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COMMENT

The Intercircuit Exclusionary Rule

INTRODUCTION

Imagine that you commit a crime in Connecticut and then return home to Puerto Rico where you commit another crime. In the course of investigating the second crime (in Puerto Rico), the FBI discovers evidence that implicates you in the first crime. In light of this evidence, the federal government indicts you for the first crime, in accordance with venue rules, in the District of Connecticut. At trial, you argue that the inculpatory evidence should be suppressed because the Second Circuit (the place of the trial) has ruled that similar searches violate the Fourth Amendment. The government, by contrast, argues that the evidence should be admitted because the First Circuit (the place of the search) has ruled that such searches do not violate the Fourth Amendment. How should the trial judge rule?[1]

For over thirty years, federal district courts have resolved these types of cases—call them "intercircuit suppression disputes"—by adopting a location-based choice-of-law rule: courts apply the precedent of the circuit where the search occurred. The choice-of-law approach has been widely followed by lower courts and even recognized by a number of criminal procedure treatises.[2] Nevertheless, this Comment will show that the approach is fundamentally mistaken.

1. For a case with a similar set of facts, see *United States v. Gerena*, 667 F. Supp. 911 (D. Conn. 1987).

2. *See* James G. Carr et al., 2 Law of Electronic Surveillance § 7:40 (2018); Clifford S. Fishman & Anne T. McKenna, Wiretapping and Eavesdropping § 34:32 (2017); *see also* Stephen L. Harwood, *Electronic Surveillance Issues*, U.S. Dep't of Just. 134 (Nov. 2005), http://www.justice.gov/sites/default/files/criminal/legacy/2010/04/11/elec-srvlnce-issuse.pdf [https://perma.cc/WFW8-8U9V] ("[T]he governing law should be that of the place where the electronic surveillance occurred.").

In some ways, the mistake is understandable. A well-developed literature—stretching back over fifty years—has long treated interjurisdictional suppression disputes as a choice-of-law problem. Scholars have examined this question in federal-state,[3] state-state,[4] and federal-international[5] cases. But the existing scholarship has yet to consider whether federal-federal suppression cases also create a choice-of-law problem.[6]

This Comment will demonstrate that federal-federal cases do not create a choice-of-law problem. The reason is relatively straightforward: circuit splits do not create separate bodies of "law" and thus do not implicate choice of law. Indeed, in other doctrinal contexts, federal courts have recognized that circuit splits do not create a choice-of-law problem. And this distinction—between different laws and different interpretations of the same law—is well grounded in broader choice-of-law theory. Courts should therefore resolve intercircuit suppression disputes in the same way that they would any other question of federal law. They should either follow vertical precedent or, if there is no binding precedent, they should independently interpret the law.

Admittedly, intercircuit suppression disputes involve one additional complication. Under the current good-faith exception to the exclusionary rule, federal courts must also determine whether an officer relied upon local appellate precedent at the time of the search. In other words, before a federal court evaluates a search under its own circuit's precedent, it must first evaluate whether the search circuit's precedent authorized the search at issue. And if the search circuit's precedent did, then the evidence should be admitted regardless of the forum court's interpretation. But to be clear, the good-faith exception is not a choice-of-law rule; the forum court still analyzes the officer's reasonable reliance from its own

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3. *See* John Bernard Corr, *State Searches, Federal Cases, and Choice of Law: Just a Little Respect*, 23 PEPP. L. REV. 31 (1995).

4. *See* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.5(c) (5th ed. 2017); John Bernard Corr, *Criminal Procedure and the Conflict of Laws*, 73 GEO. L.J. 1217 (1985); Mary Jane Morrison, *Choice of Law for Unlawful Searches*, 41 OKLA. L. REV. 579 (1988); William H. Theis, *Choice of Law and the Administration of the Exclusionary Rule in Criminal Cases*, 44 TENN. L. REV. 1043 (1977); Richard Tullis & Linda Ludlow, *Admissibility of Evidence Seized in Another Jurisdiction: Choice of Law and the Exclusionary Rule*, 10 U.S.F. L. REV. 67 (1975); Megan McGlynn, Note, *Competing Exclusionary Rules in Multistate Investigations: Resolving Conflicts of State Search-and-Seizure Law*, 127 YALE L.J. 406 (2017).

5. *See* Eric Bentley, Jr., *Toward an International Fourth Amendment: Rethinking Searches and Seizures Abroad After* Verdugo-Urquidez, 27 VAND. J. TRANSNAT'L L. 329 (1994); Michael Farbiarz, *Extraterritorial Criminal Jurisdiction*, 114 MICH. L. REV. 507, 514-15 (2016).

6. The sole articles to note federal-federal suppression cases are Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1175-77 (2012), and Mary Jane Morrison, *Exclusionary Rule Choice of Law*, 17 SEARCH & SEIZURE L. REP. 1, 8 (1990).

perspective. Instead, the good-faith exception simply recognizes that the deterrent purpose of the exclusionary rule is not served by suppressing evidence acquired by an officer who acted in objectively reasonable reliance upon binding precedent.

In light of these two insights—about circuit splits and the good-faith exception—this Comment proposes a new framework for resolving intercircuit suppression disputes. The framework has three steps: first, the forum court determines whether the officers reasonably relied upon locally binding precedent at the time of the search; second, if the officers did not, the forum court determines whether its own circuit has binding precedent that resolves the question; and third, if the circuit does not, the forum court independently determines the meaning of federal law. This framework rests upon sounder doctrinal and theoretical footing than the current choice-of-law approach. And the framework would change the outcome of suppression disputes in certain cases, such as when the search circuit would suppress the evidence but the forum circuit would not.

In defending this framework, this Comment also makes a broader theoretical contribution to the choice-of-law literature. Courts and scholars have long assumed that circuit splits do not create a choice-of-law question but have failed to provide a transsubstantive account of why they do not.[7] This Comment offers such an account by showing that the presence of separate laws—rather than just different interpretations of the same law—is a necessary prerequisite to a choice-of-law problem. And in doing so, this Comment explains why federal courts should never resolve circuit splits—even outside of the exclusionary rule context—by resorting to choice-of-law rules.

This Comment proceeds in four parts. Part I describes the existing choice-of-law approach to resolving intercircuit suppression disputes. Part II then shows that the choice-of-law approach conflicts with existing doctrine and choice-of-law theory. Part III argues that the current good-faith exception to the exclusionary rule most likely requires courts to account for another circuit's precedent in determining whether an officer reasonably relied upon a binding interpretation of the law. Finally, Part IV combines these insights into a three-step framework for resolving intercircuit suppression cases.

