

STRUCTURE AND PRECEDENT

*Jeffrey C. Dobbins**

The standard model of vertical precedent is part of the deep structure of our legal system. Under this model, we rarely struggle with whether a given decision of a court within a particular hierarchy is potentially binding at all. When Congress or the courts alter the standard structure and process of federal appellate review, however, that standard model of precedent breaks down. This Article examines several of these unusual appellate structures and highlights the difficulties associated with evaluating the precedential effect of decisions issued within them. For instance, when Congress consolidates challenges to agency decision making in a single federal circuit, is the decision that ultimately issues binding on just the deciding court, or is it binding nationwide? The lack of well-accepted answers to this and similar questions undermines the work of practitioners, courts, and Congress.

This Article uses these nonstandard processes and institutions to emphasize a rarely stated observation that will ensure a more careful and rational discussion of precedential rules in the future: the structure of the court system within which decisions are made—the structure of the appellate universe—is critical to defining the rules of binding precedent. After discussing this relationship between structure and precedent, this Article identifies, and argues in favor of, a Clear-Statement Approach to determining the precedential effect of decisions in nonstandard appellate structures. This approach encourages Congress to pay attention to the precedential effect of its structural decisions, and highlights the degree to which Congress controls rules of precedent through its control over the structure of the federal judiciary.

* Assistant Professor of Law, Willamette University College of Law. Thanks to the participants at the Willamette Valley Junior Faculty Workshop and the American University Young Federal Courts Scholars Workshop, Tom Rowe, support from Willamette University College of Law, and the research assistance of Daniel Kittle, Shestin Swartley, and Candice Brown.

TABLE OF CONTENTS

INTRODUCTION	1455
I. THE STANDARD RULES: BINDINGNESS OF PRECEDENT.....	1460
A. <i>A Lexicon of Precedent</i>	1460
1. “ <i>Binding Precedent</i> ” (Including “ <i>Vertical Precedent</i> ” and “ <i>Strong Stare Decisis</i> ”).....	1460
2. “ <i>Horizontal Precedent</i> ” or “ <i>Stare Decisis</i> ”	1461
3. “ <i>Persuasive Precedent</i> ”	1462
B. <i>Federal Court Structure and the Rules of Intracourt Binding Precedent</i>	1463
II. NONSTANDARD APPELLATE MODELS AND THE PROBLEM OF PRECEDENT	1466
A. <i>The Cross-Circuit Precedential Effect of Decisions in Consolidated Petitions for Review under 28 U.S.C. § 2112</i>	1466
1. <i>The Filing and Consolidation of Multiple Petitions for Review</i>	1466
2. <i>The Problem of Precedent in Consolidated Petitions for Review</i>	1468
3. <i>Arguments Favoring the Binding Precedential Effect of Decisions in Consolidated Petitions for Review</i> ...	1470
4. <i>Arguments Challenging the Binding Precedential Effect of Decisions in Consolidated Petitions for Review</i>	1471
5. <i>Litigation Position of the U.S. Solicitor General</i>	1475
B. <i>The Cross-Circuit Precedential Effect of D.C. Circuit Decisions in Exclusive Jurisdiction and “Accelerated Review” Cases</i>	1477
C. <i>The Cross-Circuit Precedential Effect of “Hybrid” Questions Decided by the Federal Circuit</i>	1481
D. <i>The Precedential Effect of Bankruptcy Appellate Panel Decisions</i>	1483
III. THE CONNECTION BETWEEN PRECEDENT, STRUCTURE, AND PROCESS	1485
IV. UNDERSTANDING PRECEDENT IN NONSTANDARD APPELLATE STRUCTURES	1487
A. <i>Highly Binding Approach/Structure Irrelevant</i>	1487
B. <i>Structure-Relevant Approach</i>	1488
C. <i>Clear-Statement Approach</i>	1490
CONCLUSION: PRECEDENT AS A CONSCIOUS DECISION IN STRUCTURAL REFORM AND INSTITUTIONAL DESIGN	1495

INTRODUCTION

The rules that govern the binding precedential effect of judicial decisions are a part of the deep structure of our legal system.¹ They are largely intuitive, taught only in passing at law schools,² and are rarely addressed by positive law.³ While the application of these rules of precedent can be difficult in practice,⁴ we rarely struggle with whether a given decision of a court within a particular hierarchy is 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),⁵ and (b) courts are somewhat more loosely bound by prior relevant decisions issued by their own court (“horizontal” precedent or “stare decisis”).⁶ This standard model of precedent largely tracks the standard procedure for civil cases in

1. *E.g.*, Mortimer N.S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 AM. J. COMP. L. 67, 86 (2006) (“The use of precedent by courts in the United States of America . . . is so deeply embedded in the culture of the legal profession and the judiciary that it takes place without much reflection by judges.”); *see also id.* at 72 (noting that application of the common law in American cases, including principles of precedent, “has become so automatic and unreflective in the modern era that it goes almost entirely unexplained, even in the cases that apply it”). In generalizing the idea of precedent, Schauer noted that “[r]eliance on precedent is part of life in general.” Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 572 (1987).

2. A few casebooks include explicit discussions of precedent, and first-year students may enjoy a brief introductory discussion of precedential rules in civil procedure or during orientation. For most law students, however, it is “learn as you go” when it comes to the rules of precedent.

3. *But see* Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 42–43 (1959) (citing Georgia Act of Dec. 9, 1858, No. 62, § 1 (providing that no case in the state supreme court garnering three votes could be subsequently overturned); Georgia Code of 1861, pt. 1, tit. 5, ch. 2, art. I, § 210 (backing off the 1858 Act, and allowing reversal by the full court after argument and with written decision)). *Cf.* Constitutional Restoration Act of 2004, H.R. 3799, 108th Cong. § 301 (2d Sess. 2004) (depriving federal courts of jurisdiction over certain Establishment Clause cases and providing that “[a]ny decision of a Federal court which has been made prior to or after the effective date of this Act, to the extent that the decision relates to an issue removed from Federal jurisdiction under section 1260 or 1370 of title 28, United States Code, as added by this Act, is not binding precedent on any State court”).

4. 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. *E.g.*, *United States v. Johnson*, 256 F.3d 895, 919–21 (9th Cir. 2001) (Tashima, J., concurring) (disputing which part of an en banc opinion is “holding,” and which is “dicta”). Other questions can arise even if the “holding” is obvious. In a Supreme Court decision with a heavily divided vote, for instance, which part of the written decision—if any—is the “holding” and therefore binding on lower courts? *See, e.g.*, *Nat’l Mut. 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).

5. The term “hierarchical precedent” comes from an article by Evan Caminker. *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994).

6. *E.g.*, *Miller v. Gammie*, 335 F.3d 889, 899–901 (9th Cir. 2003) (en banc) (discussing the general rule against panels overruling prior panel decisions of the circuit). This is a stronger version of horizontal precedent than the standard doctrine of stare decisis, which I define as the principle that permits, but generally discourages, the overruling of prior decisions of the same court.

the United States: district court decisions are reviewed by the intermediate court of appeals for the geographic circuit in which the district court sits, and those appellate decisions are reviewed by the Supreme Court.⁷

That standard model of precedential rules, however, breaks down in the federal system⁸ 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”⁹ managed by the Federal Circuit,¹⁰ what precedential effect does a Federal Circuit decision have in the Ninth Circuit?¹¹ Or, if Congress gives the D.C. Circuit the sole authority to review rules issued by an agency to implement a particular statute,¹² is a panel in a different circuit deciding an enforcement action bound by the D.C. Circuit’s interpretation of those rules? When 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 circuits transferring petitions to that court, or on all courts nationwide?

There are no well-accepted answers to these questions. When Congress or the courts alter our standard model for processing cases, our intuitions regarding the precedential effects of decisions break down. When we are unable to determine whether prior decisions constitute binding precedent, the resulting uncertainty makes it difficult for practitioners to effectively advocate for their cause, interferes with the ability of courts and judges to maintain an appropriate consistency among legal rulings, and undermines the effectiveness of the procedural and structural innovations adopted by Congress.

While one might hope that these questions will be resolved in time, neither the courts nor academic commentators have made much progress. In most instances, the courts have sidestepped the difficulty of evaluating the precedential effect of decisions in these nontraditional appellate processes. When faced with potentially binding decisions outside their circuit, for instance, the federal appellate courts will often merely treat them as persuasive, rather than binding. If a court of appeals chooses not to follow

7. See generally Lawrence B. Solum, *Stare Decisis, Law of the Case, and Judicial Estoppel*, in 18 MOORE’S FEDERAL PRACTICE para. 134.02 (3d ed. 2009).

8. Similar rules of precedent are also seen at the state level, with trial court decisions reviewed by two (though occasionally only one) layers of appellate courts. See Sellers, *supra* note 1, at 85–86 (“[T]he rules of precedent applied throughout the United States . . . seem usually to converge . . .”). For a discussion of the place of state appellate structures, see *infra* note 16.

9. *Midwest Indus., Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356, 1358–59 (Fed. Cir. 1999) (en banc).

10. 28 U.S.C. § 1295 (2006) (giving Federal Circuit jurisdiction over appeals under 28 U.S.C. § 1338 (2006)).

11. See *Midwest Indus.*, 175 F.3d at 1358–59 (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); *infra* Section II.C.

12. See, e.g., 42 U.S.C. § 7607(b)(1) (2006) (limiting review of certain Clean Air Act decisions to the D.C. Circuit).

an arguably binding decision of another circuit, the Supreme Court may resolve any resulting conflict on the merits, but once it has done so, there is little reason for it to weigh in on issues of intercircuit precedent.¹³ Similarly, most commentators on the problems of precedent have focused on the strength, validity, terms, and variability of the rules of stare decisis, rather than the structural question of whether, within a given appellate hierarchy, a decision is even binding.¹⁴ To the degree that commentators are currently engaged in an examination of stare decisis, the analysis has primarily focused on the role of the Constitution on precedential rules at the Supreme Court level, and has generally, and often explicitly, avoided analysis of the role of intermediate appellate courts in our understanding of precedent.¹⁵

13. See, e.g., *Env'tl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 563 (2007) (failing to address the question presented of whether the Fourth Circuit decision violated a Clean Air Act provision mandating exclusive D.C. Circuit review, and instead merely addressing the case on the merits). For further discussion of this case, see The Oyez Project, http://www.oyez.com/cases/2000-2009/2006/2006_05_848 (last visited Feb. 17, 2010). Even if the Court were to weigh in on relevant rules for managing intercircuit precedent, there is an argument that such a discussion would itself be dicta. In *Miller v. Gammie*, for instance, two concurring judges jostled over whether the en banc court's statements regarding the rules of intracircuit precedent were dicta when the en banc court had also resolved the case on the merits. 335 F.3d 889, 900–01 (9th Cir. 2003) (en banc) (Kozinski, J., concurring); *id.* at 902–04 (Tashima, J., concurring).

14. 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—what is called “stare decisis”—is the primary focus of these articles. See, e.g., Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075, 1075 n.2 (2003) (defining stare decisis, but not precedent); Lawrence Solum, Legal Theory Blog, *The Case for Strong Stare Decisis, or Why Should Neoformalists Care About Precedent?*, http://lsolum.blogspot.com/2003_06_01_lsolum_archive.html#200369898 (June 4, 2003, 05:50 EST) (focusing on stare decisis without discussing the meaning of precedent).

