

ARTICLE: SELLING THE INTEGRITY OF THE SYSTEM OF PRECEDENT: SELECTIVE PUBLICATION, DEpublication, AND VACATUR

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Uniformity . . . cannot be expected, where the judicial authority is shared among such a vast number of independent tribunals, unless the decisions of the various courts are made known to each other. . . .

In a government which is emphatically styled a government of laws, the least possible range ought to be left for the discretion of the judge. Whatever tends to render the laws certain, equally tends to limit that discretion; and perhaps, nothing conduces more to that object than the publication of reports. . . . n1

Introduction

It is common to envision precedent-building as an additive process: each new opinion fills gaps in the previous body of clearly enunciated rules. n2 This process is undermined when legal opinions are erased. In recent years, federal and state courts have adopted several practices that expunge judicial opinions and their precedential value. Our system of precedent has become subtractive as well as additive. Like a sculpture, it is shaped as much by what is removed as by what is added.

A legal judgment serves two functions. It resolves the dispute between the parties and, through the system of precedent, establishes a rule of law for future litigants. n3 The Due Process Clause protects the integrity of the dispute-resolving role, n4 but there is no corresponding constitutional guarantee to protect the integrity of the courts' law-expounding function. n5 This lack of systemic safeguards threatens the judiciary's ability to make principled decisions. The widespread use of three methods of effacing precedents -- selective publication, depublication, and vacatur motions -- evidences the need to protect the judiciary's law-expounding function.

Under the procedure of selective publication, federal circuit courts do not publish decisions that they predict are unlikely to benefit future courts or litigants. In *Johnson v. Knable*, n6 the Fourth Circuit considered a prison inmate's equal protection claim that prison officials had denied the inmate a job in the education department because he was gay. n7 The Fourth Circuit held that if prison officials had discriminated against Johnson on the basis of his sexual orientation, they may have violated his equal protection rights. n8 This was a ground-breaking decision to the extent that it suggested homosexuality might be a suspect classification. n9 The Fourth Circuit, however, limited the ability of future litigants to cite it as binding precedent by deciding not to publish the opinion. n10 Thus, the court created a progressive rule for civil rights litigants and then hid it from public scrutiny. By refusing to publish a holding that classifications based on sexual orientation may require strict scrutiny under the Equal Protection Clause, the Fourth Circuit also shielded the decision from potential Supreme Court review.

The California Supreme Court's power of depublication is even broader than the selective publication power of federal circuit courts. n11 Like their federal counterparts, California appellate decisions must also overcome an initial discretionary threshold: they are not published at all unless they have significant precedential value. n12 Even after a decision surmounts this first hurdle, the California Supreme Court may decide on its own, or on a motion by any person, to depublish the opinion. n13 Thus, for an opinion to be published in California, it must first be judged worthy by an appellate court and then survive the possibility of depublication by the California Supreme Court.

In *Family Planning Alternatives, Inc., v. Pruner*, n14 for example, a California appellate court upheld a district court injunction that prohibited Operation Rescue from blockading a private abortion clinic. Finding that the protestors had trespassed on private property, the district court enjoined them from entering or restricting access to the clinic's buildings or parking lot and from displaying signs larger than four feet by four feet on the nearby public sidewalk. n15 The appellate court held that the injunction violated neither federal nor state free speech rights. n16 Four months after the appellate decision was published, the California Supreme Court denied review and ordered that the opinion be depublished. n17 As a result, litigants in California state courts cannot cite the *Family Planning Alternatives* opinion as precedent. n18

Until recently, litigants in federal court could opt for a third method to erase precedent by moving for vacatur of a published decision. This term, in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, n19 the Supreme Court

sharply curtailed this controversial practice when it held that vacatur should only be granted if there are extraordinary equitable reasons for doing so. Before this decision, circuit courts frequently granted vacatur at the joint request of the parties. After a court had entered a judgment and written its opinion, but while an appeal was still pending, litigants would often negotiate a settlement agreement on the condition that the circuit court vacate the earlier decision. Unlike the more objective standards used for selective publication and depublishing, in considering motions for vacatur several circuits did not even bother to determine whether the opinion was likely to benefit future courts or litigants. In the interest of promoting settlement, the courts refused to interfere with the private parties' bargain.

To appreciate the effect of the *Bonner Mall* decision, it is helpful to consider an example of how the prior use of vacatur often sacrificed the interests of indigent persons and minority groups. In *Hendrickson v. Secretary of Health and Human Services*,²⁰ the Eighth Circuit ruled that the Secretary of Health and Human Services ("HHS") had erred in refusing to credit a disability claimant with eleven additional quarters of coverage. The court held that the failure to file an income tax return did not per se prevent a claimant from otherwise proving that he was entitled to coverage.²¹ As a result, the government may have wrongfully denied the plaintiff disability benefits.²² Several months later, the Eighth Circuit, without discussion, vacated its decision in response to a joint motion that the parties filed pursuant to a settlement agreement.²³ Presumably, the Secretary of HHS had agreed to meet the plaintiff's demands in exchange for a motion to vacate the judgment. By erasing the opinion's precedential value, this agreement allowed HHS to continue to deny coverage to future claimants.²⁴ Thus, the use of vacatur allowed the parties to strike a prior judgment for a price.

It is apparent from the three examples of precedent-erasing practices outlined above that the system of precedent is constantly reallocating the distribution of rights. An ideal precedent-building system would give each litigant an equal opportunity to influence changes in how judges measure rights.²⁵ Although it may be impossible for a judge to be politically neutral or to decide cases only on the basis of logic,²⁶ at the very least, once precedents are established litigants should not have unequal opportunities to profit from or to erase them. Speaking of due process as a value of dispute resolution, Jerry Mashaw has explained, "Justice in a formal philosophical sense is often defined as equality of treatment. . . . [T]he degree to which procedures facilitate equal opportunities for the adversaries to influence the decision may be the most important criterion by which fairness is evaluated."²⁷ This insight can also be applied to the precedent-building function of the courts.

Litigants' access to and influence on precedent should be equalized by eliminating each of the three methods for effacing precedent. The Supreme Court has already limited the use of vacatur motions to those extraordinary situations in which erasing a decision's precedential value would be in the public interest.²⁸ Likewise, eliminating selective publication and depublishing, and adopting a system of universal publication, would reinforce the principle that the public interest in the systematic development of legal rules should not be sacrificed for efficiency. The system of precedent would then be sculpted by reason and fairness, and not by economic or political influence.

Part I of this Article discusses the nature of the judicial role and the political legitimacy of a system of judicial precedent. Part II examines the three methods for erasing precedent and how they undermine the courts' law-expounding function. Part III discusses the importance of protecting the system of precedent.

I. The Nature of the Judicial Role

The courts' two principal functions, to resolve disputes and espouse public values, form the basis for two opposing models of adjudication. Additionally, two often unarticulated goals, to promote efficiency and protect counter-majoritarian interests, equally affect how much emphasis the courts place on preserving the integrity of the system of precedent.²⁹

A. Two Opposing Judicial Models

1. The Dispute Resolution Model

The Supreme Court has consistently adhered in its rhetoric to the "private law" model of litigation.³⁰ According to this view, the purpose of civil litigation is to resolve disputes between private parties. Establishing a precedent for future litigants is a fortunate by-product, but never the purpose, of litigation.³¹ The paradigmatic private lawsuit is retrospective rather than prospective. It is a completely self-contained episode that the parties initiate and control.³² This interpretation of the judicial function traces its roots back to *Marbury v. Madison*.³³ It was in this famous opinion that Chief Justice Marshall, declining to rule on a political question, first articulated the limitation of judicial review to the "rights of individuals."³⁴ By limiting judicial review, Marshall distinguished the judiciary's function from that of the political branches.³⁵ The judiciary is not a super-legislature: it decides private, not societal, issues.

The best examples of the Supreme Court's application of the private law model are when the Court refuses to hear a case because of justiciability doctrines.³⁶ To the extent that there is no private interest at stake, according to these doctrines, Congress, not the courts, should resolve the issue.³⁷

However, the dispute resolution model cannot sustain our system of precedent. While the private law model defines the boundaries of the federal courts' jurisdiction, it does not adequately describe the courts' influence once they decide

cases. The private lawsuit is an ideal; n38 it can never exist as an absolute because in settling a private dispute, courts necessarily establish rules for future parties. n39

2. The Law-Expounding Model

Commentators, dissatisfied with the Court's private law rhetoric, have increasingly argued that a "public law" or law-expounding model is superior from both a normative and descriptive viewpoint. Owen Fiss has explained the normative justification:

Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. . . . Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. n40

Once private parties enter the judicial system and a court lawfully asserts its jurisdiction, society commits its resources to settling the dispute. In doing so, it earns the right to use the private dispute to declare public values. In this view, precedent is not merely a by-product of the case. n41 Cases are law-expounding and future-oriented.

Depending on the rights at stake and the parties involved, either public or private goals may dominate. In many respects, an uneasy amalgam of the dispute resolution and law-expounding views best describes the Court's existing jurisprudence. n42 During the last several decades, loosening of justiciability doctrines -- standing, ripeness, and mootness -- has expanded considerably the types of issues that judges resolve. n43 Although the Supreme Court has recently tightened the doctrine of standing, n44 current justiciability doctrines are still based on many cases that run afoul of the private law paradigm. n45

To the extent that the Court continues to rely heavily on the private law model, it uses this approach most appropriately as a guideline to the exercise of jurisdiction rather than as a measure of which interests should steer a court once it has already committed itself to deciding a case. n46 With jurisdictional issues, the Court is motivated by separation of powers concerns: the need to maintain a distinction between the judicial and political spheres. n47 Once a court determines that a private dispute exists, however, it has already addressed those separation of powers concerns.

B. Utilitarianism: The Goal of Efficiency

Although rarely acknowledged explicitly, the goal of efficiency significantly informs courts' decisions about the limits of the judicial role with regard to precedent. Efficiency does not necessarily favor either the private or public law models because, depending on the case, either could "maximize social welfare," the enunciated purpose of utilitarian paradigms. n48 Too often, the utilitarian calculus is limited to whatever saves time and money.

The utilitarian perspective emphasizes the quantitative over the qualitative. n49 Courts usually invoke efficiency to justify not spending the resources necessary to achieve other, "softer" ideals. Although it is theoretically possible to develop a utilitarian equation that assigns a quantitative value to qualitative ideals like fairness, due process, principled decision-making and equality of opportunity, the process of quantifying soft variables inevitably diminishes their significance. n50 It is unrealistic to expect that every time a litigant raises a due process claim, a court will be able to quantify accurately the cost of guaranteeing fairness. Nevertheless, if courts are to empathize with those "human beings affected by their decisions," they must devote the time and resources necessary to ponder the meaning of fairness and like ideas. n51

In theory, the Constitution limits how much courts can compromise individual rights for the sake of efficiency. Due process stands for the proposition that some notions of fairness are too fundamental to reduce to a mathematical equation. n52 However, because the process of precedent-building represents collective rather than individual rights, the Bill of Rights does not prevent courts from sacrificing litigants' equality of access to and influence on precedent. n53 This willingness to sacrifice governmental regularity to efficiency fails to recognize that some rights may be held collectively. n54 When such equality is compromised in the name of "efficiency," social welfare is not maximized and the hope for justice is diminished.

