

STRUCTURE AND PRECEDENT

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I. Introduction

The rules that govern the binding precedential effect of judicial decisions are a part of the deep structure of our legal system. They are largely intuitive, taught only in passing at law schools¹ and rarely addressed by positive law. While the application of these

1. There are a few casebooks on judicial or appellate process that include discussions of precedent. First year students may enjoy a brief introductory discussion of precedential rules in Civil Procedure or during orientation, but after that, they will often find that it is "learn as you go" when it comes to the rules of precedent.

rules of precedent can be difficult in practice,² we rarely struggle with whether a given decision of a court within a particular hierarchy is potentially binding *at all*.

Our understanding about which decisions can be potentially binding arises out of a standard model of precedent. Under that standard model, we know that with limited exceptions, (a) lower courts within a geographical jurisdiction are bound by relevant precedent announced by higher courts within that jurisdiction (“vertical” or “hierarchical” precedent),³ and (b) courts are bound by prior relevant decisions issued by their own court (“horizontal” precedent or “*stare decisis*”).⁴ This standard model of precedent largely tracks the standard procedure in civil cases in the United States: District Court decisions are reviewed by the intermediate U.S. Courts of Appeals for the geographic circuit in which the District Court sits, and Court of Appeals’ decisions are reviewed by the U.S. Supreme Court.⁵ Thus, there is no doubt that a relevant holding by a Ninth Circuit panel is binding both on district courts within the Ninth Circuit and on subsequent Ninth Circuit

2. For instance, we might ask precisely *which* language in a written opinion is the “holding” that merits precedential weight, or whether a given decision presents a legal question sufficiently similar to a subsequent case that it must be followed. *See, e.g.*, *United States v. Johnson*, 256 F.3d 895, 919-21 (9th Cir. 2001) (Tashima, J., concurring) (disputing what part of *en banc* opinion is “holding,” and what is “dicta”). Other questions can arise even if the “holding” is obvious. In a U.S. Supreme Court decision with a heavily divided vote, for instance, what part of the written decisions – if any – is the “holding” and therefore binding on lower courts? *See, e.g.*, *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949) (deciding, by a 3-2-4 vote with no theory receiving support from a majority of the justices, and no intermediate position obvious, that citizens of Washington, D.C., could be deemed citizens of a state for purposes of diversity jurisdiction); *Rapanos* decision by Kennedy; cite a couple of articles on this.

3. The term “hierarchical precedent” is used by Evan A. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994).

4. *See, e.g.*, *Miller v. Gammie*, 335 F.3d 889, 899-901 (9th Cir. 2003) (*en banc*) (discussing general rule against panels overruling prior panel decisions of the Circuit).

5. *See generally* Lawrence Solum, *Stare Decisis in United States Courts*, in MOORE’S FEDERAL PRACTICE § 134.02 (2007).

panels. There is, similarly, no doubt that a Second Circuit decision on a particular issue is *not* binding in subsequent Ninth Circuit decisions, whether at the district or circuit court level.

That standard model of precedential rules, however, breaks down in the federal system⁶ when Congress or the courts alter the standard structure and process of federal appellate review. For example, in matters involving "the relationship between patent law and other federal and state law rights" managed by the Federal Circuit, what precedential effect does a Federal Circuit decision have in the Ninth Circuit?⁷ Or, if Congress gives the D.C. Circuit sole authority to review rules issued by an agency to implement a particular statute,⁸ is a panel in a different circuit deciding an enforcement action bound by the D.C. Circuit's interpretation of those rules? Where petitions for review of an agency decision are filed in multiple circuits and consolidated in a single circuit pursuant to 28 U.S.C. § 2112, is the decision that ultimately issues binding on just that court, on all the circuits transferring petitions to that court, or is it binding nationwide?

There are no well-accepted answers to these questions. When Congress or the courts alter our standard model of case processing, our intuitions regarding the precedential effects of decisions break down. In most instances, the courts have managed to sidestep the difficulties associated with evaluating the precedential effect of decisions within these non-traditional appellate processes. When faced with potentially binding decisions outside of their circuit, for

6. Similar rules of precedent are also seen at the state level, with trial court decisions reviewed by two (though occasionally one) layer of appellate courts. As noted later in this Article, however, *see infra* n. __, "non-standard" state appellate structures can, like the unusual federal appellate structures discussed herein, interfere with the application of the standard model of precedent based on the "inverted tree" structure of multiple trial courts feeding to fewer intermediate appellate courts, and (ultimately) a single court of last resort.

7. *See* *Midwest Industries, Inc. v. Karavan Trailers, Inc.*, 175 F.3 1356 (Fed. Cir. 1999) (*en banc*) (abandoning prior circuit precedent, and declining to follow regional circuit precedent in assessing whether patent claims are in conflict with state law or other federal law).

8. *See, e.g.*, 42 U.S.C. § 7607(b)(1) (limiting review of certain Clean Air Act decisions to D.C. Circuit).

instance, the federal appellate courts will often simply treat them as persuasive, rather than binding. If they choose not to follow the prior decision, the resulting conflict is resolved on the merits by the U.S. Supreme Court, which is thereby able to avoid making any decision about intercircuit precedential rules. Similarly, most commentators on the problems of precedent have focused on the validity, terms, and variability of the rules of "binding" *stare decisis*, rather than the structural question of whether, within a given appellate hierarchy, a decision is even potentially binding.⁹ To the degree that commentators have engaged in an examination of the effect of structure on *stare decisis*, the analysis has been primarily constitutional (at the federal level), and has explicitly avoided analysis of the role of intermediate appellate courts in our understandings of precedent.¹⁰

This Article focuses on the rarely-asked, and almost never-answered, question of when a given decision in a particular appellate structure should be treated as binding precedent. What

9. See *infra* at _____. Most commentators, in other words, begin with the assumption that a particular decision is "precedent", and then ask what that fact means (or should mean) to the Courts within the common law and Constitutional structures of our legal system. The "precedential" effect of precedent – i.e., what is called "*stare decisis*" – is the primary focus of these articles. See, e.g., Richard Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075, 1076 n. 2 (2003) (defining *stare decisis*, but not "precedent"); *id.* at 1077 n. 10 (in defining horizontal *stare decisis*, noting that the focus of his article is on _____); Lawrence Solum, *The Case For Strong Stare Decisis*, blog entry originally posted 6/4/2003 on legaltheoryblog.com (http://lsolum.blogspot.com/2003_06_01_lsolum_archive.html#200369898) (last visited November 2006) (focusing on *stare decisis*).

10. See, e.g., Murphy, *supra* note 9, at 1080 n. 27 ("This Article confines its attention to the separation-of-powers concerns raised by the elimination of the horizontal force of precedents."); Michael Stokes Paulsen, *Abrogating Stare Decisis By Statute: May Congress Remove The Precedential Effect Of Abrogating Stare Decisis By Statute: May Congress Remove The Precedential Effect Of Roe and Casey?*, 109 YALE L. J. 1535, ____ n. 8 (2000) ("I set to one side for purposes of this Article the interesting and important question of whether Congress may abrogate (or mandate) "vertical" *stare decisis*, in the sense of lower courts' generally accepted obligation to follow the decisions of the Supreme Court and other courts above them in the hierarchical chain of appeal.").

structural relationship is necessary in order to convert a decision that might be "persuasive" precedent (to any degree) into the status of "binding" precedent?

As an entrée into examining this question, Part I looks at several non-standard appellate (and court) structures, and notes the competing arguments associated with whether binding precedential effect should be given to earlier decisions in these unusual cases.

Part II discusses the strong link between the appellate structure of the federal appellate system and the precedential effect of decisions within that structure. Our standard model of precedent arose organically, to some degree, out of the historic development of our current federal appellate structure; to the degree that subsequent Congressional enactments have altered that structure, our standard model breaks down. Through the examination of the non-standard appellate structures, the Article illuminates certain unstated presumptions that underly that standard model, casting light on appropriate (or at least possible) resolutions of the problems of precedent addressed in Part I. As is discussed below, the role of "precedent" is intimately tied to the procedural and institutional structure of the decisionmaking bodies that are required to use it.

Part III examines some of the implications arising out of the link between structure and precedent. After discussing possible models for thinking about precedent in non-standard structures, it sets forth an optimum default rule for deciding whether a decision should be considered possibly "precedential" or not. The Article then emphasizes two important considerations flowing from the connection between structure and precedent. First, legislative bodies should be particularly attentive, when designing non-standard appellate systems or restructuring court institutions, to the way in which decisions flowing from those systems will be applied in subsequent decisions. In many cases, the potential binding effect of a particular decision on subsequent cases will be as important as the effect of that decision on the litigants directly affected by it. Legislative attention to this issue in the initial design is warranted.

Second, many commentators have discussed (particularly after the decision in *Anastasoff*) the role of precedent in our

constitutional system, and have inquired into the degree to which Congress retains control over the precedential effect of federal court decisions.¹¹ The connection between structure and precedent sheds additional light on these questions by making an explicit connection between the role of precedent and the control that Congress has over the structure of the lower federal courts. The structural control over federal courts translates directly into control over precedential rules; this conclusion reinforces the findings by some commentators that Congress retains substantial control over the precedential effect of decisions within the lower courts of the federal hierarchy. Conversely, to the limited degree that the Constitution limits Congressional control over the structure of the Courts (and, in particular, the Supreme Court), there may be substantial limits on the ability of Congress to dictate the effect of precedent even under this enhanced view of the doctrine.

It is worth emphasizing at the outset that this article does not ask rights-based questions, like whether federal (or state) constitutional rights mandate the application of precedent in particular circumstances, or whether "unpublished" decisions can or should be deemed precedential as a constitutional matter.¹² Rather, the focus of the Article is on defining the universe of decisions that must be examined in evaluating whether their holdings might amount to binding precedent at all, and on determining why we define the universe in that way.

As it turns out, the structure of the court system within which judicial decisions are made – the structure of the appellate universe – is critical to defining the rules of precedent that function within it. Through a better understanding the relationship between structure and precedent, we are better positioned to answer questions about the role of precedent within our legal system as a whole, to understand why we have certain assumptions and intuitions about precedent, and to ensure a more careful and rational discussion of precedential rules in the future.

