

# Horizontal Stare Decisis in the California Courts of Appeal: Law, History, and Reform

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FOR MORE THAN TWENTY YEARS, decisions of California’s intermediate courts of appeal have flatly recognized that there is “no horizontal stare decisis” within that court.<sup>1</sup> That is to say—albeit subject to some nuance and inconsistency—a published decision of a court of appeal does not bind any future three-judge panel of that court, regardless of district or division.<sup>2</sup> This Article explores the scope of that rule, analyzes how it developed in California, weighs the rule’s consequences, and proposes relatively minor reforms that would improve the just, speedy, and inexpensive administration of legal disputes in the nation’s largest judicial system.

A regime of “no horizontal stare decisis” affords substantial benefits to the administration of justice. Most who have reviewed the issue support its continuity.<sup>3</sup> In particular, the rule encourages the unfettered development of the law, supports distinct judicial viewpoints, and avoids arbitrary geographic division.<sup>4</sup> But the lack of horizontal stare decisis comes with a cost: unresolved splits in authority and non-uniformity in the law.<sup>5</sup> Due to the Supreme Court of California’s overlaid caseload, many identified splits of authority last far longer than they should because the already overworked supreme court is the only institutional mechanism capable of resolving them.<sup>6</sup> Other splits in authority may linger unrecognized and unaddressed, sometimes for years.<sup>7</sup> Ideally,

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1. See *infra* Section III.A; see also *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 870, 88 Cal. App. 4th 398, 409 (2001).

2. See *infra* Part I.

3. See *infra* Section IV.A.

4. See *infra* Part I.

5. *Id.*

6. See *infra* Section IV.B.

7. See *id.*

California's courts could locate an internal mechanism within the courts of appeal to resolve the legal inconsistencies that the supreme court finds unworthy of its immediate attention in denying review.

In this Article, I propose a procedure using existing constitutional, statutory, and common law authority to permit the California Supreme Court to appoint an ad hoc body within the courts of appeal and vest it with the power to bind the remainder of that court on issues of law statewide. Part I addresses stare decisis generally and the purpose, nature, and varieties of horizontal stare decisis in intermediate appellate courts of the federal and state judicial systems of the United States. Part II explains the historical development of California's court system and its current composition, which provides important context to understand California's stare decisis rules. Part III looks at legal and historical developments that resulted in California's no horizontal stare decisis rule and the current state of the law. Part IV addresses some of the ramifications of the California rule and prior efforts to reform it. Finally, Part V argues that the supreme court's longstanding depublication power is insufficient to address those concerns, but some minor procedural reforms could be implemented to do so without the need for statutory or constitutional change.

## I. Stare Decisis as a Rule Selection Tool

Stare decisis is a series of principles whereby courts, to varying degrees, afford precedential authority to prior decisions of the same court or other courts within a sovereign judicial system.<sup>8</sup> It developed as a system of rules in the common law of England, well before American independence.<sup>9</sup> “[S]tare decisis embodies an important

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8. See generally 9 B.E. WITKIN ET AL., CALIFORNIA PROCEDURE ch. XIII § 503 (6th ed. 2024). I do not intend to here offer a comprehensive theory of stare decisis—a topic of significant academic and judicial writing that surpasses the scope of this Article. In describing the general lay of the land, it is worth noting that some scholarly articles on state court stare decisis seem to miss nuances in the state of the law in jurisdictions other than those to which they are principally addressed. So although I feel somewhat obliged by convention to provide a typical Part I setup, it is not intended to be definitive, and indeed, is only useful to provide context for the specific issues of California law that are the actual focus of the later parts of this Article.

9. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*69–70. A recent concurrence by Justice Kavanaugh in *United States v. Rahimi* suggested that “[t]he ‘judicial Power’ established in Article III incorporates the principle of stare decisis, both vertical and horizontal.” 144 S. Ct. 1889, 1918 (2024) (Kavanaugh, J., concurring). I express no opinion regarding the accuracy of that statement as a matter of federal constitutional law. But as discussed below, in California, stare decisis is largely grounded in a series of judge-made rules based on prudential considerations that arise from the structure of the state's court system. See *Schmier v. Supreme Court*, 93 Cal. Rptr. 2d 580, 585, 78 Cal. App. 4th 703, 710 (2000) (noting that in

social policy.”<sup>10</sup> It ensures that the law changes in a “principled and intelligible fashion,” as opposed to “erratically.”<sup>11</sup> Despite its policy importance, in California at least, stare decisis is a “principle of judicial policy, not a rule of constitutional or statutory dimension.”<sup>12</sup> It is thus generally recognized that a court of last resort has the authority to establish the contours of the stare decisis rules within its jurisdiction.<sup>13</sup>

Stare decisis also promotes efficiency in the judicial system by making it unnecessary for courts to derive every legal rule from first principles.<sup>14</sup> As U.S. Supreme Court Justice Cardozo explained a century ago, “The labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.”<sup>15</sup> Stare decisis permits courts to rely upon foundational rules that have been settled in past cases because of the lack of alternatives. A legal regime where every question can be answered solely by reference to a positive legislative enactment is a practical impossibility to administer.<sup>16</sup>

#### A. The Vertical and Horizontal Aspects of Stare Decisis

Stare decisis has two critical dimensions: vertical and horizontal.<sup>17</sup> Under vertical stare decisis, higher court decisions bind lower courts. The California Supreme Court explained in its seminal decision in *Auto Equity Sales, Inc. v. Superior Court*: “Under the doctrine of [vertical] stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction.”<sup>18</sup> The

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California, stare decisis is “a principle of judicial policy, not a rule of constitutional or statutory dimension”).

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

11. *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986).

12. See *Schmier*, 93 Cal. Rptr. 2d at 585, 78 Cal. App. 4th at 710.

13. *Id.* (“[T]he Supreme Court—California’s highest court—is the appropriate body to establish policy for determining those Court of Appeal opinions entitled to the precedential value of the stare decisis doctrine.”).

14. Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court’s Doctrine of Precedent*, 78 N.C. L. REV. 643, 648–49 (2000).

15. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921).

16. See Glen Staszewski, *A Deliberative Democratic Theory of Precedent*, 94 U. COLO. L. REV. 1, 23 (2023) (“[B]y taking potentially controversial but entrenched legal principles off the table, precedent helps to define the relevant issues in a lawsuit in a manageable way and forecloses the need to repeatedly debate first principles. Stare decisis thereby promotes efficiency and makes reasoned deliberation within the context of a single case or controversy possible.”).

17. David C. Walker, *Precedential Power Policies*, 114 LAW LIBR. J. 167, 171 (2022).

18. 369 P.2d 937, 939, 57 Cal. 2d 450, 455 (1962); see also *Hart v. Massanari*, 266 F.3d 1155, 1175 (9th Cir. 2001) (“A district court bound by circuit authority, for example, has no choice but to follow it, even if convinced that such authority was wrongly decided.”).

function of vertical stare decisis is well established, although there is some variety in which courts are “higher” in certain court systems.<sup>19</sup>

Horizontal stare decisis addresses the precedential weight that courts ascribe prior decisions from courts at the same level within a judicial system.<sup>20</sup> It serves different functional purposes, depending on the court level in the judicial system in which it applies.<sup>21</sup> As discussed below, the application of horizontal stare decisis is significantly less uniform across state and federal jurisdictions.<sup>22</sup>

### **B. The Diversity of the Application of Horizontal Stare Decisis in Intermediate Appellate Courts**

In courts of last resort,<sup>23</sup> horizontal stare decisis is an often contentious policy choice that balances the interests in stability and consistency with the reality that courts of last resort cannot otherwise be judicially overturned.<sup>24</sup> At this level, consistency sometimes yields to a greater interest in not applying rules of law previously established by

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19. See Andrew T. Solomon, *A Simple Prescription for Texas’s Ailing Court System: Stronger Stare Decisis*, 37 ST. MARY’S L.J. 417, 426 (2006) (discussing variety); Channing J. Curtis, *State Court Structure and Precedent*, 45 N.C. CENT. L. REV. 165, 186 (2023) (noting unusual rules in Kansas in particular). Somewhat unusually, for a period of time, the Nebraska Supreme Court held that the decisions of Nebraska’s intermediate appellate court had no precedential value on the state’s trial courts because it was merely a court of error correction. *Metro Renovation, Inc. v. State Dep’t of Lab.*, 543 N.W.2d 715, 722 (Neb. 1996). That decision was later abrogated by judicial rule in 1997. NEB. CT. R. APP. P. § 2-102 (2022); see also *State v. Nichols*, 600 N.W.2d 484, 487 (Neb. Ct. App. 1999). That said, variety in the type of *horizontal* stare decisis that applies in a jurisdiction may also create some variety in vertical stare decisis, because it could affect which courts are deemed directly superior in the hierarchy of a jurisdiction’s judiciary. For instance, vertical stare decisis binds federal district courts only to the decisions of the judicial circuit in which they are located. See generally *United States v. Maury*, 695 F.3d 227, 259 n.27 (3d Cir. 2012).

20. See generally Alan M. Trammell, *Precedent and Preclusion*, 93 NOTRE DAME L. REV. 565, 581–82 (2017).

21. See Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1712–13 (2013).

22. See *infra* notes 24–40 and accompanying text.

23. By “courts of last resort,” I mean courts from which no further appeal can be taken—that is, the U.S. Supreme Court on questions of federal law and state supreme courts (however named) on questions of state law. See generally *Court of Last Resort*, BLACK’S LAW DICTIONARY (12th ed. 2024).

24. See Barrett, *supra* note 21, at 1716–25. The weight of horizontal stare decisis in courts of last resort may also vary depending on whether a perceived judicial error is interpreting a difficult-to-amend constitution or a statute that a legislature can readily amend. See *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015) (“[U]nlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees.”); *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).

courts of last resort that are later revealed, at least in the view of that court's majority, to be unfounded, unworkable, or simply incorrect.<sup>25</sup>

In lower courts—intermediate appellate courts, in particular<sup>26</sup>—horizontal stare decisis principally serves a different function. Decisions of these courts, after all, are subject to reversal by a higher court.<sup>27</sup> Provided vertical stare decisis functions normally, horizontal stare decisis manages the development of the law in the interim until the court of last resort definitively resolves an issue.<sup>28</sup> In these courts, horizontal stare decisis rules can span a continuum.<sup>29</sup> At one end of that spectrum, very strong horizontal stare decisis rules in an intermediate appellate court encourage uniformity and certainty.<sup>30</sup> At the other end, weak horizontal stare decisis rules encourage novelty and the development of law, leading to differing results in each district or circuit.<sup>31</sup>

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25. Compare *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2243 (2022), with *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992); see also Santiago Legarre & Christopher R. Handy, *Overruling Louisiana: Horizontal Stare Decisis and the Concept of Precedent*, 82 LA. L. REV. 41, 44 (2021); Jesse D.H. Snyder, *Stare Decisis Is for Pirates*, 73 OKLA. L. REV. 245, 281 (2021).

26. Although horizontal stare decisis *could* also exist between trial-level courts, I am unaware of any U.S. court system where that arrangement exists formally. See Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 804 (2012) (discussing merits of a “law of the district policy”). See generally *Hart v. Massanari*, 266 F.3d 1155, 1174 (9th Cir. 2001) (“That the binding authority principle applies only to appellate decisions, and not to trial court decisions, is yet another policy choice. There is nothing inevitable about this; the rule could just as easily operate so that the first district judge to decide an issue within a district, or even within a circuit, would bind all similarly situated district judges, but it does not.”); *Harrott v. Cnty. of Kings*, 25 P.3d 649, 655, 25 Cal. 4th 1138, 1148 (2001) (“Trial court decisions are not precedents binding on other courts under the principle of stare decisis.”). I have not done an extensive canvas of state jurisdictions on the question, but it should suffice to say that there is significant variety in informal deference to prior trial court decisions in different state jurisdictions. In California, for instance, superior court decisions are never published, difficult to find, and in the views of at least one court of appeal decision, not even citable. See *Santa Ana Hosp. Med. Ctr. v. Belshe*, 65 Cal. Rptr. 2d 754, 761, 56 Cal. App. 4th 819, 831 (1997). Unsurprisingly then, California trial courts almost never express even informal deference to prior orders of the same courts in different cases. On the other hand, in Delaware—which has no intermediate appellate court—the Court of Chancery tends to afford significant weight to its prior decisions. See generally *Zeeb v. Atlas Powder Co.*, 87 A.2d 123, 126 (Del. 1952).

27. See generally CAL. R. CT. 8.500(a)(1); 28 U.S.C. § 1254.

28. See Mead, *supra* note 26, at 794.

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

30. See Solomon, *supra* note 19, at 473–74; Barrett, *supra* note 21, at 1737.

31. See CAL. APP. PROCESS TASK FORCE, REPORT OF THE APPELLATE PROCESS TASK FORCE 60 (2000) [hereinafter 2000 TASK FORCE REPORT], <https://courts.ca.gov/sites/default/files/courts/default/2024-12/appellate.pdf> [<https://perma.cc/R4FX-SBPP>].

These differences may highlight issues upon which courts of last resort can focus their attention.<sup>32</sup>

State and federal courts in the United States cluster on three points on this scale.<sup>33</sup> I will call these Type A, B, and C horizontal stare decisis.<sup>34</sup> In a Type A jurisdiction—the strongest version—a published decision of an intermediate court of appeal binds all future panels in the jurisdiction.<sup>35</sup> In a Type B jurisdiction, the intermediate appellate courts are geographically divided into districts or circuits. Prior published decisions within the same district or circuit are binding<sup>36</sup> within districts or circuits but not across them.<sup>37</sup> That, for instance, is the model employed in the thirteen federal circuit courts of appeal.<sup>38</sup> Finally, in a Type C jurisdiction, there is essentially no horizontal stare decisis, making it the weakest.<sup>39</sup> Every panel of the intermediate court of appeal is free to draw its own conclusions, irrespective of prior decisions of that court and regardless of whether they come from the same geographic division.<sup>40</sup> Courts in Type C systems, of course, do not disagree for inconsequential reasons.<sup>41</sup> Indeed, in practice, courts subject to weak horizontal stare decisis tend to rely upon and cite each other with great frequency.<sup>42</sup> But they are not bound to do so.<sup>43</sup>

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32. *Id.*

33. Solomon, *supra* note 19, at 431–32.

34. *Id.*

35. *See, e.g.*, State v. Jones, 802 S.E.2d 518, 523 (N.C. Ct. App. 2017); City of Sheboygan v. Nytisch, 750 N.W.2d 475, 476 (Wis. Ct. App. 2008) (per curiam).