C. Protecting Counter-Majoritarian Interests: Institutional Litigants Versus One-Shotters

Chief Justice Marshall's seminal opinion in *Marbury v. Madison* contributed to the development of the judiciary as a counter-majoritarian force. By defining lawsuits as private matters, Marshall was able to assert the axiom that the Court is the final arbiter of constitutional interpretation. Because the Court is not subject to the electorate's control, it can protect minority interests n55 and check the influence of "institutional litigants" n56 through its power to interpret the Constitution. The importance of the judiciary's role as the protector of minority interests cannot be overestimated.

However, selective publication, depublication, and vacatur undermine this counter-majoritarian role by allowing majority interests in the form of institutional litigants to exert an undue influence on the shape of rules for future conduct. The paradigmatic institutional litigants, state and federal governments, are bound by social contract to represent the interests of the democratic majority. "One-shotters," in contrast, are litigants who have a single or infrequent contact with the

judicial system. Civil rights plaintiffs are more likely to be one-shotters, although in some instances they also display some of the traits of institutional litigants. n57 Indeed, lawyers themselves may level the playing field between institutional and one-shot litigants. n58

Marc Galanter has identified several strategic advantages that institutional litigants have over one-shotters. First, they can play the odds: they are indifferent to uncertainty with respect to any single claim. n59 Second, as a corollary to playing the odds, institutional litigants are able to play for rules: they can afford to balance future benefits against present losses. n60 Third, institutional litigants are able to devote the resources necessary to identify rule changes with significant impact. n61 Most one-shotters, on the other hand, only care about a single dispute. They will not have repeated contact with the legal system and must do everything to win in the particular case. Moreover, even if some individual plaintiffs are forward-looking and socially conscious in their approach to litigation, they are less likely than institutional litigants to possess the economic resources to realize these goals. n62

When the model of institutional versus one-shot litigants is applied to precedent-erasing practices, results are predictable. Institutional litigants will use selective publication, depublishing, and vacatur to maximize favorable precedent. One-shot litigants, in contrast, are likely to allow institutional litigants to erase favorable precedent in order to obtain a more satisfactory outcome in the particular dispute. n63

Selective publication, depublishing, and granting of vacatur pursuant to a settlement agreement destroy equal access to the system of precedent. Even when a court erases precedent in cases between institutional litigants, such as in trademark disputes between large businesses, n64 selective publication, depublishing, and vacatur compromise the judiciary's ability to create a system of rules based on principle. For the judiciary to continue in its role as the protector of minority interests, it must make every effort to reestablish its procedural integrity in appearance and in fact.

II. Erasing Precedent

A. Selective Publication and Depublishing

The procedures of selective publication in the federal circuits and depublishing in the California Supreme Court closely parallel each other. This Article uses the term "nonpublication" when referring to both. Although the particular rules governing each procedure are different, in both, an appellate court uses ostensibly objective criteria to decide that the efficiency benefits of excluding an opinion from the system of published precedent outweigh any detriment to the courts' law-expounding function. n65 This preference for economic efficiency over precedent-building is not normatively justified across the broad range of cases.

1. Nonpublication Procedures

Over sixty percent of federal appellate decisions are not published. n66 Although each circuit makes its own rules to guide publication selections, there are two general approaches. Half of the circuits use an amorphous test, exemplified by the Second Circuit's standard of whether any "jurisprudential purpose would be served by a written opinion." n67 The other half have developed specific criteria, such as whether the opinion establishes a new rule of law, involves an issue of continuing public interest, criticizes existing law, or resolves an apparent conflict of authority. n68 Half of the circuits provide for publication only if a majority of the panel agrees. n69 The others allow a single judge to demand publication of the entire decision, n70 or at least of that judge's own dissenting or concurring opinion. n71

In California, the state Supreme Court depublishes more appellate opinions every year than it publishes opinions of its own. n72 Before the California Supreme Court considers whether to depublish an appellate decision, the appellate court must have first certified that the opinion meets publication standards. The four criteria for publication of California appellate decisions are almost identical to the typical criteria for publication of federal circuit decisions. n73 Less than fifteen percent of appellate decisions are certified for publication; n74 of that fifteen percent, the California Supreme Court orders an additional ten percent depublished. n75

California Court Rule 979 governs depublishing procedures. n76 Any person, whether or not a party to the suit, can request or oppose depublishing. n77 The party making the depublishing request must state her reasons and persuade a majority of the Court that the original justification for publishing the decision is not valid. n78 In addition, the Supreme Court can decide on its own motion to depublish. n79

2. The Effects of Nonpublication

The decision either not to publish or to depublish a decision does not influence a court's resolution of the dispute between the parties. The judgment retains its preclusive effects. Nonpublication does not, therefore, affect the goals of the private law model of adjudication.

Nonpublication does, however, directly conflict with the goals of the law-expounding model. Nonpublication makes the opinion and the rule it develops disappear. All federal circuits but one limit citation of their own unpublished opinions. n80 Eight circuits forbid citation entirely (except to support or oppose application of *res judicata*, collateral estoppel, or law of the case) n81 and four allow citation only when there is no better precedent. n82 Courts may not, however, always abide by their own citation rules. n83

In the California state system, the Rules of the Court prohibit litigants from citing depublished appellate opinions. n84 Nor may litigants infer disapproval from the act of depublishation. n85 However, as in the federal circuits, other state courts may rely on the persuasive effect of depublished California decisions. n86

3. The Efficiency Rationale in Favor of Nonpublication

Some commentators justify not publishing all appellate decisions on efficiency grounds: judges do not have enough time and resources to analyze, research, and write each opinion to the extent necessary for it to become part of the system of published law. n87 This efficiency argument assumes that the sole purpose of publication is to advance the law. If an opinion does not break new ground, there is no reason to publish it. n88 The First Circuit's selective publication rule states, "[I]n the interests both of expedition in the particular case, and of saving time and effort in research on the part of future litigants, some opinions are rendered in unpublished form. . . ." n89

When a judge knows ahead of time that an opinion will not be published, she can save time. n90 First, the judge does not need to recite carefully the facts of the case because the parties are already familiar with them. Second, it is unnecessary to rehearse all of the arguments; the judge is able to focus the opinion on the dispositive issues. Third, the judge need not spend as much time eliminating vague language that other litigants may attempt to expand in later cases. Because unpublished opinions serve no future purpose, judges need only provide a minimal indication of the reasoning that a fully explicated opinion would have followed.

No empirical study has confirmed the claim that selective publication saves time. William Reynolds and William Richman conducted an empirical assessment of all circuit court opinions during the 1978-79 reporting year. They compared all published and unpublished circuit dispositions and hypothesized that if selective publication were saving time it would allow courts (1) to resolve unpublished appeals more quickly and (2) to handle a heavier caseload. Their findings supported the first hypothesis that courts achieved swifter justice with unpublished decisions. Turnaround time was much shorter for unpublished opinions. n91 However, it was impossible to determine whether to attribute the time savings to the decision not to publish or to the nature of the cases, since it would follow that unpublished cases tend to be less complicated and easier to resolve than published disputes. n92 Reynolds and Richman did not find any data to support the hypothesis that selective publication improves judicial productivity. Circuits that published a comparatively small portion of their opinions did not handle significantly more cases per active circuit judge. n93

The time savings from depublishation is less ambiguous. The California Supreme Court does not have time to consider fully the merits of all misleading appellate decisions. n94 It is a court of policy, not error. n95 By depublishing an opinion that reasons incorrectly but with whose outcome the Court agrees, the Court avoids hearing an oral argument and writing an opinion. This allows it to focus on the most important petitions. n96

In addition to these direct time savings, nonpublication may produce indirect effects. Repetitive appellate decisions may add needless layers of precedent through which judges and litigants must sift. n97 Thus, consumers of appellate decisions as well as producers arguably benefit from nonpublication.

4. Undermining the Principled Growth of the System of Precedent

a. Distorting the System of Precedent

The critical assumption underlying the efficiency rationale in favor of nonpublication is that judges are able to determine in advance which opinions will be valuable to future litigants. n98 This assumption fails on several grounds. n99 First, a common law system is predicated on the notion that lawmakers cannot foresee every factual context in which disputes will develop. n100 A system of precedent exists to adapt rules to society's changing needs. Requiring judges to determine which cases will have future import ignores the purpose of an evolutionary system of rule-making.

Second, judges may not accurately determine the value of decisions before writing them because writing tests the reasoning process. The process of putting words to paper often affects the structure of an argument. n101 If an opinion "won't write," it alerts a judge that the rationale, the outcome, or both, are wrong. n102

Thus, courts will inevitably make mistakes when deciding which opinions not to publish. n103 Selective publication suppresses precedent that would help courts decide future cases. n104 In addition, even if selective publication saves time, it distorts the shape of precedent. Lawyers use precedent to evaluate how courts apply the law across a range of cases as much as to identify what a precise rule of law is. n105 One cost of saving time, then, is that it leaves the law unclear and may ultimately lead to more litigation to clarify the law. n106 The long-term costs of distortion, therefore, may outweigh any short-term efficiency savings. n107

The Ninth Circuit's selective publication of immigration opinions demonstrates how not publishing all decisions can frustrate a lawyer's efforts to assess the law across a range of cases. A study by Lauren Robel showed that in 1987, the Ninth Circuit published only twenty-seven percent of its immigration opinions. n108 Included in the unpublished opinions were over half of the reversals of Board of Immigration Appeals decisions. n109 Although the rate of unpublished reversals was roughly proportional to the total number of unpublished immigration decisions, the numerous unpublished reversals made it difficult for an attorney to assess accurately the shape of the law. More significantly, the

published opinions contained disproportionately fewer concurrences and dissents than the unpublished ones. Of the sixteen concurrences and dissents, only two were published. n110 The unpublished reversals and disproportionate number of unpublished separate opinions showed the court's dissatisfaction with agency practices and disagreement among the court's own members, which would have been difficult to discern from the published digests. n111

The nonpublication of controverted judicial opinions extends beyond the immigration field. The number of unpublished, reversed lower court decisions provides an indicator of the level of distortion. One study found that one in every seven unpublished federal appellate opinions had reversed the lower court. n112 Although some of these reversals may have been the result of the lower courts' incompetence or political bias, it is probable that appellate reasoning that would be valuable to lower court judges and lawyers alike is going unpublished. Indeed, three circuits require the publication of reversals, n113 presumably because their judges believe that opinions explaining reversals are more likely to have value to future litigants.

