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# A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule

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# A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule<sup>†</sup>

AMY E. SLOAN\*

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## INTRODUCTION

The Eighth Circuit's decision in *Anastasoff v. United States*<sup>1</sup> has generated significant discussion of “unpublished,” or more accurately, “non-precedential” judicial opinions<sup>2</sup> and corresponding “no-citation” rules that limit or prohibit citation to those opinions.<sup>3</sup> Most of the discussion has focused on the normative

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1. 223 F.3d 898 (8th Cir.), *vacated en banc as moot*, 235 F.3d 1054 (8th Cir. 2000). In *Anastasoff*, the Eighth Circuit, sua sponte, determined that its local rule permitting it prospectively to designate opinions as non-precedential was unconstitutional. According to the court, the rule violated Article III because the Framers of the Constitution understood the judicial power to be limited by the requirement that courts adhere to precedent. *Id.* at 900-03.

2. Virtually all judicial opinions are now “published” in the sense of being publicly available, either electronically or in print. Accordingly, the term “unpublished” opinion is a misnomer; the more accurate term is “non-precedential” opinion. *See infra* notes 41-46 and accompanying text (discussing the evolution of “unpublished” opinions to “non-precedential” opinions).

3. *See, e.g.*, *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) (rejecting *Anastasoff*'s conclusion that courts are required by the Constitution to follow prior decisions);

aspects of the practice (whether issuing non-precedential opinions is a good idea, or at least a justifiable one) or on the constitutionality of the practice from the standpoint of the judicial power (whether Article III requires courts to follow prior decisions).<sup>4</sup>

One important issue in the debate that has not received significant attention concerns the means the courts have used to implement this system of designating opinions as non-precedential. In effect, the rules governing non-precedential opinions modify the principles of stare decisis.<sup>5</sup> They give courts the discretion to opt in or out of the traditional rule of horizontal stare decisis, which requires courts to follow their own prior decisions.<sup>6</sup> The federal courts traditionally have

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*Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the Comm. on the Judiciary, House of Representatives, 107th Cong. (2002) [hereinafter Hearings]; Symposium, Anastasoff, Unpublished Opinions, and "No Citation" Rules, 3 J. APP. PRAC. & PROCESS 175 (2001) (collecting eleven articles on the topic); Stephen R. Barnett, From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules, 4 J. APP. PRAC. & PROCESS 1 (2002) (explaining developments in the non-precedential opinion debate); Richard B. Cappalli, The Common Law's Case Against Non-Precedential Opinions, 76 S. CAL. L. REV. 755 (2003); David Greenwald & Frederick A.O. Schwarz, Jr., The Censorial Judiciary, 35 U.C. DAVIS L. REV. 1133 (2002) (arguing that no-citation rules are unconstitutional); Thomas Healy, Stare Decisis as a Constitutional Requirement, 104 W. VA. L. REV. 43 (2001) (arguing that the use of non-precedential opinions is consistent with the values that animate the principle of stare decisis); Charles R. Eloschway, Note, Say It Ain't So: Non-Precedential Opinions Exceed the Limits of Article III Powers, 70 GEO. WASH. L. REV. 632 (2002) (arguing that courts lack the rulemaking power to issue non-precedential opinions).*

4. See sources cited *supra* notes 1 & 3.

5. "Stare decisis" refers to adherence to prior precedent. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854 (1992); see also BLACK'S LAW DICTIONARY 1414 (7th ed. 1999) (defining stare decisis as "[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation").

6. Stare decisis works in two directions, horizontally and vertically. Horizontal stare decisis is the requirement that courts follow their own prior opinions. In the federal appellate courts, this requirement applies within each circuit, that is, individual panels within each circuit are bound by opinions of prior panels within the same circuit. See *infra* note 80 and accompanying text. Panel decisions can only be reversed or overruled by the court sitting en banc or by the Supreme Court. *Id.* Vertical stare decisis is the requirement that subordinate courts follow the prior opinions of higher courts. The practice of issuing non-precedential opinions also has implications for vertical stare decisis. None of the federal circuit courts' local rules defines the weight of non-precedential opinions for district courts, and they have taken three approaches to the citation of such opinions. The Second, Fourth, Sixth, Seventh, and Ninth Circuits' rules address citation of non-precedential opinions to the district courts in the circuit. SECOND CIR. R. 0.23; FOURTH CIR. R. 36(c); SIXTH CIR. R. 28(g); SEVENTH CIR. R. 53; NINTH CIR. R. 36-3. The First, Fifth, Eighth, Tenth, Eleventh, District of Columbia, and Federal Circuits' rules address the citation of non-precedential opinions to the circuit courts themselves, but are otherwise unclear about whether those opinions can be cited to district courts. FIRST CIR. R. 32.3; FIFTH CIR. R. 47.5; EIGHTH CIR. R. 28A(i); TENTH CIR. R. 36.3; ELEVENTH CIR. R. 36-2; D.C. CIR. R. 28(c); FED. CIR. R. 47.6. The Third Circuit's rule does not address parties' ability to cite non-precedential opinions, providing only that the court itself does not ordinarily cite them. THIRD CIR. I.O.P. 5.7. Some of the same considerations that apply to horizontal stare decisis may also apply to issues surrounding vertical stare decisis, although the variations in circuit rules might affect that analysis. For further discussion of the issues surrounding vertical stare decisis, see Evan H.

established rules of precedent through the adjudicatory process.<sup>7</sup> By contrast, they regulate the practice of issuing and citing non-precedential opinions largely through their local rules.<sup>8</sup> In addition, a new Federal Rule of Appellate Procedure has been proposed to eliminate the restrictions on citing non-precedential opinions, although it does not eliminate the practice of issuing them.<sup>9</sup>

The fact that the federal appellate courts use local procedural rules to authorize this practice raises interesting questions about how it might be changed. Of course, the federal appellate courts could end the practice on their own by changing their local rules.<sup>10</sup> This is unlikely. The federal appellate courts have placed increasing reliance on non-precedential opinions over the past thirty years,<sup>11</sup> using them as a docket management tool,<sup>12</sup> and are not inclined to abandon the practice unilaterally now.<sup>13</sup>

Another possibility is invalidating the local rules through litigation on the ground that they are unconstitutional. This is also an unlikely avenue for changing the practice. With the exception of *Anastasoff*, the federal courts have upheld the constitutionality of local rules regarding non-precedential opinions,<sup>14</sup> and even

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

7. *Hearings*, *supra* note 3, at 6 (statement of Judge Samuel A. Alito, Jr.) (noting that the courts have traditionally developed principles of stare decisis through adjudication); *id.* at 9 (statement of Judge Alito) (noting that courts established principles of stare decisis as part of the common law); *see also infra* note 80 (citing cases from each circuit stating that it follows the principle of horizontal stare decisis).

8. *See infra* note 25 and accompanying text.

9. *See infra* note 58 and accompanying text.

10. Indeed, Judge Richard Arnold, the author of the *Anastasoff* opinion, tried unsuccessfully to persuade his colleagues on the Eighth Circuit to change at least the non-citation rule. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 225 (1999).

11. *See infra* notes 38-39 and accompanying text (showing increased use of non-precedential opinions over time). Approximately 80% of federal appellate opinions are non-precedential. *Id.*

12. Although defenders of non-precedential opinions have tried to frame the issue so that the practice is really to the benefit of litigants, the primary reason the federal appellate courts issue non-precedential opinions is to manage their dockets. *Compare Hearings*, *supra* note 3, at 7 (statement of Judge Alito) (noting a variety of reasons for issuing non-precedential opinions, including conservation of opinion-writing time for precedential opinions, preservation of "the consistency and quality of precedential decisions," and saving "time and money for attorneys" so that they are not required to research vast amounts of case law and pay for more reporter volumes) *with id.* at 8 (statement of Judge Alito) (explaining that the courts of appeals would find it virtually impossible to stay current with their dockets if they produced precedential opinions in every case) *and id.* at 10-11 (statement of Judge Alex Kozinski) (explaining how "difficult and time consuming" writing precedential opinions is and concluding that Ninth Circuit judges could not devote that level of effort to every case given the number of cases they must resolve each year).

13. Non-precedential opinions have been characterized as "essential for the survival of the federal appellate courts." ADVISORY COMMITTEE ON APPELLATE RULES, MINUTES OF THE SPRING 2002 MEETING 25 (April 22, 2002) (as approved Nov. 18, 2002) [hereinafter APRIL MEETING] (statement of unnamed committee member), at <http://www.uscourts.gov/rules/Minutes/app0402.pdf> (last visited Jan. 24, 2004). The federal circuit courts are not likely to abandon a practice they consider vital to their very survival on their own.

14. *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001), was the first case to challenge the Eighth Circuit's analysis. Others have followed. *See, e.g.*, *Symbol Techs., Inc. v.*

*Anastasoff* was later vacated.<sup>15</sup> Moreover, procedural hurdles make judicial review difficult to obtain. In the two main cases addressing the issue, the courts raised the validity of the local rules *sua sponte*,<sup>16</sup> which is not a reliable avenue for obtaining review of an issue. Additional challenges to obtaining judicial review of the local rules include finding a case that has the right facts, is in the correct procedural posture, and involves a litigant who has standing.<sup>17</sup> These obstacles are especially daunting because, in the absence of Supreme Court review, the issue would have to be litigated in each circuit. Obtaining Supreme Court review presents a further challenge because the Court takes few cases and has been reluctant in the past to address the permissibility of non-precedential opinions.<sup>18</sup>

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*Lemelson Med.*, 277 F.3d 1361, 1367 (Fed. Cir. 2002) (adopting *Hart's* analysis and conclusion that local rules authorizing non-precedential opinions are valid); *Schmier v. United States Court of Appeals for the Ninth Circuit*, 279 F.3d 817, 819, 825 (9th Cir. 2002) (upholding dismissal of a petition for writ of mandamus to force the Ninth Circuit to permit citation to non-precedential opinions on the ground that the petitioner lacked standing and citing *Hart* for the proposition that the rules are constitutional); *In re Mays*, 256 B.R. 555, 558-59 (Bankr. D.N.J. 2000) (allowing parties to rely on non-precedential opinions because the local bankruptcy rules did not address the practice, but criticizing *Anastasoff's* conclusion that adherence to such opinions is constitutionally required).

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

16. In both *Anastasoff* and *Hart*, the courts raised the issue of the constitutionality of local rules regarding non-precedential opinions on their own. Tony Mauro, *Stealth Decisions Under Fire*, LEGAL TIMES, Sept. 4, 2000, at 6 (describing how the issue of the court's obligation to follow a prior non-precedential opinion in *Anastasoff* was raised *sua sponte* during oral argument); *Hart*, 266 F.3d at 1159 (ordering counsel who violated the Ninth Circuit's no-citation rule to show cause why he should not be disciplined). Thus, both courts effectively hijacked other claims to make their points, a practice which raises its own legitimacy concerns. See generally Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245 (2002).

17. In *Schmier v. United States Court of Appeals for the Ninth Circuit*, 136 F. Supp. 2d 1048, 1049 (N.D. Cal. 2001), *aff'd*, 279 F.3d 817 (9th Cir. 2002), the plaintiff, a member of the Ninth Circuit bar, petitioned for a writ of mandamus to force the Ninth Circuit to stop enforcing its local rules regarding non-precedential opinions. The district court questioned whether it had jurisdiction to review a rule of a higher court. *Id.* at 1050. The court declined to reach that issue or the merits of the case, however, because it determined that the plaintiff lacked standing. *Id.* at 1051. He had not attempted to cite a non-precedential opinion or unsuccessfully requested that the Ninth Circuit reissue a non-precedential opinion as precedential. *Id.* at 1052. To challenge the rules, a plaintiff would have to be able to show some injury from the application of the rule, and even if that could be shown, it might be difficult to find a plaintiff willing to pursue an action to invalidate the rules. See Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 68 U. COLO. L. REV. 1, 54 (1997) (noting that obtaining judicial review of local circuit rules is difficult because the rules are rarely pivotal in the outcome of a case and the problems they create are usually resolved before the conclusion of the litigation, among other reasons).

18. The Supreme Court has had two opportunities to consider the federal appellate courts' authority to issue non-precedential opinions. In *Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit*, 429 U.S. 917 (1976), the Supreme Court issued a one-sentence opinion denying a motion to file a petition for a writ of mandamus after the Seventh Circuit struck the petitioners' citation of a non-precedential opinion. See David Dunn, Note, *Unreported Decisions in the United States Court of Appeals*, 63 CORNELL L. REV. 128, 142-43 (1977-78) (detailing the history of the *Do-Right Auto Sales* case). In

Moreover, invalidation of the practice of issuing non-precedential opinions through litigation may not be the best approach from a policy perspective. Adjudication is an all-or-nothing approach. If the local rules were invalidated this way, all previously issued non-precedential opinions, no matter when decided, could change status and become precedential. Given the degree to which the federal appellate courts rely on non-precedential opinions, that would be a big change to absorb overnight.

Because local circuit rules are subordinate to the Federal Rules of Appellate Procedure and federal statutes,<sup>19</sup> another possibility is prohibiting the practice of issuing non-precedential opinions by rule or statute. The federal courts have been studying a national approach to this issue for over ten years.<sup>20</sup> The proposed new rule eliminating citation restrictions, although it does not expressly address the permissibility of non-precedential opinions, is an indication that the federal courts are feeling pressure to address this issue nationally.<sup>21</sup>

A rule-based or statutory approach, in contrast to litigation, potentially has several advantages. For one thing, a national rule or statute would eliminate the practice nationwide, whereas litigation circuit by circuit could lead to inconsistent rules, unless and until the Supreme Court resolved any conflicts. Moreover, a rule-based or statutory solution could allow for a phase-in period or provide other means of easing the transition away from non-precedential opinions.

This Article discusses the constitutionality of a national procedural rule or federal statute prohibiting the federal appellate courts from prospectively designating selected opinions as non-precedential. In Part I, this Article explains how the rules governing non-precedential opinions allow federal appellate courts to “opt out” of their own rules of precedent.<sup>22</sup> In Part II, this Article examines the rulemaking process, showing how the Federal Rules of Appellate Procedure are promulgated pursuant to delegated legislative authority and can, therefore, regulate only matters that Congress could regulate by statute.<sup>23</sup> Part III explores the constitutional limits of Congress’s ability to regulate the courts’ use of precedent. It shows that a federal statute or national rule prohibiting prospective designation of selected opinions as non-precedential would be constitutional. As long as the statute did not specify the weight federal appellate courts must accord to their own opinions, it would not encroach impermissibly on the courts’ Article III judicial power.<sup>24</sup>

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*Browder v. Director, Department of Corrections*, 434 U.S. 257, 258 n.1 (1978), the Court granted certiorari, but declined to discuss the validity of the Seventh Circuit’s citation restrictions.

19. 28 U.S.C. § 2071(a) (2000) (providing that local rules cannot conflict with federal statutes or national rules); FED. R. APP. P. 47(a) (repeating the language of 28 U.S.C. § 2071(a)).

20. See *infra* notes 61-62 and accompanying text (explaining the history of proposals to address non-precedential opinions nationally).

21. See *infra* notes 60-63 and accompanying text (discussing the shift in circumstances that has caused the federal courts to consider a national rule eliminating citation restrictions).

22. See *infra* Part I.

23. See *infra* Part II.

24. See *infra* Part III.

## I. THE LOCAL RULES AND THEIR EFFECT

*A. Regulation of Non-Precedential Opinions Through Local Procedural Rules*

Federal appellate courts authorize and regulate the practice of issuing non-precedential opinions through their local rules and, to a lesser extent, internal operating procedures.<sup>25</sup> The practice has two components: rules defining when

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25. FIRST CIR. R. 32.3 (permitting, but disfavoring, citation to non-precedential opinions for persuasive value), 36 (authorizing non-precedential opinions and establishing criteria for determining whether opinions will be precedential or non-precedential); SECOND CIR. R. 0.23 (authorizing non-precedential opinions and prohibiting citation to non-precedential opinions "before this or any other court"); THIRD CIR. I.O.P. 5.2 (explaining that an "opinion . . . is designated as precedential . . . when it has precedential or institutional value"), 5.3 (authorizing non-precedential opinions), 5.7 (stating that the court does not cite to non-precedential opinions because they "are not regarded as precedents that bind the court"); FOURTH CIR. R. 36(a) (establishing criteria for issuing precedential opinions), 36(b) (authorizing non-precedential opinions), 36(c) (permitting, but disfavoring, citation to non-precedential opinions as persuasive authority); FIFTH CIR. R. 47.5 (establishing criteria for designating opinions as precedential, defining unpublished opinions issued before January 1, 1996, as precedent that should be cited only in related cases, and declaring unpublished opinions issued on or after January 1, 1996, not to be precedent but permitting citation to them for persuasive value); SIXTH CIR. R. 206 (establishing criteria for issuing precedential opinions), 28(g) (permitting, but disfavoring, citation to non-precedential opinions); SEVENTH CIR. R. 53 (authorizing non-precedential opinions, establishing criteria for determining whether opinions will be precedential or non-precedential, and prohibiting citation to non-precedential opinions); EIGHTH CIR. APP. I (establishing criteria for designating opinions as precedential and prohibiting citation to non-precedential opinions), R. 28A(i) (declaring that unpublished opinions are not precedent and permitting citation to them for persuasive value); NINTH CIR. R. 36-1 (defining categories of dispositions, including opinions, memoranda, and orders), 36-2 (establishing criteria for designating opinions as precedential), 36-3 (declaring that unpublished opinions are not binding precedent and prohibiting citation to them except in related cases, in a request to publish the opinion, in a petition for rehearing or rehearing en banc, or to demonstrate a conflict among the court's dispositions); TENTH CIR. R. 36.1 (authorizing disposition without published opinion in any case that "does not require application of new points of law that would make the decision a valuable precedent"), 36.2 (stating that appellate dispositions ordinarily will be published if the lower court or tribunal published its disposition), 36.3 (stating that unpublished dispositions are not binding precedent and permitting, although disfavoring, citation of non-precedential dispositions for persuasive value); ELEVENTH CIR. R. 36-1 (establishing criteria for dispositions without opinions), 36-2 (stating that an opinion will not be published unless a majority of the panel agrees to publish and that unpublished opinions are not binding precedent; permitting citation to unpublished opinions as persuasive authority), 36-3 (permitting a panel to change the status of an opinion from non-precedential to precedential); D.C. CIR. R. 36 (establishing criteria for issuing precedential opinions, authorizing non-precedential dispositions, and permitting, but disfavoring, motions to publish unpublished dispositions), 28(c) (prohibiting citation of unpublished dispositions entered before January 1, 2002, "as precedent," and permitting citation of unpublished dispositions entered after January 1, 2002, "as precedent"); FED. CIR. R. 47.6 (authorizing non-precedential opinions, prohibiting citation to non-precedential opinions "as precedent," and permitting motions to reissue non-precedential opinions as precedential), FED. CIR. I.O.P. 10 (establishing criteria for designating opinions as precedential).

decisions will be designated as precedential or non-precedential, and rules defining when non-precedential opinions can be cited.<sup>26</sup>

To understand the impact of these rules, it is important to understand some history.<sup>27</sup> For over 100 years, jurists have expressed concern about the number of appellate opinions.<sup>28</sup> Concerns have focused on the problems that large numbers of cases present for judges (difficulty keeping the docket current and staying informed about the law) and litigants (difficulty researching large numbers of cases and doctrinal inconsistency).<sup>29</sup> The increase in the number of appellate cases from the 1960s forward spurred action by the federal courts of appeals.<sup>30</sup> Notwithstanding other justifications given, the federal appellate courts have come to rely significantly on the practice of issuing non-precedential opinions as a way of managing caseload.<sup>31</sup>

The modern history of the non-precedential opinion begins in 1964, when the Judicial Conference of the United States passed a resolution providing “[t]hat the judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value.”<sup>32</sup> In the early 1970s,

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The Ninth Circuit’s citation rule is a temporary rule. The Advisory Committee’s notes following the rule explain that the rule was first adopted on July 1, 2000, for a limited, 30-month period that ended December 31, 2002. The circuit extended the rule for another 30-month period running from January 1, 2003, until July 1, 2005. NINTH CIR. R. 36-3 advisory committee’s note.

26. See *supra* note 25.

27. See generally William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978). This was one of the first articles detailing the history of the development of local rules permitting the federal appellate courts to designate opinions as non-precedential. The history detailed in that article is confirmed in more recent work, including *Hearings, supra* note 3, at 7 (statement of Judge Alito); Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 762 (1995); Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 207-08 (2001); Eloshway, *supra* note 3, at 633-35.

28. Eloshway, *supra* note 3, at 633-34 (citing an address by Joseph Story, in 1 AM. JURIST 1, 31 (1829), that expressed the view that the volume of appeals was, at that time, overwhelming); see also John J. O’Connell, *A Dissertation on Judicial Opinions*, 23 TEMP. L.Q. 13, 14-15 (1949) (explaining the problem of too many appellate opinions); John B. Winslow, *The Courts and the Papermills*, 10 ILL. L. REV. 157, 158 (1915) (questioning whether “we are . . . in danger of being overwhelmed with the rapidly rising flood of case law” and providing statistics on state and federal dispositions from 1909 to 1913).

29. See *supra* sources cited note 28.

30. Reynolds & Richman, *supra* note 27, at 1169-72.

31. *Id.*; see also *infra* note 286; Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUDIES 627 (1994) (using economic analysis to show that judges will promulgate rules that maximize their preferences even if the rules result in costs to litigants). Rules permitting non-precedential opinions maximize judges’ preferences for interesting cases because they allow judges to dispose of boring or routine cases quickly, without much work.