11. See *infra* at nn.10-11.

12. Citations to Anastasoff cases. (Murphy note 27).

II. Problems of Precedent

A. A Lexicon of Precedential Terms

Everyday discussions of precedent are often confused by a variety of terminologies that can often stand for different principles. Before addressing circumstances in which the rules of precedent are unclear, then, this section sets out terminology regarding precedent that is used by this Article in what is hopefully a consistent manner.

1. "Binding precedent" (including "vertical precedent" and "strong *stare decisis*")

In this article, at least, "binding precedent" refers to decisions that subsequent courts *must* follow. If a court may ignore an on-point after a weighing of factors, it is not "binding" precedent.

The term refers to two kinds of obligations. First, it refers to the rules of "vertical precedent" that obligate a "lower court" to follow a decision of a "superior court" in the federal system. (Caminker refers to this variety of precedent as "hierarchical precedent."¹³) Thus, even if a panel (whether *en banc* or not) of a United States Circuit Court of Appeals concludes that a particular U.S. Supreme Court decision is incorrectly decided, it must follow the holding of that decision; it is "binding precedent." Similarly, a District Court within a particular Circuit Court's geographical jurisdiction is bound by the decisions of that Circuit Court.¹⁴

There is another form of "binding precedent" that works "horizontally" within a given court: The form of *stare decisis* that Larry Solum calls "strong *stare decisis*."¹⁵ Under this doctrine, an "on point" holding by a prior sitting of the same Court must be followed; this principle is currently applicable in the federal

¹³ See Caminker, *supra* n. 4.

¹⁴ See L. Solum, *supra* n. 6, at § 134.02[2] & n. 26.

¹⁵ See Lawrence Solum, "The Case For Strong *Stare Decisis*," blog entries originally posted beginning on 6/4/2003; archived at http://lsolum.blogspot.com/2003_06_01_lsolum_archive.html#200369898 (last visited March 24, 2008).

system only to panels of the U.S. Courts of Appeal, which are obligated to follow the decisions of earlier panels, even if they believe them to be incorrectly decided.¹⁶ While panel rulings may be overturned by *en banc* panels or the U.S. Supreme Court, the control of those entities over panel decisions of the Courts of Appeal are simple examples of the rule of vertical precedent.

2. "Horizontal precedent" or "*stare decisis*"

Subject to the above exceptions for Circuit Courts of Appeal, prior decisions of a given court are not "binding precedent" on subsequent sitting of that court. Rather, they serve as "*stare decisis*," and are given "great weight" in subsequent decisions.¹⁷ As a result, a court that is bound only by traditional (rather than strong) This principle applies to prior decisions of the U.S. Supreme Court within the Supreme Court, and to prior decisions of the Courts of Appeal when sitting *en banc*.¹⁸ Courts foll

As the Supreme Court has noted, and as Michael Stokes Paulsen begins his article on precedent by noting, this form of *stare decisis* is a "principle of policy ... not ... an inexorable command"¹⁹ – a "sub-constitutional doctrine" subject to manipulation by courts and (potentially) legislatures alike.²⁰ By contrast, binding precedent *is* a "command" to the courts bound by the "vertical" (or "strong *stare decisis*") precedential value of a

¹⁶ See L. Solum, *supra* n. 6, at § 134.02[1][c] (also noting exceptions to the general rule, which permit panel decisions to ignore prior decisions in the event that intervening Supreme Court decisions cast doubt on the validity of the earlier holding); *but see id.* at n. 15.6 (noting that the Seventh Circuit is unusual in permitting subsequent panels to overrule prior holdings for nothing more than "compelling reasons"). Solum's argument in his blog, *supra* n. 17, refers primarily to his argument that the U.S. Supreme Court should be bound by strong *stare decisis*.

¹⁷ Solum, *supra* n. 6, at §134.02[1][a] ("When the prior court is the same as the subsequent court, the general rule is that precedent is not binding, even though a court may give great weight to its own prior decisions.").

¹⁸ *Id.* at §134.02[1][b] & [c].

¹⁹ *Seminole Tribe v. Florida*, 517 U.S. 44, 63 (1996); Paulsen, *supra* note 10, at 1537 and n. 1.

²⁰ Paulsen, *supra* n. 10, at 1538.

particular case. While the source of the command for binding *stare decisis* is often unclear, the fact that it is a command means that an examination of vertical precedent requires a different kind of thinking and analysis from the examination of horizontal precedent.

Arguably, this form of *stare decisis* is simply a strong form of persuasive precedent, discussed below. Courts bound by *stare decisis* generally believe themselves obligated to provide a much stronger rationale for abandoning their prior decisions than they would feel obligated to provide if they are simply choosing to ignore persuasive precedent.

3. "Persuasive Precedent"

Persuasive precedent is used in this Article to mean all prior on-point holdings that are neither *stare decisis* nor binding precedent. The degree of persuasiveness of such a holding will vary with a number of factors, including (though not limited to) the thoroughness of the opinion announcing the holding, the expertise (if any) of the court announcing the decision, and the relative place of the Court announcing the decision within the overall federal judicial structure.

Even an on-point holding may carry little weight with a Circuit Court if it was written by a magistrate judge in a district within another geographical circuit. On the other hand, a well-reasoned *en banc* decision by a Circuit Court may well be quite persuasive to other circuits and district courts alike.

In general, a decision issued by one Circuit Court is only persuasive precedent in another Circuit Court. There are, however, circumstances in which that principle might be called into question; those circumstances are the subject of the remaining sections in this Part.

B. The Cross-Circuit Precedential Effect of Decisions In Consolidated Petitions For Review Under 28 U.S.C. § 2112.

1. The Filing and Consolidation of Multiple Petitions For Review

Many of the nation's most significant regulatory programs permit aggrieved parties to challenge agency actions by filing a petition for review with a federal court of appeals.²¹ When a rule or decision has nationwide effect, multiple parties may file petitions. And although some statutes require parties to file such petitions in a single federal circuit court (generally the D.C. Circuit),²² many other statutes permit petitions for review to be filed in either the D.C. Circuit or the geographical circuit in which the aggrieved party resides.²³ It is by no means rare for an agency issuing a wide-ranging order to find itself initially facing petitions for review in multiple circuit courts of appeals.

21. *See, e.g.*, 15 U.S.C. § 21 (antitrust-related cease and desist orders); 15 U.S.C. § 2618(a)(1)(A) (certain categories of rules promulgated under the Toxic Substances Control Act); 29 U.S.C. § 160(f) (decisions of the NLRB); 33 U.S.C. § 1319(g)(8) (Class II administrative penalties under Clean Water Act); 33 U.S.C. § 1369(b)(1) (certain agency decisions under the Clean Water Act); *see also* 28 U.S.C. § 2342 (granting “exclusive jurisdiction” to the Courts of Appeals (other than the Federal Circuit) over “all final orders” and other decisions of various agencies, including the FCC, the Federal Maritime Commission, the Atomic Energy Commission, and the Surface Transportation Board).

22. *See supra* at Part I.C.

23. *See, e.g., supra* n. __; *see also* 28 U.S.C. § 2343 (establishing venue for petitions for review under 28 U.S.C. § 2342 in “the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.”).

When a statutory scheme has no judicial review statute specific to it, decisions with a broad effect may be challenged in the district courts under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, and thereafter on appeal in the relevant circuit court. This article does not specifically address such situations; instead, it focuses on direct review in the Court of Appeals.

For over a half-century, the circuit courts of appeals, Congress, and administrative agencies viewed the filing of petitions for review in multiple circuits as a problem requiring a solution. The chosen solution was consolidation of those multiple petitions in a single circuit. In 1958, Congress enacted 28 U.S.C. § 2112,²⁴ which provides for the consolidation of multiple petitions for review into a single circuit court of appeals—the "primary reviewing court."²⁵ In its current form, enacted in 1988, all petitions filed within ten days of an agency decision are referred to the Judicial Panel on Multidistrict Litigation (the "MDL Panel"), which randomly selects one of the circuits in which a petition has been filed as the primary reviewing court, and then consolidates all pending petitions in that court.²⁶

Once the primary reviewing court is selected, the MDL Panel issues an order consolidating all petitions in that circuit, and the

24. Pub. L. 85-791, 72 Stat. 941 (August 28, 1958) (codified at 28 U.S.C. § 2112 (1964)).

25. The "primary reviewing court" is my own term, and refers specifically to the Court of Appeals that ultimately resolves the consolidated petitions for review. This is not necessarily the circuit in which the MDL consolidates the petitions; as noted below, the court in which petitions are initially consolidated will often transfer them to a different circuit court for "the convenience of the parties in the interest of justice." See 28 U.S.C. § 2112(a)(5).

26. 28 U.S.C. § 2112(a)(1)-(3).

From enactment of the 1988 amendment to § 2112 through September 2005, seventy-eight cases had been consolidated by the MDL Panel under 28 U.S.C. § 2112. Within the MDL electronic docket, these cases are designated as "RTC-xx" cases, with "RTC" standing for "Race to the Courthouse."

Prior to 1988, § 2112 provided that petitions would be consolidated in the circuit in which a petition was "first filed." See 28 U.S.C. § 2112(a) (1964). This resulted in an unseemly rush to file the first petition for review of a given agency action. See T. McGarity, *Multi-Party Forum Shopping for Appellate Review of Administrative Action*, 129 U. PA. L. REV. 302 (1980). The 1988 amendment, under which all petitions filed within 10 days of the agency decision are treated identically, was enacted to make that race irrelevant. See Pub. L. 100-236, 101 Stat. 1731 (January 8, 1988). For a discussion and listing of some of the consolidated cases prior to 1988, and descriptions of some of these races to the courthouse that initiated them, see McGarity, 129 U. PA. L. REV. at 302. McGarity's article began as a report to the Administrative Conference to the United States recommending changes to § 2112 in order to avoid the more extreme versions of the race. See *id.* at n. ___.

agency files the record with that court.²⁷ The statute further provides that all other courts of appeal in which petitions have been filed “shall transfer those proceedings to the court in which the record is so filed.”²⁸ In the primary reviewing court, the transferred petitions are given a docket number in that circuit (often, the primary reviewing court’s docket will lack any reference to where the petition for review was initially filed).

The primary reviewing circuit then considers briefing and argument by interested parties. Typically, the parties that filed the petition for review in the primary reviewing court will participate as the lead plaintiffs for purposes of the petition for review, with other plaintiffs in the consolidated cases serving as either additional plaintiffs or *amici* in the primary reviewing court.