36. Some jurisdictions follow a Type A-like bindingness within geographic circuits, while others permit a panel to overrule prior circuit precedent based on stare decisis considerations that typically apply in courts of last resort. *Compare* Miller v. Gammie, 335 F.3d 889, 899 (9th Cir. 2003) (en banc) (absent intervening higher authority, “a three-judge panel may not overrule a prior decision of the court”), *with* Walker, *supra* note 17, at 179–80, 180 n.65 (noting that “Alaska, Arizona, Connecticut, Florida, Idaho, Illinois, 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”).

37. *See, e.g.*, United States v. Perez, 89 F.4th 247, 261 (1st Cir. 2023).

38. *See* Walker, *supra* note 17, at 174 n.50 (collecting federal cases where a subsequent circuit court panel is bound to the prior decisions of a different panel in the same court); Henry J. Dickman, *Conflicts of Precedent*, 106 VA. L. REV. 1345, 1350–56 (2020).

39. *See* Solomon, *supra* note 19, at 432.

40. *See, e.g.*, Jessen v. Mentor Corp., 71 Cal. Rptr. 3d 714, 722 n.10, 158 Cal. App. 4th 1480, 1490 n.10 (2008).

41. *See* People v. Johns, 263 Cal. Rptr. 3d 611, 622, 50 Cal. App. 5th 46, 62 (2020) (“We have latitude to depart from the decisions of our sister Courts of Appeal, though we generally exercise our discretion only when supported by good reason.”).

42. *See, e.g.*, People v. McDonald, 154 Cal. Rptr. 3d 823, 830, 214 Cal. App. 4th 1367, 1377 (2013) (recognizing that the court was not bound to prior decision but following it because it was persuasive).

43. *Jessen*, 71 Cal. Rptr. at 722 n.10, 158 Cal. App. at 1490 n.10.

### C. The Role of En Banc and Publication Rules on Horizontal Stare Decisis in Intermediate Appellate Courts

The function of horizontal stare decisis is further influenced by two other procedural design choices: publication rules and the availability of hearings en banc at the level of the intermediate appellate court.<sup>44</sup> Publication rules permit intermediate appellate courts to designate certain decisions or even parts of decisions as published and precedential, subject to influence by courts of last resort.<sup>45</sup> Most state and federal jurisdictions apply some rule of limited publication.<sup>46</sup> Although their merit is beyond the scope of this Article, the publication rules work to limit the volume of decisional law that “counts” as precedential under stare decisis rules.<sup>47</sup> That effectively provides—but not without controversy<sup>48</sup>—a means by which a court can manage its internal precedent outside of the rules of stare decisis.

En banc<sup>49</sup> procedures are part of and often essential to many systems of horizontal stare decisis. Traditionally, an en banc procedure permitted the rehearing of a case before an entire court.<sup>50</sup> Even before the advent of intermediate courts of appeals, many state supreme courts—including California’s—addressed burgeoning caseloads by permitting appeals to be heard by fewer judges than the entire court.<sup>51</sup> In the event of dissension of a decision from a partial court, or in particularly important cases, a state supreme court could elect to hear the case en banc before the court as a whole.<sup>52</sup>

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44. See generally Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG 2D 17 (2000).

45. See, e.g., CAL. R. CT. 8.1105(b) (West 2024) (publication authority); *id.* 8.1110(a) (partial publication); 9TH CIR. CT. R. 36-1 to -2.

46. See *Hart v. Massanari*, 266 F.3d 1155, 1163 n.7 (9th Cir. 2001) (“Rules limiting the precedential effect of unpublished decisions exist in every federal circuit and all but four states (Connecticut, Delaware, New York and North Dakota).”).

47. See generally Boggs & Brooks, *supra* note 44, at 23.

48. Compare *Hart*, 266 F.3d at 1171, with *Anastasoff v. United States*, 223 F.3d 898, 899–900, *vacated as moot on reh’g en banc*, 235 F.3d 1054 (8th Cir. 2000), and *infra* note 250 (listing authorities debating depublication rules in California).

49. Although the old French “en banc” is the most common way to phrase and spell the procedure in U.S. jurisdictions, various other mixtures of Latin and French—“in bank,” “in banc,” “in banco”—have also been used historically. See generally 16AA CATHERINE T. STRUVE, FEDERAL PRACTICE & PROCEDURE § 3981 n.1 (5th ed. 2024) (explaining its history).

50. See *Textile Mills Sec. Corp. v. Comm’r*, 314 U.S. 326, 327 (1941).

51. See 1880 Cal. Stat. xxx (dividing the seven-justice California Supreme Court into two three-justice departments and affording substantial discretion to the chief justice to administer the process and sit with either department); see also *In re Jessup*, 22 P. 1028, 1028, 81 Cal. 408, 470 (1889) (recognizing that the 1879 amendments implicitly authorized rehearing by the entire court “in bank”).

52. See *Jessup*, 22 P. at 1028, 81 Cal. at 470.

In 1943, the U.S. Supreme Court recognized that federal courts of appeal had discretion to employ en banc review.<sup>53</sup> Congress codified the procedure five years later,<sup>54</sup> permitting the circuits to “devise [their] own administrative machinery to provide the means whereby a majority may order such a hearing.”<sup>55</sup> Although the common en banc procedure entails review by the court with every judge or justice participating, in some circumstances, rules permit “limited” en banc review by a significant subset, but not the whole, of the court.<sup>56</sup>

In Type A systems, where an appellate decision binds all future panels in the jurisdiction, en banc review serves a relatively narrow purpose. It permits a court with strong horizontal stare decisis rules to correct binding erroneous decisions without resorting to courts of last resort. En banc review also permits an intermediate court to resolve minor and inadvertent conflicts that develop in the course of its law.<sup>57</sup> In Type B systems, where an appellate decision binds all future panels in its subdivision, en banc review also facilitates the maintenance of consistent “circuit authority” by ensuring that all inferior courts in the circuit or geographic jurisdiction are bound by the same rule of decision.<sup>58</sup> In Type C systems, where appellate decisions are non-binding on future panels, an en banc procedure ensures that divisions of authority between different panels of an intermediate appellate court on issues of relatively minor import can be resolved without the need for intervention by the court of last resort.<sup>59</sup> This would seemingly be particularly important in a state like California where vertical stare decisis has no geographic component, so a trial court, faced with a

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53. *Textile Mills*, 314 U.S. at 333–35.

54. 28 U.S.C. § 46(c).

55. *W. Pac. R.R. v. W. Pac. R.R.*, 345 U.S. 247, 250 (1953).

56. The federal Ninth Circuit is the primary example of this. *See* 9TH CIR. CT. R. 35-3 (permitting limited en banc panel of eleven out of the authorized twenty-nine active circuit judges). The Ninth Circuit rule also technically permits a rehearing of a limited en banc panel decision by a “super en banc” panel comprised of the entire court. *Id.*; *see also* BENNETT EVAN COOPER, FEDERAL APPELLATE PRACTICE: NINTH CIRCUIT § 24:12 (2023). But “[t]he Ninth Circuit has never exercised this power . . . [and] such requests have been made only on four occasions.” COOPER, *supra*, § 24:12.

57. *See* *Routten v. Routten*, 822 S.E.2d 436, 449 (N.C. App. 2018) (Berger, J., concurring), *rev'd*, 843 S.E.2d 154 (N.C. 2020) (discussing utility of en banc review in North Carolina, a Type A system).

58. *See* *Hart v. Massanari*, 266 F.3d 1155, 1175 (9th Cir. 2001).

59. Christopher M. Jackson, *A Proposal to Institute En Banc Review at the Colorado Court of Appeals*, 97 DENV. L. REV. FORUM 1, 4 (2020), <https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1196&context=dlrforum> [<https://perma.cc/HH3F-9QSE>] (advocating for an en banc procedure in Colorado, which, like California, has intermediate appellate courts that do not apply horizontal stare decisis).

split in the intermediate court of appeal, has no recourse but to decide which is the better rule to apply.<sup>60</sup>

## II. The California Courts of Appeal

Because California's stare decisis rules are related to the structures of its courts and how they were organized over time, I address that history and structure in this Part.

### A. The Historical Development of the California Courts of Appeal

California is the home of the largest judicial system in the nation,<sup>61</sup> if not the world.<sup>62</sup> The current structure of California's courts developed iteratively over the course of a century as the state population grew at a rapid pace.<sup>63</sup>

California's original 1849 Constitution vested essentially all appellate jurisdiction in a three-justice supreme court.<sup>64</sup> But three justices proved inadequate to handle the state's growing caseload.<sup>65</sup> An 1862 constitutional amendment expanded the supreme court to five justices but permitted the court to sit and decide cases in three-justice panels.<sup>66</sup> "Yet, by 1879, the workload of the court had again reached the point where its five members were no longer able to discharge their duties.

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60. A California trial judge explained the rule that applies in California as follows: "You know, it's an amusing rule really for a trial court to consider that when there's an argument that there's a conflict between the Court of Appeal and the Court of Appeal, it's some lonesome trial judge somewhere who's supposed to say: Oh, yes, I'm appointed [to] the Supreme Court for temporary purposes here and I will make the call on this. [¶] That is [*Auto Equity*]." *Farmers Ins. Exch. v. Superior Court*, 159 Cal. Rptr. 3d 580, 584, 218 Cal. App. 4th 96, 101 (2013).

61. As of 2023, California's state judicial system had 1,868 authorized judges. JUD. COUNCIL OF CAL., 2024 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 7 (2024) [hereinafter 2024 COURT STATISTICS], <https://courts.ca.gov/sites/default/files/courts/default/2024-12/2024-court-statistics-report.pdf> [<https://perma.cc/5Y6G-YK5A>]. At the same time, the entire United States federal judiciary had 861. *The Federal Bench – Annual Report 2023*, U.S. CTS. (2023), <https://www.uscourts.gov/data-news/reports/annual-reports/directors-annual-report/annual-report-2023/federal-bench-annual-report-2023> [<https://perma.cc/9BLW-BUSE>].

62. See Ronald M. George, *Challenges Facing an Independent Judiciary*, 80 N.Y.U. L. REV. 1345, 1352 (2005). In a speech by chief justice of the California Supreme Court, George notes that "California's court system is the largest in the Western world[.]" *Id.*

63. Randall Don Sosnick, *The California Supreme Court and Selective Review*, 72 CALIF. L. REV. 720, 725 (1984).

64. CAL. CONST. of 1849, art. VI, § 2 (three justices); *id.* § 4 (appellate jurisdiction).

65. Sosnick, *supra* note 63, at 725.

66. CAL. CONST. of 1849, art. VI, § 2 (1862).

They had fallen behind on their calendars and were unable to issue written opinions in nearly one-half of their cases.”<sup>67</sup>

In 1879, the state adopted a new constitution following a constitutional convention.<sup>68</sup> The 1879 Constitution increased the size of the court to seven justices and divided them into two departments.<sup>69</sup> The chief justice had the discretion to assign the associate justices to departments and to apportion the court’s business among them.<sup>70</sup> Either the chief justice or any combination of four justices could order a case to “be heard in bank.”<sup>71</sup> Given public frustration with the supreme court’s practice of resolving many cases without a decision, the new constitution also required the court’s decisions to “be given in writing, and the grounds of the decision shall be stated.”<sup>72</sup> The 1879 Constitution also replaced a hodgepodge of trial-level courts—county courts, district courts, justice courts<sup>73</sup>—with a superior court in each county and other inferior courts the state legislature decided to authorize.<sup>74</sup>

Yet again, however, the state’s appellate apparatus soon proved inadequate to keep up with the growth of its population.<sup>75</sup> In 1904, the legislature passed and the voters approved a constitutional amendment to Article VI of the state constitution creating an intermediate appellate court system—the California District Courts of Appeal.<sup>76</sup> The amendment defined the new courts’ appellate jurisdiction and redefined the appellate jurisdiction of the supreme court.<sup>77</sup>

The amendment divided the state into three districts, with each district receiving a three-justice court.<sup>78</sup> The District Courts of Appeal would sit in San Francisco, Los Angeles, and Sacramento.<sup>79</sup> The amendment retained the California Supreme Court’s original appellate

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67. Sosnick, *supra*, note 63, at 725; *see also* *People v. Davis*, 81 P. 718, 720, 147 Cal. 346, 349 (1905) (noting that, by 1904, “this court had been for years unable to dispose of the business before it as fast as it accumulated, and the cases were decided from two to three years after the appeals were filed”).

68. E. DOTSON WILSON, CALIFORNIA’S LEGISLATURE 10–11 (2016), [http://www.leginfo.ca.gov/pdf/2017/2117\\_Cal\\_Leg2016\\_Sec01.pdf](http://www.leginfo.ca.gov/pdf/2017/2117_Cal_Leg2016_Sec01.pdf) [<https://perma.cc/S7PF-GUUB>]. *See generally* CAL. CONST.

69. 1880 Cal. Stat. xxx.

70. *Id.*

71. *Id.*

72. *Id.*

73. *See* CAL. CONST. of 1849, art. VI, §§ 5–9.

74. 1880 Cal. Stat. xxxi–xxxii.

75. Sosnick, *supra* note 63, at 727.

76. 1903 Cal. Stat. 737–42; *see also* Sosnick, *supra* note 63, at 726–27, 726 n.40 (noting why the amendment was voted on by the electorate).

77. 1903 Cal. Stat. 738.