32. U.S. ADMIN. OFFICE OF U.S. COURTS, JUDICIAL CONFERENCE REPORTS 11 (1964). The history of non-precedential opinions from 1964 forward appears in a number of sources. See, e.g., *Hearings, supra* note 3, at 7 (statement of Judge Alito); Dragich, *supra* note 27, at 760-62; Reynolds & Richman, *supra* note 27, at 1169-72; Eloshway, *supra* note 3, at 633-



the Judicial Conference drafted a model rule on the publication of judicial opinions.<sup>33</sup> By the mid-1970s, all of the federal appellate courts had rules establishing standards for the publication of opinions.<sup>34</sup> Then, as now, each circuit had its own rule.<sup>35</sup> Almost as soon as the nonpublication rules came into being, they were criticized.<sup>36</sup> Nevertheless, the Judicial Conference concluded that the experiment in unpublished opinions was successful and recommended their continued use.<sup>37</sup>

The experiment did, in fact, continue. Today, the vast majority of opinions from the federal appellate courts are designated as non-precedential. The percentage of opinions designated as non-precedential varies by circuit but has increased significantly over time in all circuits.<sup>38</sup> Nationally, approximately 80% of

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35. All of these histories confirm the following timeline, as set out in Hannon, *supra* note 27, at 207-08:

1964: Judicial Conference passes resolution directing federal district and appellate courts to limit publication of opinions to those "which are of general precedential value."

1971: Federal Judicial Center report notes widespread consensus that too many court opinions are being published.

1972: Federal Judicial Center recommends to Judicial Conference that each circuit review its publication policy and focus on limiting publication. Judicial Conference requests each circuit to develop and submit publication plans.

1973: Advisory Council for Appellate Justice's *Standards for Publication of Judicial Opinions* report is published, containing Model Rule for subsequent publication rules of United States Courts of Appeals.

1974: Judicial Conference receives proposed publication plans from courts of appeals.

1974-1975: Commission on Revision of Federal Court Appellate System, operating under congressional mandate, holds hearings and issues report. Majority recommends selective publication and no-citation rules but withholds judgment and defers to Judicial Conference.

33. *See supra* note 32.

34. *Id.*

35. *Hearings, supra* note 3, at 8 (statement of Judge Alito); Dragich, *supra* note 27, at 761; *see supra* note 32. Practices for issuing non-precedential opinions also vary among the circuits. ADVISORY COMMITTEE ON APPELLATE RULES, MINUTES OF THE FALL 2002 MEETING 36 (Nov. 18, 2002) (as approved May 15, 2003) [hereinafter NOVEMBER MEETING] (summary of comments of an unnamed committee member), at <http://www.uscourts.gov/rules/Minutes/app1102.pdf> (last visited Jan. 25, 2004).

36. One of the earliest critiques of non-precedential opinions came in 1978, only a few years after all of the circuits promulgated rules permitting such opinions. Reynolds & Richman, *supra* note 27.

37. *Id.* at 1172; Eloshway, *supra* note 3, at 634-35 & n.18.

38. The Administrative Office of the United States Courts compiles annual statistics showing the number of non-precedential opinions issued by the federal courts of appeals. For the twelve-month period ending September 30, 2002, the number of non-precedential dispositions in cases terminated on the merits ranged from a low of 45.4% in the First Circuit to a high of 91.8% in the Fourth Circuit. Table S-3, *U.S. Courts of Appeals—Types of Opinions or Orders Filed in Cases Terminated on the Merits After Oral Hearings or Submission on Briefs During the 12-Month Period Ending September 30, 2002*, at <http://www.uscourts.gov/judbus2002/tables/s03sep02.pdf> [hereinafter *Table*] (last visited Mar. 3, 2004). Although the percentage of non-precedential opinions issued by each circuit

federal appellate dispositions are designated as non-precedential.<sup>39</sup> Thus, what began as an experiment has become the dominant mode of case disposition for the federal appellate courts.

Over time, the nature of the opinions transformed from “unpublished,” meaning not available in print reporters, to “non-precedential,” meaning not binding on the courts. When print reporters were the sole means of accessing cases, the two terms were synonymous. The reason for declining to publish an opinion was to prevent parties from relying on it as precedent, an outcome dictated by the no-citation rules. As a practical matter, few people had access to “unpublished” opinions. If parties could not research or cite unpublished opinions, those opinions could not bind later courts.<sup>40</sup>

Beginning in the late 1980s to early 1990s, “unpublished” opinions began to become available electronically through Westlaw and LexisNexis.<sup>41</sup> Today, virtually all “unpublished” opinions are available via these services.<sup>42</sup> In the late 1990s, courts began making these opinions available themselves via court websites; today virtually all of the federal circuit courts make all of their opinions, precedential or not, available via the Internet.<sup>43</sup> All will have to shortly, under the E-Government Act of 2002.<sup>44</sup>

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varies somewhat from year-to-year, the statistics for 1997 through 2002 show, overall, a gradual increase in the total number of non-precedential opinions: 76.5% (1997); 74.9% (1998); 78.1% (1999); 79.8% (2000); 80.4% (2001); 80.5% (2002). Table 1.6, *U.S. Courts of Appeals—Type of Opinions or Orders Filed in Cases Terminated on the Merits After Oral Hearings or Submission on Briefs*, at <http://www.uscourts.gov/judicialfactsfigures/table1.6.htm> (last visited Mar. 3, 2004); see also JUDITH A. MCKENNA ET AL., FEDERAL JUDICIAL CENTER, CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURT OF APPEALS 21 (2000) (showing decreasing percentages of “published” opinions in all of the federal circuits from 1987 through 1998). The Advisory Committee notes accompanying proposed Federal Rule of Appellate Procedure 32.1, which would eliminate citation restrictions, also acknowledge the pervasiveness of non-precedential opinions. The notes following three preliminary versions of the proposed rule state that “[t]he thirteen courts of appeals have cumulatively issued tens of thousands of non-precedential opinions, and about 80% of the opinions issued by the courts of appeals in recent years have been designated as non-precedential.” NOVEMBER MEETING, *supra* note 35, at 28.

39. Table, *supra* note 38.

40. *But see* O’Connell, *supra* note 28, at 16 & n.5 (questioning whether a federal court, sitting in diversity, could refuse to follow an unpublished opinion from the state whose law controls the case and suggesting that it would be improper for the federal court to do so).

41. *Hearings*, *supra* note 3, at 7 (statement of Judge Alito), 11-12 (statement of Judge Kozinski).

42. The Third, Fifth, and Eleventh Circuits did not originally make their non-precedential opinions available in Westlaw or LexisNexis. MCKENNA ET AL., *supra* note 38, at 21. Cases from these circuits also did not appear in early volumes of West’s *Federal Appendix*, although now they do. See *infra* note 45 and accompanying text (discussing the *Federal Appendix*). Compare 1 Fed. App. vii-xxiii (2001) (listing no cases from the 3d, 5th, or 11th Circuits in the table of cases reported by circuit) with 57 Fed. App. xxvi, xxiii, xxx (2003) (listing cases from the Third, Fifth, and Eleventh Circuits in the table of cases reported by circuit).

43. *Hearings*, *supra* note 3, at 7 (statement of Judge Alito), 11-12 (statement of Judge Kozinski).

44. Pub. L. No. 107-347, 116 Stat. 2899, § 205 (2002).

The final split between “unpublished” and non-precedential opinions came in 2001, when West launched a new print reporter, the *Federal Appendix*.<sup>45</sup> The *Federal Appendix* contains non-precedential opinions from all of the circuits. It truly has become doublespeak to refer to them as “unpublished” when they appear in print form. The terminology, therefore, has shifted from “unpublished” to “non-precedential.”<sup>46</sup>

Presently, some courts use the “non-precedential” nomenclature, while others continue to use the “unpublished” label.<sup>47</sup> The effect in either case, however, is the same. The federal appellate courts provide by local rule that they are not bound to follow opinions that they designate (regardless of the terminology actually used) as non-precedential.<sup>48</sup> The shift, therefore, is more than just a linguistic one. The effect of the rules has also gradually changed over time. Rules that began as regulations of the form of opinions have become rules defining the precedential value of opinions, thereby altering the rule of horizontal stare decisis in the federal appellate courts.<sup>49</sup>

The standards for determining when an opinion will be designated as non-precedential vary among the circuits.<sup>50</sup> Most circuit rules create a presumption that opinions are non-precedential unless the panel deciding the case finds that it

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45. Barnett, *supra* note 3, at 2 (calling the publication of the *Federal Appendix* “a startling action that drains the meaning from the term ‘unpublished’ opinion”).

46. See *Hearings, supra* note 3, at 5 (statement of Judge Alito) (calling the term “unpublished opinion” “somewhat misleading” and explaining that virtually all opinions “are published in any sense of the word” because they are available in print form, electronic form, or both). In one sense, the outcome of this shift is ironic. In theory, making the courts’ opinions available should increase judicial legitimacy and accountability. *Id.* at 44 (statement of Professor Arthur D. Hellman) (explaining that, by making all opinions available electronically, the courts recognize that making “unpublished” opinions readily accessible fosters judicial accountability). But in practice, allowing courts to designate in advance that the majority of opinions are not binding decreases judicial accountability by freeing judges from considering the future consequences of their decisions. It also reduces judicial legitimacy by making the decisionmaking process arbitrary, in appearance, if not in practice. See *infra* notes 98-100 and accompanying text.

47. Compare, e.g., FED. CIR. R. 47.6 (referring to “precedential” and “nonprecedential” dispositions) with FIRST CIR. R. 36 (referring to “published” and “unpublished” dispositions).

48. Most local rules provide that non-precedential opinions are not binding, although there is some confusion over terminology in this regard. Some rules state that non-precedential opinions are not “precedent,” while others specify that they are not “binding precedent.” Compare, e.g., EIGHTH CIR. R. 28A(i) (stating that “[unpublished opinions] are not precedent”) with TENTH CIR. R. 36.3 (stating that “unpublished orders and judgments . . . are not binding precedents”). The distinction might make sense if it hinged on whether the circuit prohibits citation or allows citation for persuasive value. That, however, is not the case. For example, the Eighth Circuit permits citation for persuasive value, yet simultaneously claims that unpublished decisions are “not precedent,” whereas the Ninth Circuit’s temporary rule 36-3 prohibits citation for persuasive value, yet still specifies that unpublished opinions are “not binding precedent,” as opposed to not precedent at all. Nevertheless, “[a]ll courts of appeals agree that unpublished opinions are not binding precedent.” *Hearings, supra* note 3, at 8 (statement of Judge Alito).

49. See *infra* Part I.B (describing the effect of the rules).

50. *Hearings, supra* note 3, at 57 (statement of Judge Alito) (justifying variable rules regarding the issuance and citation of non-precedential opinions based on the differences in caseloads and internal court procedures across the circuits).

meets specific criteria qualifying the opinion for precedential status.<sup>51</sup> A few circuits use the converse rule, presuming that an opinion will be precedential unless the panel designates it otherwise.<sup>52</sup> The criteria used to make the designation vary among the circuits as well.<sup>53</sup>

Nevertheless, some common themes emerge.<sup>54</sup> Generally, opinions will be designated as precedential when they establish, alter, affect, criticize, or question existing rules of law; involve application of existing rules to unique factual circumstances; address matters of public concern; create conflicts with other circuits; or resolve conflicts among panels within the circuit.<sup>55</sup> Opinions that do not meet these criteria are designated as non-precedential.

51. FOURTH CIR. R. 36(a) (providing that opinions will be published “only” if they meet specified criteria); SIXTH CIR. R. 206 (establishing criteria for publication; opinions are designated for publication upon the request of a panel member); SEVENTH CIR. R. 53 (providing that opinions are published only if they meet the rule’s criteria because “[i]t is the policy of the circuit to reduce the proliferation of published opinions”); EIGHTH CIR. APP. I (providing that opinions should be published if they meet specific criteria); NINTH CIR. R. 36-2 (providing that opinions are published “only” if they meet specified criteria); TENTH CIR. R. 36.1 (permitting disposition of cases without opinions if they do “not require application of new points of law that would make the decision a valuable precedent”), 36.2 (specifically providing for publication only when the lower court or tribunal’s disposition has been published); ELEVENTH CIR. R. 36-2 (providing that opinions are “unpublished unless a majority of the panel decides to publish it”). It is unclear what presumption the District of Columbia Circuit’s rule creates. The rule states that opinions are published only if they meet specified criteria. D.C. CIR. R. 36. The rule also provides, however, that the court’s policy is “to publish opinions . . . that have general public interest.” *Id.* It is unclear whether the “general public interest” standard is a presumption in favor of or against making opinions precedential.

52. FIRST CIR. R. 36(b) (“In general, the court thinks it desirable that opinions be published and thus available for citation. This policy may be overcome in some situations . . .”); SECOND CIR. R. 0.23 (providing that non-precedential dispositions are made when the decision is unanimous and all judges on the panel believe no jurisprudential purpose would be served by a precedential opinion); THIRD CIR. I.O.P. 5.3 (providing that opinions that appear to have value only to the trial court or the parties are designated as not precedential); FIFTH CIR. R. 47.5 (providing that opinions will be published if they meet specified criteria; opinions are published unless each member of the panel determines that publication is not justified); FED. CIR. R. 47.6 (designating opinions as precedential unless the panel unanimously determines that an opinion should not be precedential). Interestingly, the First Circuit has the strongest policy in favor of publication and had the lowest number of non-precedential opinions in 2002 (45.4%). *Table, supra* note 38. Even so, almost half of its opinions were non-precedential.

53. *Compare, e.g.*, FOURTH CIR. R. 36(a) (providing that an opinion will be precedential if it establishes or affects a rule of law within the circuit, involves a legal issue of continuing public interest, criticizes existing law, contains an original historical review of a legal rule, resolves a conflict between panels of the court, or creates a conflict with a decision in another circuit) with TENTH CIR. R. 36.1-36.2 (providing that the court writes opinions only in cases requiring an application of new points of law that would make the decision a valuable precedent and publishes when the opinion below has been published).

54. Stephen L. Wasby, *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J. APP. PRAC. & PROCESS 325, 336-39 (2001) (noting the general stability and consistency of non-publication rules across circuits).

55. *Id.* The Fourth Circuit’s criteria are typical. *See supra* note 53.

The no-citation rules also vary considerably in the restrictions they place on citing non-precedential opinions. Four circuits prohibit citation to non-precedential opinions except in proceedings related to the underlying case.<sup>56</sup> The other nine permit citation of non-precedential opinions in unrelated cases as nonbinding authority, although citation of non-precedential opinions is often “disfavored” even where it is permitted.<sup>57</sup>

Recently, the Advisory Committee on Appellate Rules submitted a new Federal Rule of Appellate Procedure, Rule 32.1, for public comment. Rule 32.1 would eliminate citation restrictions on non-precedential opinions. The proposed rule provides that

[n]o prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as “unpublished,” “not for publication,” “non-precedential” or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.<sup>58</sup>

It could be two years or more before the proposed national rule could go into effect,<sup>59</sup> and there is no guarantee that the rule will make its way through the rest of the process with its language intact, or indeed, at all. Nevertheless, adoption of some national rule eliminating citation restrictions is likely for three reasons. First, the *Anastasoff* opinion has generated sufficient publicity in legal circles that the courts are hard pressed to continue to ignore the situation, especially given the First Amendment implications of prohibiting parties from citing to the courts’ own opinions.<sup>60</sup> Second, although non-precedential opinions and no-citation rules have been on the Judicial Conference’s agenda for more than ten years, this is the first time a proposal has been sent out for public comment,<sup>61</sup> which is another indication

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56. The Second, Seventh, Ninth, and Federal Circuits prohibit citation. Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROCESS 473, 475 (2003); see *supra* note 25.

57. Barnett, *supra* note 56, at 474-75; see *supra* note 25. It is not clear what it means to “disfavor” citation, nor is it clear how much of an impediment the court’s disfavor is to parties that want to cite non-precedential opinions.

58. REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES 29-30 (May 22, 2003), at <http://www.uscourts.gov/rules/app0803.pdf> [hereinafter ADVISORY COMMITTEE REPORT] (last visited Jan. 24, 2004); see also Tony Mauro, *Courts Move Forward on Citation Change*, LEGAL TIMES, May 26, 2003, at 8.

59. Mauro, *supra* note 58, at 8.

60. *Hearings, supra* note 3, at 53 (statement of Professor Arthur D. Hellman) (stating that, although no-citation rules do not violate the First Amendment, they implicate First Amendment concerns); Greenwald & Schwarz, *supra* note 3, at 1161-66 (arguing that no-citation rules violate the First Amendment); Salem M. Katsh & Alex V. Chachkes, *Constitutionality of “No-Citation” Rules*, 3 J. APP. PRAC. & PROCESS 287, 297-315 (2001) (arguing that no-citation rules violate the First Amendment). *But see Hearings, supra* note 3, at 15 (statement of Judge Kozinski) (doubting that no-citation rules violate the First Amendment because courts restrict the speech of lawyers in courts in a variety of ways, including through prohibitions on making false statements, even if such speech would be constitutionally protected outside the courtroom).

61. The federal courts began studying this issue over ten years ago:

that pressure for action has increased. Third, while past suggestions concerning a national rule governing non-precedential opinions have met with nearly uniform opposition from the courts, the proposed rule has met with significantly less opposition.<sup>62</sup> This is not to say that the judiciary's support for the proposed rule is unanimous; some influential judges oppose it.<sup>63</sup> Nevertheless, the mood has apparently shifted enough so that it seems likely that some type of rule eliminating citation restrictions on non-precedential opinions will eventually make its way into the Federal Rules of Appellate Procedure.

If Rule 32.1 is adopted, it will mark the first time the national rules have directly acknowledged the existence of non-precedential opinions.<sup>64</sup> Opponents of

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In 1990, the Federal Courts Study Committee recommended that the Judicial Conference establish an ad hoc committee to study whether technological advances gave reason to reexamine the policy on "unpublished" opinions. The committee did not endorse a universal publication policy, but it noted that "non-publication policies and non-citation rules present many problems." The [Judicial] Conference did not act on that recommendation.

During the past decade, amendments to the rules have been periodically proposed to the Advisory Committee on the Federal Rules of Appellate Procedure to establish uniform procedures governing "unpublished" opinions.

*Hearings, supra* note 3, at 7 (statement of Judge Alito). Aside from proposed Rule 32.1, none of the proposals sent to the Advisory Committee has made it through the process. NOVEMBER MEETING, *supra* note 35, at 37-38 & n.1 (noting that a proposal from 1991 to require the federal appellate courts to make their unpublished opinions available electronically was removed from the Advisory Committee's study agenda in April of 1998).

62. *Compare Hearings, supra* note 3, at 7 (statement of Judge Alito) (explaining that a 1998 survey of the chief circuit judges revealed virtually unanimous agreement that uniform rules regarding the issuance and citation of non-precedential opinions were unnecessary) *with id.* at 9 (statement of Judge Alito) (explaining that a survey conducted in response to a 2001 Justice Department proposal for a uniform, national rule eliminating citation restrictions revealed that several courts did not object to a rule on citation, while others still had strong reservations) *and* APRIL MEETING, *supra* note 13, at 24 (reporting that a survey of chief judges of the circuits regarding a proposal for a national rule to eliminate citation restrictions resulted in a "decidedly mixed response," with some judges supporting the proposal, some opposing it, and some failing to respond).

63. *Hearings, supra* note 3, at 54 (statement of Professor Arthur D. Hellman) (citing Michael Boudin, Chief Judge of the First Circuit, as opposing a national rule eliminating citation restrictions, because it would prevent each circuit from adopting procedures best suited to their local circumstances), 65 (statement of Judge Kozinski) (stating that abandonment of no-citation rules will exacerbate the problems of docket management in the appellate courts because if judges know their non-precedential opinions can be cited, those opinions will have to be more like precedential opinions).

64. The only reference to non-precedential opinions presently in the national rules appears in Rule 35 concerning grounds for rehearing en banc. The rule states that rehearing en banc is appropriate when a panel's decision is in conflict with an "authoritative" decision from another circuit. FED. R. APP. P. 35. The Advisory Committee notes indicate that the rule was amended in 1998 to refer to "authoritative" decisions rather than "published" decisions because of the differences among the circuits regarding the treatment of "unpublished," or non-precedential, opinions. The Advisory Committee notes following Rule 32, regarding the form of an appendix, also refer to "published" dispositions, but in the context of district court and agency decisions: "The rule permits inclusion not only of documents from the record but also copies of a printed judicial or agency decision. If a

the measure believe that it is the first step toward prohibiting non-precedential opinions.<sup>65</sup> The Advisory Committee has taken pains to assure the federal judiciary that that is not the intent of the rule. The rule says nothing about whether non-precedential opinions are permissible<sup>66</sup> or whether non-precedential opinions are binding authority, persuasive authority, or fall into some other category.<sup>67</sup> The Advisory Committee notes state expressly that the rule takes no position on either issue and affects only citation.<sup>68</sup> One preliminary version of the rule even contained language authorizing non-precedential opinions, although the Advisory Committee never seriously considered that version.<sup>69</sup>

Regardless of the Advisory Committee's intent, if the practical effect of the rule is to eliminate, or at least reduce the use of, non-precedential opinions, then that will be its effect. Opponents of the rule say that judges will have to treat non-precedential and precedential opinions the same way if non-precedential opinions can be cited as precedent. This effectively changes non-precedential opinions into

decision that is part of the record in the case has been published, it is helpful to provide a copy of the published decision in place of a copy of the decision from the record." FED. R. APP. P. 32 advisory committee's note.

65. "Those speaking against a national rule pointed out the following: . . . Many circuit judges will view this as the first step on a path that will eventually lead to the abolition of non-precedential opinions, which are unpopular among practitioners but essential for the survival of the federal appellate courts." APRIL MEETING, *supra* note 13, at 25.

66. Mauro, *supra* note 58, at 8 (saying that the Advisory Committee "sidestepped . . . the thornier question" of the courts' ability to designate opinions as non-precedential).

