No Good Deed Goes Unpublished: Precedent-Stripping and the Need for a New Prophylactic Rule

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ABSTRACT:

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This paper addresses the “open secret” that federal appellate courts regularly strip their opinions of precedential value as a means to forgo fair, principled and thorough adjudication of issues raised in appeals. Is there a basis in contemporary constitutional doctrine for a presumption that appellants suffer constitutional injury when courts dispose of their appeals using non-precedential opinions? The author answers “yes.” The argument centers on case law establishing so-called “constitutional prophylactic rules,” which work to “overprotect” a given core right—that is, to create a presumption of constitutional injury without proof of it—when such is the only effective way of protecting the core right to any meaningful extent. The author couples this case law with sobering empirical data and entrenched theories of judicial power to argue that a new prophylactic rule forbidding “precedent-stripping” is necessary to ensure that appellate courts do not deny appellants full and fair adjudication of their appeals.

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To avoid an arbitrary discretion in the courts, it is indispensible that they should be bound down by the strict rules and precedents which serve to define and point out their duty in every particular case that comes before them . . . .

The question then arises whether an overworked, underpaid judiciary confronted with too great a caseload can solve the problem by giving all of the litigants half a loaf. Or whether the proper response, given th[eir] diligence obligation, . . . mean[s] that judges should not facilitate [Congress’] underfunding of the judiciary by delivering second class justice.

Introduction

One need not be a rigid formalist to find irksome the practice of judges stripping their opinions of precedential value. But is such a practice unconstitutional? Some scholars, and at least one federal appellate judge, have argued “yes,” but on grounds that rattle at their fault lines. Some of the less ambitious constitutional arguments have proposed that precedent-stripping is per se violative of individual rights, but these arguments seem to fall short, naggingly so in the minds of readers who want to believe them. This author is one of the anxious faithful. Still believing the practice of precedent-stripping to be obnoxious to the fair and principled administration of justice, I ask in this article: is the per se unconstitutionality of precedent-stripping a prerequisite for a constitutionally based rule prohibiting precedent-stripping? This article proposes that it is not, for the Court has a long history of “overprotecting” rights with “constitutional prophylactic rules” where doing so is the only feasible way of protecting the “core” constitutional right at issue. In this article I examine the possibility of borrowing from this prophylactic rule jurisprudence as a basis for attacking precedent-stripping on constitutional grounds, regardless of the possibly per se constitutionality of the practice.

To illustrate the basic obnoxiousness of precedent-stripping to the integrity of appellate adjudication, imagine yourself as the appellant in the following hypothetical, then consider whether (1) you were denied due process of law and (2) how you would prove it:

A government official violates your rights, so you file a civil rights lawsuit. The trial court dismisses your suit, concluding that the defendant is entitled to some sort of immunity. You appeal. It’s a close call. Your argument sounds quite reasonable; it is a plausible corollary of existing precedent although the appellate court has not yet had occasion to expressly say so.

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1 The Federalist No. 78 (Alexander Hamilton).

There’s only one problem: even though you have a right to an appeal, the court would rather not deal with your issue. It’s too busy. Your issue is too complicated. Perhaps it’s too controversial.

So the court punts your issue. Does it dispose of your appeal on another ground, perhaps seizing on some jurisdictional roadblock and noting that it is obliged to do so "sua sponte"? No. Rather, the court wants to save the issue for the another day, perhaps when it feels more inclined for whatever reason to parse the Pandora’s box of issues your novel argument implicates. The court issues an opinion affirming the trial court; it addresses your legal argument, but does so in an exceedingly cursory or even circular fashion. Not wanting to be bound by what it knows is a less-than-thorough adjudication of an important issue, the court includes a curious footnote declaring the opinion to be “unpublished” and without precedential value.

Your case was disposed of using what I will hereafter refer to as a precedent-stripping rule. Since the 1960s, the federal appellate courts have promulgated rules that allow judges to decide whether their own opinions will be published in the bound reporters, and thereby serve as formal and precedential statements of “what the law is,” or whether they will be kept under wraps, never to formally resurface as precedent even in subsequent cases presenting effectively identical facts. In the above scenario, were you afforded “due process of law”? If so, how would you prove it? Are you entitled to depose the judges on the panel, send them interrogatories or ask them to otherwise swear under oath that they disposed of your case in a summary fashion for a valid reason? These questions make obvious the insurmountable burden appellants would face were they to challenge the invalid uses of precedent-stripping rules that have become commonplace in the federal courts.

Commentators have paid much critical attention to precedent-stripping, particularly over the past decade as courts, due to growing caseloads, have increasingly relied on the practice as an avenue for summary disposition. Modern precedent-stripping practices have been labeled a “scandal of private judging,” 4 have allegedly created “a double-track system [that] allows for deviousness and misuse,” 5 and have created a body of “secret law.” Some judges have joined in the drumbeat to end the practice. Some of the most persuasive arguments have called for courts to end precedent-stripping on prudential grounds, 7 a strong argument given the traditional notion

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7 See, e.g., Johanna S. Schiavoni, Who's Afraid of Precedent?: The Debate over the Precedential Value of
that the judiciary, unlike the other two branches, commands power only through its prestige.\(^8\) Those ambitious enough to argue that precedent-stripping is per se unconstitutional have argued that the practice is *ultra vires*,\(^9\) that forbidding future litigants from relying on prior non-precedential dispositions works an unconstitutional restraint on speech,\(^10\) or that the practice enables judges’ disparate treatment of similarly situated litigants in disregard of the Equal Protection Clause.\(^11\) Although these arguments are debatable and warrant attention, one weakness common between them is the seeming need to end with a conclusion of per se unconstitutionality, which may be unnecessarily ambitious. In this article I discuss a hereto unexplored procedural due process route that does not turn on a conclusion of per se unconstitutionality. I examine the basic premises underlying the Supreme Court’s establishment

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\(^8\) Hence Alexander Hamilton’s description of the judiciary as the “least dangerous” branch because it controls neither sword nor purse. *The Federalist* No. 78 (Alexander Hamilton). The institutional legitimacy concern is not merely academic navel-gazing, as this issue has reached the mainstream press:

> Studies of the use of brief circuit court decisions . . . have suggested that sketchy rulings may sometimes be used by judges who want to reach a certain legal result but are not anxious for their decision to be scrutinized.

\(^9\) See *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated en banc* by 235 F.3d 1054 (8th Cir. 2001). (Judge Richard Arnold writing for the Eighth Circuit panel declaring local precedent-stripping rule unconstitutional on separation-of-powers grounds).


of constitutional prophylactic rules, with a focus on Miranda v. Arizona.\textsuperscript{12} I then propose that the insidious misuse of precedent-stripping rules by courts presents such a \textit{systemic} threat to appellants’ procedural due process rights that the need for a new prophylactic rule forbidding precedent-stripping in the federal appellate courts arguably follows from the reasoning in the Court’s prophylactic-rule case law.\textsuperscript{13}

Importantly, this article is not intended to cavalierly demand a new prophylactic rule and provide a comprehensive practical scheme for its administration. Nor will I attempt to catalogue and retort the numerous arguments (mostly pragmatic) advanced in response to normative attacks on precedent-stripping;\textsuperscript{14} this is largely because these arguments raise very legitimate practical concerns that are so serious they deserve special attention in separate works. Rather, my purpose is much more narrow: I mean to demonstrate that the offensiveness of precedent-stripping does not just take the form of classic “rule of law” problems, prudential conundrums, harm to institutional legitimacy, or unfairness to litigants who seek to rely on prior unpublished decisions as precedent. Rather, I offer a new theoretical basis for arguing that an all-out prohibition of precedent-stripping on constitutional grounds can plausibly follow from Supreme Court case law regardless of per se constitutionality.

While such a prophylactic rule would, by definition, apply to state courts as well, I focus on the federal courts given the relative breadth of data surrounding the practice of precedent-stripping in the U.S. circuit courts. Part I examines the methods by which dispositions are stripped of precedential value by the very judges who write them, and thus become what are often termed “unpublished opinions.” Part I also discusses the proffered justifications for such methods. Part II surveys the available evidence that courts regularly use precedent-stripping in manners not permitted by local precedent-stripping rules and discusses how such stealthy misuse of precedent-stripping works to deny appellants full and fair adjudication of the issues and arguments presented in their appeals. Part III discusses the Supreme Court’s formulation of prophylactic constitutional rules, and the practical exigencies that inspire their creation, with a focus on Miranda. Part IV then proposes that, given the evidence of widespread misuse of


\textsuperscript{13} Other authors have attempted to attack prohibitions on citation (as opposed to precedent stripping per se) of unpublished opinions on procedural due process grounds by arguing that litigants’ traditional ability to invoke prior decisions is somehow essential to “fundamental fairness.” \textit{See, e.g.}, Lance A Wade, \textit{Honda Meets Anastasoff: The Procedural Due Process Argument Against Rules Prohibiting Citation to Unpublished Judicial Decisions}, 42 B.C. L. REV. 695, 713 (2001). These authors seem to assume—questionably so in this author’s view—that fundamental unfairness is manifest in the prohibition-of-citation context, even if the given court is allowed to disregard the cited decision as non-precedential. In any event, this argument was mooted by the recent promulgation of Federal Rule of Appellate Procedure 32.1, discussed \textit{infra}, which allows citation to unpublished opinions. Aside from focusing on precedent-stripping rather than prohibitions on citation, my argument differs from prior procedural due process arguments in the important respect that it focuses on the rights of litigants whose cases are disposed of via non-precedential opinions, not those who seek to rely on such opinions subsequently as precedent. \textit{See, e.g.}, Strongman, supra note 11, at 212. (Arguing that denying litigants “the opportunity to rely on the history, the reason, or the course” of a prior decision denies litigants procedural due process because it allows courts to “arbitrarily ignore or even directly contradict its previous decision for any reason or no reason at all.”).

precedent-stripping, and given the practical difficulty litigants face in proving such misuse in individual cases, the logic of Miranda and other prophylactic rule case law supports the creation of a prophylactic-rule prohibiting precedent-stripping.

