

May Stare Decisis Be Abrogated by Rule?

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The doctrine of stare decisis—that is, the general obligation of later courts to follow the decisions of earlier courts—is well established in the United States federal courts. But the legal foundation of this doctrine—whether it is constitutionally based, or whether it is simply a matter of judicial policy—has been hotly debated, leading to disagreement as to whether the doctrine could be abrogated entirely by Congress. Rather than weighing in on this debate, this Article considers the abrogation question from the federal court rulemaking perspective: May stare decisis be abrogated by the courts themselves, either pursuant to the formal federal court rulemaking power or pursuant to some other, more inherent form of rulemaking power? The answer to this question is of particular importance, for the various circuits of the United States Court of Appeals, by local rule, currently purport to do precisely that, at least with respect to certain (“unpublished”) decisions. This Article concludes, though, that whether promulgated pursuant to the federal courts’ delegated, Article I-based rulemaking power or created pursuant to their inherent, Article III-based rulemaking power, a rule abrogating stare decisis would be improper.

I. INTRODUCTION

In a provocative article, Michael Stokes Paulsen recently asked the question of whether Congress may¹ abrogate the doctrine of stare decisis² by

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¹ Despite contrary assurances by some, the word “may” can mean many things. *See, e.g.*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1396 (1993) (defining “may” as meaning (among other things) “can,” “might,” and “must”). But in this Article, the intended meaning of “may” is to have “permission” or be at “liberty” to do something, *id.*—that is, to *properly* be able to do something, in a legal sense.

² “Stare decisis” literally means “to stand by things decided.” BLACK’S LAW DICTIONARY 1443 (8th ed. 2004). In modern American jurisprudence, the doctrine of stare decisis (at least in its “horizontal” sense) refers to the obligation of a court to adhere to its own prior decisions absent compelling reasons for changing the underlying law. *See, e.g.*, *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (recognizing that stare decisis “always require[s] a departure from precedent to be supported by some special justification”) (internal quotation marks omitted); *Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992) (recognizing that “a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided”). The crucial aspect of this doctrine—and the aspect that separates “binding” precedent from any voluntary reliance on judicial decisions of *other* courts for whatever persuasive value they might have—is its ability to compel adherence to prior precedent *largely irrespective* of whether the later court would reach the same decision today. *See, e.g.*,

statute.³ Professor Paulsen concluded that Congress indeed may do so (at least in constitutional cases), arguing that such a statute is within the purview of the legislative power and not otherwise unconstitutional.⁴ Other legal scholars, though, have reached the opposite conclusion, reasoning that a statute abrogating stare decisis is somehow beyond the legislative power.⁵

Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 571 (1987) (“The bare skeleton of an appeal to precedent is easily stated: The previous treatment of occurrence *X* in manner *Y* constitutes, *solely because of its historical pedigree*, a reason for treating *X* in manner *Y*, if and when *X* again occurs.”). For more on the distinctions between “binding” and “persuasive” precedent, see *infra* notes 41–43 and accompanying text.

The doctrine of stare decisis also has a “vertical” sense that refers to the obligation of lower courts within the same judicial system to adhere, essentially without exception, to prior judicial decisions of higher courts. See, e.g., *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”); *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (“[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.”); Evan H. Caminker, *Why Must Inferior Courts Obey Supreme Court Precedents?*, 46 STAN. L. REV. 817, 818 (1994) (“[L]ongstanding doctrine dictates that a court is *always* bound to follow a precedent established by a court ‘superior’ to it.”). Though the abrogation of stare decisis in this vertical sense is itself an interesting subject, the references to the abrogation of stare decisis made in this Article refer only to stare decisis in its horizontal sense, for one can at least imagine the abrogation of one without the abrogation of the other. The practical effect of this disclaimer might be trivial, though, for under the current American understanding of this doctrine, it is difficult to see why a decision of a higher court that is not binding on that court should be binding on any lower court. Thus, it might well be that a horizontal abrogation of stare decisis would result in a vertical abrogation as well.

³ See Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535 (2000).

⁴ See *id.* at 1541 (“By virtue of the Necessary and Proper Clause, Congress has enumerated legislative power to pass a statute abrogating stare decisis, as an enactment appropriate to the carrying into execution of the judicial power. The exercise of such legislative power would not intrude on any constitutional province of the judiciary . . .”). Others have agreed, at least in large part. See, e.g., John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 542–43 (2000); Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075, 1084 (2003); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2125–26 (2002). At least one legal scholar has gone even further, and has argued that the doctrine of stare decisis is *itself* unconstitutional, at least as it has been applied in certain constitutional cases. See Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23 (1994).

⁵ See, e.g., Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 577 (2001) (“Article III’s grant of

Ambivalence toward the constitutionality of a statute abrogating stare decisis might lead one to ask instead whether stare decisis may be abrogated by *rule*.⁶ For example, what if the Supreme Court of the United States were to promulgate a rule abrogating stare decisis? Such a rule would unbind the Court from the precedential constraint ordinarily imposed by its own prior decisions.⁷ To the extent that a prior decision retains little vitality other than stare decisis—that is, lacks adequate independent jurisprudential support—it would be ripe for overruling.⁸ Moreover, a rule abrogating stare decisis

‘the judicial power’ authorizes the Supreme Court to elaborate and rely on a principle of stare decisis and, more generally, to treat precedent as a constituent element of constitutional adjudication.”); Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 194–95 (2001) [hereinafter Lawson, *Controlling Precedent*] (arguing that “Congress may not by statute tell the federal courts whether or in what way to use precedent” as “Congress does not have the power to tell the federal courts how to go about their business of deciding cases”).

⁶ As used in this Article, “rule” (or “rules”) principally means “court rules,” which in their most commonly understood form consist of

[r]egulations having the force of law and governing practice and procedure in the various courts, such as the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the U.S. Supreme Court Rules, and the Federal Rules of Evidence, as well as any local rules that a court promulgates.

BLACK’S LAW DICTIONARY 391 (8th ed. 2004). But this Article also will consider the use of the term “rule” in a broader sense, a sense that includes any “rule governing the practice or procedure in a given court,” *id.* at 1358, regardless of how it comes into being (i.e., regardless of whether it appears in statute-like form or emerges only in conjunction with a judicial decision).

Incidentally, there might well be advantages—besides constitutional ambivalence—to the use of a rule, rather than a statute, as a means of abrogating stare decisis. For example, it might well be more politically feasible to abrogate stare decisis via the federal judicial rulemaking process than via the federal legislative process. There also might be relative disadvantages. But except as discussed herein, such advantages and disadvantages are beyond the scope of this Article.

⁷ This assumes that the rule would operate “retroactively,” in the sense that it would remove, after the fact, whatever binding precedential effect those decisions previously might have had. Alternatively, the rule could be drafted so as to apply only “prospectively” to decisions made on or after its effective date. For more on the possible meaning of these terms, see Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J. L. & PUB. POL’Y 811, 812–14 (2003).

⁸ Possible candidates abound. *See, e.g.*, *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (“Whether or not we would agree with *Miranda*’s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now.”); *Planned Parenthood v. Casey*, 505 U.S. 833, 871 (1992) (opinion of O’Connor, Kennedy, and Souter, JJ.) (“We do not need to say whether each of us, had we been Members of the Court when the valuation of the state interest came before it as an original matter, would have concluded, as the *Roe* Court did,

would permit the Court to decide each case unburdened by the notion that its decision, being itself precedent, might constrain the Court in some future decision.⁹ In short, the discretion to decide each case as the Court might see fit would be, precedentially speaking, completely unfettered.¹⁰

Alternatively, what if the Supreme Court were to promulgate a rule permitting it to abrogate *stare decisis* on a case-by-case basis (whether according to some set of criteria, or not)? Such a rule would clear the way for exempting whole categories of cases from the binding effect of precedent.¹¹ For example, *stare decisis* could be abrogated only as to certain cases—such as the abortion rights cases—but not as to others.¹² The ramifications of a rule abrogating *stare decisis* even on a selective basis could be significant.

Would the Supreme Court ever promulgate such a rule? It seems unlikely, for the Court generally has shown little, if any, inclination to abrogate the doctrine of *stare decisis*.¹³ Does this then render an inquiry into the propriety of such a rule academic? Not at all. For though the Supreme Court has yet to promulgate a rule abrogating *stare decisis*, such a rule now

that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions.”); *see also* Paulsen, *supra* note 3, at 1539 n.12 (citing “[o]ther prominent examples of currently controversial decisions that might be candidates for reconsideration” if *stare decisis* were to be abrogated).

⁹ *Cf.* Harper v. Virginia Dep’t of Taxation, 509 U.S. 86, 119 (1993) (O’Connor, J., dissenting) (“It should go without saying that any decision of this Court has wide-ranging applications; nearly every opinion we issue has effects far beyond the particular case in which it issues.”).

¹⁰ *See* Anastasoff v. United States, 223 F.3d 898, 901 (“If judges had the legislative power to ‘depart from’ established legal principles, ‘the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions.’”) (quoting SIR WILLIAM W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *259 (1765)), *vacated as moot on reh’g en banc*, 235 F.3d 1054 (8th Cir. 2000). Actually, “arbitrary” is probably a bit strong, as it seems unlikely that such a rule would immediately lead to arbitrary judicial decision making. But the *potential* to become *more* arbitrary would be there. *See* Jeffrey O. Cooper, *Citability and the Nature of Precedent in the Courts of Appeals: A Response to Dean Robel*, 35 IND. L. REV. 423, 428 (2002) (“The ability to dictate whether or not a particular decision will have any precedential effect opens the door to the appearance (at the very least) of arbitrary decisionmaking . . .”).

¹¹ *See* Richard B. Cappalli, *The Common Law’s Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 761 (2003) (concluding that such a rule would “remove the power to control the resolution of future disputes from selected appellate opinions”).

¹² *Cf.* Paulsen, *supra* note 3, at 1539 (expressing this as the goal of his article). This is not to suggest that the author of this Article necessarily advocates such a result, should the Senate Judiciary Committee be watching.

