

apply the Supreme Court's theory of market power for illegal tying cases from *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 475–76 (1992), except in certain, rare cases).

¹⁸⁰ *Taylor v. Grubbs*, 930 F.3d 611, 621 (4th Cir. 2019) (Richardson, J., dissenting) (“If we continued to be bound by circuit precedent until the Supreme Court reached a different outcome on essentially the same facts, we would keep on multiplying our errors for a long time, sometimes for decades.”).

which individuals and entities rely on circuit precedent is questionable.¹⁸¹ In certain contexts, such as Fourth Amendment-related activity by law enforcement, reliance on circuit precedent will be strong.¹⁸² But in other contexts, especially for individuals and entities that operate in multiple circuits, it is difficult to foresee which circuit's precedents will ultimately govern their general activity. A firm headquartered in California would be well-advised to pay attention to Ninth Circuit precedent, but if it distributes products into the stream of commerce in other circuits, it may be subject to litigation there and bound by entirely different appellate precedent.

Moreover, competing reliance interests are at stake when the Supreme Court and a court of appeals have both spoken to similar issues. As a general matter, Supreme Court decisions are more frequently and legitimately relied upon because they affect all American litigants, are less likely to be overturned, and receive more attention. On the other hand, they might be less directly applicable to any given situation due to the lower volume of its decisions.

Consider, yet again, the modified *Flood v. Kuhn* example: an older court of appeals precedent holding that the antitrust laws do not apply to baseball, and a more recent Supreme Court decision holding that the antitrust laws do apply to boxing. Which precedent is more heavily relied upon? Boxing clubs, of course, will rely on the Supreme Court precedent; it directly controls. Football teams are far more likely to rely on the Supreme Court precedent, as well; the circuit has not spoken to the applicability of the antitrust laws to football, and the Supreme Court's boxing opinion is strong authority for reaching the same outcome in the football context. For baseball teams, it's a closer call. Circuit precedent directly insulates them from the antitrust laws for lawsuits brought *in that circuit*. But other circuits without a precedent on baseball will likely rule against them in the wake of the Supreme Court's boxing decision. Moreover, even within the relevant circuit, a presumption in favor of the on-point court of appeals precedent may cause *more* uncertainty. If the next antitrust challenge to a baseball team only reaches a panel of circuit judges, then the status quo might be preserved, but the panel might also confine the prior baseball precedent to its facts or create a doctrinal exception that effectively nullifies the precedent. Moreover, the baseball

¹⁸¹ See supra notes 153–72.

¹⁸² See *Davis v. United States*, 564 U.S. 229, 232 (2011).

team might question whether the court of appeals will review that decision en banc, in which case it might formally overrule the baseball precedent. It may also question whether the Supreme Court will grant certiorari on a baseball case and issue a decision consistent with the boxing case. On the other hand, if panels are urged to align circuit doctrine with persuasive Supreme Court authority, then the baseball team can fairly expect (to its disappointment) that upon facing its next antitrust challenge, the court of appeals panel will overrule its precedent.

Litigants in this situation receive fair notice if the courts of appeals openly acknowledge a presumption in favor of following intervening Supreme Court decisions. A high Court ruling on a related issue will provide notice that the circuit precedent is no longer on solid ground. Given that Supreme Court decisions receive far more attention, apply to courts throughout the entire nation, and are inherently more durable than court of appeals decisions, this should generally protect, rather than hinder, reliance interests.

The values of uniformity, accuracy, judicial economy, institutional legitimacy, and reliance all are well-served by a presumption in favor of overruling undermined circuit precedent, and thus, such a presumption would be prudent for federal courts of appeals to employ.

* * *

Undoubtedly, there are costs associated with granting panels the power to overrule circuit precedents. The central benefit of the law of the circuit doctrine is that all active judges on the court of appeals weigh in before a precedent is overruled, which provides both stability to the circuit precedent and prevents a randomly constituted panel from overturning settled issues of law. Thus, as a realistic matter, circuit judges may be unlikely to relinquish their vote in upending circuit doctrine to a panel simply because the Supreme Court addressed a related issue.