78. *Id.*

79. *See id.*

jurisdiction in most significant civil matters.<sup>80</sup> But the supreme court “was authorized to transfer any case to or from the District Courts of Appeal.”<sup>81</sup> It could transfer a case either before the pronouncement of judgment or within thirty days after a district court of appeal’s judgment, which would thereafter be final.<sup>82</sup> The amendment also gave the supreme court authority over the publication of district court of appeal opinions.<sup>83</sup>

Although not specified in its text, the California Supreme Court subsequently interpreted the amendment to afford itself a discretionary review of cases it previously transferred to a district court of appeal,<sup>84</sup> as well as cases within a district court of appeal’s original appellate jurisdiction.<sup>85</sup> Going forward, the court expressed an intention to grant discretionary review only for the “purposes of securing uniformity of decision and the settlement of important questions of law.”<sup>86</sup> The court also held that its “constitutionally authorized transfer of the cause to this court operated to *vacate* the decision of the District Court of Appeal.”<sup>87</sup> This had the practical effect of requiring the supreme court to review all legal issues raised in a transferred appeal to reach a judgment, regardless of whether they all “satisfied the criteria for review . . . .”<sup>88</sup>

The 1904 amendment’s system of transfers created a “deflective model” in the District Courts of Appeal.<sup>89</sup> That is, a model of jurisdiction in which appeals are initially taken to a court of last instance but

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80. Under revised Section 4 of Article VI, “the Supreme Court was given appellate jurisdiction in all superior court cases in equity (except those arising in the justice courts), in specified classes of cases at law, and in criminal cases resulting in a judgment of death.” *Snukal v. Flightways Mfg., Inc.*, 3 P.3d 286, 297, 23 Cal. 4th 754, 767 (2000). The District Courts of Appeal “were given appellate jurisdiction in all superior court cases at law seeking recovery or involving property of a minimum value of \$300, in cases of forcible, unlawful entry and detainer except those arising in the justice courts, in other defined proceedings, and in non-death-penalty criminal cases.” *Id.*

81. *Id.*; 1903 Cal. Stat. 739.

82. 1903 Cal. Stat. 739–40.

83. *Id.* at 741.

84. *People v. Davis*, 81 P. 718, 719–20, 147 Cal. 346, 347–49 (1905).

85. *Burke v. Maze*, 101 P. 440, 441, 10 Cal. App. 206, 211 (1909) (per curiam) (statement by the supreme court on denial of a petition for rehearing in the supreme court).

86. *Davis*, 81 P. at 720, 147 Cal. at 350.

87. *Snukal v. Flightways Mfg., Inc.*, 3 P.3d 286, 298, 23 Cal. 4th 754, 769 (2000) (first citing *Knouse v. Nimocks*, 66 P.2d 438, 438, 8 Cal. 2d 482, 483–84 (1937); then citing *People v. Clark*, 90 P. 549, 550, 552, 151 Cal. 200, 203, 208 (1907); and then citing *In re Smith*, 83 P. 167, 168–69, 2 Cal. App. 158, 160–61 (1905)).

88. *Id.*

89. 1903 Cal. Stat. 738.

then reassigned to an intermediate appellate court for decision.<sup>90</sup> This somewhat unusual arrangement could, in part, explain the district court of appeal's early view that it was not bound by its own precedent.

In any event, California amended its constitution again in 1928 and 1960 to further shrink the mandatory appellate jurisdiction of the supreme court and add to the jurisdiction of the district court of appeal.<sup>91</sup> Then, in 1966, California repealed the article of the state constitution addressed to the judiciary, Article VI, in its entirety and replaced it with new text.<sup>92</sup> The amendment delegated to the legislature the authority to "divide the State into districts each containing a court of appeal with one or more divisions."<sup>93</sup> It required each district to have at least three justices and to "conduct itself as a 3-judge court."<sup>94</sup> The amendment further cabined the supreme court's mandatory appellate jurisdiction, limiting it to cases "when a judgment of death has been pronounced."<sup>95</sup> With that exception, the California Courts of Appeal—whose name no longer includes the word "District"—were granted exclusive appellate jurisdiction "when superior courts have original jurisdiction and in other causes prescribed by statute."<sup>96</sup> Although the cabining of the supreme court's mandatory appellate jurisdiction limited its role as a court of review, its power to transfer cases was retained.<sup>97</sup>

Finally, in 1985, Article VI was amended again to permit the supreme court to entertain "selective review"—a review focused on certain issues presented by a decision of the court of appeal.<sup>98</sup> Section 12 was amended to permit the supreme court to "review the decision of a court of appeal in any cause," and authorized the Judicial Council of California ("Judicial Council") to adopt rules addressing "the time and procedure for transfer and for review, including, among other things, provisions for the time and procedure for transfer with instructions, for review of all or part of a decision, and for remand as improvidently granted."<sup>99</sup> Following these amendments, the California Supreme

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90. See Jackson, *supra* note 59, at 9–10 (explaining the defective model used in Nevada's state courts and noting that Idaho, Iowa, and Mississippi use a similar model).

91. 1927 Cal. Stat. 2387–89; 1960 Cal. Stat. 5046–48.

92. 1966 Cal. Stat. 974–82.

93. *Id.* at 974–75.

94. *Id.*

95. *Id.* at 976–77.

96. *Id.*

97. See *id.* at 977.

98. 1985 Cal. Stat. A-38; *Snukal v. Flightways Mfg., Inc.*, 3 P.3d 286, 300, 23 Cal. 4th 754, 772 (2000); see also Sosnik, *supra* note 63, at 742 (advocating for the adoption of the amendment to permit selective review).

99. 1985 Cal. Stat. A-38.

Court has become a body that accords review only of selected issues, remanding any unresolved issues to the courts of appeal for decision.<sup>100</sup> With the exception of death penalty cases, the 1985 amendments completed the transformation of the supreme court from its origins as an error correction body into a tribunal focused almost entirely on ensuring statewide uniformity of the law and addressing legal questions of statewide importance.<sup>101</sup>

## B. The Current Structure of California's State Courts

California's current state court system has three levels.<sup>102</sup> At the apex is the seven-justice supreme court.<sup>103</sup> It is the court of last resort for all issues of state law and the court of immediate and direct appeal in criminal cases where a capital sentence has been rendered.<sup>104</sup> Except for capital cases, the supreme court's appellate jurisdiction is purely discretionary.<sup>105</sup> It may elect to review a case in its entirety or "specify the issues to be briefed and argued."<sup>106</sup>

As discussed, California's intermediate court is the court of appeal.<sup>107</sup> The court of appeal is the appellate court as of right for criminal felony cases, except appeals from a capital sentence, civil appeals in cases where more than \$25,000 is at issue, and all appeals in equitable or public law matters.<sup>108</sup> The court of appeal is divided into six geographic "districts," each comprised of a number of counties.<sup>109</sup> By edict of the state constitution, each court of appeal must conduct its business "as a 3-judge court."<sup>110</sup> Each of the six districts, however, currently has more than three justices.<sup>111</sup> The districts also vary in their internal organization.<sup>112</sup>

The two largest districts, the First District (San Francisco Bay Area) and Second District (metropolitan Los Angeles), are subdivided into

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100. *Snukal*, 3 P.3d at 301, 23 Cal. 4th at 773.

101. *See* CAL. R. CT. 8.500(b) (West 2024) (listing grounds for supreme court review).

102. CAL. CONST. art. VI, §§ 2–4.

103. *Id.* § 2.

104. *Id.* §§ 11(a), 12(b).

105. *Id.* § 12(b); CAL. R. CT. 8.500(b).

106. CAL. R. CT. 8.516(a)(1).

107. CAL. CONST. art. VI, § 3.

108. *Id.* § 11(a); CAL. CIV. PROC. CODE § 904.1 (West 2024).

109. CAL. GOV'T CODE § 69100 (West 2024); *see* CAL. CONST. art. VI, § 3.

110. CAL. CONST. art. VI, § 3.

111. CAL. GOV'T CODE §§ 69101–69106.

112. *See id.*

“divisions,” each staffed by four justices.<sup>113</sup> The First District has five divisions with twenty justices, and the Second District has eight divisions with thirty-two justices.<sup>114</sup> With one exception,<sup>115</sup> superior court appeals in the First and Second Districts are assigned randomly or rotationally to a division. Within their respective division, cases are randomly assigned to a panel of three of the four justices.<sup>116</sup>

The Third, Fifth, and Sixth Districts, which sit in Sacramento, Fresno, and San Jose with eleven, ten, and seven justices, respectively, each have a single division.<sup>117</sup> In these courts, judicial assignments function like the U.S. Courts of Appeals.<sup>118</sup> Appeals are assigned to a three-justice panel randomly drawn from that district’s justices at large.<sup>119</sup>

Uniquely, the Fourth District is geographically divided into three divisions: Division One, which covers San Diego and Imperial Counties and sits ten justices; Division Two, which covers Inyo, San Bernardino, and Riverside Counties and sits eight justices; and Division Three, which covers Orange County and sits eight justices.<sup>120</sup> Within the divisions, cases are randomly assigned to a three-justice draw.<sup>121</sup>

Finally, all of California’s fifty-eight counties have a superior court,<sup>122</sup> which functions as a trial court for all criminal and civil cases

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113. *Id.* § 69101 (First District); *id.* § 69102 (Second District). Presumably, having four justices in each division, instead of only three, resolves difficulties that could be presented were one justice to recuse.

114. *Id.* §§ 69101–69102.

115. Because of the overwhelming predominance of Los Angeles County in the Second District, appeals from superior courts in the remaining counties in it—the Ventura, Santa Barbara, and San Luis Obispo Superior Courts—are all heard exclusively in Division Six. CAL. CT. APP., SECOND DIST., INTERNAL OPERATING PRACTICES AND PROC. 2–3 (West 2025).

116. See *id.* at 3; CAL. CT. APP., FIRST DIST., INTERNAL OPERATING PRACTICES AND PROCEDURES §§ III.A, III.B.3 (West 2025).

117. CAL. GOV’T CODE § 69103 (West 2024) (Third District); § 69105 (Fifth District); § 69106 (Sixth District).

118. CAL. CT. APP., THIRD APP. DIST., INTERNAL OPERATING PRACTICES AND PROCEDURES § VI (West 2025) [hereinafter THIRD DIST. IOP]; CAL. CT. APP., FIFTH APP. DIST., INTERNAL OPERATING PRACTICES AND PROCEDURES § II (West 2025) [hereinafter FIFTH DIST. IOP]; CAL. CT. APP., SIXTH APP. DIST., INTERNAL OPERATING PRACTICES AND PROCEDURES § II.A.1 (West 2025) [hereinafter SIXTH DIST. IOP].

119. THIRD DIST. IOP § VI; FIFTH DIST. IOP § II; SIXTH DIST. IOP § II.A.1.

120. CAL. GOV’T CODE § 69104.

121. CAL. CT. APP., FOURTH DIST., DIV. ONE, INTERNAL OPERATING PRACTICES AND PROCEDURES § II.B (West 2025); CAL. CT. APP., FOURTH DIST., DIV. TWO, INTERNAL OPERATING PRACTICES AND PROCEDURES § III (West 2025); CAL. CT. APP., FOURTH DIST., DIV. THREE, INTERNAL OPERATING PRACTICES AND PROCEDURES § III.A (West 2025).

122. CAL. CONST. art. VI, § 4.

and an appellate court for misdemeanors and limited civil matters.<sup>123</sup> These courts vary in size from two authorized judges (certain counties in the Sierra Nevada mountains and the far north of the state) to nearly six hundred judges in one county (Los Angeles).<sup>124</sup>

### III. Stare Decisis in California's Court System

The California Courts of Appeal never developed a strong tradition of deference to their own prior holdings because of the incremental manner in which they were afforded appellate jurisdiction in important cases.<sup>125</sup> The current rule of no horizontal stare decisis is well settled in California,<sup>126</sup> but it developed in fits and starts and often inadvertently. The rule appears to have coalesced, not as a matter of reasoned jurisprudence, but due to the publication and subsequent adoption of statements from an influential procedure treatise in the mid-1950s that suggested that no horizontal stare decisis was the settled state of the law.<sup>127</sup>

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123. *How Courts Work*, JUD. BRANCH CAL.: CAL. CT. SELF-HELP GUIDE (2025), <https://selfhelp.courts.ca.gov/court-basics/how-courts-work> [<https://perma.cc/AD2L-7JZC>]. Historically, California maintained two additional levels of courts—justice and municipal courts—which handled non-felony criminal matters and civil cases with low amounts in controversy. See *California Judicial Branch Fact Sheet*, JUD. COUNCIL CAL. 3 (2022), [https://courts.ca.gov/sites/default/files/courts/default/2024-12/california\\_judicial\\_branch.pdf](https://courts.ca.gov/sites/default/files/courts/default/2024-12/california_judicial_branch.pdf) [<https://perma.cc/LG6Q-QGB9>].

In 1994, the voters eliminated the justice courts by approving Proposition 191, and then in 1998, the voters approved Proposition 220, permitting unification of the municipal and superior courts. . . . [B]y 2002 the judges in all of California's counties had opted to unify their courts, with the result that each county then had only a superior court.

*People v. Henson*, 513 P.3d 947, 959, 13 Cal. 5th 574, 593 (2022). Cases formerly within municipal court jurisdiction—misdemeanors and so-called “limited civil” actions with low amounts in controversy—currently take appeals as of right to an appellate division within that superior court. CAL. CIV. PROC. CODE § 904.2 (West 2024). In such cases, further appeals—to the court of appeal or supreme court—are discretionary or by way of extraordinary writ. *Id.* § 904.3.

124. CAL. GOV'T CODE §§ 69580–69611; see also 2024 COURT STATISTICS, *supra* note 61, at 12 (graphical depiction).

125. See *supra* Section II.A (addressing how California Courts of Appeal began under a deflective model but ultimately because the appellate court of right as to all non-capital cases).

126. *Infra* Section III.A.

127. *Infra* Section III.B.