67. *See supra* note 48 and accompanying text (explaining how courts define the weight of non-precedential opinions by rule). *But see* Barnett, *supra* note 56, at 487-97 (analyzing proposed Rule 32.1 and arguing that its language could be interpreted to affect the weight that federal circuit courts accord to their non-precedential opinions).

68. The Advisory Committee describes the limited nature of the proposed rule in its notes:

Rule 32.1 is extremely limited. It takes no position on whether refusing to treat an "unpublished" opinion as binding precedent is constitutional. It does not require any court to issue an "unpublished" opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that decision. It says nothing about what effect a court must give to one of its "unpublished" opinions or to the "unpublished" opinions of another court. The one and only issue addressed by Rule 32.1 is the *citation* of judicial dispositions that have been *designated* as "unpublished" or "non-precedential" by a federal or state court—whether or not those dispositions have been published in some way or are precedential in some sense.

ADVISORY COMMITTEE REPORT, *supra* note 58, at 33-34 (emphasis in original).

69. Alternative A for proposed Rule 32.1 provided that "[a] court of appeals may designate an opinion as non-precedential." NOVEMBER MEETING, *supra* note 35, at 23. One reason this language was proposed was to reassure judges who might support a rule eliminating citation restrictions but for the fear that the rule would be the first step toward prohibiting non-precedential opinions. *See id.* at 23-35. Another reason was that proposing a broader rule than it would likely approve would give the Committee room for compromise later in the process. *Id.* at 35. The Advisory Committee rejected this language almost immediately, saying it did not want to pronounce by rule that such opinions are, in fact, constitutional. *Id.* Thus, it does not seem that this language was ever intended to be included in the rule, nor was it considered seriously by the Advisory Committee.

precedential opinions.<sup>70</sup> It is true that, under the proposed rule, federal appellate courts will still be able to decide cases at variance with prior non-precedential opinions without running afoul of the principle of horizontal stare decisis. It is also true that this will be more difficult to do when parties are permitted to cite non-precedential opinions. As a practical matter, it may be difficult for courts to maintain their legitimacy while rejecting prior opinions solely on the ground that they are non-precedential, and therefore, not binding. If parties are able to cite non-precedential opinions, courts are likely to feel constrained to distinguish or otherwise grapple with those opinions if the courts choose not to follow them.<sup>71</sup>

Ironically, however, contrary to the fears of its opponents, the language of the proposed rule as submitted for public comment may have the opposite effect. By implicitly recognizing the validity of non-precedential opinions, the proposed rule may further entrench the practice of issuing them. As noted above, the Advisory Committee attempts to sidestep the question of the courts' ability to issue non-precedential opinions in the notes accompanying the proposal, which emphasize the limited nature of the rule. Nevertheless, the notes may not overcome the implication that the rule itself creates.

The rule is stated in the negative (no prohibition or restriction may be imposed), but the effect is affirmatively to authorize the citation of non-precedential opinions. The very fact that the proposed rule authorizes citation to such opinions acts as an implicit acceptance of the practice of issuing them, if not an endorsement of it. Although some Federal Rules of Appellate Procedure prohibit parties and courts from taking certain actions,<sup>72</sup> none provide procedures for regulating impermissible practices.

By permitting citation to non-precedential opinions, the rule creates the inference that those opinions can validly be issued. If courts were not permitted to issue non-precedential opinions, why would a rule affirmatively permitting citation to them exist? If, in fact, courts were not permitted to issue non-precedential opinions, the appropriate rule would be one eliminating those opinions, not a rule permitting citation to them.<sup>73</sup>

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70. Judge Kozinski's view on this issue is typical: "If unpublished dispositions could be cited as precedent, conscientious judges would have to pay much closer attention to their precise wording. Language that might be adequate when applied to a particular case might well be unacceptable if applied to future cases raising different fact patterns." *Hearings, supra* note 3, at 13. The effect would be for judges to treat all of the opinions they write as precedential. *See id.*

71. Barnett, *supra* note 3, at 12 (expressing the opinion that allowing citation of non-precedential opinions will cause them to be followed more often than if they cannot be cited).

72. *See, e.g.*, FED. R. APP. P. 26(b) (prohibiting courts from extending time to file notice of appeal); FED. R. APP. P. 47(b) (prohibiting courts from imposing sanctions for violation of procedural requirements not contained in a statute, national rule, or local rule unless the party has actual notice of the requirement).

73. The Advisory Committee uses an express statement to contradict the conclusion that the rule creates by implicature. Implicature is a linguistic process people use to fill in the implied blanks in a conversation. Take, for example, a conversation in which someone says, "Would you like a cup of coffee?" and the response is, "Does the sun set in the west?" Implicature is the process by which the speaker understands that the answer to the response question (yes) is the implied answer to the question that the speaker posed. False implicature occurs when the answer to the response question is not the truthful answer to the question



The problem is that the Advisory Committee is attempting to use its notes to avoid the implication of the rule. Because Advisory Committee notes are entitled to weight in interpreting procedural rules,<sup>74</sup> some courts have been willing to read limitations into federal rules based on the notes.<sup>75</sup> Others, however, have not.<sup>76</sup> Because the Advisory Committee notes do not have the same force that the rules do, courts may not be willing to use them to create a meaning for a rule that the language of the rule itself does not support.

The Advisory Committee's disclaimer may also be ineffective because it cannot overcome the effect of the interplay between the proposed rule and Rule 47. Rule 47 provides that local rules cannot contravene national rules.<sup>77</sup> The Advisory Committee notes to the 1995 amendments to Rule 47 state that local circuit rules "may not bar any practice that these rules explicitly or implicitly permit."<sup>78</sup> When the national rules were silent on non-precedential opinions, local rules providing for their issuance did not contravene the national rules. Once the national rules address the topic, however, the local and national rules must be read in concert. If the national rules affirmatively permit the citation of non-precedential opinions, then that must mean that their issuance does not contravene the national rules. It would be contradictory for the national rules to prohibit the issuance of non-precedential opinions while simultaneously authorizing the citation of them. Accordingly, by operation of Rule 47, the implication of proposed Rule 32.1 is that local rules authorizing the designation of opinions as non-precedential are valid.

Indeed, Rule 32.1 could operate to prohibit circuits from prohibiting non-precedential opinions because doing so would bar a practice that Rule 32.1 implicitly permits. Of course, the proposed rule does not require the federal appellate courts to issue non-precedential opinions; it would merely operate to

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posed. Thus, if a prosecutor asks a witness, "Did you see the defendant brandish a gun?" and the witness answers, "I was there, wasn't I?", the answer to the second question (yes) may or may not be the truthful answer to the question posed. If it is not the truthful answer, the witness has engaged in false impicature, even though she has not made an overtly false statement. See Elizabeth Fajans & Mary R. Falk, *Shooting From the Lip: United States v. Dickerson, Role [Im]morality, and the Ethics of Legal Rhetoric*, 23 U. HAW. L. REV. 1, 15-17 (2000). The Advisory Committee's comment does not constitute false impicature. Rather, it appears to be an attempt to avoid the effect of principles of impicature.

74. *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 444-45 (1946).

75. *E.g.*, *Baylson v. Disciplinary Bd. of the Supreme Court of Pa.*, 975 F.2d 102, 108 (3d Cir. 1992) (relying in part on Advisory Committee comments limiting the permissible scope of district court local rulemaking power to determine that the local rule at issue was invalid).

76. *E.g.*, *Whitehouse v. United States District Court*, 53 F.3d 1349, 1364-65 (1st Cir. 1995) (stating that Advisory Committee comments to federal rules "cannot change the unambiguous language of a duly adopted federal Rule"); see also *id.* at 1358 n.12 ("[T]he Comment [to a federal rule] cannot substantively change the text of the rule."). In that case, the court determined that a limitation on local rulemaking power that appeared in a comment but not in the rule itself could not limit the district court's rulemaking power. *Id.* at 1365.

77. FED. R. APP. P. 47.

78. FED. R. APP. P. 47 advisory committee's notes (1995 amendment). In the case of Rule 47, the Advisory Committee notes do not attempt to create a meaning for the rule that is unsupported by its language, as opposed to the situation with the notes accompanying proposed Rule 32.1, which attempt to change the meaning of the text of the rule. Accordingly, the notes accompanying Rule 47 are entitled to weight in interpreting that rule's meaning. See *Miss. Publ'g Corp.*, 326 U.S. at 444 (stating that Advisory Committee comments are entitled to weight in interpreting federal procedural rules).

prevent those courts from prohibiting them. Moreover, if a court were to determine that non-precedential opinions are unconstitutional, the constitutional ruling would trump the provisions of the rule. This is not likely to become an issue unless and until one of the federal circuits affirmatively attempts to prohibit non-precedential opinions through its local rules or through adjudication on non-constitutional grounds, an event that is unlikely to happen anytime soon.

At present, the local rules of the federal appellate courts authorize the issuance of non-precedential opinions; set the criteria for determining which opinions will be designated as non-precedential; define the weight of non-precedential opinions; and limit, to greater or lesser degrees, parties' ability to cite non-precedential opinions. It seems likely that proposed national Rule 32.1, which eliminates the citation restrictions, or some version of it will be adopted. Although the proposed rule implicitly accepts the practice of issuing non-precedential opinions, it does not regulate the practice in any way. Thus, the local rules remain the principal mechanism that the federal appellate courts use to manage the practice of designating the majority of their opinions as non-precedential. These rules allow the federal appellate courts selectively to opt out of the principles of horizontal stare decisis, as explained in the next section.

### *B. The Effect of Non-Precedential Opinions on Horizontal Stare Decisis*

The federal appellate courts' local rules governing non-precedential opinions alter the principle of horizontal stare decisis because they operate as the mirror image of that principle.<sup>79</sup> Horizontal stare decisis is a rule defining prospectively the weight of a judicial opinion and is a rule to which the federal appellate courts say they generally adhere. That is, they are bound to follow prior opinions of earlier panels within the circuit, with limited exceptions.<sup>80</sup> The prerogative of overruling a

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79. As explained in note 6, *supra*, horizontal stare decisis refers to the requirement that courts within the same jurisdiction and at the same level adhere to their own prior decisions.

80. Every circuit follows this rule. *See, e.g., In re Grand Jury Subpoenas*, 123 F.3d 695, 697 n.2 (1st Cir. 1997); *United States v. King*, 276 F.3d 109 (2d Cir. 2002); *In re Cont'l Airlines, Inc.*, 279 F.3d 226, 233 (3d Cir. 2002); *Mentavlos v. Anderson*, 249 F.3d 301, 312-13 n.4 (4th Cir. 2001); *Martin v. Medtronic, Inc.*, 254 F.3d 573, 577 (5th Cir. 2001); *Valentine v. Francis*, 270 F.3d 1032, 1035 (6th Cir. 2001); *Brooks v. Walls*, 279 F.3d 518, 522 (7th Cir. 2002); *United States v. Pollard*, 249 F.3d 738, 739 (8th Cir. 2001); *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001); *Sumnum v. Callaghan*, 130 F.3d 906, 912 n.8 (10th Cir. 1997); *Walker v. S. Co. Servs., Inc.*, 279 F.3d 1289, 1293 (11th Cir. 2002); *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 198 (D.C. Cir. 2001); *Brubaker Amusement Co. v. United States*, 304 F.3d 1349, 1360 (Fed. Cir. 2002); Alan R. Gilbert, Annotation, *In Banc Proceedings in Federal Courts of Appeals*, 37 A.L.R. FED. 274, at § 5 (1978 & Supp. 2003) (collecting cases); *see also Union Pac. R.R. v. City of Atoka*, 6 Fed. App. 725, 730 (10th Cir. 2001) (explaining that the scope of prior precedent for purposes of adhering to an earlier panel decision includes not only the holding, but also the reasoning). *Union Pacific's* exposition of the meaning of horizontal stare decisis would not be binding on later Tenth Circuit panels because it comes from a non-precedential opinion.

The courts recognize an exception to the general rule when a later ruling by the Supreme Court, the circuit court sitting en banc, or a state's courts (on questions of state law) affects the continued validity of a prior panel decision. *See, e.g., Martin*, 254 F.3d at 577 (overruling of a prior panel's decision was unequivocally directed by controlling Supreme Court precedent); *United States v. Doe*, 819 F.2d 206, 209 n.1 (9th Cir. 1985) (stating that, when an earlier panel decision has been undermined by a later en banc

prior panel's decision belongs to the court sitting en banc.<sup>81</sup> The local rules authorizing individual panels to declare prospectively that their opinions are not precedential allow the federal appellate courts to sidestep this requirement and make participation in the entire system of precedent discretionary.

To understand the relationship between the local rules and stare decisis, it is necessary to parse the elements of rules prospectively defining the weight of a judicial opinion. Rules defining the weight of a judicial opinion involve two tribunals: the deciding court, which issues a decision in a case, and the applying court, which is a later court that has to decide whether to apply the deciding court's decision. In addition, rules defining the weight of a judicial opinion consist of two components: a general determination of the weight of the opinion based on its source within the court system<sup>82</sup> and a specific determination of the weight of the decision based on its content.<sup>83</sup> These elements are common both to stare decisis and local court rules authorizing non-precedential opinions.<sup>84</sup>

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decision, a later panel is free to reexamine the earlier panel decision); *Cooper v. Cent. & Southwest Servs.*, 271 F.3d 1247, 1251 (10th Cir. 2001) (stating that a panel must adhere to a prior panel's interpretation of state law, unless the state's courts have changed the law since the prior panel issued its decision).

Circuit courts also occasionally recognize ad hoc exceptions if circumstances so warrant. *See, e.g.*, *N.C. Utils. Comm'n v. FCC*, 552 F.2d 1036, 1044-45 (4th Cir. 1977) (determining that the panel was not bound to follow prior precedent when disqualification of all but one of the active circuit judges in the circuit prevented en banc review and quoting language from the Supreme Court that "stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision"). *But see* *Charleston v. United States*, 444 F.2d 504, 505 (9th Cir. 1971) (refusing to overrule a prior panel decision without rehearing en banc even though such a rehearing was not possible because of the timing of the case).

81. *See supra* note 80; 28 U.S.C. § 46 (2000) (providing procedures for en banc review); FED. R. APP. P. 35 (providing additional procedures for en banc review).

82. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 576 (1987) (explaining that rules of precedent presuppose rules regarding the status of the prior decision). "If a pure argument from precedent is valid, the earlier decision has a status that must be respected by a later decisionmaker, and that status is imposed by the rule of precedent independent of other status differentials." *Id.*

83. BLACK'S LAW DICTIONARY 1414 (7th ed. 1999) (defining stare decisis as the requirement that courts must follow prior decisions "when the same points arise again in litigation"). Thus, there is a content-based aspect of stare decisis. Courts routinely distinguish prior cases on the facts. *See also Hearings, supra* note 3, at 68 (letter from Alcan Aluminum Corp.) (noting that prior decisions that are not factually analogous to a pending case have never been binding on the court deciding the pending case); Schauer, *supra* note 82, at 576-79 (describing context-dependency and explaining how rules of relevance help a decisionmaker determine whether a prior decision with status requiring respect must in fact be applied in a later situation).

84. Michael Stokes Paulsen describes the process somewhat differently, referring to the "information" and "disposition" (decision-altering) functions of stare decisis. Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1544 (2000). Using his terminology, the local rules give the deciding court the discretion to remove the disposition (decision-altering) aspect of its decision by making it non-precedential. The no-citation rules then operate to remove the information aspect of the decision by prohibiting parties from bringing the decision to the applying court's attention. *See also Hearings, supra* note 3, at 52 (statement of Professor Arthur D. Hellman) (discussing the informational aspect of prior precedents, including nonbinding precedents).

Under the principles of *stare decisis*, the applying court controls the determination of the weight of a prior decision. The applying court first makes a generic determination about the weight of the prior decision based on its source.<sup>85</sup> The applying court then makes a specific determination about the weight of the prior decision based on its content. If the content of the prior decision is sufficiently different from that of the pending case, the applying court will not be bound to follow it. If the content of the prior decision is sufficiently similar to the case at bar, the applying court will be bound to follow it.<sup>86</sup>

Under the provisions of the local rules authorizing non-precedential opinions, the process is reversed, and the control over the determination of the weight of an opinion shifts from the applying court to the deciding court.<sup>87</sup> The deciding court first makes a specific determination about a pending case based on its content.<sup>88</sup> This content-based specific determination then becomes the basis for the deciding court's generic determination about the weight its opinion resolving the case should have.<sup>89</sup> If the content is such that the pending case is not important, interesting, or novel, as defined by the local rules, then the decision will not be binding on future applying courts and often cannot even be cited to them.<sup>90</sup> If the content of the case is such that it is important, interesting, or novel, then the decision qualifies for *stare decisis* treatment by later applying courts.<sup>91</sup>

In practice, of course, deciding courts have always had some control over the way their opinions were used by applying courts through control over the content

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85. For example, federal appellate courts are bound to follow the decisions of earlier panels within the circuit, but are not obligated to follow decisions from federal district courts, other circuits, or state courts. Thus, the court must first evaluate the source of an opinion to see whether it is one the court is obligated to follow.

86. *See supra* note 83.

87. The deciding court cannot control the way an applying court will characterize the deciding court's opinion. If the opinion is binding, therefore, the deciding court will be concerned about that future characterization; by announcing prospectively that its decision is not binding, the deciding court relieves itself of concern over future characterizations of its decisions. "[O]ne who worries about establishing a precedent . . . has in mind a characterization that the future will give to today's action, some category within which tomorrow's decisionmaker will place today's facts . . . . The power of precedent depends upon some assimilation between the event at hand and some other event." Schauer, *supra* note 82, at 579. Thus, goes the argument, non-precedential opinions increase efficiency by allowing the courts to rule without the need to craft language that is most likely to result in the future characterization that the deciding court prefers. *See, e.g., Hearings, supra* note 3, at 14 (statement of Judge Kozinski) (explaining that, when judges write precedential opinions, a significant amount of the time devoted to drafting the opinion is spent making the reasoning consistent with prior precedent and useful for the resolution of future cases).

88. *See supra* notes 54-55 and accompanying text (discussing typical criteria in local rules for designating opinions precedential or non-precedential). These are content-based criteria.

89. *Id.* If the content of the case falls within the prescribed categories, the deciding court designates the opinion as non-precedential, thereby conferring the generic status of non-precedential on the opinion.

90. *Id.* Even if the citation restrictions were eliminated, the deciding court would still be empowered under the local rules to designate an opinion as non-precedential, which still shifts the determination about the weight of the decision from the applying court to the deciding court.

91. *Id.*

of the opinion. That is, the deciding court could always provide so little information (in the extreme case, a one-word disposition) that the opinion would be of no value to the applying court.<sup>92</sup> The fact remains, however, that the applying court would not ignore the deciding court's opinion on the basis of the deciding court's prospective determination that the opinion was not binding; rather, the applying court would determine at the specific determination step that the prior opinion did not contain sufficient information for it to be useful to the applying court in resolving the pending case.

From a structural perspective, the local rules process does not completely supplant stare decisis because the deciding court can choose to give its opinion stare decisis treatment.<sup>93</sup> Indeed, deciding courts could make that choice in every case, thereby effectively circumventing the local rules and maintaining traditional principles of stare decisis. The difference, however, is that the local rules change the relationship between courts at the same level by shifting the control over the determination of the weight of an opinion away from the applying court and to the deciding court. In that sense, the local rules expressly modify stare decisis principles by making stare decisis discretionary with the deciding court. The local rules operate structurally to make stare decisis an "opt in" system, with the control over whether to opt in vested in the deciding court. Moreover, with approximately eighty percent of decisions designated as non-precedential, it is clear that the federal appellate courts do not choose the stare decisis option in the vast majority of cases.<sup>94</sup>

Although the local rules have both structural and practical implications, in practice, the result in most cases is the same as it would be under traditional stare decisis rules most of the time. That is, if an applying court agrees with the prior decision of the deciding court, it will apply the decision. Using the principles of stare decisis, this is the expected and normal result. With opinions designated as non-precedential, the applying court will either state that it is persuaded by the deciding court's opinion even though it is not bound by the opinion or it will ignore the deciding court's opinion but reach the same result.

Even if the applying court does not agree with the deciding court, most of the time the result will still be the same under both processes. That is, even applying the rule of horizontal stare decisis, the applying court will often be able to distinguish the deciding court's opinion on the facts at the specific determination step of the process. With opinions designated as non-precedential, the applying court need not do anything to avoid applying the deciding court's opinion; it is free simply to ignore the deciding court's opinion by virtue of the fact that the deciding

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92. See, e.g., SECOND CIR. R. 0.23 (authorizing summary dispositions); EIGHTH CIR. APP. I (authorizing disposition without opinion).

93. Some circuit rules expressly state that the panel that decides the case also determines whether the opinion will be precedential or non-precedential. FIRST CIR. R. 36; SECOND CIR. R. 0.23; FOURTH CIR. R. 36(a); FIFTH CIR. R. 47.5; SIXTH CIR. R. 206; SEVENTH CIR. R. 53; EIGHTH CIR. APP. I; ELEVENTH CIR. R. 36-2; FED. CIR. R. 47.6. Some circuit rules do not expressly state that the deciding panel makes the determination about the precedential status of its own opinions, but the implication from the rules is that that is the case. See THIRD CIR. I.O.P. 5.3; NINTH CIR. R. 36-1; TENTH CIR. R. 36.1 & 36.2; D.C. CIR. R. 36.

94. See *supra* notes 38-39 and accompanying text.

court designated its opinion as non-precedential, and therefore, not binding on the applying court.