15. As one regular commentator on civil procedure has noted:

In recent years, there has been a surprising outpouring of academic literature on the proper role of precedent in constitutional cases. Although some of the commentary addresses the question of ‘vertical’ stare decisis—the question whether and to what extent higher court precedents should bind lower courts—most observers have focused on the ‘horizontal’ problem of the effect of a court’s own precedents on its future decisions. And even this focus has been narrowed by concentrating on the Supreme Court, leaving the lower federal courts, as well as the state courts, to work things out for themselves.

David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEXAS L. REV. 929 (2008) (citation omitted) (Shapiro does not examine the problem of vertical precedent, either).

See Murphy, *supra* note 14, at 1080 n.27 (“[T]his Article confines its attention to the *separation-of-powers* concerns raised by the elimination of the horizontal force of precedents.”) (emphasis in original); Michael Stokes Paulsen, *Abrogating Stare Decisis By Statute: May Congress Remove The Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1538 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.”); Schauer, *supra* note 1, at 576 (assuming, for purposes of his discussion, that “the past and present decisionmakers are identical or of equal status,” and therefore setting aside the question of vertical precedent); see also John McGinnis & Michael Rappaport, *Reconciling Originalism & Precedent*, 103 NW U. L. REV. 803 (2009) (discussing role of precedent in early constitutional thought in the United States, not mentioning courts of appeals); Steven G. Calabresi, *Text vs. Precedent in Constitutional Law*, 31 HARV. J.L. & PUB. POL’Y 947 (2008) (same); *Symposium: Precedent & The Roberts Court*, 86 N. CAROLINA L. REV. 1107 (June 2008) (in 330 pages of symposium

This Article focuses on the rarely asked, and almost never answered, question of whether a given decision in a particular appellate structure should be treated as binding precedent. What structural relationship converts a decision that might be “persuasive” precedent (of any degree) into the status of “binding” precedent?

As an entrée into examining this question, Part I outlines a hierarchy of precedent and examines the relationship between our current understanding of precedential rules and the historic development of our federal courts and appellate processes.

Part II then looks at several nonstandard appellate (and court) structures, discusses the precedential problems that arise out of their unusual formats, and notes the competing arguments for whether binding precedential effect should be given to earlier decisions in these cases.

Drawing on the examples in Part II, Part III discusses the strong link between our standard model of precedent and the structure and judicial processes of the court system within which we function. It also illuminates certain unstated presumptions that underlie the standard model, and thereby casts light on appropriate, or at least possible, resolutions of the problems of precedent.

Part IV examines some of the implications arising out of the link between structure and precedent, and focuses on possible approaches to thinking about the binding effect of precedent in nonstandard structures. It then sets forth an optimum default rule for deciding whether a decision should be considered to have “binding” precedential value. In particular, I suggest that the most straightforward approach to these problems is the use of a “clear statement” rule, which rejects any cross-circuit precedential effect unless Congress has clearly indicated a contrary intent. As an initial matter, any rule at all would be preferable to the current guess-as-you-go approach. The Clear-Statement Approach would be easier to apply than most alternatives, would ensure consistency with jurisdictional statutes that limit the scope of nonstandard processes, and would encourage congressional attention to the matter of precedent. Finally, despite the obvious and critical role that federal courts play in implementing our system’s rules of precedent, the Clear-Statement Approach is most consistent with the appropriate role of federal courts within our constitutional system.¹⁶

articles—albeit one on the Roberts Court—mentioning “circuits” or “courts of appeal”; one interesting exception is Tracey E. George, *From Judge to Justice: Social Background Theory and the Supreme Court*, 86 N. CAROLINA L. REV. 1333 (2008) (focusing on the effect of prior circuit judge experience on the work of subsequently elevated Supreme Court Justices)).

16. The emphasis of this Article is on the federal system, but the general observation regarding the intimate relationship between structure and precedent holds true in state court systems as well. As in the federal system, our understanding of the rules of binding precedent in state systems is dependent, to a substantial degree, on the established state appellate structure. While some states are somewhat different—several do not have intermediate appellate courts, for instance—the general structure, and the general understanding of precedential rules, remains the same. Additional investigation into the relationship between precedent and structure at the state level would be useful, but it is beyond the scope of this Article.

Also useful, though beyond the scope of this Article, would be an examination of this issue as a matter of comparative law. As students of comparative law are aware, many civil law countries,

Finally, the Article concludes by emphasizing two important considerations flowing from the connection between structure and precedent. First, legislative bodies should be particularly attentive when designing nonstandard appellate systems or restructuring court institutions to the way in which decisions flowing from those systems will be applied in subsequent decisions. Second, the connection between structure and precedent highlights the degree to which Congress, through its constitutional control over the form and process of the federal judicial system, retains substantial control over the rules of precedent. This observation bears directly on recent academic commentary¹⁷ regarding the role of Congress in defining the rules of precedent, and highlights a means by which Congress might alter those rules indirectly.

It is worth emphasizing at the outset that this Article does not ask rights-based questions, such as 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.¹⁸ Rather, the focus of this Article is on defining the universe of decisions that must be examined in evaluating whether a court’s holdings might amount to binding precedent, and in determining why we define the universe of potentially binding decisions 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 of 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.

which generally eschew the concept of “binding precedent” as used in this Article, also have systems of judicial review that are, from the perspective of attorneys who practice exclusively in the United States, strangely nonlinear and disunified. *See, e.g.*, INTERPRETING PRECEDENTS: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1997) (comparing the structure and approach to precedent in eight different continental European countries, as well as the United States, the United Kingdom, and European community). Germany, for example, has five Supreme Federal Courts for different areas of the law and a Federal Constitutional Tribunal. Robert Alexy & Ralf Dreier, *Precedent in the Federal Republic of Germany*, in INTERPRETING PRECEDENTS, *supra* at 17–19. Except for the decisions of its Federal Constitutional Court, there are “no strict rules on the binding force of precedents.” *Id.* at 26. The French system contains two distinct hierarchies of courts: the Court of Cassation (with 84 judges, not counting state attorneys) and the Conseil d’Etat (with 270 members, only about 60 of whom actually decide cases). Michel Troper & Christophe Grzegorzczuk, *Precedent in France*, in INTERPRETING PRECEDENTS, *supra* at 103, 103–06. “Precedent” never implies a binding decision in the French legal language, because courts are not bound by past decisions. *Id.* at 111. This Article’s observation of the connection between court structure and the rules of precedent is entirely consistent with the different approach to both in many civil law countries.

17. *See supra* notes 14–15.

18. *See Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000) (holding Eighth Circuit practice of deeming unpublished decisions noncitable to be unconstitutional), *vacated en banc*, 235 F.3d 1054 (8th Cir. 2000); *see also* Murphy, *supra* note 14, at 1080–81 & n.27 (describing literature that argues for due process or equal protection concerns related to the force of precedent).

I. THE STANDARD RULES: BINDINGNESS OF PRECEDENT

A. *A Lexicon of Precedent*

Everyday discussions of precedent are often confused by a variety of terminologies that can stand for different principles. Before addressing circumstances in which the rules of precedent are unclear or uncertain, it is, therefore, important to set forth the terminology this Article uses.

First, I use the word “precedent,” standing alone, to refer to any prior decisions that might be deemed to have some positive utility in deciding later cases. Broadly stated, the term encompasses all relevant cases, from those that are “binding” on later courts to those that are valuable merely because of some relevant logical or legal force.

In any given situation, of course, a prior opinion on an apparently relevant point might be distinguished (i.e., deemed to be not on point), or a relevant point might be dismissed as dictum (i.e., a statement that is not necessary to the holding of the opinion). It is not the intent of this Article to examine well-plowed ground regarding the manner in which courts or attorneys go about distinguishing thinly distinguishable cases or deeming apparently critical holdings to be dicta. Rather, in order to focus attention on the “bindingness” of a particular decision, I assume throughout this piece that a “precedential” (or potentially precedential) prior decision announces a rule of law that is both necessary to the holding of the prior case (i.e., it is a “holding”), and “on point” (i.e., it is relevant) to the decision in the subsequent court. The only remaining variable, then, is the “bindingness” of the prior opinion on the subsequent court. The distinguishing characteristic of the following types of precedent is the magnitude of bindingness that the precedent has on a particular subsequent court.

1. *“Binding Precedent” (Including “Vertical Precedent” and “Strong Stare Decisis”)*

In this Article, “binding precedent” refers to holdings in decisions that subsequent courts *must* follow if they are on point, even if the judges strongly believe that the earlier decision was incorrect as a matter of law.¹⁹ If a court may ignore an on-point decision 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 within its judicial system. (Caminker refers to this variety of

19. See, e.g., *Rico v. Terhune*, 63 F. App’x 394, 394 (9th Cir. 2003) (Reinhardt, J., concurring) (“I concur only under compulsion of the Supreme Court decision in [*Lockyer v. Andrade*, 538 U.S. 63 (2003)]. I believe the sentence is both unconscionable and unconstitutional.”); *Bageanis v. Am. Bankers Life Assurance Co.*, 783 F. Supp. 1141, 1149 (N.D. Ill. 1992) (“[I]t is inescapable that *Kush* is directly on point. That being so, we are not at liberty to question or disagree with [that decision].”). *But see, Terhune*, 63 F. App’x at 394 (Pregerson, J., dissenting in part) (“In good conscience, I can’t vote to go along with the sentence imposed in this case.”).

precedent as “hierarchical precedent.”²⁰) Thus, even if a panel (whether en banc or not) of a court of appeals concludes a particular 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 appellate court’s geographical jurisdiction is bound by the decisions of that court of appeals.²¹

Another form of binding precedent works horizontally within a given court. Under this doctrine—which I label “binding precedent” because of the way that most treat it, but which some call a version of “strong stare decisis,”²²—an on-point holding by a prior panel of the same court *must* be followed even if the later panel disagrees with its decision. This principle is currently applicable in the federal system only to panels of courts of appeals, which are obligated to follow the decisions of earlier panels, even if they believe them to be incorrectly decided.²³ While panel rulings may be overturned by en banc panels or the Supreme Court, the control of decisions of the en banc court over panel decisions of the courts of appeals is a simple example of the rule of vertical precedent.²⁴

2. “Horizontal Precedent” or “Stare Decisis”

Subject to the above rule for panels of the courts of appeal, prior decisions of a given court are not binding precedent on subsequent panels of that court. Rather, they serve as pure “stare decisis,” which is to say that they are not binding, even though they are given great weight in subsequent decisions.²⁵ As a result, a court that is bound only by traditional (rather than strong) stare decisis is free to reach its own conclusions about the appropriate outcome of a particular legal question, even if the justification for reaching that outcome may need to be particularly strong before the second panel decides to overrule the prior precedent. This principle applies to prior decisions of the U.S. Supreme Court within the Supreme Court, to prior en

20. Caminker, *supra* note 5.

21. Solum, *supra* note 7, para. 134.02[2] & n.26.

22. *E.g.*, Solum, *supra* note 14. Arguing from a neoformalist perspective, Solum contends that this principle, which he calls “strong stare decisis,” should be extended to bind the Supreme Court to its own prior decisions. The application of a doctrine of “strong stare decisis” to Supreme Court decisions, he suggests, would encourage better decisions in the first instance.

23. *See* Solum, *supra* note 7, § 134.02[1][c] (noting exceptions to the general rule, which permit panels 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”).

24. *See infra* notes 31–41 and accompanying text. As noted in this Article, the binding nature of panel decisions on subsequent panels is somewhat anomalous if we look solely at the hierarchical relationship between the panels. An examination of the history of the federal courts, however, reveals that the anomaly is in fact largely consistent with the observation that precedential rules derive from the structural relationships between our courts.