I. “THE ROAD TO HELL IS PAVED WITH GOOD INTENTIONS”: HOW AND WHY COURTS ARE ABLE TO STRIP THEIR OPINIONS OF PRECEDENTIAL VALUE

During the 1950s and 1960s the federal courts saw, and foresaw, a daunting growth in their dockets without a corresponding rise in available resources. Bound case reporters were ballooning such that many feared that absent some reform in the publication of judicial opinions, the sheer volume of precedent would make it increasingly impracticable for lawyers and judges to identify opinions to serve as primary authority in future cases.

To deal with this problem, the Judicial Conference of the United States in 1964 declared that the federal appellate courts should publish—and therefore make precedential—only those opinions that were “of general precedential value.”15 The Advisory Council for Appellate Justice (ACAJ) provided guidelines to the circuits for the promulgation of local selective publication rules. The ACAJ urged that, in deciding whether to publish an opinion, courts should consider factors such as whether the decision created a new rule of law, altered an existing one, or resolved some conflict of authority.16 The resulting local rules track this standard.17

Given the growth in dockets since the 1960s, the proportion of cases disposed of via non-precedential dispositions has sharply increased. According to the Administrative Office of the U.S. Courts, 81.8% of federal appellate court opinions went “unpublished” in 2008,18 meaning that a vast majority of opinions issued by the federal appellate courts in 2008 were deemed inappropriate for use as precedent purportedly on the basis that they represented perfunctory application of well-settled rules in contexts where the proper application of those rules indisputably allowed only for the result reached. To put it yet another way, in theory, 81.8% of 2008 federal appellate dispositions offered absolutely nothing new to practitioners, nor did the


16 See id. at 15-17.

17 For example, see Fourth Circuit Local Rule 36(a), which provides:

Opinions delivered by the Court will be published only if the opinion satisfies one or more of the standards for publication:

i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or
ii. It involves a legal issue of continuing public interest; or
iii. It criticizes existing law; or
iv. It contains a historical review of a legal rule that is not duplicative; or
v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.

outcomes reflect any meaningful evolution—no matter how slight—of the respective law. To help ensure that future panels did not consult these “red-headed stepchildren” in deciding future cases, precedent-stripping rules until recently forbade attorneys from even citing unpublished opinions.  

Perhaps due to the steady drumbeat of calls for courts to allow citation to unpublished opinions at least as persuasive authority, Federal Rule of Appellate Procedure 32.1 was recently promulgated; it abrogates all local circuit rules insofar as they prohibit citation of unpublished opinions issued after January 1, 2007. However, Rule 32.1 leaves undisturbed courts’ ability to strip their own opinions of precedential effect, thus failing to resolve what is in this author’s view the most serious problem with “non-publication.”

That precedent-stripping raises serious concerns should be obvious upon a cursory reflection on the very nature of the rules sanctioning the practice. Why would a court need to formally and affirmatively strip a disposition of precedential status if it truly offers nothing new? If there is a published opinion on-point, one that makes the given proposition at least equally clear, would not an attorney seek out the published opinion representing the given proposition (and likely providing greater rhetorical ammunition given the relative brevity of unpublished opinions)? Attorneys do not cite unpublished opinions unless it helps their case to do so. Any

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19 For example, see Hart v. Massanari, 266 F.3d 1155, 1159 (9th Cir. 2001) ("Unpublished dispositions and orders of this Court are not binding precedent . . . [and generally] may not be cited to or by the courts of this circuit . . . ." (quoting former Ninth Circuit Local Rule 36-3)).

20 The new Rule provides:

Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

(i) designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like; and
(ii) issued on or after January 1, 2007.

Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

21 See Williams v. Dallas Area Rapid Transit, 256 F.3d 260, 263 (5th Cir. 2001) (Smith, J., dissenting) (“[T]he justification for unpublished opinions—that, as a matter of efficiency, the court should not publish redundant opinions—provides no support for the proposition that such opinions should carry no precedential weight. If the opinion is a mere restatement of existing law (as it must be, if it is accorded unpublished status), what is the harm in viewing it as precedent?”); In re Rules of United States Court of Appeals etc., 955 F.2d 36, 38 (10th Cir. 1986) (Holloway, J., dissenting from adoption of rule barring citation of unpublished opinions) (“[P]roponents of the no-citation rule argue that many of the court's rulings are not significant precedents and are in fact essentially decisions on factual issues only, or are merely applications of clearly established legal principles not meriting publication or citation. This suggestion is wholly unpersuasive to me. If this were truly the case, considerations of efficiency and economy would lead counsel to rely on published decisions, rather than dig for unpublished rulings, and we would not need a no-citation rule.” (emphasis added)); Gideon Kanner, The Unpublished Appellate Opinion: Friend or Foe?, 48 Cal. St. B.J. 386, 446 n.75 (“Why would any lawyer in his right mind go to the trouble of finding and citing unpublished opinions which merely reiterate rules and rely on precedents already larding the published
follower of the federal courts knows that unpublished dispositions often do work qualifications, clarifications or refinements of the respective legal principles, even if so subtle when made (yet subsequently meaningful to litigants) so as to escape the foresight of the authoring judges. Indeed, because the very promulgation of Rule 31.2 represents an acquiescence to voices within the profession calling for the end of citation prohibitions, it is difficult to imagine any other impetus to the rule other than the perceived value of unpublished opinions to the bar. As Ninth Circuit Judge Alex Kozinski has noted in answering demands by the Ninth Circuit bar to allow citation to unpublished opinions (before the promulgation of Rule 31.2), “[a]t bench and bar meetings, lawyers complain at length about being denied this fertile source of authority.”

Although amendments to the Federal Rules of Appellate Procedure allow citation to non-precedential dispositions, courts are now as free as ever to deny their opinions precedential status, and nothing exists to ensure that judges do not employ precedent-stripping for purposes not expressly sanctioned by the respective rules. In this regard, beyond the problem with the intrinsic logic of precedent-stripping rules, evidence strongly suggests that courts regularly use precedent-stripping as a means of truncating the adjudication of appeals, rather than merely truncating the opinions that announce outcomes; of course, precedent-stripping rules contemplate only the latter. This evidence is a topic to which I now turn.

II. EVIDENCE OF SYSTEMIC MISUSE OF PRECEDENT-STRIPPING RULES

A. Empirical Scrutiny of Precedent-Stripping

The federal appellate courts are exceedingly insular. While most lawyers believe that federal judges’ constitutionally granted immunity from transient public passions yields a net gain, life tenure and a protective mystique can erode the healthy self-consciousness that is often

22 The cliché that “stare decisis is not an inexorable command” but rather a creature of prudence is of little relevance here. See Payne v. Tennessee, 501 U.S. 808, 828 (1991); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). In most of the federal circuits, when a panel opinion is precedential, it becomes the “law of the circuit” and is thus controlling in future like cases within that circuit. See, e.g., Utah Envtl. Cong. v. Troyer, 479 F.3d 1269, 1292 (10th Cir. 2007) (“[A]ssuming arguendo that these two precedents directly conflict, we are obliged to follow the ruling of the earlier panel . . . .”); Burke-Fowler v. Orange County, 447 F.3d 1319, 1323 n.2 (11th Cir. 2006) ([W]hen a later panel decision contradicts an earlier one, the earlier panel decision controls.”); Southwestern Bell Tel. Co. v. City of El Paso, 243 F.3d 936, 940 (5th Cir. 2001) (“When two holdings or lines of precedent conflict, the earlier holding or line of precedent controls.”); Kovacevich v. Kent State Univ., 224 F.3d 806, 822 (6th Cir. 2000) (“We must defer to a prior case when two panel decisions conflict.”); Ryan v. Johnson, 115 F.3d 193, 198 (3d Cir. 1997) (“[U]nder Third Circuit Internal Operating Procedure 9.1, when two decisions of this court conflict, we are bound by the earlier decision.”); Newell Cos. v. Kenney Mfg. Co., 864 F.2d 757, 765 (Fed. Cir. 1988) (“This court has adopted the rule that prior decisions of a panel of the court are binding precedent on subsequent panels unless and until overturned en banc. Where there is direct conflict, the precedential decision is the first.”); McMellon v. United States, 387 F.3d 329, 333 (4th Cir. 2004); but see Graham v. Contract Transp., Inc., 220 F.3d 910, 914 (8th Cir. 2000) (“[W]hen faced with conflicting [intra-circuit] precedents we are free to choose which line of cases to follow.”).

23 Alex Kozinski and Stephen Reinhardt. Please Don’t Cite This: Why We Don’t Allow Citation to Unpublished Decisions, CAL. LAWYER, June 2000, at 43.
the most powerful force disciplining public servants. So little direct evidence of “how the sausage is made” in specific cases is available to the public. Thus, examining the frequency of misuse of precedent-stripping invariably involves inferences about intentions. But this is not as much of an inexact science as it may initially seem, as empirical study sometimes yields premises that support only one plausible conclusion.

David Law conducted a statistical analysis of Ninth Circuit dispositions of asylum appeals between 1992 and 2001 in order to test the hypothesis that “the decision to publish is influenced by judicial ideology.”24 After exhaustive study, Law concluded:

there exists, for some judges, a significant relationship between how the judge votes on the merits of the case, and whether the case is published: publication increases the likelihood that certain judges vote in favor of asylum. The results suggest that voting and publication are, for some judges, strategically intertwined: for example, judges may be prepared to acquiesce in decisions that run contrary to their own preferences, and to vote with the majority, as long as the decision remains unpublished, but can be driven to dissent if the majority insists upon publication.25

Law further concluded that “[i]deology influences judicial voting in unpublished cases”:

Majority-Democratic panels were significantly more likely than majority-Republican panels to grant some form of relief to asylum seekers. Moreover, this difference was pronounced in both published and unpublished cases. With respect to unpublished cases, majority-Democratic panels granted relief 20.5% of the time, while majority-Republican panels did so just 7.5% of the time. In other words, Democratic panels were 2.7 times more likely than Republican panels to rule in favor of the asylum seeker.26

Regarding cases involving law so settled such that its operation in a case is not open to reasoned debate (the theoretical description of cases stripped of precedential value) liberal and conservative judges should not differ in their conclusions this frequently, if at all. Although one need not be a died-in-the-wool legal realist to recognize that judges’ ideologies often inform their jurisprudence, in cases where the outcome is truly uncontestable, examples of judges disagreeing on outcome based on ideology are rare, primarily because most judges recognize the obvious impropriety of literally ignoring directly on-point and controlling authority. Thus, if we assume a minimum amount of integrity and competence on the part of Ninth Circuit judges—as I think we

25 Id.
26 Id. at 814.
should—the most reasonable conclusion based on Law’s analysis is that many asylum appeals disposed of via non-precedential dispositions are arguable on the merits such that their outcomes, if published, would work a refinement or clarification of governing law.27

Donald Songer in his study coded hundreds of Eleventh Circuit opinions for statistical analysis in order to determine whether judges’ decisions to publish were consistent with the written nonpublication local rule.28 According to Songer, “criteria [for using precedent-stripping rules] are not . . . applied in all instances and concomitantly there are many controversial cases that are ending up in unpublished decisions.”29 Songer observed that, in unpublished dispositions, “panels dominated by Democratic judges were liberal in 28.7% of their decisions, while Republican-dominated panels were liberal in only 8.7% of their decisions.”30 Songer thus concluded that “ideology is a factor in at least 20% of the decisions that result in . . . unpublished opinions.”