2. The Problem of Precedent In Consolidated Petitions for Review

Petitions for review of agency decisions – particularly those filed within days of the decision itself – are generally (although not always) filed as a facial challenge to the validity of a regulation or order. The relevant judicial review statute typically imposes a time limit on challenges to general agency orders, requiring petitions for review raising such facial challenges to be brought within (generally) 60 days of the agency decision.²⁹ The cases can be complex; agency decisions that generate multiple petitions for review are generally decisions promulgating rules or deciding adjudications that will have nationwide effect.

Once the primary reviewing court resolves the initial petitions for review, the agency (and particularly a losing agency) may choose to alter its rule or decision in order to conform to the Court’s rule. That is not necessarily the case, however, and even if the opinion of the primary reviewing court supports the agency’s decision, subsequent challenges to the agency order may arise in a few ways.

27. 28 U.S.C. § 2112(a)(3).

28. *Id.* at (5).

29. *See, e.g.*, 28 U.S.C. § 2344.

First, a party initially uninterested in the initial agency order may later find itself subject to civil (or even criminal) proceedings through the application of the order in question. Such a party may then raise relevant challenges to the regulation *as applied*.³⁰ These as-applied challenges are just as likely to arise in jurisdictions other than the jurisdiction of the primary reviewing court.

Second, as discussed *infra*, federal agencies are not subject to what is called "offensive nonmutual collateral estoppel"—in other words, a loss in one geographic circuit does not bind that agency in another circuit with respect to the identical legal question.³¹ Agencies may therefore relitigate issues, or seek to apply regulations or policies in one circuit court's geographical jurisdiction that were previously addressed in a different court of appeals. This "intercircuit nonacquiescence," in which an agency will assent to Court A's interpretation of a particular statute in the geographic jurisdiction in which Court A sits, but will nevertheless adhere to its preexisting approach to the statute (or rule) in other jurisdictions, is a common litigating approach for agencies seeking

30. *See, e.g.*, *Wind River Mining Corp. v. United States*, 946 F.2d 710, 713 (9th Cir. 1991) (holding that parties are not barred by the APA's general statute of limitations from bringing APA challenges well after promulgation of a rule, as long as the challenge is to the statutory or constitutional authority of that rule).

While some statutes purport to bar individuals from challenging agency decisions to the degree that they could have been challenged in initial petitions for review, *see, e.g.*, 33 U.S.C. § 1369(b)(2) (Clean Water Act); 42 U.S.C. § 7607(b)(2) (Clean Air Act), it is doubtful whether such a bar is consistent with the Due Process clause. *See* U.S. CONST. Amend. V; *Adamo Wrecking v. United States*, 434 U.S. 275, 289 (1978) (Powell, J., concurring) (suggesting that such limitations on judicial review of as-applied agency decisions are constitutionally infirm); Christopher D. Man, *Restoring Effective Judicial Review of Environmental Regulations in Civil and Criminal Enforcement Proceedings*, 5 ENVIRONMENTAL LAWYER 665, text accompanying nn. 110-176 (1999) (reviewing history of such provisions, collecting cases questioning their constitutionality, and arguing for eliminating time limits on review, but centralizing such review in single court of appeals with nationally-binding effect).

31. *See* *United States v. Mendoza*, 464 U.S. 154, 158-63 (1984).

to maintain a rule in the face of an adverse decision from a particular geographic circuit court.³²

Third, as McGarity points out, an agency might promulgate new rules or issue new orders that rely on statutory interpretations already resolved in a largely identical legal context.³³ In such instances, if the earlier decision were binding, it might alter the agency's decision regarding the content of those new rules or the outcome of a subsequent decision challenging those rules.

Finally, a party might choose not to challenge (or be barred from challenging on standing or ripeness grounds) a regulation that is initially interpreted by agency policy documents in a manner favorable to the party in question. A subsequent change in policy, however, might alter that interpretation, and give rise to the necessary imminent injury that would be necessary before suit could be initiated.

The relevant question for purposes of this article, then, is: What is the precedential effect of the decision issued by the primary reviewing court in the consolidated petitions for review? In particular, does the primary reviewing court's disposition or interpretation of the agency decision amount to binding precedent for courts in other circuits that may hear relevant challenges at a later date? As discussed in Part B.3., strong arguments can support conflicting answers to this question.

32. See generally S. Estreicher & R. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679 (1989); Note, *Administrative Agency Intracircuit Nonacquiescence*, 85 Colum. L. Rev. 582 (1985). In the more extreme version of the nonacquiescence doctrine, "intracircuit nonacquiescence," agencies would refuse to apply a circuit's own rulings even within that geographic circuit. Conformance with circuit law was dependent entirely on judicial review. See *id.*

33. McGarity, *supra* n. ___, at 329-31.

3. Arguments Favoring the Binding Precedential Effect of Decisions In Consolidated Petitions for Review

On which courts is the decision in the consolidated petition for review binding? There are conflicting principles at work, and no straightforward conclusion.

First, as an initial matter, the very existence of § 2112 suggests that Congress must have intended the decision of the primary reviewing court to be binding on subsequent appellate panels. After all, if the decision on the consolidated petitions was not binding, what would the point be of consolidating at all? While the statute says nothing about the precedential effect of the primary reviewing court's decision, there is a reasonable argument that the precedential effect of the decision in the primary reviewing court is implicit in the fact of consolidation.

This is by no means the end of the analysis, though. If § 2112 is taken to mean that the primary reviewing court's decision is binding on other circuits, is a decision in a consolidated petition for review precedential on a national level, or only in those circuits in which petitions for review were initially filed?

The first alternative—that there is a nationwide precedential effect—is entirely plausible; there are a number of statutes with respect to which Congress requires petitions for review to be filed in the D.C. Circuit alone,³⁴ and many other statutes in which Congress requires facial challenges to be filed with a single circuit, with immediate review by the U.S. Supreme Court.³⁵ If Congress specifically directs appellate review to a single court of appeals, an examination of legislative intent would suggest, at least, that the single reviewing court's decision should have a binding effect nationwide. Regardless of the wisdom of such an approach, it would seem odd, indeed, for Congress to mandate review of a particular decision by a single circuit, but to do so intending that the circuit's decision have only local precedential value.

34. See, e.g., *infra* Part I.C.*supra* n. __.

35. See *infra*, nn. _-__ and accompanying text.

Congress has directed that all petitions for review subject to § 2112 be consolidated into a single circuit court. While that single court is randomly chosen, the effect of the MDL lottery process is no different than if Congress had mandated review in the D.C. Circuit (or whatever randomly selected circuit) in the first instance. By analogy, then, these arguments suggest that the decision of the primary reviewing court should also have nationwide precedential effect.

4. Arguments Challenging the Binding Precedential Effect of Decisions In Consolidated Petitions for Review

There are, however, significant problems with this approach, stemming primarily from the general rules of precedent. Under those rules, a decision made by one circuit binds only that circuit.³⁶ If a decision regarding consolidated petitions for review has nationwide effect, such a result could be triggered by the filing of just two petitions. It is not clear why the mere fact that plaintiffs filed two or more petitions for review should be sufficient to overcome the general rule of single-circuit precedential effects, and particularly unclear why two petitions should be sufficient to trigger a ruling of national import.

To avoid these concerns, we could choose a second alternative: The decision of the primary reviewing court is binding, but only on those circuits from which petitions for review have been consolidated. Even here, however, certain difficulties present themselves. In a “normal” case, a panel deciding a case from the circuit is bound by prior decisions of that circuit. Those prior decisions may provide interpretive rules or substantive determinations that direct a particular outcome with respect to a petition for review – an outcome that would not be reached if the petition for review had been evaluated by a panel in a different circuit. The only way to prevent one circuit’s unique approaches to substance or interpretation from binding future decisions in a different circuit – a circuit that might have reached a different

³⁶ See L. Solum, *supra* n. 6, at § 134.02[1][c].

conclusion altogether – would be to limit the precedential effect of the primary reviewing court to that court alone.

Such a result would be consistent, as well, with the role of *en banc* review in confirming the precedential effect of a circuit panel's decision. Panel decisions that depart from prior circuit laws are subject to *en banc* correction in order to ensure consistency. Unlike district-court-level MDL consolidation, in which cases are at least theoretically transferred to a single district for purposes of pretrial proceedings and then transferred back to the trial court for final decision (and appellate review),³⁷ there is no mechanism under § 2112 pursuant to which the decisions of the reviewing court are “remanded” to the original circuits for review of any kind. Once transferred, petitions remain in (and are fully decided by) the primary reviewing court. If that primary reviewing court binds all other courts in which petitions for review were filed, the only court with the ability to ensure conformity with prior rulings is the *en banc* court of that circuit; no others are able to weigh in, even though the risk of conflict can be particularly significant if other circuits are deemed to be bound by the decisions of the primary reviewing court.

Beyond these considerations, practical problems abound if the decision of the primary reviewing court is deemed precedential outside of that circuit. First, there is the near-universal failure of the primary reviewing court to note whether a published decision involves petitions for review consolidated from other circuits.³⁸ As a result, a subsequent litigant will find it nearly impossible to

37. Cite to MDL rules / statute ____.

38. *See, e.g.,* Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000). The caption to this decision indicates that it resolves fifty-one cases docketed in the D.C. Circuit, but nothing in the opinion suggests where those petitions for review originated. The only hint is in the court's passing mention that “[a]ll petitions for review ... were consolidated and transferred to this Circuit.” *Id.*, 225 F.3d at 683. While that reference suggests that the case addresses at least some petitions consolidated through the § 2112 process, one would have to review at least the D.C. Circuit docket, and probably the MDL docket, to confirm that at least some of these cases were consolidated under MDL Docket No. RTC-36. The MDL Docket (or, alternatively, the original files in the primary reviewing court) would have to be consulted to find out *where* the petitions for review ultimately originated.

determine whether a prior decision in another circuit has precedential effect. The only way to do so is to telephone the clerks of various circuit courts and the MDL panel, and to carefully match up those dockets in an effort to evaluate whether a particular set of cases originated in other circuits and were passed along by the MDL panel.