25. Solum, *supra* note 7, para 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.”).

banc decisions of the courts of appeals when sitting en banc, and to prior decisions of a particular judge on a given district court.²⁶

As the Supreme Court has noted, and as Michael Stokes Paulsen begins his article on precedent by noting, even the courts recognize that this form of stare decisis is a “principle of policy . . . not . . . an inexorable command”²⁷—a “sub-constitutional doctrine” subject to manipulation by courts and (potentially) legislatures alike.²⁸ By contrast, binding precedent *is* a command to the courts bound by the vertical (or strong stare decisis) precedential value of a particular case.²⁹

Arguably, horizontal stare decisis is merely 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. In the end, however, they perceive themselves to have some mechanism by which they are able to choose to ignore prior relevant decisions.

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.³⁰ Even an on-point holding may carry little weight with a court of appeals if it was written by a magistrate judge in a district outside

26. *Id.* paras. 134.02[1][b]–[c].

27. Paulsen, *supra* note 15, at 1537 & n.1 (quoting *Seminole Tribe v. Florida*, 517 U.S. 44, 63 (1996)).

28. *Id.* at 1538.

29. This is not to say, of course, that the rules regarding what prior decisions count as binding are themselves fixed. Indeed, much of Part II is directed at examples in which uncertainty regarding whether a decision is binding or not may very well lead to manipulation by courts and legislatures regarding a final decision on that very question.

30. *See, e.g.*, *Vu v. Ortho-McNeil Pharm., Inc.*, 602 F. Supp. 2d 1151, 1154–55 (N.D. Cal. 2009) (“The Court agrees that those cases are not binding authority; however, to the extent that they are on point and to the extent that the Court is not aware of any . . . Ninth Circuit or California state court opinions to the contrary, those cases do serve as persuasive authority.”); *United States v. Sirotna*, 318 F. Supp. 2d 43, 47 (E.D.N.Y. 2004) (noting the relevance of a prior Seventh Circuit decision, but concluding it “is not binding on this Court and is not persuasive” because it misconstrued the relevant law); *see also* *Twin City Fire Ins. Co. v. Ohio Cas. Ins. Co.*, 480 F.3d 1254, 1260 n.3 (11th Cir. 2007) (analyzing persuasiveness of nonbinding unpublished opinions). It is worth noting that the “persuasive” value of precedent between courts, and the considerations governing that persuasiveness, echo the standards for determining the “degree of respect” due to nonbinding agency interpretations of law. *See, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (“The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position.” (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944) (other internal citations omitted))).

that appellate court's geographical circuit. On the other hand, a well-reasoned en banc decision by a court of appeals panel may be quite persuasive to other circuits and district courts alike.

B. *Federal Court Structure and the Rules of
Intracourt Binding Precedent*

Under the standard model of precedent, the bindingness of a prior decision turns most clearly on whether that prior decision was issued by a court with the power of appellate (or discretionary) review over the court deciding a subsequent case. This connection between process and precedent does not directly explain the different rules that govern the binding effect of decisions *within* particular levels of the federal judicial structure when a prior decision issues from a judge or group of judges different from the one deciding the subsequent case. For instance, district court judges are not bound by prior decisions of other district court judges, even within their own district. On the other hand, panels of the court of appeals *are* bound by prior decisions rendered by panels within that circuit. Finally, Supreme Court Justices are bound by rules of stare decisis to prior decisions of the Supreme Court. What explains the different approaches to the role of precedent at the intracourt level within the federal system?

An examination of the history of these courts reveals that at least part of the explanation arises out of their structure, as well as out of the procedural relationships between these courts during their historical development. That examination serves to emphasize the importance of institutional design in our view of the rules of precedent, and will help guide our application of those rules in assessing the bindingness of newly developed institutions.

The varying approaches to intracourt precedent arise from differences in the structure of these courts at the different levels of the federal system. Consider, for instance, the district courts, which were, upon their creation in 1789, each staffed with a single judge. With the exception of one brief experiment in New York in 1812–1814, it was not until the early 1900s that more than one district judge was appointed to a particular district.³¹ It should not be surprising, then, that within limits set by statute, a judge's control over the district court was largely plenary, and "the court" was literally "the judge." While his own need for consistency imposed upon him a rule of stare decisis that required a certain level of consistency from decision to decision, this history of plenary control meant that each of these district court judges remained largely independent, even after additional judges were added to the districts in the second decade of the twentieth century. Because historically, one district court judge was sufficient to determine the outcome of a case, the district court judges did not view themselves as

31. ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 70–72 (2d ed. 2002).

forced to concede their judicial authority to another judge in their own district (let alone to coequal judges in different districts).³²

On the U.S. Supreme Court, by contrast, individual judges had little power. From the beginning, the “court” consisted of all the Justices—a group that was largely consistent from one year to the next. Just as individual district court judges viewed themselves to be bound by *stare decisis* to their *own* individual prior decisions, the (only slightly) changing U.S. Supreme Court considered itself bound to its prior decisions by the rule of *stare decisis*.

What explains, then, the difference in approach on the question of bindingness for panels of the courts of appeals? The clue, I suggest, is to be found in their more complex historical development. In their original form under the Judiciary Act of 1789, the circuit courts were themselves hybrid trial and appellate courts. There were no “circuit judges” *per se*; the court was instead staffed by a district court judge and the Supreme Court Justice for that circuit in his “circuit rider” role. In 1869, Congress finally took pity on the Justices and created circuit judges in order to relieve the Supreme Court Justices of some of their responsibilities at the circuit court level.³³ It was, however, not until 1891 that the circuit courts of appeals were formed as separate courts within each of the federal circuits.³⁴

Even in 1891, however, there were no judges assigned solely to the circuit courts of appeal as appellate judges.³⁵ The circuit judges (like their courts) were hybrid trial and appellate judges until 1911.³⁶ They did not individually staff the circuit courts of appeal; rather, these early circuit courts of appeal were staffed together with various combinations of district court judges and the relevant Supreme Court Justice for that circuit. It was not until 1911, when the trial level circuit courts were abolished and the circuit judges assigned to the circuit courts of appeals (later the U.S. Courts of Appeals for each geographic Circuit) that the nation’s intermediate appellate courts were staffed by full-time appellate judges.³⁷ As the number of judges

32. *E.g.*, *id.* at 72 (“The appointment of a second judge did not insure harmonious relations as questions concerning each judge’s authority to make appointments and who should hold the sessions of court in the different cities, arose.”).

Over time, of course, the district courts have made more of an effort to work collectively; the addition of more and more district judges, the historical distance of the single-judge era, the centralized control over district courts in the hands of a chief judge, and even (in a few rare instances) the use of district court *en banc* sittings have all served to shift the attitude of district judges to a more collective approach. Nevertheless, the old rules of precedent—opinions are binding as *stare decisis* on yourself, and not at all binding on any others—remain in place in the district courts even today. For a discussion of federal district courts sitting *en banc*, see John R. Bartels, *United States District Courts En Banc—Resolving the Ambiguities*, 73 *JUDICATURE* 40 (1989).

33. *See* *SURRENCY*, *supra* note 31, at 40.

34. *Id.*

35. *Id.* at 88.

36. *Id.* at 40.

37. *Id.* at 87. Even then, however, it was not uncommon for a circuit court of appeals panel to be made up of three district court judges; this held true through the 1940s. *Id.* at 88 (citing FRANK O. LOVELAND, *THE APPELLATE JURISDICTION OF THE FEDERAL COURTS* 17 (1911)).

available to the circuit courts of appeals increased to more than three and the dockets of these courts increased, the circuits were permitted to staff cases with panels of three (and occasionally only two) judges.³⁸

Thus, in contrast to the strong identity between the district courts and their judges, or the Supreme Court and its (largely consistent) full panel, the history of the circuit courts demonstrates a much more attenuated relationship between the judges and the entity that was “the court.” To the degree that there was a separate identity associated with a particular circuit, it came initially from the association of that circuit with a particular Supreme Court Justice.³⁹ As circuit judges were appointed and took over greater responsibility on the circuit court (and, after 1891, the circuit courts of appeals as well), they would work together with the district court judges, but the makeup of the decision-making body was far less consistent on the circuit courts of appeals than on the district court or the Supreme Court.⁴⁰ Because of this constant change of individuals making decisions, the source of an appellate court decision could only be viewed as an opinion of “the court” rather than an opinion of individual judges (or justices). Because there was no individual or group of individuals who would purport to independently speak for “the court,” it should not be surprising that the rules of precedent developed in a manner that treated prior panel decisions as binding on subsequent panels to a degree that was even stronger—that is, more binding—than that followed by the Supreme Court or individual district court judges.

38. *Id.* at 90. As the number of judges increased, there was substantial discussion about whether it was even appropriate to have decision-making panels made up of fewer than all of the judges in a particular circuit. That discussion was eventually resolved in favor of allowing fewer than all of the judges to sit in panels. *See id.* at 90–91.

39. This was true until at least 1844, when Congress first permitted district court judges to hold circuit court terms on their own, although even then, the circuit justice was to attend one sitting per year in a given circuit, with the district court judge holding for that sitting the cases that merited participation by the justice. *See id.* at 53–54. It was only after the first appointment of circuit judges in 1869 that the direct trial responsibilities of the justices were lifted altogether. *Id.* at 54–55.

40. In the early years of the circuit courts of appeals, there appears to have even been uncertainty regarding the precedential effect of prior circuit court appellate decisions on the decisions of other circuits and on subsequent panels within a particular circuit. For example, an Eighth Circuit Court of Appeals case decided in 1895 noted:

It is a principle of general jurisprudence that courts of concurrent or co-ordinate jurisdiction will follow the deliberate decisions of each 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.

Shreve v. Cheesman, 69 F. 785, 790 (8th Cir. 1895) (emphasis added). See John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 516 & n.41 (2000), for some discussion on *Shreve v. Cheesman*. By contrast, Surrency notes that “[o]ne of the most frequent objections to the creation of separate Circuit Courts of Appeals was that these courts would reach different conclusions on the same issue.” SURRENCY, *supra* note 31, at 346; *see also id.* at 97 (noting the “old argument of conflicts in the decisions of these circuits”). 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 now been resolved in favor of an approach that allows the risk of intercircuit splits to exist.

As Harrison suggests, then, our strict adherence to the “standard model” of precedent relies itself on something of an historical accident⁴¹: The structural decisions that led to our current case processing system for the federal courts. If the courts of appeals had been conceived from the beginning as wholly separate intermediate appellate courts with nationwide jurisdiction, it is not difficult to envision the decisions of such a court as binding nationwide. Alternatively, if the intermediate appellate courts had been created as separate courts, with their own judges, within each circuit (rather than as hybrid entities with no separately assigned judges), it may have been that they would have followed an approach in which the more typical “soft” form of horizontal stare decisis—even as between panels of the same court—would have held sway. As it is, however, our current ideas about the bindingness of precedent at the intracircuit level are heavily influenced by the history of these structural relationships.

The well-settled historical structure is, at least in part, responsible for the way in which we view precedential rules today. In order to develop an even better sense of the relationship between the rules of precedent and our court structures, Part II turns to more recent congressional innovations in judicial processes, highlighting new structures that undermine the standard model’s ability to provide guidance regarding the binding nature of precedent.

