

Precedential Power Policies*

David C. Walker**

This article explores the development of stare decisis and the doctrinal divisions that exist in judicial approaches to precedent as binding authority. It points out ambiguities in policies concerning precedent and provides a simple approach for courts to better clarify which of their decisions count as law.

Introduction	167
A Brief History of Stare Decisis	168
The Varieties of Precedential Power Policies	171
Stare Decisis in Federal Courts	172
Stare Decisis in State Courts	178
State Court Treatment of Federal Court Decisions	182
Problems in the Promulgation of Stare Decisis Doctrinal Rules	183
Setting Policies, Establishing Rules	185

Introduction

¶1 Judicial precedent is the bedrock of the American legal system. Precedent itself, however, has no power over any person except the parties to a lawsuit.¹ Precedent might be thought of as merely the opinion of one person seated on a bench wearing a robe explaining the rationale for a decision. Precedent can wield considerable power, however, but only through the application of the doctrine of stare decisis. Without stare decisis the power of precedent is limited. Stare decisis has the power to turn precedent into binding precedent.² Commonly referred to merely as “stare decisis,” the doctrine of *stare decisis et non quieta movere* (“stand by the thing decided and do not disturb the

* © David C. Walker, 2022.

** Director, Schaffer Law Library, and Associate Professor, Albany Law School, Albany, New York. I would like to thank Claire Burke and Erin V. Wallin for their invaluable research assistance (there are so many rules).

1. See, e.g., 11TH CIR. R. 36-2; 3D CIR. I.O.P. 5.3.

2. Compare *Precedent with Binding Precedent*, BLACK’S LAW DICTIONARY (11th ed. 2019).

calm”)³ is the oldest practice under the “American Rule of Recognition.”⁴ Stare decisis refers generally to the practice of courts deferring to certain precedent decisions of other courts,⁵ and it serves a number of functions in the American common law tradition. It is the doctrine that gives power to some judicial opinions, so much so that in some cases the failure to cite certain judicial precedents⁶ (or even the failure not to cite certain cases)⁷ constitutes professional malpractice. Stare decisis has been referred to as “the foundation of the rule of law” and is said to ensure that legal rules develop “in a principled and intelligible fashion.”⁸ “It represents an element of continuity in law, and is rooted in the psychological need to satisfy reasonable expectations.”⁹ It helps in promoting stability, consistency, and predictability of legal outcomes.¹⁰

¶2 As important as it is in the American legal tradition, however, the ways in which the doctrine is applied vary from jurisdiction to jurisdiction, and in some jurisdictions the policies underlying its practices are unclear. This article sheds light on the numerous ways in which the doctrine of stare decisis operates throughout the United States. It begins with the history of the doctrine’s development in the Anglo-American tradition, compares characteristics of the doctrine in different jurisdictions, explains the problem with the normative development of the doctrine and, finally, provides a positive approach for establishing the power of precedent in a given jurisdiction.

A Brief History of Stare Decisis

¶3 Stare decisis is not an American invention, though it might operate in a unique manner in the United States. Scholars disagree as to the doctrine’s origins. Some date the doctrine to early Roman law, others to ancient Greece, and still others to ancient Egypt.¹¹ Whatever its true origin, the use of the doctrine as a rule, as opposed to a mere

3. Thomas G. Field III, *The Role of Stare Decisis in the Federal Circuit*, 9 FED. CIR. B.J. 203, 204–05 (1999).

4. According to H.L.A. Hart, rules of recognition are rules for determining what counts as law; see Timothy P. Terrell, *Introduction: Violence, Human Rights, and the Rule of Law*, 32 EMORY L.J. 383, 399 (1983).

5. Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 789–90 (2012).

6. MODEL RULES OF PRO. CONDUCT r. 3.3(a)(2) (AM. BAR ASS’N 1983); see also *Nachbaur v. Am. Transit Ins. Co.*, 752 N.Y.S.2d 605, 607 (App. Div. 2002).

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

8. *Vasquez v. Hillery*, 474 U.S. 254, 256 (1986).

9. *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

10. *State v. S.S.*, 162 A.3d 1058, 1070 (N.J. 2017).

11. See generally Hayden C. Covington, *The American Doctrine of Stare Decisis*, 24 TEX. L. REV. 190 (1946); Samuel Damren, *Stare Decisis: Maker of Customs*, 35 NEW ENG. L. REV. 1 (2000); Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 54–55 (2001) (“In ancient Greece, judges relied on past cases to settle commercial disputes, while early Egyptian judges prepared a rudimentary system of law reports to help guide their decisions. Roman judges also displayed a tendency to follow the example of their predecessors, especially in procedural matters. Though courts in Greece, Egypt, or Rome may have consulted past decisions for guidance, they were never bound, even presumptively, by those decisions, and they did not view precedent as a restraint on their power.”).

convention, developed in England during the reign of King Henry II.¹² At that time, the doctrine was used primarily as a mechanism to create adjudicatory uniformity. Henry II's courts gradually assumed the duties of local courts, whose legal customs were varied and, thus, inconsistent.¹³ In applying the doctrine of stare decisis, the King's courts would adopt a local custom, making that custom uniform throughout the nation.¹⁴ While this use of stare decisis in the creation of a uniform set of laws was conceptually beneficial, its practice was hindered by its temporal nature; that is, because there was no recording of the rules adopted by the courts, the uniform application of a given rule was limited to the memory of the bench and bar.¹⁵ Because knowledge of the rules existed only in the mind of the knower, the knowledge could not persist.¹⁶ The solution to the indeterminate lifespan of such knowledge would be introduced just decades after Henry II's reign.

¶4 In the 11th century, Henri de Bracton, an English judge and priest, took it upon himself to write a treatise to explain the principles and procedures of English common law by chronicling decisions of approximately 500 cases.¹⁷ Bracton's practice of recording precedent decisions was adopted by law student predecessors, leading to the creation of the Year Books, a digest of court cases published between the late 13th century and mid-16th centuries.¹⁸ Though the Year Books contained precedents, those precedents were not necessarily treated as binding.¹⁹ Bracton himself did not find precedent cases to be authoritative sources of law but rather examples of the application of legal principles.²⁰

¶5 It was not until a century after the end of the publication of the Year Books that the idea of precedent cases as having some binding authority took hold.²¹ Such a notion on precedent, established by Sir Edward Coke (chief justice of the King's Bench, 1613–1616), did not quite mirror the modern understanding of the binding nature of precedent, however;²² but through Coke was born the idea that a rule previously enunciated in precedent cases by common law courts was authoritative.²³

12. Field, *supra* note 3, at 204.

13. *Id.*

14. *Id.*

15. *Id.*; see also Jordan Wilder Connors, *Treating Like Subdecisions Alike: The Scope of Stare Decisis as Applied to Judicial Methodology*, 108 COLUM. L. REV. 681 (2008).

16. Field, *supra* note 3, at 204.

17. *Id.*

18. Healy, *supra* note 11, at 56–58.

19. *Id.* at 57.

20. Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 445 (1996).

21. *Id.* at 446.

22. *Id.* at 447.

23. *Id.* Those precedents were not recorded by the judges themselves, however, but by the likes of Coke and, as such, added an extra layer of gloss on the meaning of the rules. *Coke's Reports* was an example of an early nominative reporter. Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CALIF. L. REV. 15, 16 (1987) ("Nominative case reporters were individually compiled by a member of the bar who would gather notes of the courts' decisions either as recorded by himself, from other lawyers or, perhaps, from the notes of the judges. These compilations were then published as

¶6 By the time Mathew Hale served as chief justice of the King's Bench (1671–1676), Coke's notion of precedent began to gain some acceptance. Hale, however, did not wholly adopt Coke's approach that merely because a single precedent decision stood for a proposition of law did that precedent serve as a binding authority; rather, Hale believed that "a line of judicial decisions consistently applying a legal principle or legal rule to various analogous fact-situations is 'evidence' . . . of the existence and validity of such principle or rule."²⁴ For Hale, the consistency of a rule's adoption served as proof that the rule was a scientific truth and "hence, a source of its binding force."²⁵

¶7 After the death of Coke, Sir William Blackstone breathed life into the common law, which provided the underlying justification for judicial precedent to serve as binding authority. Made possible by natural law jurisprudence, Blackstone organized the common law into a logical framework, "a coherent and rational system." As Robert Berring puts it:

Blackstone's concept of a coherent system also relied upon natural law beliefs in the existence of ultimate and universal systems of norms. Natural law provided the assurance that there *was* a structure, an absolute foundation, upon which to build the rational system. Indeed, all eighteenth and most nineteenth century legal text writers prefaced their analyses by acknowledging the underpinning of natural law, which allowed for an ultimate sanctioning authority, and lent credence and coherence to the analysis that followed. Once this universal truth was established by a commentator, the primary authorities, largely in the form of case reports, could be used as indicia of the larger structure and could be analyzed and parsed as a means to mapping out the system. The written reports of judicial decisions were the embodiment of the common law.²⁶

¶8 While natural law may have provided the justification for the adoption of the doctrine of stare decisis, both the doctrine and its justification have been under attack since Jeremy Bentham.²⁷ The most notable attacks on the doctrine came from the legal realists in the early 19th century who took exception to the notion that rules of law are absolute truths discoverable by reason and that judges could actually discern a correct answer to a given legal problem. For the realists, judicial decisions were political decisions—the product of personal biases, subjective and mutable, not impersonal or mechanistic.²⁸ Justification for their aversion to the natural law ideal of precedent was due in part to the observation that a judge could easily decide to fail to apply a precedent case, claiming that the precedent case is distinguishable from the case at bar. Realists like Oliver Wendell Holmes were "frustrated by the degree to which the inertia of past decisions can inhibit present day shifts in course."²⁹ They believed that stare decisis is too limiting of a doctrine to slavishly apply decisions of the past to new situa-

illustrations of the way past matters had been adjudicated. Because there was no official written record of decisions of the court, these unofficial compilations were vital repositories.").