¹³ *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-3, at 248 (3d ed. 2000) (“[T]he Court is most unlikely ever to abandon *stare decisis* altogether, even with respect to constitutional interpretation.”).

exists in every circuit of the United States Court of Appeals.¹⁴ For example, the United States Court of Appeals for the Ninth Circuit has promulgated a local rule¹⁵ that generally provides that certain decisions of that court (those designated as “unpublished”¹⁶) “are not binding precedent.”¹⁷ Coupled with the fact that eighty-two percent of all federal court of appeals decisions are “unpublished,”¹⁸ the reality is that stare decisis is now being abrogated with respect to tens of thousands of decisions each year.¹⁹ So the question of

¹⁴ See *Hart v. Massanari*, 266 F.3d 1155, 1163 n.7 (9th Cir. 2001); see also *infra* note 26 (cataloging rules). Apparently following the federal courts of appeals’ lead, such a rule also now exists in all but a handful of states. See *Hart*, 266 F.3d at 1163 n.7.

¹⁵ Broadly construed, a “local rule” is a “rule by which an individual court supplements the procedural rules applying generally to all courts within the jurisdiction.” BLACK’S LAW DICTIONARY 957 (8th ed. 2004). For example, though practice before the United States Court of Appeals for the Ninth Circuit (and all other federal circuits) is governed generally by the Federal Rules of Appellate Procedure, see FED. R. APP. P. 1(a)(1), there also exist rules that are promulgated by the Ninth Circuit itself that govern only the practice before that particular court. See 9TH CIR. R. 1-2.

¹⁶ The term “unpublished,” as used in this context, does not literally mean unpublished, for “[v]irtually all judicial opinions are now ‘published’ in the sense of being publicly available, either electronically or in print.” Amy E. Sloan, *A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule*, 79 IND. L.J. 711, 711 n.2 (2004); accord Brian P. Brooks, *Publishing Unpublished Opinions*, 5 GREEN BAG 259, 259 (2001) (“[T]he concept of the ‘unpublished opinion’ is no longer a legal fiction—it is *fiction*, pure and simple. Unpublished opinions are now published in every relevant sense.”). Rather, the term “unpublished” is more accurately thought of as “a term of art given to those dispositions designated by the issuing court as having no (or limited) precedential value.” Niketh Velamoor, Comment, *Proposed Federal Rule of Appellate Procedure 32.1 to Require That Circuits Allow Citation to Unpublished Opinions*, 41 HARV. J. ON LEGIS. 561, 561 n.2 (2004). For more on what it means for a federal court of appeals decision to be “unpublished,” see *infra* note 28 and accompanying text.

¹⁷ 9TH CIR. R. 36-3(a). To distinguish local circuit rules of this nature (which are often referred to as “unpublished decision” rules) from the more general concept of a rule abrogating stare decisis, this Article will refer to such local rules as “nonprecedential decision” rules (which much more accurately describes their primary purpose).

¹⁸ See ADMIN. OFFICE OF THE UNITED STATES CTS., JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2005, tbl. S-3 (2005), <http://www.uscourts.gov/judbus2005/tables/s3.pdf> (last visited Apr. 10, 2006). Though this report does not include data from the Federal Circuit, see *id.*, the Federal Circuit likewise has a nonprecedential decision rule. See FED. CIR. R. 47.6.

¹⁹ For example, during the twelve-month period ending September 30, 2005, the United States Court of Appeals (excluding the Federal Circuit) issued 29,913 “decisions” (i.e., “opinions and orders that expound on the law as applied to the facts of each case and that detail the judicial reasons upon which the judgment is based”). ADMIN. OFFICE OF THE UNITED STATES CTS., *supra* note 18. Of these decisions, 24,411 were “unpublished.” *Id.* Incidentally, this Article will adopt the meaning of the term “decision” given by the Administrative Office of the United States Courts. See *supra* note 18.

whether a federal appellate court²⁰ *would* promulgate such a rule is not an idle one; the courts of appeals already have. As a result, nonprecedential decisions are not just theoretical; they are, in fact, standard practice.²¹ It is therefore little wonder that such decisions have become a “source of considerable controversy.”²²

But back to the original question: *May* the Supreme Court (or any federal appellate court), by rule, abrogate the doctrine of stare decisis? No. For even assuming such a rule would be constitutional,²³ and that it would be sound

²⁰ Such a rule would only be promulgated by a federal appellate court because there is no corresponding obligation on the part of a federal district court to adhere to its own prior decisions. *See Hart v. Massanari*, 266 F.3d 1155, 1174 (9th Cir. 2001). Precisely why this is the law is unclear. *See id.* (“That the binding authority principle applies only to appellate decisions, and not to trial court decisions, is yet another policy choice. There is nothing inevitable about this; the rule could just as easily operate so that the first district judge to decide an issue within a district, or even within a circuit, would bind all similarly situated district judges, but it does not.”). The propriety of this “policy choice,” though, is an issue that is beyond the scope of this Article.

²¹ *See also* Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1436 (2004) (“Contrary to popular belief, the United States courts have not operated under the system of precedent characteristic of common law legal systems since the 1960s.”).

²² Velamoor, *supra* note 16, at 561.

²³ Though the author of this Article is not aware of any case involving a general rule abrogating stare decisis, several courts have considered the constitutionality of particular nonprecedential decision rules. The seminal case in this area is *Anastasoff v. United States*, 223 F.3d 898, *vacated as moot on reh’g en banc*, 235 F.3d 1054 (8th Cir. 2000). In *Anastasoff*, the Court of Appeals for the Eighth Circuit held that a local rule providing that “unpublished” decisions generally have no precedential value was unconstitutional as violative of Article III. *See id.* at 899. But because the case was settled pending en banc review, the panel’s decision was vacated as moot, thus (ironically enough) negating any binding precedential effect. *See Anastasoff*, 235 F.3d at 1056. (Precisely why this should be the result in this context is unclear, for surely the case was quite justiciable when the court rendered its initial decision. For this and other reasons, the Supreme Court has expressly disapproved of this practice in all but the most extraordinary of circumstances. *See United States Bancorp Mortgage Co. v. Bonner Mall P’ship*, 513 U.S. 18, 29 (1994). Regrettably, the propriety of the vacatur in *Anastasoff* appears not to have been challenged.) Despite the fact that the original *Anastasoff* decision has been vacated, that decision “continues to have persuasive force,” *Hart*, 266 F.3d at 1159, and at least one other federal court has agreed with its reasoning. *See Alshrafi v. American Airlines, Inc.*, 321 F. Supp. 2d 150, 160 nn.9–10 (D. Mass. 2004) (Young, C.J.); *see also* *Re: Rules of the United States Court of Appeals for the Tenth Circuit*, 955 F.2d 36, 36–38 (10th Cir. 1992) (Holloway, C.J., joined by Barrett and Baldock, JJ., concurring in and dissenting from the revision of the Rules of the Tenth Circuit) (questioning the constitutionality of the Tenth Circuit’s unpublished decision rule). Conversely, the Court of Appeals for the Ninth Circuit—despite acknowledging that the “principle of precedent was well established in the common law courts by the time Article III of the Constitution was written,” *Hart*, 266 F.3d at 1174—held that its nonprecedential decision rule is

from a pragmatic standpoint,²⁴ the abrogation of stare decisis is a matter that is simply beyond the federal courts' rulemaking power. For there are also *nonconstitutional* limits to this rulemaking power, and though the application of these limits to a rule abrogating stare decisis seems to have gone virtually unexplored, they preclude the promulgation of a rule of this nature. Thus, despite the fact that such rules currently exist, they are unlawful.

The remainder of this Article is divided into four parts. By way of background, the next part, Part II, briefly describes the current status of the courts of appeals' various nonprecedential decision rules. Part III begins the analysis by discussing the sources and limits of what might be described as the formal federal court rulemaking power and applying that law to a rule abrogating stare decisis. Part IV then does the same with respect to the inherent rulemaking power of the federal courts. The Article concludes, in Part V, that such rules, whether promulgated formally or pursuant to the courts' inherent rulemaking power, exceed the power derived from those authorities.

constitutional. *Id.* at 1180. Following *Hart*, the Federal Circuit reached a similar conclusion. *See* *Symbol Techs., Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361, 1366–68 (Fed. Cir. 2002). Other courts remain undecided. *See, e.g.*, *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, 260 (5th Cir. 2001) (Smith, J., joined by Jones and DeMoss, JJ., dissenting from denial of rehearing en banc, “which would have given this court an opportunity to examine the question of unpublished opinions”).

Legal scholars likewise are divided on this subject. *Compare* Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 120–21 (2001) (concluding that although a rule abrogating stare decisis in all cases might be unconstitutional, a properly structured rule abrogating stare decisis only in certain cases would be constitutional) and Thomas R. Lee & Lance S. Lehnhof, *The Anastasoff Case and the Judicial Power to “Unpublish” Opinions*, 77 NOTRE DAME L. REV. 135, 173 (2001) (concluding that the various federal appellate court nonprecedential decision rules are constitutional), with Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 118 (2000) (concluding that such rules are unconstitutional). *See also* Cappalli, *supra* note 11, at 759 n.33 (collecting authorities on this issue).

The question thus appears to be a close one. For this reason, this Article, rather than weighing in on this debate, will heed the frequently repeated admonition that constitutional questions be avoided if the matter may be resolved on nonconstitutional grounds. *See, e.g.*, *Clinton v. Jones*, 520 U.S. 681, 690 (1997).

²⁴ The question of whether a rule abrogating stare decisis would be pragmatically efficacious, like the constitutional question, *see supra* note 23, has been hotly debated (at least with respect to the various nonprecedential decision rules). *See, e.g.*, Cappalli, *supra* note 11, at 760–61 nn.36–37 (collecting authorities on this issue). Moreover, though such arguments are important in the context of deciding whether to *adopt* such rules, such arguments constitute insufficient grounds for nullification, and thus their importance diminishes considerably once the decision to promulgate such a rule has been made. Accordingly, rather than weigh in on this debate, this Article assumes that a rule abrogating stare decisis would be a good idea.