II. NONSTANDARD APPELLATE MODELS AND THE PROBLEM OF PRECEDENT

A. *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.⁴² 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 court of appeals (generally the D.C. Circuit),⁴³ many other statutes permit petitions for review to be filed in either the D.C. Circuit or the geographical circuit in

41. Harrison, *supra* note 40, at 535.

42. *E.g.*, 15 U.S.C. § 21 (2006) (antitrust-related cease and desist orders); 15 U.S.C. § 2618(a)(1)(A) (2006) (stating categories of rules promulgated under the Toxic Substances Control Act); 28 U.S.C. § 2342 (2006) (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); 29 U.S.C. § 160(f) (2006) (decisions of the NLRB).

43. *See infra* Section I.C.

which the aggrieved party resides.⁴⁴ It is by no means rare for an agency issuing a wide-ranging order to find itself facing petitions for review in multiple courts of appeals.

For over a half-century, the courts of appeals, Congress, and administrative agencies viewed the filing of petitions for review in multiple circuits as a problem requiring a solution.⁴⁵ The chosen solution was consolidation of those multiple petitions in a single circuit. In 1958, Congress enacted 28 U.S.C. § 2112,⁴⁶ which provides for the consolidation of multiple petitions for review in a single court of appeals—the “primary reviewing court.”⁴⁷ 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 (“MDL Panel”), which randomly selects one of the circuits in which a petition has been filed as the primary reviewing court.⁴⁸ All other petitions for review are transferred to that court of appeals,⁴⁹ which hears briefings and ultimately decides the consolidated case.

44. *E.g.*, 28 U.S.C. § 2343 (2006) (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 (2006), and thereafter on appeal in the relevant court of appeals. This Article does not specifically address such situations; instead, it focuses on direct review in the courts of appeals.

45. *See, e.g.*, *Authorizing Abbreviated Records In Reviewing Administrative Agency Proceedings: Hearing on H.R. 6788 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 85th Cong. 57–59 (June 27, 1957) (testimony of Hon. Albert B. Maris) (noting concern and proposed solution to filing of multiple petitions for review).

46. Act of August 28, 1958, Pub. L. No. 85–791, § 2, 72 Stat. 941, 941–42 (codified as amended at 28 U.S.C. § 2112 (2006)).

47. 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 to which the multiple petitions are initially transferred; as noted below, the court in which petitions are initially consolidated will often transfer them to a different court of appeals for “the convenience of the parties in the interest of justice.” 28 U.S.C. § 2112(a)(5) (2006).

48. *Id.* §§ 2112(a)(1)–(3). From enactment of the 1988 amendment to § 2112, to September 2005, seventy-eight cases had been consolidated by the MDL Panel under 28 U.S.C. § 2112. *See* Judicial Panel on Multidistrict Litigation, Docket Report (Sept. 2005) (on file with author). Within the MDL electronic docket, these cases are designated as “RTC-xx” cases, with “RTC” standing for “Race to the Courthouse.” *Id.*

Before 1988, § 2112 provided that petitions would be consolidated in the circuit in which a petition was first filed. 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. Thomas O. McGarity, *Multi-Party Forum Shopping for Appellate Review of Administrative Action*, 129 U. PA. L. REV. 302, 305 (1980). The 1988 amendment, pursuant to which all petitions filed within ten days of the agency decision are treated identically, was enacted to eliminate that race. *See* Act of Jan. 8, 1988, Pub. L. No. 100–236, 101 Stat. 1731. 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, *supra*, at 319–45. 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 instances of the race. *Id.* at 302 n.*.

49. 28 U.S.C. § 2112(a)(5).

2. *The Problem of Precedent in Consolidated Petitions for Review*

Congress enacted 28 U.S.C. § 2112 in order to address a variety of problems presented by multiple petitions for review.⁵⁰ In enacting this approach, however, Congress created a nonstandard appellate process in which the problem of the precedential force of the decision of the primary reviewing court becomes significant.

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) sixty days of the agency decision.⁵¹ 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 ruling. 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 number of ways.

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. That party may then raise relevant challenges to the regulation, *as applied*.⁵² These as-applied challenges may well arise in jurisdictions other than the jurisdiction of the primary reviewing court.

Second, federal agencies are not subject to what is called “offensive nonmutual collateral estoppel.” A loss in one geographic circuit does not bind that agency in another circuit with respect to the identical legal ques-

50. See *infra* notes 65–66.

51. *E.g.*, 28 U.S.C. § 2344 (2006).

52. See, *e.g.*, *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991) (holding that parties are not barred by the Administrative Protective Act's general statute of limitations from bringing challenges well after promulgation of a rule, as long as the challenge is to the statutory or constitutional authority of that rule as applied to the party).

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) (2006); Clean Air Act, 42 U.S.C. § 7607(b)(2) (2006), there is some question as to whether such a bar is consistent with the Due Process Clause. *See* U.S. CONST. amend. V; *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 289–90 (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 ENVTL. LAW. 665, 685–700 (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). *But see* *Yakus v. United States*, 321 U.S. 414, 431–43 (1944) (suggesting that congressional limits on reviewability of statutes are acceptable).

tion.⁵³ Agencies may therefore relitigate issues or seek to apply regulations or policies in one court of appeals' geographical jurisdiction that were rejected by a different circuit. This form of 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 federal agencies seeking to maintain a rule in the face of an adverse decision from a particular geographic court of appeals. Far less common is *intracircuit* nonacquiescence, in which an agency chooses to ignore binding circuit precedent.⁵⁴ Knowing whether a prior decision is binding in a given circuit, then, will substantially affect the litigating position of federal agencies.

Third, the binding effect of a prior decision may also affect the regulatory approach taken by agencies. 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.⁵⁵ In such instances, if the earlier decision is 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 imminent injury that would be necessary before suit could be initiated.

In each case, a substantial practical effect flows from the answer to this question: 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

53. If this doctrine applied to decisions in which the United States had been a defendant, a loss by the United States to one plaintiff would be available to a different plaintiff in a later case as a basis for claiming issue preclusion against the United States. The Supreme Court has concluded that this doctrine, though occasionally available against private defendants, *see* *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979), is not available against the United States in any circumstance. *United States v. Mendoza*, 464 U.S. 154, 158–63 (1984).

54. *See generally* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 *YALE L.J.* 679 (1989). In the most extreme version of the nonacquiescence doctrine, "intracircuit nonacquiescence," agencies refuse to apply a circuit's own rulings even within that geographic circuit, making conformance with circuit law entirely dependent on judicial review. Noting the Ninth Circuit's ultimate rejection of a Social Security Administration practice:

In an effort to reduce the number of recipients of Social Security disability benefits in the face of circuit court rulings requiring proof of a change in medical condition before benefits could be terminated, SSA directed its personnel to follow agency policy and disregard contrary directions of the court of appeals.

Id. at 681–82; *see also* William Wade Buzbee, Note, *Administrative Agency Intracircuit Nonacquiescence*, 85 *COLUM. L. REV.* 582 (1985) (surveying and generally condemning agency intracircuit nonacquiescence).

55. McGarity, *supra* note 48, at 329–31.

agency decision amount to binding precedent for courts in other circuits that may hear relevant challenges at a later date?

As discussed in the next two Sections, strong arguments support conflicting answers to these questions, and in this nonstandard appellate process, our intuitions regarding what would normally be a straightforward question largely fail us. This uncertainty not only highlights the relationship between structure and precedent, but demonstrates the need for a clearer approach to problems of precedent in nonstandard processes.

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

Several arguments might favor a precedential effect of decisions issued in consolidated petitions for review.

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? To be sure, some minor efficiencies might arise from having only one, rather than several, appellate courts decide the case, but that value is tempered to some degree by the additional procedural cost of transfer. 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 very existence of the consolidation process.

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,⁵⁶ and many other statutes in which Congress requires facial challenges to be filed with a single circuit, with immediate review by the Supreme Court.⁵⁷ If Congress specifically directs appellate review to a single court of appeals, an examination of legislative intent suggests that the single reviewing court's decision should have a binding effect nationwide. Regardless of the wisdom of such an approach, it would be 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.

Congress has directed that all petitions for review subject to § 2112 be consolidated into a single court of appeals. While that single court is randomly chosen, the effect of the MDL lottery process is no different than if

56. See *infra* Section I.B.

57. See *infra* notes 76–79 and accompanying text.

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.⁵⁸ 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 the 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 might 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 conclusion altogether—would be to limit the precedential effect of the primary reviewing court to that court alone.

Such a result would be consistent 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),⁵⁹ 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 other courts are able to weigh in, even though the risk of conflict can be particularly significant if other

58. See Solum, *supra* note 7, § 134.02[1][c].

59. See 28 U.S.C. § 1407(a) (2006).

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. In particular, the primary reviewing court rarely even hints that a published decision involves petitions for review consolidated from other circuits.⁶⁰ As a result, a subsequent litigant will find it nearly impossible to determine whether a prior decision in another circuit has precedential effect. The only way to do so is to telephone the clerks of various courts of appeals 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. With sufficient care and attention to detail, this practical flaw could be corrected. The fact that the problem exists at all, however, suggests that few primary reviewing courts have anticipated the possibility that their decision might be binding on courts outside of their own circuit.

Furthermore, the efficiency rationales for consolidation—the only rationales consistently relied on 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 relatively simple, the added cost associated with the management of additional petitions for review is 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 courts of appeal with decisions that are deemed binding only on their own circuit—is more than enough to justify the associated inefficiencies.

The scant case law on these issues reflects a general reluctance to treat decisions in consolidated cases as binding precedent.⁶¹ 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

60. See, e.g., *Transmission Access Policy Study Group v. Fed. Energy Regulatory Comm’n*, 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.* 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 originated.

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

common, statutory, and administrative law.⁶² If there is, indeed, a single proper interpretation of a given statute or regulation, there is little reason to view a later court as bound to what it views as an “incorrect” interpretation of the law. This respect for the independence of the courts of appeals is so strong that at least one court has questioned, in a similar context, whether *law of the case* principles would even necessarily bind a different circuit.⁶³

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 courts of appeals in the federal judicial system. As already noted, and as generally understood, the courts of appeals are not bound by each other’s decisions. The Supreme Court often explicitly relies on the divergence—or convergence—of court of appeals’ thinking on a particular issue, both in determining whether to grant a petition for certiorari and in reviewing cases on the merits.⁶⁴ As a general matter, that basic

62. See *In re Korean Air Lines Disaster*, 829 F.2d 1171, 1175–76 (D.C. Cir. 1987). This principle carries over into a court of appeals’ management of transferred cases. When 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 *Korean Air Lines*, 829 F.2d at 1175–76; see also Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 686–88 (1984) (suggesting that circuit conflicts—and the refusal of a circuit to be bound by decisions of other circuits—is inherent in the structure of the 1891 Evarts Act, creating the courts of appeals).

63. Law of the case principles apply when the same court is asked to consider, for a second time in a given case, a prior ruling. Most relevant when there has been a change in the deciding judge, law of the case generally treats an earlier decision with comity, and rejects a re-evaluation of the issue in question.

The application of this doctrine when cases are transferred between circuits is somewhat unclear. For example, in *Korean Air Lines*, a case arising out of multiple complaints consolidated by the MDL in D.D.C. for pretrial proceedings, 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 to the original district court 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 Air Lines*, 829 F.2d at 1173–76 (emphasis added) (citations omitted). On the difficulties posed by the application of the law of the case doctrine in transferred cases in the district courts, see Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595 (1987).

64. See S. Ct. Rule 10(a) (noting that the Supreme Court considers, in granting certiorari, whether “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter”); see also *Butler v. McKellar*, 494 U.S. 407, 431 n.12 (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” (quoting Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court’s Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 716 (1984) (alterations in original))); *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. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) (stating that prior resolution of petitions for review in different circuits, and multiple resulting decisions, “exemplif[y] the wisdom of allowing difficult issues to mature

understanding should be circumvented only when there is a clear statement from Congress. There is, of course, no such explicit statement to be found in the text of § 2112.