24. Berman & Reid, *supra* note 20, at 448.

25. *Id.*

26. Berring, *supra* note 23, at 16–17.

27. *Id.* See generally JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT (1776).

28. Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 732 (2009); see also Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749 (2013).

29. Damren, *supra* note 11, at 3.

tions that arise in an ever-changing society; their view was that as society evolves, so too should the law. The realists, however, were not necessarily opposed to precedent, as long as the legal rules adopted in precedent cases could be changed when past decisions proved to be unwise or ineffective in light of changing circumstances.³⁰ Both the natural law and legal realist perspectives on horizontal stare decisis are embodied in the practice of the doctrine by both federal and states courts in the United States.

The Varieties of Precedential Power Policies

¶9 Under the modern U.S. concept of stare decisis, however, deference is not accorded to a judicial precedent merely because a court declared something. Instead, a judicial precedent must meet certain conditions for the doctrine of stare decisis to apply. Two considerations must be evaluated for a judicial precedent for the doctrine to apply: (1) the hierarchical standing of the court within the given jurisdiction that decided the case; and (2) the publication status of the court's precedent opinion.

¶10 Moreover, some of these considerations are embodied in the two different forms of stare decisis: (1) vertical stare decisis and (2) horizontal stare decisis. Vertical stare decisis is the practice of a lower court adhering to the decisions of a higher court.³¹ Horizontal stare decisis is the practice of a court deferring to its own decisions.³² While the rules concerning vertical stare decisis are generally uniform throughout all jurisdictions within the United States, the rules concerning horizontal stare decisis, while more-or-less consistent at the federal level, differ among the states. The differences between the approaches to stare decisis are centered around the dichotomy between *hard* and *soft* stare decisis, which refers to the extent to which a precedent decision has the power to bind a future court.³³ When stare decisis is soft, a rule laid down by a court authorized to declare what the law is easily changes.³⁴ When stare decisis is hard, once a rule is laid down by a court, in some cases, that same court lacks the power to alter the rule—yet in other hard stare decisis cases, a court may be quite reticent to alter the previously established rule.³⁵ The dichotomy between hard and soft stare decisis is rooted in the long history of the doctrine of stare decisis, and modern courts' application of stare decisis tends to reflect particular stages of the doctrine's development.

¶11 Federalism, like so many things in the American legal tradition, allows for the doctrine of stare decisis to be richly diverse as the several states have great latitude in determining their own laws³⁶ and, in turn, in determining what counts as law. With a

30. Field, *supra* note 3, at 207–08.

31. Mead, *supra* note 5, at 789–90.

32. *Id.*

33. Amy E. Sloan, *The Dog That Didn't Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 *FORDHAM L. REV.* 713, 719 (2009).

34. *Id.* at 720.

35. *Id.*

36. The American legal system operates under a system of federalism; powers not specifically enumerated to the federal government are reserved to the governments of the states. U.S. CONST. amend. X.

few exceptions, the way in which stare decisis operates at the federal level, with courts divided into various circuits and districts,³⁷ is consistent. However, the way in which stare decisis operates among the states is quite divergent, especially as it concerns horizontal stare decisis at the intermediate appellate court level. The one constant regarding stare decisis, whether at the federal or state level, whether vertical or horizontal, is that the holdings of unpublished opinions (e.g., the holdings of opinions not approved for publication by the court) are never binding on any court.³⁸

Stare Decisis in Federal Courts

¶12 Article III, Section 1, of the U.S. Constitution provides, “The judicial power of the United States, shall be vested in one supreme court, and in such inferior Courts as Congress may from time to time ordain and establish.” Under Article III, the Supreme Court of the United States (the Court) serves as the “one supreme court” of the United States, the federal government’s court of last resort.³⁹ Also vested with judicial power,

37. See 28 U.S.C. §§ 41, 81–131.

38. *Ang v. Gonzales*, 430 F.3d 50, 58 (1st Cir. 2005); *United States v. Ryan*, 806 F.3d 691, 694 n.4 (2d Cir. 2015); *VICI Racing, LLC v. T-Mobile USA, Inc.*, 763 F.3d 273, 287 n.9 (3d Cir. 2014); *United States v. Ruhe*, 191 F.3d 376, 392 (4th Cir. 1999); *United States v. Escalante*, 933 F.3d 395, 402 n.9 (5th Cir. 2019); *Planned Parenthood Sw. Ohio Region v. DeWine*, 931 F.3d 530, 544 (6th Cir. 2019); *White v. Nat’l Football League*, 756 F.3d 585, 595 (8th Cir. 2014); *Reynolds Metals Co. v. Ellis*, 202 F.3d 1246, 1249 (9th Cir. 2000); *United States v. Engles*, 779 F.3d 1161, 1162 n.1 (10th Cir. 2015); *United States v. Riley*, 706 F. App’x 956, 963 (11th Cir. 2017); *Slinger Drainage, Inc. v. EPA*, 244 F.3d 967, 968 (D.C. Cir. 2001); *State v. Lewis*, 340 P.3d 415, 420 (Ariz. Ct. App. 2014); *Vandiver v. Banks*, 962 S.W.2d 349, 352 (Ark. 1998); *Ferra v. Loews Hollywood Hotel, LLC*, 253 Cal. Rptr. 3d 798, 805 (Cal. Ct. App. 2019); *People v. Small*, 962 P.2d 258, 260 n.1 (Colo. 1998); *Walker v. Resource Dev. Co.*, 791 A.2d 799, 814 n.52 (Del. Ch. 2000); *In re Shorter*, 570 A.2d 760, 771 (D.C. 1990); *Baskerville v. Sec’y, Dep’t of Vet. Aff.*, 377 F. Supp. 3d 1331, 1336 (M.D. Fla. 2019); *Arakaki v. Cayetano*, 299 F. Supp. 2d 1090, 1094 n.3 (D. Haw. 2002); *Staff of Idaho Real Est. Comm’n v. Nordling*, 22 P.3d 105, 109 (Idaho 2001); *Sexton v. Brach*, 464 N.E.2d 284, 286 (Ill. App. Ct. 1984); *State v. Hancock*, 65 N.E.3d 585, 590 n.6 (Ind. 2016); *Goodwin v. Iowa Dist. Ct., Davis Cty.*, 936 N.W.2d 634, 650 (Iowa 2019) (McDonald, J., concurring); *Riverside Drainage Dist., Sedgwick Cty. v. Hunt*, 99 P.3d 1135, 1140 (Kan. Ct. App. 2004); *Beaumont v. Zeru*, 460 S.W.3d 904, 909 (Ky. 2015); *Lane v. Wal-Mart Stores E., Inc.*, 69 F. Supp. 2d 749, 756 n.1 (D. Md. 1999); *In re Wadsworth’s Case*, 935 N.E.2d 333, 337 n.4 (Mass. App. Ct. 2010); *Cox v. Hartman*, 911 N.W.2d 219, 228 (Mich. Ct. App. 2017); *Minneapolis Grand, LLC v. Galt Funding LLC*, 791 N.W.2d 549, 556 (Minn. Ct. App. 2010); *Exec. Bd., Mo. Baptist Convention v. Windermere Baptist Conf. Ctr.*, 280 S.W.3d 678, 691 n.11 (Mo. Ct. App. 2009); *Progressive Direct Ins. Co. v. Stuvienaga*, 276 P.3d 867, 882 n.5 (Mont. 2012); *Baxter v. Dignity Health*, 357 P.3d 927, 931 n.5 (Nev. 2015); *Morella v. Grand Union/N.J. Self-Insurers Guar. Ass’n*, 917 A.2d 826, 831 n.4 (N.J. Super. Ct. App. Div. 2007); *State v. Stevenson*, 455 P.3d 890, 900 (N.M. Ct. App. 2019); *State v. Waycaster*, 818 S.E.2d 189, 194 (N.C. Ct. App. 2018); *Adrovet v. Brunswick City Sch. Dist. Bd. of Educ.*, 735 N.E.2d 995, 998 (Ohio Ct. Com. Pl. 1999); *State ex rel. Prater v. Dist. Ct., Okla. Cty.*, 188 P.3d 1281, 1283 n.6 (Okla. Crim. App. 2008); *DeGrossi v. Commw., Dep’t of Transp., Bureau of Driver Licensing*, 174 A.3d 1187, 1191 (Pa. Commw. Ct. 2017); *Shakespeare Co. v. Silstar Corp. of Am., Inc.*, 906 F. Supp. 997, 1008 n.12 (D.S.C. 1995); *Fortune v. Unum Life Ins. Co. of Am.*, 360 S.W.3d 390, 398 (Tenn. Ct. App. 2010); *Tex. Vital Care v. State*, 323 S.W.3d 609, 611 n.5 (Tex. App. 2010); *Essential Botanical Farms, LC v. Kay*, 270 P.3d 430, 436 (Utah 2011); *In re Benoit*, 237 A.3d 1243, 1247 n.4 (Vt. 2020); *Jones v. Commonwealth*, 836 S.E.2d 710, 713 n.2 (Va. Ct. App. 2019); *Karanjah v. Dep’t of Soc. & Health Servs.*, 401 P.3d 381, 388 (Wash. Ct. App. 2017); *City of Sheboygan v. Nytsch*, 750 N.W.2d 475, 476 n.2 (Wis. 2008).