### A. The Current Law of Stare Decisis in California

The rule for vertical stare decisis was clearly laid down by the California Supreme Court in 1962.<sup>128</sup> In its decision in *Auto Equity*,<sup>129</sup> the court explained:

Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of stare decisis makes no sense. The decisions of this court are binding upon and must be followed by all the state courts of California. Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state, and this is so whether or not the superior court is acting as a trial or appellate court. Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court.<sup>130</sup>

The court went on to explain: “Of course, the rule under discussion has no application where there is more than one appellate court decision, and such appellate decisions are in conflict. In such a situation, the court exercising inferior jurisdiction can and must make a choice between the conflicting decisions.”<sup>131</sup>

The rules for vertical stare decisis in California are thus relatively straightforward: (1) The supreme court binds all courts; (2) any decision of the court of appeal—regardless of district or division—binds every trial court; and (3) in the event of a conflict within the courts of appeal, trial court judges are left to surmise the correct result to the best of their legal acumen.<sup>132</sup>

But *Auto Equity* did not purport to settle the rules for horizontal stare decisis.<sup>133</sup> At the supreme court level, horizontal stare decisis in California is based on the same flexible admixture of policy

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128. The basics of *vertical* stare decisis between the supreme court and courts of appeal were well established in the early 1900s. See *Heeser v. Taylor*, 82 P. 977, 978, 1 Cal. App. 619, 621 (1905) (“The District Courts of Appeal were not created for the purpose of revising or overruling the decisions of the Supreme Court, and no such power will be here exercised or assumed.”); see also *Bohn v. Bohn*, 129 P. 981, 983–84, 164 Cal. 532, 537–38 (1913) (noting that the supreme court does not adopt a court of appeal decision as its own precedent when it denies further review).

129. *Auto Equity Sales, Inc. v. Superior Court*, 369 P.2d 937, 939, 57 Cal. 2d 450, 455 (1962).

130. *Id.* As discussed above, until a 1966 amendment to the California State Constitution, the California Courts of Appeal were called the “District Court of Appeal.” See *supra* Section II.A.

131. *Auto Equity*, 369 P.2d at 940, 57 Cal. 2d at 456.

132. *Id.* at 939–40, 57 Cal. 2d at 455–56.

133. *Id.* at 940, 57 Cal. 2d at 456.

considerations that applies in most courts of last resort.<sup>134</sup> At least by negative implication, however, *Auto Equity* implies that decisions of the courts of appeal do not bind each other.<sup>135</sup> After all, the court could have said that in the event of a conflict, a superior court should follow a decision of the appellate district in which it is located. Or it could have said the trial court should follow the first appellate decision. Instead, however, the supreme court left trial courts with the ability to freely pick the better rule among competing court of appeal decisions. It is thus unsurprising that various decisions of the court of appeal have cited *Auto Equity* for the proposition that decisions within the courts of appeal are not binding on other panels, albeit without significant explication.<sup>136</sup>

But *Auto Equity* aside, over time, decisions of the courts of appeal themselves made clear that California is a paradigmatic example of “weak” horizontal stare decisis within its intermediate court of appeal.<sup>137</sup> It has thus often been said that “there is no horizontal stare decisis within the California Court of Appeal.”<sup>138</sup> Of course, that does not mean that other court of appeal decisions will be ignored haphazardly. Indeed, court of appeal decisions are typically replete with citations to prior decisions of those courts.

Myriad decisions of the courts of appeal ambiguously suggest that the court of appeal panel issuing the opinion is not bound by a

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134. See WITKIN ET AL., *supra* note 8, § 503; JON EISENBERG ET AL., CALIFORNIA PRACTICE GUIDE: CIVIL APPEALS AND WRITS § 14:192 (Laurie J. Hepler ed., 2024); see also *Hart v. Burnett*, 15 Cal. 530, 601 (1860) (adopting stare decisis formulation early in the California Supreme Court’s history).

135. 369 P.2d at 939–40, 57 Cal. 2d at 455–56.

136. See *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 870, 88 Cal. App. 4th 398, 409 (2001) (“[B]ecause there is no ‘horizontal stare decisis’ within the Court of Appeal, intermediate appellate court precedent that might otherwise be binding on a trial court is not absolutely binding on a different panel of the appellate court.” (quoting *Auto Equity*, 369 P.2d at 369, 57 Cal. 2d at 455 (1962))); see also *Prescod v. Unemployment Ins. Appeals Bd.*, 127 Cal. Rptr. 540, 546, 57 Cal. App. 3d 29, 39 (1976).

137. See, e.g., *Marriage of Shaban*, 105 Cal. Rptr. 2d at 870, 88 Cal. App. 4th at 409.

138. See, e.g., *id.*; *V Lions Farming, LLC v. County of Kern*, 318 Cal. Rptr. 3d 879, 896, 100 Cal. App. 5th 412, 436 (2024); *Ford Motor Warranty Cases*, 306 Cal. Rptr. 3d 611, 619 n.1, 89 Cal. App. 5th 1324, 1334 n.1 (2023); *Fudge v. City of Laguna Beach*, 243 Cal. Rptr. 3d 547, 551, 32 Cal. App. 5th 193, 199 (2019); *Copenbarger v. Morris Cerullo World Evangelism, Inc.*, 239 Cal. Rptr. 3d 838, 846, 29 Cal. App. 5th 1, 11 (2018); *Gonzalez v. Lew*, 228 Cal. Rptr. 3d 775, 782 n.7, 20 Cal. App. 5th 155, 166 n.7 (2018); *Travelers Prop. Casualty Co. of Am. v. Actavis, Inc.*, 225 Cal. Rptr. 3d 5, 26, 16 Cal. App. 5th 1026, 1050 (2017); *People v. Kising*, 167 Cal. Rptr. 3d 339, 342, 223 Cal. App. 4th 544, 547–48 (2014); *People ex rel. Harris v. Sarpas*, 172 Cal. Rptr. 3d 25, 46, 225 Cal. App. 4th 1539, 1560 (2014); *People v. McDonald*, 154 Cal. Rptr. 3d 823, 830, 214 Cal. App. 4th 1367, 1377 (2013); *Sarti v. Salt Creek Ltd.*, 85 Cal. Rptr. 3d 506, 510, 167 Cal. App. 4th 1187, 1193 (2008).

different “panel,” “district,” “division,” or “court.”<sup>139</sup> This language perhaps implies some level of bindingness within the geographic or divisional subunits. Notwithstanding *Auto Equity*, much of the California trial bar and even many of its trial judges work under the misimpression that stare decisis works like it does in federal court.<sup>140</sup> But none of these

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139. **“Other” or “Different” District or Division:** *Cohen v. Superior Court*, 322 Cal. Rptr. 3d 62, 71, 102 Cal. App. 5th 706, 716 (2024); *Lak v. Lak*, 263 Cal. Rptr. 3d 854, 868, 50 Cal. App. 5th 581, 599 (2020); *Raceway Ford Cases*, 177 Cal. Rptr. 3d 616, 631, 229 Cal. App. 4th 1119, 1138–39 (2014), *aff’d in part, rev’d in part, In re Raceway Ford Cases*, 385 P.3d 397, 2 Cal. 5th 161 (2016); *People v. Gipson*, 153 Cal. Rptr. 3d 428, 431, 213 Cal. App. 4th 1523, 1529 (2013); *Garza v. Asbestos Corp., Ltd.*, 74 Cal. Rptr. 3d 359, 365, 161 Cal. App. 4th 651, 659 (2008); *Jessen v. Mentor Corp.*, 71 Cal. Rptr. 3d 714, 722, 158 Cal. App. 4th 1480, 1490 (2008); *People v. Manzano*, 284 Cal. Rptr. 812, 818, 4 Cal. App. 4th 1662, 1672 (1991), *review granted*, 1 Cal. Rptr. 2d 543 (Cal. 1991); *James M. v. Sebesten*, 270 Cal. Rptr. 99, 106, 221 Cal. App. 3d 451, 462 (1990), *review granted*, 272 Cal. Rptr. 291 (Cal. 1990); *McCallum v. McCallum*, 235 Cal. Rptr. 396, 401 n.4, 190 Cal. App. 3d 308, 315 n.4 (1987); *L.A. Police Protective League v. City of Los Angeles*, 209 Cal. Rptr. 890, 893, 163 Cal. App. 3d 1141, 1147 (1985); *McGlothlen v. Dep’t of Motor Vehicles*, 140 Cal. Rptr. 168, 176, 71 Cal. App. 3d 1005, 1017 (1977); *Prescod v. Unemployment Ins. Appeals Bd.*, 127 Cal. Rptr. 540, 546–47, 57 Cal. App. 3d 29, 39 (1976); *People v. Jacobs*, 103 Cal. Rptr. 536, 545, 27 Cal. App. 3d 246, 260 (1972); *Danley v. Superior Court*, 222 P. 362, 364, 64 Cal. App. 594, 599 (1923); *see also* WITKIN ET AL., *supra* note 8, § 519 (noting that “[o]ne district or division may refuse to follow a prior decision of a different district or division”).

**“Sister” Court of Appeal:** *In re Marriage of Tara*, 13 Cal. Rptr. 3d 255, 266, 99 Cal. App. 5th 871, 884 (2024); *Sellers v. JustAnswer LLC*, 289 Cal. Rptr. 3d 1, 16 n.5, 73 Cal. App. 5th 444, 466 n.5 (2021); *People v. Lujano*, 176 Cal. Rptr. 3d 534, 546, 229 Cal. App. 4th 175, 190 (2014); *In re Hansen*, 174 Cal. Rptr. 3d 146, 154, 227 Cal. App. 4th 906, 918 (2014); *Mega Life & Health Ins. Co. v. Superior Court*, 92 Cal. Rptr. 3d 399, 405, 172 Cal. App. 4th 1522, 1529 (2009).

**“Another” or “Other” Court of Appeal:** *Haggerty v. Thornton*, 542 P.3d 645, 652, 15 Cal. 5th 729, 742 (2024); *Ochoa v. Ford Motor Co. (Ford Motor Warranty Cases)*, 306 Cal. Rptr. 3d 611, 619 n.1, 89 Cal. App. 5th 1324, 1334 n.1 (2023); *Marina Pacific Hotel & Suites, LLC v. Fireman’s Fund Ins. Co.*, 296 Cal. Rptr. 3d 777, 788, 81 Cal. App. 5th 96, 109 (2022); *People v. N. River Ins. Co.*, 254 Cal. Rptr. 3d 301, 310, 41 Cal. App. 5th 443, 454–55 (2019); *People v. Osotonu*, 247 Cal. Rptr. 3d 797, 802, 35 Cal. App. 5th 992, 998 (2019); *Look v. Penovatz*, 245 Cal. Rptr. 3d 777, 785, 34 Cal. App. 5th 61, 72 (2019); *Martinez v. Pub. Emp. Ret. Sys.*, 245 Cal. Rptr. 3d 693, 707, 33 Cal. App. 5th 1156, 1176 (2019); *People v. Dimacali*, 244 Cal. Rptr. 3d 268, 280, 32 Cal. App. 5th 822, 838 (2019); *People v. Kim*, 122 Cal. Rptr. 3d 599, 607, 193 Cal. App. 4th 836, 847 (2011); *Nabors v. Workers’ Comp. Appeals Bd.*, 44 Cal. Rptr. 3d 312, 318, 140 Cal. App. 4th 217, 226 (2006); *FirstAm. Auto., Inc. v. Sweeney*, 94 Cal. Rptr. 2d 623, 631, 79 Cal. App. 4th 1207, 1219–20 (2000), *review granted*, 97 Cal. Rptr. 2d 509 (Cal. 2000); *Fire Ins. Exch. v. Abbott*, 251 Cal. Rptr. 620, 627, 204 Cal. App. 3d 1012, 1023 (2000); *Wolfe v. Dublin Unified Sch. Dist.*, 65 Cal. Rptr. 2d 280, 287, 56 Cal. App. 4th 126, 137 (1997); *People v. Dominguez*, 6 Cal. Rptr. 2d 55, 59, 4 Cal. App. 4th 516, 523 (1992); *Fire Ins. Exchange v. Abbott*, 251 Cal. Rptr. 620, 627, 204 Cal. App. 3d 1012, 1023 (1988); *Greyhound Lines, Inc. v. Cnty. of Santa Clara*, 231 Cal. Rptr. 702, 704, 187 Cal. App. 3d 480, 485 (1986); *In re Marriage of Lusk*, 150 Cal. Rptr. 63, 69, 86 Cal. App. 3d 228, 236 (1978).

**“Other” Courts:** *County of Kern v. State Dept. of Health Care Servs.*, 104 Cal. Rptr. 3d 43, 47, 180 Cal. App. 4th 1504, 1510 (2009).

140. Indeed, this has been my personal experience litigating in California state courts for nearly twenty years.

cases affirmatively state a rule of divisional or district-level bindingness. In fact, some cases rather clearly articulate the contrary.<sup>141</sup> Other than a stray case from the late 1970s—never since cited on the point<sup>142</sup>—there is no case that suggests that a three-judge panel of an appellate district or a division within it has a binding effect on future panels of that same subunit of the courts of appeal.<sup>143</sup>

Indeed, the closest the courts of appeal have come to affirmatively suggesting *any* degree of horizontal stare decisis is in a handful of cases that assume an appellate district or division can disapprove or overrule (as opposed to simply declining to follow) prior decisions of that particular subunit of the court.<sup>144</sup> But these fleeting cases do not articulate a meaningfully theorized system of horizontal stare decisis.

The overwhelming consensus of courts and commentators is thus that there is no horizontal stare decisis in the California Courts

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141. See *Tourgeman v. Nelson & Kennard*, 166 Cal. Rptr. 3d 729, 737 n.7, 222 Cal. App. 4th 1447, 1456 n.7 (2014) (noting that “even if [a prior decision] had been decided by a panel of this division, we would be free to disagree with it.” (citing *Cedars-Sinai Med. Ctr. v. Superior Court*, 954 P.2d 511, 523, 18 Cal. 4th 1, 21 (1998) (Baxter, J., concurring))). It is worth noting that *Tourgeman*’s cite to *Cedar-Sinai* is actually to a concurrence by Justice Baxter. *Id.* Therein, in the course of an argument addressing forfeiture of appellate arguments, Justice Baxter stated (without citation) that “[a] Court of Appeal panel is free to disagree with a decision by another panel, division, or district, and may even reconsider its own prior decisions.” *Cedars-Sinai Med. Ctr.*, 954 P.2d at 523, 18 Cal. 4th at 21 (Baxter, J., concurring). Regardless, there is no indication that the rule stated by Justice Baxter is controversial.