II. CURRENT STATUS OF FEDERAL RULES GOVERNING NONPRECEDENTIAL DECISIONS

Before considering the propriety of a rule abrogating stare decisis more generally, it might be helpful to take a closer look at the various nonprecedential decision rules as they now exist in the United States Court of Appeals.

As stated previously, every federal circuit, by local rule, purports to deprive some class of decisions of binding precedential effect.²⁵ For the most part, this is done directly, through rules that provide (more or less) that certain decisions of those courts (those so designated) do not constitute binding precedent.²⁶ Several circuits also limit the binding precedential effect

²⁵ For some reason, the organization of the United States Court of Appeals by circuits, *see* 28 U.S.C. §§ 41, 43(a) (2000), has led both to the notion that precedent from one circuit is not binding on the others, *see Hart*, 266 F.3d at 1175–76, and to the promulgation of different local rules for each circuit. Precisely why this occurred is unclear; such a result seems neither necessary nor inevitable, and many problems (such as intercircuit conflicts and the need for local rules) could be avoided (or at least be lessened) were the court to be treated as a single unit. (Even knowing what to call these various courts is problematic; the proper name (e.g., “United States Court of Appeals for the Ninth Circuit,” *see* 28 U.S.C. § 43(a) (2000)) is cumbersome, yet the more common short form (e.g., “Ninth Circuit”), being no more than the name of a geographic area, *see* 28 U.S.C. § 41 (2000), is not strictly accurate.) In any event, we now find ourselves with thirteen courts of appeals (or circuits, or whatever you call them), each with its own (often conflicting) set of local rules. *See generally* Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 944–52 (1996).

²⁶ Most circuits expressly so provide. *See* 1ST CIR. R. 32.3(a)(2) (“The court will consider [unpublished] opinions for their persuasive value but not as binding precedent.”); 3D CIR. IOP 5.1 (“There are two forms of opinions: precedential and not precedential. . . . The face of an opinion states whether it is precedential or not precedential.”); 3D CIR. IOP 5.7 (“[Nonprecedential] opinions are not regarded as precedents that bind the court”); 5TH CIR. R. 47.5.4 (“Unpublished opinions issued on or after January 1, 1996, are not precedent An unpublished opinion may, however, be persuasive.”); 7TH CIR. R. 53(b)(2)(iv) (“Unpublished orders . . . shall not be . . . used as precedent (A) in any federal court within the circuit in any written document or in oral argument; or (B) by any such court for any purpose.”); 8TH CIR. R. 28A(i) (“Unpublished opinions are decisions which a court designates for unpublished status. They are not precedent”); 9TH CIR. R. 36-3(a) (“Unpublished dispositions and orders of this Court are not binding precedent”); 10TH CIR. R. 36.3(A) (“Unpublished orders and judgments of this court are not binding precedents”); 11TH CIR. R. 36-2 (“Unpublished opinions are not considered binding precedent.”); FED. CIR. R. 47.6(b) (“Any opinion or order [bearing a legend specifically stating that the disposition may not be cited as precedent] must not be employed . . . as precedent.”). The remaining four circuits strongly imply that they, too, regard certain of their decisions as nonbinding precedent. *See* 2D CIR. R. 0.23 (“Since [dispositions made in open court or by summary order] do not constitute formal opinions of the court and are unreported or not uniformly

of certain decisions more indirectly, through rules that prohibit their citation,²⁷ thereby effectively precluding any reliance thereon. Without exception, such deprivations of binding precedential effect, as well as such

available to all parties, they shall not be . . . used in unrelated cases before this or any other court.”); 4TH CIR. R. 36(c) (“In the absence of unusual circumstances, this Court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this Court’s unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored”); 6TH CIR. R. 206(c) (“Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court en banc consideration is required to overrule a published opinion of the court.”); D.C. CIR. R. 36(c)(2) (“[A] panel’s decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition.”). Most circuits expressly provide exceptions for the purposes of establishing the law of the case, *res judicata*, and other, similar matters.

²⁷ See 2D CIR. R. 0.23 (“Since [dispositions made in open court or by summary order] do not constitute formal opinions of the court and are unreported or not uniformly available to all parties, they shall not be cited . . . in unrelated cases before this or any other court.”); 7TH CIR. R. 53(b)(2)(iv) (“Unpublished orders . . . shall not be cited . . . as precedent (A) in any federal court within the circuit in any written document or in oral argument; or (B) by any such court for any purpose.”); 9TH CIR. R. 36-3(b) (“Unpublished dispositions and orders of this Court [generally] may not be cited to or by the courts of this circuit”); FED. CIR. R. 47.6(a) (“A disposition may be cited as precedent of the court unless it is issued bearing a legend specifically stating that the disposition may not be cited as precedent.”); *id.* (b) (“Any opinion or order [designated as not to be cited as precedent] must not be . . . cited as precedent.”). A Third Circuit local rule strongly implies the same result. See 3D CIR. IOP 5.7 (“The court by tradition does not cite to its not precedential opinions as authority.”). Several other circuits have rules that disfavor the citation to nonprecedential decisions, but permit citation thereto if the decision has precedential value in relation to a material issue in the case and there is no other decision that would serve as well. See 1ST CIR. R. 32.3(a)(2); 4TH CIR. R. 36(c); 6TH CIR. R. 28(g); 8TH CIR. R. 28A(i); 10TH CIR. R. 36.3(B); 11TH CIR. R. 36-2. Finally, though two circuits neither prohibit nor expressly disfavor the citation of any of their decisions, they reiterate that certain of their decisions have no binding precedential value. See 5TH CIR. R. 47.5.4; D.C. CIR. R. 36(c)(2).

At least one circuit also expressly prohibits citation to decisions of *other* courts if citation is prohibited by the issuing court. See D.C. CIR. R. 28(c)(2). But at least one federal court has held to the contrary. See *Griffy’s Landscape Maint. LLC v. United States*, 51 Fed. Cl. 667, 672–73 (2001) (considering a nonprecedential decision of the Federal Circuit as persuasive precedent, despite the fact that both the Federal Circuit and the United States Court of Federal Claims prohibit citation to their own nonprecedential decisions). (As the *Griffy’s Landscape* court pointed out, though, *no* decisions of the Court of Federal Claims are binding on that court, *id.* at 673, leaving one to wonder both why it had a local rule depriving any of its decisions of binding precedential effect and whether the *Griffy’s Landscape* holding will be followed in any future Court of Federal Claims case.)

prohibitions on citation, are based on a determination that the decision in question in some sense should not be “published.”²⁸

Why did the courts of appeals devise such a scheme, a scheme that has been described by the Reporter for the Advisory Committee on Appellate

²⁸ See *supra* notes 26–27 and related local rules.

Though not necessarily relevant to this Article, it might be observed that each circuit has established criteria for making this “publication” determination. For example, Ninth Circuit Rule 36-2 provides that a “disposition” shall be designated an “opinion” (and therefore “publishable,” and therefore binding precedent, see 9TH CIR. R. 36-3) only if it:

- (a) Establishes, alters, modifies or clarifies a rule of law, or
- (b) Calls attention to a rule of law which appears to have been generally overlooked, or
- (c) Criticizes existing law, or
- (d) Involves a legal or factual issue of unique interest or substantial public importance, or
- (e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel’s disposition of the case, or
- (f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or
- (g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.

Id. Other circuits have similar rules. See, e.g., D.C. CIR. R. 36(a)(2).

It also might be observed that the determination not to “publish” a decision has ramifications beyond those relating to a decision’s binding precedential effect. Most significantly, it also means that the decision will not be published (in full) in the official *Federal Reporter*. See Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 *FORDHAM L. REV.* 23, 26 (2005). Thus, the term “publication” (and therefore “unpublication”) actually encompasses not just one concept, but a bundle of concepts. As summarized by Professor Pether:

Unpublication means that an opinion is not designated for publication in the jurisdiction’s official reporter, if it has one; to a greater or lesser extent it makes the opinion difficult to find; it limits or destroys the precedential value of the opinion; and in most jurisdictions, citation to an unpublished opinion in documents filed in court or in argument is either banned or severely limited.

Pether, *supra* note 21, at 1436–37; see also Norman R. Williams, *The Failings of Originalism: The Federal Courts and the Power of Precedent*, 37 *U.C. DAVIS L. REV.* 761, 773 (2004) (“The circuits’ no-precedent rules have given extraordinary legal significance to the otherwise insignificant determination whether to publish a decision.”).

Rules as the “crazy uncle in the attic of the federal judiciary”?²⁹ Though the history of these rules is itself an interesting subject,³⁰ the more important point here is that the issue of whether a decision should be officially published and the issue of whether a decision should be deprived of binding precedential effect are (at least theoretically) quite separable inquiries. Neither necessarily implicates the other. Thus, one can easily imagine a rule for determining whether any given decision should be officially published without rendering it nonprecedential.³¹ Of course, the converse is true as well. Does this then mean that it would be permissible for a federal court to deprive even “published” decisions of binding precedential effect? The current scheme suggests no obvious impediments.

Two recent developments have altered the landscape somewhat. First, the E-Government Act of 2002³² now requires each circuit to establish and maintain a website containing “all written opinions” (including “unpublished” opinions) “in a text searchable format.”³³ As a result, all decisions of those courts should now be (or soon will be) electronically accessible.

More significantly, the Supreme Court of the United States has just approved a proposed amendment to the Federal Rules of Appellate Procedure (styled as new Rule 32.1) that would prohibit restrictions on the citation of “unpublished” decisions.³⁴ Though the history of proposed Rule 32.1 has

²⁹ Memorandum from Patrick J. Schiltz, Reporter, to the Advisory Comm. on Appellate Rules 97 (Mar. 18, 2004), *available at* <http://www.nonpublication.com/schiltz.pdf> [hereinafter Schiltz Memorandum].

³⁰ For those interested in learning more about the history of the nonprecedential decision rules, see, for example, RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 162–75 (1996), and William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978).

³¹ Indeed, that was precisely the original nature of the “unpublished” decision scheme. See Reynolds & Richman, *supra* note **Error! Bookmark not defined.**, at 1179 n.73.