39. U.S. Const. art. III, § 1; *Knight v. Carter Oil Co.*, 23 F.2d 481, 484 (8th Cir. 1927).

per federal statute, are 13 U.S. courts of appeal⁴⁰ (intermediate appellate courts), and 94 U.S. district courts⁴¹ (trial courts).⁴²

¶13 Each of the inferior Article III courts is bound to the decisions of the Supreme Court by means of vertical stare decisis, which is to say that once the Court determines the answer to a question of federal law, no other state or lower federal court can decide a matter contrary to the Court's prior decision;⁴³ and while it is not necessarily bound to its former decisions, the Court will reverse prior decisions only in narrow circumstances.⁴⁴ However, because of the Supreme Court's use of discretionary review, the majority of novel questions of law are decided by the courts of appeals. Typically, only when the circuits are split on questions of federal law will the Supreme Court grant a petition for certiorari to review and resolve the issue.⁴⁵

¶14 Under the doctrine commonly referred to as “the law of the circuit,” the district courts are bound to the decisions of the courts of appeals under whose geographic or subject-matter jurisdiction they fall.⁴⁶ So, as a general rule, if a district court is subservient to a particular court of appeals—that is, if the district court falls under the jurisdiction of particular court of appeals—that district court cannot rule in a manner contrary to the decisions of that court of appeals. However, under the law of the circuit, the mere issuance of an opinion by the circuit court does not bind the district courts under their jurisdiction; the opinion must also have been approved for publication.⁴⁷ So even

40. 28 U.S.C. § 41.

41. 28 U.S.C. §§ 81–131.

42. Eleven of the courts of appeals' jurisdictions are defined geographically. 28 U.S.C. § 41. The jurisdiction of the United States Court of Appeals for the Federal Circuit is based purely on subject matter, while the United States Court of Appeals for the District of Columbia's jurisdiction is defined by a combination of both geography and subject matter. The jurisdiction of all 94 U.S. district courts is also defined geographically. 28 U.S.C. §§ 81–131. Additionally, however, pursuant to Article I, Congress created two other federal trial courts, the United States Court of International Trade, 28 U.S.C. § 251, and the United States Court of Federal Claims, 28 U.S.C. § 171, each of whose jurisdiction is based on specific subject matter.

43. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994).

44. *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991).

45. See 3D CIR. R. 5.3; 4TH CIR. R. 32.1; 5TH CIR. R. 47.5.4; 7TH CIR. R. 32.1; 8TH CIR. R. 32.1A; 9TH CIR. R. 36-3; 10TH CIR. R. 32.1(A); 11TH CIR. R. 36-2.

46. *Hood v. United States*, 342 F.3d 861, 864 (8th Cir. 2003); *Hart v. Massanari*, 266 F.3d 1155, 1174 (9th Cir. 2001); *Nat'l Org. of Vet. Advocates, Inc. v. Sec'y of Vet. Aff.*, 260 F.3d 1365, 1373 (Fed. Cir. 2001); *Levin v. Madigan*, 41 F. Supp. 3d 701, 704 (N.D. Ill. 2014); *Condon v. Haley*, 21 F. Supp. 3d 572, 586–87 (D.S.C. 2014); *Panayot v. Annucci*, 898 F. Supp. 2d 469, 479–80 (N.D.N.Y. 2012); *Nat'l Franchisee Ass'n v. Burger King Corp.*, 715 F. Supp. 2d 1232, 1242–43 (S.D. Fla. 2010); *Amgen, Inc. v. F. Hoffmann-La Roche Ltd.*, 494 F. Supp. 2d 54, 60 (D. Mass. 2007); *B.T. ex rel. G.T. v. Santa Fe Pub. Schs.*, 506 F. Supp. 2d 718, 724–25 (D.N.M. 2007); *Bradford v. Metro. Life Ins. Co.*, 514 F. Supp. 2d 1024, 1028 (E.D. Tenn. 2007); *Does 1-7 v. Round Rock Indep. Sch. Dist.*, 540 F. Supp. 2d 735, 749 (W.D. Tex. 2007); *In re Bayside Prison Litig.*, 190 F. Supp. 2d 755, 763 (D.N.J. 2002); *Anselmo v. King*, 902 F. Supp. 273, 276 n.3 (D.D.C. 1995).

47. Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG 2D 17, 18 (2000) (“While an unpublished opinion of a circuit panel resolves the particular dispute at issue, it is not exactly part of a circuit's case law because—at least under most local circuit rules—it may not be cited as precedent in later cases. The unpublished opinion is tolerated for reasons involving such pedestrian considerations as efficiency in judicial administration. Unpublished opinions are usually regarded as helpful by overburdened judges and as a minor issue by lawyers who occasionally discover that a perfectly

though a vast number of cases are decided by the courts of appeals each year, only those cases whose opinions are approved for publication are binding precedent.

¶15 Pursuant to principles of vertical stare decisis adopted by the federal courts, the decisions of the district courts have no binding authority (with one exception),⁴⁸ mainly because, as a practical matter, the district courts are at the first rung of the Article III hierarchy. Moreover, the district courts have no binding authority by means of horizontal stare decisis either, though published opinions of district courts are typically cited as persuasive authority.⁴⁹ So while district court judges may choose to do so, they need not adhere to the precedent cases of their brethren in the same district. Thus, even if the same district court were to decide two cases involving the same question of law under a similar set of facts, the court could reach different results in each case involving the same issue despite the publication status of either of the decisions.

¶16 In most cases where horizontal stare decisis applies at the federal intermediate appellate level, however, a subsequent panel of a court of appeals is bound to the decisions of a prior panel of the same court.⁵⁰ There are, however, two generally accepted

analogous case cannot be cited as authority.”).

48. In *Bryant v. Smith*, 165 B.R. 176, 180 (W.D. Va. 1994), the court stated, “Although the bankruptcy court is bound to follow the opinions of the district judges of this district so long as those opinions are not in conflict, the district judges are not bound by each others’ opinions.” However, the majority position of other federal courts seems to be that U.S. district court decisions are not binding on federal bankruptcy courts. See *In re McBrearty*, 335 B.R. 513, 517 (Bankr. E.D.N.Y. 2005) (quoting *In re KAR Dev. Assocs.*, 180 B.R. 629, 640 (D. Kan. 1995)) (“The better view, the one which reflects an understanding of the court structure and the nature of stare decisis, is that because district court bankruptcy decisions do not bind other district judges within the same district, they are not binding on bankruptcy courts either.”); *In re Carrozella & Richardson*, 255 B.R. 267, 272 (D. Conn. 2000) (“[A] judge of the bankruptcy court—a unit of the district court, 28 U.S.C. s.151—is not bound by the decision of a single district court judge.”); *In re Raphael*, 238 B.R. 69, 77 (D.N.J. 1999) (“[T]he decision of a district court is not binding on a bankruptcy court.”); *In re Phipps*, 217 B.R. 427, 430 (W.D.N.Y. 1998) (“ . . . (1) bankruptcy judges exercise jurisdiction of the district court in bankruptcy matters; and (2) the bankruptcy courts, consequently, are not inferior courts for the purpose of stare decisis analysis; and therefore (3) a bankruptcy judge is as free to differ with an earlier decision of a district court judge as would be a different district judge of the district.”); *In re Shattuc Cable Corp.*, 138 B.R. 557, 567 (Bankr. N.D. Ill. 1992) (“In the interests of comity and uniformity, this Court strongly believes that the bankruptcy courts should give deference to and seek to follow the decisions of the district court judges, but it is not absolutely bound to do so when it feels that the result reached therein is contrary to the intended scope of the Bankruptcy Code.”); see also *In re Gen. Motors Corp.*, 407 B.R. 463, 487 (Bankr. S.D.N.Y. 2009), *aff’d sub nom. In re Motors Liquidation Co.*, 428 B.R. 43 (S.D.N.Y. 2010), and *aff’d sub nom. In re Motors Liquidation Co.*, 430 B.R. 65 (S.D.N.Y.), and *enforcement den. In re Motors Liquidation Co.*, 529 B.R. 510 (Bankr. S.D.N.Y. 2015), and *aff’d in part, vacated in part, rev’d in part* 590 B.R. 39, 43 (S.D.N.Y. 2018), *aff’d*, 943 F.3d 125 (2d Cir. 2019) (“While an opinion of one bankruptcy judge in this District is not, strictly speaking, binding on another, it is the practice of this Court to grant great respect to the earlier bankruptcy court precedents in this District, particularly since they frequently address issues that have not been addressed at the Circuit level.”).

49. *Mead*, *supra* note 5, at 800.

50. *Gonzalez-Mesias v. Mukasey*, 529 F.3d 62, 65 (1st Cir. 2008) (“We are bound by the law of the circuit doctrine. That doctrine ‘holds a prior panel decision inviolate absent either the occurrence of a controlling intervening event (e.g., a Supreme Court opinion on the point; a ruling of the circuit, sitting en banc; or a statutory overruling) or, in extremely rare circumstances, where non-controlling but persuasive case law suggests such a course.’”); *Ithaca Coll. v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980) (“As the Third

exceptions to that rule: (1) the Supreme Court reverses the precedent decision,⁵¹ or (2) the court of appeals hearing the case en banc decides to resolve the question of law differently than the panel did.⁵² That being said, were the Supreme Court to decide a