7. An exception is Jeffrey L. Rensberger, *Domestic Splits of Authority and Interstate Choice of Law*, 29 GONZ. L. REV. 521 (1994). But Rensberger's article focuses on the importance of separate sovereigns rather than of separate laws. *See id.* at 568-73; *see also infra* notes 70-72 and accompanying text (discussing the limits of the separate-sovereign account).

I. THE FEDERAL EXCLUSIONARY RULE AS A CHOICE-OF-LAW PROBLEM

Thirty years ago, in *United States v. Gerena*,[8] a federal district court ruled for the first time that intercircuit suppression disputes present a choice-of-law question. The facts of *Gerena* are essentially those presented in the Introduction: the defendant robbed a bank in Connecticut, but the FBI acquired key evidence for the case through a wiretap located in Puerto Rico. When faced with the question of which circuit's precedent should apply, the district court ruled that intercircuit suppression disputes are controlled by "the law of the place where [the allegedly illegal search] occurred."[9] *Gerena* is significant for being not only the first, but also the most in-depth, discussion of the application of choice-of-law principles to federal circuit conflicts over the exclusionary rule. Indeed, subsequent decisions adopting *Gerena*'s choice-of-law approach have generally cited its holding with little independent analysis.[10]

In support of its choice-of-law approach, the court in *Gerena* first turned to the *Restatement (Second) of Conflict of Laws*. The court began by quoting the *Restatement*'s claim that "Conflict of Laws covers an extremely wide area, embracing all situations where the affairs of men cut across state lines."[11] The *Restatement*, the court further observed, defines "state" as "any 'territorial unit with a distinct general body of law' and is expressly *not* limited according to notions of sovereignty or political boundaries."[12] Based on the *Restatement*'s broad definitions, the court reasoned that circuit splits may constitute a form of state-state conflict as "the states are in a position roughly similar to that of the circuits."[13]

The court next noted that "the law of a state is also broadly defined to include 'the body of standards, principles and rules.'"[14] "Accordingly," it concluded that

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8. 667 F. Supp. 911 (D. Conn. 1987).

9. *Id.* at 924.

10. Technically, *Gerena* considered the exclusionary rule prescribed by the federal wiretap statute rather than the Fourth Amendment. *See* 18 U.S.C. § 2518 (1982). Title III could raise distinct questions about the scope of the exclusionary rule. *See Gerena*, 667 F. Supp. at 914-16. But subsequent decisions have applied the court's choice-of-law reasoning to suppression cases more broadly. *See infra* note 26 and accompanying text.

11. 667 F. Supp. at 919 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 cmt. c (AM. LAW INST. 1971)).

12. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 3 & cmt. c (AM. LAW INST. 1971)).

13. *Id.*

14. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 4 (AM. LAW INST. 1971)).

"'law' may properly include differing 'interpretations' of the law."[15] Or put another way, the court decided that circuit precedent should be thought of as "law," subject to choice-of-law principles.

Finally, the court pointed out that the *Restatement* recognizes "intrastate" conflicts.[16] Specifically, the court noted that the *Restatement* treats conflicts that arise when the subdivisions of a state, including "counties, cities, towns and villages[,] . . . have their own separate law and courts" as "analogous to those dealt with in the Restatement."[17] The court then analogized the *Restatement*'s understanding of "intrastate conflicts"—which the court presumed included differing interpretations of state law—to "intrafederal" conflicts in the form of circuit splits.[18] "To the extent that each circuit has its own body of binding precedent," the court concluded, "then, in the absence of authoritative Supreme Court disposition of the particular issue in question, differences among the circuits give rise to intrafederal disputes and thus genuine conflicts within the general meaning of conflict of laws analysis."[19]

In addition to discussing the *Restatement*, *Gerena* cited two key federal precedents to support its view of intercircuit choice of law. First, the court noted that in *Factors Etc., Inc. v. Pro Arts, Inc.*,[20] the Second Circuit deferred to a Sixth Circuit decision holding that there is no inheritable right to publicity under Tennessee law. The Second Circuit gave "conclusive deference" to the Sixth Circuit's interpretation of Tennessee law in large part because Tennessee is located within the Sixth Circuit.[21] *Gerena* took *Factors* to stand for the broader proposition that federal courts should apply the precedent of the circuit from which a case arises.[22] In addition, the court cited *United States v. Buck*,[23] another Second Circuit decision in which the court of appeals ruled that evidence from an illegal search in New Jersey should not be suppressed because the officers had acted in good faith at the time of the search.[24] *Gerena* emphasized, however, that the Sec-

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15. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 4 (AM. LAW INST. 1971)).

16. *Id.*

17. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 cmt. c (AM. LAW INST. 1971)).

18. *Id.*

19. *Id.*

20. 652 F.2d 278 (2d Cir. 1981).

21. *Id.* at 279, 283.

22. *See Gerena*, 667 F. Supp. at 922.

23. 813 F.2d 588 (2d Cir. 1987).

24. *Id.* at 593.

ond Circuit made its own determination "only after finding that the Third Circuit had not addressed the issue at bar."[25] In other words, the court appeared to read *Buck* as implicitly following the precedent of the search circuit.

In the past thirty years, nearly every district court to address an intercircuit suppression case has adopted *Gerena*'s choice-of-law rule.[26] And the courts of appeal have shed little additional light on the matter. Appellate courts have either summarily affirmed district court decisions without elaborating on the choice-of-law question,[27] ignored the question in applying the precedent of the forum circuit,[28] or dismissed the issue in a cursory footnote.[29]

But notwithstanding this indifference, intercircuit suppression disputes matter. For one thing, these disputes have the potential to arise in a wide range of cases. Indeed, the issue can come up any time the federal government conducts a search in one circuit and tries the case in another circuit.[30] Given the interstate

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25. *Gerena*, 667 F. Supp. at 922.