³² E-Government Act of 2002, Pub. L. No. 107-347, § 205(a), 116 Stat. 2899, 2913 (2002).

³³ *Id.*

³⁴ See Federal Judiciary’s Home Page on the Federal Rules of Practice, Procedure, and Evidence, <http://www.uscourts.gov/rules/index.html#supreme0406> (last visited Apr. 17, 2006) [hereinafter Judiciary’s Home Page on Rules]. Specifically, proposed Rule 32.1 (“Citing Judicial Dispositions”) provides:

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

been turbulent, to say the least,³⁵ the arguments in favor of the rule seem, on balance, compelling, and given the recent approval by the Supreme Court, promulgation seems likely.³⁶ But as the Advisory Committee on Appellate Rules states, the scope of this proposed rule is “extremely limited”³⁷:

It does not require any court to issue an unpublished opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as “unpublished” or specify the procedure that a court must follow in making that determination. It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court. In particular, it takes no position on whether refusing to treat an unpublished opinion of a federal court as binding precedent is constitutional. Rule 32.1 addresses only the *citation* of federal judicial dispositions that have been *designated* as “unpublished” or “non-precedential”—whether or not those dispositions have been published in some way or are precedential in some sense.³⁸

Nonetheless, “[b]y allowing unpublished opinions to be treated as persuasive authority, . . . the Advisory Committee has, whether it likes it or not, taken a position in the debate over precedential effect.”³⁹ In particular, “[b]y

(i) designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like; and

(ii) issued on or after January 1, 2007.

(b) 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.

Supreme Court Order of April 12, 2006, at <http://www.supremecourtus.gov/orders/courtorders/frap06p.pdf>.

³⁵ Schiltz, *supra* note 28, at 24 (“Proposed Rule 32.1 is, without question, one of the most controversial proposals in the history of federal rulemaking.”).

³⁶ Proposed Rule 32.1 now has been transmitted to Congress and will take effect on December 1, 2006 (though only as to decisions issued on or after January 1, 2007) unless Congress enacts contrary legislation. *See* Judiciary’s Home Page on Rules, *supra* note 34. *See also* 28 U.S.C. § 2074(a) (2000) (prescribing the rulemaking procedure following Supreme Court approval).

³⁷ Memorandum from the Honorable Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules, to the Honorable David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure 3 (May 6, 2005), <http://www.uscourts.gov/rules/Reports/AP5-2005.pdf>.

³⁸ *Id.* (citations omitted).

³⁹ Velamoor, *supra* note 16, at 571–72.

permitting citation to non-precedential opinions, the rule creates the inference that those opinions can validly be issued.”⁴⁰

The upshot of these developments is that “unpublished” court of appeals decisions soon will be universally accessible, and almost certainly will be universally citable. Nonetheless, “unpublished” decisions almost certainly will continue to be issued, in large part because they will continue to have no binding precedential effect.⁴¹

The significance of this last point should not be lost. “Unpublished” decisions—even if accessible, and even if citable—will continue to have no binding precedential effect. They are precedent in name only, for their value lies solely in the strength of their inherent persuasiveness.⁴² The gulf between binding and nonbinding precedent is, therefore, a wide one. The distinction is a matter of discretion, for once “precedent” becomes

⁴⁰ Sloan, *supra* note 16, at 725. Of course, there still is some difference between *allowing* an improper practice to continue through inaction and promulgating a rule that is *itself* improper, and it is possible that the Committee failed to address the precedential effect of “unpublished” decisions in part because it believed it *may* not, for the reasons discussed in this Article. *See infra* note 108 (discussing the propriety of a hypothetical rule of this nature).

⁴¹ As summarized by Professor Pether:

2001 saw the beginning of a series of events calling for reform of, and in some cases actually reforming, the “noncitation” aspect of the unpublication rules and making more unpublished opinions at least theoretically available (although not always readily so). No such action has occurred in relation to that aspect of unpublication that goes to the designation of the precedential value or lack thereof of unpublished opinions.

Pether, *supra* note 21, at 1465–66 (footnote omitted); *see also* K.K. DuVivier, *Are Some Words Better Left Unpublished?: Precedent and the Role of Unpublished Decisions*, 3 J. APP. PRAC. & PROCESS 397, 414 (2001) (“If unpublished opinions are readily available and now . . . may be cited, the debate shifts to the precedential weight of unpublished decisions.”).

⁴² Indeed, an argument from “persuasive” precedent is not an argument from precedent at all. *See* Schauer, *supra* note 2, at 576 (“Only if a rule makes relevant the result of a previous decision regardless of a decisionmaker’s current belief about the correctness of that decision do we have the kind of argument from precedent routinely made in law and elsewhere.”). Rather, it is nothing more than a “nonrule-governed choice by a decisionmaker in an individual case to rely on the prior decisions of others.” *Id.* at 575–76. In other words, “[w]hen the choice whether to rely on a prior decisionmaker is entirely in the hands of the present decisionmaker, the prior decision does not *constrain* the present decision, and the present decisionmaker violates no norm by disregarding it.” *Id.* at 575; *accord* Paulsen, *supra* note 3, at 1538 n.8 (“One does not need a doctrine of stare decisis to explain a court’s decision to adhere to prior interpretation of law that it thinks is *correct*, on independent criteria.”); *see also* Velamoor, *supra* note 16, at 571–75 (discussing generally the distinctions between “binding” and “persuasive” precedent in this regard).

nonbinding, a much less constrained form of judicial decision making becomes possible.⁴³

All of this assumes, though, that these various nonprecedential decision rules are proper. But are such rules (notwithstanding their ubiquity) proper, qua rules? The answer to this question lies in the limits of the federal court rulemaking power, to which this Article now turns.⁴⁴

III. ABROGATING STARE DECISIS THROUGH THE EXERCISE OF THE FORMAL ARTICLE I RULEMAKING POWER

As stated in the Introduction, there are actually two constitutional sources of federal court rulemaking power. As we will see, what might be called the “formal” rulemaking power—that is, the power to make those rules with which lawyers are most familiar—derives not from the courts themselves, but from Congress, via Article I of the United States

⁴³ See *supra* notes 7–12 and accompanying text. Of course, one must be careful not to overstate the breadth of this distinction. Stare decisis is a malleable, not a monolithic, doctrine, and certainly precedents sometimes may be distinguished and even overruled. It also seems that some nonbinding authorities have a persuasive force that exceeds the value of the inherent soundness. Still, all would probably agree that a substantial distinction continues to exist between binding and nonbinding precedent. See, e.g., Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 367 (1988) (concluding that “the doctrine of stare decisis does in fact have a profound influence on judicial decision making,” to the point that “reliance on precedent is one of the distinctive features of the American judicial system”).

Incidentally, the various nonprecedential decision rules undoubtedly have had other effects on the judicial decision-making process, and the same presumed would be true of a rule abrogating stare decisis. But the point of this discussion (again) is not to debate whether such a rule, on balance, would be good or bad. Rather, the point is simply to show, first, that there is a distinction between binding and nonbinding precedent, and second, that this distinction matters.

⁴⁴ It is important at this juncture to emphasize what this Article is not about. This Article does not question the ability of federal courts to limit the number of decisions that are “officially” published in particular reporters, such as the *Federal Reporter*. This Article also does not question either the criteria used by those courts to make those determinations or the correctness of those determinations. Finally, this Article takes no position regarding the manner in which judicial decisions are written (or even whether they need to be written at all), despite the fact that such issues can bear directly on the issue of precedent in that an indiscernible basis for decision is no precedent at all. Instead, this Article concerns only the ability of federal courts, by rule, to limit the precedential effect of some or all of their decisions. This is not to say that these other issues are not important; they are. But their resolution is not necessary to the issue addressed here.

Constitution. This Part will consider the propriety of a rule abrogating stare decisis from this perspective.⁴⁵

In the federal judicial system, there are, in essence, two types of formal rules. The first type consists of national (or “federal”) rules—that is, rules generally applicable to all courts of a particular nature (such as the United States Court of Appeals).⁴⁶ The second type consists of “local” rules—that is, rules applicable only to a particular court (such as the United States Court of Appeals for the Ninth Circuit).⁴⁷ Because the various nonprecedential decision rules are of the local type,⁴⁸ let us start there.

The courts of appeals’ power to promulgate local rules derives from two provisions: 28 U.S.C. § 2071 and Federal Rule of Appellate Procedure 47. Section 2071(a) provides: “The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules *for the conduct of their business*. Such rules shall be *consistent with Acts of Congress* and rules of practice and procedure prescribed under section 2072 of this title.”⁴⁹ Rule 47(a)(1) similarly empowers each individual circuit court of appeals to “make and amend rules *governing its practice*,” (again) so long as such local rules are “*consistent with—but not duplicative of—Acts of Congress* and rules adopted under 28 U.S.C. § 2072.”⁵⁰ Thus, by statute and by rule, the local rulemaking power is limited to those rules relating to a court’s “practice” (i.e., the “conduct of [its] business”) that are “consistent” with all other federal statutes.

Rule 47 (like most federal rules) was promulgated pursuant to 28 U.S.C. § 2072.⁵¹ Section 2072—which derives from the original Rules Enabling Act

⁴⁵ Pursuant to Article III of the United States Constitution, federal courts also possess some inherent rulemaking power; accordingly, Part IV will consider the propriety of a rule abrogating stare decisis from that perspective.

⁴⁶ For example, the Federal Rules of Appellate Procedure generally apply to the United States Court of Appeals. *See supra* note 15.

⁴⁷ *See id.*

⁴⁸ *See supra* note 26.

⁴⁹ 28 U.S.C. § 2071(a) (2000) (emphasis supplied).

⁵⁰ FED. R. APP. P. 47(a)(1) (emphasis supplied). Though Federal Rule of Appellate Procedure 47 applies only to the courts of appeals, *see* FED. R. APP. P. 1(a)(1), an analogous rule (which provides essentially to the same effect) applies to the United States district courts: Federal Rule of Civil Procedure 83. *See* FED. R. CIV. P. 1. Though the Supreme Court also has promulgated rules (the Supreme Court Rules) to govern its own procedure, there is no analogous Supreme Court rule, presumably because the Supreme Court is a unitary court—that is, all Supreme Court rules are, in essence, local rules.