Other empirical data is available. According to Lauren Robel, 30% of federal judges admitted in a survey that they sometimes forwent drafting published opinions for cases in which they knew published opinions “should be written.”31 One federal appellate judge has admitted that “[i]n our circuit, staff attorneys prepare routine drafts that judges approve but do not research or write. . . . These definitely should not be available for citation.”32 Similarly, a study of the federal courts during 1978-79 revealed that one out of every seven unpublished dispositions in the federal appellate courts resulted in reversals,33 and in 2002, the rate rose to one in every 4.7.34 That is, in 2002, in one out of every 4.7 cases in which the operation of the respective law was allegedly perfectly clear, the respective district judge applied the law incorrectly and reversibly erred in doing so. That reversal results this frequently is significant because minor district court errors that manifest no harm to appellants are generally ignored on

27 Law also demonstrated how a panel’s political-party make-up is a “highly significant predictor[] of how unpublished asylum cases were decided.” Id. at 847. An asylum seeker had a 4% chance of victory on appeal with an all-Republican panel. The presence of one Democrat raises his chances to 12%, with two Democrats, 20%, and with an all Democratic panel, 30%. Id.


29 Id. at 976.

30 Id. at 977.


appeal as “harmless errors,” and are therefore not adequate bases for reversal. For example, in
the Fifth Circuit, district court “abuses of discretion” warrant reversal only if, pursuant to the
harmless error doctrine, “a substantial right of the complaining party was affected.”\(^{35}\) “An error
affects substantial rights if it affects the outcome of the trial proceedings.”\(^{36}\) Thus, the more than
1 out of 5 unpublished dispositions announcing reversals in 2002 represent significant legal
errors by the respective district judges.\(^{37}\) Either district judges very frequently blatantly ignore
well-established and perfectly clear precedent, or the operation of precedent is not clear in many
of these cases.

Thus unsurprising is Sixth Circuit Judge Danny Boggs’ assertion that the “theory often
advanced to explain unpublished opinions”—that is, the matters disposed of via unpublished
opinions are “easy cases that are clearly dictated by existing precedent”—“is self-evidently
wrong for both empirical and theoretical reasons. As an empirical matter, plenty of unpublished
decisions have been accepted for review and reversed by the Supreme Court.”\(^{38}\) Judge Boggs
continued, explaining:

> Even if all that is meant by “easy cases” is that some cases are clearly dictated by precedent within a particular circuit at the time a case is decided (without regard to circuit splits or other facts that might cause the Supreme Court to review and possibly reverse a decision clearly dictated by circuit law at the time), the “easy cases” rationale is still faulty on empirical grounds. Consider the number of unpublished opinions that involve lengthy dissents.\(^{39}\)

On this note, Deborah Jones Merritt and James J. Brudney have published the results of
their statistical analysis of the 1,224 unfair labor practices cases the federal appellate courts
disposed of between 1986 and 1993.\(^{40}\) They found that the non-precedential opinions studied
“included a surprising number of reversals, dissents, and concurrences.” They also concluded:

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\(^{35}\) Triple Tee Golf, Inc. v. Nike, Inc., 485 F.3d 253, 265 (5th Cir. 2007).

\(^{36}\) United States v. Mejia-Huerta, 480 F.3d 713, 720 (5th Cir. 2007).

\(^{37}\) Of course, some of these reversals are appropriate for summary disposition. For example, in Booker v. United States, 543 U.S. 220 (2005), the Supreme Court announced a new rule governing application of the Federal Sentencing Guidelines; the new rule applied not only to future criminal sentences but also sentences against which challenges were then pending in the federal appellate courts. Thus, the appellate courts subsequently remanded many cases to district courts for resentencing in compliance with Booker. These are true perfunctory remands, where all that is needed is a citation to the intervening change in law. These types of dispositions likely represent a small portion of the unpublished dispositions during 2002, and thus cannot explain away the reversal rate in unpublished dispositions during that year.


\(^{39}\) Id. at 21.

Democratic judges were significantly more likely than their Republican colleagues to support the union in these unpublished cases. Judges who had held elected office or served as full-time academics were also more likely to vote for the union. Conversely, judges with prior judicial experience, as well as Latino and Asian judges, were significantly less likely to support the union.\footnote{Id. at 109.}

Merritt and Brudney thus concluded that:

panels authoring unpublished opinions reach some results with which other reasonable judges would disagree. Such divergent views are likely to reflect both differences as to the meaning of legal principles and disagreement over the proper application of seemingly settled law. Under those circumstances, failing to give unpublished opinions precedential effect raises the very specter . . . that like cases will be decided in unlike ways, that judges’ decisions will be regulated only by their own (personal) opinions . . . \footnote{Id. at 119 (internal quotation marks omitted).}

Sarah Ricks studied the Third Circuit’s case law on the “state-create danger” doctrine relating to substantive due process; she studied both precedential and non-precedential opinions over a period of seven years and concluded that “the doctrinal inconsistencies between the Third Circuit's precedential and non-precedential state-created danger opinions created a layer of hierarchical decision-making” that undermines “the appellate functions of ensuring that like cases are treated alike, [and] of ensuring that judicial decisions are predictable and not arbitrary.”\footnote{Sarah E. Ricks, The Perils of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit, 81 WASH. L. REV. 217, 222 (2006).}

B. Other Evidence of the Problem

A vast body of anecdotal evidence reinforces the empirical data. On more than one occasion federal judges have expressly voiced their disdain over misuse of precedent-stripping rules. As a random example among many, consider a dissent from Fifth Circuit Judge Jerry Smith, in which he urged his colleagues to reconsider its policy of refusing to lend precedential value to unpublished dispositions. Judge Smith noted that although “theoretically, because an unpublished case does nothing new, an older case easily can be cited for the same proposition, . . . there are opinions that, though unpublished, do establish a new rule of law or apply existing law to distinct facts.”\footnote{Williams v. Dallas Area Rapid Transit, 256 F.3d 260, 261-62 (5th Cir. 2001) (Smith, J. dissenting).} Judge Smith continued, citing “[e]mpirical evidence” suggesting that such cases “are more common than one might think.”\footnote{44}
Richard Posner, Chief Judge of the Seventh Circuit, has asserted that non-precedential opinions are a “sort of a formula for irresponsibility,” and has admitted that “[m]ost judges, myself included, are not nearly as careful in dealing with unpublished decisions.”\footnote{Glaberson, supra note 8, §1, at 1.} That a judge so familiar with the workings of the federal courts, with vast experience within them, and with such familiarity with the jurisprudential issues the federal courts face, would confidently assert that “most judges” give non-precedential dispositions less care is quite damning. Consider further an article by Patricia Wald, former Chief Judge of the D.C. Circuit, wherein she laments the gradual advent of “a double-track system [that] allows for deviousness and misuse”:\footnote{Wald, supra note 5, at 1374.}

I have seen judges purposely compromise on an unpublished decision incorporating an agreed-upon result in order to avoid a time-consuming public debate about what law controls. I have even seen wily would-be dissenters go along with a result they do not like so long as it is not elevated to a precedent. We do occasionally sweep troublesome issues under the rug . . . . [The common absence of meaningful rhetoric in] unpublished decisions signifies that they are the product of a different and much-abbreviated decision-making process.\footnote{Id. at 1374-75. Judge Wald also notes: “One of our most prominent judges a few years ago authored twenty three published opinions and thirty-one unpublished opinions for the court, while an equally distinguished colleague authored thirty-four published and only three unpublished opinions. All judges on our court sit on the same number of cases annually.” Id. at 1376.}

Judge Wald also raised the issue with her colleagues in her concurring opinion in National Classification Committee v. United States:

I want . . . to express my concerns about the manner in which No. 83-1866 was decided. In my view, it did not present the type of case appropriate for disposition without a published opinion. Indeed, the present case testifies to the unfortunate by-products of the overuse of this rapidly growing mode of disposition. Although the heavy caseload in this court necessitates the disposition of a large percentage of cases by order or short unpublished memorandum opinions, serious questions continue to be raised about the circumstances in which it is appropriate for this court to dispose of cases in such a truncated manner.\footnote{765 F.2d 164, 173 (D.C. Cir. 1985) (Wald, J., concurring).}
As another example, Judge Richard Arnold, former Chief Judge of the Eighth Circuit and one of the most vociferous opponents of precedent-stripping on the federal bench, has asserted that use of precedent-stripping rules has created “a vast underground body of law . . . disavowed by the very judges who are producing it”:

[M]any cases with obvious legal importance are being decided by unpublished opinions. Some unpublished opinions—and, I must say, I believe this occurs more in other circuits than in the Eighth—are fairly elaborate. They go for as long as twenty pages. They contain citations and legal reasoning. Occasionally they decide questions that anyone would describe as important.50

Judge Arnold goes further; although he disclaims witnessing actual misuse by his colleagues, he seems to acknowledge it when he states:

If, for example, a precedent is cited, and the other side then offers a distinction, and the judges on the panel cannot think of a good answer to the distinction, but nevertheless, for some extraneous reason, wish to reject it, they can easily do so through the device of an abbreviated, unpublished opinion, and no one will ever be the wiser. . . . Or if, after hearing argument, a judge in conference thinks that a certain decision should be reached, but also believes that the decision is hard to justify under the law, he or she can achieve the result, assuming agreement by the other members of the panel, by deciding the case in an unpublished opinion and sweeping the difficulties under the rug.51

Other judges have written about the tendency for some colleagues to use precedent-stripping as a means of disposing of appeals without having to commit to the reasoning inspiring their decision as “the law” on the issue, lest they face the prospect of en banc vacatur, Supreme Court reversal, frustration from circuit colleagues (who for obvious reasons pay most attention to newly issued binding opinions) or just feel more comfortable deferring adjudication of an issue of first impression for another day. As Judge Boggs has noted:

Because [en banc or Supreme Court] review of panel decisions usually is limited to decisions that present the need for establishment of an authoritative rule—perhaps where there has been a conflict among prior decisions, or where the issue involved is of particular public significance—it is left to the panels


51 Id. at 224.
themselves to protect against the possibility of ordinary error. One way to do this is to enter rule-setting decisions on an unpublished basis, thus permitting the question at issue to continue to “percolate” in the circuit before adopting a final, authoritative rule.  