Circuit has recently stated: A decision by this court, not overruled by the United States Supreme Court, is a decision of the court of last resort in this federal judicial district. Thus our judgments . . . are binding on all inferior courts and litigants in the Third Judicial District, and also on administrative agencies when they deal with matters pertaining thereto”); *United States v. Savani*, 733 F.3d 56, 62 (3d Cir. 2013) (citing *Reich v. D.M. Sabia Co.*, 90 F.3d 854, 858 (3d Cir. 1992)) (“Although we, as a three-judge panel, are generally bound by prior decisions of this Court, we ‘may reevaluate a precedent in light of intervening authority and amendments to statutes or regulations.’”); *Williams v. Taylor*, 163 F.3d 860, 866 (4th Cir. 1998) (quoting *Smith v. Moore*, 137 F.3d 808, 821 (4th Cir. 1998)) (“It is well established that a decision of this Court is binding on other panels unless it is overruled by a subsequent *en banc* opinion of the Court or an intervening decision of the United States Supreme Court.”); *United States v. Zuniga-Salinas*, 945 F.2d 1302, 1305–06 (5th Cir. 1991) (“[W]e cannot overrule the decision of a prior panel unless such overruling is unequivocally directed by controlling Supreme Court precedent.”); *Salmi v. Sec’y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985) (“A panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.”); *De Leon Castellanos v. Holder*, 652 F.3d 762, 765 (7th Cir. 2011) (“Accordingly, it would take compelling circumstances, or an intervening on-point Supreme Court decision, to disturb [two previous 7th circuit cases.]”); *Hood*, *supra* note 46, at 864 (“The District Court, however, is bound, as are we, to apply the precedent of this Circuit.”); *Hart*, *supra* note 46, at 1174 (“If a court must decide an issue governed by a prior opinion that constitutes binding authority, the later court is bound to reach the same result, even if it considers the rule unwise or incorrect. Binding authority must be followed unless and until overruled by a body competent to do so.”); *In re Troff*, 329 B.R. 85, 100 (D. Utah 2005), *aff’d*, 479 F.3d 1213, *withdrawn from bound volume amended and superseded on reh’g*, 488 F.3d 1237, and *aff’d*, 488 F.3d 1237 (10th Cir. 2007) (“As a general rule, under the doctrine of *stare decisis*, inferior courts are obligated to apply the law as decided by courts to which they owe obedience, and in particular, ‘[a]ll other American courts, state and federal, owe obedience to the decisions of the Supreme Court of the United States on questions of federal law, and a judgment of the Supreme Court provides the rule to be followed in all such courts until the Supreme Court sees fit to reexamine it.’”); *United States v. Kim*, 364 F.3d 1235, 1241 (11th Cir. 2004); *Brewster v. Comm’r*, 607 F.2d 1369, 1373–74 (D.C. Cir. 1979) (“*Stare decisis* demands that we abide by a recent decision of one panel of this court unless the panel has withdrawn the opinion or the court En banc has overruled it.”); *Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 1563 (Fed. Cir. 1991) (“[W]e note that decisions of a three-judge panel of this court cannot overturn prior precedential decisions.”).

51. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1416 n.5 (2020) (“To be clear, the *stare decisis* issue in this case is one of horizontal *stare decisis*—that is, the respect that this Court owes to its own precedents and the circumstances under which this Court may appropriately overrule a precedent. By contrast, vertical *stare decisis* is absolute, as it must be in a hierarchical system with “one supreme Court” U. S. Const., Art III, § 1. In other words, the state courts and the other federal courts have a constitutional obligation to follow a precedent of this Court unless and until it is overruled by this Court.”); *see also* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”).

52. *Igartua v. United States*, 626 F.3d 592, 603 (1st Cir. 2010) (“This circuit has recognized two exceptions to the rule of *stare decisis*. First, the rule does not apply when ‘[a]n existing panel decision [is] undermined by controlling authority, subsequently announced, such as an opinion of the Supreme Court, an en banc opinion of the circuit court, or a statutory overruling.’”); *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 154 (2d Cir. 2015), *as amended* (Dec. 17, 2015), *aff’d sub nom.* *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (“Generally speaking, “this panel is bound by prior decisions of this court

matter of law, all subservient federal courts would be bound to the Court's decision.⁵³

unless and until the precedents established therein are reversed *en banc* or by the Supreme Court.”); *Karns v. Shanahan*, 879 F.3d 504, 515 (3d Cir. 2018) (“Our respect for the uniformity of decisions within this Court therefore must succumb when a prior holding of our Court—even an *en banc* decision—conflicts with a subsequent Supreme Court holding.”); *United States v. Collins*, 415 F.3d 304, 311 (4th Cir. 2005) (quoting *Etheridge v. Norfolk & W. Ry. Co.*, 9 F.3d 1087, 1090 (4th Cir. 1993)) (“A decision of a panel of this court becomes the law of the circuit and is binding on other panels unless it is overruled by a subsequent *en banc* opinion of this court or a superseding contrary decision of the Supreme Court.”); *Jacobs v. Nat’l Drug Intel. Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) (“It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel’s decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court.”); *Wright v. Spaulding*, 939 F.3d 695, 700 (6th Cir. 2019) (“Like most circuits, this circuit follows the rule that the holding of a published panel opinion binds all later panels unless overruled or abrogated *en banc* or by the Supreme Court.”); *Fed. Trade Comm’n v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 776 (7th Cir. 2019), *cert. granted*, 141 S. Ct. 194, *vacated*, 141 S. Ct. 810, *cert. denied*, 141 S. Ct. 195 (2020), and *cert. denied sub nom.* *FTC v. Credit Bureau Ctr.*, No. 19-825, 2021 WL 1725275 (U.S. May 3, 2021) (quoting *Russ v. Watts*, 414 F.3d 783, 788 (7th Cir. 2005)) (“Although we must give considerable weight to our prior decisions, we are not bound by them absolutely and may overturn circuit precedent for compelling reasons.’ An intervening Supreme Court decision that displaces the rationale of our precedent is one such reason.”); *Dean v. Searcey*, 893 F.3d 504, 511 (8th Cir. 2018) (citing *BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT* 38 (2016)) (“Hence, we would only re-examine the decision if it were ‘repudiated or undermined by later authority, such as a statute, an intervening Supreme Court decision, or *en banc* decision.’”); *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1261 (9th Cir. 2020) (citing *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (*en banc*)) (“Published decisions of this court become law of the circuit, which is binding authority that we and district courts must follow until overruled. Controlling, overruling authority includes only intervening statutes or Supreme Court opinions that create ‘clearly irreconcilable’ conflicts with our caselaw.”); *Barnes v. United States*, 776 F.3d 1134, 1147 (10th Cir. 2015) (quoting *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993)) (“However, ‘[w]e are bound by the precedent of prior panels absent *en banc* reconsideration or a superseding contrary decision by the Supreme Court.’”); *Granda v. United States*, 990 F.3d 1272, 1283 (11th Cir. 2021) (“As this Court held *en banc* in *United States v. Johnson*, ‘when “a precedent of the Supreme Court has direct application,” we must follow it.’”); *Allegheny Def. Project v. Fed. Energy Regul. Comm’n*, 964 F.3d 1, 18 (D.C. Cir. 2020) (“We also may depart from circuit precedent when ‘intervening development[s]’ in the law—such as Supreme Court decisions—‘ha[ve] removed or weakened the conceptual underpinnings from the prior decision[.]’”); *Deckers Corp. v. United States*, 752 F.3d 949, 959 (Fed. Cir. 2014) (“In this Circuit, a later panel is bound by the determinations of a prior panel, unless relieved of that obligation by an *en banc* order of the court or a decision of the Supreme Court.”); *Bankers Tr. N.Y. Corp. v. United States*, 225 F.3d 1368, 1375 (Fed. Cir. 2000) (“Indeed, perhaps *stare decisis* should be viewed as even stronger at the court of appeals level, since erroneous interpretations of statutes are correctable not only by Congress, but also by the court itself sitting *en banc*, as well as by the Supreme Court.”).

53. *United States v. Rodriguez-Pacheco*, 475 F.3d 434, 441 (1st Cir. 2007) (“In this circuit, we have recognized two exceptions to this *stare decisis* rule. The first exception applies when ‘[a]n existing panel decision [is] undermined by controlling authority, subsequently announced, such as . . . an *en banc* opinion of the circuit court.’”); *United States v. Walker*, 974 F.3d 193, 201 (2d Cir. 2020) (quoting *United States v. Moore*, 949 F.2d 68, 71 (2d Cir. 1991)) (“[P]rior opinions of a panel of this court are binding upon us in the absence of a change in the law by higher authority or our own *in banc* proceeding (or its equivalent.)”); *Karns*, *supra* note 52, at 514 (“We are therefore generally obligated to follow our precedent absent *en banc* reconsideration.”); *Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 642 (4th Cir. 1975) (“Such a decision is binding, not only upon the district court, but also upon another panel of this court—unless and until it is reconsidered *en banc*.”); *Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs., Inc. v. Kauffman*, 981 F.3d 347, 369 (5th Cir. 2020) (“An opinion of a panel does not bind the *en banc* court.”); *In re HNRC Dissolution Co.*, 761 F. App’x 553, 562 (6th Cir. 2019) (“First and foremost, *Lowenbraun* remains controlling because it has not been overruled by an *en banc* decision of this court

Likewise, to the extent that an en banc court were to rehear a case, regardless of its decision, all subsequent panels of that court would be bound to the holding(s) of the en banc court.⁵⁴

¶17 Quite interesting, though, is the divergent manner by which circuit courts that were once part of another circuit handle precedent cases from their former circuit. In 1929, Congress divided the Eighth Circuit into the Eighth and Tenth Circuits.⁵⁵ Later, in 1981, Congress divided the Fifth Circuit into the Fifth and Eleventh Circuits.⁵⁶ In 1981, after the split, the Eleventh Circuit adopted the rule that decisions of the Fifth Circuit that were submitted for decision on or before October 1, 1981, would be binding precedent on the Eleventh Circuit.⁵⁷ However, in 2001, as a matter of first impression, when the Tenth Circuit was presented with the almost identical issue (this time involving Eighth Circuit precedent), the Tenth Circuit decided that it would not be bound to the pre-Tenth Circuit era decisions of the Eighth Circuit.⁵⁸ While the Tenth Circuit was aware of the Eleventh's Circuit precedent in that matter, it chose to ignore it.