The only time the two processes render different results is when the applying court does not agree<sup>95</sup> with the deciding court but is unable to distinguish the deciding court's opinion. The situation when courts have to apply precedent with which they do not agree is really the only time when courts actually are bound by authority as authority, that is, are constrained by a precedent because of its status.<sup>96</sup> The rest of the time, if courts are persuaded that prior decisions are correct, it does not matter whether the determination is that those decisions are binding or nonbinding.<sup>97</sup>

95. Lack of agreement may even be too strong a way to describe this situation. *Stare decisis* constrains decisionmaking when the applying court might (if writing on a clean slate) choose a different rule or outcome in the pending case than it would if it were constrained by a deciding court's prior decision, even if the applying court does not disagree with the deciding court or believe that the deciding court's prior decision was affirmatively incorrect. Incorrect decisions present thorny problems in relation to *stare decisis*, see generally Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001), but more at the Supreme Court level than at the circuit court level. Rehearing en banc and appeal to the Supreme Court, although not perfect and not generally intended for error correction, are mechanisms that can provide some check on decisionmaking at the circuit court level.

96. *Stare decisis* also constrains judicial decisionmaking when judges are uncertain about the correct answer. See Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 95 (1989).

97. Frederick Schauer, *The Authority of Legal Scholarship*, 139 U. PA. L. REV. 1003, 1005-06 (1991). As Schauer explains:

[A]n argument for obedience to authority is an argument for taking some directive as a reason for action (or reason for decision) because of its source rather than because of its content.

This is not to say that we do not frequently take directives seriously because of their content. But when we do so, it is because we are persuaded by that content rather than by its source. The notion of content-independence is designed to reflect the difference between the soldier who stops because a colleague has pointed out to him the presence of a mine and the soldier who stops because a sergeant has ordered him to do so. When the colleague says "Stop!" and no more, the soldier's first response is likely to be "Why?," requesting a *reason other than the mere issuance of the directive* for complying with its mandates. But when the sergeant says "Stop!," any good soldier knows that the last thing you say is "Why?"

The distinction between authority and persuasion, therefore, is content-independent and source-based. When the source rather than the content of a directive is a reason for taking its indications as a reason for action, an argument from authority in the strict sense exists.

*Id.* (emphasis in original) (citations omitted); see also John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503, 508 (2000) ("Norms of precedent have decisive force precisely when the court would have come out the other way had it not been following precedent."); *Hearings, supra* note 3, at 51 (statement of Professor Arthur D. Hellman) (explaining that a contrary authority on a point of law only constrains the deciding court in the rare case when three circumstances exist: (a) the earlier panel announces a new rule of law; (b) the statement of the new rule was essential to the outcome of the case; and

If the result under either system is the same most of the time, why should we care about the limited circumstances under which the results will differ? If the federal appellate courts are going to operate using the rule of horizontal stare decisis, the times when the applying court does not agree with a prior deciding court is exactly when that rule should apply. The principle of stare decisis is a "basic self-governing principle" that acts as a check on arbitrary decisionmaking.<sup>98</sup> A system that permits the courts to exempt some opinions from this self-governing mechanism allows applying courts to make arbitrary decisions because they can ignore prior opinions on an unreasoned basis, or no basis at all. This is the very type of arbitrary discretion that led the Framers to believe that courts should be bound by precedent in the first instance.<sup>99</sup> The present system also allows deciding courts to make arbitrary decisions when they know their decisions will not constrain future decisionmakers.<sup>100</sup>

In addition, the present system undermines the legitimacy of the courts.<sup>101</sup> This would be the case even if the present system never led the federal appellate courts actually to make any arbitrary decisions, which is an unlikely scenario under any adjudicatory system, given human fallibility. The ease with which the present system allows the federal appellate courts to disregard their prior opinions creates the perception of arbitrary decisionmaking. The present system also undermines the legitimacy of the courts by creating a conflict of interest for deciding courts. This conflict arises because the rules allow the same court that resolves an individual case on the merits to decide for itself the weight its decision will have for future applying courts. Moreover, for the federal appellate courts to say they will follow the principle of horizontal stare decisis while simultaneously employing rules that allow them to ignore the majority of their own decisions raises legitimacy concerns. Indeed, one could argue that it would be preferable for them expressly to abandon the principle of horizontal stare decisis than to continue the present system. Although that might not resolve concerns about arbitrary decisionmaking, it would at least reflect more accurately the weight the federal appellate courts actually accord to the majority of their opinions.

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(c) adhering to the new rule in a pending case would require the court to reach a different decision than it would otherwise reach).

98. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) ("[I]t is indisputable that stare decisis is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'") (quoting THE FEDERALIST NO. 78, at 502-03 (Alexander Hamilton) (Robert Scigliano ed., 2000)).

99. "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . . ." THE FEDERALIST NO. 78, at 502-03 (Alexander Hamilton) (Robert Scigliano ed., 2000).

100. Schauer, *supra* note 82, at 579 (explaining that the resolution of a matter is affected by the knowledge that a future decisionmaker will make use of the precedent). In this regard, non-precedential opinions are especially problematic in death penalty cases. David R. Dow & Bridget T. McNeese, *Invisible Executions: A Preliminary Analysis of Publication Rates in Death Penalty Cases in Selected Jurisdictions*, 8 TEX. J. ON C.L. & C.R. 149, 151-52 (2003). When courts issue non-precedential opinions denying relief in death penalty cases, they "can write tendentious, sloppy opinions because there is no one left alive who has an interest in holding them up to shame." *Id.* at 152.

101. Healy, *supra* note 3, at 106 (noting that the Constitution requires a legitimate judiciary for the government to function).

Certainly, a system of precedent need not and should not require absolute adherence to prior decisions. If applying courts were unyieldingly obligated to follow prior opinions, the law would become calcified and the balance between consistency and fairness that *stare decisis* seeks to achieve would tilt too far toward the consistency side of the scale.<sup>102</sup> Any generally applicable rule of horizontal *stare decisis* that the courts adopt must be flexible enough to allow for exceptions to the rule and changes to the law in appropriate cases. But when the decision about whether to participate in the system of precedent at all is made selectively by the same court that issues a decision, there is a serious risk that the consistency element will fall off the scale altogether.

The present effort to eliminate citation restrictions does not solve this problem. Although eliminating citation restrictions can make it difficult for a panel completely to disregard a prior non-precedential opinion that is on point with a pending case, the panel still will be able to do so. Moreover, an opinion in conflict with a prior non-precedential opinion may itself be non-precedential, which then allows the next panel facing the issue to disregard both opinions and take yet a third approach to an issue. If the third opinion is non-precedential, this compounds the problem further. Eliminating citation restrictions, although laudable, leaves this system intact.

Because the mechanism for making participation in the system of precedent discretionary comes from local procedural rules, the Federal Rules of Appellate Procedure seem to be a natural vehicle to consider for eliminating the mechanism nationally. The submission of proposed Rule 32.1 for public comment shows that national regulation is a possibility. Although that rule would affect only citation restrictions and would not affect the issuance of non-precedential opinions, its approval would open the door for further national regulation of the practice. In evaluating the possibility of regulating non-precedential opinions through the Federal Rules of Appellate Procedure, it is important to consider the permissible scope of those rules. Part II addresses that issue.

## II. THE NATIONAL RULEMAKING PROCESS: AN EXERCISE IN DELEGATED LEGISLATIVE AUTHORITY

Procedure in the federal courts is regulated in three ways: by federal statutes, by national rules, and by local rules. The national rules of procedure, including the Federal Rules of Civil Procedure, Criminal Procedure, Bankruptcy, Evidence, and Appellate Procedure, hold a unique status in American law. Although the federal

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102. A system of adherence to precedent requires some flexibility. The doctrine of *stare decisis* entails tensions that make strict adherence to all prior decisions all of the time unwise. Sometimes the goals of stability and legitimacy from adherence to prior decisions are in conflict with the goal of accurate judicial opinions. Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 652-55 (1999); see also Macey, *supra* note 96, at 93 (noting that principles of *stare decisis* reflect the common law's primordial tension between change and stability). *Stare decisis* cannot require blind adherence to decisions that are clearly incorrect. Doing so would undermine the courts' legitimacy, which is a principal goal of the doctrine and which depends at least to some degree on the courts' ability to correct past erroneous decisions. Conversely, however, if an exception to the doctrine allowed courts to reexamine all prior precedents in every case, the exception would swallow the rule. Lee, *supra*, at 654.



courts have inherent authority in the absence of congressional action to regulate procedure, Congress also has the authority to regulate procedure and has established a mechanism through the Rules Enabling Act for the adoption of procedural rules.<sup>103</sup> Procedural rules promulgated by the courts and adopted pursuant to this mechanism are subject to congressional review, and therefore, have statutory characteristics without actually being statutes.<sup>104</sup> Consequently, they have been characterized as a “quasi-judicial/statutory Frankenstein.”<sup>105</sup> Notwithstanding their hybrid character, national procedural rules, including the Federal Rules of Appellate Procedure, are promulgated pursuant to delegated legislative authority, and therefore, are fundamentally creatures of legislative power.<sup>106</sup> When the federal courts regulate procedure through the statutory rulemaking process, they act in a legislative capacity and cannot promulgate national rules that exceed Congress’s legislative power.

Congress has the authority to regulate procedure in the courts as a “necessary implication” of its power to create tribunals inferior to the Supreme Court, as well as by virtue of the Necessary and Proper Clause, which expressly confers on Congress the power to make laws to execute the judicial power.<sup>107</sup> Congress has delegated this authority to the United States Supreme Court to promulgate national

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103. 28 U.S.C. §§ 2071-77 (2000).

104. See *infra* notes 116-21, describing the statutory character of procedural rules. Procedural rules have been analogized to administrative regulations promulgated by executive agencies pursuant to delegated authority. Jack B. Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905, 928-29 (1976). The analogy is not perfect, however, because, unlike executive agencies that have no power to act beyond what is delegated to them, federal courts have an independent source of power to act in Article III of the Constitution.

105. E-mail from James G. Scott, Assistant Counsel, United States Senate, Office of the Legislative Counsel, to Amy E. Sloan (Mar. 25, 2003) (on file with the author).

106. See *infra* notes 119-24 and accompanying text.

107. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941) (citing *Wayman v. Southard*, among other sources, to establish Congress’s power to regulate federal court procedure); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 22 (1825) (explaining that the Necessary and Proper Clause gives Congress the authority to regulate court procedures). David Engdahl has argued that Congress has no power by necessary implication of the Tribunals Clause because that clause gives Congress only the power to establish lower courts, and nothing more. David E. Engdahl, *Intrinsic Limits of Congress’ Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 104-19. The Supreme Court has accepted the “necessary implication” of the Tribunals Clause as a source of Congress’s power to regulate procedure, but seems to construe its scope as co-extensive with that of the Necessary and Proper Clause. *Willy v. Coastal Corp.*, 503 U.S. 131, 136 (1992) (upholding district court’s imposition of Rule 11 sanctions in a case dismissed for lack of jurisdiction by saying that the Tribunals Clause, “Article I, § 8, cl. 9, authorizes Congress to establish the lower federal courts. From almost the founding days of this country, it has been firmly established that Congress, acting pursuant to its authority to make all laws ‘necessary and proper’ to their establishment, also may enact laws regulating the conduct of those courts and the means by which their judgments are enforced.”) (footnote omitted); *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) (explaining that “the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts”); see also Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 198 (2001).

procedural rules for the federal courts through the Rules Enabling Act.<sup>108</sup> This delegation traces its history to the early days of the United States.<sup>109</sup> Congress first delegated rulemaking authority to the Supreme Court in the Judiciary Act of 1789.<sup>110</sup> This authority was “reaffirmed and strengthened” in legislation enacted in 1842.<sup>111</sup> The Supreme Court failed to act on this authority, however, which led to procedural confusion in the federal courts.<sup>112</sup> Accordingly, in the Conformity Act of 1872, Congress withdrew the delegation of authority and required federal courts to use state court procedures, “any rule of court to the contrary notwithstanding . . . .”<sup>113</sup> The Conformity Act failed to achieve its purpose of making federal and state court procedures uniform for a variety of reasons, including the fact that the Constitution and federal statutes that superseded state procedural rules governed some actions in federal court.<sup>114</sup> Thus, it was not a satisfactory solution to the federal courts’ procedural difficulties. After several unsuccessful attempts, Congress renewed its delegation of statutory rulemaking authority to the courts in the Rules Enabling Act of 1934,<sup>115</sup> and that Act continues to govern rulemaking in the federal courts today.

Under the Rules Enabling Act, the federal judiciary promulgates national procedural rules. Congress then reviews the rules; unless Congress acts within a

108. 28 U.S.C. § 2072(a) (2000) (“The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.”). The rulemaking process has many steps. Generally, one of five Advisory Committees appointed by the Judicial Conference considers new or amended rules. If the Advisory Committee approves the new or amended rule, it then goes before the Committee on Rules of Practice and Procedure, commonly known as the “Standing Committee.” If the Standing Committee approves the rule, it then goes before the Judicial Conference. If the Judicial Conference approves the rule, it is then submitted to the Supreme Court. If the Supreme Court approves the rule, it transmits the rule to Congress pursuant to the Rules Enabling Act. Congress then has six months to review the rule. If Congress does not act, the new or amended rule goes into effect. If Congress does not approve the rule, it must act legislatively to reject, modify, or defer the rule. Thus, although the federal judiciary is functionally responsible for promulgating the rules, its authority is “subject to the ultimate legislative right of the Congress” to change or reject the rules. Leonidas Ralph Mecham, *The Rulemaking Process: A Summary for the Bench and Bar*, at <http://www.uscourts.gov/rules/proceduresum.htm> (last visited May 27, 2003); see also 28 U.S.C. §§ 2071-77 (2000).

109. For a comprehensive treatment of the pre-1934 history of rulemaking in the federal courts, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982). A shorter history appears in Weinstein, *supra* note 104, at 916-22.

110. Weinstein, *supra* note 104, at 916 (citing the Judiciary Act of 1789, Act of Sept. 24, 1789, ch. 20, 1 Stat. 73).

111. Burbank, *supra* note 109, at 1040 & n.103 (citing the Act of Aug. 23, 1842, ch. 188, § 6, 5 Stat. 516, 518); accord Weinstein, *supra* note 104, at 919 (citing the same Act and noting that the Act was a reaffirmation of the federal courts’ delegated rulemaking power).

112. Burbank, *supra* note 109, at 1039-41; see also Weinstein, *supra* note 104, at 918-20 (noting that, although the Supreme Court made limited efforts at rulemaking in equity, admiralty, and bankruptcy, it failed to promulgate rules of civil procedure from 1789 to 1872, when Congress withdrew delegated rulemaking authority in the Conformity Act).

113. Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197.

114. Burbank, *supra* note 109, at 1040.

115. *Id.* at 1045-95 (detailing efforts from 1906 to 1934 to convince Congress to renew its delegation of rulemaking authority to the courts).

prescribed period of time, the rules become effective as submitted to Congress,<sup>116</sup> and they are published as part of the United States Code.<sup>117</sup> They are not presented to the President for signature or veto.<sup>118</sup> Although Congress can amend existing or proposed rules by statute, the rules themselves are not true “statutes.”<sup>119</sup> Nevertheless, because they flow from Congress’s legislative power, they have the force of statutes<sup>120</sup> and are valid only to the extent that they implement congressional or legislative policy.<sup>121</sup> The “abrogation clause” of the Rules Enabling Act also confers statutory weight on the national procedural rules. That clause provides that “[a]ll laws in conflict with such [national] rules shall be of no further force or effect after such rules have taken effect.”<sup>122</sup> When a national rule and a federal statute conflict, the courts apply traditional principles of statutory interpretation to resolve the conflict, treating the national rule and statute with equivalent force.<sup>123</sup> Thus, national procedural rules are legislative in character.<sup>124</sup>

116. 28 U.S.C. §§ 2071-77 (2000).

117. In U.S.C., the rules are published with Title 28 (Judiciary and Judicial Procedure) as an Appendix. U.S.C.A. also publishes them as an Appendix to Title 28. In U.S.C.S., they are appended to the end of the code in separate “Rules” volumes.

118. U.S. CONST. art. I, § 7, cl. 2 (Presentment Clause).

119. *Apostolic Pentecostal Church v. Colbert*, 169 F.3d 409, 414-15 (6th Cir. 1999) (explaining that procedural rules are not statutes because they are promulgated through delegated authority and not usually affirmatively adopted by the legislature).

120. *See, e.g., Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385, 392 (7th Cir. 2002) (stating that the Federal Rules of Civil Procedure have the force of statutes); *Atchison, Topeka & Santa Fe Ry. Co. v. Hercules, Inc.*, 146 F.3d 1071, 1074 (9th Cir. 1998) (stating that procedural rules are as binding as any federal statute); *United States ex rel. Tanos v. St. Paul Mercury Ins. Co.*, 361 F.2d 838, 839 (5th Cir. 1966) (explaining that the Federal Rules of Civil Procedure have the same force and effect as statutes); *Am. Fed’n of Musicians v. Stein*, 213 F.2d 679, 686 (6th Cir. 1954) (stating that federal procedural rules have the force and effect of statutes); *Wilkes v. United States*, 192 F.2d 128, 129 (5th Cir. 1951) (explaining that legislative authorization and approval give procedural rules the force and effect of statutes).

121. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 15 (1940); 1 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 1.04[1][c] (3d ed. 2003).

122. 28 U.S.C. § 2072(b) (2000).

123. *See, e.g., United States v. Wilson*, 306 F.3d 231, 236 (5th Cir. 2002) (resolving conflict between FED. R. APP. P. 4 and an earlier federal statute by applying traditional principles of statutory interpretation because the court viewed the rule to be the same as a federal statute); *United States v. Kim*, 298 F.3d 746, 749 (9th Cir. 2002) (analyzing the same conflict and giving effect to the later-enacted rule because “[t]he rule trumps the statute”), *modified in other respects* by 317 F.3d 917 (9th Cir. 2003).

124. *Sibbach*, 312 U.S. at 9-10 (explaining, in the context of upholding FED. R. CIV. P. 35 and 37, that “Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States”) (citation omitted); *Hanna v. Plumer*, 380 U.S. 460, 464 (1965) (acknowledging that the Rules Enabling Act delegated congressional rulemaking authority to the courts); *see also Baylson v. Disciplinary Bd. of the Supreme Court of Pa.*, 975 F.2d 102, 107 n.1 (3d Cir. 1992) (construing a local district court rule as beyond the court’s rulemaking power and noting that “the federal courts have recognized that rulemaking authority is ultimately a legislative power residing in Congress, although delegated in large measure to the courts”) (internal citation omitted). Although *Sibbach* and *Hanna* concerned the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure are also promulgated pursuant to

One question the statutory mechanism raises is the degree to which courts retain independent, inherent<sup>125</sup> authority to regulate procedure. As the Supreme Court has recognized, the federal courts have the authority to regulate procedure in the absence of congressional action.<sup>126</sup> Thus, for example, federal courts have inherent authority to dismiss a complaint *sua sponte* for lack of prosecution,<sup>127</sup> regulate admission to the bar,<sup>128</sup> and punish contempt even in the absence of national rules or legislation authorizing those actions.<sup>129</sup> This inherent authority has been described as “self-executing” judicial power that courts, acting as courts, must have to resolve cases before them.<sup>130</sup> It is distinguishable from non-self-executing

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delegated legislative authority under the Rules Enabling Act. *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5 n.3 (1987).

125. The courts’ ability, as courts, to take the steps necessary to resolve cases before them has been described as “inherent,” “incidental,” and “implied” authority. *See, e.g.*, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 35 (1991) (resolving a case that involved the scope of a federal court’s “inherent” power to sanction); *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (referring to “implied powers” that courts possess “because they are necessary to the exercise of all others”); *ITT Cmty. Dev. Corp. v. Barton*, 569 F.2d 1351, 1360 n.20 (5th Cir. 1978) (noting that inherent powers are sometimes called “incidental” powers). These terms all refer to the same type of power and are used interchangeably. Sometimes courts also use the term “supervisory” to describe courts’ powers to take the steps necessary to resolve cases before them. *See, e.g.*, *Thomas v. Arn*, 474 U.S. 140, 145 (1985) (referring to the Sixth Circuit’s use of “supervisory powers” to adopt a procedural rule); *United States v. Horn*, 29 F.3d 754, 759 (1st Cir. 1994) (“Supervisory power [is] sometimes known as inherent power . . .”). Although the terms “supervisory power” and “inherent power” are sometimes used interchangeably, the two types of power are somewhat different. Inherent power refers to a court’s ability to take action for itself that it deems necessary to process litigation to a conclusion. Supervisory power refers to the power of an appellate court to make and review procedures used by a subordinate court. *Frazier v. Heebe*, 482 U.S. 641, 645 (1987) (referring to the Supreme Court’s “inherent supervisory power” to review local rules to ensure that they are “consistent with the principles of right and justice”) (internal citation omitted); *Burbank*, *supra* note 109, at 1040 n.102 (“‘Supervisory rulemaking’ refers to the promulgation of court rules for the conduct of proceedings in inferior courts and should be distinguished from local rulemaking, the promulgation of court rules for the conduct of proceedings in the promulgating court.”).

126. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962) (noting that inherent authority is “governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases”); *see also Chambers*, 501 U.S. at 43-44; *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980); *Hudson*, 11 U.S. at 34.

127. *Link*, 370 U.S. at 630-31.

128. *Frazier*, 482 U.S. at 645. Although the regulation of bar admission in that case was invalidated, the Supreme Court stated that the district court’s inherent authority included the authority to regulate admission to its bar. *Id.*

129. *Hudson*, 11 U.S. at 34.