Perhaps one alternative, which might win broader acceptance from circuit judges, would be to establish a more nuanced presumption that differentiates based on the degree of attenuation between the Supreme Court's holding and the circuit precedent. The modified *Flood v. Kuhn* hypothetical, for instance, might be too easy of a case—it seems obvious that the Supreme Court's reasoning from a boxing antitrust case ought to also carry over to a baseball antitrust case. But in some cases, the gulf between the high Court and lower court decision will be wider.

Consider, for example, the Fourth Circuit's decision in *Taylor v. Grubbs*.¹⁸³ At issue was the status of circuit precedent regarding prisoner lawsuits in the wake of an intervening Supreme Court decision. Indigent prisoners may proceed *in forma pauperis* in federal court, meaning that they need not prepay court fees when filing a complaint or appeal.¹⁸⁴ But in the Prison Litigation Reform Act of 1995 ("PLRA"), Congress created a "three-strikes rule," which provides that a prisoner may not bring a civil action or an appeal *in forma pauperis* if he has had three prior actions each "dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted."¹⁸⁵ In *Taylor*, the issue was whether a prisoner could proceed *in forma pauperis* in appealing a district court's dismissal of a third qualifying complaint for failure to state a claim.¹⁸⁶ In other words, the question was whether the district court's order was the third strike itself (and thus could not be appealed *in forma pauperis*), or whether it did not become a third strike until the dismissal had been affirmed by the appellate court (and thus could be appealed *in forma pauperis*).

The Fourth Circuit had previously addressed this exact issue in *Henslee v. Keller* and held that a prisoner could appeal *in forma pauperis* a third dismissal for failure to state a claim.¹⁸⁷ But a few years later, the Supreme Court held in *Coleman v. Tollefson* that a prisoner whose third dismissed complaint was pending on appeal could not file *additional* actions *in forma pauperis*.¹⁸⁸ The Court's reasoning was grounded in the PLRA's language, which treats a *dismissal* itself as a strike, rather than an affirmance of a dismissal.¹⁸⁹ *Coleman* thus cast serious doubt on (and perhaps even rejected) *Henslee*'s logic. But the Fourth Circuit panel in *Taylor* retained *Henslee*.¹⁹⁰ A fundamental concern in *Henslee* was that treating the dismissal as the third strike would effectively insulate that decision from appellate review, and the *Taylor* panel reasoned that this argument remained valid after *Coleman*.¹⁹¹ Moreover, the Supreme Court in *Coleman* expressly treated the issue in *Henslee*—whether a plaintiff

¹⁸³ 930 F.3d 611 (4th Cir. 2019).

¹⁸⁴ 28 U.S.C. § 1915(a)(1) (2018).

¹⁸⁵ *Id.* § 1915(g).

¹⁸⁶ *Taylor*, 930 F.3d at 615.

¹⁸⁷ 681 F.3d 538, 543–44 (4th Cir. 2012).

¹⁸⁸ 135 S. Ct. 1759, 1763, 1765 (2015).

¹⁸⁹ *Id.* at 1763–64.

¹⁹⁰ *Taylor*, 930 F.3d at 619.

¹⁹¹ *Id.* at 619–20.

could appeal the dismissal of the third action itself *in forma pauperis*—as a separate question and declined to weigh in on it.¹⁹²

Under the general presumption this Note articulates, the *Taylor* panel should have overruled *Henslee* in light of its inconsistency with *Coleman*'s interpretation of the PLRA.¹⁹³ But *Taylor* is undoubtedly a difficult case from the standpoint of dueling precedents, and it illustrates why courts of appeals might wish to tailor the scope of their presumption to the similarity of the issues decided or the proximity between the circuit precedent's reasoning and the Supreme Court's decision.¹⁹⁴ When issues are further distanced, the court should still apply a presumption in favor of overruling, but perhaps a circuit wishes to at least reserve the question for consideration by all active circuit judges. For instance, one might imagine a spectrum of the degree of fit between the circuit and Supreme Court precedent: category 1 might involve a fairly clear contradiction by the Supreme Court, category 2 might involve a precedent merely called into question after an intervening Supreme Court decision. The *Flood v. Kuhn* hypothetical might fall into category 1, while the Fourth Circuit's *Henslee* precedent might fit into category 2. Courts of appeals might also wish to categorize circuit precedents by how often they recur in the court's opinions. Decisions that are infrequently cited might have less purchase among the judges and may be less relied upon by litigants; thus, these might be category 1 decisions. On the other hand, judges might wish to retain more control over precedents that are commonly cited (e.g., a pleading standard precedent); these precedents might fall into category 2.¹⁹⁵