The little case law that there is on these issues reflects a general reluctance to treat decisions in consolidated cases as binding precedent.³⁹ In the view of at least some panels, this is true because the courts view their role in the federal legal system as seeking the “proper” interpretation of a unitary federal common, statutory, and administrative law.⁴⁰ If there is, indeed, a single proper interpretation of a given statute or regulation, there is no reason to view one court to be any more deserving of deference than another, particularly not in the absence of explicit congressional instruction. This respect for the independence of circuit courts is so strong that at least one court has questioned, in a similar context, whether *law of the case* would necessarily bind a different circuit court.⁴¹

39. This is the standard view of the *stare decisis* effect of federal circuit court decisions, and certainly would apply to a decision resolving only one petition filed in a single circuit court. The resulting decision would have no horizontal *stare decisis* effect in other circuits. *See generally* Northwest Forest Res. Council v. Dombek, 107 F.3d 897, 900 (D.C. Cir. 1997).

40. *See In re Korean Air Lines Disaster*, 829 F.2d 1171, 1175-76 (D.C. Cir. 1987). This principle carries over into a circuit court's management of transferred cases. Where substantive state law is at issue in a transferred case, the federal courts are bound to follow the law of the transferor state (as long as the transferring court had jurisdiction), *see* Van Dusen v. Barrack, 376 U.S. 612 (1964). For federal law, however, the convention is that because there is only “one federal law,” federal courts will apply the law of their own circuit, not the transferor circuit, when deciding questions of federal law in transferred cases. *See In re Korean Air Lines Disaster*, 829 F.2d at 1175-76.

41. In *In re Korean Airlines*, then-Judge Ruth Bader Ginsburg asked whether the D.C. Circuit's interpretation of the Warsaw Convention and Montreal Agreement would have law-of-the-case effect in a different circuit once the cases before it were transferred back for trial. She wrote that “[w]e believe it should ... for if it did not, transfers under 28 U.S.C. § 1407 could be counterproductive, i.e., capable of generating rather than reducing the duplication and protraction Congress sought to check. On this issue in the case at hand, however, our circuit is not positioned to speak the last word.” *Korean*

Skepticism about the cross-circuit precedential effect of the primary reviewing court's decision is reinforced by deeply-held structural understandings about the role of the circuit courts in the federal judicial system. As already noted, and as generally understood, federal circuit courts are not bound by each other's decisions.⁴² The Supreme Court often explicitly relies on the divergence—or convergence—of circuit court thinking on a particular issue both in determining whether to grant a petition for certiorari and in reviewing cases on the merits.⁴³ As a general matter, that basic understanding should be circumvented only where there is a clear statement from Congress. There is, of course, no such explicit statement to be found in the text of § 2112.

Air Lines, 829 F.2d at 1173-76 (emphasis added, footnote and internal citation omitted). On the difficulties posed by the application of the law of the case doctrine in transferred cases in the District Courts, see J. Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595 (1987).

42. This principle means not only that circuit courts are not bound by the decision of other circuit courts—i.e., that there is no horizontal *stare decisis* between circuits – but that federal agencies are not bound by the decisions in circuits outside of a particular geographical circuit. See, e.g., *Mendoza*, 464 U.S. at 158-63 (holding doctrine of offensive non-mutual collateral estoppel inapplicable to the federal government in light of its unique national role in lawmaking and the importance of the process of dialogue and percolation among the circuits). See *supra* n. ____.

43. See S. Ct. Rule 10(a); see also *Butler v. McKellar*, 494 U.S. 407, 430 (1990) (noting "[t]he process of percolation allow[ing] a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule" (citing Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 716 (1984))); *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari) ("In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court."); *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n. 26 (1977) (prior resolution of petitions for review in different circuits, and multiple resulting decisions, "exemplifies the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals. By eliminating the many subsidiary, but still troubling, arguments raised by industry, these courts have vastly simplified our task, as well as having underscored the reasonableness of the agency view").

Nor does the legislative history of § 2112 support the idea that decisions in these consolidated cases should be binding on other circuits. If Congress intended these decisions to have inter-circuit *stare decisis* value, one would expect to see in the legislative history some effort to weigh the benefits associated with consolidation against the legal, practical, and policy difficulties it poses. But there is no such discussion.⁴⁴ Rather, the legislative history demonstrates that the statute and its most substantial amendment came into being largely as afterthoughts, tacked onto or salvaged from the remnants of bills that proposed administrative reforms of a more sweeping nature. That history does not discuss the practical or legal effect of the resulting decision. Instead, it simply assumes that consolidation should occur in order to save time and resources by having the equivalent of only one petition for review, rather than petitions in multiple courts of appeals.⁴⁵

Furthermore, the efficiency rationales for consolidation—the only rationales consistently relied upon in enacting and amending § 2112—provide only a limited rationale for taking such a step in light of its costs. Particularly in the modern era, in which electronic copies of administrative records and electronic briefs make the management of petitions in multiple jurisdictions

⁴⁴ Throughout the legislative history (both in 1958 and in 1988), there is no explicit or implicit discussion of the costs of consolidation, such as the practical difficulties associated with consolidation, the limitation on forum choice that results, the uncertainties in the current statute regarding precedential effect, the circumvention of the process of circuit court "percolation" prior to Supreme Court review, and the constitutional primacy of the Supreme Court in the federal appellate system. To the degree that costs are addressed at all, the concerns relate to difficulties and incentives associated with the consolidation *process*, and do not ask the fundamental question: Should consolidation happen at all? Early in his article, for instance, McGarity states with respect to the filing of multiple petitions that "there *must* be a mechanism for determining which court shall hear the case." McGarity, *supra* n. 6 at 304 (emphasis added). There is, however, little explanation of why this *must* be the case.

⁴⁵ The only rationales consistently articulated in the enactment of § 2112 and its amendments, as well as in the few cases that actually discuss consolidation under § 2112, suggest only efficiency rationales. In other words, the point is simply to save the time and energy associated with handling multiple petitions for review. Indeed, the statute was initially enacted, at least in part, to ease the burden of agencies in their filing of the administrative record.

relatively simple, the relative cost associated with the management of additional petitions for review is relatively minimal. While there is certainly some value to limiting the number of federal appellate judges considering a particular legal question, there are many circumstances in which different appellate courts consider identical legal issues. In most cases, the value associated with that inefficiency – a value inherent in the very fact that there are multiple circuit courts of appeal with decisions that are deemed binding only on that circuit – is more than enough to justify the associated inefficiencies.

There are, therefore, plausible arguments on both sides of the question of whether a decision by the primary reviewing court in consolidated petitions for review is binding on other circuit courts. In all likelihood, a circuit court squarely presented with this problem would give a prior decision persuasive value, but little more – and it would almost certainly not depend on whether one of the consolidated petitions had been originally filed in the circuit that came late to the issue.⁴⁶ That approach, however, gives little weight to what would seem to be an obvious effect of consolidation – treatment of the decision in the primary reviewing court as binding precedent on subsequent court decisions.

It is worth noting that the Solicitor General has hinted that the United States considers decisions in consolidated cases to be

⁴⁶ Indeed, this appears to be the result in most of the cases in which subsequent circuit courts examine the precedential value of the prior case. *See, e.g.,* Transmission Agency of N. Cal. v. FERC, 495 F.3d 663 (D.C. Cir. 2007) (treating Ninth Circuit decision in consolidated case, Bonneville Power Admin. v. FERC, 422 F.3d 908 (9th Cir. 2005), as persuasive, but not binding, precedent; failing to mention that the Ninth Circuit case was consolidated under § 2112); WWC Holding Co., Inc. v. Sopkin, 488 F.3d 1262 (10th Cir. 2007) (mentioning and agreeing with decision in consolidated case of Texas Office of Public Utility Counsel v. F.C.C., 265 F.3d 313 (5th Cir. 2001), but failing to mention the consolidation of petitions under § 2112); Texas Office, 265 F.3d at 324 (agreeing with decision of Eighth Circuit in consolidated petition, Southwestern Bell Tel. Co. v. FCC, 153 F.3d 523 (8th Cir. 1998)); *cf.* Indiana Bell Tel. Co., Inc. v. McCarty, 362 F.3d 378, 389 & n. 13 (7th Cir. 2004) (noting that in D. Indiana, parties had argued for binding effect of 8th Circuit decision in a consolidated petition for review, but that Supreme Court decision had intervened, mooting the argument).

binding nationwide.⁴⁷ The first such statement was found in the Solicitor General's brief to the Supreme Court in *National Cable & Telecommunications Associates v. Brand X Internet Services*.⁴⁸ In *Brand X*, seven petitions for review were filed in three different circuits challenging an FCC ruling. The MDL lottery resulted in the consolidation of the decisions in the Ninth Circuit.⁴⁹ The Circuit, however, had already issued a ruling on the relevant provisions of the Telecommunications Act in a case between private parties,⁵⁰ and it therefore concluded that its decision in *Portland* required the Court to reject the FCC decision.

In issuing its decision, the Ninth Circuit did not explicitly consider the fact that it was deciding petitions for review from the Third and D.C. Circuits as well. In those circuits, of course, *Portland* was not the rule, and principles of *Chevron* deference would have led the Courts to defer to the agency.

In its Petition for Certiorari, the Solicitor General pointed to the curious result that flowed from the combined effect of *Portland* and § 2112, and suggested (without analysis) that the Ninth Circuit's decision had nationwide precedential effect. According to the SG:

The combination of the Ninth Circuit's mistaken view of *Chevron* and the lottery provisions of 28 U.S.C. 2112(a)(3) has produced particularly perverse results in this case. A prior decision of a single circuit that did not apply *Chevron* has effectively denied the FCC, on a nationwide basis, the deference to which it is entitled.⁵¹

This position is somewhat curious in light of government's long adherence to nonacquiescence principles.⁵² Nevertheless, the clear implication of the SG's statement is that consolidated petitions are

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⁴⁸ 545 U.S. 967 (2006).

⁴⁹ 345 F.3d at 1127.

⁵⁰ See *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000).

⁵¹ Petition for Certiorari, *FCC v. Brand X Internet Services*, U.S. Sup. Ct. Case No. 04-281 at n. 8 (2005).