In addition to unpublished reversals, the number of unpublished concurrences and dissents is a good indicator of whether important opinions are being erased. Although a disproportionately high percentage of concurrences and dissents went unpublished in Ninth Circuit immigration cases, a study of all unpublished federal appellate cases during one year found that those with separate opinions were almost always published. n114 In contrast, in California, the state Supreme Court depublishes non-unanimous decisions more often than unanimous ones, n115 enabling a narrow majority on the state Supreme Court to create a false sense of uniformity. n116 An inherent advantage of the common law system is thereby eliminated: judges with different philosophies are no longer able to challenge one another. n117

Nonpublication also hinders the possibility of receiving a grant of certiorari from the United States Supreme Court. The Court already grants less than ten percent of all certiorari requests. n118 Because an unpublished opinion cannot be cited as precedent, the Supreme Court is hesitant to devote its limited resources to reviewing a case that will have little future effect. n119

The case of *Johnson v. Knable*, in which the Fourth Circuit chose not to publish a decision that arguably would have made homosexuality subject to strict scrutiny review under the Equal Protection Clause, illustrates how nonpublication may be used to hide controversial decisions. The question of whether homosexuality should be a suspect classification that triggers increased judicial scrutiny under the Equal Protection Clause is hotly debated. n120 Since the landmark decision of *Bowers v. Hardwick*, n121 in which the Supreme Court refused to expand the right to privacy for procreative sex to include sex between a homosexual couple, the Fourth Circuit has not published any decisions discussing the status of homosexuality as a suspect classification. n122 In *Johnson*, however, the Fourth Circuit issued an unpublished decision that recognized homosexuals as a protected group. n123

Arguably, the nonpublication of the *Johnson* opinion enabled the Fourth Circuit to chart a more progressive course than it ordinarily would have taken. If it had published the opinion, the Supreme Court would have been more likely to grant a petition for certiorari. By creating an unpublished and review-shielded doctrine, the Fourth Circuit was effectively able to champion civil rights. This justification has two shortcomings. First, it accentuates the judiciary's power to act without the restraint contemplated by our governmental structure. Although a counter-majoritarian judiciary exercises a valuable constitutional "check" over the political branches, its decisions should at least be subject to public scrutiny and review by a higher court. Courts should be cautious of contradicting the decisions of the elective branches. n124 Second, a Supreme Court decision to overturn a controversial decision itself generates public controversy and debate and focuses the political branches' attention. Ultimately, this mobilization of the political process may offer a more promising method for expanding rights. n125

The *Family Planning Alternatives* n126 case provides a second illustration of how nonpublication suppresses potentially valuable opinions. The California appellate court held that an injunction that prevented Operation Rescue activists from displaying signs larger than four feet by four feet on the nearby public sidewalk did not violate federal or state free speech rights. Although it is impossible to ascertain the California Supreme Court's reasons for depublishing the decision, n127 the effect of depublishing was to leave uncertain the rights of anti-abortion activists in California. More importantly, if the protestors had petitioned for certiorari, the depublishing order might have shielded the decision from review by the United States Supreme Court. n128 For reasons of comity, the United States Supreme Court, already hesitant to second-guess state courts of last resort, would probably be even less willing to grant a request for certiorari when the state court had not even published an opinion. n129

If publication were universal, judges and litigants would be able to refer to and review the entire body of precedent rather than a limited and unrepresentative subset. The most powerful criticism of a system of universal publication is that it assumes that judges have the time and resources to prepare a careful opinion in every appeal. n130 If writing a well-crafted opinion for every case is not possible, then universal publication could result in more carelessly written decisions that might distort the system of precedent. n131 This criticism has merit, but there are ways out of the dilemma. Either increasing judicial resources, by hiring more judges, or developing alternative methods for decreasing the judicial

workload would allow judges to prepare well-crafted, publishable precedents in every appeal. n132

b. Favoring Institutional Litigants

Not only do nonpublication practices pervert the composition of precedent, they also favor institutional litigants over one-shotters. Institutional litigants can influence which decisions courts select for publication. Moreover, they have better access to the information contained in unpublished decisions.

The formal rules allow the litigants, and in some cases, non-parties, to affect which decisions the courts select for publication. All of the federal circuit courts presently allow the parties themselves to make a motion to change the status of an opinion from unpublished to published. n133 In about half of the circuits non-parties can also request such a change. n134 In California state courts "any person" can make a depublishation request. n135

Institutional litigants are more likely than individual litigants to take advantage of this opportunity to influence the selection process because they have a greater interest in what types of rules the courts adopt. n136 In contrast, individual litigants face a collective action problem: as a group they have an interest in seeing an opinion published, but no single litigant has enough at stake to warrant expending the necessary resources to ensure that favorable opinions become part of the system of precedent. In a study of Seventh Circuit opinions whose status changed from unpublished to published, seventy-three percent involved a government litigant. n137 The federal government, in particular, was a party in fifteen of thirty subsequently published opinions; in each of these, the published result was advantageous to the government. n138

In addition to the development of favorable rules, nonpublication benefits institutional litigants because they have better access to and make better use of unpublished opinions. As a practice, courts send copies of unpublished opinions to each litigant. Because institutional litigants litigate frequently, they are involved in more unpublished cases and can compile the decisions. n139 Electronic databases do not equalize access to unpublished or depublished decisions. LEXIS and Westlaw do not list all unpublished decisions. n140 Further, computer searches are expensive, n141 so one-shot litigants may be priced out of the market. With superior access to nonpublished opinions, institutional litigants can study the reasoning, arguments, and authorities that previous litigants have advanced. n142 Finally, institutional litigants can study the weight of unpublished opinions to predict results more effectively.

c. Undermining Judicial Legitimacy

Even if nonpublication did not distort the growth of precedent or favor institutional litigants, it would still undermine the perception that justice had been done and decrease the possibility of legislative reversal. Litigants may feel that an appellate court that does not publish an opinion has not given the case its complete attention. When a court hands down an opinion without stating its reasoning, n143 the litigant may perceive that the court has not fulfilled its promise of justice. Nonpublication can create the appearance of arbitrariness. n144

Moreover, certain types of cases involving identifiable classes of plaintiffs are published less often than others. Prisoner civil rights cases, Social Security cases, and prisoner petitions are, as a group, published at a disproportionately low rate. n145 Arguably, these decisions have low publication rates because they are more likely to produce frivolous appeals. n146 They do, however, sully the appearance of justice.

A particularly flagrant example of the manner in which nonpublication can tarnish the judiciary's image was described by a California appellate court in *Gardner v. Charles Schwab & Co.* n147 After the Gardner appellate court initially certified the opinion for publication, it received many letters from lawyers, neither parties nor amici curiae, who urged the court to decertify the opinion. n148 The court sharply criticized the lawyers' communications:

A trial judge would be shocked to imagine that counsel not representing parties to the litigation, and not having become amici curiae, could with impunity press their unsolicited views on him concerning an undecided but submitted matter. Such practices are equally improper in appellate courts. While such petitioning may be common in addressing legislative bodies, that practice has never been approved in judicial proceedings and for good reason. . . . Such communications violate conventional rules of fairness established by a briefing process which insures that all parties are heard in an orderly manner. n149

Ironically, the California Supreme Court promptly depublished the Gardner chastisement of the depublishation process. In addition to undermining the appearance of justice, nonpublication interferes with the separation of powers between the judicial and political branches. Because nonpublication often hides the actual state of the law, it may substantially reduce the possibility of legislative reversal. In California, after the state legislature passed the California Determinate Sentence Law, n150 the courts of appeal reached different interpretations and imposed varying sentences. The California Supreme Court addressed the appellate variations by allowing all of the decisions to stand but depublishing one side of the conflict. n151 The court signaled the correct interpretation to the depublished courts without requiring adjustments in the sentences. By "clarifying" the statute's interpretation in this manner, however, the court increased the disparity of sentences (those sentenced according to the disfavored interpretation received longer terms) and

contradicted the statute's purpose: to achieve "the elimination of disparity and the provision of uniformity of sentences." n152 Robert Gerstein commented on this perversion: "[D]epublication is a process by which legislative intent may be thwarted and the results of that thwarting are swept under the rug: the surface uniformity of published opinions hides a suppressed disparity in sentencing." n153 Part of the justification for allowing a counter-majoritarian judiciary to interpret laws is that, except on constitutional issues, legislatures can overrule courts. Thus, nonpublication may prevent legislatures from adequately policing judicial abuses.

B. Vacatur as a Condition of Settlement

1. Vacatur Procedure

After a federal district court or a circuit court reaches a decision, the parties often reach a settlement agreement rather than pursuing further appeals or trying to enforce a judgment. Although a court has already issued a judgment (or, if the decision has already been appealed, two courts will have issued judgments), the litigants reach a private bargain to resolve the dispute on their own terms. Typically, both parties, as a condition of their settlement, request the circuit court to vacate a lower court's or its own prior judgment n154 and therefore prevent the use of that judgment for collateral estoppel n155 and diminish its stare decisis value. n156 This practice alters the shape of the system of precedent.

Until the Supreme Court decided *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, n157 the federal circuit courts were divided into three camps over the appropriate standard for evaluating joint requests for vacatur as part of a settlement agreement. n158 One group of circuit courts granted such requests almost automatically. n159 Consistent with the dispute resolution model, these circuits viewed the lawsuit as a private affair. They emphasized the importance of encouraging settlement and the unfairness of forcing the parties to continue to litigate an issue to avoid the effects of nonmutual issue preclusion. n160 Using the rationale of the law-expounding model, the second camp focused on the public nature of judicial opinions. n161 These courts reasoned that although precedent is initially only a by-product of the goal of resolving disputes, an opinion, once written by the court, belongs to the public. n162 The third approach split the difference, balancing the societal and private interests on a case-by-case basis when reviewing joint motions for vacatur. n163

In *Bonner Mall*, the Supreme Court resolved the three-way circuit conflict in favor of the law-expounding camp. n164 The case involved a controversy over the "new value exception" to the absolute priority rule for reorganization plans under Chapter 11 of the Bankruptcy Code. n165 After the Court granted a writ of certiorari, the parties stipulated to a consensual reorganization plan that received the approval of the bankruptcy court and mooted the Supreme Court appeal. n166 One of the parties then requested that the Supreme Court vacate the Ninth Circuit judgment because the case was moot. n167

Justice Scalia, writing for a unanimous court, held that mootness because of settlement does not justify a grant of vacatur n168 and that, except in "exceptional circumstances," the courts should not respond to the parties' request to erase a judgment. n169 Although courts might in the future attempt to expand the definition of exceptional circumstances, the Court made it clear that it intends for this to be a narrowly limited remedy. n170

2. Settlement as a Justification for a Liberal Vacatur Standard

In *Bonner Mall*, the Supreme Court implicitly chose the public law approach in the terms and rationale of its holding. The circuits' disagreement over the appropriate standard for granting vacatur had paralleled the conflict between the private and public models of litigation. The goal of efficiency also significantly shaped the debate. Because the court system is overburdened, advocates of a liberal vacatur rule emphasized the value of vacatur as a bargaining chip to encourage settlement. n171 A losing party that would have been willing to resolve the particular dispute might have felt compelled to continue to appeal the judgment to avoid the consequences of *res judicata* n172 or adverse precedent. n173 Vacatur allowed the losing party to "purchase" the erasure of the judgment and precedent.