130. Holding hearings, compelling witnesses, and adjudicating claims are examples of actions within the courts’ self-executing judicial power. Engdahl, *supra* note 107, at 84. Self-executing aspects of judicial power have been described as relating to “judicial potency.” Judicial potency refers to power that must necessarily inhere in the courts for them to operate as courts and fulfill their function of deciding cases. *Id.* at 81-82. If a tribunal lacked the attributes of judicial potency, it would not be a “judicial” body, at least in the way judicial bodies have been understood in Anglo-American legal traditions. *Id.*

aspects of judicial power, such as conferring jurisdiction or appointing judges, which require action by another branch of government to be effectuated.<sup>131</sup>

Because the courts and Congress share authority for procedural rulemaking in the federal courts, the boundary between legislative and judicial power in this context can be difficult to delineate. Although the federal courts have inherent, or self-executing, judicial power to regulate procedure, control over court procedures is ultimately a legislative prerogative.<sup>132</sup> Thus, on one end of the spectrum, Congress's legislative authority, whether exercised directly or delegated to the courts, can displace or limit the courts' inherent authority.<sup>133</sup> This is a function both of the Supremacy Clause, under which legislative enactments supersede judicially made rules,<sup>134</sup> and the Rules Enabling Act, which authorizes federal courts to adopt local procedural rules so long as those rules do not conflict with national rules or federal statutes.<sup>135</sup>

131. For example, Congress had the choice between vesting the judicial power in one Supreme Court or in inferior tribunals as well; even the Supreme Court could not come into existence without a determination regarding the number of justices it would have, the nomination of justices by the President, and the confirmation of those justices by the Senate. *Id.* Because the judicial branch was dependent on the other two branches to come into being, its power cannot be considered completely self-executing, as the Supreme Court recognized in 1799 when it stated that "Article III is non-self-executing with regard to subject matter jurisdiction." *Id.* at 83 (citing *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 10 n.1 (1799) (Chase, J.)) (emphasis omitted).

132. *See, e.g., Ex parte Foshee*, 21 So. 2d 827, 829 (Ala. 1945) (explaining that the legislature has the power to prescribe procedural rules for the courts and that legislative actions to regulate procedure supersede rules created by the courts); A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 3 (1958) (noting that, although courts and legislatures have "[f]or decades, if not for centuries" shared control over judicial rulemaking, legislatures have been "conceded ultimate authority over virtually the entire procedural area"); Weinstein, *supra* note 104, at 906 ("The taproot of rulemaking power in this country is legislative delegation, though there is also nourishment from the inherent role of a constitutionally independent judiciary.").

133. The lower federal courts' exercise of inherent power can be limited by statute or rule. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991); *see also Palermo v. United States*, 360 U.S. 343, 353 n.11 (1959) (noting that the Supreme Court's power to make procedural rules exists only the absence of legislation); *United States v. Horn*, 29 F.3d 754, 759-60 (1st Cir. 1994) (noting that the Supreme Court has made clear the general proposition that Congress may limit the inherent power of lower federal courts to regulate procedure by rule or statute).

134. U.S. CONST. art. VI, § 2; *see also Katsh & Chachkes, supra* note 60, at 316-19 (explaining that "rules promulgated under a court's inherent power are subservient to the supremacy of statutory or constitutional dictates" and differentiating courts' "inherent" Article III power to regulate procedure from rules generated through the statutorily created rulemaking process). For example, the Conformity Act of 1872 directed courts to use state law procedures regarding "the practice, pleadings, and forms and modes of proceeding" in civil actions, "any rule of court to the contrary notwithstanding," thereby displacing court rules adopted pursuant to inherent authority. Act of June 1, 1872, ch. 255, §§ 5-6, 17 Stat. 196, 197; *see also Chisolm v. Gilmer*, 299 U.S. 99, 102-03 (1936) (holding that the Conformity Act of 1872, which directed federal courts to use state procedures, superseded a federal district court's local rule establishing a procedure for the same action that differed from the state procedure).

135. 28 U.S.C. § 2071 (2000).

On the other end of the spectrum are aspects of procedure that the courts can regulate, but that are beyond Congress's power. Both state and federal courts have invalidated legislative attempts to regulate procedure in ways that intrude on the courts' inherent judicial power, on the ground that the legislation violates principles of separation of powers.<sup>136</sup> Thus, for example, state courts have struck down statutes requiring written opinions in every case,<sup>137</sup> delaying the issuance of a mandate for thirty days,<sup>138</sup> attempting to control the management of the court's docket,<sup>139</sup> and relieving parties of the judicially created obligation that they identify appealable errors and issues in their briefs.<sup>140</sup> Many of these decisions are relatively old state court decisions, but federal decisions of more recent vintage have cited

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136. See e.g., cases cited *infra* notes 137-40, 151; see generally Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283 (1993) (arguing that, although Congress has some authority to make procedural rules for the federal courts, the courts also possess exclusive, inherent rulemaking power over some matters).

137. Compare *Houston v. Williams*, 13 Cal. 24, 25-26 (1859) (invalidating a state statute requiring the appellate courts to issue written opinions in all cases because courts retain the discretion to determine whether and how to deliver their opinions) and *Vaughan v. Harp*, 4 S.W. 751, 752 (Ark. 1887) (quoting *Houston* in invalidating a state statute requiring the court to "deliver written opinions in all cases involving a principle of law not previously settled by the court and reported") with *State v. Gary*, 247 S.E.2d 420 (W. Va. 1978) (adopting a rule through adjudication and pursuant to the court's inherent authority requiring decisions to deny bail when it is requested and opposed to be in writing).

Imposing requirements regarding the manner in which courts deliver their opinions is a common example used to illustrate impermissible legislative control over court procedures. See, e.g., *Hearings*, *supra* note 3, at 8 (statement of Judge Kozinski) (suggesting that legislatures cannot require courts to issue written opinions); Paulsen, *supra* note 84, at 1590, 1591 n.154 (questioning whether Congress could forbid federal judges from writing concurring or dissenting opinions and concluding that the power to speak the law includes the power to decide the content and manner of delivering opinions); Levin & Amsterdam, *supra* note 132, at 30 (using the requirement that courts issue written opinions in every case as an example of legislation that interferes with the exclusive domain of the judiciary). Thus, the fact that the West Virginia court used its inherent authority to impose such a requirement seems to be especially persuasive for showing that courts have inherent authority to regulate aspects of procedure that are beyond legislative control.

138. *Burton v. Mayer*, 118 S.W.2d 547 (Ky. 1938) (relying on a state constitutional provision vesting legislative power in the legislature and judicial power in the courts).

139. *State ex rel. Kostas v. Johnson*, 69 N.E.2d 592 (Ind. 1946) (relying on the state constitution's vesting clauses to invalidate a statute that permitted transfer of a matter held under advisement for longer than ninety days to another judge); *State ex rel. Watson v. Merialdo*, 268 P.2d 922 (Nev. 1954) (invalidating a statute that conditioned judges' pay on an affirmation that no matter on the docket had been pending for longer than ninety days; the court based the decision on the state constitution's vesting clauses, as well as a provision prohibiting reduction of judges' salaries during their terms of office); *Riglander v. Star Constr. Co.*, 90 N.Y.S. 772 (App. Div. 1904) (striking down a statute giving scheduling preference to certain types of cases), *aff'd*, 73 N.E. 1131 (N.Y. 1905); *Atchison, Topeka & Sante Fe Ry. Co. v. Long*, 251 P. 486 (Okla. 1926) (invalidating a statute that required courts to try certain tax cases within ten days after the defendant answered).

140. *Solimito v. State*, 122 N.E. 578 (Ind. 1919) (invalidating a statute removing the requirement that the appellant present in the brief every error and exception upon which the appeal is based). The following year, the court reaffirmed its ruling and refused to overrule *Solimito*. *Epstein v. State*, 128 N.E. 353 (Ind. 1920).

them for the proposition that courts retain inherent authority beyond legislative reach.<sup>141</sup>

Although the federal courts claim this power, the outer limit of Congress's power to regulate procedure has been characterized as uncharted territory.<sup>142</sup> Legislative attempts to control or limit the courts' exercise of their inherent authority have been rare,<sup>143</sup> and the federal courts have been reluctant to invalidate legislative regulations of procedure on the ground that they intrude on the courts' exclusive authority. Thus, although the federal courts assert that they have inherent authority beyond Congress's reach,<sup>144</sup> they consistently interpret procedural legislation in ways that avoid direct conflict between legislative and judicial power.<sup>145</sup> For example, the Supreme Court interpreted a statute requiring jury trials in contempt matters to apply only to criminal contempt to avoid ruling that the statute impermissibly encroached on the courts' inherent authority to punish contempt.<sup>146</sup> Time limits for judicial action, which state courts have invalidated, have also been permitted by federal courts. In upholding the time limits, the federal courts have ruled that they retain equitable power to adjust the timetable as

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141. See, e.g., *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 562 n.7 (3d Cir. 1985) (collecting sources for the proposition that courts retain inherent autonomy in some matters); *United States v. Brainer*, 691 F.2d 691, 695-99 (4th Cir. 1982) (citing *State ex rel. Kostas v. Johnson*, 69 N.E.2d 592 (Ind. 1946); *Riglander v. Star Constr. Co.*, 90 N.Y.S. 772 (N.Y. App. Div. 1905); *Atcheston, Topeka & Santa Fe Ry. Co. v. Long*, 251 P. 486 (Okla. 1926); and other cases and assuming "without deciding that federal courts possess some measure of administrative independence such that congressional intervention would, at some extreme point," encroach on the courts' exclusive inherent authority).

142. E.g., *United States v. Horn*, 29 F.3d 754, 760 n.5 (1st Cir. 1994) (noting that the question of whether the courts retain "some residuum of supervisory power" that Congress may not regulate, "or may only be regulated up to a certain point," has not been resolved); *In re Stone*, 986 F.2d 898, 901 (5th Cir. 1993) (noting that prior cases have not identified the precise inherent powers that courts possess that are beyond congressional reach). This is a question the federal courts have avoided for many years. See, e.g., *Michaelson v. United States*, 266 U.S. 42, 66 (1924) (acknowledging that Congress can regulate the federal courts' inherent authority "within limits not precisely defined"); *Nudd v. Burrows*, 91 U.S. 426, 442 (1875) (declining to reach the issue of how far Congress can impair the courts' inherent powers or dictate the manner in which the courts exercise those powers).

143. *United States v. Rojas*, 53 F.3d 1212, 1214 (11th Cir. 1995) (noting that congressional attempts to control the judiciary's inherent authority are rare); *Stone*, 986 F.2d at 901 (noting that the judiciary has core inherent powers that cannot be regulated by Congress, but that Congress has rarely attempted to interfere with those powers).

144. See, e.g., cases cited *infra* notes 146-47; *Rojas*, 53 F.3d at 1214-15 (noting that federal courts have inherent authority beyond Congress's reach, but its exact scope is uncertain; holding that a statute under which foreign nations certify their willingness to be subject to U.S. drug laws did not violate those inherent powers); *Eash*, 757 F.2d at 562 (identifying three types of inherent judicial authority, including authority derived from Article III that is so essential to judicial functioning that it is beyond legislative control). *Eash's* description of the categories of inherent authority has been cited by other courts, but the Supreme Court has not found it necessary to adopt *Eash's* approach. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 n.12 (1991).

145. Linda S. Mullenix, *Judicial Power and the Rules Enabling Act*, 46 MERCER L. REV. 733, 738 (1995) (characterizing the federal courts as having "largely capitulated, with only muted objection, to Congress's conclusory fiats on rulemaking power").

146. *Michaelson*, 266 U.S. at 66-67.

necessary, even when the statutory language has not so provided;<sup>147</sup> that the time limit is merely advisory or hortatory;<sup>148</sup> and that the time limit does not require a decision by a particular time, but rather, temporarily adjusts the obligations of the parties until the court rules.<sup>149</sup>

Although the federal courts are reluctant to invalidate procedural statutes on the ground that they interfere with the courts' exclusive, inherent authority, the Supreme Court has done so on rare occasions. The Court has made it clear that it can, through adjudication, adopt procedural rules required by the Constitution, and that Congress has no authority to amend or abrogate those rules through legislation.<sup>150</sup> Further, although Congress can change substantive rules of decision in ways that are outcome determinative, it cannot use procedure to dictate the result in an individual case without changing the underlying substantive rule.<sup>151</sup> Thus, although the federal courts have acceded almost completely to congressional control over court procedures, some areas still remain exclusively within the courts' control.

In the middle are procedural matters that Congress could, but has not, regulated. The Supreme Court has stated that federal courts "may, within limits, formulate procedural rules not specifically required by the Constitution or the

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147. *Hadix v. Johnson*, 144 F.3d 925, 937 (6th Cir. 1998) (upholding the Prison Litigation Reform Act's provisions automatically staying prospective relief if the district court does not rule within the statutory time limit by reading in equitable power to stay the stay); *United States v. Brainer*, 691 F.2d 691, 695-99 (4th Cir. 1982) (accepting that the courts possess some inherent authority beyond Congress's reach, but upholding the Speedy Trial Act's time limits because the Act contains a number of exceptions permitting the court to extend the time, including a general authorization to extend the time for "good cause"); *cf. Miller v. French*, 530 U.S. 327 (2000) (rejecting the reasoning of *Hadix* but upholding the statute on other grounds).

148. *In re Siggers*, 132 F.3d 333, 336 (6th Cir. 1997) (noting that courts have inherent authority to control the docket, but ruling that the time limit in the Antiterrorism and Effective Death Penalty Act for courts of appeals to decide on successive habeas corpus petitions does not impermissibly infringe on that authority because the time limit is "hortatory or advisory rather than mandatory").

149. *Miller*, 530 U.S. 327 (upholding the Prison Litigation Reform Act's provisions automatically staying prospective relief if the district court does not rule within the statutory time limit on the ground that the statute imposes temporary consequences for failure to rule within the time limit, but does not actually require a ruling within the time limit).

150. *Dickerson v. United States*, 530 U.S. 428 (2000). In that case, the Supreme Court determined that the judicially created procedural rule to safeguard against coerced criminal confessions adopted in *Miranda v. Arizona*, 384 U.S. 436 (1966), could not be superseded by a federal statute enacted after *Miranda* providing a different rule. The Court explained that, although Congress retains the ultimate authority over non-constitutional procedural rules adopted by the judiciary, it does not have the power to modify or abrogate judicially created procedural rules that are required by the Constitution. *Id.* at 437.

151. *See, e.g., United States v. Klein*, 80 U.S. (13 Wall.) 128, 147-48 (1871) (determining that a statute, which provided that presidential pardons of individuals who supported the confederacy during the Civil War could not be used to show entitlement to return of property seized during the war, exceeded Congress's power).



Congress.”<sup>152</sup> This power flows both from delegated legislative authority and inherent authority.

The delegated legislative authority comes from the provision of the Rules Enabling Act that empowers federal courts to promulgate local rules.<sup>153</sup> These rules may be promulgated pursuant to the statutory mechanism or adopted through adjudication.<sup>154</sup> It also comes from the national rules, which authorize lower federal courts to promulgate local rules and regulate procedure in individual cases in any manner consistent with federal statutes and national and local rules.<sup>155</sup>

This authority is also inherent in the courts.<sup>156</sup> For example, federal district courts have used their inherent authority to promulgate local rules requiring prosecutors to obtain approval from the court before serving a subpoena on an attorney,<sup>157</sup> prohibiting television cameras in the courtroom,<sup>158</sup> and sanctioning an attorney.<sup>159</sup>

In the context of regulating procedure in individual cases, the Supreme Court upheld a district court’s imposition of sanctions that would not have been authorized by Federal Rule of Civil Procedure 11 or a federal statute permitting awards of attorneys’ fees.<sup>160</sup> The Supreme Court determined that the rule and statute added to, but did not displace, the district court’s inherent authority to impose sanctions in an individual case. The district court’s action did not contravene the rule or statute, and Congress did not displace the district court’s inherent authority to act in the case, because the sanctions were imposed for conduct not addressed by the rule or statute.<sup>161</sup> By contrast, a federal district court lacked inherent authority to grant an untimely motion for judgment of acquittal because doing so was directly contradictory to a national rule.<sup>162</sup> Congress’s

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152. *Carlisle v. United States*, 517 U.S. 416, 426 (1996) (quoting *United States v. Hastings*, 461 U.S. 499, 505 (1983)) (ruling that the district court lacked inherent authority to grant an untimely motion for judgment of acquittal).

153. 28 U.S.C. § 2071 (2000).

154. *Ortega-Rodriguez v. United States*, 507 U.S. 234, 253 (1993) (explaining that FED. R. APP. P. 47 authorizes the federal circuit courts to make procedural rules “through rulemaking or adjudication”) (Rehnquist, C.J., dissenting); *Thomas v. Arn*, 474 U.S. 140, 145-46 (1985) (characterizing a rule adopted in a Sixth Circuit opinion, under which failure to object to a magistrate’s recommendation at the district court level results in waiver of the right to appeal to the circuit court, as a rule of procedure adopted pursuant to the Sixth Circuit’s inherent authority).

155. FED. R. CIV. P. 83 (authorizing district courts to adopt local rules for civil matters); FED. R. CRIM. P. 57 (authorizing district courts to adopt local rules for criminal matters); FED. R. APP. P. 47 (authorizing the circuit courts to adopt local rules for appeals).

156. *See* *Katsh & Chachkes*, *supra* note 60, at 319 n.118 (collecting cases in which local procedural rules were upheld based on the courts’ inherent authority to promulgate them).

157. *Whitehouse v. United States District Court*, 53 F.3d 1349 (1st Cir. 1995). The Third Circuit ruled the opposite way on this issue, but only because it thought the local rule was in conflict with a national rule, not because district courts lack inherent authority to regulate procedure. *Baylson v. Disciplinary Bd. of the Supreme Court of Pa.*, 975 F.2d 102, 108 (3d Cir. 1992).

158. *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 20 n.6 (2d Cir. 1984).

159. *In re Sutter*, 543 F.2d 1030, 1037-38 (2d Cir. 1976).

160. *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991).

161. *Id.* at 46-52.

162. *Carlisle v. United States*, 517 U.S. 416, 426 (1996).

delegated legislative authority displaced the court's inherent authority in that instance.

The national procedural rules, including the Federal Rules of Appellate Procedure, fall on the legislative side of the spectrum because they are promulgated pursuant to delegated legislative authority and are ultimately within Congress's control. Congress has direct review over them.<sup>163</sup> It can add, modify, or reject rules when the courts submit them for review,<sup>164</sup> or in any piece of legislation.<sup>165</sup> Thus, the matters subject to regulation through the national rules are limited to those Congress could also validly regulate by statute. This limitation is not generally an issue because most procedural matters could validly be regulated either by Congress or the courts. It is, nevertheless, a limitation on the permissible scope of the national rules. To permit regulation of matters exclusively within the federal courts' inherent authority through the national rules would be tantamount to permitting Congress to legislate matters beyond its authority. As a consequence, for national rules adopted pursuant to the Rules Enabling Act, the federal courts' inherent authority has been displaced by Congress's legislative authority.<sup>166</sup>

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163. Local rules, by contrast, are not subject to congressional review. The Rules Enabling Act and the national rules provide that local rules cannot contravene federal statutes or national rules, thereby limiting the permissible scope of local rules. 28 U.S.C. § 2071(a) (2000); FED. R. CIV. P. 83; FED. R. CRIM. P. 57; FED. R. APP. P. 47. Local rules promulgated pursuant to the Rules Enabling Act and national rules are not, however, submitted to Congress for review. Local circuit rules are subject to review only by the Judicial Conference, and local district rules are subject to review by the judicial conference of the circuit. 28 U.S.C. § 2071(c). All local rules, whether promulgated pursuant to the Rules Enabling Act or adopted through adjudication, are subject to review by the courts if they are challenged through litigation. *See, e.g., Frazier v. Heebe*, 482 U.S. 641 (1987) (using supervisory authority to invalidate a local procedural rule promulgated pursuant to the Rules Enabling Act and FED. R. CIV. P. 83); *Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993) (invalidating the Eleventh Circuit's local rule, adopted through adjudication and challenged on direct appeal, which provided that fugitives returned to justice after conviction, but before sentencing and notice of appeal, waive their right to appeal); *Whitehouse v. United States District Court*, 53 F.3d 1349 (1st Cir. 1995) (invalidating in a declaratory judgment action a local district rule requiring court approval prior to service of subpoenas on attorneys, which was promulgated pursuant to the Rules Enabling Act and FED. R. CRIM. P. 57).

164. 28 U.S.C. § 2074 (2000).

165. For example, in the USA Patriot Act, Congress amended the Federal Rules of Criminal Procedure. Pub. L. No. 107-56, §§ 203(a)(1), 219, 115 Stat. 272, 278-80, 291 (2001) (amending FED. R. CRIM. P. 6 & 41). The Antiterrorism and Effective Death Penalty Act included amendments to FED. R. APP. P. 22(a) concerning writs of habeas corpus. Pub. L. No. 104-132, § 103, 110 Stat. 114, 118 (1996). *See also* *United States v. Dickerson*, 530 U.S. 428, 437 (2000) ("Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution.").