One approach a circuit could follow is to allow panels to apply a presumption in favor of overruling circuit precedent in these clearer category 1 cases, but that in category 2 cases, all active circuit judges should participate in the decision to overrule. One way to do this—without resorting to the rare, costly, and generally disfavored en banc proceeding—is for a circuit to adopt the D.C. Circuit's *Irons* footnote procedure for category 2 cases,¹⁹⁶ where the judges still apply a

¹⁹² *Coleman*, 135 S. Ct. at 1764–65.

¹⁹³ Accord *Taylor*, 930 F.3d at 622 (Richardson, J., dissenting).

¹⁹⁴ Accord *Gahagan v. USCIS*, 911 F.3d 298, 303 (5th Cir. 2018) (“The overriding consideration is the similarity of the issues decided.”).

¹⁹⁵ Indeed, the fact that a court of appeals decision has been applied faithfully by many judges over a lengthy period of time (e.g., no confinement to facts or doctrinal workarounds) may be evidence that the decision is correct.

¹⁹⁶ See *supra* notes 59–62.

presumption in favor of overruling undermined circuit precedent. This approach has three primary benefits: (1) the full circuit participates in aligning its doctrine with that of the Supreme Court in more difficult cases, rather than a randomly constituted panel, (2) reconsideration of the circuit precedent will be automatic rather than upon consent of the active circuit judges, and (3) the circuit precedent can be easily overruled without expending the significant judicial resources required for en banc review. Notably, however, if a circuit accepts the premise that there should be a background presumption in favor of panels overruling circuit precedent in favor of Supreme Court precedent, it may not want to necessitate unanimity, as the D.C. Circuit requires for decisions overruled in this manner.¹⁹⁷ A lower threshold would enable the presumption in favor of high Court rulings to operate more effectively and would minimize the need to resort to lengthy and costly en banc proceedings.

Circuits have the ability to tailor the nuances of the background presumption in any way they want: allowing a panel to apply the presumption in both category 1 and 2 cases, using an *Irons* footnote procedure for category 2 cases, or something else altogether. Of course, whether a panel classifies a past precedent as category 1 or 2 will involve discretion, and such an approach may pose a similar line-drawing problem to that which circuits already face in analyzing the viability of their undermined-but-not-overruled precedent. But the purpose of this Note is not to bring absolute clarity to an inherently vague task. Instead, this Note argues that circuits ought to at least adopt a general presumption which favors aligning circuit doctrine with that of the Supreme Court and that three-judge panels ought to be regularly entrusted to exercise this presumption and overrule undermined circuit precedent without resort to en banc proceedings. If a panel has to decide whether it is empowered to overrule an undermined decision, rather than whether the Supreme Court itself overruled a decision, then the line-drawing battle is at least happening in the proper arena, and on net, more undermined circuit precedents will give way to intervening Supreme Court decisions.

¹⁹⁷ Comment, Appellate Procedure—Force of Circuit Precedent—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, 725–26 (2003).

2. *Special Cases*

Stare decisis is a judicial policy that is grounded in prudential concerns, and thus, a court ought to vary its application of stare decisis (and thus its application of the background principle laid out above) in light of special cases. While courts may wish to tailor the presumption based on the unique degree of fit between the high Court and lower court precedents, there are also certain paradigmatic scenarios that will call for a strengthened or weakened presumption.

i. Stronger Presumption: the Intervening Supreme Court Decision Overruled the Court's Own Precedent

Imagine that at Time 0, the Supreme Court concludes that the antitrust laws do not apply to boxing. Relying on this precedent at Time 1, the court of appeals holds that the antitrust laws do not apply to baseball. At Time 2, the Supreme Court reverses its Time 0 precedent and holds that the antitrust laws *do* apply to boxing. At Time 3, when the court of appeals called upon to review its baseball precedent, the panel should apply an even stronger presumption in favor of overruling.