There are several reasons to question the claim that a liberal granting of vacatur promoted the efficient use of society's judicial resources. First, the availability of vacatur encouraged some losing parties, who otherwise would have complied with a judgment, to appeal. The strategy of pursuing an appeal enabled dissatisfied parties to force the other party to "sell" the judgment (by filing a joint motion for vacatur) in exchange for compliance. n174 Second, a liberal vacatur standard merely encouraged other parties to delay settlement until after trial. Granting vacatur at the parties' request lowered the costs of an adverse judgment. Parties knew that they would be able to purchase judicial expungement. Without vacatur, the parties cannot bargain for the elimination of an adverse decision. Because the costs of losing are significantly higher, they have a greater incentive to settle before the court issues an opinion. n175 Third, to the extent that eliminating a precedent left the law ambiguous, it encouraged future litigants to go to trial and to pursue appeals. n176

3. Judgments as Public Property

The Supreme Court's decision in *Bonner Mall* will also protect the position of one-shotters and prevent judgments from

becoming negotiable commodities. As with nonpublication practices, institutional litigants stood to gain the most from a liberal vacatur rule. n177

Pro-vacatur courts assumed that allowing the litigants to settle their own dispute, without the help of the courts, was inherently beneficial. Owen Fiss has presented the most forceful critique of this position: for settlement negotiations to be fair, the parties must have equal bargaining power. n178 In many lawsuits, the opposing parties do not have comparable resources at their disposal. An institutional litigant can afford to "purchase" the rights to an adverse decision while the paradigmatic one-shotter often cannot afford to think beyond the outcome in the particular case. While adjudication ideally prevents inequalities between the parties from affecting the outcome, the settlement process encourages parties to exploit inequalities to encourage quicker resolutions. n179

Examples of how litigants used vacatur prior to the Bonner Mall decision demonstrate how the judicial system sold the rights of future one-shot litigants to resolve present disputes more efficiently. Thus, in *Hendrickson v. Secretary of Health and Human Services*, n180 an institutional litigant -- the government -- used a settlement agreement conditioned on vacatur to eliminate an adverse precedent that would have expanded the class of people entitled to disability benefits. Likewise, in the case of *In re United States*, n181 the federal government unsuccessfully attempted to use vacatur to expunge a judgment limiting the state secrets doctrine. n182 If the District of Columbia had adopted a more liberal vacatur standard and the government had been allowed to purchase the judgment in *In re United States*, it would have upset the separation of powers doctrine and called into question the judiciary's willingness to limit the executive's unbridled discretion. n183 The ability to buy and sell judgments in several circuits prior to Bonner Mall assumed that decisions were the parties', not the public's, property.

At the point when the decision is being made whether or not to settle a dispute, potential or future precedent may properly be thought of as being solely a by-product of dispute resolution. However, once a decision is made to commit society's resources to resolving the dispute and an opinion is issued, it is more appropriate to think of the judgment as part of society's rules. n184 Bonner Mall embraced and affirmed the viewpoint articulated earlier by Justice Stevens in his dissent to *Izumi*: "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." n185 Even if one accepts the private law model premise that the purpose of litigation is to resolve the dispute between the parties, once a court issues a judgment the private dispute should be thought of as public property.

C. The Broader Impact of the Bonner Mall Decision

The Bonner Mall decision is notable for its unanimous support and for its explicit espousal of a law-expounding model of jurisprudence. Even Justice Scalia, one of the strongest advocates of the traditional dispute resolution model, n186 now underscores the public interest:

To allow a party who steps off the statutory path [of appeal] to employ the secondary remedy of vacatur as a refined form of collateral attack on this judgment would -- quite apart from any considerations of fairness to the parties -- disturb the orderly operation of the federal judicial system. . . . [T]he public interest requires those demands [of "orderly procedure"] to be honored when they can. n187

The emphasis on the public interest in orderly procedure over the fairness to the parties contradicts the Court's longstanding adherence to the private law approach. n188

However, to interpret the Bonner Mall decision as heralding a major shift in the Court's interpretation of the judicial role would be an over-simplification. Justice Scalia reaffirmed that the primary function of the courts is still to decide private disputes. n189 Unless there is an Article III "case or controversy," a federal court does not have jurisdiction. n190 It follows that, consistent with the private law approach, in deciding the merits of the particular "case," a court should only consider the parties' interests and not society's. The Bonner Mall Court does not embrace a law-expounding model at this stage of the litigation. However, even though the case-or-controversy requirement is no longer fulfilled, once a court decides the case (or a settlement moots it), a court may still enter orders, write opinions, and "make such disposition of the whole case as justice may require." n191

In Bonner Mall the Court makes clear that after the private dispute is resolved, a court not only may, but should, take account of the public interest. During this post-judgment phase of the litigation, the private parties no longer write the court's agenda. The courts must weigh the public interest in the orderly operation of the judicial system against any efficiency benefits. n192 Thus, the Supreme Court may be ready to rule on the propriety of the federal circuits' selective publication practices, and to the extent that efficiency benefits are illusory or slight, require universal publication to protect the public interest in judicial precedent.

III. Conclusion: The Importance of a System of Precedent

If the courts' law-expounding function is recognized as legitimate and often more important than their dispute-resolving

role, it follows that all appellate decisions should be published. Universal publication would protect the system of precedent and provide clear guidance to litigants. If a court of further appeal, such as the California Supreme Court, later determines that a published decision is incorrect, the higher court should reverse the decision and explain its reasoning, but it should not be able to stifle dissenting voices.

The advantages of a system of precedent correspond to the three discussed goals of adjudication: promoting efficiency, protecting private rights, and espousing public values. From the perspective of efficiency, the system of precedent supplements legislative rule-making. Whenever a legislature enacts a statute, it leaves gaps. n193 It would be impossible for a judicial system to interpret legislation and fill in gaps if it eyed each issue afresh in every case. n194 The system of precedent allows the judiciary to resolve disputes and pronounce legal rules without constantly retesting every legal proposition.

The system of precedent also promotes the protection of private rights and the resolution of disputes. The system of precedent makes the law more certain and uniform because it allows courts separated geographically and temporally to exchange their decisions and reasoning. n195 It creates guidelines within which individual judges must operate to avoid reversal. By making the law more certain, it also allows individuals to structure their affairs to avoid disputes and litigation. n196

Finally, the system of precedent allows the exposition of public values. As Justice Holmes wrote, "The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race." n197 In particular, publication of judicial decisions allows the public to determine whether principles do in fact guide the courts' decisions. The system of precedent is perhaps most useful when there is a conflict between stare decisis and changing public values because the system of precedent allows for evolution. Requiring the reasoned justification for decisions encourages public debate and participation. For instance, in *Escola v. Coca-Cola Bottling Co. of Fresno*, n198 the California Supreme Court, applying a negligence standard, affirmed a jury award to a plaintiff injured by an exploding cola bottle. n199 In his separate concurrence, Justice Traynor argued that the decision should be based on a theory of strict liability. n200 Justice Traynor's reasoning, although not persuasive to the *Escola* Court, became part of the system of precedent and contributed significantly to the adoption of strict products liability in many jurisdictions during the 1960s. n201 His opinion was revolutionary on a conceptual level because it provided rational arguments for basing liability on the parties' relative abilities to spread costs and to avoid defects instead of on their fault.

An equally seminal opinion was Justice Harlan's dissent in *Poe v. Ullman*. n202 Justice Harlan did not hesitate to base the right of married couples to use contraceptives on the Due Process Clause's protection of liberty:

This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints. . . . n203

Several years later, the majority of the Court followed Harlan's lead and guaranteed a couple's right to purchase and use contraceptives under the Due Process Clause. n204 Ultimately, Justice Harlan's substantive reading of the Constitution's due process guarantees led to the controversial proclamation of a woman's right to choose to have an abortion. n205 Although it is unclear whether Justice Harlan himself would have extended the Due Process Clause this far, his dissent became part of the system of precedent. As precedent, his ideas and reasoning are society's property. n206 The system of precedent preserves the reasoning of prevailing as well as losing arguments so that future courts can continue to reason through and to revise the applicable rules. While separate opinions may not always lead to changes in the majority viewpoint, a majority rule's ability to withstand contrary reasoning adds to its validity. It is the reliance on tradition and the equal opportunity of litigants to influence this tradition that provides judicial legitimacy in a political democracy. n207

It is a question of priorities, of how highly we value precedent when calculating the most "efficient" distribution of resources. The courts cannot afford to ignore efficiency, but at the same time judicial integrity is an intangible. An equation cannot adequately measure the costs of selling the integrity of the system of precedent.

FOOTNOTES:

n1 1 WILLIAM CRANCH, REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES iii (Frederick C. Brightly ed., 3d ed., Banks Law Publishing Co. 1911) (1804).

n2 See BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 17 (Yale Paperback 1949) (1921).

n3 See Frank H. Easterbrook, *The Supreme Court, 1983 Term -- Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 5 (1984).

n4 See U.S. CONST. amend. V, XIV.

n5 See *infra* notes 53-54 and accompanying text.

n6 No. 88-7729, 1988 WL 119136 (4th Cir. Oct. 31, 1988).

n7 See *id.*

n8 The Johnson Court stated: "[Johnson] alleges that he was discriminated against in being denied the work assignment because of the statement that he was a homosexual. If Johnson was denied a prison work assignment simply because of his sexual orientation, his equal protection rights may have been violated." *Id.* at *1.

n9 After stating that prison officials may have violated Johnson's equal protection rights, the court cited to *Thomas v. Pate*, 493 F.2d 151, 156 (7th Cir. 1974), as holding "that racial discrimination in prison work assignments presents a claim cognizable under § 1983." Johnson, 1988 WL 119136, at *1. Such a citation only makes sense if Johnson's situation were parallel to that of an inmate suffering from racial discrimination, in short, if the Fourth Circuit viewed both homosexuality and race as suspect classifications.

n10 See 4TH CIR. I.O.P. 36.6 (disfavoring citation of unpublished opinions unless no published precedent is available).

n11 California's depublication practice has been widely considered in the state's legal literature, but rarely in conjunction with similar federal practices. See, e.g., Stephen Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 LOY. L.A. L. REV. 1033, 1072 (1993); Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 CAL. L. REV. 514 (1984); Gerald F. Uelmen, *Publication and Depublication of California Court of Appeal Opinions: Is the Eraser Mightier than the Pencil?*, 26 LOY. L.A. L. REV. 1007 (1993).

n12 See CAL. R. CT. § 976.

n13 See CAL. R. CT. § 979.

n14 15 Cal. Rptr. 2d 316 (1992) (ordered not published).

n15 See *id.* at 318.

n16 See *id.* at 325-27.

n17 See *id.* at 316. The bound volumes of the official California Reports do not include depublished opinions, but West's California Reporter provides access to them. They are also available on the Westlaw and LEXIS on-line computer services.

n18 See CAL. R. CT. § 977. Rule 977 provides only two exceptions to the no citation rule. First, a depublished opinion may still be cited or relied on under the doctrines of law of the case, *res judicata*, or collateral estoppel. Second, the court may rely on a depublished opinion in a criminal proceeding when that opinion explains decisions affecting the same defendant in another proceeding. See CAL. R. CT. § 977.

n19 No. 93-714, 1994 WL 611411 (U.S. Nov. 8, 1994). An excellent discussion of the state of vacatur law prior to *Bonner Mall* was recently published. See Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471 (1994).