142. See generally *Galloway Crane & Trucking Co. v. Truck Ins. Exch.*, 136 Cal. Rptr. 645, 67 Cal. App. 3d 386 (1977). There, a panel of the Second District found that a decision by a prior panel in a different division of the same district was “seemingly binding upon us” without significant discussion of the stare decisis question. *Id.* at 646, 67 Cal. App. 3d at 389. A concurring justice took issue with that conclusion, explaining:

Perhaps the inference is that when a division of this Second District determines a point of law, all future cases on this point of law arising in any division of this Second District must be decided in exactly the same way, irrespective of one’s belief as to the correctness of the prior decision. I know of no rule of law which requires us to be bound by a prior Court of Appeal decision, whether it be from a division of the Second District or a division of any other district.

*Id.* at 648, 67 Cal. App. 3d at 391–92 (Jefferson, J., concurring). In the ensuing forty-four years, *Galloway Crane* has never been cited by an appellate court in California on *any* point, much less the majority’s assumed conclusion about the binding force of a prior opinion of the same district. Under the circumstances, it is safe to say it is an outlier.

143. See generally John B. Oakley, *Precedent in the Federal Courts of Appeals: An Endangered or Invasive Species?*, 8 J. APP. PRAC. & PROCESS 123, 129 (2006) (noting that “[t]here is in fact one large appellate system, the Courts of Appeal of the State of California, that self-consciously operates today without horizontal stare decisis”).

144. See *Cohen v. Superior Court*, 322 Cal. Rptr. 3d 62, 102 Cal. App. 5th 706 (2024) (“Courts of Appeal, and divisions thereof, are empowered to reconsider—and in the appropriate case disapprove of or overrule—prior decisions of those courts.”); *Estate of Sapp*, 248 Cal. Rptr. 3d 244, 262 n.9, 36 Cal. App. 5th 86, 109 n.9 (2019); *Saucedo v. Mercury Sav. & Loan Ass’n*, 86 Cal. Rptr. 552, 552–53, 111 Cal. App. 3d 309, 310 (1980).

of Appeal. Given that consensus, were the issue squarely raised before the California Supreme Court, it appears nearly certain that the court would adopt the prevailing “no horizontal stare decisis” standard.

### **B. The Less-than-Satisfying Historical Development of the “No Horizontal Stare Decisis” Rule in the Courts of Appeal**

Having settled that “no horizontal stare decisis” is the prevailing rule in the California Courts of Appeal, the question is begged: *why?* As discussed above, there are benefits and burdens of strong versus weak conceptions of horizontal stare decisis.<sup>145</sup> One might expect, then, that the selection of a particular regime of horizontal stare decisis would be the result of reasoned deliberation. That, however, does not appear to be the case in California.

Vertical stare decisis between the courts of appeal and supreme court was settled without substantial controversy shortly after the creation of the courts of appeal.<sup>146</sup> But the first twenty years of the intermediate appellate courts’ existence produced no opinions discussing whether the courts of appeal—systemwide as a whole or by district—were bound to their own prior decisions.<sup>147</sup> Then, in 1923, a pair of

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145. See *supra* Part I.

146. See *Heeser v. Taylor*, 82 P. 977, 978, 1 Cal. App. 619, 621–22 (1905).

147. But aside from a great deal of inconsistent discussion on the significance of the supreme court’s denial of review on the precedential value of a court of appeal opinion, had it not been settled already, see, e.g., *People v. Davis*, 81 P. 718, 720, 147 Cal. 346, 350 (1905) (“[T]he denial in any case of an application for transfer of a case decided by a District Court of Appeal is not to be taken as an expression of any opinion by this court, or as the equivalent thereof, . . . nor, indeed, as an affirmative approval by this court of the propositions of law laid down in such opinion.”), the court definitively settled the issue in 1911, *Bohn v. Bohn*, 129 P. 981, 984, 164 Cal. 532, 537–38 (1913) (holding the supreme court does not adopt a court of appeal decision as its own precedent when it denies further review). It reiterated the same point in 1927, *People v. Rabe*, 261 P. 303, 307, 202 Cal. 409, 418–19 (1927), and the modern supreme court has unequivocally stated that “an order granting or denying a petition for review . . . is not an expression of opinion on the merits of the case,” *People v. Salazar*, 538 P.3d 688, 696 n.4, 15 Cal. 5th 416, 425 n.4 (2023). Nonetheless, in the first half of the twentieth century, some court of appeal decisions suggested otherwise. In 1921, the court of appeal explained that a court of appeal decision for which review was denied “possesses all the authority of a pronouncement by the Supreme Court itself.” *Bridges v. Tefft*, 200 P. 71, 74, 53 Cal. App. 117, 122 (1921). Other court of appeal cases made a similar error. *Accord Walls v. Sys. Freight Serv.*, 211 P.2d 306, 307, 94 Cal. App. 2d 702, 703 (1949) (suggesting that the supreme court’s denial of review of a court of appeal decision implicitly overruled inconsistent precedent in a prior supreme court opinion); see, e.g., *Hous. Auth. of City of L.A. v. Peters*, 261 P.2d 561, 561, 120 Cal. App. 2d 615, 616 (1953); *Masonic Mines Ass’n v. Superior Court*, 253 P. 187, 188, 136 Cal. App. 298, 299 (1934); *Clover v. Jackson*, 253 P. 187, 188, 81 Cal. App. 55, 60 (1927); *People v. Whitaker*, 228 P. 376, 377, 68 Cal. App. 7, 11–12 (1924). Even as late as 1955, the supreme court curiously described a court of appeal opinion over which review was denied as “a decision of a court of last resort in this state,

decisions that included little in the way of analysis reached opposite conclusions on the issue.<sup>148</sup>

In *Danley v. Superior Court*, the issue before the court of appeal was whether a superior court had the inherent power to reinstate a preliminary injunction to maintain the status quo while an appeal was pending.<sup>149</sup> A 1913 court of appeal decision had resolved the question in the affirmative.<sup>150</sup> Instead of finding itself conclusively bound by the prior case, however, the court explained that “it is true . . . that the opinion and judgment of another department of the district court of appeal is *not binding* upon this court . . . .”<sup>151</sup> Nevertheless, the prior “opinion and judgment has its persuasive effect” such that were the court to “agree both in the reasoning advanced and the conclusion reached it is our privilege and our duty to adopt the same.”<sup>152</sup> The appellate court thus elected to follow the prior case as persuasive.<sup>153</sup>

But three years later, *Skaggs v. Taylor* presented the question of whether a nonsuit was a “judgment for defendant” within the scope of Section 667 of the Code of Civil Procedure.<sup>154</sup> As in *Danley*, that question had previously been answered in the affirmative by a court of appeal in a 1913 case.<sup>155</sup> But unlike in *Danley*, because the court found “no difference in principle between that case and the one before us,” it held that the prior “decision . . . must be held to be *conclusive* upon the points here involved.”<sup>156</sup>

For more than fifty years, neither *Skaggs* nor *Danley* was cited for a statement of horizontal stare decisis rules within the courts of appeal.<sup>157</sup>

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until and unless disapproved by this court or until change of the law by legislative action.” *Cole v. Rush*, 289 P. 2d 450, 453, 45 Cal. 2d 345, 350–51 (1955). Regardless, the supreme court has, in more modern decisions, clarified that its refusal to grant review of a published court of appeal decision “is to be given *no weight*[.]” *See Trope v. Katz*, 902 P.2d 259, 268 n.1, 11 Cal. 4th 274, 287 n.1 (1995). *See generally* WITKIN ET AL., *supra* note 8, §§ 522–523.

148. *See* *Danley v. Superior Court*, 222 P. 362, 364, 64 Cal. App. 594, 599 (1923); *Skaggs v. Taylor*, 247 P. 218, 221, 77 Cal. App. 519, 524–25 (1926).

149. 222 P. 362, 363, 64 Cal. App. 594, 598 (1923).

150. *Id.* (discussing *Mulvey v. Superior Court*, 135 P. 53, 54, 22 Cal. App. 514, 516 (1913)).

151. *Id.* at 364, 22 Cal. App. at 599 (emphasis added).

152. *Id.*

153. *Id.*

154. 247 P. 218, 219–20, 77 Cal. App. 519, 521–24 (1926).

155. *Id.* at 220, 77 Cal. App. at 524 (discussing *Kowalsky v. Nicholson*, 137 P. 607, 23 Cal. App. 160, 162 (1913)).

156. *Id.* at 220, 77 Cal. App. at 524–25 (emphasis added).

157. *Skaggs* is cited in *Hous. Auth. of L.A. v. Peters*, 261 P.2d 561, 561, 120 Cal. App. 2d 615, 616 (1953), for the (erroneous) point that the supreme court’s denial of review effectively turns a court of appeal decision into supreme court precedent. But that is not the rule that is the focus of this Article.

But throughout that time—as is true today—it was not uncommon for both court of appeal and supreme court decisions to cite prior court of appeal cases as authority, binding or not.<sup>158</sup>

A decade after *Danley*, in *People v. Brunwin*, a court of appeal was faced with the issue of whether a penal code provision defining larceny criminalized the obtaining of real property by false pretense.<sup>159</sup> A 1926 court of appeal decision, *People v. Folcey*, previously held that larceny was limited to thefts of personal property.<sup>160</sup> Citing the supreme court's 1927 decision in *People v. Rabe*, the court in *Brunwin* held that “we are not bound to accept the language’ of *People v. Folcey* ‘as precedent’” and thus that “a close examination and analysis of the decision in *People v. Folcey* is warranted.”<sup>161</sup> Upon further examination, the court found that *Folcey* had been undermined by later case law and that it was, in any event, inconsistent with the text of the larceny statute.<sup>162</sup>

*Brunwin* is curious, however, in that the supreme court's decision in *Rabe* states the same proposition that the court had previously staked out in *Davis* and *Bohn*: A court of appeal decision does not become the kind of precedent that binds the supreme court just because supreme court declines to review it.<sup>163</sup> But the court's holding in *Brunwin* says nothing meaningful about the precedential effect of such decisions on the courts of appeal. That said, the *Brunwin* court's position is logically inconsistent with a strong rule of horizontal stare decisis that assumes an earlier decision of a coordinate court—even one not denied review by the supreme court—automatically binds a later one.

By the mid-1930s, California's appellate courts had yet to develop a coherent theory of horizontal stare decisis. A 1940 Ninth Circuit decision interpreting California law recognized as much.<sup>164</sup> It explained that “California is divided territorially into four judicial districts in each of which sits a District Court of Appeal, an intermediate appellate court.”<sup>165</sup> It further noted that “there is conflict in these courts

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158. See, e.g., *Shelton v. City of Los Angeles*, 275 P. 421, 424, 206 Cal. 544, 550–51 (1929); see also John H. Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 S. CAL. L. REV. 381, 389–91 (1977).

159. 37 P.2d 1072, 1075–76, 2 Cal. App. 2d 287, 293–94 (1934).

160. 247 P. 916, 916–17, 78 Cal. App. 62, 63 (1926).

161. *Brunwin*, 37 P.2d at 1076, 2 Cal. App. 2d at 294–95 (citing *People v. Rabe*, 261 P. 303, 307, 202 Cal. 409, 418–19 (1927)).

162. *Id.* at 1076, 2 Cal. App. 2d at 295–96.

163. *Rabe*, 261 P. at 307, 202 Cal. at 418–19.

164. *Six Cos. of Cal. v. Joint Highway Dist. No. 13 of Cal. (Six Companies)*, 110 F.2d 620, 626 (9th Cir.), *rev'd*, 311 U.S. 180, 188 (1940).

165. *Id.*

whether the decision of one is binding on another . . . .”<sup>166</sup> But, citing *Brunwin*, it found that “the most recent case holds that one District Court of Appeal is not bound by the decision of another.”<sup>167</sup> The Ninth Circuit thus held that it was not required to defer to a prior court of appeal ruling on an issue of contract law because it was “not persuasive, and . . . wrongly decided.”<sup>168</sup>

In *Ex parte Hadley*, a 1943 habeas corpus case, a panel in the Second District Court of Appeal declined to follow a decision from a Third District panel two years prior because it was “contrary to the great weight of authority and . . . not supported by sound reasoning.”<sup>169</sup> Although *Hadley* assumes a rule of weak horizontal stare decisis, it does not contain a whit of discussion of that nature of horizontal stare decisis in the courts of appeal.<sup>170</sup>

The crucial aspect of *Hadley*, however, was its timing. That is because in 1954, Bernard Witkin published the first edition of *California Procedure*, a treatise on California civil procedure that continues in publication today, seventy years hence.<sup>171</sup> *California Procedure*’s chapter on appeals includes the first comprehensive discussion of the functioning of stare decisis in California’s state courts.<sup>172</sup> That chapter includes an entry on the stare decisis effect of a ruling of a district court of appeal.<sup>173</sup> The treatise correctly observed that “[t]here has been relatively little discussion of the binding effect of a rule declared by a district court of appeal.”<sup>174</sup> Foreseeing *Auto Equity*, it agreed that court of appeal decisions should bind the superior courts and appellate

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166. *Id.* (citing *Skaggs v. Taylor*, 247 P. 218, 77 Cal. App. 519 (1926); and then citing *Clover v. Jackson*, 253 P. 187, 189, 81 Cal. App. 55, 60 (1927)).

167. *Id.* (citing *Brunwin*, 37 P.2d at 1076, 2 Cal. App. 2d at 294).

168. *Id.* (declining to follow *Sinnott v. Schumacher*, 187 P. 105, 108, 45 Cal. App. 46, 51 (1919)). Although not relevant to the state law issues discussed herein, the U.S. Supreme Court reversed *Six Companies* for failing to give due respect to the prior opinion of the court of appeal. *See Six Companies*, 311 U.S. at 188. Given that the Court had “an announcement of the state law by an intermediate appellate court in California in a ruling which apparently has not been disapproved, and there is no convincing evidence that the law of the State is otherwise,” the Ninth Circuit should have followed the decision of the court of appeal. *Id.* A court of appeal case decided in 1988 described the federal courts’ interpretation of California law in *Six Companies* as “a comedy of errors.” *Pac. Emps. Ins. Co. v. City of Berkeley*, 204 Cal. Rptr. 387, 394, 158 Cal. App. 3d 145, 155 (1984).

169. 135 P.2d 381, 383, 57 Cal. App. 2d 700, 703 (1943).

170. *See also Freitas v. Peerless Stages*, 239 P.2d 671, 674, 108 Cal. App. 2d 749, 754 (1952) (declining to follow prior court of appeal decision because it was “contrary to a long line of other cases, and is not supported by the main authority relied upon in the opinion”).