Indeed, this was a situation recently faced by the Seventh Circuit in *FTC v. Credit Bureau Center, LLC*.¹⁹⁸ The first relevant precedent is *Porter v. Warner Holding Co.*, where the Supreme Court held that district courts have authority to order an implied equitable remedy “[u]nless a statute in so many words, or by a necessary and inescapable inference” prohibits that remedy.¹⁹⁹ The reasoning of *Porter* eventually led the Seventh Circuit to conclude in *FTC v. Amy Travel Service, Inc.* that Section 13(b) of the Federal Trade Commission Act (“FTCA”) permits a district court to order restitution following a statutory violation,²⁰⁰ even though the statute only authorizes temporary restraining orders, preliminary injunctions, and permanent injunctions.²⁰¹

Later, however, the Supreme Court reversed course on its implied equitable relief jurisprudence. In *Meghrig v. KFC Western, Inc.*, the Court

¹⁹⁸ 937 F.3d 764, 767 (7th Cir. 2019), cert. granted, No. 19-825, 2020 WL 3865251 (U.S. July 9, 2020).

¹⁹⁹ 328 U.S. 395, 398 (1946). The Court reiterated this holding fourteen years later in *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

²⁰⁰ *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571–72 (7th Cir. 1989). Although *Amy Travel* did not explicitly ground its reasoning in *Porter*, it relied on *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112–13 (9th Cir. 1982), which justified its holding based on *Porter*.

²⁰¹ 15 U.S.C. § 53(b) (2018).

held that “where Congress has provided elaborate enforcement provisions for remedying the violation of a federal statute . . . it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under the statute.”²⁰² Thus, after *Meghrig*, the existence of a “comprehensive and reticulated [statutory] scheme” limits a district court’s ability to order equitable relief not expressly authorized by the statute.²⁰³ The basis upon which *Amy Travel* had been decided was significantly eroded after *Meghrig*, as the FTCA indeed has an intricate remedial scheme that expressly authorizes certain types of equitable relief, but not restitution. On that basis, a Seventh Circuit panel overruled *Amy Travel* in *Credit Bureau Center*.²⁰⁴

A stronger background presumption in favor of overruling circuit precedent is appropriate in these cases because when the Supreme Court overrules (or cabins) its own decisions, the effect should be that those decisions lose their force. Otherwise, the Supreme Court can only effectively overrule the decision if it continues to grant certiorari on cases that peripherally touch on the decision it has already overruled. For example, if the Supreme Court at Time 2 overrules its Time 0 boxing precedent, then it should fairly expect that any lower court decisions that grounded their analysis in the Time 0 precedent should be defunct. If not, it will also have to expend its scarce resources reversing numerous Time 1 lower court decisions that are related to boxing, such as baseball precedents. And if the Court would prefer not to disturb these lower court holdings, it can make clear that its Time 2 decision is limited to its facts.

Strengthening the background presumption for these types of cases is justified by the value of judicial economy—sparing the Supreme Court, after a formal overruling, from having to reconsider substantially similar cases to overrule the *effects* of its prior decision. And importantly, reliance interests are protected by a stronger presumption in these cases because when parties learn that the Supreme Court has reversed the underpinnings of the on-point circuit precedent, they can reasonably expect that the circuit precedent no longer governs.

²⁰² 516 U.S. 479, 487–88 (1996) (quoting *Middlesex Cty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 14 (1981)) (internal quotation marks omitted).

²⁰³ *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1200 (D.C. Cir. 2005) (quoting *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002)) (internal quotation marks omitted).

²⁰⁴ *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 783 (7th Cir. 2019).

ii. Weaker (or no) Presumption: There Is Extensive Reliance on the Relevant Circuit Precedent

A fundamental function of horizontal precedent is to protect reliance interests. This Note has questioned the extent to which individuals actually and legitimately rely on court of appeals precedent,²⁰⁵ but in certain contexts, circuit precedent undoubtedly does generate strong expectations that require special treatment.