n20 765 F.2d 747 (8th Cir. 1985).

n21 See *id.* at 752.

n22 See *id.* at 749.

n23 See *Hendrickson v. Secretary of Health and Human Services*, 774 F.2d 1355 (8th Cir. 1985).

n24 The vacated Eighth Circuit ruling had directly conflicted with a prior Tenth Circuit decision. See *Yoder v. Harris*, 650 F.2d 1170, 1172-73 (10th Cir. 1981). *Ciccione v. Secretary of Health and Human Services*, 861 F.2d 14 (2d Cir. 1988), is the only case that has cited either *Hendrickson* or *Yoder* for its precedential value since the *Hendrickson* opinion was vacated. It chose *Yoder's* unvacated precedent as the prevailing rule of law. See *Ciccione*, 861 F.2d at 15. In most instances, vacatur also eliminates a judgment's collateral estoppel effects. See *infra* note 156 and accompanying text. In *Hendrickson*, the government was the losing party and thus collateral estoppel was not an issue. See *United States v. Mendoza*, 464 U.S. 154 (1984). But see *Colorado Springs Prod. Credit v. Farm Credit Admin.*, 666 F. Supp. 1475, 1476-79 (D. Colo. 1987) (applying nonmutual collateral estoppel against the government in a situation that fell outside of the policy considerations of the *Mendoza* rule).

n25 See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2814 (1992) ("The need for principled action to be perceived as such is implicated to some degree whenever this, or any other appellate court, overrules a prior case.").

n26 Traditionally, scholars have argued that neutrality in developing rules for future conduct distinguishes the judicial from the legislative function based on the assumption that judges allocate entitlements based on principle, not politics. See *Abram Chayes, The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1307-08 (1976); *Lon L. Fuller, The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978); *Herbert Wechsler, Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). The system of precedent provides judges with the principles against which they evaluate litigants' proofs and reasoned arguments. See *Louis D. Brandeis & Samuel D. Warren, The Right to Privacy*, 4 HARV. L. REV. 193, 197 (1890) (looking to precedent to determine whether there is a principle in law that allows protection of a privacy right); cf. *KARL N. LLEWELLYN, THE BRAMBLE BUSH* 189-92 (1960) (explaining that the "law of leeways" can provide judges with a sound consciousness of the duty and limits of balancing precedent against reason).

In contrast to this traditional viewpoint, many contemporary scholars argue that entitlements can neither be derived from logical principles, nor are they politically neutral. See *Karl E. Klare, The Law-School Curriculum in the 1980s: What's Left?*, 32 J. LEGAL EDUC. 336, 340 (1982); *Mark Tushnet, Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205 (1981). Granting one type of right means that another right will be curtailed. See *Cass R. Sunstein, Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLO. L. REV. 1, 50 (1992).

n27 *Jerry L. Mashaw, The Supreme Court's Due Process Calculus for Administration Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 52 (1976).

n28 See *supra* note 19 and accompanying text.

n29 Although this section focuses descriptively on the federal system, its normative conclusions are equally relevant to state procedures. See, e.g., *Neary v. Regents of the Univ. of Calif.*, 3 Cal. 4th 273, 280-81 (1992) (favoring dispute resolution to the law-expounding model).

n30 See *PAUL M. BATOR, ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 82 (3d ed. 1988) [hereinafter *HART & WECHSLER*]; *Susan Bandes, The Idea of a Case*, 42 STAN. L. REV. 227, 228 (1990).

n31 In *Hewitt v. Helms*, 482 U.S. 755, 761 (1986), the Court stated, "The real value of the judicial pronouncement -- what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion -- is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff" (emphasis in original).

n32 See *Chayes, supra* note 26, at 1282; *Easterbrook, supra* note 3, at 5.

n33 5 U.S. (1 Cranch) 137 (1803).

n34 *Id.* at 169-70.

n35 Chief Justice Marshall wrote: "It 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." *Id.* at 177-78.

n36 See, e.g., *United States v. Richardson*, 418 U.S. 166 (1974) (holding that a generalized societal grievance does not satisfy the standing requirement of a concrete injury particular to the plaintiff).

n37 See *id.* at 179 ("[T]he absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.").

n38 Cf. HART & WECHSLER, *supra* note 30, at 80 ("The distinction between what may simplistically be called the 'dispute resolution' and 'public action' models does not involve watertight compartments.").

n39 Even in *Marbury*, much of Marshall's opinion was dicta, statements of principle unnecessary to deciding the particular dispute. See Michael B. Dashjian, *The Prospective Application of Judicial Legislation*, 24 PAC. L.J. 317, 387 (1993); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 311 (1993).

n40 Owen M. Fiss, *Comment, Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

n41 See Easterbrook, *supra* note 3, at 5.

n42 See HART & WECHSLER, *supra* note 30, at 79-80; Easterbrook, *supra* note 3.

n43 See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* §§ 2.1-.5 (1989); Chayes, *supra* note 26, at 1290-91; Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1379-92 (1973).

n44 See *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992) (suggesting that the ban on generalized grievances is constitutional rather than prudential and, for the first time, using standing to protect the separation of powers between the judicial and executive branches).

n45 See, e.g., Evan T. Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 624-25 (1992) (discussing *Roe v. Wade* and *United States Parole Comm'n v. Geraghty* as instances where the Supreme Court decided technically moot cases). It is possible to find similarly expansive interpretations of standing and ripeness doctrines. See Bandes, *supra* note 30.

n46 Cf. Martin Redish, *The Passive Virtues, the Counter-Majoritarian Principle, and the "Judicial-Political" Model of Constitutional Adjudication*, 22 CONN. L. REV. 647, 669 (1990) (arguing that justiciability doctrines should be redefined to take account of the hybrid judicial and political functions performed in the adjudication of constitutional issues).

n47 See Monaghan, *supra* note 43, at 1376-77; Redish, *supra* note 46, at 669-70.

n48 See Mashaw, *supra* note 27, at 47.

n49 See *id.* at 51.

n50 See *id.* at 48. For instance, to try to put a dollar value on an individual litigant's demoralization because of her inability to present an argument in an oral proceeding is asking an unanswerable question.

n51 See William Brennan, Jr., *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3, 21-22 (1988).

n52 See *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

n53 The Fourth Circuit has stated in dicta that inaccessibility to published judicial decisions does not violate an individual's constitutional due process rights. See *Jones v. Superintendent*, 465 F.2d 1091, 1094 (4th Cir. 1972); see also David Dunn, Note, *Unreported Decisions in the United States Courts of Appeals*, 63 CORNELL L. REV. 128, 142-43 (1977). Systematic reporting did not even come into existence until the mid-nineteenth century. See William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 575-77 (1981). Therefore, universal access to precedent cannot be described as a traditional and fundamental norm of due process. Cf. *Poe*, 367 U.S. at 542 (Harlan, J., dissenting) (describing the process through which due process is defined).

Dissenting in *Crowell v. Benson*, 285 U.S. 22 (1931), Justice Brandeis explained that if there is an essential core of judicial power, it is defined by the need to protect individual due process rights rather than systemic rights:

If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the jurisdiction of the federal District Courts as such, but because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process.

Id. at 87; cf. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 867 (1986) (Brennan, J., dissenting).

n54 See Monaghan, *supra* note 43, at 1369.

n55 See *id.* at 1368; Redish, *supra* note 46.

n56 See generally Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (comparing the structural advantages of institutional litigants to "one-shotters"). Galanter uses the terms "repeat players" and "one-shotters" to describe two litigant paradigms. I prefer the term "institutional litigants" to "repeat players" because repeat players are invariably institutions and the asymmetry in power derives from their economic and political status as much as from repeated contact with the courts.

Institutional litigants are typically those organizations that (1) engage in frequent litigation, (2) are more concerned with long-range goals than with the outcome of any particular case, and (3) have the political and economic resources necessary to support these larger interests. See *id.* at 97.

n57 Thus, civil rights groups like the NAACP or ACLU may adopt test-case strategies in which they choose clients to forward an interest rather than allowing the particular clients' interests to determine their agenda. See *id.* at 136 n.101; see also Carl Tobias, *Environmental Litigation and Rule 11*, 33 WM. & MARY L. REV. 429, 457-58 (1992) (noting that the courts have imposed relatively few Rule 11 sanctions on institutional civil rights plaintiffs in comparison to individual civil rights plaintiffs).

n58 Arguably, because the lawyers of one-shot plaintiffs have repeated contacts with the legal system, they are in a position to act for the long-term and rule-oriented interests of a particular class of clients rather than individual clients. However, because the legal system is structured so that lawyers are identified with their clients as individuals, lawyers, as an institution, may accentuate the imbalance between institutional litigants and one-shotters. See Galanter, *supra* note 56, at 114-15. According to accepted standards of professional conduct, a lawyer cannot advise an individual to refuse to settle a case that is likely to create "good" precedent unless the creation of precedent is the plaintiff's main objective. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a). A lawyer, however, can advise an organization that it should refuse to settle a case that is likely to make good law because it is in the interests of an organization to win over a broader range of cases. Moreover, a large organization can usually afford better legal services. See Tobias, *supra* note 57, at 458; Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 496 (1988-89).

n59 See Galanter, *supra* note 56, at 99-100.

n60 See *id.* at 100-01.

n61 Because of economies of scale, institutional litigants can reduce information costs. See PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 129 (1983); Galanter, *supra* note 56, at 103.

n62 See Tobias, *supra* note 57, at 459.

n63 The distinction between the government, as an institutional litigant, and a civil rights plaintiff, as a one-shotter, is more a continuum than a dichotomy. Some government entities do not act with foresight and some civil rights plaintiffs seek to vindicate group rights. Over the broad range of cases, however, institutional litigants will be better able to shape the system of precedent to their advantage. See SCHUCK, *supra* note 61, at 126; Tobias, *supra* note 58, at 498 (noting that civil rights plaintiffs are more vulnerable to Rule 11 sanctions than other litigants).

n64 See, e.g., *Nestle Co. v. Chester's Market*, 756 F.2d 280 (2d Cir. 1985) (vacating, on the parties' joint motion, a judgment involving a trademark dispute).

n65 Unlike federal decisions, California appellate decisions are available in unofficial reporters for several months before they are republished. While California appellate courts may be wary of a new precedent until it becomes apparent that the Supreme Court will not depublish the decision, other lower courts may rely on a California decision for persuasive effect only to see the California decision republished. See *infra* note 86.

n66 See Mark D. Hinderks & Steve A. Leben, *Restoring the Common in the Law: A Proposal for the Elimination of Rules Prohibiting the Citation of Unpublished Decisions in Kansas and the Tenth Circuit*, 31 WASHBURN L.J. 155, 158 (1992). The current publication system emerged from a 1964 Judicial Conference. For a brief history of publication procedures in the 19th and 20th centuries, see Reynolds & Richman, *supra* note 53, at 575-79. Most state courts have similar systems of limited publication. See Hinderks & Leben, *supra*, at 163-65.

n67 2D CIR. R. 0.23; see also 3D CIR. R. APP. I, I.O.P. 5.5.1; 10TH CIR. R. 36.1; 11TH CIR. R. 36-2; FED. CIR. R. 47.6(b).

n68 See 1ST CIR. R. 36.2(a); 4TH CIR. I.O.P. 36.4; 5TH CIR. R. 47.5.1; 6TH CIR. R. 24(a); 8TH CIR. R. APP. I, at 4; 9TH CIR. R. 36-2; D.C. CIR. R. 14(b). The Seventh Circuit's rule is the most detailed:

A published opinion will be filed when the decision

(i) establishes a new, or changes an existing rule of law;

(ii) involves an issue of continuing public interest;

(iii) criticizes or questions existing law;

(iv) constitutes a significant and non-duplicative contribution to legal literature

(A) by a historical review of law,

(B) by describing legislative history, or

(C) by resolving or creating a conflict in the law;

(v) reverses a judgment or denies enforcement of an order when the lower court or agency has published an opinion supporting the judgment or order; or

(vi) is pursuant to an order of remand from the Supreme Court and is not rendered merely in ministerial obedience to specific directions of that Court.