⁵¹ *See* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1001-08 (3d ed. 2002) (discussing generally the history of the promulgation of the federal rules).

of 1934⁵²—empowers the Supreme Court to “prescribe *general rules of practice and procedure* and rules of evidence for cases in the United States district courts . . . and courts of appeals,”⁵³ but only so long as such rules do not “*abridge, enlarge or modify any substantive right.*”⁵⁴ Presumably, the phrase “Acts of Congress,” as used in § 2071(a) and Rule 47, includes § 2072, and indeed the Supreme Court has so held.⁵⁵ Thus, consistency with § 2072 requires that *local* federal court rules (like the more general federal rules) relate to a court’s practice and procedure and not abridge, enlarge, or modify any substantive right.

The Rules Enabling Act itself derives primarily (if not exclusively) from the Necessary and Proper Clause.⁵⁶ Of course, under the Act, it is not

⁵² Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2000)). Though the origins of § 2071 and § 2072 were actually quite distinct, the entire formal federal rulemaking scheme as codified in chapter 131 of title 28 (§§ 2071-77) is now frequently referred to as the Rules Enabling Act. *See, e.g.*, Sloan, *supra* note 16, at 734 n.103. This Article will similarly so refer to these collective statutes.

⁵³ 28 U.S.C. § 2072(a) (2000) (emphasis supplied). Of course, if a rule abrogating *stare decisis* were to be promulgated on a *national* (federal) scale, à la proposed Federal Rule of Appellate Procedure 32.1, rather than by local rule, § 2072 would be the starting point of the analysis.

⁵⁴ 28 U.S.C. § 2072(b) (2000) (emphasis supplied). Though § 2072(b) further provides that all laws in conflict with a federal rule “shall be of no further force or effect” once the federal rule has taken effect, this supersession clause (as it is sometimes referred), by virtue of § 2071(a), does not apply to local rules.

⁵⁵ *See Colgrove v. Battin*, 413 U.S. 149, 161 n.18 (1973); *accord* 12 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3153, at 525–26 (2d ed. 1997) (“[S]urely only regulation of practice may properly be included in local rules; the scope for the authority granted [lower federal] courts to promulgate local rules cannot be greater than that which the Rules Enabling Act confers on the Supreme Court in adopting national rules.”).

⁵⁶ *See* U.S. CONST. art. I, § 8, cl. 18. Specifically, the Necessary and Proper Clause empowers Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” *See also* *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 22 (1825) (“That a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce, is expressly conferred by this clause, seems to be one of those plain propositions which reasoning cannot render plainer.”).

There is some thought that the Rules Enabling Act also derives from other constitutional provisions, most notably the Tribunals Clause, U.S. CONST. art. I, § 8, cl. 9, which empowers Congress to create “inferior” federal courts. *See, e.g.*, *Livingston v. Story*, 34 U.S. (9 Pet.) 632, 656 (1835) (“And that the power to ordain and establish, carries with it the power to prescribe and regulate the modes of proceeding in such courts, admits of as little doubt.”). But powerful arguments to the contrary have recently been advanced. *See, e.g.*, Lawson, *Controlling Precedent*, *supra* note 5, at 197–98. The

Congress *itself* that promulgates procedural rules; instead, it has *delegated* that power to the Supreme Court (in the case of the federal rules)⁵⁷ and to the various federal courts themselves (in the case of local rules).⁵⁸

Though the Rules Enabling Act derives from the Necessary and Proper Clause, it bears emphasizing that this Act does *not* go to the limits of the “necessary and proper” power.⁵⁹ Thus, the limitations imposed by the Act are not strictly *constitutional* limitations (though certainly exercises of the authority delegated under those statutes also must be encompassed by the Article I power and consistent with other constitutional (primarily separation of powers) principles). Rather, they are *statutory* limitations imposed by Congress. Conceivably, Congress could amend the Rules Enabling Act so as to permit the courts to promulgate rules to the full extent permitted by the Constitution,⁶⁰ at which point the question of whether stare decisis may be abrogated by rule would collapse into the statutory question raised by Professor Paulsen.⁶¹ But Congress has shown little interest in doing so and

resolution of this debate does not affect the conclusion that Congress possesses considerable power in this regard, though.

⁵⁷ See 28 U.S.C. § 2072(a) (2000).

⁵⁸ See 28 U.S.C. § 2071(a) (2000). This is not to say that Congress may not, or has not, enacted rules of this nature directly; it may, and it has. But such is not the scheme prescribed under the Rules Enabling Act.

⁵⁹ As Stephen Burbank writes in his epic historical exploration of the Rules Enabling Act:

If the Act could be read to reflect, and only to reflect, constitutionally imposed limitations on court rulemaking, there would be a basis for the development of allocation standards outside the Act’s history. But the evidence does not support that reading; the statutory limitations imposed by the Act stand on their own.

Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1113 (1982) [hereinafter Burbank, *Rules*]; accord 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4509, at 265 (2d ed. 1996) (“[T]he constraints imposed on the Court’s rulemaking authority by the Enabling Act are at least somewhat more demanding than those imposed by the Constitution.”); see also *Burlington N. R.R. v. Woods*, 480 U.S. 1, 6 (1987) (discussing, in this context, “both . . . constitutional and statutory constraints”).

⁶⁰ Cf. 28 U.S.C. § 1367(a) (2000) (conferring subject-matter jurisdiction in the federal district courts of “supplemental” claims “that are so related to claims in the action within [those courts’] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution”).

⁶¹ See *supra* notes 1–4 and accompanying text. This assumes, though, that such a delegation of power *itself* would be constitutional. As the authorities discussed in this Part imply, the propriety of the delegation of congressional power to the courts encompassed by the Rules Enabling Act is now well established. But whether and to what extent broader delegations of congressional power (rulemaking or otherwise) would be constitutional is a more difficult question. At least one scholar has concluded that a delegation of power to promulgate a rule abrogating stare decisis poses no constitutional

(more to the point) has not yet done so.⁶² As a result, the constitutional and statutory inquiries remain separable—meaning that a rule might be constitutional, and yet invalid under the Act.⁶³

Thus (to restate the rulemaking process in reverse): Pursuant to its constitutional power to prescribe the procedure to be followed in the federal courts, Congress has enacted statutes (including the Rules Enabling Act) that delegate to the courts themselves a more limited power to promulgate procedural rules. Federal courts in turn have exercised this power to promulgate rules of national (federal) applicability (such as Federal Rule of Appellate Procedure 47) and of more limited (local) applicability (such as the various nonprecedential decision rules).

Properly understood, the federal rulemaking scheme provides the blueprint for testing the propriety of any local rule. In order for a local rule to be proper, it must meet each of the following five requirements:

(1) the rule must be constitutional (i.e., consistent with Congress' Article I rulemaking power and not violative of any other constitutional provision);⁶⁴

(2) the rule must be procedural⁶⁵ (i.e., it must relate to the promulgating court's "practice"⁶⁶ and the "conduct of [its] business");⁶⁷

(3) the rule must not "abridge, enlarge or modify any substantive right";⁶⁸

(4) the rule must be consistent with all Acts of Congress (i.e., all federal statutes);⁶⁹ and

(5) the rule must be consistent with all other federal (national) rules (e.g., a local court of appeals rule must be consistent with the Federal Rules of Appellate Procedure).⁷⁰

difficulties. *See* Murphy, *supra* note 4, at 1157–58. The resolution of this question, though, is not necessary to the arguments made in this Article.

⁶² To the contrary, through its 1988 amendments to the Rules Enabling Act, Congress appears to have reinforced the limited nature of its scope. *See* Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 102 (1998) (discussing the legislative history of the 1988 amendments in this regard).

⁶³ *See* 19 WRIGHT ET AL., *supra* note 59, § 4509, at 265–66.

⁶⁴ *See, e.g.*, Colgrove v. Battin, 413 U.S. 149, 151–60 (1973).

⁶⁵ *See* 28 U.S.C. § 2072(a) (2000).

⁶⁶ FED. R. APP. P. 47(a)(1).

⁶⁷ 28 U.S.C. § 2071(a) (2000). Admittedly, even when confined to a federal court's exercise of this delegated rulemaking power, "procedure," "practice," and "conduct of [its] business" almost certainly mean somewhat different things. But for the purpose of this Article, these terms and phrases will be regarded as having the same meaning—whichever is broadest.

⁶⁸ 28 U.S.C. § 2072(b) (2000).

⁶⁹ *See* 28 U.S.C. § 2071(a) (2000).

How does all of this relate to a rule abrogating stare decisis? As stated previously, this Article assumes that there are no constitutional impediments to such a rule. This Article also assumes that such a rule would be consistent with all federal statutes and federal rules of appellate procedure. With these assumptions, the propriety of a local rule abrogating stare decisis (or, for that matter, a federal rule abrogating stare decisis) turns on whether such a rule truly relates to practice and procedure and does not, in fact, abridge, enlarge, or modify any substantive right—in short, whether “the subject matter governed by the rule” is “within the power of a lower federal court to regulate.”⁷¹

Let us start with the first of these limitations. How does one determine whether a rule relates to a court’s “practice and procedure”? The logical starting point (this phrase not being statutorily defined) is the Supreme Court, which has had several opportunities to consider this question.⁷² The seminal

⁷⁰ See *id.* Again, if the rule in question is a federal (rather than a local) rule, it need meet only the first three of these requirements. See 28 U.S.C. § 2072(a), (b) (2000).