26. *See* United States v. Warras, No. 2:13-CR-439-LDG-VCF, 2015 WL 6736981, at *5 n.4 (D. Nev. May 18, 2015), *report and recommendation adopted*, No. 2:13-CR-00439-KJD-VCF, 2015 WL 6755275 (D. Nev. Nov. 4, 2015); United States v. Kennedy, No. CRIM. 13-240, 2014 WL 6090409, at *4 (W.D. Pa. Nov. 13, 2014); Recommended Decision on Motions to Suppress, United States v. Gates, No. CRIM. 08-42-P-H, 2008 WL 5382285, at *6 (D. Me. Dec. 19, 2008), *aff'd*, 709 F.3d 58 (1st Cir. 2013); United States v. Barragan, 589 F. Supp. 2d 1012, 1015 (S.D. Ind. 2008); United States v. Ozuna, 129 F. Supp. 2d 1345, 1354 (S.D. Fla. 2001); United States v. Longo, 70 F. Supp. 2d 225, 261 (W.D.N.Y. 1999); *see also* United States v. Kurniawan, No. 12 CR 376, 2013 WL 180412, at *1 (S.D.N.Y. Jan. 17, 2013) (analyzing the case under both Second and Ninth Circuit precedent); United States v. Restrepo, 890 F. Supp. 180, 191-92 (E.D.N.Y. 1995) (noting that following the precedent of the place of the search is "sensible," but applying Second Circuit precedent because "[w]here the parties do not raise the conflicts issue, it is appropriate to apply the law of the circuit in which the motion to suppress is made"); United States v. Ferrara, 771 F. Supp. 1266, 1302 n.11 (D. Mass. 1991) (predicting that a district court in Connecticut would apply First Circuit precedent when a search occurred in Massachusetts). The sole case to have diverged from *Gerena* distinguished *Gerena* rather than challenge the choice-of-law approach. *See* United States v. Rohlsen, 968 F. Supp. 1049, 1053 (D.V.I. 1997) (distinguishing *Gerena* because "[t]he courts and judges of the [search circuit] have no interest or involvement in [the evidence] or the prosecution of these defendants"), *aff'd mem. sub nom.* United States v. Riviere, 185 F.3d 864 (3d Cir. 1999) (unpublished table decision).

27. *See* United States v. Kurniawan, 627 F. App'x 24 (2d Cir. 2015); United States v. Ozuna, 48 F. App'x 739 (11th Cir. 2002).

28. *See* United States v. Ojeda Rios, 875 F.2d 17, 23 (2d Cir. 1989).

29. *See Gates*, 709 F.3d at 62 n.2 ("The parties squabble over whether Fourth Circuit precedents, rather than First Circuit precedents, should apply to this issue. This contretemps suggests a false dichotomy: the legitimacy of a *Terry* stop is a matter of federal constitutional law. Geography does not matter.").

30. *See* Logan, *supra* note 6, at 1175-76.

focus of federal criminal law, we should expect intercircuit cases to be relatively common.[31] And they are likely to increase in frequency as new technologies erode the significance of traditional jurisdictional boundaries.[32] To be sure, this Comment has only identified a handful of cases that directly address the issue. But these decisions likely understate the incidence of the problem as courts often address choice-of-law questions in unpublished or oral decisions.[33]

Moreover, the way in which courts resolve intercircuit suppression disputes matters. Recent scholarship has found that the Fourth Amendment has proved particularly divisive in the lower courts, giving rise to dozens of circuit splits.[34] And when an intercircuit suppression dispute arises between circuits with different precedents, the court's choice-of-law rule can be outcome determinative. Admittedly, in every reported intercircuit suppression case where the choice-of-law approach was applied, courts have concluded that the two circuits agreed on the legal issue. In conflict of laws, such cases are called "false conflicts" because the two jurisdictions would decide the case in the same way.[35] Put another way, a false conflict means that the court's choice of law doesn't practically matter. But given the frequencies with which federal criminal investigations extend across multiple circuits and with which lower courts disagree over the meaning of the Fourth Amendment, we should expect a "true conflict"—a case in which the jurisdictions disagree as to the right result—to arise in the future. And when it does, the court should decide the suppression question correctly.

Finally, intercircuit suppression disputes give us an opportunity to consider a broader question—one with important theoretical implications for choice of law and practical implications for the federal system: do different lower-court precedents create a choice-of-law problem? The answer to that question may affect not only how courts address circuit splits in the Fourth Amendment context but also how they treat circuit splits more generally.

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31. *See* Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 SYRACUSE L. REV. 1127, 1177 (1997).

32. *See* McGlynn, *supra* note 4, at 411.

33. *See* Hillel Y. Levin, *What Do We Really Know About the American Choice-of-Law Revolution?*, 60 STAN. L. REV. 247, 257-58 (2007) (reviewing SYMEON C. SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT, AND FUTURE (2006)) (noting that published decisions do not fully account for how choice of law actually operates on the ground); *see also* Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 VILL. L. REV. 973, 989-94 (2008) (same).

34. *See* Logan, *supra* note 6, at 1195-1203.

35. *See* Peter Kay Westen, *False Conflicts*, 55 CALIF. L. REV. 74, 76-77 (1967).

II. FEDERAL CIRCUIT SPLITS AND CHOICE OF LAW

This Part will explain why federal circuit splits do not create a choice-of-law problem. For one thing, in most other areas of federal law, courts have already concluded that circuit splits do not create a choice-of-law question. The federal exclusionary rule cases are thus an unjustified exception to the general rule. For another, as a matter of choice-of-law theory, it makes little sense to treat interpretive disagreements among lower courts as creating a choice-of-law problem. Indeed, the core requirement for having a choice-of-law problem—separate laws—is not present in intercircuit suppression disputes, which merely involve different interpretations of the same law.

A. Federal Circuit Splits

In other areas, federal courts have rejected the notion that circuit splits implicate choice of law.[36] For over a century, courts and scholars have suggested that federal judges have an independent duty to determine the meaning of federal law within the constraints of vertical precedent. And since the 1980s, this view has become widely accepted.[37]

When Congress created the modern federal courts of appeals in 1891,[38] it left open whether circuit courts should determine federal law independently of one another. But within a decade, the Supreme Court resolved the question by holding that circuit courts are not bound by each other's rulings.[39] On the contrary, the Court observed that, although "comity" might persuade a circuit in some cases to follow a sister circuit's ruling, in most cases "the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right."[40]

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36. *See, e.g.*, Meeks v. Ill. Cent. Gulf R.R., 738 F.2d 748, 751 (6th Cir. 1984) ("There are, however, no choice of law rules for intercircuit conflicts."); Ackert v. Bryan, 299 F.2d 65, 69 (2d Cir. 1962) (noting that federal circuit splits do not present a "true conflict of laws problem").

37. An exception is Sanford Casut-Ellenbogen, Note, *Using Choice of Law Rules to Make Intercircuit Conflicts Tolerable*, 59 N.Y.U. L. REV. 1078 (1984), which argues that federal courts *should* use choice-of-law rules to address the problem of unresolved circuit splits.

38. *See* Judiciary (Evarts) Act of 1891, ch. 517, 26 Stat. 826.

39. *See* Mast, Foos, & Co. v. Stover Mfg. Co., 177 U.S. 485, 488 (1900).