7TH CIR. R. 53(c)(1).

n69 See 3D CIR. R. APP. I, I.O.P. 5.1.3; 6TH CIR. R. 24(a); 10TH CIR. R. 36.1; 11TH CIR. R. 36-2.

n70 See 1ST CIR. R. 36.2(b); 2D CIR. R. 0.23; 5TH CIR. R. 47.5.2; FED. CIR. R. 47.6(b); cf. 4TH CIR. I.O.P. 36.4 (the author or a majority can order publication); 7TH CIR. R. 53(d)(2) ("Notwithstanding the right of a single federal judge to make an opinion available for publication, it is expected that a single judge will ordinarily respect and abide by the opinion of the majority in determining whether to publish."); 9TH CIR. R. 36-2(g) (providing that an opinion be published if it "is accompanied by a separate, concurring or dissenting opinion, and the author of such separate expression requests publication of the disposition of the court and the separate expression").

n71 See 8TH CIR. R. APP. I, at 3.

n72 See Gerald F. Uelmen, *Losing Steam*, CAL. LAW., June 1990, at 33, 44.

n73 According to the California court rules:

No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion:

- (1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;
 - (2) resolves or creates an apparent conflict in the law;
 - (3) involves a legal issue of continuing public interest; or
 - (4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.
- CAL. R. CT. § 976(b).

n74 See Uelmen, *supra* note 72, at 43.

n75 See Philip L. Dubois, *The Negative Side of Judicial Decision Making: Depublication as a Tool of Judicial Power and Administration on State Courts of Last Resort*, 33 VILL. L. REV. 469, 488 (1988).

n76 CAL. R. CT. § 979.

n77 See CAL. R. CT. § 979(a).

n78 See Dubois, *supra* note 75, at 475 (stating that California decisions are depublished if a majority of the Supreme Court agrees). Rule 979 does not explain why the Supreme Court depublishes previously certified decisions. However, the Deputy Clerk of the Supreme Court has stated that the Court only depublishes those decisions that it determines do not meet the original publication standards of § 976. Telephone Interview with Deputy Clerk of the California Supreme Court (Feb. 14, 1994). For the text of § 976, see *supra* note 73. Despite this official position, a former California Supreme Court Justice has stated that in the vast majority of situations, the Court votes for depublication even if it thinks that the appellate court correctly applied the publication criteria. See Grodin, *supra* note 11, at 514-15 (1984).

n79 CAL. R. CT. § 979(d).

n80 The Third Circuit forbids the court, but not the litigants, from citing unpublished opinions. See 3D CIR. R. APP. I, I.O.P. 5.8. At least one Third Circuit court has ignored even this prohibition. See *United States v. Polan*, 970 F.2d 1280, 1283 (3d Cir. 1992) (citing an unpublished Third Circuit disposition).

On the other hand, there is little reciprocity among circuits. Except in the District of Columbia, no circuit has a rule that prevents litigants from citing unpublished decisions from other federal circuits. Compare D.C. CIR. R. 11(c) with *City of Newark v. United States Dep't of Labor*, 2 F.3d 31, 33 n.3 (3d Cir. 1993) (citing an unpublished opinion from the Sixth Circuit); *United States v. Sherrod*, 964 F.2d 1501, 1510 n.22 (5th Cir. 1992) (citing an unpublished disposition as the rule of law from the Tenth Circuit); see also Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 945 n.24 (1989).

n81 See 1ST CIR. R. 36.2(b)6; 2D CIR. R. 0.23; 7TH CIR. R. 53(b)(2)(iv); 8TH CIR. R. APP. I, at 3; 9TH CIR. R. 36-3; 10TH CIR. R. 36.3; D.C. CIR. R. 11(c); FED. CIR. R. 47.6; see also *Atlantic States Legal Found. v. Eastman Kodak Co.*, 12 F.3d 353, 357 n.9 (2d Cir. 1993) (disparaging a litigant's citation to an unpublished opinion).

n82 See 4TH CIR. I.O.P. 36.6; 5TH CIR. R. 47.6; 6TH CIR. R. 24(a); cf. 11TH CIR. R. 36-2 (litigants may cite unpublished opinions as persuasive, although not binding, authority).

n83 See *Estate of Warner v. United States*, 743 F. Supp. 551, 556 (N.D. Ill. 1990) ("And as to the United States' claimed violation of [the Seventh Circuit's prohibition on citing unpublished opinions], . . . [n]othing there bars a party from simply advising this Court that a District Court decision, which is not itself subject to any such restriction, has been affirmed on appeal -- after all, such affirmation is itself a matter of public record."); *Durkin v. Davis*, 390 F. Supp. 249, 254 (E.D. Va. 1975) ("Although the Court is mindful of the Fourth Circuit's admonition that memorandum decisions are not to be accorded precedential value, . . . the legal trend evinced by these four memorandum decisions, with all seven active judges participating in one or more of them, leads the Court to the conclusion that it is now the law in this circuit that an individual convicted of a crime has a constitutional entitlement to pre-conviction confinement sentence credit, whether indigent or not."), *rev'd on other grounds*, 538 F.2d 1037 (4th Cir. 1976).

n84 CAL. R. CT. § 977.

n85 CAL. R. CT. § 979(e).

n86 See, e.g., *Niesig v. Team I*, 559 N.Y.S.2d 639, 639-40 (N.Y. App. Div. 1989) (denying a request for reargument of a New York decision that was based in part on the persuasive authority of a subsequently depublished California case).

n87 For example, one study estimated that judges spend approximately 30% of their time writing opinions, based on records kept by seven Third Circuit judges. See 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, 1183 n.95 (1978).

n88 See Reynolds & Richman, *supra* note 87, at 1176-77; Robel, *supra* note 80, at 941.

n89 1ST CIR. R. 36.1; see also 2D CIR. R. 0.23.

n90 See Reynolds & Richman, *supra* note 87, at 1183-84; Reynolds & Richman, *supra* note 53, at 580.

n91 See Reynolds & Richman, *supra* note 53, at 593-94.

n92 See *id.*

n93 See *id.* at 596-97.

n94 See Grodin, *supra* note 11, at 518-20; Kent L. Richland, *Depublication: Depublication is an important tool for controlling aberrant court of appeal opinions*, L.A. LAW., Aug.-Sept. 1990, at 48, 50.

n95 See CALIF. CONST. art. VI, § 12 (1994) (Supreme Court's review of appellate decisions is discretionary); *People v. Davis*, 81 P. 718, 719-20 (1905) (California Supreme Court only exercises its discretionary power of review to secure uniformity of decision and settle important questions of law).

n96 Indeed, the increase in orders of depublication in recent years closely correlates to a decrease in grants of rehearing. Gerald F. Uelmen, *Depublication: The paper trail leading to a depublication order should be accessible to everyone*, L.A. LAW., Aug.-Sept. 1990, at 55. The California Supreme Court hears only about 10% of all petitions. Dubois, *supra* note 75, at 472.

n97 See Reynolds & Richman, *supra* note 87, at 1184. The savings to consumers of opinions, however, are illusory to the extent that some circuits allow litigants to cite unpublished precedents. If they are not as readily available, but citable, lawyers will spend more time researching fewer cases.

n98 See Reynolds & Richman, *supra* note 87, at 1182; Reynolds & Richman, *supra* note 53, at 579.

n99 See generally RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 122-23 (1985); John Paul Stevens, *Address to the Illinois State Bar Association's Centennial Dinner*, 65 ILL. B.J. 508, 510 (1977).

n100 See Hinderks & Leben, *supra* note 66, at 186.

n101 See Reynolds & Richman, *supra* note 87, at 1175.

n102 Judge Coffin has written:

A remarkably effective device for detecting fissures in accuracy and logic is the reduction to writing of the results of one's thought processes. . . . [W]e may be in the very middle of an opinion, struggling to reflect the reasoning all judges have agreed on, only to realize that it simply "won't write." The act of writing tells us what was wrong with the act of thinking.

FRANK COFFIN, *THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH* 57

(1980), quoted in Reynolds & Richman, *supra* note 53, at 624 n.151. When a federal circuit court decides not to publish an opinion, it still writes a brief explanation of its decision that it makes available to the parties. Since efficiency is a goal of nonpublication, judges should be expected to devote less time to unpublished opinions and thus test their reasoning less. See POSNER, *supra* note 99, at 122, 124. But see Hinderks & Leben, *supra* note 66, at 189-90 (reviewing all 885 unpublished 1990 decisions by the Kansas Supreme Court and Court of Appeals and not finding any significant variation in the quality and quantity of reasoning). Worse still, when the California Supreme Court elects to depublish a decision, it writes no explanation.

n103 See, e.g., *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2702 n.3 (1993) (criticizing the Fourth Circuit for not publishing an affirmation of a district court judgment that a federal law was unconstitutional as applied).

n104 See POSNER, *supra* note 99, at 123 ("Despite the vast number of published opinions, most federal circuit court judges will confess that a surprising fraction of federal appeals are difficult to decide, not because there are too many precedents but because there are too few on point.").

n105 See Hinderks & Leben, *supra* note 66, at 186.

n106 See Reynolds & Richman, *supra* note 87, at 1200 n.161.

n107 See POSNER, *supra* note 99, at 123 ("No one has made a cost-benefit analysis, but there is no convincing basis for presuming that the additional costs of universal publication would exceed the benefits.").

n108 Robel, *supra* note 80, at 947. Robel studied all Ninth Circuit opinions, published and unpublished, during the period from October 1986 through September 1987.

n109 *Id.* at 946-47 n.33.

n110 *Id.* at 948.

n111 See *id.* at 949.

n112 See Reynolds & Richman, *supra* note 53, at 617-18.

n113 See 3D CIR. R. APP. I, I.O.P. 5.1.2; 5TH CIR. R. 47.6; 11TH CIR. R. 36-1.

n114 Reynolds & Richman, *supra* note 53. Some circuits require that non-unanimous decisions be published. See 2D CIR. R. 0.23; 3D CIR. R. APP. I, I.O.P. 5.1.2. In other circuits, a single judge can require the publication of all of the opinions for the case. See 1ST CIR. R. 36.2(b); 2D CIR. R. 0.23; 5TH CIR. R. 47.5.2; FED. CIR. R. 47.6(b).