Two additional limitations relating specifically to local rules at least bear mentioning. In *Frazier v. Heebe*, 482 U.S. 641 (1987), the Supreme Court, in striking down a local rule requiring a lawyer seeking to gain membership in a federal district court bar to be a resident or maintain an office in the state encompassing that court, held that it has an “inherent supervisory power” to ensure that lower federal court local rules are “consistent with the principles of right and justice” and “to protect the integrity of the federal system.” *Id.* at 645, 648 n.7 (internal quotation marks omitted). It seems doubtful that a local rule abrogating stare decisis would be consistent with the principles of right and justice, and would not damage the integrity of the federal system. The propriety of this limitation itself, though, seems somewhat dubious, see *id.* at 652 (Rehnquist, C.J., joined by O’Connor and Scalia, JJ., dissenting), and accordingly this Article assumes that a local rule abrogating stare decisis is consistent with principles of right and justice and does not damage the integrity of the federal system.

The second limitation is found in *Miner v. Atlass*, 363 U.S. 641 (1960), wherein the Court struck down a local rule that authorized the taking of depositions in admiralty cases on the ground that such “basic procedural innovations” were inappropriate subjects for local federal court rulemaking. *Id.* at 650. Most would probably conclude that a rule abrogating stare decisis, to the extent that it may be characterized as procedural, would be quite innovative, and thus it might well be found to violate this limitation as well. But like *Frazier*, the continued viability of *Miner* (which also inspired a vigorous dissent, see *id.* at 652–55 (Brennan, J., joined by Douglas and Stewart, JJ., dissenting)) seems questionable (and indeed, though the *Colgrove* Court attempted to cabin *Miner* to “those aspects of the litigatory process which bear upon the ultimate outcome of the litigation,” *Colgrove v. Battin*, 413 U.S. 149, 164 n.23 (1973), it seemed to back away from this “requirement” considerably, see *id.*). Thus, this Article also assumes that a rule abrogating stare decisis would not represent a basic procedural innovation.

⁷¹ *Frazier*, 482 U.S. at 654 (Rehnquist, C.J., dissenting).

⁷² One has to appreciate the irony of an invocation of stare decisis to assess the propriety of a rule abrogating stare decisis. Cf. *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 106 (1993) (Scalia, J., concurring) (recognizing the irony of the dissent’s invocation

decision is *Sibbach v. Wilson & Co.*⁷³ In *Sibbach*, the Court held that Federal Rules of Civil Procedure 35 and 37 (dealing with physical and mental examinations and with discovery sanctions) were “within the authority granted” by the Rules Enabling Act.⁷⁴ In the course of so holding, the Court stated that “[t]he test must be whether a rule *really regulates procedure*,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.”⁷⁵ Since *Sibbach*, the Court has consistently applied this “test”⁷⁶ in upholding the propriety of several procedural rules.⁷⁷

One difficulty with the *Sibbach* test for determining the propriety of a federal rule is that it seems to focus entirely on the § 2072(a) “practice and procedure” limitation and ignore the § 2072(b) “substantive rights” limitation.⁷⁸ But “[b]y virtue of the ‘substantive rights’ proviso in the statute,

of stare decisis in defense of prospective decision making, a “method[] of destroying *stare decisis* recently invented in violation of *stare decisis*”).

⁷³ *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941).

⁷⁴ *Id.* at 16.

⁷⁵ *Id.* at 14 (emphasis supplied).

⁷⁶ If one may call it that. Indeed, many have criticized the use of this term in this context. See, e.g., 19 WRIGHT ET AL., *supra* note 59, § 4509, at 264 (“In reality, the *Sibbach* ‘test’ is no test at all—in a sense, it is little more than the statement that a matter is procedural if, by revelation, it is procedural.”).

⁷⁷ See, e.g., *Hanna v. Plumer*, 380 U.S. 460 (1965) (upholding the propriety of Federal Rule of Civil Procedure 4). Indeed, it is frequently observed that the Court has yet to conclude that any rule has exceeded the authority vested by the Rules Enabling Act. See, e.g., Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1102 (2002). To some extent, though, the Court has achieved this record by “constru[ing the rule at issue] so as to avoid some of the resulting Enabling Act problems.” *Id.* (In this regard, the reader might consider the plausibility of multiple constructions of a rule abrogating stare decisis.) One also might keep in mind that, “beginning with Justice Frankfurter’s opinion in *Sibbach*, there have been vigorous dissents from opinions adjudging challenged Rules valid.” Kelleher, *supra* note 62, at 105. For example, though the civil discovery rules at issue in *Sibbach* seem fairly innocuous today, the validity of those rules was upheld by only a five to four margin. See *Sibbach*, 312 U.S. at 16 (Frankfurter, J., joined by Black, Douglas, and Murphy, JJ., dissenting). Perhaps, then, the primary reason that no rule has yet been found to violate the Act is simply because the Court has yet to consider any rule that is clearly nonprocedural. (Of course, whether a rule abrogating stare decisis represents such a rule is one purpose of the inquiry here.)

⁷⁸ See 19 WRIGHT ET AL., *supra* note 59, § 4508, at 258. Perhaps this is because there is no separate “substantive rights” limitation, and because the “substantive rights” and “practice and procedure” limitations are simply two sides of the same coin. See Burbank, *Rules*, *supra* note 59, at 1107–08. On the other hand, what might have been true with respect to the original version of § 2072 might not be true with respect to the amended version that exists today, and it is for this reason (as well as others) that the weight of authority tips in favor of according independent significance to the “substantive

it is not sufficient that a Civil Rule relate to practice or procedure; in addition, it cannot ‘abridge, enlarge or modify any substantive right.’⁷⁹ Thus, it is possible that a rule might be found to be sufficiently “procedural” under the Rules Enabling Act, and yet be violative of the “substantive rights” limitation.⁸⁰

Regrettably, as with the “practice and procedure” limitation, a satisfactory explanation of this “substantive right” limitation “has proved to be extremely elusive.”⁸¹ The classic interpretation of this phrase probably is that offered by Henry M. Hart, Jr. and Herbert Wechsler, who suggested that it refers to rules of law that “characteristically and reasonably affect people’s

rights” limitation. *See infra* note 79 and accompanying text. *See also infra* notes 96–100 and accompanying text (discussing *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001)). But even if procedure and substance are, for this purpose, regarded as mutually exclusive categories, a conclusion that a rule abrogating stare decisis would be substantive, and not procedural, would be conclusive.

⁷⁹ 19 WRIGHT ET AL., *supra* note 59, § 4509, at 265 (quoting § 2072(b)); *accord* John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 719 (1974); *see also* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 200 (2004) (“If substance and procedure were two mutually exclusive categories, then § 2072(b) would be mere surplusage.”). Such an interpretation also has the benefit of avoiding a strict procedure/substance analytical dichotomy. In other words, if given thing *Y*, and told that it must be classified either as *X* or *Z* depending upon which it most closely resembles, the task can almost always be accomplished (with the understanding that, at the margins, reasonable people might differ as to the conclusion reached). But this sort of test clearly works best when *X* and *Z* are mutually exclusive categories. For example, the question of whether Smith is in the room or out of the room almost always can be answered with certainty, for even if Smith is neither completely in nor completely out of the room, Smith is always going to be more of one than the other (unless Smith is exactly halfway out, in which case even this test is indeterminate). But if the question is whether Smith is a man or a lawyer, the answer might be that Smith is one and not the other, or neither, or both—at which point any attempt to distinguish between these categories (i.e., to determine whether Smith is more like one than the other) becomes nonsensical. The same seemingly can be said of many attempts to classify rules as procedural or substantive. *See, e.g.*, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 559 (1949) (Rutledge, J., dissenting) (“Suffice it to say that actually in many situations procedure and substance are so interwoven that rational separation becomes well-nigh impossible.”); Solum, *supra*, at 200–25. Thus, the better view today is that “the terms ‘substance’ and ‘procedure’ are not mutually exclusive,” and that the Rules Enabling Act reflects this reality. Paul D. Carrington, “*Substance*” and “*Procedure*” in the Rules Enabling Act, 1989 DUKE L.J. 281, 287.

⁸⁰ *See* Solum, *supra* note 79, at 200.

⁸¹ 19 WRIGHT ET AL., *supra* note 59, § 4509, at 267. For a survey of approaches, *see id.* at 267–69; Carole E. Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction*, 28 STAN. L. REV. 397, 433–37 (1976); Kelleher, *supra* note 62, at 109–120.

conduct at the stage of primary private activity.”⁸² However this phrase is defined, it clearly includes not only those substantive rights conferred by the Constitution or by statute, but also those rights recognized by the courts through the operation of common law adjudication.⁸³ And “[i]f the application of a rule results in a party gaining a substantive right not available under law, or losing one that would have been available,” the rule would violate the Rules Enabling Act.⁸⁴

So how does a rule abrogating stare decisis fare in light of these provisions? Not well. For one thing, such a rule does not seem very procedural, as it has very little to do with the judicial process for enforcing rights and duties. In fact, a rule depriving a court’s decisions of binding precedential effect has virtually *nothing* to do with that process.⁸⁵ Conversely, a rule abrogating stare decisis seems quite substantive. Indeed, the primary purpose of such a rule is to limit the effect of a court’s decisions (and therefore the extent and nature of the substantive law) in future cases.⁸⁶

⁸² HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 678 (1953); *accord Hanna*, 380 U.S. at 475 (Harlan, J., concurring) (adopting the Hart and Wechsler interpretation). Though Hart and Wechsler’s interpretation has been criticized as being too narrow, *see* 19 WRIGHT ET AL., *supra* note 59, § 4509, at 267, it will do for the purpose of this Article.

⁸³ *See* 1 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 1.05[2][b], at 1–31 (3d ed. 2005). Of course, it also would include judicial interpretations of those rights conferred by the Constitution or by statute.