40. *Id.*; *see also* Henry J. Friendly, *The "Law of the Circuit" and All That*, 46 ST. JOHN'S L. REV. 406, 413 (1972) ("One circuit will follow another or others when it is persuaded, has no strong views either way, or considers immediate nationwide uniformity to be unusually important, but generally not when it firmly believes the other circuit or circuits have been wrong.").

Richard Marcus has called this view—that federal courts must independently interpret the law—the "principle of competence."[41] Marcus developed the principle of competence to address a similar question to the one addressed here: whether federal courts should follow each other's precedents when federal cases are transferred between circuits for venue reasons. Before Marcus's article, some federal courts had adopted a choice-of-law rule that they were bound to apply the precedent of the circuit in which the case originated—a territorial rule similar to the one followed by courts in intercircuit suppression cases.[42] But according to the principle of competence, when deciding questions of federal law, "federal courts have not only the power but the duty to decide correctly."[43] In fact, Marcus argued that "[i]f a federal court simply accepts the interpretation of another circuit without addressing the merits, it is not doing its job."[44]

Soon after Marcus published his article, the D.C. Circuit drew upon the principle of competence in deciding what would become the seminal case on choice of law in federal-question transfer cases. In *In re Korean Air Lines Disaster of September 1, 1983*, then-Judge Ruth Bader Ginsburg held that courts in transfer cases should "be free to decide a federal claim in the manner it views as correct without deferring" to the circuit in which the case first arose.[45]

Judge Ginsburg's opinion relied in large part upon a formalist principle—that federal law is unitary—in concluding that circuit splits do not present a question of choice of law. She noted, for instance, that "federal courts comprise a single system [in which each tribunal endeavors to apply] a single body of law."[46] Furthermore, in *Korean Air Lines*, lawsuits from a number of different circuits had been consolidated into a single court for pretrial proceedings. As a result, treating different circuit precedents as different laws subject to choice-of-law principles, in Judge Ginsburg's view, would force multidistrict judges into the "logically inconsistent" position of "simultaneously [applying] different and conflicting interpretations of what is supposed to be a unitary federal law."[47]

41. Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 702 (1984).

42. *See id.* at 692 n.100 (citing cases).

43. *Id.* at 702.

44. *Id.*

45. 829 F.2d 1171, 1174 (D.C. Cir. 1987) (quoting Marcus, *supra* note 41, at 721), *aff'd sub nom.* Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989).

46. *Id.* at 1175 (quoting H.L. Green Co. v. MacMahon, 312 F.2d 650, 652 (2d Cir. 1962)) (alteration in original).

47. *Id.* at 1175-76.

Since *Korean Air Lines*, lower federal courts have uniformly followed the principle of competence in applying their own precedent in federal-question transfer cases.[48] Indeed, Marcus's article and Judge Ginsburg's opinion have been so influential that lower courts have followed the approach in other contexts. For example, when federal courts issue a subpoena for a case pending in another circuit, they apply their own circuit's precedent, notwithstanding attempts by litigants to convince these courts to adopt a choice-of-law approach.[49]

Of course, we all realize that "the uniformity of federal law is . . . a myth."[50] Indeed, one reason that litigants engage in "forum shopping" in the federal system is because they realize that circuits can have different precedents.[51] For practical purposes, these circuits have different bodies of law. But even if the uniformity of federal law is a myth, it is a myth that federal courts have come to believe they "are required to accept."[52]

Although the principle of competence directs courts to make an independent determination of the meaning of federal law, federal courts are also still constrained by rules of hierarchical precedent. Setting aside whether some rules of vertical precedent may be constitutionally required,[53] there are a number of consequentialist justifications for following hierarchical precedent, including judicial economy, the avoidance of delayed justice, and the greater proficiency of superior courts.[54] In other words, most scholars believe that, at the very least, "efficiency concerns require the application of the law of the court with appellate

48. *See* Robert A. Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 MICH. L. REV. 703, 705-06, 731-32 (1995) (documenting the influence of *Korean Air Lines*); Larry D. Thompson, Jr., *Adrift on a Sea of Uncertainty: Preserving Uniformity in Patent Law Post-*Vornado *Through Deference to the Federal Circuit*, 92 GEO. L.J. 523, 566 (2004) (documenting the influence of Marcus's article).

49. *See* Jimenez v. City of Chicago, 733 F. Supp. 2d 1268, 1271 (W.D. Wash. 2010); Highland Tank & Mfg. Co. v. PS Int'l, Inc., 246 F.R.D. 239, 244 (W.D. Pa. 2007); New York v. Microsoft Corp., No. CIV A. 98-1233(CKK), 2002 WL 649492, at *1-2 (D.D.C. Apr. 8, 2002); *In re* Ramaekers, 33 F. Supp. 2d 312, 315-16 (S.D.N.Y. 1999).

50. Ragazzo, *supra* note 48, at 736.

51. Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79, 99-102 (1999).

52. Ragazzo, *supra* note 48, at 738.

53. *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 828 (1994).

54. *See id*. at 839-49; Ragazzo, *supra* note 48, at 739.

jurisdiction."[55] This limitation on the principle of competence should come as no surprise as vertical precedent is a widely accepted aspect of our judicial system.[56]

The principle of competence—and its application in federal-question transfer cases—helps us realize *Gerena*'s choice-of-law mistake. Federal courts should not adopt a choice-of-law rule to resolve circuit splits over the exclusionary rule because they have an independent obligation to determine the meaning of federal law within the bounds of vertical precedent. Whatever the merits of *Gerena*'s choice-of-law approach at the time of the decision, subsequent developments have significantly eroded the logic of the approach, rendering the case a doctrinal outlier.

In addition, the principle of competence can even explain the Second Circuit's seemingly contrary decision in *Factors* (upon which *Gerena* relied). First, although Marcus would apply the principle of competence to questions of state law,[57] lower courts and even the Supreme Court have often deferred to the local circuit courts on questions of state law because these local circuits "are better schooled in and more able to interpret the laws of their respective States."[58] But federal courts do not defer to each other on questions of *federal* law because courts perceive themselves to be equally competent to interpret federal law.[59] Thus, *Factors* may simply be a state-law exception to the principle of competence. In addition, even if this state-law distinction is not entirely satisfying, the *Factors* rule is at least a lesser deviation from the principle of competence because it is a deference rule, not a choice-of-law rule. That is, under *Factors*, courts can still disagree with local circuit precedent if they think it "clearly misread[s] state

55. Ragazzo, *supra* note 48, at 743.

56. *See* Caminker, *supra* note 53, at 818.

57. *See* Marcus, *supra* note 41, at 704 n.166.

58. Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1150 (2017) (quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 500 (1985)); *see also* Jonathan Remy Nash, *Resuscitating Deference to Lower Federal Court Judges' Interpretations of State Law*, 77 S. CAL. L. REV. 975 (2004) (defending this rule).