On this note, Judge Wald speculates that inappropriate use of non-precedential disposition arises when “overworked judges are seduced too easily into preferring the easier, nonrhetorical route, especially in close cases.”

Misuse of precedent-stripping rules has become so common such that federal judges openly admit to using them for purposes not endorsed by the respective rules. Consider Ninth Circuit Judge Alex Kozinski’s statement before Congress, made in defense of noncitation rules: “while three judges might all agree on the outcome of the case before them, they might not agree on the precise reasoning or the rule that would be binding in future cases if the decision were published.” According to Judge Kozinski, even though language in unpublished opinions may inadvertently imply (notwithstanding being cursory) certain premises or reasoning, such reasoning is not fairly attributable to the entire panel, and therefore attorneys should not be permitted to rely on such language as statements of circuit law in future cases.

Judge Kozinski’s remarks unselfconsciously ignore the fact that the Ninth Circuit rule in effect at the time, Rule 36-2, did not list this rationale as a valid basis for precedent-stripping. And of course, if three panel members cannot agree on the operation of controlling law in a given case, it is likely that a definitive statement of law, if negotiated between the judges as their judicial rule contemplates, would refine or clarify the relevant law. Therefore, the theoretical justification for nonpublication is absent in these cases.

That a judge may want to let an issue “percolate” is not in itself an ethical indictment. There are certainly understandable practical reasons for this; for example, if the advocacy in a case presenting a novel issue is so poor such that the arguments and authority presented are of little assistance in aiding the court in reaching a conclusion sufficiently vetted to serve as precedent—as is often the case in pro se appeals—a judge might believe it is the “lesser evil” to not contaminate the reporters with bad precedent, but rather defer making new law to a time when the court is more competent to do so. See Reagan, supra note 32, at 75 (quoting Judge JF-2) (“Allowing citation of these decisions would... suggest that the court has reached considered decisions on particular issues when in fact that is not often true.”). The problem is, the relevant rules do not contemplate such a reason as a valid basis for precedent-stripping. Further, this reasoning “proves too much.” Consider that essentially all collateral attacks (post-conviction habeas corpus petitions) are brought by pro se prisoners. Prisoners are able to bring them because Congress has decided to give them a right to do so. See 28 U.S.C. § 2255. The above reasoning in favor of “percolation,” if sound, would mean that courts could indefinitely forgo definitive adjudication of important issues presented in habeas corpus petitions; if such is true, it is difficult to imagine how many appellants would have their rights affected by decisions the correctness of which commands so little confidence by the very judges who issue them.

Wald, supra note 5, at 1376 (emphasis added).


 Aside from this, Judge Kozinski’s remarks beg the question of why the hypothetical trio’s failure to agree on reasoning warrants silence; if anything, it seems to warrant the opposite given courts’ institutional role. See
Hearsay and anecdotal evidence consistent with the above is abundant. For example, Professor Pether notes:

One colleague tells me that on the federal court on which he clerked, decisions about whether opinions should be published often turned on which clerk was perceived to need an opinion of his/her authorship published for future employment purposes. There are also anecdotal accounts of judges "punishing" repeat-player litigants and lawyers for whom they are legally obliged to rule against their inclination, by not publishing the relevant opinion so it will not be available as precedent in future litigation. Unsurprisingly, no public record of such behavior exists.\footnote{Pether, \textit{supra} note 4, at 1488.}

David Law has asserted his conclusion, based on his “own observations as a law clerk on the Ninth Circuit” that “circuit judges prefer to publish decisions they favor on ideological grounds.”\footnote{See \textit{Law, supra} note 24, at 837-38. \textit{See also} Paul Marcotte, \textit{Unpublished but Influential}, A.B.A. J., Jan. 1991, at 26 (“Law clerks told [law professor Lauren] Robel that judges sometimes would agree not to dissent if an opinion remained unpublished.”).}

Compounding the problem of general inappropriate use of precedent-stripping is the fact that certain \textit{classes} of cases are disproportionally disposed of through non-precedential dispositions, thus raising suspicions that courts regularly treat pro se or criminal appellants as second-class litigants. In proposing “periodic overviews of which kinds of cases get sent down one track rather than another,” Judge Wald has noted:

\begin{quote}
Danger signals include the presence of obviously difficult issues or the predominance of certain kinds of cases (for example section 1983 prisoner cases) on one track, inconsistencies between published and unpublished results and rationales, and widely differing rates of published and unpublished opinions among different judges.\footnote{Wald, \textit{supra} note 24, at 1376.}
\end{quote}

Ninth Circuit Judge Margaret McKeown has described this relegation of certain types of cases as constituting a “private history” of precedent-stripping:

\begin{quote}
\textit{McFarland}, 311 F.3d at 420 (“Judges often express different reasons for reaching a single result. In fact, the best test of competing legal theories is in the open marketplace of ideas. Silence, therefore, could mean unwillingness to compete.”); \textit{see also} County of Los Angeles v. Kling, 474 U.S. 936, 940 n.6 (1985) (Stevens, J., dissenting from the Court’s summary reversal of appellate decision) (“If I cannot give reason I should be willing to stand to, I must shrink from the very result which otherwise seems good.”); \textit{McFarland}, 311 F.3d at 417 (“Federal appellate courts’ twin duties are to decide appeals and articulate the law.”).}
\end{quote}
Judge McKeown’s thesis was that the development of contemporary unpublication derived not only from the overt cause, the difficulties of indexing law libraries because of the volume of opinions issuing from the federal courts, but from the federal judiciary’s anxiety about floods of civil rights and pro se prisoner postconviction appeals litigation in the 1960s.⁵⁹

Edith Jones, currently Chief Judge of the Fifth Circuit, has stated that in deciding whether a case will be disposed of via an unpublished opinion, or whether it will be handled primarily by non-Article III court personnel such as staff attorneys, the court considers “criteria as whether they were filed pro se or whether they present ‘routine,’ as opposed to novel, issues.”⁶⁰ A former Chief Judge of the Fourth Circuit has noted that “[n]ow no postconviction case gets on our regular hearing calendar unless at least one judge is of the opinion that a full hearing would be of assistance in its disposition.”⁶¹ A Ninth Circuit judge has noted, in response to questions about “screening” cases—essentially, cases tracked for summary disposition—that “we lack the resources to give 10,000 dispositions the same attention and scrutiny as precedential opinions must have.”⁶² Thus, in some courts certain classes of cases are categorically presumed to be frivolous unless an overworked judge, understandably distracted by many other complicated cases, happens to notice an issue warranting traditional adjudication.⁶³

Some argue that this “double-track” system of justice is the result of judges weighing the importance of cases based on the monetary value implicated.⁶⁴ Others note that this advent of a “two track system” of justice is due partly to court culture wherein an aura of intellectual gravitas surrounds the doctrinal “big picture” issues often inhering in civil cases. The implication being

⁵⁹ Pether, supra note 4, at 1444-45 (citing Audiotape: What is “Authority”? Panel Presentation, held at the Association of American Law Schools (Jan. 3-6, 2001) (remarks of Judge Margaret McKeown, United States Court of Appeals for the Ninth Circuit) (on file with author)).


⁶³ This is another feature of current appellate court practice that has received mainstream press attention. See Glaberson, supra note 8, § 1, at 1 (New York Times article noting: “In one of the most controversial changes, the appeals courts created new staff lawyer positions, permanent employees with the authority to screen and, some critics say, to effectively decide thousands of cases by giving judges brief summaries of recommended decisions.”).

⁶⁴ “[T]he transformation has created different tracks of justice for different cases and different litigants: important cases (usually measured by monetary value) and powerful litigants receive greater judicial attention than less important cases and weaker litigants. At one end of the spectrum, perhaps in a major securities case, the judges play a very active role: they listen to oral argument, work hard preparing opinions which are circulated among and read carefully by their colleagues, and ultimately have the final opinion published in the Federal Reporter as a precedent. A stark contrast exists at the other end of the spectrum.” William M. Richman & William L. Reynolds, Elitism, Expedience, and the New Certiorari: Requiem for the Learned Hand Tradition, 81 CORNELL L. REV. 273, 275 (1996).
that among judges and clerks, “law nerd” is a badge of honor, and judges or (more often) their clerks rarely waste opportunities to demonstrate their bookishness bona fides by treating the most arcane doctrinal issues with seeming visceral passion. In civil non-pro se cases, the lawyers tend to be the more celebrated members of the bar (while public defenders, perhaps unfairly, are often not) and, because they get paid incredible hourly rates to do so, they tend to raise the most novel and creative legal arguments. Thus, as Penelope Pether discusses, work on civil appeals often provides a greater degree of professional satisfaction to judges and law clerks, and criminal or pro se matters quickly gain the reputation of being routine, unchallenging and boring.65

To be sure, that certain classes of cases are disproportionately disposed of via non-precedential opinions is not surprising, nor is it in itself evidence of systemic elitism or unfairness. Chief Judge Jones is correct when she notes that the dockets of the federal appellate courts have been “dumbed down,” to use her words, by pro se appellants who regularly bring patently frivolous arguments.66 These are often prisoners who have nothing better to do with their time but to bring successive and grossly meritless arguments, and in the process bog down administration of the federal courts. The concern, however, is that judges’ sensitivity to this reality, and need to deal with it, has spawned a system whereby certain types of appeals are presumed to be meritless, and are disposed of based on such a presumption without the full consideration and research conducted for other appeals. In this sense, cases in which courts knowingly use precedent-stripping as a means to forgo the deliberation and research required to thoroughly adjudicate an appeal may be the tip of the iceberg.