⁸⁴ *Id.*

⁸⁵ This is not to say that a rule abrogating stare decisis would have no effect on “practice and procedure” whatsoever. Certainly such a rule would create some disincentive for future litigants to cite cases that would then have, at best, only persuasive value. More tangentially, such a rule also might save time, in that it would reduce the universe of authorities to which future courts must adhere, and might cause the issuing court (having been relieved of the burden of binding precedent) to render shorter and (perhaps) less well-reasoned or well-written opinions. (Indeed, some of these effects are touted as the primary rationales for the various nonprecedential decision rules. *See, e.g.*, *Hart v. Massanari*, 266 F.3d 1155, 1176–79 (9th Cir. 2001).) But regardless of the motivation of the promulgator—that is, even if these were the only reasons for promulgating a rule abrogating stare decisis—such procedural effects must be regarded as incidental. It has long been recognized that procedural rules often have substantive effects, yet that only *incidental* substantive effects will avoid invalidation. *See, e.g.*, *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 445–46 (1946). The opposite must be true as well: incidental procedural effects will not save substantive “rules” from invalidation. *Cf. Kelleher, supra* note 62, at 69 (“A legal rule can have both procedural and substantive purposes, and even if the animating policies of a rule ostensibly are procedural, it may have significant substantive implications, whether intended or not.”).

⁸⁶ In this regard, a rule abrogating stare decisis stands in some contrast even to rules governing the *citation* of particular decisions. As Professors Reynolds and Richman write:

Consider, for example, the nonprecedential decision rule at issue in *Anastasoff v. United States*.⁸⁷ In *Anastasoff*, the plaintiff's claim for a refund of overpaid federal income tax was received by the Internal Revenue Service one day past the statutory deadline.⁸⁸ As a result, the plaintiff sought to rely on a statutory "mailbox rule" that, if applicable, would deem her claim as received when postmarked, and therefore timely.⁸⁹ But in an earlier, "unpublished" decision, the court rejected this same argument.⁹⁰ Finding its earlier decision indistinguishable, the *Anastasoff* court, upon concluding that its nonprecedential decision rule was unconstitutional, regarded the earlier decision as binding, and held for the government.⁹¹ Because it considered itself so bound, the *Anastasoff* court was unable to consider whether, if deciding this issue anew, it would instead adopt the reasoning of a contrary sister circuit decision.⁹² In other words, because the court's prior decision—irrespective of the fact that it was "unpublished"—was binding, the plaintiff lost. If, on the other hand, a valid rule abrogating stare decisis had been in place, the plaintiff quite possibly would have won. That is the direct effect of a rule abrogating stare decisis. What is procedural about that? And even if one were to consider whatever incidental procedural effects such a rule might

The questions of citation and precedent are at least theoretically distinct. A rule that says a prior decision is not a precedent appears to be making an ontological or metaphysical statement about that opinion's place in the legal firmament. A rule that says that a prior decision may not be cited simply says that the opinion may not be used in a particular way.

Reynolds & Richman, *supra* note 30, at 1179 n.73. Of course, this Article also takes issue with the notion that a no-citation rule is predominantly "procedural," for there are few better ways to affect the substantive law than to prohibit citation thereto. *See supra* note 27 and *infra* note 108 and accompanying text. *See also* Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 120 (2001) (concluding (with respect to nonprecedential decision rules) that "publication decisions, when combined with limited-citation rules, do affect the substance of precedential law"). But if that is so, then how much more substantive is a rule that deprives a presumptively binding authority of binding effect in the first instance?

⁸⁷ *Anastasoff v. United States*, 223 F.3d 898, *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000).

⁸⁸ *See id.* at 899.

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ *See id.* at 899–900.

⁹² *See id.* at 905; *see also id.* (Heaney, J., concurring) ("I write separately only to state that in my view, this is a case which should be heard en banc in order to reconsider our [earlier holding] and thus resolve an important issue.").

engender,⁹³ does this rule not affect substantive rights?⁹⁴ It is difficult to imagine a clearer violation of the Rules Enabling Act.⁹⁵

Just to drive the point home, let us consider two additional precedents, starting with the Supreme Court's recent (and unanimous) decision in *Semtek International Inc. v. Lockheed Martin Corp.*⁹⁶ *Semtek* involved a federal district court's dismissal of a state law-based action due to the expiration of

⁹³ See *supra* note 85.

⁹⁴ It should be observed that the conclusion that a rule abrogating stare decisis affects substantive rights is not based solely on the fact that it can be outcome determinative. Many rules are potentially outcome determinative, but that does not necessarily mean that they violate the Rules Enabling Act. As explained by one treatise author:

[I]f a party has a substantive right and must follow certain rules to exercise it, the party will be required to comply with those procedures. If a party fails to comply with those procedures, loss of the opportunity to exercise the substantive right is considered an incidental effect of noncompliance. The substantive right itself is not abridged, enlarged, or modified.

1 MOORE ET AL., *supra* note 83, ¶ 1.05[2][b], at 1–32. The difference here, though, is that the rule in question, functionally speaking, does *nothing* other than dictate whether a given judicial decision is or is not binding precedent. Though this rule does not expressly grant or deny any particular claim or defense, it comes awfully close, and certainly is more substantive than, say, a statute of limitations or any of a host of similar provisions that generally are regarded as at least suspect in this regard.

⁹⁵ Consider also that, for the purpose of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), “stare decisis . . . is substantive law,” meaning that “[f]ederal stare decisis principles . . . apply only to construction of federal law.” Rosenkranz, *supra* note 4, at 2126 n.169. Admittedly, the Supreme Court has cautioned that what is “substantive” in one context might not be “substantive” in another. See, e.g., *Jinks v. Richland County*, 538 U.S. 456, 465 (2003). Still, when one considers the respective “purposes for which the dichotomy is drawn,” *id.*, it is difficult to distinguish the Rules Enabling Act context from the *Erie* context when discussing a rule abrogating stare decisis. One also cannot escape the fact that such a rule (like the nonprecedential decision rules currently in force) unquestionably would apply only to federal court decisions based on federal law. (This is not to say that such a rule would not “apply” to, say, state-law cases reaching the federal courts by virtue of diversity jurisdiction, see 28 U.S.C. § 1332 (2000), amended by Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4(a), 119 Stat. 4, 8–11 (2005); it would, but not in any real sense, for such decisions are not binding on the states in any event.) A rule abrogating stare decisis, therefore, would be quite unusual in that federal rules typically apply to *all* federal cases, *regardless* of the nature of the underlying law. Indeed, is that not the point? Cf. *Hanna v. Plumer*, 380 U.S. 460, 473–74 (1965) (“To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution’s grant of power over federal procedure or Congress’ attempt to exercise that power in the Enabling Act.”).

⁹⁶ *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001).

the applicable state statute of limitations.⁹⁷ At issue was whether Federal Rule of Civil Procedure 41(b), which provides that a dismissal of this nature be deemed “on the merits,” also requires that such a dismissal be given claim-preclusive effect.⁹⁸ In holding that Rule 41(b) does not so require, the Court reasoned:

[I]t would be peculiar to find a rule governing the *effect that must be accorded federal judgments by other courts* enconced in rules governing the internal procedures of the rendering court itself. Indeed, such a rule would arguably violate the jurisdictional limitation of the Rules Enabling Act: that the Rules “shall not abridge, enlarge or modify any substantive right,” 28 U.S.C. § 2072(b).⁹⁹

Admittedly, there is a distinction between federal *judgments* and federal *precedents*. Nonetheless, the *effect* of a rule abrogating stare decisis does seem eerily close to the effect of the hypothetical rule at issue in *Semtek*—so close, in fact, that the impropriety of the former cannot seriously be doubted.¹⁰⁰

Consider also the case of *Bonner v. City of Prichard*.¹⁰¹ In *Bonner*, the newly-formed United States Court of Appeals for the Eleventh Circuit adopted as binding precedent the judicial decisions of the United States Court of Appeals for the Fifth Circuit (the circuit from which the Eleventh Circuit was formed) as they existed at the time of the Eleventh Circuit’s formation.¹⁰² The *Bonner* court further held that the adoption of that body of precedent *in the course of a judicial decision*, by the court sitting en banc, was the appropriate vehicle for rendering that determination.¹⁰³ Contrasting

⁹⁷ *See id.* at 499.

⁹⁸ *See id.* at 501–03.

⁹⁹ *Id.* at 503 (emphasis supplied). Some have criticized the Court’s construction of Rule 41 in that case. *See, e.g.,* Stephen B. Burbank, *Semtek, Forum Shopping, and Federal Common Law*, 77 NOTRE DAME L. REV. 1027, 1038–47 (2002). However valid that criticism might be, though, it does not detract from the conclusion that, but for such a construction, Rule 41 almost certainly would have violated the Act. *See id.* at 1031.

¹⁰⁰ One might argue that because a rule abrogating stare decisis results in the creation of no binding precedent, it cannot be said to affect substantive rights. A response to that argument (if one accepts stare decisis as the norm; *see infra* note 132 and accompanying text) is that, in the absence of such a rule, those decisions affected thereby *would* be binding precedent, thus quite possibly affecting substantive rights. Though the rights affected would not be those of the parties to the nonprecedential decision (assuming that such a rule would have no effect on how courts decide particular cases), it was precisely this sort of forward-looking effect that concerned the *Semtek* Court.

¹⁰¹ *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).

¹⁰² *See id.* at 1209–10.

¹⁰³ *See id.* at 1211.

(and rejecting) the possibility of reaching the same result by *local rule*, the court explained:

Court rules generally address court procedures and court conduct of business. Congress has authorized the courts to prescribe rules for the conduct of their business. Rule 47 of the Federal Rules of Appellate Procedure, adopted under that authority, authorizes the judges of the circuit to make rules of practice not inconsistent with FRAP, and in cases not provided for by FRAP authorizes the court of appeals “to regulate their practice in any manner not inconsistent with these rules.” Neither the statute nor FRAP addresses the establishment of substantive law by court rule. The judges of this court, when judges of the former Fifth Circuit, maintained a distinct separation between their administrative and their judicial functions. The substantive law of the circuit was established by the exercise of judicial authority and procedural rules by administrative action. We consider it inappropriate to decide what this circuit’s substantive law will be by any means other than judicial decision.¹⁰⁴

If the determination of whether to adopt as binding precedent some particular body of case law is a matter beyond the scope of the federal rulemaking power, it is difficult to see how the determination of whether to *nullify* the binding precedential effect of some other body of case law, by rule, would be proper.¹⁰⁵

Indeed, it seems that the only reason the question of whether the Rules Enabling Act permits the promulgation of a rule abrogating stare decisis might appear to be a close one—aside from the obvious procedural-type impacts such a rule might have—is that its bizarre nature almost defies any traditional form of analysis. In fact, “bizarre” almost fails to do such a rule justice; the various nonprecedential decision rules aside, a rule abrogating stare decisis would be completely unlike any rule currently on the books.¹⁰⁶

¹⁰⁴ *Id.* at 1210–11 (some citation and quotation marks omitted).