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 intercircuit 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.⁶⁵ 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.⁶⁶ That history does not discuss the practical or legal effect of the resulting decision. Instead, it merely 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.⁶⁷

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”).

65. Nothing in the legislative history (either in 1958 or in 1988) explicitly or implicitly discusses 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 court of appeals’ “percolation” before 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* note 48, at 304 (emphasis added). There is, however, little explanation of why this *must* be the case.

66. The relevant legislative history for § 2112 arises out of two laws, Pub. L. No. 85-791 § 2, 72 Stat. 941 (1958) (enacting the initial consolidation rule, providing for consolidation in the court of appeals where a petition was “first instituted,” 28 U.S.C. § 2112(a) (1960)); and the 1988 amendment, which changed the process to the current form, Pub. L. No. 100-236 § 1, 101 Stat. 1731 (1988). In 1958, the consolidation process was one of several provisions of a larger statute that allowed federal courts to streamline the process of judicial review through allowing the filing of abbreviated administrative records. *See, e.g.*, H.R. Rep. No. 85-842, at 6 (1957) (accompanying H.R. 6788) (noting that the purpose of the legislation was to allow courts of appeals to “adopt rules authorizing the abbreviation of the transcript and other parts of the [administrative record]”). There is no discussion in the legislative reports suggesting consideration of the precedential effects of the proposed consolidation.

In 1988, the statute amending § 2112 and adopting the MDL process was salvaged out of the Omnibus Regulatory Reform Bill introduced in 1980 and 1981. *See Selection of Courts of Appeals to Decide Multiple Appeals: Hearing on H.R. 3084 Before the Subcomm. on Administrative Law and Governmental Relations, 98th Cong., 1st Sess. 2* (1983). While the larger bill apparently could not muster adequate support, there was (eventually) support for a bill that would end the embarrassing spectacle of the “race to the Courthouse.” *See S. REP. NO. 100-263, at 3-4* (1987) (to accompany S. 1134) (noting legislative history of Senate legislation identical to ultimately-enacted House bill). Once again, however, the focus of the legislation was not on the precedential effect of consolidated decisions, but on eliminating problems inherent in the existing process. *See id.* at 2-3.

67. 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, are efficiency rationales—namely, the point of consolidation is to save the time and energy associated with handling multiple petitions for review. Indeed, the statute was initially enacted, at least in substantial

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 courts of appeals. In all likelihood, an appellate court squarely facing 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.⁶⁸ That approach, however, gives little weight to what seems to be an obvious effect of consolidation—treatment of the decision in the primary reviewing court as binding precedent on subsequent court decisions. On an issue as fundamental as whether a prior decision is potentially binding at all, it seems particularly dissatisfying to leave the issue up to individual courts of appeal to evaluate on a case-by-case basis.

5. *Litigation Position of the U.S. Solicitor General*

Given the important role that the solicitor general plays in ensuring consistency in the United States' position in the federal courts (a role that is also imposed through binding precedent),⁶⁹ it is worthwhile to examine the solicitor general's position on the binding effect of decisions in consolidated cases. The most recent statement on this issue came in the United States' brief on the merits to the Supreme Court in *National Cable & Telecommunications Associates v. Brand X Internet Services*.⁷⁰ There, the solicitor general

part, to ease the burden of agencies in their filing of the administrative record. *See, e.g.*, H.R. Rep. No. 85-842, at 6 (1957) (accompanying H.R. 6788) (noting that primary purpose of legislation was to limit the work needed to develop the administrative record in cases of multiple petitions for review); S. Rep. No. 85-2129 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3996, 3997 (“The object of the instant legislation is to eliminate the filing of the entire record except in instance where it is required.”); *id.* at 3999.

68. Indeed, this appears to be the result in most of the cases in which subsequent courts of appeals examine the precedential value of a prior decision in a case involving consolidated petitions for review. *See, e.g.*, *Transmission Agency of N. Cal. v. Fed. Energy Regulatory Comm'n*, 495 F.3d 663 (D.C. Cir. 2007) (treating Ninth Circuit decision in consolidated case, *Bonneville Power Admin. v. Fed. Energy Regulatory Comm'n*, 422 F.3d 908 (9th Cir. 2005), as persuasive, but not binding precedent and failing to mention that the Ninth Circuit case was consolidated under § 2112); *WWC Holding Co. v. Sopkin*, 488 F.3d 1262 (10th Cir. 2007) (mentioning and agreeing with decision in consolidated case of *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), but failing to mention that the Fifth Circuit case involved consolidated petitions under § 2112); *Tex. Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 324 (5th Cir. 2001) (agreeing with decision of Eighth Circuit in consolidated petition, *Sw. Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998)). *But cf.* *Ind. Bell Tel. Co. v. McCarty*, 362 F.3d 378, 389 & n.13 (7th Cir. 2004) (noting that parties had argued for the binding effect of a Eighth Circuit decision in a consolidated petition for review, but that a Supreme Court decision had intervened, mooting the argument).

69. *See* LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987) (explaining the history of the solicitor general's position and role).

70. Brief for Federal Petitioners, *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967 (2005) (Nos. 04-277, 04-281), 2005 WL 122088, *rev'g* *Brand X Internet Serv. V. FCC*, 345 F.3d 1120 (9th Cir. 2003).

hinted that the United States considers decisions in consolidated cases to be binding nationwide.⁷¹

In *Brand X*, seven petitions for review were filed in three different circuits challenging a Federal Communication Commission (“FCC”) ruling. The MDL lottery resulted in the consolidation of the decisions in the Ninth Circuit.⁷² The Ninth Circuit, however, had already issued a ruling on the relevant provisions of the Telecommunications Act in a case between private parties, *AT&T v. City of Portland*,⁷³ and it concluded in *Brand X* that its decision in *Portland* required it to reject the FCC ruling.

In issuing its decision, the Ninth Circuit did not explicitly consider the fact that in *Brand X*, 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 in *Brand X* had nationwide precedential effect. According to the solicitor general:

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.⁷⁴

This position is somewhat curious in light of government’s long adherence to nonacquiescence principles at the intercircuit level.⁷⁵ Nevertheless, the clear implication of the solicitor general’s statement is that consolidated petitions are binding nationwide. The solicitor general appeared to take a similar position with respect to decisions in regulatory review cases over

71. *Id.* Whether this position would hold true when directly presented under different circumstances is unclear. As noted above, federal agencies often rely on the principle of intercircuit nonacquiescence in order to comply with a court order striking down a particular policy or regulation in one circuit, while continuing to pursue that policy or regulation in other, friendlier, circuits. See *supra* note 53 and accompanying text. In one recent example, the Department of Homeland Security (“DHS”) has complied in the Ninth Circuit with that court’s ruling in *Freeman v. Gonzales*, 444 F.3d 1031 (9th Cir. 2006) (striking down DHS rulings that rejected application of alien spouse for permanent residency status under visa waiver program when their U.S. citizen spouse dies before processing of the application was complete), but it has continued to apply its prior policy in other circuits. See *This American Life: The Audacity of Government Part Two* (Chicago Public Radio Broadcast Mar. 28, 2008), available at http://www.thisamericanlife.org/Radio_Episode.aspx?sched=1236.

Because it is not uncommon for federal agencies to rely on this ability to ignore circuit decisions in other circuits, it seems difficult to believe that the solicitor general would, if squarely presented with this issue, willingly abandon the flexibility that the general rule—no intercircuit binding effect—gives to the federal agencies.

72. *Brand X Internet Serv. v. FCC*, 345 F.3d 1120, 1127 (9th Cir. 2003).

73. 216 F.3d 871 (9th Cir. 2000).

74. Petition for Writ of Certiorari at 23 n.8, *FCC v. Brand X Internet Serv.*, 545 U.S. 967 (No. 04-281), 2004 WL 1943678.

75. See *supra* note 53.

which the D.C. Circuit has exclusive jurisdiction, which is the subject of Section II.B.⁷⁶

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

As already noted, a number of statutes provide for judicial review of agency regulations in only one circuit—generally the D.C. Circuit.⁷⁷ Congress occasionally takes a similar approach in the statutory context in which it perceives a need for immediate judicial review; this often takes the form of immediate “panel review” within the district court of the D.C. Circuit. For instance, § 437b of the Bipartisan Campaign Reform Act of 2002 (“BCRA”) provided for a three-judge D.C. Circuit review of any constitutional challenges to the Act.⁷⁸ The BCRA 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 (though, on occasion, discretionary review by) the Supreme Court.⁷⁹

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

For instance, where the Supreme Court is given mandatory 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. In cases of mandatory appellate Supreme Court jurisdiction, the process suggests that the D.C. Circuit decision is merely a stepping stone 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. By contrast, when Supreme Court review is merely discretionary, the argument in favor of treating the appellate court’s decision as binding nationwide is stronger. First, leaving a consolidated appeal in the sole hands of a single court suggests that Congress intended that particular court to wield final authority on the issue presented in that case. Second, while mandatory appellate review by the Supreme Court necessarily suggests that the Supreme Court’s review, but not the appellate court’s review,

76. See *infra* text accompanying notes 77–87.

77. E.g., 42 U.S.C. § 7607(b)(1) (2006) (limiting review of certain Clean Air Act decisions to D.C. Circuit); 47 U.S.C. § 402(j) (2006) (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”).

78. 2 U.S.C. § 437h (2006) (setting forth rules governing single-circuit [three-judge district court panel] review of constitutional challenges to the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107–155, 116 Stat. 81 (2002)).

79. E.g., 2 U.S.C. § 922 (2006) (review of balanced budget reform act by three-judge panel in D.C. District Court); *Bowsher v. Synar*, 478 U.S. 714 (1986) (deciding appeal of same).

is final, discretionary review suggests that Congress was comfortable with the lower court having the final word on the issue presented. Under a discretionary review system, the Supreme Court has only one opportunity to consider the issues presented on appeal; if the Court rejects a petition for certiorari, such a decision would at least implicitly suggest a level of comfort with the lower court's decision.⁸⁰

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-court 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 courts of appeals in order to ensure a swift and final resolution of challenges to a particular statute. Congress's 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 by multiple circuit courts. 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 from the blunderbuss approach to consolidation that is taken by § 2112. This argument for deference 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 suggest some congressional interest in ensuring control over judicial review of an agency's decision, that interest might 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, D.C. 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 constitutional 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

80. It is, of course, a staple of appellate practice before the Supreme Court that denials of certiorari do not count as rulings on the merits of a case. *See, e.g.*, EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 334–35 (9th ed. 2007). The rationale for that conclusion, however, turns on the fact that, for several reasons, a given petition might not be the best time for the Court to decide a given question, even if it disagrees with the outcome. In the case of single-circuit review of particular questions, however, many of the non-merits-based arguments for denying certiorari fall away. Even if there are procedural or factual flaws, there is little guarantee of future cases coming before the Court if the ability to conduct appellate review is limited by statute. And, depending on the strength of the jurisdictional limit in the statute, there are unlikely to be later decisions by other circuits on the same point. If the Court is to correct a legal error, then, the best and arguably only time to do it would be immediately after the D.C. Circuit decision. If the Court nevertheless denies certiorari, it may not amount to a decision on the merits—but the implications are arguably clearer than might be true for a run-of-the-mill denial of certiorari. While one might, of course, argue that certiorari had been denied because the case was unimportant, the unusual and congressionally dictated process of accelerated review would cut against such a conclusion.

to consolidate can be presumed, it would have been largely impossible for Congress to adequately balance the benefits and costs of consolidation or extended precedential effects. Furthermore, while statutory single-court reviews are often followed by mandatory Supreme Court review, single-circuit consolidation of petitions for review are almost always left to the discretionary certiorari process in the Supreme Court. Because there is only one reviewing entity, and because there are many such court of appeals decisions, a policy that gives a single circuit binding authority over all other circuits would seem to run strongly against the accepted value of the “laboratory” of multiple circuit courts of appeals.⁸¹

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, 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 courts of appeals. In other instances—instances much more common than § 2112 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 appellate courts review a single agency decision.