The base may be cases wherein appellants suffer summary disposition of their arguments, without full adjudication of them, because judges perhaps negligently assume such cases are utterly routine. Scholars and judges have repeatedly noted how the process of opinion writing is more than just perfunctory memorialization of premises firmly established in the mind, and reasoning fully evolved and vetted, prior to the grasp of pen. Rather, opinion writing is often part of the process of adjudication itself rather than a mere vehicle for its announcement. As Laruen Robel notes, “many judges have noted how frequently a case’s complexities are revealed through the process of writing an opinion.”67 For example, Judge Wald explains:

> [e]ven when judges agree on a proposed result after reading briefs and hearing argument, the true test comes when the writing judge reasons it out on paper (or on computer). That process, more than the vote at conference or the courtroom dialogue, puts the writer on the line, reminds her with each tap of the key that she will be held responsible for the logic and persuasiveness of the reasoning and its implications for the larger body of circuit or national law. Most judges feel that responsibility keenly; they literally agonize over their published opinions, which sometimes take weeks or even

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65 Pether, supra note 4, at 28.

66 Jones, supra note 61, at 1493

67 Robel, supra note 31, at 962. See also Law, supra note 24, at 284 (“Writing out an opinion helps the author to understand the problem, to see things she otherwise would not see.”).
months to bring to term. It is not so unusual to modulate, transfer, or even switch an originally intended rationale or result in midstream because "it just won't write." But writing to explain a preordained result with no concern for its precedential effect under a self-imposed time constraint of hours is something else entirely, inviting no backward looks or self-doubt. Rhetoric will always be tied to import and permanence, and its absence in unpublished decisions signifies that they are the product of a different and much-abbreviated decision-making process. 68

Chief Judge Jones has expressed this same sentiment:

[T]he necessity of stating reasons not infrequently changes the results by forcing the judges to come to grips with nettlesome facts or issues which their normal instincts would otherwise cause them to avoid. 69

Further, in his aforementioned 2002 statement before Congress, Judge Kozinski stated in his attempt to defend precedent-stripping, that:

[Writing opinions is a] very difficult and delicate business indeed. While an unpublished disposition can often be prepared in only a few hours, an opinion generally takes many days (often weeks, sometimes months) of drafting, editing, polishing and revising. Frequently, this process brings to light new issues, calling for further research, which may sometimes send the author all the way back to square one. 70

In their unselfconsciousness, Judge Kozinski’s comments, made in an attempt to actually rationalize the use of precedent-stripping rules, are quite revealing. In the balance of his statement, Judge Kozinski generally chooses his words carefully, attempting to explain how judges’ use of precedent-stripping yields greater efficiency and prevents harm to the bar. According to Judge Kozinski, by enabling judges to forgo careful expression of their reasoning, non-precedential dispositions allow adjudication of the respective appeal without the confusion or appearance of contradiction that might result were less carefully crafted opinions made precedential. As he puts it, “[i]f unpublished dispositions could be cited as precedent, conscientious judges would have to pay much closer attention to their precise wording.

68 Wald, supra, at 1375.

69 McFarland, 311 F.3d at 417 (quoting CARRINGTON, MEADOR & ROSENBERG, supra note 2, at 10) (internal quotation marks omitted). See also Nichols, supra, note 14, at 916 (Former judge of the Federal Circuit noting “[j]udges are quoted as saying that they sometimes start on opinions that ‘will not write’ and the difficulty in putting it on paper is finally realized to be due to a weakness in the decision itself, as tentatively arrived at after oral argument. I have experienced this, other judges say they have, and there can be no doubt it occurs.”).

70 House Hearing, supra note 55, at 31-32.
Language [as opposed to reasoning or principles] that might be adequate when applied to a particular case might well be unacceptable if applied to future cases raising different fact patterns.”

But Judge Kozinski undermines his own implicit (but crucial) premise—that non-precedential dispositions represent only the absence of precise language rather than thorough analysis or research—by unwittingly conceding that the continuing evolution of analysis that characterizes opinion writing often meaningfully effects the application of the law, bringing to “light new issues,” “calling for further research,” and, most importantly, “sending the author back to square one,” which Judge Jones agrees sometimes means a change in result.

A corollary of Judge Kozinski’s remarks, which is reinforced by what other judges (and the law clerks that assist them) acknowledge, is that opinion writing is an organic contemplative process rather than one of mere after-the-fact recitation. It is part of the process of adjudication in that the process of drafting, and the reaching of panel consensus on a final precedential version, involves deep consideration of the future implications of, or the analytical soundness of, what is written. These considerations are all a part of establishing “what the law is,” and they have long been considered legitimate—indeed, necessary—parts of the adjudicative process (see the ubiquitous “policy” questions on law school exams). They ensure that the principle expounded or applied in a given case is one that encompasses “justice” in the various senses of the term: balancing the public interest, textual fidelity, adequate incorporation of prudential doctrines, legislative intent and vindication of the given litigant’s rights in a manner that most maintains the stability, predictability and integrity of the law and the judicial system. What results from this full adjudicative process is often fine tuning or all out redrafting of the opinion, or even alteration of the outcome.

In short, evidence indicates that courts often use precedent-stripping rules as a means to knowingly forgo formal and complete adjudication of issues for various reasons. The problem is compounded by the reality that even where misuse of precedent-stripping is not knowing, judges often forgo the deliberative segment of adjudication associated with opinion writing based on the presumptuous hunch that those cases implicate the relevant law only to an extent already

71 Id. at 34.

72 See McFarland, 311 F.3d at 417 (quoting CARRINGTON, MEADOR AND MAURICE, supra, note 2 at 10).

73 As Judge Kozinski notes, the process of hammering out a published opinion that all panel members can agree on can be a painstaking process:

Once an opinion is circulated, the judges on the panel and their clerks scrutinize it very closely. Often they suggest modifications, deletions, or additions. It is quite common for judges to exchange lengthy memoranda about a proposed opinion. Sometimes, differences can’t be ironed out, precipitating a concurrence or dissent. By contrast, the phrasing (as opposed to the result) of a memdispo is given relatively little scrutiny by the other chambers; dissents and concurrences are rare.

Kozinski & Reinhardt, supra note 23, at 44.
addressed in prior published opinions. This reality—which for the moment we will assume presents procedural due process problems—is systemic in the federal appellate courts. The question arises, then, as what to do about it. The answer arguably lies in the logic of the Supreme Courts’ prophylactic rule jurisprudence, a subject to which I now turn.

III. PROPHYLACTIC RULES: “OVERPROTECTING” RIGHTS

Unlike in the early hypothetical, when courts misuse precedent-stripping rules, it’s virtually impossible to tell. As Judge Arnold has noted, if judges wish to decide a case based on “extraneous reason[s] . . . they can easily do so through the device of an abbreviated, unpublished opinion, and no one will ever be the wiser.” This fact not only means that panels feel more comfortable resorting to this “device,” it also makes it all but impossible for litigants to demonstrate abbreviated review. How, then, can litigants realistically establish the type of facts on which a procedural due process argument must be predicated? Without some relief from the normal burdens of proof, the answer is that in most cases they cannot. Enter prophylactic rules.

This problem of undetectability is not novel to the Supreme Court’s jurisprudence. The Court’s decision in Miranda is a good example of how, when faced with government misconduct that is empirically known to be widespread, but that is also virtually impossible to prove in individual cases, the Court has distilled from express constitutional mandates prophylactic rules—roughly meaning rules that operate to protect more than just the core constitutional right, because “overprotection” is necessary in order to avoid extreme underprotection of the core right. Strictly speaking, the meaning of “prophylactic rule” is not yet settled. Professor Klein defines a “constitutionally prophylactic rule” as a:

[doctrinal rule or legal requirement determined by the Court as appropriate for deciding whether an explicit or "true" federal constitutional rule is applicable. It may be triggered by less than a showing that the explicit rule was violated, but provides approximately the same result as a showing that the explicit rule was violated. It is appropriate only upon two determinations: first, that simply providing relief upon a showing that the explicit right was violated is ineffective; second, that use of this rule will be more effective and involve only acceptable costs.]

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74 This is especially true given that the decision not to publish an opinion usually occurs early in the process. The entire efficiency goal of nonpublication would be defeated were judges to decide not to publish an opinion only after drafting a full opinion with the presumption of publication.

75 Arnold, supra note 50, at 224; see also Pether, supra note 4, at 1484 (“[S]crutiny of what the courts are doing is made difficult in many cases and impossible in others.”).

76 See Mitchell N. Berman, Constitutional Decisional Rules, 90 Va. L. Rev. 1, 14 (2004) (noting that “the term is susceptible to a great many interpretations.”).

77 Susan R. Klein, The Fate or the Pre-Dickerson Exceptions to Miranda: Identifying and Reformulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure, 99 Mich. L. Rev. 1030, 1032-33 (2001); see also Tracy A. Thomas, Understanding Prophylactic Remedies Through the Looking Glass of Bush v. Gore, 11 WM. & MARY BILL OF RTS. J. 343, 375 (noting that “prophylactic relief” is a “term of
The most expansive definition of “prophylactic rules” is that they are necessary corollaries of constitutional mandates: Brian Landsberg argues that “[t]hese rules inhere in the nature of any constitutive document designed to advance normative values. And they inhere in the function of courts.” David Strauss has powerfully observed that prophylactic rules are so much an inherent aspect of constitutional adjudication that their existence as a distinct conceptual species of rules is essentially illusory; this is because when courts decide constitutional cases, “they consider not only the constitutional values at stake, but also the institutional difficulties that courts face in advancing those values.” According to Strauss, then, courts routinely integrate these latter considerations into their constitutional holdings even when such holdings are not subsequently conceptualized by observers as prophylactic rules. Thus, according to Mitch Berman, prophylactic rules—or what he terms “constitutional decision rules”—“are a ubiquitous component of constitutional doctrine,” even if courts do not tag their prudential creations as “prophylactic rules.”