59. There appears to be one exception to this rule. The Federal Circuit defers to other circuit courts on questions of substantive and procedural law outside of its specialized jurisdiction. *See* Paul R. Gugliuzza, *The Federal Circuit as a Federal Court*, 54 WM. & MARY. L. REV. 1791, 1843-44 (2013). We might distinguish the Federal Circuit's choice-of-law rule under a similar theory of comparative expertise. Or we might think that the Federal Circuit's rule is itself wrong. Notably, scholars have long criticized the Federal Circuit's choice-of-law doctrine based on the principle of competence. *See* Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 38 & n.220, 59-61 (1989); Joan E. Schaffner, *Federal Circuit "Choice of Law":* Erie *Through the Looking Glass*, 81 IOWA L. REV. 1173, 1204-06 (1996).

law."[60] By contrast, a choice-of-law rule requires a complete abdication of the principle of competence. The court does not defer to another circuit's precedent but follows it absolutely.

B. Choice of Law

The existing doctrinal view that federal circuit splits do not implicate choice of law also makes sense as a matter of choice-of-law theory.[61] There are two problems with treating circuit splits as a choice-of-law problem. First, scholars have historically assumed that choice-of-law questions only arise when two separate sovereigns have a relationship to the case, and circuit splits do not involve separate sovereigns. Admittedly, the separate-sovereigns view is incomplete. Modern scholarship recognizes that choice-of-law issues can also arise within a single sovereign when two different laws could be applied to a case. But even under this second broader view, circuit splits do not create a choice-of-law problem because circuit splits do not involve formally separate laws.

Both historical and modern approaches to choice of law have treated sovereignty as a key factor in the creation of a choice-of-law problem. Indeed, past scholarship has used the presence of multiple sovereigns to distinguish domestic splits of authority from classic choice-of-law problems.[62] The *Restatement (First) of Conflict of Laws*, for example, prescribed a number of territorial choice-of-law rules that focused on the place where the activity occurred. The theory was that "the only law that could operate in a foreign territory was the law of the foreign sovereign," and therefore, "[w]hen an event . . . occurred in a foreign territory, a right was created" based on the law of that sovereign.[63] In other words, the *First Restatement*'s approach was based upon "the exclusivity of territorial sovereignty."[64]

60. Abex Corp. v. Md. Cas. Co., 790 F.2d 119, 126 (D.C. Cir. 1986) (citing Factors Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278 (2d Cir. 1981)) (emphasis omitted).

61. It should not be surprising that *Korean Air Lines* reflects broader choice-of-law principles, as its author, Judge Ginsburg, taught Conflict of Laws when she was a law professor. *See* Herma Hill Kay, *Ruth Bader Ginsburg, Professor of Law*, 104 COLUM. L. REV. 2, 11 (2004).

62. *See* Rensberger, *supra* note 7, at 568-73; *see also* Lea Brilmayer, *The Other State's Interests*, 24 CORNELL INT'L L.J. 233, 234 (1991) (defining choice of law in terms of separate sovereigns).

63. William M. Richman & David Riley, *The* First Restatement of Conflict of Laws *on the Twenty-Fifth Anniversary of Its Successor: Contemporary Practice in Traditional Courts*, 56 MD. L. REV. 1196, 1197 (1997).

64. James Audley McLaughlin, *Conflict of Laws: The Choice of Law* Lex Loci *Doctrine, the Beguiling Appeal of a Dead Tradition, Part One*, 93 W. VA. L. REV. 957, 960 (1991).

Modern choice-of-law approaches have moved away from notions of exclusive territorial sovereignty but have retained an emphasis on multiple sovereigns. The *Second Restatement*, for instance, begins by explaining that choice-of-law rules are "necessary" because "[t]he world is composed of territorial states having separate and differing systems of law"[65] and that "[p]roblems arise when legally significant aspects of a case are divided between *two or more states*."[66] The *Second Restatement* defines "state"—like the *First Restatement*—as "a territorial unit with a distinct general body of law."[67]

In contrast to the states, the federal system is typically understood as comprising a single sovereign. The *Second Restatement*, for example, describes the United States as "*a state* . . . as to matters that are governed by federal law."[68] And in a related context, Judge Frank Easterbrook has observed that "[n]o limitations on sovereignty come into play in federal courts . . . [because] [the United States] is one sovereign, the same 'judicial Power,' whether the court sits in Indianapolis or Alexandria."[69] Thus, under the separate-sovereigns account, circuit splits do not create a choice-of-law problem.

Yet the separate-sovereigns account is incomplete. Many modern scholars now believe that "intrastate" or "domestic" conflicts should also be understood in terms of choice of law. Domestic conflicts can arise in two contexts. First, as *Gerena* noted, conflicts can arise when different subdivisions of the same sovereign—such as different cities—have separate laws.[70] Or they can arise when multiple laws within the same sovereign have overlapping application.[71] For example, scholars have described conflicts between the Federal Arbitration Act and

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65. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 1 (AM. LAW INST. 1971).

66. *Id.* § 1 cmt. b (emphasis added).

67. *Compare id.* § 3, *with* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 2 (AM. LAW INST. 1934). The comment cited by *Gerena* that "states" are "expressly not limited according to notions of sovereignty or political boundaries" is not to the contrary. The comment merely draws a distinction between the meaning of "state" for the purposes of conflict of laws and the meaning of "state" under foreign relations law. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 3 cmt. c (AM. LAW INST. 1971). A politically sovereign unit in foreign relations law can "engage[] in foreign relations and assume[] responsibility for its acts in such relations." RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 4 cmt. b (AM. LAW INST. 1965). In contrast, a state within the United States cannot. *See, e.g.*, Seth Davis & Christopher A. Whytock, *State Remedies for Human Rights*, 98 B.U. L. REV. 397, 414 (2018).

68. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 3 cmt. c (AM. LAW INST. 1971) (emphasis added).

69. Bd. of Trs., Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc., 212 F.3d 1031, 1036 (7th Cir. 2000) (describing sovereignty for purposes of personal jurisdiction).

70. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 cmt. c (AM. LAW INST. 1971).

71. *See* Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 283 (1990).

other federal statutes as giving rise to a choice-of-law problem.[72] In summary, under the modern view, a choice-of-law problem arises when two separate laws can be applied to a case—whether the laws come from separate sovereigns or a single sovereign.