¶18 So while the various federal courts have developed positive law regarding the manner in which they treat precedent cases, such positive law typically stems not from the branches of higher authorities but rather are the fruit of their own gardens. Thus, at the federal court of appeals level, stare decisis does not act as an impenetrable barrier for changes in law by the same circuit, but it creates a high hurdle for change, indicating

and *Stern* is not an inconsistent decision of the United States Supreme Court that would require modification of *Lowenbraun*.”); *In re Bentz Metal Prod. Co.*, 253 F.3d 283, 285 (7th Cir. 2001) (“It is well-established that on rehearing en banc, the full court may, and sometimes does, overrule a decision reached earlier by a three-judge panel in a separate case.”); *United States v. Manning*, 786 F.3d 684, 686 (8th Cir. 2015) (quoting *United States v. Wright*, 22 F.3d 787, 788 (8th Cir. 1994)) (“A panel of this Court is bound by a prior Eighth Circuit decision unless that case is overruled by the Court sitting en banc.”); *Silva v. Garland*, 993 F.3d 705, 717 (9th Cir. 2021) (“In our circuit, a three-judge panel must apply binding precedent even when it is clearly wrong because (for example) it failed to recognize an intervening change in the law. . . . Only an en banc court has the power to fix these errors.”); *United States v. Lira-Ramirez*, 951 F.3d 1258, 1260 (10th Cir.), *cert. denied*, 141 S. Ct. 830 (2020) (“We must generally follow our precedents absent en banc consideration.”); *United States v. Dixon*, 901 F.3d 1322, 1347 (11th Cir. 2018) (quoting *United States v. Dailey*, 24 F.3d 1323, 1327 (11th Cir. 1994)) (“[T]he earliest panel opinion resolving the issue in question binds this circuit until the [C]ourt resolves the issue en banc.”); *Erwin-Simpson v. AirAsia Berhad*, 985 F.3d 883, 891 n.2 (D.C. Cir. 2021) (“Generally, a panel decision can be overruled only through en banc review.”); *Teva Pharms. USA, Inc. v. Novartis Pharms. Corp.*, 482 F.3d 1330, 1338 (Fed. Cir. 2007) (quoting *Tex. Am. Oil Co. v. U.S. Dep’t of Energy*, 44 F.3d 1557, 1561 (Fed. Cir. 1995) (en banc)) (“This court respects the principle of stare decisis and follows its own precedential decisions unless the decisions are ‘overruled by the court en banc.’”).

54. The only U.S. court of appeals to provide for a different avenue for change of law by means of the court is that of the Seventh Circuit. Pursuant to its local rules, “A proposed opinion approved by a panel of [the] court adopting a position which would overrule a prior decision of [the] court” may be published if it is “circulated among the active members of the court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted.” 7TH CIR. R. 40(e).

55. *Estate of McMorris v. Comm’r*, 243 F.3d 1254, 1258 (10th Cir. 2001).

56. *Id.*

57. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209 (11th Cir. 1981).

58. *Estate of McMorris*, *supra* note 55, at 1258.

a practice of utilizing a very hard stare decisis rule. The same cannot necessarily be said for the courts of the several states.

Stare Decisis in State Courts

¶19 While there is great unanimity overall in the rules of recognition concerning precedent opinions employed by federal courts, the same cannot be said for state courts save two exceptions. First, in every state, the decisions from the courts of last resort are binding on the lower courts within that same state.⁵⁹

¶20 Second, the decisions of state intermediate courts are binding on those courts lower than them in the judicial hierarchy⁶⁰—though that has not always been the case.

59. See *Frederick v. Frederick*, 92 So. 3d 792, 795 (Ala. Civ. App. 2012); *Swezey v. State*, 167 P.3d 79, 80 (Alaska Ct. App. 2007); *Sell v. Gama*, 295 P.3d 421, 428 (Ariz. 2013); *Ferguson v. Ferguson*, 334 S.W.3d 425, 430 (Ark. Ct. App. 2009); *People v. Johnson*, 267 P.3d 1125, 1131 (Cal. 2012); *Heafer v. Denver-Boulder Bus Co.*, 489 P.2d 315, 316 (Colo. 1971); *State v. Johnson*, 70 A.3d 168, 174 (Conn. App. Ct. 2013); *McGonigal v. Ward Baking Co.*, 67 A.2d 61, 64 (Del. Super. Ct. 1949); *Carrithers v. Cornett's Spirit of Suwannee, Inc.*, 93 So. 3d 1240, 1242 (Fla. Dist. Ct. App. 2012); *Whorton v. State*, 741 S.E.2d 653, 658 (Ga. Ct. App. 2013); *State v. Jim*, 97 P.3d 395, 407 (Haw. Ct. App. 2004); *Peoria & P.U. Ry. Co. v. U.S. Rolling Stock Co.*, 28 Ill. App. 79, 91 (Ill. App. Ct. 1888); *Cont'l Ins. Co. v. Wheelabrator Tech., Inc.*, 960 N.E.2d 157, 162 (Ind. Ct. App. 2011); *Figley v. W.S. Indus.*, 801 N.W.2d 602, 608 (Iowa Ct. App. 2011); *Snider v. Am. Family Mut. Ins. Co.*, 298 P.3d 1120, 1128 (Kan. 2013); *Gill v. Burress*, 382 S.W.3d 57, 65 (Ky. Ct. App. 2012); *Arrington v. ER Physician Grp., Inc.*, 110 So. 3d 193, 197 (La. Ct. App. 2013); *Martinez ex rel. Fielding v. Johns Hopkins Hosp.*, 70 A.3d 397, 409 (Md. Ct. Spec. App. 2013); *Commonwealth v. Sanchez*, 944 N.E.2d 625, 629 (Mass. App. Ct. 2011); *People v. Mitchell*, 408 N.W.2d 798 (Mich. 1987); *Bevis v. Linkous Const. Co.*, 856 So. 2d 535, 541 (Miss. Ct. App. 2003); *City of Branson v. Hotels.com, LP*, 396 S.W.3d 378, 384 (Mo. Ct. App. 2013); *Demontiney v. Mont. Twelfth Jud. Dist. Court*, 51 P.3d 476, 479 (Mont. 2002); *State v. Hausmann*, 758 N.W.2d 54, 59 (Neb. Ct. App. 2008), *rev'd on other grounds*, 765 N.W.2d 219 (Neb. 2009); *Kass v. Brown Boveri Corp.*, 488 A.2d 242, 248 (N.J. Super. Ct. App. Div. 1985); *McNeill v. Burlington Res. Oil & Gas Co.*, 153 P.3d 46, 52 (N.M. Ct. App. 2006); *Warnock v. Duello*, 816 N.Y.S.2d 595, 596 (App. Div. 2006); *Strickland v. City of Raleigh*, 693 S.E.2d 214, 217 (N.C. Ct. App. 2010); *State v. Lawson*, 984 N.E.2d 1126 (Ohio Ct. App. 2013); *Bays Expl., Inc. v. Jones*, 230 P.3d 907, 910 (Okla. Civ. App. 2010); *Zauflik v. Pennsbury Sch. Dist.*, 72 A.3d 773, 783 (Pa. Commw. Ct. 2013); *Univ. of R.I. v. Dep't of Emp. & Training*, 691 A.2d 552, 555 (R.I. 1997); *State v. Cheeks*, 733 S.E.2d 611, 618 (S.C. Ct. App. 2012); *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 430 (Tenn. 2011); *Lubbock Cty., Tex. v. Trammel's Lubbock Bail Bonds*, 80 S.W.3d 580, 585 (Tex. 2002); *State v. Tenorio*, 156 P.3d 854, 857 (Utah Ct. App. 2007); *Roadcap v. Commonwealth*, 653 S.E.2d 620, 625 (Va. Ct. App. 2007); *Green v. Normandy Park*, 151 P.3d 1038, 1051 (Wash. Ct. App. 2007); *Estate of Kriefall v. Sizzler USA Franchise, Inc.*, 801 N.W.2d 781, 816 (Wis. Ct. App. 2011).

60. ALA. R. APP. PROC. 15; *Joseph v. State*, 293 P.3d 488, 492 (Alaska Ct. App. 2012); *Castillo v. Indus. Comm'n*, 520 P.2d 1142, 1148 (Ariz. Ct. App. 1974); *Williams v. State*, 91 S.W.3d 54, 61 (Ark. 2002); *State ex rel. Weiser v. Castle L. Grp., LLC*, 457 P.3d 699, 708 (Colo. Ct. App. 2019); *McGauley v. Goldstein*, 653 So. 2d 1108, 1109 (Fla. Dist. Ct. App. 1995); 6 GA. PROC. POST-TRIAL MOTIONS AND APPEALS § 3:177 (2013); *Jenkins v. Cades Schutte Fleming & Wright*, 869 P.2d 1334, 1337 (Haw. 1994); *Klosterman v. Rogers*, 973 P.2d 161, 163 (Idaho Ct. App. 1999); *In re Dominique F.*, 583 N.E.2d 555, 561 (Ill. 1991); *Atchison v. Shaffer*, 2016 WL 5929999, at *2 (Iowa Ct. App. Oct. 12, 2016); *State v. Thomas*, 237 So. 3d 1201, 1203 (La. Ct. App. 2018); *Holloway v. State*, 157 A.3d 356, 360 (Md. Ct. Spec. App. 2017); *Commonwealth v. Dube*, 796 N.E.2d 859, 867 (Mass. Ct. App. 2003); *People v. Giovannini*, 722 N.W.2d 237, 240 (Mich. Ct. App. 2006); *People v. Qualls*, 421 N.W.2d 248, 251 (Mich. Ct. App. 1988); *State v. Morales-Mulato*, 744 N.W.2d 679, 688 (Minn. Ct. App. 2008); *In re Guardianship of Duckett*, 991 So. 2d 1165, 1181 (Miss. 2008); *Severns v. Concord Chem. Co.*, 861 A.2d 243, 247 (N.J. Super. Ct. Law Div. 2004); *State v. McKinney*, 609 N.E.2d 613, 616 (Ohio Ct. App. 1992); *Pledger v. Janssen Pharms., Inc.*, 198 A.3d 1126, 1148 (Pa. Super. Ct. 2018);

For example, Nebraska struggled with this issue within the last three decades. Prior to 1991, Nebraska courts operated on a two-tier system but, in 1991, the Nebraska Court of Appeals was created by constitutional amendment as an intermediate appellate court. In 1996, the Nebraska Supreme Court held that the published decisions of the Nebraska Court of Appeals were not binding authority and would be treated as “dicta at best,” reasoning, in part:

Real and certain risks are associated with the grant of precedential authority to an intermediate appellate court. If binding authority were to be granted to published Court of Appeals decisions, then lower courts would be forced to follow a decision even though they were not certain whether this court might ultimately rule similarly (internal citations omitted).⁶¹

That holding was subsequently reversed via court rule, which adopted vertical stare decisis for the court of appeals’ precedential opinions to bring efficiency and order to the Nebraska judicial system,⁶² and this was recognized in *State v. Nelson*⁶³ by the Supreme Court of Nebraska.