⁵² See *supra*, n. ____.

binding nationwide. The SG appeared to take a similar statement with respect to decisions in regulatory review cases over which the D.C. Circuit has exclusive jurisdiction, which is the subject of Part I.C.⁵³

C. The Cross-Circuit Precedential Effect of D.C. Circuit Decisions in Exclusive Jurisdiction and "Accelerated Review" Cases

As already noted *supra*, a number of statutes provide for judicial review of agency regulations in only one circuit – generally the D.C. Circuit.⁵⁴ Congress occasionally takes a similar approach in the statutory context in which it perceives a need for immediate, single-circuit judicial review. In a recent example, section 437b of the Bipartisan Campaign Reform Act (“BCRA”) of 2002 provided for a three-judge D.C. Circuit review of any constitutional challenges to the Act.⁵⁵ The BRCA is just one example of a judicial review provision directing single-circuit review (or single-panel review; the panel can consist of both appellate and district court judges) of challenges to a particular statute. With most of the immediate review schemes for statutes, the review provision provides for an immediate appeal to (or discretionary review by) the U.S. Supreme Court.⁵⁶

Is the decision that results from these single-circuit review provisions binding nationwide? Again, there are competing arguments, and they vary, to some degree, depending on the nature of the jurisdictional grant to the D.C. Circuit and the nature of the subject matter of the case.

⁵³ See *infra* n. ____.

⁵⁴ See, e.g., 42 U.S.C. § 7607(b)(1) (limiting review of certain Clean Air Act decisions to D.C. Circuit); 47 U.S.C. § 402 (limiting certain decisions by the FCC to the D.C. Circuit, whose judgment “shall be final, subject, however, to review by the Supreme Court of the United States,” *id.* at (j)).

⁵⁵ See 2 U.S.C. § 437h (setting forth rules governing single-circuit (three-judge district court panel) review of constitutional challenges to the Bipartisan Campaign Reform Act of 2002 (BCRA), 116 Stat. 81 (2002)).

⁵⁶ See, e.g., 2 U.S.C. § 922 (review of balanced budget reform act by 3-judge panel in D.C. District Court); *Bowsher v. Synar*, 478 U.S. 714 (1986) (deciding appeal of same).

For instance, where the Supreme Court is given appellate jurisdiction, the argument in favor of such a binding effect is arguably weaker than for cases in which Congress grants only discretionary review authority. Where Supreme Court review is within the Court's appellate jurisdiction, Congress suggests that the D.C. Circuit decision is merely a steppingstone en route to Supreme Court review; there is hardly an opportunity for the D.C. Circuit decision to be examined by other courts before the Supreme Court weighs in on the merits. When Supreme Court review is merely discretionary, however, the argument in favor of binding nationwide effect is stronger; such an approach gives the Supreme Court a single, specific opportunity to consider the issues presented on appeal, and if the Court were to reject a petition for certiorari, such a decision would at least implicitly suggest a level of comfort with the lower court's decision.

In addition, the rationale for giving a decision binding status is stronger when it comes to provisions calling for accelerated and exclusive review of a statute. Enactment of such single-circuit accelerated review provisions occurs when Congress anticipates constitutional challenges to a particular substantive statute. In those circumstances, is it easier to have confidence that Congress has made a conscious and informed decision to circumvent the "laboratory" of the circuit courts in order to ensure a swift and final resolution of challenges to a particular statute. Congress' decision suggests that it views the value of efficiency in these limited number of cases to be worth the resulting loss of creativity and analysis that comes from review in multiple circuit courts.

The argument for deference suggests that such a Congressional judgment regarding the costs and benefits of consolidation merits deference. The subject-specific analysis that goes into a Congressional decision to specify a single circuit for review of a statute is very different than the blunderbuss approach to consolidation that is taken by § 2112.

The argument may not be as strong when it comes to single-circuit review of agency decisions under a particular statutory scheme. While the single-circuit review provisions certainly suggest some Congressional interest in ensuring control over judicial review of an agency's decision, that interest might simply

be in ensuring that the federal agencies making these decisions need not drag themselves to court in circuits that are quite distant from their own headquarters in Washington, DC. There is very little legislative history for these provisions that might serve to tip the argument in one direction or another.

Furthermore, unlike statutory single-circuit review provisions, administrative single-circuit review provisions are solely prospective. Congress has no way of knowing the subject matter of the agency order or orders that will later be subject to what amounts to the *de facto* consolidation of petitions for review in a single circuit. Even if a conscious decision to consolidate can be presumed, it would have been largely impossible for Congress to adequately balance the benefits and costs of consolidation and/or extended precedential effects. Furthermore, while statutory single-circuit reviews are often followed by mandatory Supreme Court review, these single-circuit consolidation rules for administrative decisions are almost always left to the discretionary certiorari process in the U.S. Supreme Court. Because there is only one reviewing entity, and because there are a substantial number of such Circuit Court decisions, a single-circuit review process would effectively create a single National Court of Appeals if the primary reviewing court's decision was binding on other circuits. As otherwise discussed in this article, the policy considerations counseling against such an entity suggest caution in concluding that such a binding effect exists.

Similarly, there will certainly be administrative decisions that would benefit from the swift, certain resolution that can be provided by binding single-circuit review. Such a review, however, should occur only if the precedential effect of such a single-circuit decision is clearly stated, only if protections exist to ensure the primacy of the Supreme Court in the hierarchy of the federal system, and only if the benefit of the resulting efficiencies outweighs any risks to accuracy that arise by circumventing the percolation that would otherwise occur in multiple circuit courts. In other instances—instances much more common than § 2112 currently admits—the value of consolidation is not so great, there is no particular need to rush to a final decision, and the efficiencies posed by consolidation are trumped by the increased accuracy and

insights that can flow from having multiple circuit courts review a single agency decision.

Like with consolidated petitions under 28 U.S.C. § 2112, the Solicitor General has suggested that decisions made by the D.C. Circuit pursuant to exclusive judicial review provisions are binding nationwide. In the Supreme Court's recent decision in *Environmental Defense, et al. v. Duke Power Co., et al.*,⁵⁷ the Court was presented with the question whether the Fourth Circuit was constrained by the provision in 42 U.S.C. § 7607(b)(2), which provides that "[a]ction of the Administrator with respect to which review could have been obtained under paragraph (1) [permitting petitions for review of certain agency decisions] shall not be subject to judicial review in civil or criminal proceedings for enforcement." In the decision on review in that case, the Fourth Circuit examined the EPA's definition of a "modification" under the Clean Air Act's PSD program. The Fourth Circuit, without addressing the application or validity of section (b)(2), concluded (contrary to the implication of an earlier ruling by the D.C. Circuit in a petition for review to that court from the initial promulgation of the PSD "modification" rule, *see New York v. United States EPA*, 413 F.3d 3 (2005)), that the PSD definition of modification had to be identical to the NSPS definition of "modification."

In the oral argument in that decision, the Solicitor General took the position that review decisions made by a single circuit court pursuant to a particular statutory scheme are binding nationwide. According to the AAG arguing the case:

MR. HUNGAR: The court is precluded from considering a challenge that would invalidate the regulation because that is the determination Congress made in requiring pre-enforcement review to avoid the problem of inconsistent determinations and circuit conflicts and 700 district judges potentially construing the statute in different ways and tying EPA's hands. The Congress made that determination.

⁵⁷ 127 S.Ct. 1423 (2007).

JUSTICE KENNEDY: Are there other areas in the law where courts have to take as binding a legal proposition that they think is dead wrong when they-

MR. HUNGAR: It's quite common. It's quite common, Your Honor, in any regime where review of an agency decision is relegated to the exclusive jurisdiction of one court, as it is here, and enforcement proceedings are brought in a different court. Agencies, their decisions are reviewable in the court of appeals but often enforceable in the district courts.⁵⁸

Neither at argument, nor in the briefs, was the SG's position on this issue supported by any authorities. Furthermore, as is typically true in cases presenting questions about the binding effect of precedent among the circuits, the Supreme Court simply decided the case on the merits, and did not explicitly resolve the question presented regarding the precedential effect of the D.C. Circuit's decision under 42 U.S.C. § 7607(b)(2).

D. The Cross-Circuit Precedential Effect of "Hybrid" Questions Decided by the Federal Circuit

The last example of non-standard processes to be examined here is the subject-matter specific jurisdiction that the federal circuit has over patent matters.⁵⁹ Under the current system, cases involving patent matters originate in the U.S. District Courts, but are taken on appeal to the Federal Circuit.⁶⁰ As the Federal Circuit has noted, however, its subject-matter specific jurisdiction causes

⁵⁸ Oral Argument in *Environmental Defense v. Duke Energy Corp.*, 127 S.Ct. 1423 (2007).

⁵⁹ See 28 U.S.C. § 1295 (giving Federal Circuit jurisdiction over appeals under 28 U.S.C. § 1338, giving district courts jurisdiction over cases relating to "any Act of Congress relating to patents ... copyrights and trademarks").

⁶⁰ *Id.*

certain problems in cases involving "mixed" questions of law over which it has jurisdiction and law over which it does not:

We recognize, of course, that questions involving conflicts between patent law and other causes of action can and do arise in cases over which this court does not have appellate jurisdiction—cases in which claims under the Lanham Act or state law claims are not joined with a claim under the Patent Act. As a result, there is a risk that district courts and litigators could find themselves confronting two differing lines of authority when faced with conflicts between patent law and state or federal trademark claims.⁶¹

The Federal Circuit believed that the resolution of this issue was straightforward: "[A]s the sole appellate exponent of patent law principles this court should play a leading role in fashioning the rules specifying what patent law does and does not foreclose by way of other legal remedies."⁶²

If the Federal Circuit has decided a case involving one of these mixed issues, then,⁶³ and if a subsequent case arises in a regional Circuit Court because it does not present a patent-related cause of action sufficient to give the Federal Circuit jurisdiction under 28 U.S.C. § 1295, is the regional circuit court bound by the decision of the Federal Circuit? Like the other scenarios discussed in part B. and C., this circumstance involves a prior case decided pursuant to a non-standard appellate process established by Congress on what appears to be perfectly rational ground, and a subsequent decision not subject to the alternative process, but which might nevertheless be determined (at least in part) by the prior decision of the other circuit. Is the other circuit's decision binding?

⁶¹ *Midwest Industries, Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356, 1361 (Fed. Cir. 1999) (en banc).

⁶² *Id.*

⁶³ One example might be (as in *Midwest Indus.*) the question of whether patent law preempts a state law cause of action.