171. 3 B. E. WITKIN, CALIFORNIA PROCEDURE (1st ed. 1954).

172. *Id.* §§ 218–238.

173. *Id.* § 221.

174. *Id.*

divisions thereof.<sup>175</sup> But “[o]n the other hand,” Witkin explained, a court of appeal decision

is not binding in the district courts of appeal. The same district or division may overrule its prior decision, or refuse to follow a prior decision of a different district or division, for the same reasons that influence the federal courts of appeal of the various circuits to make independent decisions.<sup>176</sup>

On this point, the first edition of the treatise’s sole citation was a “see” citation to *Hadley*.<sup>177</sup> It then noted that, “[o]f course, the usual practice is to follow such prior decisions without questioning their authority.”<sup>178</sup>

As an early reviewer of *California Procedure* observed, Witkin’s treatise, while clearly comprehensive and useful, had an unfortunate tendency to make the law seem more certain than the cited cases bore out.<sup>179</sup> That, no doubt, had substantial utility to busy practitioners, and sometimes even appellate justices,<sup>180</sup> looking for clear answers. The treatise also tended to smooth over nuances and uncertainties. Although the highly abstract meta-question of horizontal stare decisis had escaped deep exploration for half a century, the willingness of an esteemed legal commentator to make a definitive pronouncement on the issue with only one legal authority was adequate to tip the scale and settle the rule for practicing attorneys.<sup>181</sup>

In the decade between the *California Procedure*’s first edition and the supreme court’s *Auto Equity* decision, court of appeal decisions took the liberty to disagree with prior decisions of those courts with increasing frequency.<sup>182</sup> This phenomenon can likely be ascribed not to any increasingly sophisticated theory of horizontal stare decisis but instead

175. *Id.*

176. *Id.* On this point, Witkin correctly states the rule *between* federal circuits, but not necessarily the rule *within* them, although the rules for horizontal stare decisis were also not particularly clear in federal courts in the mid-1950s. *Id.*

177. *Id.*; see *In re Hadley* 135 P.2d 381, 383, 57 Cal. App. 2d. 700, 703 (1943).

178. WITKIN, *supra* note 171, § 221; see *Hadley*, 135 P.2d at 383, 57 Cal. App. 2d. at 703.

179. Ted Finman, *Book Review: California Procedure*, 8 STAN. L. REV. 540, 544 (1956) (concluding that *California Procedure* “should be used as a beginning rather than an end to thinking on the problems of California practice and procedure”).

180. *California Procedure* drew its first citation by the California Supreme Court within a year of its publication. See *Tide Water Assoc. Oil Co. v. Superior Court*, 279 P.2d 35, 42, 43 Cal. 2d 815, 828 (1955). It has been cited by more than seven thousand published decisions since.

181. Witkin had already established his reputation as a scholar on chronicling California law by publishing a treatise on substantive California law—*Summary of California Law*—since the 1930s. See Wolfgang Saxon, *B.E. Witkin, Legal Scholar and Author*, 91 N.Y. TIMES, Dec. 26, 1995, at D64.

182. See, e.g., *Richard v. Degen & Brody Inc.*, 5 Cal. Rptr. 263, 272, 181 Cal. App. 2d 289, 303–04 (1960); *Christensen v. Slawter*, 343 P.2d 341, 348, 173 Cal. App. 2d 325, 337 (1959); *Rubino v. Utah Canning Co.*, 266 P.2d 163, 167, 123 Cal. App. 2d 18, 26 (1954).

to the ever-increasing volume of published precedent at the appellate level, which made it more likely that inconsistent rulings would arise, even if inadvertently. When faced with conflicting rulings, under the rule of *Auto Equity*, a trial court cannot choose fidelity to both. And a three-justice court of appeal panel encountering such a conflict lacks the power to settle the question.<sup>183</sup> Under the current no horizontal stare decisis rule, the most a court of appeal can do is add to the persuasive weight of its interpretation of the law until the supreme court weighs in.<sup>184</sup>

In any event, following the first edition of *California Procedure* and *Auto Equity*, court of appeal decisions often disagreed with prior court of appeal decisions<sup>185</sup> and/or noted the rule as set out in Witkin.<sup>186</sup> Many of these decisions, especially from the mid-1960s to 1980, cite directly to Witkin<sup>187</sup> or *Auto Equity*<sup>188</sup> as authority for their imperative to disagree with prior court of appeal decisions. Along these lines, a 1981 case notes: “[T]he merit in not forcing the various districts within

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183. See, e.g., *Cho v. Chang*, 161 Cal. Rptr. 3d 846, 849–50, 219 Cal. App. 4th 521, 526 (2013).

184. See generally *Bardin v. DaimlerChrysler Corp.*, 39 Cal. Rptr. 2d 634, 636, 136 Cal. App. 4th 1255, 1261 (2006) (“We respectfully suggest that our Legislature and Supreme Court clarify the definition of ‘unfair’ in consumer actions under the UCL.”).

185. See, e.g., *Bridges v. Bridges*, 147 Cal. Rptr. 471, 472, 82 Cal. App. 3d 976, 978 (1978); *Theresa Enter. v. Davis*, 146 Cal. Rptr. 802, 806, 81 Cal. App. 3d 940, 947 (1978); *Van Gaalen v. Superior Court*, 145 Cal. Rptr. 371, 512, 514, 80 Cal. App. 3d 371, 376, 378 (1978); *Estate of Toy v. Coldwell Banker & Co.*, 140 Cal. Rptr. 183, 185, 72 Cal. App. 3d 392, 396 (1977); *People v. Creighton*, 129 Cal. Rptr. 249, 254, 57 Cal. App. 3d 314, 324 (1976); *Slapin v. L.A. Int’l Airport*, 135 Cal. Rptr. 296, 298, 65 Cal. App. 3d 484, 489 (1976); *Beckman v. Mayhew*, 122 Cal. Rptr. 604, 607, 49 Cal. App. 3d 529, 534–35 (1975); *People v. Jacobs*, 103 Cal. Rptr. 536, 544, 27 Cal. App. 3d 246, 260 (1972); *People v. Muir*, 53 Cal. Rptr. 398, 401–02, 244 Cal. App. 2d 598, 603 (1966).

186. See, e.g., *Wolfe v. Dublin Unified Sch. Dist.*, 65 Cal. Rptr. 2d 280, 287, 56 Cal. App. 4th 126, 137 (1997); *People v. Dominguez*, 6 Cal. Rptr. 2d 55, 59, 4 Cal. App. 4th 516, 523 (1996); *Henry v. Assoc. Indem. Corp.*, 266 Cal. Rptr. 578, 585, 217 Cal. App. 3d 1405, 1416 (1990); *Fire Ins. Exch. v. Abbott*, 251 Cal. Rptr. 620, 627, 204 Cal. App. 3d 1012, 1023 (1988); *McCallum v. McCallum*, 235 Cal. Rptr. 396, 400 n.4, 190 Cal. App. 3d 308, 315 n.4 (1987); *Greyhound Lines, Inc. v. Cnty. of Santa Clara*, 231 Cal. Rptr. 702, 704, 187 Cal. App. 3d 480, 485 (1986); *L.A. Police Protective League v. City of Los Angeles*, 209 Cal. Rptr. 890, 891, 163 Cal. App. 3d 1141, 1147 (1985); *McGlothlen v. Dep’t of Motor Vehicles*, 140 Cal. Rptr. 168, 176, 71 Cal. App. 3d 1005, 1017 (1977); *Prescod v. Unemployment Ins. Appeals Bd.*, 127 Cal. Rptr. 540, 546–47, 57 Cal. App. 3d 29, 39 (1976); *Swinerton & Walberg Co. v. City of Inglewood-L.A. Cnty. Civic Ctr. Auth.*, 114 Cal. Rptr. 834, 836, 40 Cal. App. 3d 98, 101 (1974); *People v. Jacobs*, 103 Cal. Rptr. 536, 545, 27 Cal. App. 3d 246, 260 (1972).

187. See, e.g., *Dominguez*, 6 Cal. Rptr. 2d at 59, 4 Cal. App. 4th at 523; *Henry*, 266 Cal. Rptr. at 585, 217 Cal. App. 3d at 1416; *McGlothlen*, 140 Cal. Rptr. at 176, 71 Cal. App. 3d at 1017; *Jacobs*, 103 Cal. Rptr. at 545, 27 Cal. App. 3d at 260.

188. See, e.g., *Prescod*, 127 Cal. Rptr. at 547, 57 Cal. App. 3d at 39.

the Court of Appeal to blindly apply stare decisis to the holding first published.”<sup>189</sup>

At the beginning of the twenty-first century, in *In re Marriage of Shaban*, relying on *Auto Equity*, a court of appeal observed that “there is no ‘horizontal stare decisis’ within the Court of Appeal.”<sup>190</sup> *Shaban* was typical of the seemingly accidental development of the rule because the case was not actually passing upon or deciding a rule about the weight of court of appeal precedent. Instead, in the fee dispute in a family law case, the decision explains the value of retaining separate appellate counsel.<sup>191</sup> But regardless of its humble and perhaps unintentional origin, that language has been picked up in numerous cases over the last twenty-plus years,<sup>192</sup> to the extent that it effectively expresses the current state of the law in California, as is recognized in various authoritative secondary sources.<sup>193</sup> Seventy years later, the current edition of *California Procedure* retains essentially the same statement of the stare decisis law as the first.<sup>194</sup> But it is now accompanied by a string cite of twenty cases.<sup>195</sup>

#### IV. Evaluating the Role of Horizontal Stare Decisis in the Court of Appeal

Although not a prior topic of extensive study, the role of horizontal stare decisis in the courts of appeal was one of many considerations

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189. *In re Marriage of Hayden*, 177 Cal. Rptr. 183, 187, 124 Cal. App. 3d 72, 77 (1981).

190. 105 Cal. Rptr. 863, 870, 88 Cal. App. 4th 398, 409 (2001).

191. *Id.* at 870–71, 88 Cal. App. 4th at 408–09.

192. See cases cited *supra* note 138. Federal cases explaining California’s stare decisis rules—which are distinct from those that apply in federal court—also quote the language. See *Hart v. Massanari*, 266 F.3d 1155, 1174 n.30 (9th Cir. 2001) (quoting *Shaban* to note that “court of appeal panels are not bound by the opinions of other panels, even those within the same district”).

193. A 2001 blue ribbon study of the State of California’s appellate courts recognized that many cases support the law as articulated by Witkin “and it is clear that Courts of Appeal are following Witkin’s interpretation of *stare decisis* instead of the suggestion in *Cole v. Rush*.” 2000 TASK FORCE REPORT, *supra* note 31, at 60. Other secondary sources on California law agree the rule is settled. See EISENBERG ET AL., *supra* note 134, § 14:193.1 (citing and quoting *Shaban*); HON. EILEEN C. MOORE & MICHAEL PAUL THOMAS, CALIFORNIA CIVIL PRACTICE PROCEDURE § 41:73.50 (2024) (citing and quoting *Shaban*); 16 WILLIAM LINDSLEY ET AL., CALIFORNIA JURISPRUDENCE 3d § 316 (2025) (citing same rule as *Witkin*); 1 MATTHEW BENDER PRACTICE GUIDE: CALIFORNIA CIVIL APPEALS & WRITS § 2.23[4] (K. Klatcho & B. Shatz eds., 2024).

194. WITKIN ET AL., *supra* note 8, § 519 (“A decision of a Court of Appeal is not binding in the Courts of Appeal. One district or division may refuse to follow a prior decision of a different district or division, for the same reasons that influence the federal Courts of Appeals of the various circuits to make independent decisions.”).

195. *Id.*

by an appellate task force convened by Chief Justice George in 1997.<sup>196</sup> The task force's 2000 report recommended that no changes were necessary.<sup>197</sup> This Part aims to review the task force's conclusions and examine whether they remain true today.

#### A. The California Appellate Process Task Force Considers and Rejects Changes to Horizontal Stare Decisis and an En Banc Procedure

As discussed briefly above, a judicial system that applies no horizontal stare decisis (Type C) in its intermediate appellate court has both advantages and disadvantages. In 1997, Chief Justice George appointed a California Appellate Process Task Force ("Task Force") to "examine the constitutional requirements, statutory provisions, and rules of court governing the manner in which appellate courts perform their functions and to evaluate court organizational structures, work flows, and technological innovations that affect the work of the Courts of Appeal."<sup>198</sup> The role of stare decisis in the courts of appeal was among the topics studied in the Task Force's 2001 report.<sup>199</sup> After concluding that California has rejected horizontal stare decisis in the courts of appeal, the report explained "[m]any reasons support this approach to *stare decisis*."<sup>200</sup>

Among the advantages addressed, the Task Force noted:

- "[P]ermitting every Court of Appeal to render its own interpretation of the law, relatively unconstrained by the opinions of other Court of Appeal panels, subjects the law to constant reevaluation and testing in the crucible of individual cases."<sup>201</sup>
- "[C]onflicts among Court of Appeal decisions are an important way in which new ideas can be introduced into the law. Good ideas can flourish, while bad ideas will ultimately wither."<sup>202</sup>
- "[C]onflicts create an ongoing, informed debate that helps to inform the Supreme Court when it intervenes to resolve the conflict."<sup>203</sup>

On the other hand, "strong" horizontal stare decisis, like Type A, has disadvantages. As Judge Kozinski explained in *Hart v. Massanari*, the strong stare decisis applied in federal circuit courts "deprives the law

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196. 2000 TASK FORCE REPORT, *supra* note 31, at 2.

197. *Id.* at 60.

198. *Id.* at 2.

199. *Id.* at 59–63.

200. *Id.* at 60.