As with consolidated petitions under 28 U.S.C. § 2112,⁸² 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. v. Duke Power Co.*,⁸³ the Court faced the question of whether the Fourth Circuit was constrained by 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.” The Fourth Circuit examined the Environmental Protection Agency’s (“EPA”) definition of a “modification” under the Clean Air Act’s Prevention of Significant Deterioration (“PSD”) program. The Fourth Circuit, without addressing the application or validity of § 7607(b)(2), concluded—contrary to the implication of an earlier ruling by the D.C. Circuit in a petition from

81. Indeed, giving binding precedential effect to a single-circuit decision would effectively create a national court of appeals. While such entities have been proposed many times, those proposals have thus far been rejected (or at least not implemented). For a discussion of the many proposals to create a national court of appeals, see Thomas E. Baker, *Imagining the Alternative Futures of the U.S. Courts of Appeals*, 28 GA. L. REV. 913, 927–46 (1994). Baker notes that the “hostile reaction” to the Freund Commission’s 1972 proposal to create a national court of appeals “set some limits to permissible debate.” While Baker hoped that such hostility would not greet the 1990 proposals of Federal Courts Study Committee, *see id.*, few of the more substantial structural recommendations offered by that group ever came to pass.

82. *See supra* text accompanying notes 55–58.

83. 549 U.S. 561 (2007).

the initial promulgation of the PSD “modification” rule⁸⁴—that the PSD definition of modification had to be identical to the New Source Performance Standard definition of “modification.”

The Supreme Court granted certiorari on two questions, the first of which was “[w]hether the Fourth Circuit's decision violated Section 307(b) of the Act, which provides that national Clean Air Act regulations are subject to challenge ‘only’ in the D.C. Circuit by petition for review filed within 60 days of their promulgation, and ‘shall not be subject to judicial review’ in enforcement proceedings.”⁸⁵

In the oral argument in that decision, the solicitor general took the position that review decisions made by a single court of appeals pursuant to a single-circuit review scheme are binding nationwide. According to the assistant attorney general arguing the case:

MR. HUNGAR: The [subsequent] court is simply 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.

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. Hobbs Act agencies, their decisions are reviewable in the court of appeals but often enforceable in the district courts.⁸⁶

Neither at argument, nor in the briefs, was the solicitor general's position on this issue supported by any authority. 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).⁸⁷ As is so often the case with these questions of precedent, the question remained unresolved.

84. See *New York v. U.S. EPA*, 413 F.3d 3 (D.C. Cir. 2005).

85. *Petition for Writ of Certiorari, Envtl. Def. v. Duke Energy Corp.*, 547 U.S. 1127 (2006) (No. 05-848), 2005 WL 3615991, at *1.

86. Transcript of Oral Argument at 8, *Duke Energy*, 549 U.S. 561 (No. 05-848), available at http://www.oyez.org/cases/2000-2009/2006/2006_05_848 (last visited Feb. 20, 2010).

87. See generally *Duke Energy*, 549 U.S. at 561.

C. *The Cross-Circuit Precedential Effect of “Hybrid”
Questions Decided by the Federal Circuit*

A further example of nonstandard processes in the federal appellate system is the subject-matter specific jurisdiction that the Federal Circuit has over issues involving intellectual property. Under the current system, cases involving patent, trademark, and copyright matters originate in the district courts, but are taken on appeal to the Federal Circuit.⁸⁸ As the Federal Circuit has noted, however, its subject-matter specific jurisdiction causes certain problems in cases involving “mixed” questions of law over which it has jurisdiction and law over which it does not. In *Midwest Industries, Inc. v. Karavan Trailers, Inc.*, the Federal Circuit faced such a mixed case. The plaintiff, Midwest, alleged (in a suit initially filed in the Southern District of Iowa) patent claims as well as state and federal trademark claims. The defendant argued that patent law preempted the plaintiff’s nonpatent claims.⁸⁹

The question presented to the Federal Circuit (which had jurisdiction over the case since it “arose under” the federal patent laws) was whether, in evaluating the preemption claims, it should apply the law of the Tenth Circuit, from where the case arose, or the law of the Federal Circuit. In several prior cases, the Federal Circuit had held that it should apply the law of the regional circuit.⁹⁰ In *Midwest Industries*, however, the Federal Circuit overruled those prior cases, and concluded that it would “henceforth” apply its own law “in resolving questions involving the relationship between patent law and other federal and state law rights.”⁹¹

As the Federal Circuit noted, however, its decision to apply its own law in these “hybrid” cases presented its own problems:

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

88. 28 U.S.C. § 1295 (2006) (giving Federal Circuit jurisdiction over appeals from district court decisions in which the lower court’s jurisdiction was “based, in whole or in part, on” 28 U.S.C. § 1338 (2006), which gives district courts jurisdiction over “any civil action arising under any Act of Congress relating to patents . . . copyrights and trademarks”).

89. *Midwest Indus., Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356, 1357–58 (Fed. Cir. 1999) (en banc).

90. *Id.* at 1358–59.

91. *Id.* While the *Midwest Industries* case was only before a panel of the Federal Circuit, the panel circulated this portion of the opinion to the en banc court, which concurred in the holding. *See id.* at 1359 n.*.

Contrast the ruling in *Midwest Industries* with the Federal Circuit’s “Rule of Deference,” under which it applies the rules of procedure that would have been applicable in the relevant geographic circuit out of which a patent case arises. *See* Peter J. Karol, *Who’s At The Helm? The Federal Circuit’s Rule of Deference and the Systemic Absence of Controlling Precedent in Matters of Patent Litigation Procedure*, 37 AIPLA Q.J. 1, 4 (2009).

faced with conflicts between patent law and state or federal trademark claims.⁹²

Thus, if the Federal Circuit has decided a case (like *Midwest Industries*) involving one of these mixed issues,⁹³ and if a subsequent case arises in a regional court of appeals but does *not* present a patent-related claim sufficient to give the Federal Circuit jurisdiction under 28 U.S.C. § 1295,⁹⁴ is the regional court of appeals bound by the decision of the Federal Circuit? The Federal Circuit believed that the resolution of this issue was straightforward, and, perhaps unsurprisingly, that it should be resolved in favor of Federal Circuit law: “[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.”⁹⁵ Despite the Federal Circuit’s conviction, however, the resolution of this question of bindingness is not so clear.

Like the other scenarios discussed in Sections II.B and II.C, this circumstance involves a prior case decided pursuant to a nonstandard 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 (here, the Federal Circuit’s) binding?

The arguments in favor are much the same, although in the case of the Federal Circuit, congressional intent to allocate decision-making responsibility to that court over certain areas of law presents, if anything, the strongest case for bindingness 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 a single court within 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 to ensure the development of a court with specialized knowledge. If anything, such a rationale suggests the importance of deference, and argues in favor of granting a prior federal circuit decision the status of binding precedent on a question in a matter that is directly relevant to its grant of jurisdictional authority.

At the same time, however, the Federal Circuit’s jurisdictional statute allocates jurisdiction to that circuit only under very specific circumstances: The Federal Circuit has control over questions of law that are presented by cases within that appellate jurisdiction. If, as the Federal Circuit appears to suggest, its decisions were given binding precedential effect in cases to which its jurisdictional statute does not apply (i.e., to cases that do not “arise under” relevant federal intellectual property statutes), the Federal Circuit

92. *Midwest Indus.*, 175 F.3d at 1361.

93. One example might be (as in *Midwest Industries*) the question of whether patent law preempts a state law claim.

94. For instance, the plaintiff might file a state law cause of action for trademark infringement, but no accompanying claim for patent infringement.

95. *Midwest Indus.*, 175 F.3d at 1361 (this portion of the opinion is still en banc).

would substantially expand its unique jurisdictional authority through the use of rules of precedent. Absent clearer direction from Congress, such an expansion is unwarranted. Although rejecting this expanded view of the Federal Circuit's responsibilities might require district courts to apply different principles of law depending upon a case's ultimate appellate destination—the Federal Circuit or the geographic court of appeals—this inconsistency is no different than that faced any time one litigates in different circuits. In this case, however, that inconsistency is made very tangible because of the divided appellate routes that are created in the district courts by the presence of the Federal Circuit.

D. *The Precedential Effect of Bankruptcy Appellate Panel Decisions*

The preceding examples of nonstandard processes have all involved cases in which the standard model of appellate processes has been modified without any direct effect on the district courts. In the following example, however, the district court is a direct player in the question of the binding nature of a prior decision. At issue is the precedential value of appeals decided by Bankruptcy Appellate Panels (“BAP”) under the Bankruptcy Code.

Under the Bankruptcy Code, parties who disagree with a decision of a bankruptcy judge may seek review of that decision in either the district court or (in those circuits that have created them) the BAP of the court of appeals for their circuit.⁹⁶ The BAPs are staffed by bankruptcy judges drawn from throughout the circuit.⁹⁷ Appeals from first-instance decisions (whether decided by a district judge or a BAP) are taken to the relevant court of appeals for that circuit.⁹⁸

There is a substantial division among the bankruptcy and district courts on the binding effect of BAP decisions.⁹⁹ On one hand, because BAPs are created by the courts of appeals and draw bankruptcy judges from throughout the circuits, they seem to be a part of the appellate court; as such, some courts view their decisions as having a binding effect circuit-wide. Some courts even conclude that a Ninth Circuit BAP deciding a case from the bankruptcy court in the District of Oregon, for instance, would have binding effect on the district courts in the District of Idaho and all other district courts within that circuit.¹⁰⁰ On the other hand, they are identically

96. 28 U.S.C. § 158(c) (2006). To add to the complexity, a court of appeals may decide under certain circumstances to not establish a BAP, or it may jointly create a BAP with another circuit.

97. *Id.* § 158(b)(1).

98. *Id.* § 158(d)(1) (permitting appeals from final orders); *id.* § 158(d)(2) (permitting various interlocutory appeals in bankruptcy matters from district courts or BAP panels).

99. See WILLIAM L. NORTON, JR. & WILLIAM L. NORTON III, *NORTON BANKRUPTCY LAW AND PRACTICE* § 170:17 (William L. Norton, Jr. et al. eds., 3d ed. 2009) (noting multiple approaches to this question, all supported in various forms by different combinations of appellate, BAP, district, and bankruptcy court decisions).