¶21 The real difference among the states concerns the stare decisis practices where the opinion of one three-judge panel of an intermediate appellate court speaks on behalf of the court as a whole. When it comes to horizontal stare decisis of intermediate appellate courts, the state practices are mixed. While a rule has not necessarily been articulated by all states, it appears that the rule followed by the federal courts—all subsequent intermediate appellate panels are bound to precedent cases approved for publication—is not closely followed by the state intermediate appellate courts. While Alabama, Kansas, Kentucky, North Carolina, Oklahoma, Tennessee, Texas, Virginia, and Wisconsin have strong horizontal stare decisis rules similar to that of the federal courts of appeal—subsequent panels of the intermediate court of appeal are bound to the prior precedents of the same court⁶⁴—Alaska, Arizona, Connecticut, Florida, Idaho, Illinois,

Holder v. Tenn. Jud. Selection Comm’n, 937 S.W.2d 877, 881 (Tenn. 1996); Owen v. Jim Allee Imports, Inc., 380 S.W.3d 276, 284 (Tex. App. 2012).

61. Metro Renovation, Inc. v. State Dep’t of Labor, 543 N.W.2d 715, 721–22 (Neb. 1996), *disapproved of by* State v. Nelson, 739 N.W.2d 199 (Neb. 2007).

62. State v. Nichols, 600 N.W.2d 484, 487 (Neb. Ct. App. 1999).

63. 739 N.W.2d 199, 204 (Neb. 2007).

64. ALA. R. APP. PROC. 15 (“No former adjudication of the courts shall be overruled or materially modified except upon consultation of the court as a whole.”); *In re Cray*, 867 P.2d 291, 297 (Kan. 1994) (“We know of no authority for one panel of the Court of Appeals to disapprove or overrule a decision of another panel of the same court. Any such action should be done, at a minimum, by an en banc review and decision of the Court of Appeals.”); KY. R. SUP. CT. 1.030(d) (“The decision of a majority of the judges of a panel shall constitute the decision of the Court of Appeals. If prior to the time the decision of a panel is announced it appears that the proposed decision is in conflict with the decision of another panel on the same question, the chief judge may reassign the case to the entire court. If a panel is unable to reach a decision on a case under consideration by it, the chief judge may reassign the case to a larger or different panel or to the entire court.”); *Strickland*, *supra* note 59, at 217 (“Antiquity has never been a reason for this Court to overrule its own prior case law or that of the North Carolina Supreme Court, indeed, this Court does not have the authority to do so.”); *Bays Expl.*, *supra* note 59, at 910–11 (“We are also prevented by statute and rule from reexamining prior decisions of the Court of Civil Appeals.”); *Owen*, *supra* note 59, at 284 (Tex. App. 2012) (“This Court is bound by decisions of the United States Supreme Court, the Texas Supreme Court, and

Indiana, Louisiana, Maryland, Massachusetts, Missouri, New Jersey, Ohio, Oregon, Utah, and Washington allow for their intermediate courts of appeal to reverse their prior decisions on their own.⁶⁵ Moreover, among the states whose horizontal stare decisis practices are softer than that of the federal practice, there are considerable differences in the level of deference afforded precedent cases. At one end of the

prior decisions of this Court.”); *Collins v. Commonwealth*, 517 S.E.2d 277, 280 (Va. Ct. App. 1999) (citing *Commonwealth v. Burns*, 395 S.E.2d 456, 457 (Va. 1990)) (“We are not at liberty to ignore the decision of a previous panel.”); *City of Sheboygan*, *supra* note 38, at 476 (“It is well settled that the court of appeals may not overrule, modify or withdraw language from a previously published decision of the court of appeals.”).

65. *Joseph*, *supra* note 60, at 492 (“We will overrule a prior decision only if we are ‘clearly convinced that the [precedent] was originally erroneous or is no longer sound because of changed conditions’ and that ‘more good than harm would result from a departure from precedent.’”); *Castillo*, *supra* note 60, at 1148 (“We consider decisions of coordinate courts as highly persuasive and binding, unless we are convinced that the prior decisions are based upon clearly erroneous principles, or conditions have changed so as to render these prior decisions inapplicable.”); *State v. Thompson*, 839 A.2d 622, 641 (Conn. App. Ct. 2004) (“The doctrine [of stare decisis] requires a clear showing that an established rule is incorrect and harmful before it is abandoned . . . and counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it.”); *Durham v. Palm Ct., Inc.*, 558 So. 2d 59, 62 (Fla. Dist. Ct. App. 1990) (“[T]he trial court was bound by the First District’s *Gordon* case because of the holding in *State v. Hayes*, 333 So.2d 51 (Fla. 4th DCA 1976)”); *Klosterman*, *supra* note 60, at 163 (“This Court in the proper performance of its judicial function is required to examine its prior precedents. When precedent is examined in the light of modern reality and it is evident that the reason for the precedent no longer exists, the abandonment of the precedent is not a destruction of stare decisis but rather a fulfillment of its proper function.”); *People v. Ward*, 548 N.E.2d 1120, 1127 (Ill. App. Ct. 1989) (“One district of the appellate court is not in all instances bound to follow the decisions of other districts of the appellate court.”); *Leatherwood v. State*, 880 N.E.2d 315, 319 (Ind. Ct. App. 2008) (“We may only revisit earlier determinations to ‘correct error’ or in ‘extraordinary circumstances such as where the initial decision was clearly erroneous and would work manifest injustice.’”); *Orillion v. Allstate Ins. Co.*, 690 So. 2d 846, 849 (La. Ct. App. 1997) (“While decisions of our sister circuits are not binding on us, they can certainly be persuasive authority.”); *Montgomery Cty. Career Fire Fighters Ass’n v. Montgomery Cty.*, 62 A.3d 287, 306 (Md. Ct. Spec. App. 2013) (“The Court . . . may overrule its own precedent when a decision is ‘clearly wrong and contrary to established principles’ or ‘when there is a showing that the precedent has been superseded by significant changes in the law or facts.’”); *Chickel v. Mass. Bay Transp. Auth.*, 2001 Mass. App. Div. 241, 2001 WL 1558784 (Nov. 30, 2001) (“The principle of Stare Decisis is not applicable among the several Appellate Division Districts.”); *State v. Byers*, 396 S.W.3d 366, 369 (Mo. Ct. App. 2012) (in considering whether to overrule a governing decision, the Supreme Court of Missouri has considered whether a decision has remained unchanged for many years); *First Bank v. Fischer & Frichtel, Inc.*, 364 S.W.3d 216, 224 (Mo. 2012) (whether it is clearly erroneous and manifestly wrong); *Novak v. Kan. City Transit, Inc.*, 365 S.W.2d 539, 546 (Mo. 1963) (whether it violates a constitutional right); *David v. Gov’t Empls. Ins. Co.*, 821 A.2d 564, 572 (N.J. Super. Ct. App. Div. 2003) (“We decide cases by panels, not en banc, and the decisions of one panel of the Appellate Division are not binding upon the remaining panels.”); *State v. George*, 362 N.E.2d 1223, 1231 (Ohio Ct. App. 1975) (“[A]s a matter of practice, a court of appeals, or any panel of judges sitting therein, is not unalterably bound to follow the precedent of a rule previously announced or followed by such court, whether published or unpublished.”); *State v. Roberts*, 172 P.3d 651, 654 (Or. Ct. App. 2007) (“We generally adhere to the doctrine of stare decisis in considering an issue of statutory construction that we have previously resolved, ‘unless error is plainly shown to exist.’”); *State v. Tenorio*, *supra* note 59, at 857 (“While a court will overrule its own precedent in the limited circumstances where it is ‘clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent.’”); *Geise v. Lee*, 519 P.2d 1005, 1008 (Wash. Ct. App. 1974) (“Appellate courts, no doubt, have discretionary power to change or abandon prior legal doctrine and, to the extent necessary, to overrule prior decisions.”).

spectrum, some state courts give little deference to precedent opinions from coordinate courts. For example, the California Court of Appeals remarked in *People v. Gourley*, “The opinion of another appellate division constitutes, *at most*, persuasive authority,” thus suggesting that some prior opinions need not be afforded any deference.⁶⁶ The Massachusetts Appeals Court stated in *Chickel v. Massachusetts Bay Transportation Authority*, “The principle of Stare Decisis is *not applicable* among the several Appellate Division Districts.”⁶⁷ At the other end of the spectrum, courts like Wisconsin’s take this position: “It is well settled that the court of appeals may not overrule, modify or withdraw language from a previously published decision of the court of appeals.”⁶⁸ However, there appears to be a myriad of ways in which courts treat prior intermediate appellate court opinions, while at other times, the position of the courts remains somewhat unclear. This may be due to different states having potentially vastly different court structures.

¶22 Many of the states that do not find intermediate appellate courts bound to prior decisions appear to be quite reserved in overruling prior precedents. In some cases, like in Idaho, the courts caution against disregarding stare decisis unless there is a need to alter the law based on changing circumstances in society⁶⁹ or, as in the case of Oregon, the precedent is found to be plainly wrong.⁷⁰ As the Idaho Court of Appeals views adherence to stare decisis, “When precedent is examined in the light of modern reality and it is evident that the reason for the precedent no longer exists, the abandonment of the precedent is not a destruction of stare decisis but rather a fulfillment of its proper function.”⁷¹ Some courts, on the other hand, articulate specific conditions where deviation from precedent is warranted. Missouri has articulated the following test to determine whether deviation from precedent is warranted: “In considering whether to overrule a governing decision, the Supreme Court of Missouri has considered whether a decision has remained unchanged for many years, whether it is clearly erroneous and manifestly wrong and whether it violates a constitutional right.”⁷² Likewise, Ohio has adopted a different test to determine whether deviation from precedent is warranted. In Ohio, the court of appeals may overrule a “prior decision when (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision; (2) the decision defies practical workability; and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.”⁷³ So even where stare decisis practices are soft, there are different layers of elasticity the courts place on the doctrine, some more pliable than others.