166. *See supra* notes 133-34 (explaining that Congress's delegated legislative authority can displace the courts' authority to adopt procedural rules). The dissenting justices in a 1995 Supreme Court decision implicitly accepted this limitation on the permissible scope of national procedural rules in arguing that a statute that reopened final judgments in securities cases was constitutional. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (Stevens and Ginsburg, JJ., dissenting). The dissent referred to Federal Rule of Civil Procedure 60(b), which permits courts to reopen final judgments, as a "statute." *Id.* at 256. Justices Stevens and Ginsburg then argued that, if Rule 60(b) is constitutional, Congress must also have the

The requirement that national procedural rules be limited to matters within Congress's legislative power exists notwithstanding the fact that some national rules govern matters that in the past have been considered beyond legislative control, such as the content of appellate briefs<sup>167</sup> or the requirement that some dispositions be issued in writing.<sup>168</sup> The courts' lack of objection to some aspects of the national rules stems from the fact that the federal courts themselves submitted those rules to Congress. If Congress attempted to change those requirements in favor of requirements that impeded the federal courts' ability to function, such as a requirement that all dispositions be in writing, the courts might well find that the rules intrude on matters beyond legislative control.<sup>169</sup> What these examples illustrate is that at least some aspects of "[r]ulemaking of necessity fall[] into a blurred area where precise separation of the powers of the independent branches is inappropriate."<sup>170</sup>

The fact that some of the national rules fall into a gray area of shared legislative and judicial power "does not, however, require total abandonment of the concept [of separation of powers] in the context of rulemaking."<sup>171</sup> It is true that the federal courts have the inherent authority to regulate most aspects of procedure in the absence of congressional action, and it is also true that the inclusion of rules relating to matters traditionally outside of legislative control have made their way unchallenged into national rules promulgated pursuant to delegated legislative authority. This does not mean, however, that the federal courts are free to call upon their inherent authority to justify national procedural rules on matters that Congress could not legislate. Fundamentally, the national rules, like the Federal Rules of Appellate Procedure, must be limited to matters Congress could legislate because they flow from delegated legislative power, not from judicial power. It may be difficult in some instances to delineate precise boundaries between legislative and judicial power and, for technical matters, it may not be worth the effort. Where the boundaries can be drawn, however, they must be observed, especially in matters of

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authority to reopen final judgments through the statute at issue in the case. *Id.* at 256-57. This argument assumes that the Federal Rules of Civil Procedure are statutory enactments and that they cannot authorize actions beyond Congress's legislative power. Congress seems to concur that rulemaking is a legislative act. Edwin J. Wesley, *The Civil Justice Reform Act; The Rules Enabling Act; The Amended Federal Rules of Civil Procedure; CJRA Plans; Rule 83—What Trumps What?*, 154 F.R.D. 563, 570 (1994) (identifying references in the Civil Justice Reform Act's legislative history referring to limitations on rulemaking power delegated to the Supreme Court and to Congress's exclusive power to enact procedural rules). *But see* Mullenix, *supra* note 136, at 1287 ("Congress is wrong in declaring—as it does in the legislative history to the [Civil Justice Reform] Act—that it has exclusive federal rulemaking power.").

167. FED. R. APP. P. 28 (establishing the required contents of appellate briefs).

168. FED. R. APP. P. 24(a)(2) ("If the district court denies the motion [for a party to proceed in forma pauperis], it must state its reasons in writing.").

169. *See infra* Part III.A (setting out the analysis for determining whether a statute impermissibly interferes with the federal courts' judicial power); *Hearings, supra* note 3, at 16 (statement of Judge Kozinski) (suggesting that a statute requiring written opinions in every case, struck down in *Houston v. Williams*, might still be unconstitutional today).

170. Weinstein, *supra* note 104, at 928.

171. *Id.*

policy.<sup>172</sup> Because the national rules are statutory in character, they can validly regulate only matters within Congress's legislative authority.

### III. CONSTITUTIONAL LIMITS ON PROHIBITING NON-PRECEDENTIAL OPINIONS BY STATUTE OR NATIONAL RULE

Proposed Federal Rule of Appellate Procedure 32.1 is the first effort on the national level to regulate the federal appellate courts' use of non-precedential opinions. Although the proposed rule affects only citation practices, some judges believe it is the first step toward prohibiting non-precedential opinions through the national rules.<sup>173</sup> Because the Federal Rules of Appellate Procedure are fundamentally statutory in character, their permissible scope is co-extensive with Congress's legislative authority to regulate court procedures. Even if Congress were not motivated to act on its own on this issue, attempts to regulate the process through the national rules could spur Congress to exercise its legislative power in ways that would effectively prohibit non-precedential opinions.

For example, if a national rule prohibiting prospective designation of opinions as non-precedential were submitted for congressional review, it could go into effect without congressional action. The rule would only be valid, however, if Congress could directly legislate its content.<sup>174</sup> Alternatively, if a national rule authorizing the present practice were proposed, along the lines of the language to that effect in an early version of proposed Rule 32.1,<sup>175</sup> Congress could act legislatively to change that rule. If Congress simply abrogated the rule in its entirety, the federal appellate courts would revert to their present local rules governing non-precedential opinions. Congress has been known, however, to rewrite rules submitted for review.<sup>176</sup> The submission of a rule authorizing prospective designation of opinions as non-precedential could prompt Congress to legislate a contrary rule. Moreover, if Rule 32.1 is adopted in its present form, its implied acceptance of non-precedential opinions could cause Congress to act affirmatively to prohibit the practice of issuing them.<sup>177</sup>

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172. *Id.* at 929-30 (suggesting that Congress refrain from adjusting technical details of national rules submitted for its review and limit its review to basic policy issues).

173. *See supra* notes 65-69 and accompanying text.

174. *See supra* Part II.

175. Alternative A for proposed Rule 32.1 provided that "[a] court of appeals may designate an opinion as non-precedential." NOVEMBER MEETING, *supra* note 35, at 23. *See supra* note 69 and accompanying text for discussion of this proposal. Although the Advisory Committee has indicated that it is not inclined to propose a rule to that effect at this time, it is possible that one could be proposed in the future.

176. 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1001 (3d ed. 2002) (noting a new trend since the early 1980s in which Congress increasingly involves itself in rulemaking and listing examples in which Congress amended rules submitted for review and enacted procedural legislation outside of the rulemaking review process); Mullenix, *supra* note 145, at 735-36 (noting that "[j]udicial rulemaking was a truly soporific issue until the early 1980s, when Congress unexpectedly began to flex its legislative muscle in the procedural rulemaking arena," resulting in "what can only be charitably characterized as Congress's arrogant, heavy-handed usurpation of procedural rulemaking authority in the last decade"); *see also supra* note 165.

177. *See supra* notes 72-78 and accompanying text (explaining how proposed Rule 32.1 implicitly accepts the use of non-precedential opinions).

Such a rule or statute raises constitutional concerns about whether it intrudes on an aspect of procedure committed to the exclusive, inherent authority of the courts. A rule or statute that required the federal appellate courts to give binding weight to all of their opinions all of the time would not be constitutional because it would interfere with their ability to interpret the law in the context of adjudicating individual cases free from legislative control.<sup>178</sup> It would not be necessary, however, for Congress to go that far.

Instead, Congress could simply remove the federal appellate courts' discretion to opt out of their own rules of precedent. Congress could do this by prohibiting the panels deciding cases (or individual judges or internal committees of any type) from prospectively designating some of their own opinions as non-precedential. This would make all opinions subject to the generally applicable rules of precedent in force within the circuit. A statute of this type would not intrude on the federal appellate courts' Article III powers because it would not define the weight, if any, that they must accord to their own prior opinions, nor would it dictate a rule of precedent for the courts. The federal appellate court would remain free to create or change the generally applicable rules defining the weight of prior opinions, as they are now. All the statute would do is prevent the federal appellate courts from opting out of whatever rules of precedent they adopt by prospectively categorizing selected opinions in a way that takes them outside the system of precedent.<sup>179</sup>

Proposed Rule 32.1, if adopted, would also invoke Congress's legislative power because it is a national rule. Rule 32.1 does not present precisely the same constitutional issues that a statute or rule prohibiting prospective designation of selected opinions as non-precedential does because it addresses only citation practices. It, too, is constitutional because it leaves control over the rules of precedent with the courts.

Part III.A first explains the standards for evaluating the constitutionality of a rule or statute prohibiting selective prospective designation of opinions as non-precedential. Part III.B analyzes the constitutionality of such a rule or statute. Part III.C then proceeds to analyze the constitutionality of proposed Rule 32.1. Because the national procedural rules flow from delegated legislative authority, the use of the term "statute" below includes both legislation and national rules.

#### *A. The Constitutional Framework for Analyzing Statutes and Procedural Rules*

The federal courts acknowledge that regulation of court procedure is a legislative prerogative, but Congress cannot legislate in ways that intrude on the courts' judicial power without running afoul of separation of powers principles.<sup>180</sup>

178. Paulsen, *supra* note 84, at 1596; *see also infra* Part III.B.

179. *See infra* Part III.B.

180. Although Congress can validly regulate court procedures in general, it would be possible for a procedural rule to interfere with the federal courts' ability to perform their functions to such an extent that it would violate separation of powers principles. Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 *MERCER L. REV.* 697, 725 (1995); *see generally* Mullenix, *supra* note 136 (arguing that separation of powers limitations prevent Congress from regulating procedure in ways that encroach on judicial power); Dean Alfange, Jr., *The Supreme Court and the Separation of Powers: A Welcome Return to Normalcy?*, 58 *GEO. WASH. L. REV.* 668, 672 (1990) (discussing how the Supreme Court has resolved separation of powers questions).

The Constitution vests each “department” of government with its own duties and powers.<sup>181</sup> Each branch is limited to the performance of functions committed to it by the Constitution, and the other branches are not permitted to intrude on those functions. This concept of separation of powers is an accepted limitation on the actions of all three branches of government.<sup>182</sup>

For federal legislation to be valid, therefore, it cannot exceed the legislative authority granted to Congress by the Constitution,<sup>183</sup> nor can it intrude on another branch’s power. The Necessary and Proper Clause authorizes Congress to enact legislation that is necessary and proper for executing the judicial power.<sup>184</sup> The Supreme Court has also said that the power to establish lower federal courts carries with it the power to regulate their procedures, but this power must be “supported by a grant of federal authority contained in Article I or some other section of the Constitution.”<sup>185</sup> Thus, although these two clauses appear to be separate sources of legislative authority, the Supreme Court treats them as co-extensive.<sup>186</sup> Even though the Constitution grants Congress affirmative authority to legislate court procedures, that legislation cannot intrude on the federal courts’ Article III judicial power. The analysis of these two factors—whether the legislation is supported by an affirmative grant of power and whether it intrudes on the federal courts’ judicial power—collapses into one in the context of procedural legislation. A procedural statute that intrudes on the courts’ Article III power would not be a “proper” executory statute, and therefore, would exceed Congress’s legislative authority.<sup>187</sup>

181. U.S. CONST. arts. I, II, & III (referring to governmental branches as “departments” and defining the respective duties and powers of each department).

182. *Miller v. French*, 530 U.S. 327, 342 (2000) (noting that the Constitution requires the separation of judicial and legislative power); *INS v. Chadha*, 462 U.S. 919, 951 (1983) (explaining that the Constitution divides the government into three branches “to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility”); *Buckley v. Valeo*, 424 U.S. 1, 120-22 (1976) (explaining that, although the Constitution does not require “hermetic sealing off of the three branches of government from one another,” it nonetheless established a system of separation of powers).

183. Authority for legislation must come from an enumerated power. *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997); *see also McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (noting that the federal government is one of enumerated powers); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (noting that the powers of the legislature are defined and limited).

184. U.S. CONST. art. I, § 8, cl. 18.

185. *Hanna v. Plumer*, 380 U.S. 460, 471 (1965).

186. *See supra* note 107.

187. To be valid under the Necessary and Proper Clause, a statute must be both necessary and proper. U.S. CONST. art. I, § 8, cl. 18. A statute is “necessary” if its means are suitably related to its ends. *McCulloch*, 17 U.S. at 413-14. The “necessary” requirement, therefore, has not proven to be a significant restraint on Congress. *Lawson, supra* note 107, at 199.

To be “proper,” legislation cannot encroach on the judiciary’s Article III powers. *See generally* Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993) (analyzing the meaning of the term “proper” in the Sweeping Clause (otherwise known as the Necessary and Proper Clause) and concluding that the clause constrains Congress’s choice of means to execute federal powers in a variety of ways, including limiting congressional actions to those that do not usurp the constitutional powers of another branch of the federal government); *see also Paulsen, supra* note 84, at 1568 (arguing that Congress could

Accordingly, the pivotal question is whether a statute prohibiting federal appellate courts from prospectively designating selected opinions as non-precedential intrudes on the courts' judicial power.

In determining whether the actions of one branch intrude on powers vested in another branch, the Supreme Court has taken two alternative approaches, the formalist approach and the functionalist approach.<sup>188</sup> The formalist approach is rule-bound and almost syllogistic.<sup>189</sup> It evaluates whether the action of one branch usurps a function that the Constitution vests in another branch. Once a function is categorized as "legislative," "executive," or "judicial," then performance of that function by another branch violates separation of powers, except in those instances in which the Constitution grants authority for shared power. Under this approach, Congress cannot legislatively usurp for itself or delegate to another branch functions committed to the federal courts as part of their Article III judicial power.<sup>190</sup>

The functionalist approach evaluates whether the action of one branch impedes another branch in the performance of its constitutional duties. This approach accepts that complete separation of government powers is impossible. It balances the risk that one department will become too powerful relative to the other branches against the social goals sought to be accomplished. Under this approach, legislation through which Congress exercises "some" judicial power is valid so long as it does not give Congress "too much" power or unduly undermine the courts' ability to perform their "essential" or "core" functions.<sup>191</sup> The functionalist approach finds support in the Madisonian view of separation of powers. According to Madison, the Constitution permits the three branches of government to have "*partial agency in*" or "*control over the acts of each other.*"<sup>192</sup> The principle of separation of powers is subverted only "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department."<sup>193</sup> Something less than one branch's whole power, however, can be shared by another branch.<sup>194</sup> The functionalist approach, therefore, balances the allocation of power between branches.

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statutorily eliminate stare decisis for the Supreme Court in abortion cases, but acknowledging that such a statute would have to be "proper" to be valid).

188. These two approaches are described in a multitude of sources. See, e.g., Mullenix, *supra* note 136, at 1290-92; Redish, *supra* note 180, at 709-12; Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 362-63.

189. Redish, *supra* note 180, at 709-10; Vermeule, *supra* note 188, at 363.

190. "The Constitution prohibits one branch from encroaching on the central prerogatives of another." *Miller v. French*, 530 U.S. 327, 341 (2000); see also *Buckley v. Valeo*, 424 U.S. 1, 121-22 (1976) (explaining that Congress cannot transfer its legislative power to the President or the judicial branch, nor can it take on executive or judicial power for itself) (citing *Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928)).

191. See *supra* note 188. Deciding what is "too much" power and whether an action "unduly" undermines another branch's authority can be difficult. Redish, *supra* note 180, at 711-12 (describing functionalist models as indeterminate); Mullenix, *supra* note 136, at 1293-94 (explaining that a functionalist approach requires balancing interests involved in questions of allocation of power).

192. THE FEDERALIST NO. 47, at 309 (James Madison) (Robert Scigliano ed., 2000) (emphasis in original).

193. *Id.* at 309 (emphasis in original).

194. Vermeule, *supra* note 188, at 363.

The Supreme Court's opinion in *Plaut v. Spendthrift Farm, Inc.*<sup>195</sup> illustrates the analysis of separation of powers conflicts between Congress and the judiciary under both approaches. In that case, Congress passed a statute retroactively extending the statute of limitations for certain claims under the Securities Exchange Act of 1934. The effect of the statute was to reopen final judgments for some claims that had been dismissed as untimely before Congress extended the statute of limitations.<sup>196</sup> The Supreme Court invalidated the statute on separation of powers grounds.

The majority opinion used a formalistic approach.<sup>197</sup> It defined the judicial power to include the power to render dispositive judgments.<sup>198</sup> Because the statute usurped the judicial function of finally resolving individual cases on the merits, it violated separation of powers principles.<sup>199</sup> The majority rejected any sort of functionalist balancing. According to the majority, "the doctrine of separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified."<sup>200</sup> It is, therefore, a "prophylactic device" establishing clear distinctions between legislative and judicial power.<sup>201</sup>

Justice Breyer's concurrence, by contrast, illustrates the functionalist approach. According to Justice Breyer, if a statute risks giving too much power to Congress, it is invalid.<sup>202</sup> He concluded that a statute that reopens final judgments sometimes presents this risk, but not always. The statute at issue in *Plaut* presented that risk because it applied only retroactively and only to a small, identifiable group of people. It therefore risked singling out particular individuals for oppressive treatment by the government<sup>203</sup> and constituted a legislative attempt "to *apply*, as well as *make*, the law."<sup>204</sup> Thus, Justice Breyer concurred with the majority in declaring the statute unconstitutional.

The dissenters also employed functionalist analysis, but reached the opposite conclusion. According to the dissent, statutes that involve some commingling of the functions of the legislative and judicial branches are permissible so long as they pose no danger of aggrandizement of Congress's power or undue encroachment on the judiciary's power.<sup>205</sup> The retroactive reopening of the judgments affected by the longer statute of limitations did not direct the outcome in the reopened cases. It "merely remove[d] an impediment to judicial decision on the merits," and therefore, did not violate separation of powers principles.<sup>206</sup>

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195. 514 U.S. 211 (1995).

196. *Id.* at 212-17.

197. The *Plaut* majority's strongly formalist approach has been characterized as "alarm clock formalism." This is the jurisprudential equivalent of setting an alarm clock one hour early so that one wakes on time even if one sleeps after the alarm clock goes off. In the separation of powers context, it refers to using overprotective rules to guard against attempts to encroach on judicial power. Vermeule, *supra* note 188, at 365-66.

198. *Plaut*, 514 U.S. at 219.

199. *Id.*

200. *Id.* at 239 (emphasis in original).

201. *Id.*

202. *Id.* at 241-42 (Breyer, J., concurring).

203. *Id.* at 242-44.

204. *Id.* at 241 (emphasis in original).

205. *Id.* at 260 (Stevens and Ginsburg, JJ., dissenting) (citation omitted).

206. *Id.*



As *Plaut* demonstrates, both the formalist and functionalist approaches hold sway with various members of the Supreme Court. The Supreme Court has not been consistent in its choice of approaches for resolving separation of powers questions.<sup>207</sup> For this reason, its contemporary separation of powers jurisprudence has been criticized as “unpredictable, ad hoc justice.”<sup>208</sup> Moreover, although the formalist and functionalist labels provide some assistance in understanding contemporary separation of powers cases, older cases are harder to categorize and could reasonably be justified using either approach.<sup>209</sup> Analyses of decisions in which the Supreme Court has considered statutes affecting the judiciary illustrate the variable approaches the Court has taken.

The Supreme Court has invalidated statutes affecting the judiciary on separation of powers grounds in three circumstances: when the statute vests review of judicial decisions outside of Article III courts,<sup>210</sup> attempts to direct the outcome of an individual case on the merits,<sup>211</sup> or, as in *Plaut*, reopens final judgments.<sup>212</sup> As discussed above, the *Plaut* majority used a formalist approach, but the decision could have been justified on functionalist grounds as well, as Justice Breyer’s concurrence shows. The same is true of the other decisions invalidating legislative encroachments on judicial power.

In *Hayburn’s Case*,<sup>213</sup> a statute granted to an executive officer the review of courts’ Article III decisions regarding entitlement to pensions. The Supreme Court invalidated the statute on the ground that Congress could not delegate Article III powers to another branch of government. Doing so usurped the courts’ judicial power. Similarly, in *United States v. Klein*,<sup>214</sup> the Supreme Court refused to give effect to a statute directing it to treat a presidential pardon as evidence of disloyalty barring compensation for goods confiscated during the Civil War. According to the Court, the statute was an attempt by Congress to dictate the result in an individual case pending before the Court, in effect directing judgment in favor of the

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207. Compare, e.g., *INS v. Chadha*, 462 U.S. 919 (1983) (using formalist analysis to strike down the legislative veto) with *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986) (rejecting formalism expressly and using a functionalist balancing test in upholding the Commission’s power to hear state law counterclaims).

208. Mullenix, *supra* note 136, at 1295.

209. The formalist approach is also evident in some of the state court decisions invalidating procedural statutes. These decisions defined judicial power broadly, to include matters related to the internal functioning of the courts, such as control over the docket or over the content of briefs. They then concluded that legislative control of these matters usurped the judicial function. See *supra* notes 137-40 and accompanying text. The federal courts generally have not defined the judicial power as broadly as some state courts have. See generally Vermeule, *supra* note 188 (detailing the analytical approaches in state cases addressing separation of powers questions and contrasting them with the approaches used by the federal courts).

210. *Hayburn’s Case*, 2 U.S. (2 Dall.) 408, 409 (1792); see also *Plaut*, 514 U.S. at 218 (explaining that *Hayburn’s Case* “stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch”); *Miller v. French*, 530 U.S. 327, 342-43 (2000) (quoting *Plaut* on the meaning of *Hayburn’s Case*).

211. *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

212. *Plaut*, 514 U.S. at 218-19.

213. 2 U.S. (2 Dall.) at 409.

214. 80 U.S. (13 Wall.) at 128.

government, and thereby usurping the judicial function of deciding cases.<sup>215</sup> The language in both cases sounds formalistic, referring to usurpation of functions committed to the judiciary. It would be easy to reach the same results, however, using functionalist analysis. Vesting review of judicial decisions in executive officers and directing the outcome in individual cases could easily be seen as vesting “the whole judicial power” in another branch and unduly impeding the courts in the performance of their judicial function of resolving cases on the merits.