The most often discussed specimen of the Court’s prophylactic rule jurisprudence is its reasoning in Miranda. There, the Court considered fine tuning the rubric used to determine whether custodial confessions of criminal defendants are admissible at trial. Since long before Miranda, courts administered this rule by examining on a case-by-case basis whether the evidence demonstrated that a given confession was secured because the defendant’s “will was overborne” by authorities. In Miranda, however, the Court applied and created a superseding standard, one borne out of what the Court perceived to be the practical realities of police interrogations.

In Miranda, there was no evidence before the Court that the confession at issue was in fact the product of police coercion; as the Court noted, “[t]o be sure, the records do not evince overt physical coercion or patent psychological ploys.” In holding that Miranda’s confession

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See, e.g., Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Culombe v. Connecticut, 367 U.S. 568, 602 (1961) (“The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.”).

Miranda, 384 U.S. at 457.
was nevertheless inadmissible, the Court emphasized the fact that, pursuant to modern law enforcement techniques, interrogation:

still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms. A valuable source of information about present police practices however may be found in various police manuals and texts which document procedures employed with success in the past, and which recommend various other effective tactics. . . . By considering these texts and other data, it is possible to describe procedures observed and noted around the country.\(^{83}\)

After describing the recommended practices in detail, the Court stated:

From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is [to] . . . undermine[] [the subject’s] will to resist. . . . When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. . . . Even without employing brutality, the "third degree" or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.\(^{84}\)

From these two considerations—(1) the inherent inability of courts to determine what takes place in specific interrogations given the privacy that characterizes them, and (2) evidence suggesting what happens generally during police interrogations—the Court concluded that abandoning the case-by-case standard of coercion-in-fact was necessary in order to provide “adequate safeguards to protect precious Fifth Amendment rights.”\(^{85}\) That rule was to require police to apprise detainees of their rights before attempting to interrogate them, including the Fifth Amendment right to remain silent and avoid interrogation altogether.

In short, the Miranda Court decided that the traditional case-by-case test was unrealistically stringent. In theory it rendered inadmissible forced confessions, but it too often stripped the Fifth Amendment of any practical force largely because of the difficulty of proving coercion in specific cases. As Professor Klein has noted, prior to Miranda “[t]he Court tried for thirty years to ensure that coerced confessions were not admitted in criminal trials.”\(^{86}\) This, combined with information about widely used police interrogation tactics, called for a remedial blunt instrument the acceptable incidental effect of which is to sometimes trigger Fifth

\(^{83}\) Id. at 448.

\(^{84}\) Id. at 455.

\(^{85}\) Id. at 457.

\(^{86}\) Klein, supra note 78, at 1035.
Amendment protections in cases where the right to avoid self-incrimination is not truly implicated.

The Court likely straddles the boundaries of its Article III power in promulgating prophylactic rules, as they directly discipline state law enforcement practices. As such, because the Supreme Court lacks the jurisdiction to promulgate state law enforcement procedures, but only to announce constitutional limitations on those procedures, prophylactic rules are best rationalized as rules of constitutional logistics that are necessary to effectuate the substantive protections the Constitution affords, and thus fall within the province of the Court to impose on states through the Fourteenth Amendment. Unsurprisingly, then, the Court’s recent treatment of the Miranda rule reinforces the characterization of it as a prophylactic constitutional rule.

As Professor Caminker has discussed, the Court recently in Dickerson v. United States was faced with the question of whether the rule announced in Miranda was a “constitutional rule,” or a non-constitutional rule the type of which Congress may supersede by statute. There, the district court suppressed evidence against Dickerson on Miranda grounds, despite Congress’ 1968 passage of 18 U.S.C. § 3501, the intent of which was to legislatively overrule Miranda by requiring the exclusion from evidence only confessions coerced-in-fact. The U.S. Fourth Circuit reversed the district court’s suppression, ruling that Miranda was not a constitutional rule, and therefore that it was validly superseded by § 3501. The Supreme Court disagreed. After seeming to hedge on the issue of whether mirandizing arrestees is itself constitutionally required, Justice Rehnquist speaking for the Court asserted that “Miranda announced a constitutional rule.”

The remainder of the opinion brings into relief precisely what the Court meant by “constitutional rule.” First, the Court discussed the dissent’s view that Miranda represents judicial overreaching because it imposed on state law enforcement limitations exceeding what

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87 If this seems question-begging and tenuous, I do not necessarily disagree. I attempt here only to rationalize precedent, not defend it. I agree that prophylactic rules raise serious jurisdictional concerns, but whether they are categorically illegitimate is irrelevant for present purposes. Prophylactic rules are “good law,” so my argument is, in a sense, a positivist offering; my concern is how to leverage the established law toward a wholesale eradication of precedent-stripping on procedural due process grounds.


91 Dickerson, 530 U.S. at 444.

92 Professor Klein has expressed her view that the Court in Dickerson wholly dodged the question of whether Miranda established a constitutional rule, characterizing the Dickerson Court as “refusing to label the Miranda warnings either a prophylactic rule or [the product of] pure constitutional interpretation.”); Klein, *supra* note 78, at 1070; cf. Caminker, *supra* note 89, at 5-6. For present purposes, however, labels matter little. What matters is that the Court has treated the Miranda rule as a prophylactic rule, as it is riddled with numerous pragmatic exceptions, and was expressly established, and continues to be upheld, on the basis that it is necessary to ensure practical protection of Fifth Amendment rights.
was necessary to satisfy constitutional requirements.\textsuperscript{93} Noting that Miranda was a response to “the advent of modern custodial police interrogation,”\textsuperscript{94} the majority responded by noting that the Miranda “constitutional rule” was borne of the fact that “reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession, a risk that the Court [in Miranda] found unacceptably great.”\textsuperscript{95} In concluding that Congress could not overrule Miranda, the Dickerson Court necessarily announced the Miranda rule to be of constitutional status, even if not the product of pure constitutional interpretation.

Other examples of prophylactic rules abound. For example, Professor Klein has discussed the Court’s creation of prophylactic rules to determine whether searches are “reasonable” for Fourth Amendment purposes,\textsuperscript{96} and Professor Strauss has discussed prophylactic rules that protect First Amendment rights.\textsuperscript{97} Indeed, fortuitously, the Court very recently announced a prophylactic rule for the specific purpose of ensuring fair adjudication in appellate courts. In Caperton v. A.T. Massey Coal Co., Inc,\textsuperscript{98} a West Virginia jury found Massey liable under various common-law theories and returned for Caperton a $50 million award. Knowing that state supreme court Justice Brent Benjamin would sit to hear Massey’s appeal, Massey’s chairman donated $3 million to Benjamin’s reelection campaign, a total that exceeded all other contributions for Benjamin combined. In the ensuing appeal, Benjamin refused to recuse himself; he and his fellow justices then reversed the jury’s verdict.

Caperton won certiorari\textsuperscript{99} on the issue of whether Benjamin’s refusal to recuse himself worked a denial of Caperton’s due process right to a fair appeal, even though Benjamin had no direct financial stake in the outcome of the appeal. The U.S. Supreme Court reversed. In doing so, the Court first noted its traditional position that “most matters relating to judicial disqualification [do] not rise to a constitutional level,”\textsuperscript{100} and that “[p]ersonal bias or prejudice ‘alone [is] not [a] sufficient basis for imposing a constitutional requirement under the Due Process Clause.”\textsuperscript{101} However, to prelude its expansive holding the Court then noted that “[a]s new problems have emerged . . . experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.”\textsuperscript{102} It then discussed the

\textsuperscript{93} Dickerson, 530 U.S. at 442-44.
\textsuperscript{94} Id. at 434.
\textsuperscript{95} Id. at 442 (internal citation omitted).
\textsuperscript{96} Klein, supra note 78, at 1046-47.
\textsuperscript{97} See Strauss, supra note 80, at 196-97 (discussing Lovell v. Griffin, 303 U.S. 444 (1938)).
\textsuperscript{98} 129 S. Ct. 2252 (2009).
\textsuperscript{100} Id. at 2259 (citing FTC v. Cement Institute, 333 U.S. 683, 702 (1948)).
\textsuperscript{101} Id. (citing Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 820 (1986)).
\textsuperscript{102} Id. (internal quotation marks omitted).
two categories of cases where the Court has held that recusal is constitutionally mandated: cases wherein a judge has a direct financial interest in the litigation, or in the contempt context, where the judge, although having no financial interest, was “challenged because of a conflict arising from his participation in an earlier proceeding.”103

After noting that the context of judicial elections was a novel one vis-à-vis its constitutionally-mandated recusal jurisprudence, the Court tackled the question of whether Massey’s “pivotal role in getting Justice Benjamin elected created a constitutionally intolerable probability of actual bias.”104 The Court began answering this question by discussing the personal introspection of the judge, which governs the question of recusal in the first instance, and by noting that “[t]here are instances when the introspection that often attends this process may reveal that what the judge had assumed to be a proper, controlling factor [in her decision] is not the real one at work.”105 From this, the Court noted:

The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias.106

From these premises, the Court declared that “[d]ue process requires an objective inquiry into whether the contributor's influence on the election under all the circumstances 'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true between the state and the accused.'”107 The Court then concluded that the risk that Massey’s influence “engendered actual bias” was “sufficiently substantial” such that it "must be forbidden if the guarantee of due process is to be adequately implemented."108

Although the Court in Caperton did not employ the phrase “prophylactic rule”—it rarely does—Caperton no doubt establishes one. Indeed, its formulation perfectly parallels the logic of

103 Id. at 2260-61.
104 Id. at 2262.
105 Id.
106 Id. at 2263.
107 Id. at 2264. (quoting Tumey v. Ohio, 273 U.S. 510, 532 (1927)).
108 Id. (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).
Miranda. The Court’s decision turned on the reality that, in cases like Caperton’s, bias-in-fact is virtually impossible to detect and prove. That is, because “[t]he judge’s own inquiry into actual bias . . . is not one that the law can easily superintend or review, giving force to the procedural due process rights of litigants in these contexts requires the use of an objective rule, one that will be triggered regardless of whether there is any actual bias in a given case, and thus regardless of whether the respective litigant is denied a fair tribunal.