66. 130 Cal. Rptr. 3d 181, 186 (App. Dep’t Super. Ct. 2011) (citing *People v. Gokcek*, 42 Cal. Rptr. 3d 405 (App. Dep’t Super. Ct. 2006)) (emphasis added).

67. 2001 Mass. App. Div. 241, 2001 WL 1558784, at *2 (Nov. 30, 2001) (emphasis added).

68. *City of Sheboygan*, *supra* note 39, at 476.

69. *Klosterman*, *supra* note 60, at 163.

70. *Hostetter v. Bd. of Parole & Post-Prison Supervision*, 296 P.3d 664, 666 (Or. Ct. App. 2013) (citing *Aguilar v. Washington Cty.*, 120 P.3d 514, 518 (Or. Ct. App. 2005)).

71. *Klosterman*, *supra* note 60, at 163.

72. *State v. Byers*, *supra* note 65, at 369 (internal citations omitted).

73. *Bouher v. Aramark Servs., Inc.*, 910 N.E.2d 40, 45 (Ohio Ct. App. 2009).

State Court Treatment of Federal Court Decisions

¶23 In addition to stare decisis practices involving a court's own precedent is the question as to how states handle precedent from the lower federal courts concerning matters of federal law. The states are split as to whether they are bound to the decisions of the lower federal courts (i.e., the courts of appeals and the district courts) on matters of federal law. Four states' courts—Maine, Nebraska, New Hampshire, and South Dakota⁷⁴—take the position that they are bound to the decisions of the lower federal courts on matters of federal law. The remaining 46 states' courts do not consider themselves bound to the decisions of the lower federal courts on matters of federal law.⁷⁵ Instead, concerning matters of federal law—both statutory and constitutional—in the absence of a decision by the U.S. Supreme Court, the vast majority of the states find that they are free to interpret federal statutes and the U.S. Constitution as they so choose. That is not to say, however, that the rule is free from exceptions. For example, the Supreme Court of Tennessee has said, “This Court is not bound by federal court decisions other than those of the United States Supreme Court.” However, in the context of Fourth Amendment jurisprudence, the court carved out an exception to the rule,

74. *Littlefield v. State*, Dep't of Hum. Servs., 480 A.2d 731, 737 (Me. 1984); *Anderson v. HMO Neb., Inc.*, 2 Neb. C.A. 794, 1993 WL 61839 (Neb. Ct. App. Mar. 9, 1993); *Desmarais v. Joy Mfg. Co.*, 538 A.2d 1218, 1220 (N.H. 1988); *Cloud v. Leapley*, 521 N.W.2d 118, 122 (S.D. 1994).

75. *Dolgencorp, Inc. v. Taylor*, 28 So. 3d 737, 744 n.5 (Ala. 2009); *Peterson v. State*, Dep't of Nat. Res., 236 P.3d 355, 363 (Alaska 2010); *Skydive Ariz., Inc. v. Hogue*, 360 P.3d 153, 161 (Ariz. Ct. App. 2015); *Larry Hobbs Farm Equip., Inc. v. CNH Am., LLC*, 291 S.W.3d 190, 195 (Ark. 2009); *Castaneda v. Dep't of Corr. & Rehab.*, 151 Cal. Rptr. 3d 648, 666 (Ct. App. 2013); *Carter v. Brighton Ford, Inc.*, 251 P.3d 1179, 1182 (Colo. Ct. App. 2010); *State v. Dyous*, 53 A.3d 165 (Conn. 2012); *Beals v. Wash. Int'l, Inc.*, 386 A.2d 1156, 1158 (Del. Ch. 1978); *Maestas v. State*, 76 So. 3d 991, 994 (Fla. Dist. Ct. App. 2011); *Hix v. Hertz Corp.*, 705 S.E.2d 219, 222–23 (Ga. Ct. App. 2010); *AlohaCare v. Ito*, 271 P.3d 621, 644 n.40 (Haw. 2012); *Dan Wiebold Ford, Inc. v. Universal Comput. Consulting Holding, Inc.*, 127 P.3d 138, 143 (Idaho 2005); *State Bank of Cherry v. CGB Enters., Inc.*, 984 N.E.2d 449, 458–59 (Ill. 2013); *Mitchell v. 10th & the Bypass, LLC*, 973 N.E.2d 606, 611 (Ind. Ct. App. 2012); *State v. Jones*, 280 P.3d 824, 833 (Kan. Ct. App. 2012); *Commw. Nat. Res. & Env't Prot. Cabinet v. Kentec Coal Co.*, 177 S.W.3d 718, 725 (Ky. 2005); *FIA Card Servs., N.A. v. Weaver*, 62 So. 3d 709, 714 (La. 2011); *French v. Hines*, 957 A.2d 1000, 1035 n.21 (Md. Ct. Spec. App. 2008); *Commonwealth v. McGowan*, 982 N.E.2d 495, 500 n.6 (Mass. 2013); *Spohn v. Van Dyke Pub. Schs.*, 822 N.W.2d 239, 247 n.12 (Mich. Ct. App. 2012); *Midland Credit Mgmt. v. Chatman*, 796 N.W.2d 534, 536 n.3 (Minn. Ct. App. 2011); *Fulgham v. State*, 47 So. 3d 698, 701 (Miss. 2010); *McGuire v. Kenoma, LLC*, 375 S.W.3d 157, 167 n.9 (Mo. Ct. App. 2012); *Davis v. State*, 187 P.3d 654, 657 (Mont. 2008); *Custom Cabinet Factory of N.Y., Inc. v. 8th Jud. Dist. Ct. ex rel. Cty. of Clark*, 62 P.3d 741, 742 (Nev. 2003); *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1243–44 (N.J. 1990); *Howse v. Roswell Indep. Sch. Dist.*, 188 P.3d 1253, 1260 (N.M. Ct. App. 2008); *Summit Constr. Servs. Grp., Inc. v. ACT Abatement, LLC*, 935 N.Y.S.2d 499, 505 (N.Y. Sup. Ct. 2011); *In re Fifth Third Bank, N.A.*, 716 S.E.2d 850, 855 (N.C. Ct. App. 2011); *Scheer v. Altru Health Sys.*, 734 N.W.2d 778, 783 (N.D. 2007); *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 994 N.E.2d 408, 413 (Ohio 2013); *Howard v. Nitro Lift Techs.*, 273 P.3d 20, 23 n.3 (Okla. 2011); *Miller v. Pac. Trawlers, Inc.*, 131 P.3d 821, 837–38 (Or. Ct. App. 2006); *Mendel v. Williams*, 53 A.3d 810, 822 n.6 (Pa. Super. 2012); *Doe ex rel. Doe v. E. Greenwich Sch. Dep't*, 899 A.2d 1258, 1265 (R.I. 2006); *Unisun Ins. v. Hawkins*, 537 S.E.2d 559, 561–62 (S.C. Ct. App. 2000); *Terry v. State*, 46 S.W.3d 147, 160 (Tenn. 2001); *Guzman v. State*, 85 S.W.3d 242, 249 n.24 (Tex. Crim. App. 2002); *State v. Austin*, 685 A.2d 1076, 1079–80 (Vt. 1996); *Feis v. King Cty. Sheriff's Dep't*, 267 P.3d 1022, 1034 (Wash. Ct. App. 2011); *Ratliff v. Norfolk S. Ry. Co.*, 680 S.E.2d 28, 34 n.17 (W. Va. 2009); *State v. Felton*, 824 N.W.2d 871, 874 n.3 (Wis. Ct. App. 2012); *First Wyo. Bank, N.A., Rawlins v. Trans Mountain Sales & Leasing, Inc.*, 602 P.2d 1219, 1225 (Wyo. 1979).

stating, “Since guarantees of the Fourth Amendment of the Federal Constitution against unreasonable searches and seizures now apply to states through the due process clause, and this is the supervening law of the land, federal cases on search and seizure must be abided by.”⁷⁶ While at first this practice may seem counterintuitive, in some sense it demonstrates the prominent place that federalism plays in the structure of government in the United States.

Problems in the Promulgation of Stare Decisis Doctrinal Rules

¶24 There is no problem with the state courts taking different approaches to stare decisis. The problem, or potential problem, in many cases is the failure of courts to adequately communicate their policies on precedent. Stare decisis practices in the courts are not without confusion. This is likely because there is, in most cases, no rule of law as to whether a court is bound to the decisions of another court. There might be practices, policies, and precedents for the use of precedent, but they typically do not take the form of clear law but just precedent itself.

¶25 One who conducts legal research presumably does so to find out what the law is in a particular jurisdiction, but to do that one needs to know “what counts as law” or, as H.L.A. Hart put it, to know the applicable practice under the rule of recognition. Should one stumble upon a case declaring a rule of law, but it turns out that the case is “not good law”—because, for example, it has not been approved for publication, it is from a different intermediate court of appeals in a jurisdiction whose intermediate appellate courts need not follow one another, or even it was decided by the Nebraska Court of Appeals sometime between 1996 and 2007—the rule is no rule at all, but merely a declaration from a jurist sitting on a bench, wearing a robe.

¶26 It is true, and it has been shown, even in this article, that the courts often do declare policies regarding precedent. Some policies, like the notion that the decisions of the courts of last resort bind all their subservient courts in their decision-making processes, are widely stated and easy to find by searching relevant judicial opinions. However, other rules are unclear in many states, and even when they are stated they can be hard to find. There are cases from the courts of less than 20 states opining as to whether the intermediate appellate courts can declare what the law is in absence of a court of last resort decision. Moreover, it is even difficult to discern from the statements made by some of those courts whether those courts are necessarily speaking on behalf of the intermediate appellate court as a whole or just a panel or part.⁷⁷ In some states, either the rules concerning the authoritativeness of an intermediate court of appeals

76. *Sneed v. State*, 423 S.W.2d 857, 860 (Tenn. 1968) (internal citations omitted).