The Supreme Court has also upheld legislation that potentially diminished the judicial power against separation of powers challenges. Two examples are *Mistretta v. United States*<sup>216</sup> and *Commodity Futures Trading Commission v. Schor*,<sup>217</sup> both of which showcase functionalist reasoning. In *Mistretta*, the Supreme Court upheld the Sentencing Reform Act, which established the United States Sentencing Commission (“USSC”). The USSC is charged with creating sentencing guidelines for federal crimes. The guidelines shift most of the discretion in determining appropriate sentences from individual district court judges to the USSC.<sup>218</sup> The Court reasoned that this shift was constitutional because sentencing has never been the exclusive province of the courts, but rather, has historically resided in a “‘twilight area’ in which the activities of the separate Branches merge.”<sup>219</sup> Prior to the creation of the USSC, Congress had established by statute the ranges of punishments for federal crimes; judges had exercised virtually unlimited discretion in determining punishments for individual defendants within the statutory ranges; and executive officers, through the parole process, had determined how much of their sentences defendants actually served.<sup>220</sup>

The Court determined that the statutory scheme did not alter the balance of power between the legislative and judicial branches to such a degree as to violate the Constitution.<sup>221</sup> The USSC, although it is an independent body, is located within the judicial branch. Because significant control over sentencing remains with the judiciary, the USSC’s activities did not diminish the courts’ judicial power.<sup>222</sup> The creation of the USSC also did not aggrandize the judicial branch by giving the judiciary legislative power more properly belonging to Congress, nor did it undermine the integrity of the judicial branch by involving it in policy matters better resolved by the political branches of government.<sup>223</sup>

The Court also balanced the policy justifications for the creation of the USSC against the potential effect on judicial power. One reason for the creation of the USSC was dissatisfaction over disparities in sentences imposed on similarly situated defendants. Earlier attempts to address this problem had not been

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215. *Id.* The exact scope of *Klein* has been a subject of ongoing debate. The modern gloss on the opinion, however, is that it stands for the proposition that Congress cannot direct the outcome of an individual case without changing the underlying substantive law. See, e.g., *Miller*, 530 U.S. at 348-49 (explaining *Klein*); *Plaut*, 514 U.S. at 218 (explaining *Klein*).

216. 488 U.S. 361 (1989).

217. 478 U.S. 833 (1986).

218. *Mistretta*, 488 U.S. at 363-67.

219. *Id.* at 386.

220. *Id.* at 364-65.

221. *Id.* at 395.

222. *Id.*

223. *Id.* at 393.

successful.<sup>224</sup> Indeed, the Court characterized the problem of sentencing disparities as a “seemingly intractable dilemma.”<sup>225</sup> Accordingly, any reallocation of powers occasioned by the creation of the USSC was justified by the need to create an expert body to undertake “the intricate task of formulating sentencing guidelines.”<sup>226</sup>

In *Schor*, the Supreme Court determined that the Commodity Futures Trading Commission (“CFTC”), an entity empowered to resolve claims of violations of the Commodity Exchange Act, could hear state law counterclaims arising out of the disputes the CFTC was empowered to hear.<sup>227</sup> In considering the separation of powers challenge to having state law claims adjudicated by a non-Article III tribunal, the Court engaged in functionalist balancing. It “declined to adopt formalistic and unbending rules,” choosing instead to “weigh[] a number of factors, . . . with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary.”<sup>228</sup>

The Court determined that the statutory scheme, although a departure from Article III’s requirements, did not aggrandize Congress’s power or impermissibly diminish the judiciary’s power for several reasons: the CFTC is limited to hearing state law counterclaims; it resolves cases only in a narrow substantive area of law; its decisions are reviewable by Article III courts; and litigants retain the option of pursuing their claims in court instead of before the CFTC.<sup>229</sup> In reaching its conclusion, the Supreme Court considered Congress’s purpose in creating an expert body capable of resolving specific types of claims inexpensively.<sup>230</sup> It also explained that Congress could not displace the federal courts by creating a system of non-Article III tribunals empowered to resolve all cases that Article III courts ordinarily would resolve, but determined that the de minimis intrusion on the judicial power occasioned by the statutory scheme in this case was justified.<sup>231</sup>

Although the use of the functionalist approach generally signals that legislative action will be upheld against a separation of powers challenge,<sup>232</sup> the Supreme Court recently upheld provisions of the Prison Litigation Reform Act using an essentially formalist approach in *Miller v. French*.<sup>233</sup> The Court considered a

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224. *Id.* at 365-66.

225. *Id.* at 384.

226. *Id.* at 412.

227. *Schor*, 478 U.S. at 841.

228. *Id.* at 851.

229. *Id.* at 852-56.

230. *Id.* at 856.

231. *Id.* at 855-56.

232. Some have observed that use of the formalist approach generally results in invalidation of the challenged action, while use of the functionalist approach generally results in upholding the challenged action. *See, e.g.*, Mullenix, *supra* note 136, at 1292 n.31. Interestingly, in the context of challenges to legislation involving conflicts between the federal judiciary and Congress, the Supreme Court has recently applied formalist analysis. *See, e.g.*, *Miller v. French*, 530 U.S. 327 (2000); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). In the context of legislation involving cooperation (or at least not involving conflict) between the federal judiciary and Congress, by contrast, the Supreme Court has used functionalist analysis. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361 (1989); *Schor*, 478 U.S. at 847-48 (1986).

233. 530 U.S. 327.

provision of the Act that automatically stays injunctions in prison litigation if a district court does not make specific findings within the statutory time limit.

In upholding the automatic stay provision, the majority defined the judicial power narrowly, as the power to decide individual cases finally on the merits. It then concluded that, because the automatic stay provision is temporary, suspending a judicial order only until the district court makes the requisite findings, it does not usurp the judicial function of finally deciding cases on the merits.<sup>234</sup> The automatic stay provision “does not by itself ‘tell judges when, how, or what to do.’”<sup>235</sup>

The majority then turned to the issue of the time limit triggering the automatic stay. The prisoners argued that placing a deadline on judicial decisionmaking interferes with core judicial functions, a functionalist argument that the majority rejected. The majority stated that time limits in general do not implicate the structural concerns of separation of powers because they do not “deprive courts of their adjudicatory role,” but rather, merely “encourage[] courts to apply [new substantive standards] promptly.”<sup>236</sup> The majority declined to say whether a time limit could, in theory, be so short that it would effectively usurp the courts’ adjudicatory function.<sup>237</sup>

As these cases demonstrate, the Supreme Court has used both formalist and functionalist approaches in resolving cases involving separation of powers conflicts between the federal judiciary and Congress. The Court’s recent use of formalism in *Miller* and *Plaut* suggests that it might be inclined toward a formalist approach in evaluating a statute prohibiting prospective designation of selected opinions as non-precedential. This is especially so because the statute would directly affect judicial decisionmaking, as did the statutes at issue in those cases. Nevertheless, some of the justices clearly adhere to functionalism; thus, the statute could be evaluated under that approach as well. Accordingly, the next Part analyzes such a statute using both formalist and functionalist approaches, showing that it is constitutional under either approach.

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234. *Id.* at 346.

235. *Id.* (quoting the lower court’s opinions in *French v. Duckworth*, 178 F.3d 437, 449 (7th Cir. 1999) (Easterbrook, J., dissenting from the denial of rehearing en banc)).

236. *Id.* at 349-50. The application of new substantive standards to a prior order did not present a constitutional problem because the orders at issue provided prospective relief. Congress does not violate separation of powers by changing the substantive standards justifying prospective relief. Because injunctions are subject to the continuing jurisdiction of the court, they are not the “final word” of the judicial department and are subject to revision based on changes to the underlying substantive law. *Id.* at 347.

237. *Id.* at 350. The brevity of the time limit was an issue for the concurring justices. They were concerned that the time limit might be so short that the automatic stay would inevitably go into effect. *Id.* at 352 (Souter and Ginsburg, JJ., concurring). If that were the case, Congress would, for all practical purposes, have “usurp[ed] the judicial function of determining the applicability of a general rule in particular factual circumstances.” *Id.* Without further fact finding on that issue, however, the concurring justices were unable to conclude that the statute was unconstitutional. *Id.* The dissenters would have interpreted the statute to avoid the constitutional question by reading in authority for courts to extend the time if necessary. *Id.* at 354 (Breyer and Stevens, JJ., dissenting).

*B. Could Non-Precedential Opinions Be Prohibited by Statute or National Rule?*

A statute prohibiting selective prospective designation of opinions as non-precedential can be justified on formalist and functionalist grounds. The statute would not usurp a judicial function, nor would it unduly diminish judicial power or aggrandize legislative power at the expense of judicial power. Accordingly, no matter which analytical methodology is used, the statute would be constitutional.

The analysis of the statute using either approach starts from the premise that the federal appellate courts' practice of designating opinions as non-precedential is constitutional. This premise is not without controversy. Adherence to precedent has been described as "of fundamental importance to the rule of law."<sup>238</sup> The Supreme Court, in its most detailed exposition of the role of stare decisis in constitutional adjudication, stated that "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."<sup>239</sup> Nevertheless, the Constitution clearly does not require absolute adherence to precedent.<sup>240</sup> The Supreme Court has repeatedly said that stare decisis is judicial policy, not a constitutional requirement. As recently as 2003, the Supreme Court reaffirmed that "[t]he doctrine of stare decisis is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command."<sup>241</sup>

238. *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991); *see also Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989).

239. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854 (1992); *see Patterson*, 491 U.S. at 172 ("The Court has said often and with great emphasis that 'the doctrine of stare decisis is of fundamental importance to the rule of law.' Although we have cautioned that 'stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision,' it is indisputable that stare decisis is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'") (citations omitted); *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986) (explaining that stare decisis ensures against erratic changes in the law and protects society's expectation that fundamental legal principles are founded on law, rather than on individual judges' proclivities); *see also Hearings, supra* note 3, at 50 (statement of Professor Arthur D. Hellman) (stating that allowing courts to decide cases without regard for prior precedent "violates basic norms of equality and indeed the rule of law").

240. *See cases cited infra* note 241; *see also Healy, supra* note 3, at 54-91 (arguing that history supports the proposition that, even if courts generally were expected to follow precedent, they were not expected to give precedential effect to all of their decisions).

241. *Lawrence v. Texas*, 123 S. Ct. 2472, 2483 (2003) (invalidating Texas sodomy law as violative of privacy rights under the Due Process Clause and overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986)). The Supreme Court has repeatedly noted that stare decisis is not "an inexorable command." This precise phrase appears regularly in the Supreme Court's discussions of stare decisis. *See, e.g., Agostini v. Felton*, 521 U.S. 203, 235-36 (1997); *Payne v. Tennessee*, 501 U.S. 808, 827-30 (1991). Even *Casey*, in which the Court used stare decisis to justify reaffirmation of *Roe v. Wade*, recognized that horizontal stare decisis is not a constitutional mandate. *Casey*, 505 U.S. at 854. As the Court explained in *Payne*, courts cannot adhere to prior precedent in all circumstances:

Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. Adhering to precedent is usually the

Although strict adherence to prior precedent is not constitutionally compelled, the question of the constitutionality of prospectively designating opinions as non-precedential has not been definitively resolved. In *Anastasoff v. United States*, the Eighth Circuit concluded that issuing non-precedential opinions exceeded the courts' Article III judicial power.<sup>242</sup> Some have argued that non-precedential opinions may violate due process.<sup>243</sup> Others have argued that non-precedential opinions are permissible.<sup>244</sup> The Advisory Committee on Appellate Rules deliberately declined to address the question of the permissibility of issuing non-precedential opinions, opting instead simply to address citation restrictions. The Advisory Committee did so in part because it did not want to weigh in on the constitutionality of the practice.<sup>245</sup>

Determining whether the practice of issuing non-precedential opinions is or is not constitutional is something only the federal courts can do. The power to say what the law is includes the power to interpret the Constitution; Congress cannot tell the courts what the Constitution means or requires.<sup>246</sup> The federal courts have consistently upheld the practice of issuing non-precedential opinions. The lone exception, *Anastasoff*, was vacated by the Eighth Circuit sitting en banc, and the Supreme Court has declined (so far) to address the issue.<sup>247</sup> Thus, although sound arguments support the conclusion that non-precedential opinions are unconstitutional, the federal courts do not seem likely to reach that conclusion anytime soon.

If non-precedential opinions are unconstitutional, a statute prohibiting them would not present a constitutional problem. From a formalist perspective, the judicial power cannot include the power to do unconstitutional acts. Thus, Congress does not usurp the judicial power by prohibiting an unconstitutional method of decisionmaking. From a functionalist perspective, Congress cannot

wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right. Nevertheless, when governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent. Stare decisis is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision.

*Payne*, 501 U.S. at 827-28 (citations and internal quotations omitted); see also Richard H. Fallon, Jr., *Stare decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 581-82 (2001) (arguing that excessive focus on the Supreme Court's description of stare decisis as judicial policy is a mistake because the use of the term "policy" implies only that stare decisis is a principle that can be overridden in appropriate circumstances and because the fact that a principle is not absolute does not mean that it lacks constitutional stature).

242. 223 F.3d 898 (8th Cir.), vacated as moot, 235 F.3d 1054 (8th Cir. 2000) (en banc).

243. See, e.g., Melissa H. Weresh, *The Unpublished, Non-Precedential Decision: An Uncomfortable Legality?*, 3 J. APP. PRAC. & PROCESS 175, 193-95 (2001).

244. See, e.g., K.K. DuVivier, *Are Some Words Better Left Unpublished?: Precedent and the Role of Unpublished Decisions*, 3 J. APP. PRAC. & PROCESS 397 (2001); Healy, *supra* note 3.

245. See *supra* note 69 (explaining why the Advisory Committee took no position on the permissibility of non-precedential opinions).

246. See *infra* notes 252-53 and accompanying text (explaining that the task of constitutional interpretation belongs to the courts).

247. See *supra* notes 14-18 (setting out the history of litigation on the issue of non-precedential opinions).

aggrandize itself or take on too much power by prohibiting the courts from using unconstitutional means of reaching decisions.<sup>248</sup> Moreover, it would not be possible for the federal courts legitimately to declare non-precedential opinions unconstitutional and simultaneously to strike down a statute prohibiting them. For the federal courts to conclude that the issuance of non-precedential opinions is unconstitutional, but that they retain power beyond Congress's reach to continue to use an unconstitutional method of decisionmaking, strains credulity. Accordingly, if a statute prohibiting the federal appellate courts from prospectively designating selected opinions as non-precedential presents a constitutional problem at all, it must be because the statute prohibits a practice that the federal courts may constitutionally employ.

### 1. Formalist Analysis

The formalist approach posits that Congress cannot perform a judicial function that the Constitution commits to the federal courts as part of their Article III judicial power. A formalist analysis of the statute, therefore, turns on whether Congress usurps a judicial function by eliminating the federal appellate courts' ability prospectively to designate selected opinions as non-precedential. Congress does not usurp a judicial function simply by eliminating the federal appellate courts' ability selectively to opt out of their own rules of precedent. Accordingly, the statute would survive constitutional scrutiny under the formalist approach.

A statute that prohibits selective prospective designation of opinions as non-precedential does not dictate the result in an individual case, and therefore, does not violate the principle of *United States v. Klein*.<sup>249</sup> *Klein* prohibits Congress from directing the result in an individual case without changing the underlying substantive rule.<sup>250</sup> A statute prohibiting selective prospective designation of opinions as non-precedential does not direct the federal appellate courts to rule in favor of any party in any case.<sup>251</sup> Thus, it does not contravene *Klein*.

The statute also leaves the federal appellate courts free to interpret the law in any way they see fit. Interpreting the law is unquestionably a judicial function. As the Supreme Court said 200 years ago, "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."<sup>252</sup> Alexander Hamilton's *Federalist No. 78*, one of the most commonly cited sources of understanding about the scope of the judicial power, also described judges' authority to interpret the law in the context of the need to give them lifetime tenure:

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248. Gary Lawson has argued that Congress has no power to control judicial decisionmaking, even when the courts use unconstitutional methods to decide cases. Lawson, *supra* note 107, at 194-95. This argument, however, reaches too far. Taken to its logical extreme, it would prevent Congress from prohibiting courts from deciding cases based on coin flips or skin color. Michael Stokes Paulsen, *Lawson's Awesome*, 18 CONST. COMMENT. 231, 232 (2001).

249. 80 U.S. (13 Wall.) 128 (1871).

250. *Id.*

251. See *supra* note 215 (explaining the modern gloss on *Klein*).

252. *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803).

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It must therefore belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.<sup>253</sup>

The power to interpret the law includes the authority to choose methods of decisionmaking.<sup>254</sup> If Congress could tell the courts what process to use in interpreting the law, it could control outcome, in effect telling the courts what the law is.<sup>255</sup> “[I]t is almost silly to say that the core of the judicial power is merely the power to reach a result, without reference to the process by which that result is reached. Accordingly, Congress can pass substantive laws, but it cannot tell the courts how to identify, construe, and apply them.”<sup>256</sup>

253. THE FEDERALIST NO. 78, at 498 (Alexander Hamilton) (Robert Scigliano ed., 2000). *See also*, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363-65 (2001) (explaining that defining constitutional guarantees is the responsibility of the Supreme Court, not Congress); *City of Boerne v. Flores*, 521 U.S. 507, 519-24 (1997) (same). The ability to interpret and implement the Constitution has been described as one of the minimum requirements of judicial independence. Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 325-26 (1999); *see also* Redish, *supra* note 180, at 712.

254. Alexander Hamilton confirmed that the Framers understood the power to interpret the law to include the power to choose methods of decisionmaking. He explained that federal courts would have the power to interpret conflicting statutes, and if the statutes could not be reconciled, to determine which statute was in force. THE FEDERALIST NO. 78, at 498-99 (Alexander Hamilton) (Robert Scigliano ed., 2000). The method for making that determination “is a rule not enjoined upon the courts by legislative provision but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law.” *Id.* at 436; *see also* *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 225 (1995) (“If the legislature cannot . . . indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly, by . . . directing what particular steps shall be taken in the progress of a judicial inquiry.”) (quoting Thomas Cooley’s 1868 treatise on constitutional law).

255. Once Congress vests authority in the federal courts to adjudicate a case, it is prohibited by separation of powers principles from controlling the outcome of the case, either by directing a decision for one of the parties or by excluding from the court the power to resolve particular legal or factual questions that arise in the case. Redish, *supra* note 180, at 713; *see also* Burbank, *supra* note 253, at 335-36 (decisional independence is necessary for the resolution of ordinary cases according to the law).

256. Lawson, *supra* note 107, at 211. The ability of the federal courts “to interpret and apply, rather than create, substantive legal principles in the specific context of an individual adjudication, free from control or interference by the purely political branches of the federal government” has been termed decisional independence. Redish, *supra* note 180, at 717; *cf.* *Plaut*, 514 U.S. at 218-19 (“The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy . . . .”) (emphasis in original).

The power to choose decisionmaking methodologies is not absolute. Congress legislatively controls judicial decisionmaking in a variety of ways, including through the Federal Rules of Evidence and statutes requiring deferential standards of review for certain agency decisions, to name just two examples. Paulsen, *supra* note 84, at 1583-90. Nevertheless, Congress cannot control the way the federal courts interpret the law.



Thus, for example, Congress cannot tell the courts that Case A means X and is to be interpreted as such, even if Congress could enact X as the substantive rule of decision, and it certainly could not dictate the meaning of Case A if the case interpreted the Constitution. Congress could not control the decisionmaking process by saying that, in statutory interpretation, courts must first look at A, then B, and then C, which would effectively be a statute defining the weight of authorities A, B, and C.<sup>257</sup> To do so would be an attempt to control the courts' determination of cases involving statutory interpretation on the merits and would effectively make Congress the judge in its own case on questions of statutory interpretation. Similarly, if a statute prohibiting selective prospective designation of opinions as non-precedential is a backdoor method of controlling the federal courts' interpretation of the law, then it usurps a judicial function.

As long as the statute did not specify the weight, if any, that federal appellate courts must accord to their own opinions, it would leave the courts in control of the rules of precedent. The principles of horizontal stare decisis that the federal appellate courts presently follow require them to treat all precedential opinions issued by panels within the circuit as binding precedent.<sup>258</sup> If, by statute, federal appellate courts were prohibited from prospectively designating selected opinions as non-precedential, all federal appellate decisions would then necessarily belong to the precedential category. That would have the effect of making all opinions binding authority on later applying courts within the circuit.<sup>259</sup>

Although this would be the effect of the statute under the presently existing principles of horizontal stare decisis, the statute would not require that result. It would leave the courts free to make any generally applicable rule of horizontal stare decisis they desired. Indeed, as long as the statute merely prohibited *selective* prospective designation of opinions as non-precedential, it would not require the federal appellate courts to follow horizontal stare decisis at all. If they wanted to adopt a rule prospectively declaring *all* of their opinions non-precedential, in effect abandoning the requirement of horizontal stare decisis, they would be free to do so under the statute as long as they determined that doing so comports with the Constitution.<sup>260</sup>

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257. Lawson, *supra* note 107, at 212-13, raises a version of this hypothetical. He rejects this type of statute, saying that the choice among decisionmaking methods, including how much weight to give to various authorities, is inherent to the judicial power; thus, congressional regulation of this type would not be proper. *Id.* at 214; *see also* Fallon, Jr., *supra* note 241, at 576-77 (arguing that a statute that directs courts to give less weight to prior cases than they would under principles of stare decisis also impermissibly controls decisionmaking because it effectively directs the court to give greater significance to other methods of decisionmaking, such as original understanding).

258. *See* AMY E. SLOAN, BASIC LEGAL RESEARCH: TOOLS & STRATEGIES 4-6 (2d ed. 2003) (explaining differentiations among types of authority, including the difference between binding and nonbinding authority).

259. *See supra* note 80.

260. *See, e.g.,* Katsh & Chachkes, *supra* note 60, at 288 n.5 (questioning whether horizontal stare decisis in the federal appellate courts is constitutionally required and suggesting that the rule may simply be one of convenience and prudence). Abandoning horizontal stare decisis would not eliminate the problem of arbitrary decisionmaking and could exacerbate it. Although the statute would leave this option open for the courts, it is unlikely that they would take it, even assuming that it would be constitutional for them to do so. Stare decisis prevents courts from having to revisit the same issues repeatedly. Thus,

Moreover, as long as the statute focused on *prospective* designation of the precedential status of opinions, it would not force an all-or-nothing choice between making all cases either fully binding precedent or not precedent at all. There are gradations of precedent, some of which are entitled to greater deference than are others.<sup>261</sup> A statute that prohibited selective prospective designation of opinions as non-precedential would still permit the federal appellate courts to create different categories or tiers of precedent. For example, Stephen Barnett has advocated the creation of a new category of “overrulable” precedent. A panel decision designated as “overrulable” would be binding unless and until a later panel overruled it in a fully binding opinion. A fully binding opinion would be subject to the usual rule of horizontal stare decisis; later panels within the circuit would be required to follow it unless and until it was reversed or overruled by the court sitting en banc or the Supreme Court.<sup>262</sup> Nothing in the statute would prevent courts from adopting a system like that.