In short, decisions such as Miranda and Caperton, as well as descriptive scholarly work discussing prophylactic rules, reveal that such rules arise when the Court deems them necessary to protect a core constitutional right and a narrower rule would yield an unacceptable degree of underprotection. Or, as Professor Landsberg notes, prophylactic rules are “designed to correct for the ineffectiveness of more direct prohibitions”; the ineffectiveness of a direct prohibition “stems in part from the human tendency to stretch compliance with core rules and in part from the difficulties of detecting and punishing violations of many core rules.”

By now, then, it should be fairly clear how the logic of prophylactic rules applies to the context of judges misusing precedent-stripping to forgo thorough or fair adjudication of appeals, the subject to which I now turn.

IV. GETTING TO THE PROPHYLAXIS

The legitimacy of prophylactic rules is not the focus of this article; that is, important issues such as whether the Court’s creation of them is ultra vires, or infringes on states’ rights. Rather, because prophylactic rules are an entrenched aspect of constitutional jurisprudence, it is only natural to consider whether a new prophylactic rule is warranted in circumstances presenting the same exigencies as in cases like Miranda and Caperton. If, empirically speaking, courts’ misuse of precedent-stripping is as systemically pernicious as the interrogation methods at issue in Miranda, and if such harm is as equally difficult to prove in individual cases such that requiring litigants to prove it would work an underprotection of

\[109\] Id. at 929.

\[110\] As it is other works. See, e.g., Landsberg, supra note 79, at 925 (Stating the “modern issue of prophylactic rules” as: “May the Supreme Court, the institution charged by the Constitution with enforcing core rules, protect against the violation of constitutional rights by adopting measures designed to minimize the risk of such violations, even when those measures are not specifically authorized by the Constitution? Or will the adoption of such prophylactic rules in fact subvert the Constitution by unduly enlarging the powers of the rule enforcer?”); Joseph D. Grano, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 NW. U.L. REV. 100, 101 (1985) (“[P]rophylactic rules raise a question of constitutional legitimacy.”).

\[111\] See Grano, supra note 111, at 125 (“The teaching of Erie . . . is that the mere grant of jurisdiction by article III does not carry accompanying authority for federal courts to promulgate a general common law either binding on the state courts or superseding their law in federal courts. . . . The state sovereignty argument takes on added force when the federal courts seek to overturn state court judgments that do not actually violate either the federal Constitution or a valid federal statute.”).

\[112\] For a long but nevertheless non-exhaustive list of such prophylactic rules—as well as “safe harbor” rules that underprotect constitutional rights in favor of providing law enforcement breathing room—see Klein, supra note 78, at 1036-51.
procedural due process rights vis-à-vis the appellate process, it follows that a prophylactic rule against precedent-stripping is necessarily warranted.

This syllogism, of course, depends on a premise that hereto I have asked the reader to assume: that the full and fair adjudication often denied by courts’ misuse of precedent-stripping implicates a cognizable procedural due process interest. While it may seem obvious to most readers that it does, it may not to others. Of course, the reporters are replete with the aspirational platitudes about “fairness” that are grist for preliminary-round moot court arguments or briefs by pro se litigants claiming unfair process. To invoke this question-begging language to define the contours of the right I claim exists might seem facile and insufficient to some. As such, before continuing with the analogy with Miranda and with the discussion of the proposed prophylactic rule, I discuss briefly why procedural due process doctrine in its current formulation necessarily gives rise to a right of appellants to a full and fair adjudication of their appeals, and how such fairness is denied when judges engage in the practices discussed above.

A. The Doctrinal Sources of the Right at Stake

The Fifth Amendment provides that no person shall “be deprived of life, liberty, or property, without due process of law” by the federal government. Similarly, the Fourteenth Amendment provides that no state may “deprive any person of life, liberty, or property, without due process of law.” While the Fourteenth Amendment, of course, applies only to the states, the general consensus is that the due process clause of the Fifth Amendment imposes the same constraints on the federal government as the Fourteenth does on the states. As such, although a large majority of Supreme Court due process case law expounds the Fourteenth Amendment, such does not diminish its applicability to the conduct of the federal courts.

113 See, e.g., Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (“The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done.” (internal citations and quotation marks omitted)); Withrow v. Larkin, 421 U.S. 35, 47 (1975) (“[A] fair trial in a fair tribunal is a basic requirement of due process.”).

114 U.S. CONST. amend X.

115 U.S. CONST. amend. XIV, § 1.

116 See, e.g., Republic of Pan. v. BCCI Holdings S.A., 119 F.3d 935, 944 (11th Cir. 1997) (“Because the language and motivating policies of the due process clauses of these two amendments are substantially similar, opinions interpreting the Fourteenth Amendment due process clause provide important guidance for us in determining what due process requires in cases involving nationwide service of process.”); Welch v. Thompson, 20 F.3d 636, 639 (5th Cir. 1994) (“We look to federal constitutional law to determine whether La.R.S. 15:1111 creates a legitimate claim or entitlement protected by the Due Process Clause of the Fourteenth Amendment. Moreover, the due process analysis is the same in measuring the Louisiana statute against the strictures of the Fourteenth Amendment as it would be under the Fifth Amendment. We analyze procedural due process questions using a two-step inquiry . . . .”); Raditch v. United States, 929 F.2d 478, 481 (9th Cir. 1991) (Discussing post-deprivation remedies and noting that “[a]lthough Hudson involved § 1983 and the Fourteenth Amendment, the same due process principles apply to the federal government through the Fifth Amendment.”).
Neither amendment tells us what specific interests are protected; rather, for purposes of procedural (as opposed to substantive) due process, the interests protected are those created by “independent sources,” usually statutes. As the Court has put it, the “dimensions” of cognizable interests are “defined by existing rules or understandings . . . that secure certain benefits and that support claims of entitlement to those benefits.” Thus, for example, although the poor enjoy no substantive constitutional right to welfare benefits, a state may not discontinue such benefits without providing recipients the process established by the respective state for determining eligibility; thus, welfare benefits may be a cognizable property interest for purposes of procedural due process.

In 28 U.S.C. § 1291 Congress granted to the federal appellate courts jurisdiction over all appeals from “all final decisions of the district courts of the United States.” While the statute does not expressly bestow upon federal court litigants the right to bring direct appeals in every case, the Supreme Court has read § 1291 as giving rise to “appeals as of right.” The Court has invigorated that right by asserting that when an appellant exercises an appeal as of right, procedural due process translates into a right to an appeal that counts. For example, in Douglas v. California, the Court held that states must provide indigent appellants with counsel because doing so is necessary to make the appellate process “meaningful.” In Evitts v. Lucey, the Court extended the reasoning of Douglas by holding that the mandate of Douglas is not satisfied if appellate counsel’s performance is exceedingly poor. The Court emphasized that is not enough to allow a person to appeal when they have the right to do so under state law. Rather, due process requires states to take extra steps to ensure that the appeal is “more than a ‘meaningless


118 Bd. of Regents v. Roth, 408 U.S. 564, 578 (1972).

119 See Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (“Such benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are "a 'privilege' and not a 'right.'")).

120 The statute reads:

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court . . .

121 See Digital Equip. Corp. v. Desktop Direct, 511 U.S. 863, 865 (1994) (“Section 1291 of the Judicial Code confines appeals as of right to those from final decisions of the district courts.” (internal quotation marks omitted)).


ritual.” Further, in holding that indigent appellants have a right to a free copy of lower court transcripts, the Court stated in Griffin v. Illinois, that when appeals are taken as of right, due process requires the provision of any resource necessary to make the appellate process “adequate and effective.” Indeed, recently in Caperton, the Court premised its procedural due process holding on the axiom that “[a] fair trial in a fair tribunal is a basic requirement of due process.” Given that the Court went on to find a denial of due process in the West Virginia state appellate process, the axiom obviously applies in the appellate context, and obviously may be implicated when judges use their power in ways that cast suspicion on the fairness of an appeal, even if prejudice is not manifest.

When a court fails to fully adjudicate an appeal, it denies the appellant the process to which she is due; this should be so obvious as to seem tautological. When a court either presumes an appeal to be meritless because of its nature, or knowingly forgoes formal resolution of an issue properly before the court due to a desire to truncate thorough consideration of the appeal, it denies the appellant full and fair adjudication of her arguments, and therefore the appeal becomes either a “meaningless ritual,” or at the very least, the appellate process ceases to be “effective” in the manner arguably contemplated in decisions like Griffin. Remember that Griffin teaches that it is not sufficient for due process purposes for the government to “go through the motions” of providing some appellate process to a litigant if the government’s failure to provide that litigant with lower court transcripts results in a failure to subject lower court conduct, or the principles that inspired that conduct, to rigorous and thorough examination through the adversarial process. So too due process is denied when such absence of rigorous and thorough examination is not the product of a denial of effective counsel (as in Evitts) but rather the result of the respective court’s decision not to perform it before disposition; under either scenario, the litigant does not enjoy the systemic vigilance that most characterizes true “adjudication” of legal issues and arguments.

With precedent such as Griffin, Evitts and Douglas forming the backdrop, Caperton is best viewed as confirmation that procedural due process requires a fair adjudication of appeals taken as of right, but also a declaration that prophylactic rules to ensure protection of the right are appropriate to limit the discretion of judges to engage in conduct that threatens the procedural due process protections of litigants. As noted above, this feature of Caperton squares it with the archetypal prophylactic reasoning of Miranda; these two decisions, it can be said, are models for a prophylactic rule in the precedent-stripping context.