But even under the modern view, circuit conflicts cannot be treated as a choice-of-law problem because different circuit precedents do not create formally separate laws. As Stephen Sachs has aptly noted, "We might talk about a particular search-and-seizure ruling as 'the law of the Fourth Circuit,' but we don't actually think that the Fourth Amendment requires different things in Maryland than it does in Delaware."[73] We likewise should not think that choice-of-law principles require a federal district court in Maryland to apply the Third Circuit's interpretation of the Fourth Amendment.

Choice of law has long embraced this reasoning in its treatment of intermediate appellate precedent. Joseph Beale, the reporter for the *First Restatement*, noted as much in his *Treatise on the Conflict of Laws*, published a year after the *First Restatement*.[74] Specifically, Beale observed that "it is entirely possible that the intermediate appellate court of one district should decide the law in one way while the corresponding court in another district of the state decides it in the opposite way."[75] But he emphasized that "[i]t cannot be said that there come to be two or more legal units in the state"; instead, the law simply "remains indefinite" until the disagreement is resolved.[76] Likewise, when two circuits disagree

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72. *See* Andrew D. Bradt, *Resolving Intrastate Conflicts of Laws: The Example of the Federal Arbitration Act*, 92 WASH. U. L. REV. 603 (2015).

73. Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y. 817, 861 (2015).

74. *See* JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935).

75. *Id.* § 3.3.

76. *Id*. Beale's *Treatise* also shows that *Gerena* was wrong to read "standards, principles and rules" as suggesting that different lower-court interpretations of the law are also "law." These terms in the *Second Restatement* come from the *First Restatement*. *Compare* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 4(1) (AM. LAW INST. 1971), *with* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 3 (AM. LAW INST. 1934). And Beale, the reporter for the *First Restatement*, defined "principles . . . [as] general premises of law which can be used for deduction and for analogy"; "standard[s] . . . [as] rule[s] which [are] stated as a degree of a continuously changing series to be reached, in order for a legal result to follow"; and "rule[s] [as] . . . statement[s] of law applicable only to a narrowly defined class of cases and incapable of extension by deduction or analogy." BEALE, *supra* note 74, § 3.2. In other words, none of these terms necessarily refer to lower-court interpretations of the law.

as to the meaning of federal law, federal law simply "remains indefinite" until the Supreme Court settles the question.[77]

More recently, scholars have argued that most choice-of-law problems raise "ordinary questions of statutory interpretation."[78] This view of choice of law—first proposed by Brainerd Currie, the father of modern conflict-of-laws analysis, and soon to be adopted in the *Third Restatement*—instructs courts to first determine the scope and content of the relevant laws at issue using ordinary principles of interpretation.[79] Courts engage in this analysis because in many cases, one law does not grant the parties any rights and, thus, there is no conflict.[80]

But under the statutory-interpretation approach, it makes little sense to treat circuit splits as raising a choice-of-law question because circuit splits do not involve separate laws whose scope and content can be interpreted. Instead, circuit splits simply involve an interpretive disagreement over the meaning of theoretically uniform federal law.[81] In contrast, other domestic cases—such as conflicts between different municipal laws and conflicts between different federal statutes—can raise choice-of-law questions because they involve formally separate laws that can be separately interpreted.

This distinction may seem formalistic (perhaps even simplistic). But the idea of separate laws is at the heart of both historical choice-of-law analysis—which required separate sovereigns and thus necessarily involved separate laws—as well as more modern approaches.

III. THE GOOD-FAITH EXCEPTION AND RELIANCE ON CIRCUIT PRECEDENT

The previous Part offered a general account of why circuit conflicts do not create a choice-of-law problem. This Part, by comparison, considers an issue

77. *See* Stephen E. Sachs, *Precedent and the Semblance of Law*, 33 CONST. COMMENT. (forthcoming 2018) (manuscript at 16), https://ssrn.com/abstract=3170047 (noting that "the law of the circuit . . . stands in for the actual law," but that "if someone argued that a federal statute *really* had different legal content in Maryland than in Delaware, we'd call them crazy; that's just not how the American legal system works").

78. *See, e.g.*, Kermit Roosevelt III, *Brainerd Currie's Contribution to Choice of Law: Looking Back, Looking Forward*, 65 MERCER L. REV. 501, 509 (2014). Of course, this approach is not without its critics. *See* Lea Brilmayer, *What I Like Most About the* Restatement (Second) of Conflicts of Law *and Why It Should Not Be Thrown Out with the Bathwater*, 110 AJIL UNBOUND 144 (2016).

79. *See* Roosevelt, *supra* note 78, at 512; Kermit Roosevelt III & Bethan Jones, *What a Third Restatement of Conflict of Laws Can Do*, 110 AJIL UNBOUND 139, 142-43 (2016).

80. *See* Roosevelt, *supra* note 78, at 511.

81. *See* Ragazzo, *supra* note 48, at 736-38.

unique to intercircuit suppression cases: the good-faith exception to the exclusionary rule. The good-faith exception is one area where the forum court should consider the precedent of another circuit because suppression is not allowed when an officer reasonably relied upon local appellate precedent. In other words, if the precedent of the search circuit would have permitted the search, then the forum court should not suppress the evidence.

The modern federal exclusionary rule is based on a single rationale: deterrence.[82] As a consequence, over the past thirty years, the Supreme Court has recognized a number of "good-faith exceptions" to the rule that unlawfully obtained evidence will be suppressed. Simply put, even if a law-enforcement officer conducts an unconstitutional search, courts will suppress the evidence only when the police are "sufficiently culpable that such deterrence is worth the price paid by the justice system."[83]

In *Davis v. United States*,[84] the Supreme Court extended the good-faith exception to reliance on local circuit precedent. In *Davis*, the Alabama police performed a search that was lawful under Eleventh Circuit precedent at the time of the search. But while the case was on appeal, the Supreme Court ruled in a separate proceeding that the type of search at issue in *Davis* violated the Fourth Amendment.[85] The Court in *Davis* thus had to resolve whether evidence should be suppressed when the officers had acted in "objectively reasonable reliance on binding judicial precedent" that was later overruled.[86]

The Court began by emphasizing that suppression is neither "a personal constitutional right" nor a remedy "designed to 'redress the injury' occasioned by an unconstitutional search."[87] Instead, "[t]he rule's sole purpose . . . is to deter future Fourth Amendment violations," a purpose whose value must be balanced against "the 'substantial social costs'" of exclusion.[88] The Court next observed that its prior cases had arrived at the "basic insight . . . that the deterrence benefits of exclusion 'var[y] with the culpability of the law enforcement conduct' at issue."[89] In cases where officers had acted in "reasonable reliance" on an invalid

82. *See* Herring v. United States, 555 U.S. 135, 141 (2009).

83. *Id.* at 144.

84. 564 U.S. 229 (2012).