100. The decision in *Coyne v. Westinghouse Credit Corp.* (*In re Globe Illumination Co.*), 149 B.R. 614, 620 (Bankr. C.D. Cal. 1993), seems to hint that this should be the case.

positioned in the appellate hierarchy with the district courts, with appeals taken to the courts of appeals. It therefore seems rather odd to conclude that a BAP decision would be binding circuit-wide, when the presumably equivalent appellate process—appeal to the district court—would not result in a decision that would bind throughout the circuit. Similarly, there is no argument that the decisions of a district court would bind subsequent decisions of a circuit-level BAP. Given that the district court/BAP appellate choice is largely intended to be equivalent, it seems curious to conclude the BAP decision would be binding on other district courts.¹⁰¹

As Norton notes, in a statement that could be easily generalized to any of the alternative appellate structures addressed in Part II, “[t]he difficulty in determining the effect of Bankruptcy Appellate Panel and district court decisions lies in establishing where within the judicial hierarchy bankruptcy courts and Bankruptcy Appellate Panels stand in relation to the district court.”¹⁰² The problem arises because the appellate model in the bankruptcy courts is entirely different from the model that most of us have in mind in assessing the bindingness of precedent. The difficulty with determining the precedential effect of these decisions—and the disagreement among courts on this issue—comes from the intimate relationship between our understanding of precedent and the traditional design of our appellate court structure and processes. Because the district court/BAP choice deviates from our standard structure, the straightforward propositions governing the bindingness of court decisions within that structure no longer apply.

In each of the prior three examples—consolidated appeals under 28 U.S.C. § 2112, and exclusive jurisdiction in the D.C. Circuit and the Federal Circuit—the relevant entities were all part of the established appellate system, and the difficulty arose from creating new lines of appeals within that system. In the BAP example, however, there is the further complication of the creation of an entirely new entity (the BAP). The conflicting views regarding the precedential effect of BAP decisions come primarily from conflicting interpretations about “where” the BAP fits into the appellate structure. For those courts that view the BAP as part of the court of appeals, the circuit-wide binding effect of BAP decisions seems apparent. If, on the other hand, the focus is on the fact that the BAP is not the last word in the circuit, but that it is in fact inferior to the courts of appeal, and in a similar position in the appellate hierarchy as the district courts, then it makes much less sense to treat BAP opinions as binding anywhere other than within a district—and even then, as binding only on the bankruptcy courts within that district.

The example of the BAP, then, emphasizes the importance, in our evaluation of the bindingness of precedent, of not only the institutional process

101. See David A. Levin, Comment, *Precedent and the Assertion of Bankruptcy Court Autonomy: Efficient or Arrogant?*, 12 BANKR. DEV. J. 185 (1995); NORTON & NORTON, *supra* note 99, § 170:17.

102. NORTON & NORTON, *supra* note 99, § 170:17.

for appellate review, but also the design and place of the judicial institutions within that process.

III. THE CONNECTION BETWEEN PRECEDENT, STRUCTURE, AND PROCESS

We are accustomed to knowing, given 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 nonstandard processes discussed in Part II?

As repeatedly suggested in the examples above, the problem lies in the unusual nature of the processes employed in those cases. Our understanding of precedent develops in the context of the standard judicial process (and, given the federal-centric nature of most law school instruction, the context of the standard *federal* judicial process). Once we are outside 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 is either potentially binding or not.

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

The above survey, and the difficulties in the area of precedent that are presented by the unusual processes and structures discussed in Part II, all provide an insight into the nature of precedential rules which, though perhaps implicit in the literature, is only rarely stated explicitly: the commonly understood rules of binding vertical and horizontal precedent are dependent in substantial part on the structure of the judicial system in which those rules are applied.

This observation flows directly not only from the nonstandard processes discussed above, but also from the very definition of precedent. The precedential effect of a court's opinions is determined not only by the precedential rules that govern what amounts to a relevant holding, but also by the structure of the judicial system applying those rules.¹⁰³ For there to be

103. There are statements to this effect here and there in the literature. In his comparative examination of American precedent, for instance, Sellers suggested, “[t]he essence of the American system of precedent as experienced in practice resides in the great authority and hierarchical arrangement of the courts.” Sellers, *supra* note 1, at 68. Harrison states the relationship negatively, noting, 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* note 40, at 521.

binding precedent, there must not only be a prior holding on point, but that prior holding must also have been issued by a court that is a superior court (in the case of vertical precedent),¹⁰⁴ or the same court as the one issuing the subsequent decision (in the case of horizontal precedent, or *stare decisis*, whether in its “normal” or “strong” form). The definitions of these terms—“court” and “superior (or higher) court”—are themselves complex, and to know when they apply we necessarily rely on processes of review 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 face nonstandard processes for the management and resolution of federal cases. There is a question about the binding effect of BAPs because there is uncertainty associated with whether they should be deemed to be the same “court” as the court of appeals with which they are associated. Similarly, when consolidated petitions for review are decided by a primary reviewing court, it is uncertain whether that court should be viewed as a “superior” court or not.

That uncertainty about the place of nonstandard structures and processes feeds directly back into the application of the rules of binding precedent. 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 a case—or 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 review, the consolidation process effectively treats the circuit courts of appeal as fungible entities, all part of the same court. Since binding horizontal precedent is premised on the ability of one court of appeals to identify the court that decided a given precedent, the blurring of lines between circuits, without the structure of the transfer rules in § 1404 or § 1406, gives rise to confusion about the application of binding horizontal precedent to these kinds of decisions.

In a recent judicial exchange on the rules of precedent, the Ninth Circuit noted the importance of hierarchical structure on the rules of precedent in the federal judicial system. In rejecting the holding of *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 its own prior unpublished decisions),¹⁰⁵ the Ninth Circuit¹⁰⁶ made two important observa-

104. BLACK'S LAW DICTIONARY 1296 (9th ed. 2009) (defining binding precedent as “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”).

105. 223 F.3d 898 (8th Cir. 2000), *vacated en banc*, 235 F.3d 1054 (8th Cir. 2000). Although the panel decision was swiftly vacated, its effects reverberated throughout the federal appellate system for some time, and may have served to motivate the recent decade's substantial academic work involving the role of precedent in the federal system. See, e.g., Harrison, *supra* note 40; Norman R. 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).

106. Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001).

tions about the role of history and structure in the development of precedential rules, emphasizing both the role of “reliable reports of cases”¹⁰⁷ and the need for a “settled judicial hierarchy” in the development of our current model of precedent.¹⁰⁸ As Judge Kozinski suggested in *Hart*, our current conceptions about precedent are substantially (though not solely) related to the current structure of the federal judiciary,¹⁰⁸ and arose, in part, only after the federal courts took on their current three-tiered structure.¹⁰⁹

With this understanding in hand, we are in a position to discuss in further detail the resolution to the problems posed in Part II, 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 nonstandard models of appellate review in order to ensure that rules regarding precedent are clear and well understood.

IV. UNDERSTANDING PRECEDENT IN NONSTANDARD APPELLATE STRUCTURES

We therefore return to the problems presented in Part II: when presented with these nonstandard 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.

A. Highly Binding Approach/Structure Irrelevant

At one extreme is the Highly Binding Approach to precedent, under which any holding that might be deemed relevant precedent among the circuit courts would 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.

To a substantial degree, the assumptions underlying this approach to the federal appellate courts have already been rejected. Under the current system, each court of appeals is bound only by its own decisions, not by decisions in other circuits. While we might abandon that model in any

107. *Id.* at 1164 n.10 (noting the importance of reliable reporting to the development of our current model of stare decisis). 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 in consolidated petitions for review is the parties’ inability to determine whether a circuit court that decides a petition for review was the only circuit to receive that petition, 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 (2006). If parties cannot determine whether their circuit transferred a petition to the primary deciding circuit, it is difficult to insist that they treat the primary deciding circuit’s decision as binding.

108. *Hart*, 266 F.3d at 1164 n.10 (noting that a “settled judicial hierarchy” is important to the development of precedent).

109. *See id.* at 1173 (“The various rules pertaining to the development and application of binding authority do not reflect the developments of the English common law. They reflect, rather, the organization and structure of the federal courts and certain policy judgments about the effective administration of justice.”).

marginally uncertain case—shifting the presumption of “not binding if from another circuit” whenever nonstandard appellate practices or structures generate uncertainty—doing so merely to solve the problems presented by the nonstandard cases makes little sense. Indeed, it would be particularly unfortunate to reject the national laboratory that our standard approach encourages in these nonstandard cases; after all, in many instances, Congress has adopted these alternative approaches because it perceived all procedurally similar cases as presenting significant national problems. Part of the reason for encouraging multiple perspectives among the courts of appeals is to ensure a diversity of opinions on important questions of law. Because many of these unusual appellate processes arise only when there are substantial problems of nationwide import, it would seem particularly counterproductive to abandon the laboratory approach in the very cases where that approach seems most useful.

Furthermore, allowing exceptions to the general rule of nonbindingness would encourage litigants to broaden the scope of what would be deemed “complex” or “nonstandard,” threatening a further incursion into the general rule under which decisions by one circuit do not bind another. Absent a demonstrated need for a radical transformation in the assumptions that govern federal appellate practice, such an approach seems to have already been rejected.¹¹⁰

B. Structure-Relevant Approach

A second approach, the Structure-Relevant 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 court of appeals. 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 nonstandard process might create binding precedent only if courts viewed the process as creating a decision-making body that could be considered to have a superior position within the federal hierarchy. As part of this analysis, for instance, a court might examine whether the nonstandard 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 established a particular court as the sole decision maker 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 Con-

110. Lawrence Solum correctly 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 law is up for grabs, it cannot realize the values we summarize by the phrase *the rule of law*.” Solum, *supra* note 14. While an accurate reflection of the justifications that support the idea of precedent generally, we know that our system already has rejected this proposition in the intercircuit context; there, the value of precedent and consistency is outweighed by the systemic value of the different circuit courts acting as laboratories. In itself, this reliance on the “rule of law” cannot justify the Highly Binding Approach.

gress 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 decision making in at least some cases) against the problems (the lack of circuit control through an internal en banc process, the lost value of percolation among the courts 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 approach has the merit of moderation, giving some binding effect to those nonstandard processes that seem to present the best case for binding courts outside of the standard rules of precedent.¹¹¹

On the other hand, this approach would do little to resolve the problems that currently face courts attempting to determine the binding effect of decisions issued in these complex cases. Much of the reason that the determination of precedential effect is difficult in these unusual structures is because the revised appellate structure makes it hard to determine whether a court is or is not in a superior review position, or whether a particular court is part of the same "court." Is a given BAP, in deciding a case arising out of the District of Oregon, superior to a bankruptcy court sitting in the Eastern District of Washington? If we view the BAP as part of the court we call the U.S. Court of Appeals for the Ninth Circuit, we might answer that question in the affirmative. But since that BAP's decisions are themselves reviewable by the Ninth Circuit, it seems somewhat counterintuitive to deem them the same "court."

One might turn to the language of positive law establishing a particular statutory scheme in order to determine if it provides clues about whether a given structure is intended to place a new entity or process within the scope of existing structures. Indeed, this is very much the approach taken by the courts examining the precedential effect of BAP decisions.¹¹² This ultimately becomes an exercise in statutory interpretation, however, layered with assumptions about the effect of statements regarding courts and reviewability on the issue of precedential effect. While Congress might be able to make the work of courts easier by clarifying how new processes and entities fit into existing structures, such a tangential approach seems doomed to an arcane exercise in which courts mine statutory language and legislative

111. 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.

112. See, e.g., *Coyne v. Westinghouse Credit Corp.* (*In re Globe Illumination Co.*), 149 B.R. 614, 620 (Bankr. C.D. Cal. 1993) (parsing the language of Title 15 in order to discern whether or not BAPs are part of the court of appeals); *In re Junes*, 76 B.R. 795, 797 (Bankr. D. Or. 1987) (concluding that BAPs stand in the same hierarchical position vis-à-vis both bankruptcy courts and courts of appeal as district courts, and therefore have no more binding effect than a district court decision would).

history for clues to a structural classification that may not lend itself to an easy answer. In the end, given the importance of the bindingness determination and the difficulty of characterizing unusual entities and processes into the pigeonhole of “normal” courts and case processing, this approach seems unlikely to resolve the problem of determining bindingness in a satisfactory manner.