124 Id. at 394.

125 Griffin v. Illinois, 351 U.S. 12, 20 (1956) (noting that due process requires “adequate and effective” appellate review); see also Evitts, 469 U.S. at 393 (“[P]rocedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.”); Rheuark v. Shaw, 628 F.2d 297, 302 (5th Cir. 1980) (“We are convinced that due process can be denied by any substantial retardation of the appellate process, including an excessive delay in the furnishing of a transcription of testimony necessary for completion of an appellate record.”).

126 Caperton, 129 S. Ct. at 2258 (quoting In re Murchison, 349 U.S. 133, 136 (1955)).
My suggestion that the term “adjudication” connotes a minimum threshold of formality and fairness with which cases are to be decided—much as a product of Congress is not termed “legislation” if it is not vetted through the procedural formalities making it deserving of that status—is reinforced by the Court’s non-delegation case law. For example, in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., the Court declared unconstitutional the broad grant of jurisdiction to non-Article III bankruptcy courts to render final judgment on state law claims because such a grant of jurisdiction “impermissibly removed most, if not all, of the essential attributes of the judicial power from the Art. III district courts.”\(^\text{127}\) For the most part, the Court’s conclusion of unconstitutionality was premised on the fact that such a broad grant of jurisdictional power to the bankruptcy courts allowed those courts to decide the common law rights of the claimants without providing them all of the safeguards of Article III adjudication. In this sense, the Court made clear that the non-delegation doctrine is not only concerned with separation-of-powers, but also the procedural rights of litigants (or, perhaps to put more correctly, that separation-of-powers principles exist primary to protect individual liberty, and are therefore the two concerns are inextricably intertwined\(^\text{128}\)).

The Court expounded on its Northern Pipeline decision in Commodity Futures Trading Commission v. Schor.\(^\text{129}\) In reviewing whether Congress could grant the Commodity Futures Trading Commission the jurisdiction to “entertain” state law counterclaims, the Court noted:

> Article III, § 1, serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government, and to safeguard litigants’ right to have claims decided before judges who are free from potential domination by other branches of government . . . . [T]his guarantee serves to protect primarily personal, rather than structural, interests.”\(^\text{130}\)

While neither Article III nor the Schor opinion directly describe a right of appellants to enjoy a minimum threshold of thoroughness in presenting their arguments to the courts, the point is that Article III, by the very fact that it establishes power that is “judicial,” also establishes the right of litigants to enjoy all the benefits of the exercise of judicial power. If we accept the premise that the power of the courts is to “say what the law is”—rather than to say what it might or should be—it is not a great leap to argue that Article III promises to litigants a process that


\(^{128}\) Which, of course, is not a novel proposition, as it’s a recurring theme in case law. See, e.g., Boumediene et al. v. Bush, 128 S. Ct. 2229, 2247 (“In our own system the Suspension Clause . . . . protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the delicate balance of governance that is itself the surest safeguard of liberty.”) (internal quotation marks omitted)); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“[T]he Constitution diffuses power the better to secure liberty”); Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (“Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.”).


\(^{130}\) Id. at 847-48 (internal citation and quotation marks omitted).
disposes of their claims only on premises deserving of the status of “law.” If a judge, in invoking propositions or principles in disposing of cases, is, at the same time, unwilling to commit to those propositions as binding statements of “what the law is” for future like cases, he is (unless the case does truly qualify as utterly redundant) necessarily admitting a lack of confidence that his premises are truly law. Instead, he is declaring “this is what the law might be were we to decide this issue definitively.” As such, it is worth asking: how is the resulting opinion functionally different than a constitutionally forbidden advisory opinion?

B. Time for a New Prophylaxis

Regardless of where one finds the specific contours of the right at issue, the evidence accumulated over the past several decades strongly suggests the existence of an unofficial policy, slowly nurtured (intentionally or not) by judges who rightly feel overworked, of using precedent-stripping rules to dispose of appeals in circumstances where such appeals, given their factual or legal nuances, should be disposed of in precedential opinions. The apparent frequent misuse of precedent-stripping rules, combined with the peculiar insidiousness of such misuse given the insular nature of the judiciary, amounts to a systemic threat to appellants’ due process rights by, in the name of pragmatism, disposing of appeals without full and thorough adjudication. Further, the practically insurmountable burden of proving such unfairness in specific cases makes unrealistic the notion that a specific litigant should be required to prove that the relevant judges did in fact cut corners. These exigencies—the empirical conspicuousness of the government conduct at issue and the difficulty of proving it in specific cases—inspired the Court’s Miranda and Caperton decisions. The logic of these decisions, then, supports the creation of a prophylactic rule that “overprotects” appellants’ right to procedural due process by forbidding precedent-stripping in all cases.

One might respond that if prophylactic rules exist only to the extent they are necessary to protect core rights, is not a remedy less drastic than an all-out prohibition of precedent-stripping more appropriate? In this vein, an alternative remedy might be a new rule of burden allocation: a litigant could establish a prima facie case of arbitrary appeal disposition if a precedent-stripping rule was used to dispose of her arguments. The prima facie case of arbitrariness could be rebutted if the other party (probably the court as respondent) could demonstrate, say, that no reasonable judge could have, given existing precedent, decided the case at hand differently, or that no reasonable judge could have concluded that the given appeal implicated no refinement of governing law. Obviously, such a process would be unrealistically cumbersome, and would exacerbate the very efficiency problems the courts are attempting to alleviate via their current precedent-stripping practices. Further, such an idea poses the obvious problem of who would enforce it meaningfully. Assuming the rule did not rely on the unrealistic expectation that the Supreme Court would grant certiorari in every relevant case, it would mean that the very appellate court that violated the rule would be responsible for ensuring its integrity on petition for rehearing. Although rehearing panels are usually comprised of a different group of three judges than the panel originally deciding the case, one could not be blamed for wondering whether the second panel members, who are likely responsible for nurturing—or at least entertaining for purposes of collegial pragmatism—the court culture endorsing the misuse of precedent-stripping rules, can be relied on to rigorously enforce such a rule.
A better argument is that the prophylactic rule should simply take the form of the Supreme Court forbidding the federal appellate courts from stripping their dispositions of precedential value. Not only would this solution prevent the administrative burdens noted above, it would cure the systemic threat to due process while minimally affecting the primary stated purpose of non-publication—to keep the reporters uncluttered with opinions that offer nothing new. Were a circuit court prohibited from stripping a given opinion of precedential effect, the court could still designate the opinion as “unpublished,” meaning that the court did not at the time of disposition deem it to represent any refinement or clarification of governing law. Such designation would serve as an easy way of delineating for practitioners that case law deserving of focus from that less so deserving, while still allowing attorneys to research and rely upon the unpublished decisions at the margins should such cases represent misapplication of unpublishation rules in the first place. Indeed, as noted before, if the unpublished disposition is not of such value, its citation would be pointless.

Conclusion

The federal courts are not packed with unprincipled judges seeking to deny litigants due process. However, evidence strongly suggests that over the past four decades, an attitude within the federal appellate courts has slowly developed around precedent-stripping rules that any use of them to further efficiency interests is not without virtue, even if not formally supported by the respective precedent-stripping rules. The exigencies that have nurtured this attitude are very real, but the way courts have dealt with them—by rationing the deliberateness which should characterize disposition of all appeals to only certain cases or certain appellants—is obnoxious to procedural due process. Using the logic of Supreme Court prophylactic-rule case law as a guide, the conspicuousness of inappropriate precedent-stripping as a systemic problem combined with the difficulty of proving such impropriety in individual cases arguably supports the creation of a prophylactic rule prohibiting precedent-stripping.

As a final note, I must register my appreciation for the reality that the federal courts currently face extreme practical burdens. No doubt, much of the misuse of precedent-stripping discussed above is the product of judges’ attempts at damage control, given an ever increasing workload without correspondingly increasing resources. Some of these judges have admirably recognized the problem and have proposed remedial alternatives to precedent-stripping.131 But even if we assume that the good-faith triage that characterizes a fraction of the justice-rationing actually describes all incidents of inappropriate precedent-stripping, such is cold comfort to litigants who are denied thorough adjudication of their arguments. The question, then, becomes, how should we respond to the problem? By over-sympathizing with judges’ complaints that they are overworked, and cavalierly132 accepting “efficiency” as the primary determinant in whether

131 See, e.g., Stephen Reinhardt, Surveys Without Solutions: Another Study of the United States Courts of Appeals, 73 TEx. L. REV. 1505, 1513 (1995) (book review) (Judge Reinhardt, responding to resistance to increasing the number of federal appellate judgeships, stating “[i]t is clear that the opposition to adding enough judges to handle our overwhelming caseload properly lies in the traditional view of the appellate ideal. We federal judges are simply unable to abandon our notion of the appellate courts as small, cohesive entities operating in a pristine and sheltered atmosphere. It appears that, rather than surrender this wholly unrealistic and outdate vision of the federal judiciary, many of us are willing to ration justice.”).

132 See Diane Adams-Strickland, Don’t Quote Me: The Law of Judicial Communications in Federal Appellate
litigants receive their due process? Or do we insist that the courts no longer enable Congress’ failure to address the problem by, for example, increasing the number of federal appellate judgeships, decreasing the federal courts’ exclusive jurisdiction, or, in any event, forbidding precedent-stripping?

I think the better answer is that we insist that institutions do their respective jobs. The job of the courts is to fully and fairly adjudicate all issues before them. It is Congress’ job to ensure that the courts have the resources they need to do that job adequately; this is especially true given that it is Congress that has repeatedly burdened the courts by creating new remedies and by statutorily increasing the availability of the federal venue. As such, perhaps things must get worse before they get better. The body responsible for ultimately fixing the problem is one that responds only to pressure from those experiencing the practical drawbacks of bad policy. If precedent-stripping ends but nothing else changes, the wheels of justice will no doubt slow. Perhaps it is only then that sufficient pressure on Congress will arise so as to motivate reform.

Practice and the Constitutionality of Proposed Rule 32.1, 14 COMMLAW CONSPECTUS 133, 163 (2005) (“To say that an assault on judicial efficiency is insufficient to support publication plans and no-citation rules is naive.”).