Perhaps the most important example of this is the Fourth Amendment's Exclusionary Rule.²⁰⁶ Circuit precedent is especially likely to influence the decisions of federal law enforcement because officers operate solely within a local jurisdiction, and their Fourth Amendment-related actions are frequently litigated in the local federal court. Thus, the court of appeals is the only federal court (besides the Supreme Court) whose decisions establish rules that impact their day-to-day work. Accordingly, as the Supreme Court recognized in *Davis v. United States*, “[r]esponsible law enforcement officers will take care to learn what is required of them under Fourth Amendment precedent,” which includes circuit decisions.²⁰⁷ And as the Supreme Court has reiterated in its qualified immunity jurisprudence, law enforcement officers are expected to be aware of and comply with on-point circuit precedents if they are to be insulated from private damages actions.²⁰⁸

A presumption in favor of overruling appellate Fourth Amendment precedents when the Supreme Court issues an intervening decision would excessively impair law enforcement reliance interests. Given the high volume of Fourth Amendment decisions at the Supreme Court, lower court precedents would frequently be called into question, thereby disabling law enforcement from depending on them as they so often must do. While the good-faith exception from *Davis*—which allows admission of evidence gained by an officer lawfully relying on then-binding appellate precedent—protects law enforcement's reliance interests in a particular case, it does not mitigate the systemic costs imposed by

²⁰⁵ See *supra* notes 153–72.

²⁰⁶ *Oliva v. Blatt, Hasenmiller, Leibsker & Moore LLC*, 864 F.3d 492, 500 (7th Cir. 2017) (en banc) (“We are aware of one area in the law where reliance on controlling circuit precedent has been given special treatment: an exception from the exclusionary rule under the Fourth Amendment.”).

²⁰⁷ 564 U.S. 229, 241 (2011) (quoting *Hudson v. Michigan*, 547 U.S. 586, 599 (2006)) (internal quotation marks omitted).

²⁰⁸ See *Hope v. Pelzer*, 536 U.S. 730, 745–46 (2002).

overruling precedent.²⁰⁹ Given the degree of reliance in the Fourth Amendment context, these systemic costs would be especially exacting; thus, a weakened presumption, or none at all, is warranted.

Reliance is also an especially important value in contract and property law, as individuals have invested time and resources based on their expectation of the governing law.²¹⁰ Thus, *stare decisis* is particularly justified in these cases. Although state law primarily informs contract and property rules, federal law sometimes is applicable. For example, the rights and obligations of the federal government under its contracts are governed by federal common law rather than state law.²¹¹ In the property domain, copyrights and patents are governed by federal law.²¹² Indeed, in *Kimble v. Marvel Entertainment, LLC*—a Supreme Court case which considered the continued viability of a precedent dealing with both licensing arrangements (contracts) and patents (property)—the litigants disputed the extent of reliance which the prior precedent had generated.²¹³

Importantly, however, not all decisions overruling precedent will upset reliance expectations. If a court concludes that a certain contractual arrangement is legal which was previously illegal, that unsettles no one's reliance interests because no enforceable contract would have been formed on that basis. This was the case in *Kimble*. The prior precedent, *Brulotte v. Thys Co.*, held that a patent licensing arrangement could not allow for the payment of royalties after the patent expires.²¹⁴ Thus, parties to patent licensing contracts presumably did not agree to the payment of royalties after the patent's expiration date and instead aggregated all royalty payments before that time.²¹⁵ If this precedent had been overruled, no contracts would be disrupted; parties would simply reconsider how to structure licensing arrangements going forward. On the other hand, if a court overrules a precedent and thereby declares a certain kind of contract unenforceable, that decision voids a great number of contracts and thus seriously unsettles reliance expectations. If the inverse of *Brulotte* had been the precedent—patent licensing arrangements *can* provide for royalty payments after the patent's expiration—and that decision had

²⁰⁹ See Nelson, *supra* note 88, at 63.

²¹⁰ *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

²¹¹ *Clearfield Tr. Co. v. United States*, 318 U.S. 363, 366–67 (1943).

²¹² U.S. Const. art. I, § 8, cl. 8.

²¹³ 135 S. Ct. 2401, 2410 (2015).

²¹⁴ 379 U.S. 29, 30 (1964).