n115 See Dubois, *supra* note 75, at 499 (noting that 18.4% of depublished California appellate cases involved non-unanimous decisions compared to 4.8% of published cases).

n116 One commentator who analyzed the use of depublishation in California during the liberal Bird Court and conservative Lucas Court eras stated unequivocally that "depublishation can be seen for precisely what it is: a device to suppress dissenting views." Uelmen, *supra* note 11, at 1019.

n117 See *id.* at 1020. Former Associate Justice of the California Supreme Court Joseph Grodin admitted, "[Depublishation] not only eliminates the court of appeal opinion as precedent, but it also removes that opinion from the realm of judicial discourse, and therefore from the development of the common law." Grodin, *supra* note 11, at 523.

n118 See HART & WECHSLER, *supra* note 30, at 1855.

n119 See Reynolds and Richman, *supra* note 87, at 1203; cf. *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 551-52 n.3 (1990) (remanding to the circuit court because it would be an inappropriate use of the Supreme Court's discretion to apply a prior precedent without the benefit of the lower court's reasoning); *Terrell v. Morris*, 493 U.S. 1, 4 (1989)

(Rehnquist, C.J., dissenting from per curiam opinion) (Supreme Court should not use its limited resources to vacate an unpublished circuit opinion merely because it would have preferred a more extended discussion). But see *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2703 n.3 (1993) (reversing and remarking on an unpublished per curiam decision); *Commissioner of Internal Revenue v. McCoy*, 484 U.S. 3, 7 (1987) (per curiam) (nonpublication not influencing the decision to review the appellate order).

Public controversy over unusual published appellate decisions or a split between circuits is sometimes the only way to attract enough attention to obtain certiorari. See *Reynolds & Richman*, supra note 87, at 1203; *Reynolds & Richman*, supra note 53, at 616.

n120 See *Ben-Shalom v. Marsh*, 881 F.2d 454, 463-64 (7th Cir. 1989) (refusing to treat homosexuality as a suspect classification), cert. denied, 494 U.S. 1004 (1990); *Watkins v. United States Army*, 847 F.2d 1329, 1349 (9th Cir. 1988) (finding homosexuality a suspect classification under equal protection doctrine), opinion vacated and withdrawn after reh'g en banc, 875 F.2d 699, 704-05 (9th Cir. 1989) (finding it unnecessary to reach the equal protection issue), cert. denied, 498 U.S. 957 (1990); *Padula v. Webster*, 822 F.2d 97, 102-03 (D.C. Cir. 1987) (finding homosexuality not a suspect classification).

n121 478 U.S. 186 (1986). *Hardwick* was not a suspect classification case. Doctrinally, at least, the North Carolina sodomy statute could still be challenged on this basis. But the *Hardwick* Court drew a line between married heterosexuals and homosexuals even though this line was not explicitly drawn in the challenged statute. Thus, it is unlikely that the Supreme Court will declare homosexuality to be a suspect classification. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-33 n.47 (2d ed. 1988).

n122 Since *Hardwick*, the Fourth Circuit has followed the Supreme Court's narrow holding that homosexual conduct is not protected by the substantive due process right to privacy. See *Walls v. City of Petersburg*, 895 F.2d 188, 193 (4th Cir. 1990).

n123 Cf. *Fry v. Patseavouras*, No. 91-7240, 1992 WL 212146 (4th Cir. Sept. 1, 1992) (exempting married heterosexual couples but not unmarried heterosexuals from North Carolina's sodomy prohibition does not violate the Equal Protection Clause). An unpublished Fourth Circuit district court opinion has disagreed with *Johnson*, holding that homosexuality is not a suspect classification. See *Dawson v. State Law Enforcement Div.*, C/A No. 3:91-1403-17, 1992 WL 208967, at *6-*7 (D.S.C. Apr. 6, 1992).

n124 Cf. Alexander Bickel, *The Supreme Court, 1960 Term -- Forward: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). Bickel extols the judiciary's "passive virtues" which counsel for circumspection in holding unconstitutional those laws enacted by political branches. More often than not, the Court uses justiciability doctrines to avoid deciding the merits of cases that would require it to contradict elected officials. See, e.g., infra notes 202-206 and accompanying text (discussing *Poe v. Ullman*, 367 U.S. 497 (1961), which was dismissed on justiciability grounds).

n125 For instance, the controversy over equal protection rights for gays and lesbians led the Clinton Administration to press for a new, less restrictive policy with regard to homosexual servicemembers. See John Lancaster, *Administration Decision Not to Defend Homosexual Ban is a Retreat of Sorts*, WASH. POST, Dec. 31, 1993, at A12; see also Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1619-25 (1993); David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319 (1994).

n126 15 Cal. Rptr. 2d 316 (Ct. App. 1992).

n127 The Court does not provide its reasons for depublication. See supra note 78 and accompanying text.

n128 Depublication made it less likely that they would have received further review. The United States Supreme Court decided a closely analogous case in which the Florida Supreme Court and Eleventh Circuit had come to opposite conclusions. See *Madsen v. Women's Health Center*, 114 S. Ct. 2516 (1994) (upholding a trial court's order to enjoin Operation Rescue from picketing and making excessive noise with a "buffer zone" but striking down other provisions on First Amendment grounds). Significantly, both opinions had been published. Compare *Cheffer v. McGregor*, 6 F.3d 705 (11th Cir. 1993) (striking down the entire injunction) with *Operation Rescue v. Women's Health Ctr.*, 626 So. 2d

664, 679 (Fla. 1993) (affirming the entire injunction).

n129 See *Pennsylvania v. Bruder*, 488 U.S. 9, 13-14 (1988) (Stevens, J., dissenting from summary reversal); cf. *Capital Cities Media, Inc. v. Toole*, 466 U.S. 378 (1984) (vacating case where Supreme Court of Pennsylvania had denied a media petition for a writ of prohibition without writing an opinion and remanding with directions to clarify the record).

n130 See POSNER, *supra* note 99, at 124.

n131 See *id.* This, of course, assumes that selective publication saves time.

n132 For a consideration of the advantages and disadvantages of different methods for decreasing the average judicial workload, see, for example, Larry Kramer, "The One-Eyed Are Kings": Improving Congress's Ability to Regulate the Use of Judicial Resources, 54 *LAW & CONTEMP. PROBS.* 73 (Summer 1991); Jon O. Newman, Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System, 56 *U. CHI. L. REV.* 761, 770-77 (1989).

n133 See Robel, *supra* note 80, at 958.

n134 See 1ST CIR. R. 36.2(a)4; 7TH CIR. R. 53(d)(3); 9TH CIR. R. 36-4; D.C. CIR. R. 14(e); FED. CIR. R. 47.6(c).

n135 See CAL. R. CT. § 978(a).

n136 See POSNER, *supra* note 99, at 126 ("Institutions with recurrent litigation in particular areas . . . sometimes find it worth their while to review unpublished opinions systematically and request publication of those that favor their litigation interests. Unless their opponents are also repeat litigants with an interest in precedent, an unrepresentative sample of unpublished opinions will be given precedential status through publication, and the weight of precedent in particular areas will be distorted."); Reynolds & Richman, *supra* note 87, at 1179; Robel, *supra* note 80, at 958; Uelmen, *supra* note 72, at 44; see also Uelmen, *supra* note 96, at 49 (stating that lawyers frequently file mini-briefs or organize letter-writing campaigns to affect the California Supreme Court's depublication decisions).

n137 Robel, *supra* note 80, at 958.

n138 *Id.* For instance, in *Haines v. Otto Kerner*, 492 F.2d 937 (7th Cir. 1974), the Seventh Circuit ruled that 15 days' confinement in an isolation cell was not cruel and unusual punishment. The case was initially disposed of by an unpublished order, but it was subsequently published in response to a motion by the Illinois Attorney General. Reynolds & Richman, *supra* note 87, at 1179 n.72 (citation omitted). If the case had turned out the other way and the prisoner had won, the opinion would have probably remained hidden.

n139 See Robel, *supra* note 80, at 956-57.

n140 For instance, Westlaw does not include unpublished opinions from the Second, Third, Fifth, and Eleventh Circuits. Telephone Interview with Westlaw Customer Service Representative (Mar. 1, 1994).

n141 According to a Westlaw Customer Service Representative, a good "rule of thumb" is that access costs four dollars per minute. The government receives special pricing, but other public interest entities do not. Telephone Interview with Westlaw Customer Service Representative (Mar. 1, 1994).

n142 Hinderks & Leben, *supra* note 66, at 212; Reynolds & Richman, *supra* note 87, at 1199; Robel, *supra* note 80, at 943-44, 956.

n143 See Reynolds & Richman, *supra* note 53, at 603-04.

n144 See *id.* at 602-03.

n145 See *id.* at 621-23.

n146 For example, there is an absence of disincentives for prisoners to appeal. See *id.*

n147 267 Cal. Rptr. 326 (Ct. App. 1990) (ordered to be only partially published).

n148 See *id.* at 339. For a description of the distinction between the California appellate courts' initial certification of an opinion for publication and the California Supreme Court's republication procedures, see *supra* notes 73-79 and accompanying text.

n149 Gardner, 267 Cal. Rptr. at 340.

n150 CAL. PENAL CODE § 1170.

n151 See Robert S. Gerstein, Law by Elimination: Depublication in the California Supreme Court, 67 JUDICATURE 293, 298 (1984).

n152 CAL. PENAL CODE § 1170(a)(1).

n153 Gerstein, *supra* note 151, at 298.

n154 A similar practice has recently developed in the California state system. See *Neary v. Regents of the Univ. of Calif.*, 834 P.2d 119 (Cal. 1992).

n155 See *United States v. Munsingwear*, 340 U.S. 36, 39-40 (1950) (holding that appellate courts may vacate lower courts' decisions that become moot pending appeal when mootness occurs due to circumstances unattributable to any of the parties); see also *United States Philips Corp. v. Windmere Corp.*, 971 F.2d 728, 730-31 (Fed. Cir. 1992) (granting a motion for vacatur as part of a joint settlement agreement despite a non-party's protests that the judgment should be preserved for purposes of collateral estoppel in another trial); cert. granted sub nom. *Izumi v. United States Philips Corp.*, 113 S. Ct. 2411 (1993), cert. dismissed, 114 S. Ct. 425 (1993).

n156 See *County of L.A. v. Davis*, 440 U.S. 625, 634 n.6 (1979) (holding that decision of Supreme Court that vacates a judgment of the Court of Appeals deprives the lower court's opinion of stare decisis effect); see also CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: JURISDICTION AND RELATED MATTERS 2D § 3533.10 n.47 (collecting authorities); cf. *Harris v. Board of Governors*, 938 F.2d 720, 723 (7th Cir. 1991) (holding that when a case becomes moot pending appeal, the only effect of appellate vacatur of all previous orders is to deprive orders of preclusive effect in subsequent litigation, not their stare decisis effect).

n157 No. 93-714, 1994 WL 611411 (U.S. Nov. 8, 1994).