The arguments are much the same, although in the case of the Federal Circuit, Congressional intent to allocate decisionmaking responsibility to that Court over certain areas of the law is, if anything, the strongest of all the cases examined thus far. Unlike the consolidation of petitions under 28 U.S.C. § 2112, and unlike the allocation of responsibility to the D.C. Circuit to decide a matter quickly, the allocation of appellate jurisdiction to the Federal Circuit in patent matters seems to be done with the specific intent of ensuring the development of a court with specialized knowledge. If anything, such a rationale suggest the importance of deference, and argues in favor of granting a prior federal circuit decision the status of binding precedent.

At the same time, however, the Federal Circuit's jurisdictional statute allocates jurisdiction to that Circuit only under very particular circumstances. If the Federal Circuit's decisions are given binding authority outside of cases in which its jurisdictional statute applies, the circuit's jurisdiction effectively expands outside the scope of its authority. Congress chose to create a court with a particular scope of jurisdiction; it seems that there is little reason to expand it absent Congress's direction to do so.

III. Structure and Precedent

A. The Nature of the Problem: Non-Standard Structures for Courts and Appellate Review

We are accustomed to knowing, given a particular relationship between two courts, whether a decision issued by one of those courts is binding on the other. Given our strong intuitions regarding the rules of precedent, why is it so difficult to determine the precedential effect of decisions resulting from the kinds of non-standard processes discussed in Part I?

The problem lies in the unusual nature of the processes established in those examples. Our understanding of precedent develops in the context of the standard federal judicial process. Outside of that process, the standard model breaks down, and we are forced to look at the underlying rationales for binding precedent – rationales that justify the application of binding

precedent in particular situations. This is a difficult exercise, though, because precedent usually "just is" – it either is potentially binding or not.

The problem is compounded by the lack of any incentive for the U.S. Supreme Court to resolve questions regarding cross-circuit precedents. As was seen in the decision in *Duke Power*, the Court is generally able to address the pressing legal issue in the case on the merits. Once the substantive decision has been made, there is little rationale for the Court to decide the procedural question of whether one circuit court should have followed the decision of another. The problem has been solved, and the Court moves on.

Before addressing the relationship between structure and precedent head-on, some historical perspective may provide further insight into the source of our standard model of precedent.

B. The Historical Development of the Standard Model of Binding Precedent in the Federal Courts

In recent years, the most substantial public debate regarding the historical source of precedential rules came as a result of Judge Richard Arnold's decision in *Anastasoff v. United States*, in which a panel of the Eighth Circuit concluded that it was constitutionally prohibited from refusing to give precedential effect to prior unpublished decisions of the Circuit.⁶⁴ The Eighth Circuit took the case en banc and ultimately vacated the decision as moot.⁶⁵ The effects of the decision reverberated throughout the federal appellate system for some time, however, and may have served to motivate the recent decade's substantial academic work involving the role of precedent in the federal system.⁶⁶

⁶⁴ *Anastasoff v. United States*, 223 F.3d 898 (8th Cir.), *vacated*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

⁶⁵ *Id.*

⁶⁶ See, e.g., Harrison, *supra* n. __; N. Williams, *The Failings Of Originalism: The Federal Courts and the Power of Precedent*, 37 U.C. Davis L. Rev. 761 (2004) (critically reviewing the constitutional and historical analysis of horizontal precedent in those cases); additional citations.

The judicial response to *Anastasoff* came from the Ninth Circuit in the form of Judge Kozinski's opinion for the court in *Hart v. Massanari*.⁶⁷ Kozinski reached a conclusion directly contrary to that of the Eighth Circuit's panel in *Anastasoff*.

The primary focus of these decisions is on the role of *stare decisis* within the federal system, rather than on the particular nature of rules governing vertical precedent or strong *stare decisis* in the circuit courts. Incident to that discussion, however, the Court noted two important observations regarding the role of history and structure in the development of precedential rules: The importance of "reliable reports of cases," and the need for a "settled judicial hierarchy."⁶⁸

The history of the federal courts demonstrates the importance of the last point to the development of our concepts of precedent. For example, if we at the history of precedential rules governing whether there was intracircuit *stare decisis*, one can see some uncertainty in the historical literature.

Harrison noted, for instance, that the rule governing the precedential effect of decisions across circuits may have been different in the early years of their existence. In an Eighth Circuit case decided in 1895, he notes,⁶⁹ the Circuit Court stated that

[i]t is a principle of general jurisprudence that courts of concurrent or co-ordinate jurisdiction will follow the deliberate decisions of each

⁶⁷ 266 F.3d 1155 (9th Cir. 2001).

⁶⁸ *Id.* at 1164 n. 10 (noting the two preconditions to the development of rules of *stare decisis*: The presence of reliable reporters and the presence of a "settled judicial hierarchy").

In light of the importance of access to a decision on the effect of that decision, one of the most compelling arguments against the intercircuit binding effect of decisions in consolidated petitions for review is the lack of any way for parties to determine whether a circuit court that decides a petition for review was the only circuit to receive a petition for review, or whether it was, instead, the circuit at the receiving end of a transfer of multiple petitions for review under 28 U.S.C. § 2112. If parties cannot determine whether their circuit transferred a petition to the primary deciding circuit, it is difficult, indeed, to insist that they treat the primary deciding circuit's decision as binding.

⁶⁹ Harrison, 50 DUKE L. J. at 516 and n. 41.

other, in order to prevent unseemly conflicts, and to preserve uniformity of decision and harmony of action. This principle is nowhere more firmly established or more implicitly followed than in the circuit courts of the United States. A deliberate decision of a question of law by one of these courts is generally treated as a controlling precedent in every federal circuit court in the Union, until it is reversed or modified by an appellate court.⁷⁰

On the other hand, according to Surrency's *History of the Federal Courts*, "[o]ne of the most frequent objections to the creation of separate Circuit Courts of Appeals was that these courts would reach difference conclusions on the same issue."⁷¹ While Surrency does not identify the source of this objection, it seems that there may have been little consensus on the rule which has, at least for the moment, been resolved in favor of those who feared the possibility of circuit splits. This uncertainty was likely due to the substantial transition that federal courts were going through at the time.

The Circuit Courts of Appeals were created only four years before the decision in *Shreve*.⁷² It is important to recognize that these Circuit Courts of Appeal were distinct from, though in many ways direct descendants of, the trial-level "Circuit Courts" that had existed since 1789.⁷³ Those original Circuit Courts had geographic jurisdictions over both trial and certain appellate matters. Staffed originally by only district judges and Supreme Court justices "riding circuit," the original Circuit Courts were supplemented

⁷⁰ *Shreve v. Cheesman*, 69 F. 785, 790 (8th Cir. 1895).

⁷¹ Erwin C. Surrency, *HISTORY OF THE FEDERAL COURTS* 346 (2nd ed. 2002); *see also id.* at 97 (noting the "old argument of conflicts in the decisions of these circuits").

⁷² *Id.* at 87; Act of March 2, 1891, 26 Stat. 827.

⁷³ *See Surrency, supra* n. 25, at 88. "[U]nder the Judiciary Act of 1789, the Circuit Courts "were conceived as the major trial courts in the federal system." *Id.* at 55.

beginning in 1869 by Circuit Court judges.⁷⁴ When the Circuit Courts of Appeals were created in 1891 to serve as an intermediate appellate court, they followed the geographic structure of the trial-level Circuit Courts, and were staffed by panels of three judges, drawn from the District Courts, the Circuit Courts, and the Supreme Court Circuit Justice.⁷⁵ As the number of judges in the Circuit Courts of Appeals increased above three, and as the dockets of these courts increased, the circuits were permitted to staff cases with panels of three (and occasionally only two) judges.⁷⁶

The close relationship between the Circuit Courts and the Circuit Courts of Appeal, as well as the development of the Circuit Courts, likely had a substantial influence on the initial role of precedent in the developing modern federal system. In particular, this history suggests, at least in part, the rationale for the difference between the *strong stare decisis* rule that is applicable to panels within the federal courts of appeal, and the absence of any such rule as between district courts.

This difference in approach is, at its heart, a difference in how the two "courts" were perceived, and a difference in how they developed historically. The district courts (and the trial court responsibilities of the pre-1911 circuit courts) were made up of individual judges who worked independently. They were seen as separate decisionmakers with no particular precedent for collaboration at the district court level, and as such, there was no particular precedent (in the historical sense) for believing that their decisions bound each other. By contrast, the judges within the Circuit Courts of Appeal worked together from the beginning, with substantial discussion about whether it was even appropriate to have decisionmaking panels made up of fewer than all the judges in a particular circuit. Given that history, it is not surprising that the Circuit Courts decided that panel decisions – subentities within the larger court – would be binding on all subsequent panels. The difference between circuit court and intra-district court *stare*

⁷⁴ *Id.* at 55-61; Act of April 10, 1869, 16 Stat. 44.

⁷⁵ *Id.* at 90, 344-45.

⁷⁶ *Id.* at 90.

decisis is a direct result of the different way in which these judicial entities defined the "Court."

As Harrison suggests, then, our strict adherence to the "standard model" of precedent relies itself on something of an historical accident.⁷⁷ The decisions that led to our current case processing system for the federal courts. If, by contrast, the Circuit Courts had originally been conceived as an intermediate appellate court with nationwide jurisdiction, decisions would likely have been binding nationwide and today's "non-standard" processes would be unremarkable and clearly binding on trial courts and other intermediate appellate courts in the system. Our idea of precedent, at least as among the lower federal courts, is bound up with this historical accident.

Similarly, as Judge Kozinski suggests in his *Hart*,⁷⁸ our current conceptions about precedent are substantially (though not solely) related to the current structure of the federal judiciary, and arose, in part, only after the federal courts took on their current three-tiered structure.⁷⁹

C. Structure and Precedent

This historical survey, and the difficulties in the area of precedent that are presented by the unusual processes and structures discussed in part I, all point to an insight into the nature of precedential rules which, though perhaps implicit in the literature, is only rarely stated explicitly⁸⁰: The rules of both vertical and horizontal precedent are dependent in substantial part

⁷⁷ Harrison, *supra* note __, at 535.

⁷⁸ 266 F.3d at 1168.