77. Compare *People v. Ward*, *supra* note 65, at 1127 (“One district of the appellate court is not in all instances bound to follow the decisions of other districts of the appellate court.”) with *In re Cray*, *supra* note 64, at 297 (“We know of no authority for one panel of the Court of Appeals to disapprove or overrule a decision of another panel of the same court. Any such action should be done, at a minimum, by an en banc review and decision of the Court of Appeals.”) and *Collins*, *supra* note 64, at 280 (citing *Commonwealth v. Burns*, 395 S.E.2d 456, 457 (Va. 1990)) (“We are not at liberty to ignore the decision of a previous panel.”).

decision have not been clearly established or the courts seem to not know what the rules are.

¶27 In Tennessee, an appellate panel in *Morgan v. City of Memphis Hospitals* raised the same issue without deciding it when it wrote, “Whether or not we are bound by a decision of the Eastern Section of this Court where permission to appeal has been denied by our supreme court, we apply the holding and rationale of *Buckner* to this case as we find *Buckner* highly persuasive.”⁷⁸ In *Morgan*, one of the parties contended that the Western Section was not bound to a published Eastern Section decision. While the court did not deem it necessary to resolve that question, the same question persisted. In a number of unpublished cases, however, the Tennessee Court of Appeals has suggested that one panel is not bound to the decisions of another panel of the Tennessee Court of Appeals.⁷⁹ This is contrary to the position taken by the Tennessee Court of Criminal Appeals in *Brown v. State*: “We are, of course, bound by the former opinions of this Court unless and until they are reversed by higher authority.”⁸⁰ Part of the apparent conflict might just be poor wording on the part of the courts that have suggested subsequent panels are not bound to the published opinions of prior panels of the Tennessee Court of Appeals. Poor wording does not, however, make it any easier for the researcher trying to discern what the law at a given time is in the state of Tennessee.

¶28 New York offers a novel issue as well. New York’s intermediate appellate courts consist of four judicial departments.⁸¹ The First, Second, and Third Departments have decided that in cases where there is no court precedent on point in the jurisdiction in which a trial court falls, the trial court must follow precedent decisions of the other departments should any happen to exist.⁸² While three judicial departments have spoken, the Fourth Department remains silent on the matter. While there may be some internal understanding in the Fourth Department that trial courts must follow decisions of the other departments, no such understanding has been communicated to the outside world. Moreover, legal authority in New York is silent as to what a trial court is to do when there is no court precedent on point in the jurisdiction in which a trial court falls, but there is contradictory authority in two other judicial departments.

78. *Morgan v. City of Memphis Hosps.*, 1987 WL 4530, at *2 (Tenn. Ct. App. Feb. 25, 1987).

79. See *Johnson v. Floyd*, No. W2012-00207-COA-R3CV, 2012 WL 2500900, at *11 (Tenn. Ct. App. June 29, 2012) (citing *Ezell v. Cockrell*, No. 01A01-9304-CV-00192, 1994 WL 8295, at *8 (Tenn. Ct. App. Jan. 12, 1994), *aff’d*, 902 S.W.2d 394 (Tenn. 1995)) (where the court properly declined to follow an unpublished Tennessee Court of Appeals decision and purported, “While appellate courts are bound to follow the decisions of the Supreme Court as binding precedent, appellate courts may decline to follow decisions by other sections of the Court of Appeals,” citing the dissent of another unpublished Tennessee Court of Appeals opinion).

80. *Brown v. State*, 466 S.W.2d 527, 528 (Tenn. Crim. App. 1971). Tennessee has an interesting court structure as it has two intermediate appellate courts, the Tennessee Court of Appeals and the Tennessee Criminal Court of Appeals. Neither is higher in authority than the other; each just has its own jurisdiction—criminal or not criminal appeals.

81. *Mountain View Coach Lines, Inc. v. Storms*, 476 N.Y.S.2d 918, 919 (App. Div. 1984).

82. *Nachbaur v. Am. Transit Ins. Co.*, 752 N.Y.S.2d 605, 607 (App. Div. 2002) (1st Dep’t); *Mountain View Coach Lines*, *supra* note 81, at 920 (2d Dep’t); *Shoback v. Broome Obstetrics & Gynecology, P.C.*, 126 N.Y.S.3d 212, 213 (App. Div. 2020) (3d Dep’t).

¶29 New Jersey also raises the question of who decides which cases are binding and which are not. A New Jersey Appellate Division court stated in an opinion, “We decide cases by panels, not en banc, and the decisions of one panel of the Appellate Division are not binding upon the remaining panels.”⁸³ The question remains: from where was this rule established? There appears to be no higher authority approving of this one court’s opinion. So, might other panels be free to disagree? In fact, this very proposition was raised by the New Jersey Supreme Court in *State v. McKinney*, where the court said, “According to the State, one appellate panel is permitted to disagree with the legal or factual conclusions of another, as the Appellate Division is bound only by the decisions of this Court.”⁸⁴ While the court in *McKinney* raised the state’s assertion, it never actually addressed whether the one appellate panel is binding on another. The fact that the court was sure to point out that the proposition was just the state’s assertion suggests that there is not in fact a rule to which the court could point. What is more problematic, or may seem so at least, is that that very court of last resort did not address the issue. As such, there still seems to be a question as to whether Appellate Division decisions bind other Appellate Divisions in the state of New Jersey. This problem is not one so much for the Appellate Division judges, as they can freely decide that matter (and all matters) in light of a lack of rulemaking from the court of last resort, but rather, the problem is for the researcher, who needs guidance as to what the law is.

¶30 Clearly there are gaps in the doctrine of stare decisis. Even in states where rules are stated, questions still abound. Legal researchers need clarity regarding stare decisis especially if, as the Court put it, stare decisis is “the foundation of the rule of law.”⁸⁵

Setting Policies, Establishing Rules

¶31 What needs to happen is for the courts to adopt clear rules governing the stare decisis effect of the distinct types of opinions rendered. However, formal rulemaking regarding stare decisis is lacking in most state courts. There are a few exceptions. One is found in Alabama. Alabama’s rules of appellate procedure state, “No former adjudication of the court shall be overruled or materially modified except upon consultation of the court as a whole.”⁸⁶ Another example of rulemaking regarding stare decisis can be found in Kentucky, where Supreme Court Rule 1.030(d) states:

The decision of a majority of the judges of a panel shall constitute the decision of the Court of Appeals. If prior to the time the decision of a panel is announced it appears that the proposed decision is in conflict with the decision of another panel on the same question, the chief judge may reassign the case to the entire court. If a panel is unable to reach a decision on a case under consideration by it, the chief judge may reassign the case to a larger or different panel or to the entire court.

83. *David*, *supra* note 65, at 572.

84. *State v. McKinney*, 126 A.3d 1200, 1209 (N.J. 2015) (emphasis added).

85. *Vasquez*, *supra* note 8, at 256.

86. ALA. R. APP. P. 15.

¶32 But, in most cases, it is the intermediate appellate courts themselves, acting through precedent, that decide who determines the precedential power of their precedents. In some cases, these decisions seem arbitrary. Recall the opposite “rules” adopted by the Tenth and Eleventh Circuits. While the Eleventh Circuit decided that it would be bound to Fifth Circuit decisions decided prior to the birth of the Eleventh Circuit,⁸⁷ the Tenth Circuit took the opposite approach by declaring that it would not be bound to the pre-Tenth Circuit era decisions of the Eighth Circuit.⁸⁸

¶33 Assuming that clear stare decisis rules were to be established, who should do it and through what vehicle? Judicial opinions may seem like the obvious choice. That seems to be where most of the articulated stare decisis policies can be found. However, there are problems with the piecemeal common law approach to developing a solid stare decisis doctrine. The most obvious is that the issue would somehow have to come up in a case, that is, a court would have to be confronted with the question, “Which cases are binding?” And courts have certainly answered that, but it seems to always be the court deciding for itself—and perhaps for everyone else. Why should the First Department decide that its cases are binding on the Fourth Department? Why should one Appellate Division panel decide for all others—or even just for itself?

¶34 And even in a case where it was a higher court deciding whether the intermediate courts of appeals are or are not bound to their own decisions, it is questionable whether a judicial opinion is the appropriate vehicle to do so. For it to be a rule of law from a judicial opinion, it would have to come in the form of a holding, and there can certainly be a lot of disputes over whether a statement in a judicial opinion constitutes the case’s ratio decidendi or its obiter dicta.⁸⁹

¶35 Another option for establishing clear and consistent rules regarding the authoritativeness of judicial precedent is through the legislative process. Legislatures could very well decide these types of issues. They are, after all, the branch all governments expect to make rules. The problem with that approach, however, is that it might present a separation of powers issue. And the courts are probably in a better position to determine how stare decisis ought to operate in their states as they seem to have developed the doctrine to date—and would be the ones bound to the decisions.

¶36 The best approach, however, might just be to follow Kentucky’s and Alabama’s approach in declaring their policies on the power of precedent through court rules. The U.S. courts of appeals have acted in a comparable manner.⁹⁰ Each state would need to fashion its own rules to fit them within the framework of its court structures, but there should be plenty of guidance in the form of precedent to resolve those questions. Most important, the policies concerning precedential power must be clear, communicated, and easily accessible. In doing so, the problems with precedent are minimized for the

87. *Bonner*, *supra* note 57, at 1209.

88. *Estate of McMorris*, *supra* note 55, at 1258.

89. See generally Andrew C. Michaels, *The Holding-Dictum Spectrum*, 70 ARK. L. REV. 661 (2017).

90. See 3D CIR. R. 5.3; 4TH CIR. R. 32.1; 5TH CIR. R. 47.5.4; 7TH CIR. R. 32.1; 8TH CIR. R. 32.1A; 9TH CIR. R. 36-3; 10TH CIR. R. 32.1(A); 11TH CIR. R. 36-2.

legal researcher, and lawyers are then free to try to resolve ambiguities in the law, not whether a case stands for a proposition of law.