85. *See* Arizona v. Gant, 556 U.S. 332 (2009).

86. *Davis*, 564 U.S. at 238-39.

87. *Id.* at 236 (quoting Stone v. Powell, 428 U.S. 465, 486 (1976)).

88. *Id.* at 236-37 (quoting United States v. Leon, 468 U.S. 897, 907 (1984)).

89. *Id.* at 238 (alteration in original) (quoting Herring v. United States, 555 U.S. 135, 143 (2009)).

warrant or statute, the Court had previously concluded that there would be insufficient deterrent benefits to suppressing the evidence because the police lacked sufficient culpability.[90]

Within the particular context of *Davis*, the Supreme Court reasoned that "[a]n officer who conducts a search in reliance on binding appellate precedent does no more than 'ac[t] as a reasonable officer would and should act.'"[91] As a result, excluding evidence under these circumstances would merely deter officers from "do[ing] [their] duty," which "is not the kind of deterrence the exclusionary rule seeks to foster."[92] The Court therefore held that evidence should not be suppressed when the police had acted in objectively reasonable reliance on binding circuit precedent.

The Court's holding in *Davis* should logically apply not only when precedents change over time, but also when precedents vary across jurisdictions. Put another way, if an officer performs a search that was authorized under binding precedent where the search occurred, then the evidence should not be suppressed even if the case is eventually brought in a circuit that would otherwise exclude it. Indeed, one district court has already found that good-faith reliance on circuit precedent is relevant to intercircuit suppression disputes, although that court blurred the rule from *Davis* with earlier cases that follow the choice-of-law approach.[93]

The Supreme Court's decision in *Davis* can also help us reconcile the principle of competence with the Second Circuit's decision in *Buck* (upon which *Gerena* also relied). Recall that in *Buck*, the Second Circuit had addressed the exclusionary rule question "only after finding that the Third Circuit had not addressed the issue at bar."[94] Rather than representing a choice-of-law determination, the Second Circuit's decision to look first at Third Circuit precedent is best understood in light of the Supreme Court's subsequent decision in *Davis*. The court in *Buck* first had to determine whether the Third Circuit had addressed the legal issue in order to assess whether the officers could have acted in good-faith reliance on binding circuit precedent.

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90. *Id*. at 238-39.

91. *Id*. at 241 (quoting *Leon*, 468 U.S. at 920) (second alteration in original).

92. *Id*. at 241 (quoting *Leon*, 468 U.S. at 920) (first alteration in original).

93. *See* United States v. Kennedy, No. CRIM. 13-240, 2014 WL 6090409, at *5 (W.D. Pa. Nov. 13, 2014) (citing *Davis*, 564 U.S. at 236-37 and United States v. Restrepo, 890 F. Supp. 180, 191 (E.D.N.Y. 1995)). Ironically, the district court invoked *Davis* even though the search-circuit precedent was "more favorable" to the defendant. *Id*. Given that the good-faith exception is about excusing police misconduct, it makes little sense to apply the search circuit's precedent under *Davis* in order to benefit the defendant. *See infra* Part IV.

94. United States v. Gerena, 667 F. Supp. 911, 922 (D. Conn. 1987) (citing United States v. Buck, 813 F.2d 588, 593 (2d Cir. 1987)).

The good-faith exception thus represents one deviation from the rule that courts should decide cases according to their local circuit precedent or independent judgment. Together, the principle of competence and the good-faith exception can provide us with a new framework for resolving intercircuit suppression disputes.

IV. THE INTERCIRCUIT EXCLUSIONARY RULE

My prior discussion of the principle of competence and choice of law applies to federal circuit splits more broadly. As a general matter, federal courts should never use choice-of-law rules to resolve circuit splits. But in this final Part, I will focus on intercircuit suppression disputes. This Part describes a three-step framework for resolving such cases—what I will call the "intercircuit exclusionary rule."

The three-step framework is as follows: *First*, the court should determine whether the search was clearly authorized by the precedent of the circuit in which the search occurred. If it was, then the court should rule the evidence admissible under the good-faith exception. If it was not, then the court should proceed to the second step. *Second*, the court should determine whether its own circuit's precedent clearly dictates the outcome. If it does, then the court should follow that precedent. If its circuit's precedent is unclear, the court should proceed to the third step. *Third*, if neither of the first two questions resolve the issue, then the court should use its independent judgment to decide the issue.

The first step is simply an application of *Davis* to differences in precedent across space rather than time. If an officer acts in reliance on binding local appellate precedent, then under *Davis*, there is no deterrent benefit to suppressing the evidence. Note, however, that in this context, courts are not applying the precedent of another circuit as a matter of choice of law. Instead, they are simply following the Supreme Court's analysis of the good-faith exception by admitting evidence that does not further the deterrent purpose of the exclusionary rule.

The second step follows from current principles of vertical stare decisis. Because intercircuit cases do not create a choice-of-law question, legal or prudential considerations weigh in favor of courts following the precedent of their own circuit.

Finally, the third step is based upon the principle of competence. In the absence of the good-faith exception or binding forum precedent, courts should reach their best understanding of federal law—that is, the interpretation that, "in the eyes of the forum court, [is] the correct one."[95]

95. Marcus, *supra* note 41, at 702 n.154.

There are two principal differences between the existing rule and my proposed rule. First, under the existing choice-of-law approach, the search circuit's precedent always applies. By contrast, under my proposed approach, the search circuit's precedent is relevant only when it *authorizes* the search because that is the only context in which the good-faith exception is implicated. Second, under the existing rule, the forum circuit's precedent never applies. By contrast, under my proposed rule, the forum court will usually apply its own precedent or, in the alternative, its independent judgment.

In some cases, the existing rule and my proposed rule result in the same outcome; in others, the outcomes diverge. Consider again the facts of *Gerena*.[96] In the actual case, the defendant argued that precedent from the Second Circuit (the forum circuit) required the evidence to be suppressed, while the government argued that precedent from the First Circuit (the search circuit) allowed the evidence to be admitted. In this case, under either approach, the result would be the same: the evidence should be admitted. Under the choice-of-law rule, the court would adopt the First Circuit's precedent and admit the evidence. And under the intercircuit exclusionary rule, the court would apply the good-faith exception and admit the evidence.

But now imagine that the circuits flipped precedents—that is, the Second Circuit would admit the evidence and the First Circuit would suppress it. In this case, the two rules diverge. Under the choice-of-law rule, the court would adopt the First Circuit's precedent and would suppress the evidence. By contrast, under the intercircuit exclusionary rule, the court would apply its own circuit's precedent and would admit the evidence.