⁷⁹ Hart, at __ (Kozinski quotation); Solum in blog;

⁸⁰ John Harrison comes closest to making this explicit point, though he doesn't quite get there. He notes, for instance, that it is "unlikely that there was widespread agreement as to norms of vertical precedent when the Constitution was adopted, because judicial structures were very much in flux." Harrison, *supra* n. __, at 521. In the course of pointing out the degree of Congressional control over rules of precedent, Harrison also engages in substantial discussion about Congress' ability to alter precedential rules through changes in the structure of the federal courts. *See, e.g., id.* at 531-39.

on the structure of the judicial system in which those rules are applied.

This observation flows directly from not only the non-standard processes discussed above, but from the very definition of "precedent." The precedential effect of a court's opinions is determined not only by the relevant precedential rules that govern what amounts to a "relevant" "holding," but by the structure of the judicial system within which those rules are applied. For there to be "binding precedent", there must not only be a prior holding on point, but that prior holding must have been issued by a court that is either the same court, or a "superior court."⁸¹ Horizontal precedent, or *stare decisis* (whether in its "normal" or "strong" form), is applicable only insofar as the entity issuing the first decision on a particular issue is the same "court" as the entity issuing a subsequent decision. Vertical or "hierarchical" precedent is applicable only insofar as the entity issuing the first decision on a particular issue is a "higher" or "superior" court in relationship to the entity issuing a subsequent decision. The definitions of these terms – "court" and "higher (or superior) court" – are themselves complex, and to know when they apply, we necessarily rely on processes as well as the history and particular form of the institutions involved.

The importance of structure to precedent is confirmed by the degree to which traditional rules of precedent break down when courts are faced with non-standard processes for the management and resolution of federal cases. It is further confirmed by the historical accident of our federal judicial structure. And it carries through to the non-standard decisions of today. For instance, part of the reason why the difficulty regarding precedential effect presents itself at all under 28 U.S.C. § 2112 is because the consolidation and transfer of multiple petitions for review does not appear to be a normal "transfer" of an appeal – or at least it is difficult to easily classify it into a typical 28 U.S.C. § 1404 or § 1406 transfer situation. In the context of multiple petitions for

⁸¹ See, e.g., BLACK'S LAW DICTIONARY, "Precedent" (8th ed. 2004) ("*binding precedent*. A precedent that a court must follow. • For example, a lower court is bound by an applicable holding of a higher court in the same jurisdiction. -- Also termed *authoritative precedent*; *binding authority*.");

review, the consolidation process effectively treats the circuit courts of appeal as fungible entities, all part of the same “court.” Since horizontal precedent is premised on the ability to identify the “court” for which a given precedent amounts to stare decisis, the breaking down of the boundaries of the circuits, without the structure of the transfer rules in 1404 and 1406, gives rise to confusion about the application of stare decisis to these kinds of decisions.

With this understanding in hand, we are in a position to discuss in further detail the resolution to the problems posed in Part I, to discuss certain observations regarding the ongoing debate about the constitutional role of precedent, and to make recommendations to those engaged in the development of non-standard models of appellate review in order to ensure that rules regarding precedent are clear and well-understood.

IV. Understanding the Role of Structure In Precedent

A. Addressing Non-Standard Appellate Processes

We therefore return to the problems presented in Part I: When presented with these non-standard processes, how should we determine whether a decision in one court has binding effect in another? The insight into the effect of structure on precedent suggests a range of approaches.

1. "Highly Binding" Approach / Structure Irrelevant

At one extreme is a "highly binding" approach to precedent under which any holding that might be deemed "persuasive" among the circuit courts would, in fact, be treated as "binding." Such an approach would at least have in its favor a structural simplicity. It would avoid all review of structural relationships, and ask only whether a preexisting decision is relevant to the legal question presented.

This view, of course, would amount to a radical transformation in the assumptions that govern federal practice. Any decision of

any Court of Appeals would be binding on any other Court of Appeals as long as the decision was relevant. A Second Circuit holding in an admiralty case, for instance, would be binding in a similar case in the Ninth Circuit, or even in the District of Alaska. A decision regarding the validity of an EPA rule in the Second Circuit – whether conducted in a consolidated petition for review or not – would be binding on the Ninth Circuit.

Our existing system has already rejected this approach, however, in that each Circuit Court is bound only by its own decisions, not by decisions in other circuits. To abandon that model, and the "national laboratory" that it encourages, would make little sense simply to solve the problems presented by the "non-standard" cases.

2. Structure-Relevant Approach

A second approach would retain the basic structure of the current appellate model -- in most cases, the only precedential authority would be the authority within a given Circuit Court. Under the Structure-Relevant Approach, however, the courts would take into account the structural relationship between the courts in question, and give effect to the relationship between structure and precedent.

In particular, the non-standard process might create binding precedent only if courts viewed the process as creating a decisionmaking body that could be considered to have a "superior" or "higher" position within the federal hierarchy. As part of this analysis, for instance, a court might examine whether the non-standard scheme appointed a different court to decide cases every time (such as the random assignment process under 28 U.S.C. § 2112), or whether (in contrast), Congress had established a particular court as the sole decisionmaker for a particular type of decision (such as for the Federal Circuit in patent matters, or the D.C. Circuit in certain regulatory or statutory matters of national import). In the latter case, the Courts might conclude that Congress intended the deciding court to have (or develop) expertise in that particular subject area. Consistent with the idea that precedent is binding when the initial court's position is

"superior" to the subsequent court, precedent would be binding in the latter circumstance, but not binding in the former.

Other factors might be relevant to this analysis. For instance, courts would need to balance the value of binding cross-circuit precedent (efficiency, expertise, and expedient decisionmaking in at least some cases) against the problems (the lack of circuit control through an internal *en banc* process, the risks associated with creating a "National Court of Appeals," the loss of the systemic benefit of multiple viewpoints, and the practical difficulties presented by the need to identify principles that are binding across circuit lines). This second approach has the merit of moderation, giving some binding effect to those non-standard processes that seem to present the "best case" for binding courts outside of the standard rules of precedent.⁸²

3. Clear Statement Approach

Despite the value of the Structure-Relevant Approach, I believe that it has flaws that permit it to be outweighed by a third approach: The Clear Statement Approach.

The default rule should be as follows: Unless Congress clearly states its view to the contrary when creating non-standard appellate processes, those processes should not result in cross-circuit binding precedent. While the intimate connection between structure and precedent makes it tempting to assign such cross-circuit binding effect, we should not allow the creation of these non-standard structures to complicate the relationship between the federal circuit courts and other institutions unless there is clear (and, I would suggest, expressly stated)⁸³ Congressional intent.

⁸² There are several "variations" of this second approach that might make the application of binding precedent more acceptable to the circuit to which it applies. A subsequent circuit might conclude, for instance, that the prior decision is subject to overruling by an *en banc* panel of the subsequent circuit court.

⁸³ If implicit Congressional intent were sufficient to permit cross-circuit binding precedent, this approach would be essentially identical to the second "Structure Relevant" approach. The benefits of this approach are achieved only

In its own way, this approach is as extreme as the first. It denies effect to the relationship between structure and precedent, and runs counter to what is arguably Congressional intent for some of the currently-existing alternative processes.⁸⁴ Nevertheless, there are several reasons for why the Clear Statement Approach provides the optimum way to manage the problems presented by questions of precedent in non-standard processes.

a. First, the Clear Statement Approach would be less resource intensive than the others. Under this approach, advocates and decisionmakers will simply continue to apply the standard rules of precedent, and rely on well-understood limits governing which jurisdictions can provide binding precedent in any given case. A change in those rules in order to accommodate non-standard processes would prove costly. Attorneys would initiate disputes over the threshold question of whether a decision from another circuit is potentially binding.⁸⁵ Furthermore, even if another court's decisions are identified as potentially binding, identifying those other decisions would also be a daunting task. As noted above, it is quite rare for the courts to tag their decisions as (for instance) being made pursuant to 28 U.S.C. § 2112 or an exclusive review statute.⁸⁶ Making such decisions binding on other circuits

by requiring explicit statements regarding the binding effect of decisions made pursuant to a non-standard appellate process.

⁸⁴ Because no existing alternative processes include "clear statements" that they generate binding precedent outside of the deciding circuit, the application of this approach would mean that no currently existing system would result in binding precedent applying across circuits.

⁸⁵ Of course, disputes would arise under the Clear Statement Approach as well. But not nearly as many as under the Structure-Relevant Approach, since counsel would need to point to explicit statutory language in order to make their case.

⁸⁶ Even if the Courts do identify their decision as being based on a consolidated petition for review, they certainly don't discuss which circuits their decisions come from.

Of course, if the system were to give cross-circuit binding effect to decisions arising from non-standard processes, we might expect this problem to cure itself over time. Courts might, for instance, learn to "tag" their decisions as "potentially binding in other circuits," and perhaps the online services like Lexis and Westlaw would come to include those tags in a manner that would make

would impose substantial additional costs on everyone in the legal system.⁸⁷

b. Second, those additional costs would come with little in the way of benefits. The standard model of precedent applies to the vast bulk of decisions in federal cases, and the benefits of consistency and efficiency flow directly from the application of that standard model to many similar cases over the years. The non-standard models, however, are non-standard for a reason: They are encountered only rarely. Between 1988 and 2005, for instance, the Panel on Multidistrict Litigation handled only 78 cases under 28 U.S.C. § 2112, or less than five each year.⁸⁸ While there are certainly other "non-standard" cases out there, the numbers are still small in comparison to the 60,000-plus appeals managed by the circuit courts in 2005.⁸⁹

Because decisions are only rarely issued as a result of non-standard processes, there would be little harm associated with refusing to give those decisions an atypical precedential effect. Larry Solum appropriately suggests that "[w]ithout [vertical] *stare decisis* the meaning of [statutory and constitutional] provisions would be up for grabs in every case involving them. And when the

them part of the database for the circuits in which they are binding (if, of course, such a determination could possibly be made).

Even under the Clear Statement Approach, it would be to the benefit of all involved if Courts developed explicit language that would permit parties to easily identify which decisions (out of the usual collection of entirely routine decisions) were generated as a result of non-standard processes that Congress had indicated should be binding in other circuits.

⁸⁷ It might also give rise to other problems. For instance, if the Second Circuit's decision in a consolidated petition for review is deemed binding in the Ninth Circuit, but if the Second Circuit (sitting *en banc*) subsequently overrules its earlier ruling, does that subsequent decision then bind the Ninth Circuit? *Cf. Sassy Doll Creations, Inc. v. Watkins Motor Lines, Inc.*, 331 F.3d 834, 840 n.1 (11th Cir. 2003) (suggesting that subsequent overruling of another circuit's decision is not binding on Eleventh Circuit, even if prior decision of Eleventh Circuit had relied on now-overruled decision as persuasive authority).