201. *Id.*

202. *Id.*

203. *Id.*

of flexibility and adaptability” and requires tolerance of error because only a higher court or an en banc decision can correct panel error.<sup>204</sup> That downside can be aggravated because “the first panel to consider an issue and publish a precedential opinion occupies the field, whether or not the lawyers have done an adequate job of developing and arguing the issue.”<sup>205</sup> The Task Force also recognized that “requiring one panel of the Courts of Appeal to follow another might introduce an unhealthy element of competition within the Courts of Appeal as one panel tries to rush to publication an opinion in an area where there may be multiple appeals pending raising the same or similar issues.”<sup>206</sup>

On the other side of the ledger, however, the lack of horizontal stare decisis raises a “risk of inconsistent results introduced into the law by permitting each Court of Appeal panel to follow its own conscience in stating and interpreting the law.”<sup>207</sup> “[A]bsent a doctrine of horizontal stare decisis, it is possible for conflicts to arise between districts and divisions that remain unresolved for many years (because the California Supreme Court may not intervene to resolve the conflict).”<sup>208</sup> The difficulties with these conflicts are magnified by *Auto Equity*’s instruction that a superior court faced with a conflict in the courts of appeal must choose what it views to be the better rule.<sup>209</sup>

Weighing these considerations, in 2000, the consensus view of the members of the Task Force was to recommend that California’s stare decisis doctrine should not change.<sup>210</sup> The Task Force’s report found that the number of conflicts in published court of appeal opinions was not large and that the supreme court was adequately granting review to resolve them.<sup>211</sup> The report recognized that “concerns about unresolved conflicts and simmering uncertainty are legitimate” but ultimately found that “a convincing case has not yet been made that the number of conflicts or the degree of uncertainty is so high that horizontal stare decisis, statewide or intra-district, has become necessary as an antidote.”<sup>212</sup>

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204. 266 F.3d 1155, 1175 (9th Cir. 2001).

205. *Id.*

206. 2000 TASK FORCE REPORT, *supra* note 31, at 60.

207. *Id.*

208. *Id.* at 61.

209. *See* *Auto Equity Sales, Inc. v. Superior Court*, 369 P.2d 937, 940, 57 Cal. 2d 450, 456 (1962).

210. 2000 TASK FORCE REPORT, *supra* note 31, at 62. One of the dissenters explained his view in a 2006 law review article. *See* Oakley, *supra* note 143, at 129.

211. 2000 TASK FORCE REPORT, *supra* note 31, at 61.

212. *Id.* at 62.

The Task Force also considered whether instituting an en banc procedure in the courts of appeal would be advisable.<sup>213</sup> It found that a statewide en banc procedure would offer “significant advantages” but only if the horizontal stare decisis rules were strengthened.<sup>214</sup>

If horizontal stare decisis were introduced, disagreements between panels might not be expressed as readily in published opinions, but the disagreements might persist below the surface and affect decision-making and opinion writing in subtle ways. The en banc procedure serves, in part, as a safety valve for the expression of these differing viewpoints.<sup>215</sup>

But without a change in the rules for stare decisis, the Task Force believed that the expense and bureaucracy entailed with an en banc process outweighed the risk that “important, unresolved conflicts among districts and divisions” would go unresolved.<sup>216</sup>

## B. Reflecting Twenty-Four Years Later

The Task Force was of the view that, as of 2001, there were not enough unresolved conflicts among decisions of the courts of appeal to merit any change, either to horizontal stare decisis rules or to justify an en banc procedure.<sup>217</sup> The Task Force’s report, however, cites no empirical evidence in support of its conclusion. Still, divisions of authority on important and recurring issues have persisted within the courts of appeal for more than a decade.<sup>218</sup> Perhaps worse is the ability of the courts of appeal to disagree with their prior rulings without overruling them. Therefore, until the supreme court grants review to resolve these conflicts, even old cases setting out minority views that have largely been rejected are still fair game for revival under the *Auto Equity* standard.<sup>219</sup>

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213. *Id.* The potential for an en banc procedure was also addressed in a 1987 symposium on the California Supreme Court at the Santa Clara School of Law. See Robert Thompson, Symposium, *Restructuring of Judicial Pyramid: Expanding the Jurisdiction of the California Court of Appeal*, 28 SANTA CLARA L. REV. 293, 303–10 (1998) (proposing an en banc court of seven sitting court of appeal justices, with one appointed by each justice of the supreme court); see also Gerald F. Uelman, *Creating an Appetite for Appellate Reform in California*, 45 HASTINGS L.J. 597, 601 (1994) (briefly referencing the potential creation of an en banc court as part of larger reform of the courts of appeal).

214. 2000 TASK FORCE REPORT, *supra* note 31, at 62.

215. *Id.*

216. *Id.* at 63.

217. *Id.*

218. This Article does not endeavor to definitively catalogue or measure the volume of conflict in 2001 or currently. But it should suffice to say—especially in civil cases—that there are numerous splits of authority on important issues that have persisted for many years.

219. See *Auto Equity Sales, Inc. v. Superior Court*, 369 P.2d 937, 940, 57 Cal. 2d 450, 456 (1962).

A few examples are illustrative of the first point: that court of appeal splits in civil cases can remain unresolved for many years. California's Strategic Lawsuit Against Public Participation ("anti-SLAPP")<sup>220</sup> statute provides "a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights," including engaging in protected speech and petitioning activities.<sup>221</sup> The threshold burden in applying the statute requires the movant to "demonstrate that the defendant's conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e)" of the statute.<sup>222</sup> If that showing is satisfied, the burden would shift to the plaintiff to make a prima facie showing of the elements of the claim.<sup>223</sup> If the plaintiff fails to satisfy that test, the cause of action is dismissed.<sup>224</sup> Because the grant or denial of an anti-SLAPP motion is subject to immediate interlocutory appeal,<sup>225</sup> anti-SLAPP litigation has generated a massive volume of appellate case law.<sup>226</sup>

Soon after the legislature's 2001 expansion of the scope of the statute, a split of authority developed over how to address so-called "mixed" causes of action; that is, causes of action that intermingle allegations of conduct that fall within one of the protected Subdivision (e) categories with other conduct that does not. One line of cases held that "where a cause of action alleges both protected and unprotected activity, the cause of action will be subject to section 425.16 unless the protected conduct is 'merely incidental' to the unprotected conduct."<sup>227</sup> In those cases, the plaintiffs would be required to establish a probability of prevailing as to any part of the cause of action, with failure to do so resulting in the dismissal of the entire claim.<sup>228</sup>

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220. CAL. CIV. PROC. CODE § 425.16(a) (West 2024); see *Equilon Enters. v. Consumer Cause, Inc.*, 52 P.3d 685, 689, 29 Cal. 4th 53, 57 (2002).

221. See *Rusheen v. Cohen*, 128 P.3d 713, 717, 37 Cal. 4th 1048, 1055 (2006).

222. *Equilon Enters.*, 52 P.2d at 693, 29 Cal. 4th at 66; see CAL. CIV. PROC. CODE § 425.16(e).

223. *Equilon Enters.*, 52 P.2d at 694, 29 Cal. 4th at 67.

224. *Id.*

225. See CAL. CIV. PROC. CODE § 425.16(i).

226. See *id.* § 425.16; see also *Shepard's® Comprehensive Report: Cal. Civ. Proc. Code sec. 425*, LEXIS, <https://plus.lexis.com/api/permalink/abec013a-7d6f-42aa-a6d3-85ba706b15d3/?context=1530671> (last visited Feb. 14, 2025) (showing that as of February 18, 2025, the anti-SLAPP statute has been cited in 906 published decisions, including 66 decisions of the California Supreme Court and 837 decisions of the courts of appeal).

227. See, e.g., *Mann v. Quality Old Time Serv., Inc.*, 15 Cal. Rptr. 3d 215, 221, 120 Cal. App. 4th 90, 103 (2004); *Kids Against Pollution v. Cal. Dental Ass'n*, 134 Cal. Rptr. 2d 373, 108 Cal. App. 4th 1003, review granted, 76 P.3d 843 (2003), dismissed as moot, 49 Cal. Rptr. 655 (2006); *Fox Searchlight Pictures, Inc. v. Paladino*, 106 Cal. Rptr. 2d 906, 918, 89 Cal. App. 4th 294, 308 (2001).

228. See *Mann*, 15 Cal. Rptr. 3d at 218, 120 Cal. App. 4th at 100.

A second line of cases applied a more surgical rule. If part of a claim arose from protected activity, the plaintiff would be required to show a probability of prevailing on that part of the claim, with a failure resulting in the dismissal only of the allegations of protected conduct.<sup>229</sup> This split of authority affected numerous cases over several years.<sup>230</sup> Despite an abortive effort to resolve the rule in 2003,<sup>231</sup> the California Supreme Court did not resolve the split until 2016—thirteen years after the articulation of the contrary rule in *Kids Against Pollution*—when it adopted the latter approach in *Baral v. Schnitt*.<sup>232</sup> The court similarly took more than a decade to resolve another interpretive question over a different part of the anti-SLAPP statute.<sup>233</sup>

Another example of a lingering split resulting from the lack of horizontal stare decisis in the California courts is the dispute over the appealability of post-judgment discovery orders. In 2013, a panel in the first division of the Fourth District Court of Appeal held that an order requiring a judgment debtor's attorney to produce documents was immediately appealable as a post-judgment order under Code of Civil Procedure section 901.4(a)(2).<sup>234</sup> Only six days later, a panel of the same division, including a justice who was on the panel in the prior case, reached the opposite conclusion.<sup>235</sup> The split has been repeatedly noted.<sup>236</sup> It remains unresolved eleven years later.

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229. See *Wallace v. McCubbin*, 128 Cal. Rptr. 3d 205, 226–39, 196 Cal. App. 4th 1169, 1196–1212 (2011).

230. Compare *Cho v. Chang*, 161 Cal. Rptr. 3d 846, 850, 219 Cal. App. 4th 521, 526 (2013) (describing the split, following *Mann*), and *Burrill v. Nair*, 158 Cal. Rptr. 3d 332, 349, 217 Cal. App. 4th 357, 380 (2013) (arguing the same as *Cho*), with *City of Colton v. Singletary*, 142 Cal. Rptr. 3d 74, 92–94, 206 Cal. App. 4th 751, 772–73 (following *Wallace*).

231. The California Supreme Court granted review of *Kids Against Pollution*, which presented the issue of mixed causes of action. See 76 P.3d 843 (2003). Three years later, a ballot proposition changed the standing requirements for the cause of action at issue, which the supreme court thereafter held applied to all pending cases. See *Disability Rts. v. Mervyn's, LLC*, 138 P.3d 207, 213, 39 Cal. 4th 223, 233–34 (2006). That rendered *Kids Against Pollution* moot, and the supreme court remanded to the court of appeal to vacate the decision given its ruling. *Id.*

232. 376 P.3d 604, 614–15, 1 Cal. 5th 376, 393 (2016).

233. See Michael Shipley, *What to Do About the Anti-SLAPP Catchall?*, L.A. DAILY J. (Dec. 27, 2016) (on file with author) (describing a years'-long split in the court of appeal over the interpretation of Code of Civil Procedure § 425.16(e)(4)); *Wilson v. Cable News Network, Inc.*, 444 P.3d 706, 716, 7 Cal. 5th 871, 889 (2019) (resolving the split).

234. See *Macaluso v. Superior Court*, 162 Cal. Rptr. 3d 318, 322, 219 Cal. App. 4th 1042, 1049 (2013).

235. *Fox Johns Lazar Pekin & Wexler, APC v. Superior Court*, 162 Cal. Rptr. 3d 571, 576 n.4, 219 Cal. App. 4th 1210, 1218 n.4 (2013).

236. See *Dalessandro v. Mitchell*, 256 Cal. Rptr. 2d 935, 938, 43 Cal. App. 5th 1088, 1091 (2019); *Shrewsbury Mgmt., Inc. v. Superior Court*, 244 Cal. Rptr. 3d 595, 599, 32 Cal. App. 5th 1213, 1221 (2019); *In re Marriage of Tim & Wong*, 44 Cal. Rptr. 3d 466, 470, 32 Cal. App. 5th 1049, 1054 (2019); *Fin. Holding Co. v. Am. Inst. of Certified Tax Coaches, Inc.*,

Perhaps, these enduring splits serve the purpose of weak horizontal stare decisis. They encourage the law to percolate and develop over time. After all, there are many instances along the way where, notwithstanding an obvious split, the supreme court denied review.<sup>237</sup> The court does not ordinarily publish any reasoning for denial of review.<sup>238</sup> It, therefore, cannot be known whether its failure to resolve these issues is a policy choice or, as it has been in the past, the result of a strained docket that affords inadequate resources and time to resolve the splits in authority.

Nevertheless, the sheer volume of published authority often yields inconsistent results that fail to acknowledge one another's existence, even when setting aside well-developed and recognized splits within the courts of appeal. These divisions of authority are especially common for evidentiary and procedural issues that are not the principal thrust of an appeal and are unlikely to rise to the level of supreme court intervention.<sup>239</sup> This problem is compounded by the poor quality of briefing in many appeals and publication practices of the courts of appeal. An unpublished court of appeal decision is often largely indistinguishable from a published decision because of the process by which a court of appeal decision is typically drafted.<sup>240</sup> This results in

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240 Cal. Rptr. 3d 604, 617, 29 Cal. App. 5th 663, 680 (2018); *Yolanda's, Inc. v. Kahl & Goveia Com. Real Est.*, 217 Cal. Rptr. 3d 625, 627–28, 11 Cal. App. 5th 509, 513 (2017); *Li v. Yan*, 201 Cal. Rptr. 3d 772, 777 n.1, 247 Cal. App. 4th 56, 64 n.1 (2016); *SCC Acquisitions, Inc. v. Superior Court*, 196 Cal. Rptr. 3d 533, 539–40, 243 Cal. App. 4th 741, 749 (2015).

237. The supreme court denied review in both *Burrill v. Nair*, 158 Cal. Rptr. 3d 332, 364, 217 Cal. App. 4th 357, 399 (2013), and *Wallace v. McCubbin*, 128 Cal. Rptr. 3d 205, 209, 196 Cal. App. 4th 1169, 1175 (2011), each of which identified the split over “mixed” anti-SLAPP cases long before the court resolved it in *Baral*. In doing so, perhaps the supreme court decided to permit further percolation of the law before resolving the issue. Or perhaps it simply thought the issue was too trivial or unworthy of its limited time. Because the court does not explain its reasons for denial, however, there is no way to know.