n158 See generally *Oklahoma Radio Associates v. Federal Deposit Insurance Corp.*, 3 F.3d 1436, 1440-44 (10th Cir. 1993) (surveying the law in each circuit).

n159 See *Philips*, 971 F.2d 728; *Tosco Corp. v. Hodel*, 826 F.2d 948 (10th Cir. 1987); *Federal Data Corp. v. SMS Data Products Group*, 819 F.2d 277 (Fed. Cir. 1987); *Nestle Co. v. Chester's Market*, 756 F.2d 280 (2d Cir. 1985). At least two other circuits appeared to grant vacatur automatically. See *Baxter Healthcare Corp. v. Healthdyne, Inc.*, 956 F.2d 226 (11th Cir. 1992); *Hendrickson v. Secretary of Health & Human Services*, 774 F.2d 1355 (8th Cir. 1985). In these cases the courts published conclusory orders to vacate the prior judgments. Both orders relied exclusively on a citation to the *Munsingwear* doctrine, suggesting that the Eighth and Eleventh Circuits also vacated prior judgments pursuant to a settlement agreement as a matter of right.

n160 In *Nestle Co. v. Chester's Market*, 756 F.2d 280 (2d Cir. 1985), the Second Circuit explained: "We see no justification to force these defendants, who wish only to settle the present litigation, to act as unwilling private attorneys general and to bear the various costs and risks of litigation." *Id.* at 284. Several years later, the Second Circuit reversed its position in *Manufacturers Hanover Trust Co. v. Yanakas*, 11 F.3d 381 (2d Cir. 1993) and joined the second camp of circuits that refused outright to grant joint requests for vacatur.

n161 See *Clarendon, Ltd. v. Nu-West Industries*, 936 F.2d 127, 129 (3d Cir. 1991); *In re United States*, 927 F.2d 626, 628 (D.C. Cir. 1991); *In re Memorial Hosp.*, 862 F.2d 1299 (7th Cir. 1988).

n162 For instance, in *In re Memorial Hosp.*, Judge Easterbrook held:

When a clash between genuine adversaries produces a precedent, however, the judicial system ought not allow the social value of that precedent, created at cost to the public and other litigants, to be a bargaining chip in the process of settlement. The precedent, a public act of a public official is not the parties' property. . . . Judges must have at heart the interests of other litigants in future cases, and hold them equal in weight with the interests of today's.

Id. at 1302-03.

n163 See *National Union Fire Ins. Co. v. Seafirst Corp.*, 891 F.2d 762 (9th Cir. 1989); *Ringsby Truck Lines, Inc. v. Western Conf. of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982) ("The answer may be different in different cases as equities and hardships vary the balance between the competing values of right to relitigate and finality of judgment."). Similarly, in *Oklahoma Radio Associates v. Federal Deposit Insurance Corp.*, 3 F.3d 1436 (10th Cir. 1993), the Tenth Circuit adopted the Ninth Circuit's case-by-case approach, rejecting several earlier precedents liberally granting vacatur. See *id.* at 1439-40, 1444.

n164 Last term the Court had promised to hear the issue when it granted certiorari in *Izumi v. United States Philips Corp.*, 114 S. Ct. 425 (1993), but the per curiam opinion dismissed the writ as improvidently granted without discussing the vacatur issue. *Id.* at 425-26.

n165 See *Bonner Mall*, 1994 WL 611411, at *1-*2.

n166 See *id.*

n167 See *id.* The other party opposed vacatur. Usually, both litigants agree to vacatur as part of the settlement and jointly move the court. See, e.g., *In re United States*, 927 F.2d 626 (D.C. Cir. 1991).

n168 Justice Scalia refused to extend the doctrine enunciated in *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950), that when a case becomes moot during the appellate process, the trial court judgment should be vacated. Justice Scalia emphasized that in *Munsingwear*, the case became moot due to happenstance, not due to any action taken by either party. See *Bonner Mall*, 1994 WL 611411, at *4; *Munsingwear*, 340 U.S. at 39-40. The rationale of *Munsingwear* is that a party deprived of appellate review should not be bound by a preliminary decision. See *id.* In cases of settlement, however, the losing party either already has had appellate review (and lost) or has foregone an appeal as a tactical choice. See *Bonner Mall*, 1994 WL 611411, at *4 ("The judgment is not unreviewable, but simply unreviewed by his own choice."); see also *Karcher v. May*, 484 U.S. 72, 82-83 (1987) (refusing to vacate the lower court's decision because *Munsingwear* is inapplicable where the controversy did not become moot due to circumstances unattributable to any of the parties).

n169 See *Bonner Mall*, 1994 WL 611411, at *7.

n170 See *id.*

n171 See, e.g., Henry E. Klingeman, Note, *Settlement Pending Appeal: An Argument for Vacatur*, 58 *FORDHAM L. REV.* 233, 242-45 (1989). *Contra*, Jill E. Fisch, *Rewriting History*, 76 *CORNELL L. REV.* 589, 632-41 (1991).

n172 See *Nestle Co. v. Chester's Market*, 756 F.2d 280, 281 (2d Cir. 1985).

n173 While it is impossible to know why a losing party would want to vacate a particular opinion, the institutional litigant's likely motive was to erase negative precedent. See *Manufacturers Hanover Trust v. Yanakas*, 11 F.3d 381, 384 (2d Cir. 1993).

n174 See *In re United States*, 927 F.2d 626, 628 (D.C. Cir. 1991).

n175 See *Bonner Mall*, 1994 WL 611411, at *6-*7; *Memorial Hosp. v. United States Dep't of Health & Human Services*,

862 F.2d 1299, 1302 (7th Cir. 1988); Barnett, *supra* note 11, at 1072; Fisch, *supra* note 171, at 636-37. If the parties still decide to litigate, they have an incentive to invest more resources in the first decision to ensure that it is accurate. See Easterbrook, *supra* note 3, at 31.

n176 A comparable example from the California state courts casts further doubt on the alleged efficiency benefits of vacatur in the federal system. Until recently in the California state system, one division of the court of appeals regularly refused to grant joint requests for vacatur while the other appellate divisions routinely granted them. The aberrant appellate division had an average settlement rate that was twice as high as the other appellate divisions. See Barnett, *supra* note 11, at 1073. Thus, empirical data supported the contention that liberal grants of vacatur do not promote settlement.

n177 See *Manufacturer Hanover Trust v. Yanakas*, 11 F.3d 381, 384 (2d Cir. 1993) ("[Granting vacatur] would allow a party with a deep pocket to eliminate an unreviewable precedent it dislikes simply by agreeing to a sufficiently lucrative settlement to obtain its adversary's cooperation in a motion to vacate." (emphasis added)).

n178 See Fiss, *supra* note 40, at 1076.

n179 See *id.* at 1078 ("There is, moreover, a critical difference between a process like settlement, which is based on bargaining and accepts inequalities of wealth as an integral and legitimate component of the process, and a process like judgment, which knowingly struggles against those inequalities.").

n180 765 F.2d 747, vacated as moot, 774 F.2d 1355 (8th Cir. 1985). See *supra* notes 20-24 and accompanying text.

n181 872 F.2d 472 (D.C. Cir. 1989).

n182 In the original trial, the plaintiff, whose husband was a former member of the Communist Party of the United States of America, asserted that the FBI had planted a fictitious report in a car used by her husband to make him appear to be an FBI informant and to discredit him. See *In re United States*, 872 F.2d at 474. The government refused to comply with the plaintiff's discovery requests for certain documents by invoking the state secrets doctrine. See *id.* The district court, affirmed by the circuit court on appeal, ruled that it would review the relevance of the state secrets doctrine on a document-by-document basis. See *id.* at 478. While the government's petition for a writ of certiorari was pending, the parties reached a settlement and jointly moved the D.C. Circuit to vacate its affirmation of the district court's ruling, but the circuit court refused. *In re United States*, 927 F.2d 626 (D.C. Cir. 1991).

n183 See *In re United States*, 872 F.2d at 474-75.

n184 See *Manufacturers Hanover Trust Co. v. Yanakas*, 11 F.3d 381, 385 (2d Cir. 1993). In practice, even before a court writes an opinion and issues a judgment, society invests significant resources in resolving "private" disputes.

n185 See *Izumi v. United States Philips Corp.*, 114 S. Ct. 425, 431 (Stevens, J., dissenting).

n186 See, e.g., *Hewitt v. Helms*, 482 U.S. 755, 761 (1986) (stating that a court's statement of law is not a vindication of rights, but rather that the real value of a judicial decision is that it "affects the behavior of the defendant toward the plaintiff") (emphasis in original).

n187 *Bonner Mall*, 1994 WL 611411, at *5.

n188 See *supra* notes 30-32 and accompanying text.

n189 See *Bonner Mall*, 1994 WL 611411, at *3.

n190 See *id.*

n191 See *id.* (quoting *Chandler v. Judicial Council of Tenth Circuit*, 398 U.S. 74, 111 (1970) (Harlan, J., concurring in denial of writ)).

n192 See *Bonner Mall*, 1994 WL 611411, at *6-*7.

n193 An inherent trade-off constrains the effectiveness of rule-making: the more precise and determinate a rule is, the less inclusive and riddled with exceptions it will be. The more inclusive a rule (or standard) is, the less determinately it will resolve specific cases. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 22, 57-59 (1992).

n194 See *CARDOZO*, supra note 2, at 149, cited in *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2808 (1992).

n195 See *Casey*, 112 S. Ct. at 2808. See generally Reynolds & Richman, supra note 53, at 575.

n196 See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 587 (1958 tentative ed.); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 26 (1960).

n197 Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

n198 150 P.2d 436 (1944).

n199 *Id.* at 440 (relying on the doctrine of *res ipsa loquitur*).

n200 *Id.* at 440 (Traynor, J., concurring).

n201 See James A. Henderson, Jr. & Aaron D. Twerski, *Stargazing: The Future of American Products Liability Law*, 66 N.Y.U. L. REV. 1332, 1333 (1991); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 638 n.177, 690 (1992).

n202 367 U.S. 497 (1961). A plurality of the Court dismissed the challenges to Connecticut's prohibition against the use of contraceptives on justiciability grounds.

n203 *Poe*, 367 U.S. at 543 (Harlan, J., dissenting).

n204 See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (proclaiming the right of married couples to use contraceptives); see also *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending the right to unmarried couples).

n205 See *Roe v. Wade*, 410 U.S. 113, 167-69 (1973) (Stewart, J., concurring) (situating the right to choose to have an abortion within due process liberty rights and emphasizing the impact of Justice Harlan's *Poe* opinion).

n206 In Justice Harlan's words: "The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing." *Poe*, 367 U.S. at 542 (Harlan, J., dissenting) (emphasis added); see also Tobias, supra note 58, at 497 ("Indeed, the civil justice system and society depend on the common law process of growth and creativity in litigation to explore, discover, and enunciate an ever expanding panoply of civil rights, so that by definition the legal theories articulated in inquiries that precede numerous civil rights cases challenge conventional understandings of what is acceptable.").

n207 See Mashaw, supra note 27, at 54; supra notes 26-27 and accompanying text.

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