In addition, the rules can also differ in cases where either the forum circuit's or search circuit's precedent is unclear. Under the existing choice-of-law rule, courts would likely have to predict how the search circuit *would* rule if the particular legal question has not yet been resolved by that circuit.[97] The notion of one circuit predicting how another circuit will rule may seem strange. Indeed, it was partially this very strangeness that led to the rejection of a choice-of-law approach in federal transfer cases.[98] By contrast, under my proposed rule, if the search circuit's precedent does not authorize the search, courts would either follow binding forum precedent or exercise their independent judgment.[99]

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96. *See supra* note 1 and accompanying text.

97. *See* Logan, *supra* note 6, at 1176.

98. *See* Marcus, *supra* note 41, at 714.

99. It is true that lower courts have disagreed about what it means for a prior decision to authorize a search. *See* David J. Twombly, Note, *The Good-Faith Exception and Unsettled Law: A Study of GPS Tracking Cases After* United States v. Jones, 74 OHIO ST. L.J. 807, 821-28 (2013). But this

To be sure, this rule may appear unduly harsh to defendants because the precedent of another circuit only applies when it favors the government—that is, when it makes the evidence admissible. Indeed, *Gerena* cited the interests of defendants in "the preservation of their civil liberties and the vindication of their rights" as a reason for adopting the search-precedent rule.[100] But as noted before, the modern exclusionary rule is grounded in the single rationale of deterrence. "[T]he exclusionary rule," as the Supreme Court has emphasized, "is not an individual right."[101] In traditional choice-of-law cases, courts might think about where a legal right "vests" in deciding whether to apply a foreign body of law.[102] But even if intercircuit suppression disputes created a choice-of-law question (which they do not), courts would not be allowed to consider the defendant's interests when choosing among federal exclusionary rule precedents. Instead, they could only consider the government's reliance interests in applying the good-faith exception.[103]

Once we recall the deterrent purpose of the exclusionary rule, the apparent harshness of my proposed framework becomes more understandable. Imagine first that evidence is admissible in the search circuit but inadmissible in the forum circuit. The reason that the evidence should be admitted is that, per *Davis*, suppressing the evidence would not serve the deterrent purpose of the exclusionary rule. Now imagine the opposite scenario: the evidence is admissible in the forum circuit but inadmissible in the search circuit. We might wonder why, in this case, the police should get the benefit of the forum rule when they committed an illegal search in the search circuit. The reason, once again, is that the exclusionary rule is about deterrence. In the eyes of the forum circuit, the search

disagreement simply recognizes that a prior decision may apply even if that decision is not on all fours with the facts of the case. *See* Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 198-99 (2014).

100. United States v. Gerena, 667 F. Supp. 911, 917 (D. Conn. 1987).

101. Herring v. United States, 555 U.S. 135, 141 (2009).

102. Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191, 1194-95 (1987).

103. My framework may also raise concerns about prosecutorial forum shopping. For example, if prosecutors plan to bring a case in a circuit where a certain type of search is prohibited, they may wait and conduct a search in a circuit that permits the search and thus benefit from the good-faith exception. But forum shopping can also arise under the current choice-of-law approach. The federal government may already conduct searches in different circuits in order to gain the benefits of more favorable precedent. At least under my framework, courts may be able to limit such forum shopping by recognizing that reliance on circuit precedent is not always "reasonable." For example, if the defendant can show that the government waited to conduct a search in a particular circuit solely to gain the benefit of that circuit's precedent, then the government's reliance may no longer be objectively reasonable. *See* Illinois v. Krull, 480 U.S. 340, 355 (1987) (discussing other contexts where reliance was not "reasonable"); *see also* Corr, *supra* note 3, at 52-55 (discussing a similar solution).

was not illegal, so it makes little sense to suppress the evidence. Excluding the evidence would not deter *illegal* conduct—at least according to the forum court.

One might pause to ask: Why are we shifting between what the search circuit thinks and what the forum circuit thinks? Doesn't this shifting perspective just favor the government? Might it undermine the deterrent purposes of the exclusionary rule? In a formal sense, no. What is important to remember is that we are always viewing the issue from the perspective of the forum court. In the first example, the forum court still concludes that the search was illegal; the court just cannot provide a suppression remedy because the police lack sufficient culpability. This is how the Supreme Court framed the issue in *Davis*. The Justices did not adopt or follow the lower court's decision. Indeed, they had just ruled two years earlier that this exact type of search was illegal. Instead, the Court simply concluded that, in light of the officers' reasonable reliance, the suppression "remedy" was inappropriate.[104]

By comparison, in the second example, the forum court concludes that the search was permissible; the court disregards the precedent of the search circuit. This is how the Supreme Court often addresses Fourth Amendment cases. When the Justices decide that some investigative technique is permissible, they don't then ask whether evidence should be suppressed because under local circuit court precedent the search was unlawful. Instead, the Supreme Court simply rules the evidence admissible because, in the Justices eyes, there is no illegal conduct to deter. Thus, in both examples, the deciding court—that is, the forum court or the Supreme Court—is consistent in evaluating the deterrent benefits of the exclusionary rule from its own perspective.

Looking beyond formal justifications, I recognize that this uniformly pro-government result might seem unappealing or even unjust. But to the extent that the intercircuit exclusionary rule seems unfair, the critique should be directed at the exclusionary rule more broadly. For example, perhaps reliance on circuit precedent should not fall within the good-faith exception.[105] Or perhaps the exclusionary rule should be about more than just deterrence.[106] These issues go well beyond the scope of this Comment. I merely raise them to suggest that any perceived unfairness may speak to much deeper issues. By contrast, this Com-

104. Davis v. United States, 564 U.S. 229, 243-45 (2011).

105. *See* Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077 (2011). Indeed, the Supreme Court does not allow defendants to escape criminal liability on the basis that they acted in objectively reasonable reliance on binding circuit precedent that is later overruled. *See* United States v. Rodgers, 466 U.S. 475, 484 (1984); *see also* Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455 (2001) (critiquing *Rodgers*).

106. *See Herring*, 555 U.S. at 151-53 (Ginsburg, J., dissenting).

ment's project has been modest: to make sense of intercircuit suppression disputes within prevailing understandings of the exclusionary rule and choice of law.

CONCLUSION

The intercircuit exclusionary rule can help federal courts resolve a narrow doctrinal question: how to determine the admissibility of evidence acquired in another circuit. Yet the rule also illustrates something important about the relationship between appellate precedent and choice of law more generally. In short, circuit splits do not present a choice-of-law question. And that latter conclusion—grounded in established doctrine and theory—has broader implications for how courts should treat circuit splits across various areas of federal law.

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