238. See generally EISENBERG ET AL., *supra* note 134, § 13:127.

239. Compare, e.g., *Staub v. Kiley*, 173 Cal. Rptr. 3d 104, 110–11, 226 Cal. App. 4th 1437, 1446 (2014) (finding that late expert disclosure does not require per se exclusion), with *Cottini v. Enloe Med. Ctr.*, 172 Cal. Rptr. 3d 4, 22–23, 226 Cal. App. 4th 401, 425 (2014) (stating that exclusion is mandatory).

240. Although the California Constitution requires “[d]ecisions of the Supreme Court and courts of appeal that determine causes [to] be in writing with reasons stated,” CAL. CONST. art. VI, § 14, California’s Standards for Judicial Administration permit (indeed, seemingly require) decisions in unpublished cases to be resolved by abbreviated memorandum opinion, CAL. R. CT. 8.1 (West 2024). But the state constitution requires courts to decide matters within ninety days of submission. CAL. CONST. art. VI, § 19. That incentivizes drafting opinions *prior to oral argument*, which must be afforded in every appeal. See, e.g., CAL. CT. APP., FIRST APP. DIST., INTERNAL OPERATING PRACTICES AND PROCEDURES § III.B.4 (West 2025); CAL. CT. APP., SECOND APP. DIST., INTERNAL OPERATING PRACTICES AND PROCEDURES 3 (West 2025); see also Goodwin Liu, *How the California Supreme Court Actually Works: A Reply to Professor Busse*, 61 UCLA L. REV. 1246, 1250 (2014) (describing a similar practice in the supreme court).

after-the-fact publication requests, which can result in the publication of opinions lacking the benefit of research that exceeds the parties' briefing.<sup>241</sup>

## V. The Case for Limited Reform

In any event, whether or not splits of authority are more prevalent now than they were when the Task Force gave its report almost a quarter decade ago, a number of facts remain unassailably true. First, although the California Supreme Court is extraordinarily busy, the number of cases it hears on the merits is a minuscule fraction of the caseload of the courts of appeal.<sup>242</sup> In fiscal year 2023, the most recent year for which data are available, the appellate courts disposed of 7,899 appeals by written opinion.<sup>243</sup> The statewide publication rate for appeals was nine percent,<sup>244</sup> resulting in about 711 published opinions.<sup>245</sup> But the supreme court granted true review<sup>246</sup> of only twenty-four civil matters and nineteen criminal ones.<sup>247</sup> It produced fifty-six written opinions throughout the year.<sup>248</sup> Moreover, although the court does not track the time between the filing of a petition for review in a civil case and the ultimate decision by the supreme court in a granted case, it often exceeds two years.<sup>249</sup>

The supreme court is unlikely to be able to maintain the uniformity of California precedent on a significant number of issues in any

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Because a draft opinion also serves as a pre-argument bench memorandum for the other justices on the panel, drafting abbreviated opinions in unpublished cases would actually require *more* work by the court and its staff.

241. CAL. R. CT. 8.1120.

242. 2024 COURT STATISTICS, *supra* note 61, at 13 (showing that the supreme court disposed of 5,764 matters in fiscal year 2023).

243. *Id.* at 27.

244. *Id.* at 35.

245. *Id.*

246. The court can “grant and hold” cases—generally court of appeal cases whose disposition could turn on the merits of a case where review has already been granted. CAL. R. CT. 8.512(d). And it can “grant and transfers” cases—typically summarily denied writ petitioned returned to the court of appeal for decisions on the merits. *Id.*, rule 8.528(d), (e). It uses these procedures more often than it decides cases on the merits. *See* 2024 COURT STATISTICS, *supra* note 61, at 16.

247. *See* 2024 COURT STATISTICS, *supra* note 61, at 16.

248. *Id.* at 21.

249. As the court does not publish data on this issue, the evidence is largely anecdotal. For instance, on June 15, 2022, the court granted review on a relatively straightforward procedural issue regarding the timeliness of an appeal. *Meinhardt v. City of Sunnyvale*, 291 Cal. Rptr. 3d 250, 76 Cal. App. 5th 43, *review granted*, 294 Cal. Rptr. 3d 232 (Cal. 2022). The court decided the case unanimously on July 29, 2024. *Meinhardt v. City of Sunnyvale*, 16 Cal. 5th 643, 649 (2024).

given year, absent a significant increase in output. It follows that, given the absence of horizontal stare decisis, the California judicial system must either tolerate a significant lack of uniformity or employ some procedure short of full supreme court review to obtain greater consistency in the law.

### A. Depublication Has Proven Inadequate

One method that has been historically employed to manage appellate precedent is the supreme court's authority—first afforded in the 1966 constitutional amendments<sup>250</sup>—to order the depublication of court of appeal decisions.<sup>251</sup> This permits the supreme court to remove a decision from the realm of published precedent when “a majority of the justices consider the opinion to be wrong in some significant way, such that it would mislead the bench and bar if it remained as citable precedent.”<sup>252</sup> Depublication has been controversial over the years,<sup>253</sup> and its use has waned substantially since its heyday in the late 1980s and early 1990s.<sup>254</sup> In 1993, the supreme court made clear that a depublication ruling was not a judicial expression of the correctness of any statement of law in the decision.<sup>255</sup> Thus, while depublication affords the court a means to remove potentially troubling precedent from the *Auto Equity* rule, it does little to actually settle the law in the courts of appeal. As a 1994 article in the *Hastings Law Journal* by University of California, Berkeley School of Law Professor Stephen Barnett explained, following that change: “Depublished opinions, meanwhile, are not ‘official’

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250. 1996 Cal. Stat. 977.

251. See CAL. CONST. art. VI, § 14; CAL. GOV'T CODE § 68902 (West 2024); CAL. R. CT. 8.1125.

252. Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 CALIF. L. REV. 514, 514–15 (1984). In the article by Grodin, a former California Supreme Court justice, he explains the practice as it existed in the early 1980s. *Id.*

253. See generally *id.* at 514; Steven B. Katz, *Without Precedent*, 24 L.A. LAW. 43, 43 (Mar. 2001); Stephen R. Barnett, *Depublication Deflating: The California Supreme Court's Wonderful Law-Making Machine Begins to Self-Destruct*, 45 HASTINGS L.J. 519, 520 (1994) [hereinafter Barnett, *Depublication Deflating*]; J. Clark Kelso, *A Report on the California Appellate System*, 45 HASTINGS L.J. 433, 492 (1994); Stephen R. Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 LOY. L.A. L. REV. 1033, 1033 (1993); Gerald F. Uelman, *Publication and Depublication of California Court of Appeal Opinions: Is the Eraser Mightier than the Pencil?*, 26 LOY. L.A. L. REV. 1007, 1011 (1993).

254. Compare Uelman, *supra* note 253, at 1007–08 (noting that the supreme court ordered more than one hundred decisions per year depublished from 1987 to 1992), with 2024 COURT STATISTICS, *supra* note 61, at 23 (stating that only seventeen opinions depublished in fiscal year 2023).

255. *People v. Saunders*, 852 P.2d 1093, 1098 n.8, 5 Cal. 4th 580, 592 n.8 (1993) (citing CAL. R. CT. 979(e), which is currently codified as CAL. R. CT. 8.1125(d), consistent with a 1990 change to the Rules of Court. CAL. R. CT. 8.1125(d)).

precedents, but no longer are they discredited, either. Courts of appeal now have a green light to reach the same result and employ the same reasoning as a depublished opinion, as long as they do so without citing or relying on that opinion.<sup>256</sup> In any event, a nearly sixty-year history of depublishment has not proven effective in avoiding substantial inconsistencies in the California Courts of Appeal.

## **B. The Possibility of Court of Appeal En Banc Review**

If the supreme court's active docket is unable to ensure uniformity in state law, and its depublishment authority cannot achieve the same result by negative implication, the only remaining option is to locate some form of precedent setting within the courts of appeal. As discussed, true en banc review is bureaucratically cumbersome and likely constitutionally impermissible. But a more limited form of precedent-setting authority can likely be established in the courts of appeal under current constitutional authority and with only limited changes to court rules that the state constitution delegates the judiciary the authority to establish.

### **1. True En Banc Review—District or Statewide—May Be Constitutionally Impossible**

The 2000 Task Force Report concluded that instituting en banc review at the district level offered only a slight benefit and at a statewide level was not worth the additional bureaucratic cost.<sup>257</sup> On top of these points, without a constitutional amendment, true en banc review—review by the whole membership of a court—or even limited en banc review as practiced in the Ninth Circuit would likely be constitutionally impermissible at the level of the courts of appeal. The provision of the state constitution that authorizes the courts of appeal requires a court of appeal to “conduct itself as a 3-judge court.”<sup>258</sup> The plain language of that limitation suggests that having all of the justices within a district, the courts of appeal statewide, or some subset of more than three justices sit en banc could be problematic under the state constitution.

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256. Barnett, *Depublishment Deflating*, *supra* note 253, at 547.

257. 2000 TASK FORCE REPORT, *supra* note 31, at 60.

258. CAL. CONST. art. VI, § 3.

## 2. Establishing a “Precedential Retransfer” Function Within the Court of Appeal Under the Current Constitutional Structure

Existing law, however, permits the state supreme court, in denying review of its own: (1) to grant and re-transfer a case to a three-justice panel of justices selected from across the various appellate districts; and (2) to (a) afford that panel the authority to set courts of appeal-wide precedent; (b) disapprove prior inconsistent court of appeal decisions; and (c) otherwise settle questions of state law that, for whatever reason, do not rise to the level of a grant of review by the supreme court.

The building blocks of a “precedential retransfer” policy are all currently present in constitutional rules.<sup>259</sup> First, as a vestige of the original deflective structure of the courts of appeal, the supreme court retains the authority to “transfer a cause from itself to a court of appeal or from one court of appeal or division to another.”<sup>260</sup> The Judicial Council is authorized to “provide, by rules of court, for the time and procedure for transfer and for review, including, among other things, provisions for the time and procedure for transfer with instructions, for review of all or part of a decision, and for remand as improvidently granted.”<sup>261</sup> The California Rules of Court, as currently in effect, permit the supreme court to grant review and “transfer the cause to a Court of Appeal without decision but with instructions to conduct such proceedings as the Supreme Court orders.”<sup>262</sup> That rule appears to permit the supreme court, upon recognizing non-uniformity that merits resolution but does not justify a grant of review, to transfer a case to a court of appeal authorized to do so.

The existing rules also permit the supreme court to “transfer[] to itself, before decision, a cause pending in the Court of Appeal” and to “retransfer the cause to a Court of Appeal without decision.”<sup>263</sup> That would potentially authorize a court of appeal, in recognition of a split of authority, to ask the supreme court to take a case and transfer it back to the court of appeal with instructions to resolve the conflict.<sup>264</sup>

Second, existing California law recognizes that *stare decisis* is “a principle of judicial policy, not a rule of constitutional or statutory

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259. As noted, because the constitution permits the court of appeal to operate only as a “3-judge court,” it would be misleading to refer to this process as an *en banc* or even a limited *en banc* hearing. CAL. CONST. art. VI, § 3.

260. *Id.* § 12(a).

261. *Id.* § 12(c).

262. CAL. R. CT. 8.528(d) (West 2024).

263. *Id.*, rule 8.528(e); *see also id.*, rule 10.1000(a)(1)–(3).

264. This is akin to a panel of the Ninth Circuit calling for a case to be initially heard *en banc*. *See* 9TH CIR. GEN. ORD. 5.2(b).

dimension.”<sup>265</sup> It is thus for the supreme court to determine, as a matter of policy, the appropriate application of judicial precedent under the stare decisis doctrine.<sup>266</sup> Indeed, the state constitution implicitly recognizes this power by giving the supreme court authority over publication.<sup>267</sup> It logically follows that the supreme court must implicitly have the *power* to transfer a case back to the court of appeal with an instruction that, notwithstanding the default rule of “no horizontal stare decisis,” the transferee court’s decision will be horizontally precedential. To make this policy clear and formalize the practice, the Judicial Council could readily adopt a minor rule change pursuant to its authority under the state constitution.<sup>268</sup>

Finally, the constitution authorizes the chief justice of the supreme court to “expedite judicial business and to equalize the work of judges.”<sup>269</sup> In that capacity, she can “provide for the assignment of any judge to another court.”<sup>270</sup> Given that authority, on retransfer of a case back to a court of appeal for a precedential decision, the supreme court and the chief justice, in particular, should be able to establish a procedure whereby, regardless of the district to which the case is transferred, a three-justice panel is staffed by justices selected from across the courts of appeal statewide.<sup>271</sup> Given the authority delegated to the chief justice, either the Judicial Council in the rules of court or the chief justice in the supreme court’s internal operating procedures can and should lay out rules to normalize this process.

## Conclusion

In sum, the no horizontal stare decisis rule that applies in the California Courts of Appeal works reasonably well to balance the interests in the free development of the law versus the interest in uniform

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265. *Schmier v. Supreme Court*, 93 Cal. Rptr. 2d 580, 585, 78 Cal. App. 4th 703, 710 (2000).

266. *Id.*; see also *Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.* 973 P.2d 527, 538, 20 Cal. 4th 163, 178 (1999) (explaining that the supreme court can create statewide precedent by “adopting” a court of appeal opinion without drafting its own).

267. CAL. CONST. art. VI, § 14.

268. *Id.* § 12(c) (permitting the Judicial Council to promulgate rules regarding transfers).

269. *Id.* § 6(e).

270. *Id.*

271. The California Supreme Court’s internal operating procedures currently have a similar system for assigning courts of appeal justices to sit *pro tempore* on the supreme court in cases where a justice is unavailable or disqualified. CAL. SUP. CT., INTERNAL OPERATING PRACTICES AND PROCEDURES § IV.J (West 2025). The current setup revolves through court of appeal justices alphabetically, excepting justices appointed for less than a year. *Id.*

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judicial precedent. But it is not perfect. And indeed, it has sometimes led to lasting uncertainty over important legal rules, especially in civil cases, where it can cause unjust results and increased expense in litigation over uncertain rules. For that reason, the California Supreme Court and the Judicial Council should consider, at least on a pilot basis, an option to re-transfer cases to a court of appeal for precedential decisions that, going forward, would bind the courts of appeal and the trial courts of the state. This policy could be established under existing constitutional authority and with relatively minimal expenditure of additional judicial resources.