⁸⁸ Citation to FJC RTC docket.

⁸⁹ See Administrative Office of the U.S. Courts, *Federal Court Management Statistics, 2005*, available at <http://www.uscourts.gov/cgi-bin/cmsa2005.pl> (last visited March 25, 2008) (68,473 appeals filed in 2005).

law is up for grabs, it cannot realize the values we summarize by the phrase *the rule of law*."⁹⁰ This statement, however, is not strong enough to justify the "highly binding" approach to precedential rules – we already reject the concept of one circuit binding another. We give up very little if we refuse to apply binding precedent in a small subset of those cases.

Just as "the rule of law" survives when a plaintiff in the Second Circuit has a federal law interpreted differently than a plaintiff in the Ninth Circuit, it survives just as well when the Second Circuit decision resolves a petition for review consolidated from two, seven, or eleven other Circuit Courts. While the interaction of structure and precedent might suggest that it would be appropriate to extend binding precedent across circuit boundaries, the effect of refusing to do so would be limited, indeed.⁹¹

If these non-standard processes resulted in qualitatively or quantitatively significant cases over time, the importance of applying binding precedent in these non-standard cases would increase. It is precisely because these non-standard processes are "non-standard" that the Clear Statement approach gives up very little in refusing to give those processes binding cross-circuit precedential effect.

Furthermore, any cases that present particularly difficult problems can be addressed by treating the non-standard decision as persuasive precedent. If refusing to give binding effect to a non-standard decision generates particularly high costs (as in the case of judicial review of complex regulatory processes) or substantial unfairness, a court can choose to follow another circuit in order to avoid the worst of those effects.

⁹⁰ Lawrence Solum, "The Case For Strong *Stare Decisis*," blog entries originally posted beginning on 6/4/2003; archived at http://lsolum.blogspot.com/2003_06_01_lsolum_archive.html#200369898 (last visited March 24, 2008).

⁹¹ This adherence to the standard model is not, in itself, correct or incorrect. As noted *supra*, it reflects, to a substantial degree, the historical accident that led to the development for processing cases through our federal system. The structure we have relates intimately to the views of precedent that we hold. If the system had been different, there might have been little concern associated with many of these "non-standard" processes.

This alternative, of course, requires that the court have some interpretive space within which to maneuver. If the law seems sufficiently clear to mandate a particular outcome (the decision of another circuit notwithstanding), a court will likely find solace in the standard model of precedent and dismiss the other circuit's decision as not binding. If there is room for disagreement on the legal question, however, and if the problems presented in a particular case particularly large, the principles of persuasive precedent will permit a court to follow other circuits and thereby avoid the inefficiency or unfairness that might otherwise result.⁹²

Finally, the risk of conflicting decisions that might be generated by refusing to give binding precedential effect is substantially alleviated by continuing presence of Supreme Court review. As long as the Court is available to resolve conflicts among the federal circuits, the limited inconsistencies that result from the Clear Statement Approach are likely to be minimal.

c. Third, to the degree that Congress has created non-standard processes for the resolution of cases in the federal courts, jurisdictional statutes govern the circumstances triggering those non-standard processes.⁹³ For subsequent cases that present questions of law that have been addressed in prior resolutions of non-standard processes, yet which are not covered by those jurisdictional statutes, the application of binding precedent to the earlier decision expands the scope of the jurisdictional statute, making the outcome of the non-standard process binding in circumstances outside of the intended scope of that process. This

⁹² In all likelihood, a court will vary the degree to which it relies on "persuasive" authority from another circuit depending on a variety of other factors. At least one factor may be present in all these cases: Many circuits have stated that they will avoid creating circuit splits if at all possible. *See, e.g.*, *In re Miller*, 276 F.3d 424, 428-29 (8th Cir. 2002) (follow other circuits whenever "reasoned analysis will allow"); *Environmental Protection Info. Center v. Pacific Lumber Co.*, 257 F.3d 1071, 1077 (9th Cir. 2001) (follow other circuits unless "unless there are valid and persuasive reasons to hold otherwise").

⁹³ *See, e.g.*, 28 U.S.C. § 2112 (multiple petitions for review of agency action); 28 U.S.C. § 1295 (giving Federal Circuit jurisdiction over appeals under 28 U.S.C. § 1338, giving district courts jurisdiction over cases relating to "any Act of Congress relating to patents ... copyrights and trademarks").

concern is not presented under the standard appellate model; if the Ninth Circuit issues a decision, it is entirely consistent with the scope of that Court's jurisdiction to conclude that the subsequent case should be bound by the earlier Ninth Circuit ruling. The same principle is not the case where a party is (for instance) challenging, in the Ninth Circuit, the statutory authority for an enforcement action that had previously been examined in a consolidated petition for review in the Second Circuit (even if one of the consolidated petitions was originally filed in the Ninth Circuit). In that case, the non-standard jurisdiction of the Second Circuit over the earlier petition for review is not consistent with the source of the Ninth Circuit's jurisdiction in the subsequent case. Giving binding precedential effect to the Second Circuit's earlier decision expands the scope of 28 U.S.C. § 2112 beyond the scope of the circumstances that Congress deemed appropriate.

d. Fourth, the clear statement model will encourage Congressional attention to the relationship between structure and precedent.⁹⁴ While it might be possible for courts to identify and evaluate the factors that enter into deciding whether decisions from a non-standard model should be binding or not, doing so would be a difficult proposition that would lead to extended disputes. Rather than struggle through this problem, the minimal effect associated with applying the Clear Statement rule argues in favor of forcing Congress to address these issues, rather than the Courts.

e. Finally, the "clear statement" rule seems most consistent with the role of the federal courts within our Constitutional system. At first, this seems to be a strange argument. As noted in such detail above, the rules of precedent are not traditionally positive law enactments, and are more often than not viewed as within the judicial branch's exclusive sphere of control. This is true, and it makes the second analytical approach (the structure-relevant approach) at least a plausible one. Ultimately, however, the relationship of structure (a legislatively-controlled input) to precedent, and the relatively limited set of circumstances in which these problems are likely to arise, suggests that courts need not

⁹⁴ A similar approach has arguably driven the Supreme Court's jurisprudence governing implied rights of action. [Cite]

reach out to evaluate the complex matters of precedent in these unusual cases.

Allowing the legislature, rather than the Courts, to decide this issue also has the advantage of avoiding the problem of self-interest on the part of courts and judges. Admittedly, that self-interest takes the form of two competing factors: One, avoiding unnecessary work, argues in favor of applying binding precedent as often as possible. The other – the desire to retain jurisdiction over cases, rather than ceding control to prior decisionmakers – argues against it. These factors may well cancel each other out, but avoiding decisions in which Courts have substantial vested interests – particularly where such decisions are just as well given over to legislative determinations – is preferable.

The "Clear Statement" approach is not the only reasonable one; there are a number of subtle approaches that might be adopted under the "Structure-Relevant" approach that might generate substantial benefits while allowing the Courts to comply with what is at least an arguably implicit Congressional intent. In the end, however, I believe that the lack of any clear Congressional direction on how precedent is to be managed in these non-standard processes, as well as the complexities associated with determining whether and how binding precedent should apply in them, militates in favor of the Clear Statement approach.

B. Precedent as a Conscious Decision in Structural Reform

The Clear Statement approach to determining the place of binding precedent in non-standard appellate models leads directly to the need for Congress to be made – and to become – explicitly aware of the way in which structural or institutional reform within the federal judiciary can alter precedential rules. Given the intimate relationship between the structure of our federal appellate processes and the rules of precedent, Congress should not act to alter judicial structures without explicitly considering the precedential effect of those rules. Whether Congress is considering the division of the Ninth Circuit, a new specialty court,

or some alternative appellate process intended to streamline federal case processing, Congress must consider how the change in structure is going to fit within our standard model of precedential rules. If the new process does not obviously fit, Congress should provide explicit direction to the Courts about which decisions carry binding precedential weight.

C. Congressional Control Over Precedent Through Structural Reform and Institutional Design

Finally, the fundamental insight regarding the relationship between structure and precedent also provides guidance for those who have occasionally examined the question regarding the degree to which precedential rules can be changed by Congress or the judiciary. Because the federal appellate process is largely controllable by Congress, its power to control precedent is perhaps broader than one might expect at first glance.

This article does not seek to challenge or even review in detail the work of those who have examined the role of the Constitution in setting the outer limits of direct Congressional control over the rules of precedent. Nevertheless, the insight into the relationship between structure and precedent necessarily implies a degree of Congressional control over precedent in an indirect fashion: Because Congress has the power to create and the power to destroy lower (or "inferior"⁹⁵) federal courts, Congress also has an inherent ability to define the role of precedent in that system. Even if there is some question about Congress' ability to directly control rules of precedent in the federal courts, Congress' plenary authority over the structure of those courts implies near-plenary control over the rules of precedent as well. Anything that could be accomplished directly can be accomplished indirectly through the reorganization of the lower courts.⁹⁶

Finally, it is worth noting that this control necessarily extends to the Supreme Court. To be sure, Article III places some limits on

⁹⁵ U.S. Const. Art. III §1.

⁹⁶ See, e.g., Harrison, *supra* n. ___, at 539-42 (suggesting ways in which Congress might rely on the Necessary and Proper clause to control the structure of lower federal courts and, thereby, rules of precedent).

Congress' ability to alter the structure of the Court -- Article III requires that there *be* a "Supreme Court," and that it be staffed by federal judges with lifetime appointments -- but Congress may well have a broader authority beyond its Constitutional authority to create exceptions to the Court's appellate jurisdiction. We know, for instance, that Congress wields control over the number of judges, and could likely control the manner in which they sit to hear cases (in panels, for instance, with only occasional *en banc* review in appropriate cases). While the full scope of this kind of Congressional control over the structure of the Supreme Court -- and, therefore, over the role of precedent in the Court -- would require further analysis, the general observation -- that the power to control structure and process amounts, in itself, to the power to control rules of precedent -- is one that is worth keeping in mind as the debate regarding Congressional control over the Federal Courts continues.