²¹⁵ Reply Brief for Petitioners at 16–18, *Kimble*, 135 S. Ct. 2401 (No. 13-720).

been overruled, then a great deal of licensing contracts would be significantly impaired.

Thus, only when (1) a subject matter that implicates reliance interests at the court of appeals level (e.g. Fourth Amendment, contract, or property law) is in play, and (2) the decision itself unsettles reliance interests should a court apply a weaker presumption, or none at all.

iii. Relevant Guidance: Sister Circuits Have Weighed in on the Application of Intervening Supreme Court Precedent to the Question Presented

The interpretations of intervening Supreme Court decisions by sister circuits should be an important factor when a court of appeals is presented with this type of case. Consider, once more, if the First and Second Circuits both have a Time 1 precedent concluding that the antitrust laws do not apply to baseball, and the Supreme Court holds at Time 2 that the antitrust laws do apply to boxing. If the First Circuit, at Time 2 ½, holds that the antitrust laws now apply to baseball, then the Second Circuit at Time 3 should apply an even stronger presumption in favor of following suit. Likewise, if the Third Circuit, which had no prior on-point precedent, holds that the antitrust laws apply to baseball at Time 2 ½, that should also militate in favor of a stronger presumption for the Second Circuit at Time 3.

The Fifth Circuit found the decisions of its sister circuits to be a reliable basis for reconsidering its own precedent in *Gahagan v. U.S. Citizenship & Immigration Services*.²¹⁶ The court considered whether an attorney appearing *pro se* can recover attorney's fees for an action brought under the Freedom of Information Act.²¹⁷ Under the Fifth Circuit's precedent in *Cazalas v. U.S. Department of Justice*, the answer to that question was "yes."²¹⁸ After *Cazalas*, the Supreme Court decided *Kay v. Ehrler*, which held that an attorney appearing *pro se* cannot recover attorney's fees in a civil rights case under 42 U.S.C. § 1988(b).²¹⁹ The question presented in *Gahagan*, then, was whether the Supreme Court's rule carried over from the civil rights context to FOIA. In abandoning circuit precedent in favor of *Kay*, the Fifth Circuit was especially persuaded by the fact that "all of [its] sister circuits ha[d] heeded [*Kay*'s] instructions," and that if it had

²¹⁶ 911 F.3d 298, 303–04 (5th Cir. 2018).

²¹⁷ *Id.* at 300.

²¹⁸ 709 F.2d 1051, 1057 (5th Cir. 1983).

²¹⁹ 499 U.S. 432, 433, 438 (1991).

adhered to *Cazalas*, then it “would be the only court of appeals to do so after *Kay*.”²²⁰ The court’s reluctance to create a circuit split was a compelling reason to overrule its own precedent, despite not being directly required to do so.²²¹

Two types of out-of-circuit decisions at Time 2 ½ are important. First, the Second and Eleventh Circuits did not have a prior on-point precedent in the FOIA context, and thus, their post-*Kay* FOIA cases were matters of first impression.²²² Second, the D.C. Circuit did have an on-point FOIA precedent which accorded with *Cazalas*, but before *Gahagan*, the court had already abandoned that precedent in favor of *Kay*.²²³ Both types of Time 2 ½ out-of-circuit precedent are relevant if the deciding court wants to avoid a circuit split at Time 3. But notably, the second type of precedent (that of the D.C. Circuit) is stronger evidence in favor of overruling, as it directly mirrors what the Fifth Circuit had to do in *Gahagan*: overrule its own precedent to follow that of the Supreme Court.

A third type of out-of-circuit precedent is irrelevant: that which is decided before the Supreme Court’s decision at Time 2. This was true in *Gahagan*: the First and Sixth Circuits had disagreed with *Cazalas* before *Kay* was decided.²²⁴ Thus, this circuit split existed at the time of *Kay*, and the Fifth Circuit would not be creating a circuit split simply by maintaining the status quo of a split that already existed.²²⁵

In two other situations, however, the decisions of sister courts might weaken the background presumption. First, sister circuits might uniformly agree that the Time 2 Supreme Court decision does *not* bear on the question addressed by the Time 1 circuit precedent. In that case, the deciding court should not apply a presumption in favor of overruling its own decision, as that would create a circuit split. It is also good evidence that the Supreme Court’s decision does not actually bear on the question presented. Second, the circuits might be divided on the effect of a Time 2 Supreme Court decision on the question presented, whether they have an

²²⁰ *Gahagan*, 911 F.3d at 303–04.