Finally, acting as applying courts,<sup>263</sup> the federal appellate courts could recognize exceptions to the rule of horizontal stare decisis as circumstances so require, including ad hoc exceptions, as they have done in the past.<sup>264</sup> The only thing they could not do is selectively “opt out” of their own system of precedent, whatever that system might be, by prospectively designating selected opinions as non-precedential and, therefore, outside of the system.

Of course, the judicial power is more than the power to reach a result. It also includes the power to express the reasoning of a decision; the result and the reasoning often cannot be divorced from one another.<sup>265</sup> Judges have argued that the ability to designate opinions prospectively as non-precedential, while not result

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despite claims that making all opinions precedential would create too much work for the courts, eliminating horizontal stare decisis could actually create more work by requiring courts to revisit settled issues.

261. Barnett, *supra* note 3, at 22-25 (identifying five categories of precedent and suggesting that relaxation of the law of the circuit rule might give federal appellate courts the flexibility to manage their dockets without prospectively declaring some opinions non-precedential); *see also Hearings, supra* note 3, at 46-47 (statement of Professor Arthur D. Hellman) (criticizing polarized positions under which courts must either treat non-precedential opinions as fully binding or be free to disregard them entirely and suggesting that more nuanced alternatives for defining precedent would be useful).

262. Barnett, *supra* note 3, at 22-25. Barnett uses the term “published” opinion to describe the type of binding opinion subject to the usual rule of horizontal stare decisis. *Id.* Whether Congress could, by statute or rule, establish this type of precedential system for the federal appellate courts is questionable; so long as the rule or statute prohibiting designation of selected opinions as non-precedential left this and other options open for the courts, it would be constitutional.

263. A “deciding court” is a court that issues a decision. An “applying court” is a court that has to decide whether to apply an earlier deciding court’s decision. *See supra* text accompanying note 82 (defining the terms “deciding court” and “applying court” for purposes of horizontal stare decisis).

264. *See supra* note 80 (noting exceptions to the generally applicable rule of horizontal stare decisis).

265. *See, e.g.,* *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1994) (explaining that the judicial power is more than the power to reach a result); *Union Pac. R.R. v. City of Atoka*, 6 Fed. App. 725, 730 (10th Cir. 2001) (explaining that the scope of prior precedent for purposes of adhering to a prior panel decision includes not only the holding, but also the reasoning); Paulsen, *supra* note 84, at 1590 & n.154 (concluding that the power to say what the law is includes the power to choose the form of expression of an opinion).

altering, affects the reasoning in opinions and is intimately bound up with the development of the law.<sup>266</sup> Even so, the statute would not affect the federal appellate courts' ability to craft opinions in the manner they see fit to communicate the results and reasoning in the cases they decide, because it would leave them in control of the form and content of their opinions. The statute would not require them to write opinions of a particular length, or even to write opinions at all. They would remain free to use summary dispositions, very short opinions, oral rulings, or any other method of communicating their opinions. Accordingly, the federal appellate courts would not lose their ability to fashion opinions as appropriate for the development of the law. Indeed, as a practical matter, they could issue opinions with so little information as to be of virtually no value to later applying courts, which would effectively render the opinions non-precedential. Although this might raise questions as to the wisdom of the statute, it does not affect the statute's constitutionality.

Finally, the federal courts as an institution would remain in control of the development of the law because the statute would not affect their ability to change the law.<sup>267</sup> Even if the federal appellate courts retained the traditional rule of horizontal stare decisis that they presently follow for precedential opinions, each circuit would still have the same ability that it presently enjoys, sitting en banc, to reverse or overrule its own precedents. Having to sit en banc to change panel decisions might be inconvenient for the courts, but that does not make the statute unconstitutional.<sup>268</sup> The Supreme Court would also retain the ability to reverse or overrule circuit precedent, as it does now. Accordingly, the statute would not enshrine the present interpretations of federal law or the Constitution in a way that would prevent the federal courts from changing those interpretations if they wanted to do so.<sup>269</sup>

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266. In fact, judges say they join non-precedential opinions even when they do not agree with the reasoning, such that the opinions may not actually reflect the court's reasoning. *See, e.g., Hearings, supra* note 3, at 13 (statement of Judge Kozinski) (explaining that a non-precedential opinion does not always reflect the court's actual reasoning); *see also infra* notes 291-92 and accompanying text.

267. *Cf. Miller v. French*, 530 U.S. 327, 347 (2000) (explaining that Congress can change the substantive rules and apply them retroactively to pending cases because any interim resolution is not the final word of the judicial department; the power over final determinations applies to the judicial department as a whole, not to individual courts).

268. *Cf. Hadix v. Johnson*, 144 F.3d 925, 951 (6th Cir. 1998) (Norris, J., concurring in part and dissenting in part) (explaining that the inconvenience of meeting the statutory time limits in the Prison Litigation Reform Act should not render the statute unconstitutional). The majority reasoning in *Hadix* was rejected in *Miller v. French*, 530 U.S. 327 (2000), which upheld the statute on other grounds.

269. A statute mandating that the Supreme Court follow its own prior opinions would be unconstitutional because it would effectively enshrine existing constitutional jurisprudence in perpetuity. *See, e.g., Paulsen, supra* note 84, at 1596. A statute prohibiting federal appellate courts from prospectively designating selected opinions as non-precedential is distinguishable from this type of statute. Because the statute would leave open the possibility for decisions to be overruled by the court sitting en banc or by the Supreme Court, it would not enshrine existing jurisprudence on the Constitution or any other area of law in perpetuity. Moreover, the statute would not require the federal appellate courts to give binding weight to their own opinions.

The statute would be analogous to the automatic stay provision of the Prison Litigation Reform Act that the Supreme Court upheld in *Miller v. French*.<sup>270</sup> That Act, which imposes an automatic stay on court orders in prison litigation if district courts do not rule on pending matters within defined time limits, affects the timing of judicial decisionmaking, a discretionary matter that has historically been within the courts' control.<sup>271</sup> Congress was concerned, however, that the federal courts would use this procedural power to avoid applying new substantive standards in prison litigation, using control over timing to affect the outcome in the case. The automatic stay provision was designed to circumvent the courts' use of procedure in this way, but the provision did so in a way that did not direct the outcome of the case.<sup>272</sup> Under that Act, the courts can avoid the imposition of the automatic stay simply by ruling within the statutory time limit. Even if the automatic stay goes into effect, it is only temporary until the court rules on the merits of the case. The automatic stay has no effect on the ultimate resolution of the case.<sup>273</sup>

A deciding court's designation of the status of its opinion is similar. The courts' traditional ability to use procedure (control over publication decisions) to effect at least some prospective control over the precedential value of their opinions is analogous to their traditional control over the timing of decisions.<sup>274</sup> Eliminating the federal appellate courts' ability to designate selected opinions prospectively as non-precedential to avoid the effect of horizontal stare decisis is analogous to eliminating their ability to use timing delays to avoid applying new substantive standards. Both are separate from the resolution of the underlying case on the merits. Like the statute upheld in *Miller*, a statute prohibiting selective prospective designation of opinions as non-precedential would not tell the courts "when, how, or what to do."<sup>275</sup>

Because the statute would not dictate the results in individual cases, control the courts' interpretation of the law, or require them to issue opinions in any particular form or manner, it does not usurp the courts' adjudicatory function. Thus, under a formalist approach, the statute would not violate separation of powers principles and would be constitutional.

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270. 530 U.S. 327 (2000).

271. *Id.* at 340-41.

272. Judge Easterbrook, dissenting from the denial of rehearing en banc, noted Congress's concern that judges would not apply the Act's new criteria and cited an example of a judge who opined "that relief should continue for the judge's lifetime." *French v. Duckworth*, 178 F.3d 437, 448 (7th Cir. 1999), *rev'd sub nom. Miller v. French*, 530 U.S. 327 (2000).

273. *Miller*, 530 U.S. at 346.

274. Courts during the founding era did not feel constrained by precedent the way courts do today. *See, e.g., Healy, supra* note 3, at 73-91. The exercise of the discretion to reject a prior opinion on the *applying* end, however, must be distinguished from the power to designate opinions as non-precedential on the *deciding* end—that is, prospectively. Without question, applying courts have historically had varying degrees of discretion in determining which authorities were binding on them. A statute prohibiting prospective designation of opinions as non-precedential would not affect the courts' ability on the applying end to decide what is or is not binding on them. *See supra* notes 258-63 and accompanying text (explaining that the statute would leave the federal appellate courts free to establish any constitutional rule of horizontal stare decisis on the applying end of the equation).

275. *Miller*, 530 U.S. at 346 (quoting the Seventh Circuit's opinion below, *Duckworth*, 178 F.3d at 449).

## 2. Functionalist Analysis

Unlike the formalist approach, the functionalist approach does not turn on whether Congress attempts to perform a judicial function. Rather, the functionalist approach evaluates the effect of the statute on the relative balance of power between the judicial and legislative branches to determine whether it upsets the balance sufficiently to create a threat to liberty. It would assess whether the statute unduly interferes with the federal appellate courts' ability to perform their core function and whether it risks accumulating too much power in the legislative branch.<sup>276</sup> An analysis of the scope of the statute, the degree to which it leaves traditional judicial functions with the courts, and the concerns that would motivate Congress to act shows that the statute would not diminish the judicial power. Further, the statute would not aggrandize legislative power or create the risk that a small, identifiable group of individuals would be singled out for oppressive treatment by the government. Accordingly, the statute would not upset the balance of power between Congress and the federal courts and would be constitutional under a functionalist analysis.

One factor the Supreme Court has used in determining the effect of a statute on the judicial power is its scope.<sup>277</sup> Concededly, the scope of the statute would be broad. It would affect the roughly 80% of cases that the federal appellate courts presently designate as non-precedential.<sup>278</sup> Thus, as compared with the statute upheld in *Schor*, which affected only state law counterclaims arising out of claims under the Commodity Exchange Act,<sup>279</sup> a statute prohibiting selective prospective designation of opinions as non-precedential would affect many more cases. Viewed differently, however, the statute would have less of an effect on judicial power than did the statute at issue in *Schor* because it would not remove any claim from consideration by Article III courts. Further, as *Mistretta* demonstrates, for a statute to affect a large percentage of cases is not fatal. The sentencing guidelines upheld in *Mistretta* affected all criminal cases in the federal courts, which comprise a significant portion of the docket.<sup>280</sup> Thus, although the scope of the statute is one factor to consider in assessing whether the statute unduly diminishes judicial power, that factor is not dispositive.

Another factor is the "extent to which the 'essential attributes of judicial power' are reserved to Article III courts."<sup>281</sup> As long as the statute does not specify the weight, if any, that the federal appellate courts must accord to their own opinions, it would not interfere with the courts' core function of deciding cases,

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276. See *supra* notes 191-94 and accompanying text; see also *Mistretta v. United States*, 488 U.S. 361, 383 (1989); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986) (explaining that the Supreme Court evaluates statutes affecting the judiciary to determine whether they "impermissibly threaten[ ] the institutional integrity of the Judicial Branch").

277. See, e.g., *Schor*, 478 U.S. at 852 (explaining that one reason for upholding the statute was the limited subject matter over which the Commodity Futures Trading Commission could exercise jurisdiction).

278. See *supra* note 38.

279. *Schor*, 478 U.S. at 835.

280. *Mistretta*, 488 U.S. at 367-68.

281. *Schor*, 478 U.S. at 851 (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 81 (1982)).

thus leaving the essential attributes of judicial power with the federal courts. As discussed above, the statute would not dictate the results in individual cases or require the courts to interpret the law in a way that Congress prefers. It would leave the courts in complete control over the rule of horizontal stare decisis. Finally, the federal appellate courts sitting en banc and the Supreme Court would retain the power to reverse or overrule circuit precedent.<sup>282</sup>

The effect of the statute in this respect echoes the effect of the sentencing guidelines upheld in *Mistretta*,<sup>283</sup> which transferred substantial discretion to determine criminal sentences from individual judges to the USSC, an independent agency within the judicial branch. Similarly, a statute prohibiting prospective designation of selected opinions as non-precedential would transfer the discretion to determine the precedential status of an opinion from the panel deciding the case to a panel applying the case, the latter of which not only has the power to determine whether the prior case applies to the pending case, but also has the power to make generally applicable rules of precedent. Because the statute simply shifts discretion from one part of the judiciary to another, it does not diminish the judicial power.

The statute also leaves the traditional attributes of judicial power with the courts by leaving the federal appellate courts in complete control of the form and content of their opinions.<sup>284</sup> This fact defuses the argument that the statute would interfere with the courts' core function by interfering with docket management.<sup>285</sup> Taking away the option of prospectively designating selected opinions as non-precedential, the argument goes, would require judges to spend so much time writing opinions that they could not resolve the number of cases pending before them within a reasonable amount of time.<sup>286</sup>

It is true that an overburdened judiciary cannot be an effective protector of liberty.<sup>287</sup> Nevertheless, it is not clear that eliminating prospective designation of selected opinions as non-precedential would overburden the judiciary to such a degree that it could not function properly. This is an empirical question that is difficult to answer in the abstract. Even under the present system, some non-precedential opinions are as comprehensive as their precedential counterparts.<sup>288</sup> Moreover, the statute would not require the federal appellate courts to issue comprehensive or even written decisions in every case; control over the form and content of opinions would leave the courts a range of options for communicating

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282. See *supra* notes 257-69 and accompanying text.

283. *Mistretta*, 488 U.S. at 361.

284. See *supra* notes 265-67 and accompanying text.

285. *Michaelson v. United States*, 266 U.S. 42, 66-67 (1924).

286. As Judge Alito has explained, one justification for non-precedential opinions is the judiciary's concern that making all opinions precedential would either reduce the quality of opinions or impose intolerable burdens on judges in researching and drafting opinions. *Hearings, supra* note 3, at 8. "It would be virtually impossible for the courts of appeals to keep current with their case loads if they attempted to produce such an opinion in every case. Responsible appellate judges must devote more time to an opinion that changes the law or clarifies it in an important way (and may thus affect many litigants in future cases) than to an opinion that simply applies well-established law to specific facts (and thus affects solely the litigants at hand)." *Id.*

287. Alfange, Jr., *supra* note 180, at 693-94.

288. Some non-precedential opinions are "20-page, signed opinions containing exhaustive legal analysis." NOVEMBER MEETING, *supra* note 35, at 36 (summarizing comments of an unnamed committee member).

their decisions if docket management concerns required them to reduce the time spent writing opinions. Federal rules do require written dispositions for some matters, but these requirements are rare and apply mostly to district courts.<sup>289</sup> Thus, while the statute probably would create some additional work for the courts, it would not encroach on their core function of deciding cases.

In addition, a third factor the Supreme Court considers in determining whether a statute impermissibly threatens the judiciary's institutional integrity is the concern motivating Congress's action.<sup>290</sup> The concerns over arbitrary decisionmaking and judicial legitimacy that non-precedential opinions create are at least as weighty as the concerns that have justified other legislative initiatives affecting the judiciary. Although an increase in the number of summary dispositions would be a possible effect of the statute, Congress could reasonably determine that that risk is worth taking. As judges acknowledge, non-precedential opinions do not always reflect the actual reasoning of the courts.<sup>291</sup> On one hand, some explanation of a result, even one that does not contain all of the judges' reasoning, may be preferable to a one-word disposition. On the other hand, the issuance of one-word dispositions may be preferable to issuing "non-precedential opinions that have been joined by judges who may or may not agree with what the opinions say."<sup>292</sup> A decision that does not reflect the court's actual reasoning could, in an extreme case, potentially be considered a fraud on the litigants and the public. Accordingly, Congress's concern over this aspect of non-precedential opinions justifies the potential risk it creates of increased numbers of summary dispositions.<sup>293</sup>

Looking at the other side of the equation, the statute would not increase Congress's power at the expense of the courts'. Congress would not gain any power through the statute. Although the statute would eliminate the federal appellate courts' ability prospectively to designate selected opinions as non-precedential, it does not substitute a rule of precedent of Congress's choosing in its place. Like the statute at issue in *Schor*, a statute prohibiting prospective designation of selected opinions as non-precedential would not appreciably expand Congress's power.<sup>294</sup>

Nor does the statute present the risk that concerned Justice Breyer in concurrence in *Plaut*: the risk that some small, identifiable group of people will be singled out for oppressive treatment by the government.<sup>295</sup> Although some cases

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289. See, e.g., FED. R. APP. P. 24(a)(2) (requiring a district court's denial of motion to pursue an appeal in forma pauperis to be in writing).

290. See *Mistretta v. United States*, 488 U.S. 361, 383-84 (1989); *Commodity Futures Trading Comm'n v. Schorr*, 478 U.S. 833, 851 (1986).

291. See, e.g., *Hearings, supra* note 3, at 13 (statement of Judge Kozinski) (explaining that a non-precedential opinion does not always reflect all of the three panel judges' actual reasoning); NOVEMBER MEETING, *supra* note 35, at 37 (noting that judges join non-precedential opinions as long as they agree with the result, even if they do not agree with the reasoning, when they know the opinions will not be precedential).

292. NOVEMBER MEETING, *supra* note 35, at 37 (summarizing comments of unnamed committee member).

293. Cf. *Mistretta*, 488 U.S. at 365-66 (explaining Congress's dissatisfaction with sentencing disparities as one reason for creating the USSC).

294. See *Schor*, 478 U.S. at 856-57.

295. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 242-43 (1995) (Breyer, J., concurring).

might be resolved differently if judges cannot ignore earlier cases solely on the ground that those cases were designated as non-precedential, it is impossible to identify those cases, or the individuals affected by them, in advance. Thus, no identifiable group of persons would be targeted for oppressive treatment by the government under the statute.

The statute would not diminish the power of the judicial branch or interfere with the federal appellate courts' ability to perform their adjudicatory function, nor would it risk aggrandizing legislative power at the expense of judicial power. Using a functionalist approach, therefore, the statute would be constitutional.

### *C. Is the Proposed Rule Eliminating Citation Restrictions Constitutional?*

Proposed Rule 32.1, which would prohibit courts from restricting citations to non-precedential opinions, does not present the same constitutional concerns that a statute prohibiting non-precedential opinions would. Nevertheless, it merits analysis because it is the first national rule to attempt to regulate non-precedential opinions. This rule should pass constitutional muster under either formalist or functionalist reasoning.

From a formalist perspective, the proposed rule does not usurp the judicial power. It does not dictate results in cases, nor does it control the courts' interpretation of the law or require the federal appellate courts to give any weight at all to non-precedential opinions.<sup>296</sup> Federal appellate courts remain free to ignore non-precedential opinions solely on the ground that those opinions are not binding. All the rule does is prohibit courts from restricting citations to non-precedential opinions unless they impose the same restrictions on citations to precedential opinions.

The proposed rule would also survive a challenge based on functionalist analysis, for many of the same reasons justifying a statute prohibiting prospective designation of selected opinions as non-precedential. The argument that the proposed rule would impede the courts' ability to perform their core function of deciding cases would have to be that it would interfere so substantially with the courts' ability to manage their dockets that it would unduly diminish the judicial power. Judges may say that the rule will make it harder for them to get through the docket because they will have to give more attention to their non-precedential opinions if they know those opinions can be cited later.<sup>297</sup> As noted above, however, as long as judges retain control over the form and content of their opinions, the argument that writing citable opinions will be so burdensome for the courts as to constitute an unconstitutional intrusion on their essential functions is weak.

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296. *But see* Barnett, *supra* note 56, at 489-94 (arguing that proposed Rule 32.1 could be read to affect the weight that federal appellate courts accord to their non-precedential opinions).

297. *See, e.g.,* *Hearings, supra* note 3, at 13 (statement of Judge Kozinski).



## CONCLUSION

Judges and lawmakers often assume that the federal courts use judicial power to promulgate procedural rules.<sup>298</sup> But that is not the case, at least as far as the national rules are concerned. Because these rules flow from delegated legislative authority, they cannot be used to regulate matters beyond Congress's legislative power. In the case of prospective designation of selected opinions as non-precedential, Congress could prohibit the practice by statute without running afoul of separation of powers principles as long as the statute did not specify the weight the federal appellate courts must give to their own opinions. Thus, it would also be possible to prohibit the practice through a national procedural rule or statute. Judges would undoubtedly prefer to retain the present system, which gives them discretion to apply flexible standards, over stricter rules.<sup>299</sup> And they may chafe over legislative efforts to restrict their discretion.<sup>300</sup> The risk of arbitrary decisionmaking that the use of non-precedential opinions creates, however, makes the practice unwise. The courts' unwillingness to change the practice despite this risk makes a national rule or procedural statute an appropriate vehicle for addressing the issue. Whether this will happen remains to be seen. If it does, the Constitution will not stand in the way.

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298. *See, e.g., id.* at 3 (statement of Congressman Howard L. Berman) (noting that rulemaking is a judicial matter); *id.* at 15-16 (statement of Judge Kozinski) (stating that the issue of non-precedential opinions, while capable of resolution through new procedural rules, is a matter for the courts to resolve).

299. Vermeule, *supra* note 188, at 390 (explaining that judges prefer standards that permit the exercise of case-specific judicial discretion over rules).

300. *Id.* at 360 (characterizing some decisions on separation of powers issues as displaying "a prickly sensitivity to any slighting of judicial prerogatives"); *id.* at 391 (noting, in the context of separation of powers cases, that judges have a strong tendency to equate tasks that they customarily perform with fundamental judicial functions).