C. Clear-Statement Approach

Despite the value of the Structure-Relevant Approach, I believe its flaws limit its practical value. If the problem of bindingness is to be dealt with efficiently, a more straightforward approach is called for. Rather than take the Structure-Relevant Approach in which both courts and Congress have unclear roles in the definition of bindingness, I suggest that Congress should simply cut to the chase and state what it believes the rules of precedent should be in nonstandard appellate processes and models.

Under this Clear-Statement Approach, the default rule should be as follows: unless Congress clearly states its view to the contrary when creating nonstandard appellate processes, those processes should not result in cross-circuit binding precedent, nor in binding precedential effect on any courts not regularly in a direct appellate relationship. While the intimate connection between structure and precedent makes it tempting to assign binding effect to such cross-circuit decisions, we should not allow the creation of these nonstandard structures to complicate the relationship between the federal courts of appeals and other institutions unless there is clear (and, I would suggest, expressly stated¹¹³) congressional intent.

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 (at least plausibly) congressional intent for some of the currently existing alternative processes.¹¹⁴ Nevertheless, there are several reasons why the Clear-Statement Approach provides the optimal way to manage the problems presented by questions of precedent in nonstandard processes.

First, the Clear-Statement Approach is less resource-intensive than the others. Under this approach, advocates and decision makers 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 nonstandard processes would prove costly. Attorneys would likely initiate

113. If implicit congressional intent were sufficient to permit cross-circuit binding precedent, this approach would be essentially identical to the Structure-Relevant Approach, in which courts evaluate the context of new structures and processes in order to decide how best to assign them to existing roles in the federal system. The difficulties of that approach are obvious, and so the benefits of the Clear-Statement Approach are achieved only by requiring *explicit* statements regarding the binding effect of decisions made pursuant to a nonstandard appellate process.

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

disputes over the threshold question of whether a decision from another circuit is potentially binding. While disputes would arise under the Clear-Statement Approach as well, counsel would only need to point to explicit statutory language in order to make their case. Under such a system, there would be far fewer disputes than under the current rule-less system, and fewer than under the interpretation-heavy Structure-Relevant Approach. Furthermore, even if another court's decisions might be binding, identifying those other decisions would be a daunting task because, 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.¹¹⁵ Making such decisions binding on other appellate courts would impose substantial additional costs, in terms of increased disputes and increased resources expended, on everyone in the legal system.¹¹⁶

Second, the Clear-Statement Approach would impose few significant costs on the federal appellate system. As an initial matter, 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 nonstandard models are nonstandard for a reason: they are encountered only rarely. Between 1988 and 2005, for instance, the Panel on Multidistrict Litigation handled only seventy-eight cases under 28 U.S.C. § 2112—fewer than five each year.¹¹⁷ While other nonstandard cases are out there, the numbers are still small in comparison to the 60,000-plus appeals managed by the courts

115. Even if the courts do identify their decision as being based on a consolidated petition for review, they do not discuss which circuits their decisions come from. *See supra* note 60.

Of course, if the system were to give cross-circuit binding effect to decisions arising from nonstandard 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 online services such as Lexis and Westlaw would come to include those tags in a manner that would make 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 nonstandard processes that Congress had indicated should be binding in other circuits.

116. 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 en banc 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 the subsequent overruling of another circuit's decision is not binding on the Eleventh Circuit, even if prior decisions of the Eleventh Circuit had relied on a now-overruled decision as persuasive authority).

117. *See MDL Panel Docket Report, supra* note 48. If one counts Federal Circuit cases, of course, there are more significant numbers; even then, however, the Federal Circuit considered only 476 cases from the district courts in 2005. *See LEONIDAS RALPH MECHAM, ADMIN. OFFICE OF THE U.S. COURTS, Judicial Business of the United States Courts: 2005 Annual Report of the Director* 143, tbl. B-8 (2006), available at <http://www.uscourts.gov/judbus2005/appendices/b8.pdf> (last visited Nov. 26, 2009).

of appeals in 2005.¹¹⁸ Because decisions are (almost by definition) only rarely issued as a result of nonstandard processes, there would be little harm associated with refusing to give those decisions an atypical precedential effect.

Just as the rule of law survives when a plaintiff in the Second Circuit has a federal law interpreted differently from 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 courts of appeals. 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.¹¹⁹

In addition, the Clear-Statement Approach is most consistent with what Schauer has called the “front end” effect of rules about precedent.¹²⁰ These rules are important not only in the way that they affect later courts, but in how they influence the initial decision maker. Knowledge that one’s decision will serve as precedent for a later court necessarily alters the way in which you think about the decision itself.¹²¹ This front-end effect of precedential rules is most useful when the initial decision maker has some familiarity with the future decision maker, as well as with those courts that will be bound by its decision. Under the Structure-Relevant Approach, at least, a court is unlikely to be fully aware of the range of other courts on which its decision is likely to be ultimately binding, and that uncertainty will limit, and perhaps interfere with, the effectiveness of its own decisions. Under the Clear-Statement Approach, however, courts will have immediate guidance about the precedential effect of their decisions, giving the front end effect of precedential rules its greatest utility.

Furthermore, any cases that present particularly difficult problems under the Clear-Statement Approach can be addressed by treating the nonstandard decision as persuasive precedent. If refusing to give binding effect to a nonstandard 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 to avoid the worst of those effects.

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

118. See Admin. Office of the U.S. Courts, *Federal Court Management Statistics 2005, Courts of Appeals* <http://www.uscourts.gov/cgi-bin/cmsa2005.pl> (last visited Mar. 25, 2008) (reporting 68,473 appeals filed in 2005).

119. This adherence to the standard model is not, in itself, correct or incorrect. As noted in Section I.B., 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 nonstandard processes.

120. See Schauer, *supra* note 1, at 588–89.

121. See *id.*

on the legal question, however, and if the problems presented in a particular case loom 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.¹²²

A last risk that might arise from refusing to give binding precedential effect is the risk of conflicting decisions, but any concerns there would be substantially alleviated by the 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.

Third, application of the Clear-Statement Approach is most consistent with the jurisdictional statutes that govern allocation of particular legal issues to particular courts. Consider, for instance, the Federal Circuit's specialized jurisdiction. If a case arises presenting an issue previously decided by the Federal Circuit, and that subsequent case is within the scope of the Federal Circuit's jurisdictional statute,¹²³ then there is little doubt that the subsequent case is bound by an earlier on-point holding of the Federal Circuit. On the other hand, if the subsequent case is not within the scope of the Federal Circuit's appellate jurisdiction, a decision to nevertheless treat the earlier Federal Circuit decision as binding would effectively extend the scope of the Federal Circuit's jurisdictional statute beyond the statute's plain language.

Under this view, the statutes allocating jurisdiction to nonstandard appellate (or even trial-level) processes reflect an implicit (and limited) congressional judgment regarding the appropriate precedential effect of those decisions. While Congress almost never explicitly considers precedential effects in enacting these statutes, the jurisdictional language is an appropriate stand in for what should otherwise be a congressional assessment of which court decisions should carry weight in particular areas of law. By allowing decisions within the jurisdictional scope of a statute to have binding effect on decisions in cases that are outside the jurisdictional scope of that statute, we necessarily expand the "jurisdiction" of the statute to cases that were necessarily outside the scope of congressional intent.

This concern is not presented under a limiting interpretation of the rules of precedent. Under the Clear-Statement Approach, it would be Congress, rather than the courts, that would use changes in precedential rules to refine the jurisdictional scope of new entities or appellate processes. Given that it

122. 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) (explaining the court's preference for following other circuits whenever "reasoned analysis will allow"); *Env'tl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 257 F.3d 1071, 1077 (9th Cir. 2001) (following other circuits "unless there are valid and persuasive reasons to hold otherwise").

123. *See* 28 U.S.C. § 1295 (2006) (giving Federal Circuit jurisdiction over appeals in cases when district courts have jurisdiction under 28 U.S.C. § 1338); 28 U.S.C. § 1338 (2006) (giving Federal Circuit jurisdiction over cases relating to "any Act of Congress relating to patents . . . copyrights and trademarks").

was Congress that defined the jurisdictional scope of these nonstandard entities in the first instance, it is appropriate that the full extent of that jurisdiction remain in the hands of Congress.

Fourth, as the prior point suggested, the Clear-Statement Approach 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 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 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.¹²⁴ The other, the desire to retain jurisdiction over cases, rather than ceding control to prior decision makers, 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.

Finally, and for reasons emphasized in the prior section, the Clear Statement-Approach will encourage congressional attention to the relationship between structure and precedent. While it might be possible for courts to identify and evaluate the factors that enter into deciding whether decisions from a nonstandard 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 Approach argues in favor of forcing Congress to address these issues, rather than the courts.

The Clear-Statement Approach would aid practitioners and judges, and would guide Congress in the development of effective alternative models for the federal judicial process. Rather than evaluate these nonstandard processes on a case-by-case basis, the lack of any clear congressional direction on how precedent is to be managed in these nonstandard 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.

124. This is, of course, a simplified version of a classic justification for precedential rules from a law and economics perspective. See William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & Econ. 249 (1976).

CONCLUSION: PRECEDENT AS A CONSCIOUS DECISION IN STRUCTURAL
REFORM AND INSTITUTIONAL DESIGN

The Clear-Statement Approach to determining the place of binding precedent in nonstandard appellate models leads directly to the need for Congress to be made—and to become—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.

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 to abolish lower (or “inferior”¹²⁵) 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’s ability to directly control rules of precedent in the federal courts, Congress’s 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.¹²⁶

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

125. U.S. CONST. art. III, § 1.

126. *See, e.g.*, Harrison, *supra* note 40, 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).

jurisdiction.¹²⁷ 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 the rules of precedent—is one that is worth keeping in mind as the debate regarding congressional control over the federal courts continues.

127. Some have suggested, for instance, that Congress might designate circuit judges to sit on the Supreme Court when one of the justices must recuse him or herself from a case. See Howard J. Bashman, *Avoiding Recusal-Based Tie Votes at the U.S. Supreme Court*, LAW.COM, Mar. 4, 2008, <http://www.law.com/jsp/article.jsp?id=1204544938947>.

The history of the federal courts discussed in Section I.B. suggests that expanding the Supreme Court to include a wider variety of judges might loosen the hierarchical structure of our existing system, and thereby alter our views of both horizontal and vertical precedent. Notably, one academic suggested that a Supreme Court decision with a circuit judge sitting by designation might be entitled to lesser weight than a case in which only justices sat. See Posting of Mike Dimino, Concurring Opinions, *Sitting by Designation on the Supreme Court*, http://www.concurringopinions.com/archives2006/01/sitting_by_desi.html. (Jan. 13, 2006, 10:44). This view (something that has likely never been suggested as a reason to give less weight to a court of appeals decision with a district court judge sitting “by designation”) may well relate to the strong identity between the Supreme Court and the justices who sit on it. This, again, appears to be due more to historical happenstance, rather than to positive or other law.

The only limit on a particular judge’s role within the federal court system might be for the Chief Justice, who (though not mentioned in Article III) is responsible for presiding over presidential impeachment hearings in the Senate. U.S. CONST. art. I, § 3. Even that may not be enough to mandate that a particular person serve as Chief Justice “for life,” given Congress’s management control over the internal operations of the Court.