²²¹ *Id.* at 304.

²²² See *Pietrangelo v. U.S. Army*, 568 F.3d 341, 344–45 (2d Cir. 2009) (per curiam); *Ray v. U.S. Dep’t of Just.*, 87 F.3d 1250, 1252 (11th Cir. 1996).

²²³ *Burka v. U.S. Dep’t of Health & Hum. Servs.*, 142 F.3d 1286, 1288, 1290 (D.C. Cir. 1998) (overruling *Cuneo v. Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977)).

²²⁴ *Aronson v. U.S. Dep’t of Hous. & Urb. Dev.*, 866 F.2d 1, 5 (1st Cir. 1989); *Falcone v. IRS*, 714 F.2d 646, 646 (6th Cir. 1983).

²²⁵ For an argument that the law of the circuit doctrine should not bind a court when a circuit split exists, see *Sassman*, *supra* note 100, at 1451–58.

on-point Time 1 precedent or it is a matter of first impression. Here, a circuit split already exists, and the deciding court's decision will unavoidably deepen it. Disagreement on the applicability of the Supreme Court precedent to the question presented suggests that the decision's scope is unclear, and thus, a circuit court should not favor overruling.

The strengthened presumption when sister circuits have interpreted the Supreme Court decision to reach the question presented is important for a few reasons. First, agreeing with sister circuits brings about uniformity in federal law, a key function of the Supreme Court in resolving circuit splits. Thus, it in turn furthers judicial economy by mitigating the need for the Supreme Court to address another circuit split. Moreover, sophisticated litigants who monitor developments in multiple circuits will be on notice that the relevant circuit precedent is no longer on steady ground, thus granting more protection to the reliance interests of those parties. Finally, when a sister circuit agrees that the Supreme Court's Time 2 ruling addresses the specific context, that is strong evidence suggesting that, indeed, a consistent decision is the accurate outcome.

C. A Word on District Courts

The presumption in favor of overruling undermined circuit precedent does not extend to district courts. If the circuit precedent has merely been undermined, then it is still good law. Both the Supreme Court and court of appeals precedents are vertical with respect to the district court, and thus, the more directly applicable decision binds the district judge.

Of course, a district court might conclude that the Supreme Court decision itself overruled the court of appeals decision. In that case, it would be compelled to follow the high Court's decision. But if the district court concludes that the court of appeals decision has been undermined, but not overruled, then it must follow that decision if it otherwise governs. "Just as the court of appeals must follow decisions of the Supreme Court whether or not we agree with them, so district judges must follow the decisions of th[e] court [of appeals] whether or not they agree."²²⁶

²²⁶ Reiser v. Residential Funding Corp., 380 F.3d 1027, 1029 (7th Cir. 2004) (citations omitted).

V. CONCLUSION

Courts of appeals routinely confront intervening Supreme Court decisions that undermine their own precedents, while not formally overruling them. This poses a great challenge to circuit judges who are caught in a bind between adhering to their own precedent but also respecting the decisions of the high Court.

The first point to recognize is that horizontal stare decisis is not a constitutional or statutory obligation for the federal courts of appeals. Instead, the law of the circuit doctrine has developed based on prudential concerns—uniformity, institutional legitimacy, accuracy, reliance, and judicial economy. Because these values are better promoted by adherence to vertical precedent, courts of appeals should apply a general background presumption in favor of overruling their own decisions when a Supreme Court decision would suggest a different result, were it a matter of first impression. But this rule is not an absolute: courts must tailor the general presumption to the specific legal context presented.

This Note starts the task of providing guidance to federal circuit judges in these difficult and common situations. As this doctrine of precedent begins to develop, circuit judges will respond to conflicts of precedent with more analytical rigor, litigants will develop more realistic expectations as to the status of court of appeals precedent, and the Supreme Court's crucial role in harmonizing the lower courts' interpretations of federal law will be more effectively realized.