¹⁰⁵ Thus, an additional response to the argument that a rule abrogating stare decisis would not affect substantive rights, *see supra* note 100, is that, unlike the rule at issue in *Semtek*, a rule abrogating stare decisis is primarily substantive. In other words, one need only consider the Rules Enabling Act’s “substantive rights” limitation if the rule in question relates (substantially) to a court’s “practice and procedure”; if it does not, then any concern for “substantive rights” seems largely inapposite. Thus, whether a rule abrogating stare decisis actually results in divergent judicial decisions is probably beside the point; the subject matter of the rule alone places it outside the purview of the Act.

¹⁰⁶ *Cf.* Schiltz Memorandum, *supra* note **Error! Bookmark not defined.**, at 97 (“The more I think about the comments on [proposed] Rule 32.1, the more I am struck by how strange the current system is.”). Perhaps such a rule should not even be considered a rule. *See* Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, 61 LAW & CONTEMP. PROBS. 157, 164 (Summer 1998) (“Ordinarily, a rule is a prohibition on certain conduct accompanied by both a formal policing mechanism and a set of sanctions.”). Tellingly,

Thus, it should not be surprising that more traditional tests for determining the propriety of a rule might seem somewhat inapposite. Nonetheless, the conclusion that such a rule would not be proper ultimately is inescapable.¹⁰⁷

In sum, whether promulgated as a local rule or as a more general federal rule, a formal rule abrogating stare decisis would be improper. Such a rule, having little to do with procedure, and much to do with substance, simply may not be promulgated pursuant to the statutory rulemaking power currently in force.¹⁰⁸

Professors Gulati and McCauliff conclude that “[n]either of these accompanies the rules governing circuit court publication practices.” *Id.*

¹⁰⁷ Two last points: As noted previously, it is often stated that rules only incidentally affecting litigants’ substantive rights are permissible under the Rules Enabling Act, *see, e.g.*, *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 445–46 (1946), and some proponents might argue that this is all that a rule abrogating stare decisis would do. One problem with this argument, though, is that not *every* rule incidentally affecting substantive rights *is* permissible; rather, this exception applies only to those rules that are “reasonably necessary to maintain the integrity of that system of rules” of which they are a part. *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5 (1987). It is extremely difficult to see how a rule abrogating stare decisis—which surely would at least incidentally affect substantive rights—would be at all necessary to maintain the integrity of, say, the Federal Rules of Appellate Procedure. *Cf. id.* at 8 (concluding that Federal Rule of Appellate Procedure 38, which permits the court to impose sanctions for frivolous appeals, is reasonably necessary to maintain the integrity of that rules system).

Second, some might argue that, given the nature of the formal rulemaking process—that is, “the study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect,” *id.* at 6—a rule abrogating stare decisis, like any other rule, would be entitled to “presumptive validity under both the constitutional and statutory constraints.” *Id.* But even aside from questions as to the propriety of this presumption—a presumption that may be rebutted in any event—it appears (by implication) to apply only to *federal* (i.e., national) rules. *See, e.g., id.* As for *local* rules (such as the nonprecedential decision rules), which are promulgated following a much less stringent (and much more incestuous) process, *compare* 28 U.S.C. § 2071(b)-(e) (2000) (prescribing the local rulemaking procedure) *with* 28 U.S.C. §§ 2073-74 (2000) (prescribing the federal rulemaking procedure), the justification for any sort of presumptive validity seems quite weak.

¹⁰⁸ Incidentally, this conclusion might apply as well to a rule that *prohibited* federal courts from abrogating stare decisis (i.e., from designating certain decisions as nonprecedential)—which might explain (in part) why the Advisory Committee on Appellate Rules, in contrast to its proposed rule governing the *citation* of “unpublished” decisions, *see supra* notes 34–40, has proposed no rule in this regard. (Constitutional impediments might arise as well. *See* Paulsen, *supra* note 3, at 1594–96 (concluding that a statute mandating adherence to prior precedent would be unconstitutional). *But see* Sloan, *supra* note 16, at 766 (concluding, as a constitutional matter, that a rule prohibiting federal courts from abrogating stare decisis properly could be promulgated, though without explicitly considering possible statutory-based or rule-based constraints).) But even if not legally improper, such a rule certainly would be unusual, in that the net result

IV. ABROGATING STARE DECISIS THROUGH THE EXERCISE OF THE INHERENT ARTICLE III RULEMAKING POWER

As the previous subpart demonstrates, a rule abrogating stare decisis would violate the Rules Enabling Act, and if that were the only source of the federal courts' rulemaking power, that would be the end of this discussion.¹⁰⁹ Nonetheless, some might wonder further whether such a rule may be "promulgated" by federal courts pursuant not to some delegated Article I authority, but rather pursuant to Article III itself. A rule abrogating stare decisis created through an exercise of the "judicial Power"¹¹⁰ would avoid not only the statutory limitations imposed by the Rules Enabling Act, but also the constitutional limitations that might preclude the abrogation of stare decisis by statute. Does the "judicial Power" include such inherent rulemaking authority?

As we will see, the answer to this question also is no—but not because such authority is lacking entirely. Though the nature and limits of the federal judicial power are somewhat murky¹¹¹—and therefore the nature and limits

would be to codify something that has been the norm all along. Stare decisis is something that just happens; it requires no action (beyond the issuance of a decision from a court) for its operation. Thus, promulgating a rule that (in effect) prescribes that all decisions of that court constitute binding precedent makes about as much sense as promulgating a rule prescribing that $1 + 1 = 2$. One does not need a rule to *make* $1 + 1 = 2$, and this proposition does not become more true through codification. Indeed, like proposed Federal Rule of Appellate Procedure 32.1 and its intended effect on no-citation rules, it is doubtful that anyone would even consider a rule prohibiting the issuance of nonprecedential decisions had a rule *authorizing* the issuance of such decisions not been promulgated. Obviously, the much neater solution would have been to avoid going down this road in the first instance.

What about proposed Rule 32.1 itself, and the local no-citation rules that rule will nullify? Those rules seem to present closer questions, and though proposed Rule 32.1 seems sufficiently procedural, the same probably may not be said of the various circuit rules that prohibit the citation of certain of that circuit's own prior case law. But here also, rather than engaging in a lot of gamesmanship that simply gets one back to where one started, the neater solution would be to somehow repeal these local no-citation rules themselves.

¹⁰⁹ Of course, because there is (again) no doubt but that the various nonprecedential decision rules were promulgated pursuant to that authority, that *is* the end of the discussion there.

¹¹⁰ See U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

¹¹¹ See, e.g., Evan Caminker, *Allocating the Judicial Power in a "Unified Judiciary,"* 78 TEX. L. REV. 1513, 1514 (2000) [hereinafter Caminker, *Judicial Power*] ("Article III's Vesting Clause clearly bestows '[t]he judicial Power of the United States' in the federal judiciary, but provides no further delineation of what exactly the judicial power is.") (alteration in original).

of the inherent power of the federal courts are also murky¹¹²—such courts undoubtedly have some inherent rulemaking power. The leading case in this regard is *Chambers v. NASCO, Inc.*,¹¹³ in which the Supreme Court held that federal courts have the inherent power to sanction a litigant for bad-faith conduct.¹¹⁴ In so holding, the *Chambers* Court explained:

It has long been understood that certain implied powers must necessarily result to our Courts of justice from the nature of their institution, powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others. For this reason, Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates. These powers are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.

Prior cases have outlined the scope of the inherent power of the federal courts. For example, the Court has held that a federal court has the power to control admission to its bar and to discipline attorneys who appear before it. While this power ought to be exercised with great caution, it is nevertheless incidental to all Courts.

In addition, it is firmly established that the power to punish for contempts is inherent in all courts. This power reaches both conduct before the court and that beyond the court's confines, for the underlying concern that gave rise to the contempt power was not merely the disruption of court proceedings. Rather, it was disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of trial.

Of particular relevance here, the inherent power also allows a federal court to vacate its own judgment upon proof that a fraud has been perpetrated upon the court. This historic power of equity to set aside fraudulently begotten judgments, is necessary to the integrity of the courts, for tampering with the administration of justice in this manner involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public. Moreover, a court has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud.

There are other facets to a federal court's inherent power. The court may bar from the courtroom a criminal defendant who disrupts a trial. It

¹¹² See, e.g., William F. Ryan, *Rush to Judgment: A Constitutional Analysis of the Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761, 765 (1997) ("Unfortunately, inherent power discussions have traditionally been quite muddled, with courts and commentators failing to distinguish between very different activities that have all been justified as exercises of inherent power.").

¹¹³ *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991).

¹¹⁴ See *id.* at 35. This is not to say that *Chambers* stands on solid footing, though; the case was decided by a narrow five-justice majority. See *id.* Chief Justice Rehnquist and Justices Scalia, Kennedy, and Souter either authored or joined in dissents. See *id.*

may dismiss an action on grounds of *forum non conveniens*; and it may act *sua sponte* to dismiss a suit for failure to prosecute.

Because of their very potency, inherent powers must be exercised with restraint and discretion.¹¹⁵

So is this inherent federal court power sufficient to support the promulgation of a rule abrogating *stare decisis*? Before considering this question, let us first consider the *relationship* between the Article I formal rulemaking power and the Article III inherent rulemaking power, particularly as it pertains to a rule of this nature. In other words, which branch of the federal government is empowered to promulgate such a rule, if any? Though the precise nature of this relationship (like everything else in this area) is murky,¹¹⁶ there seem to be three possibilities. One possibility is that the power to promulgate a rule abrogating *stare decisis*, to the extent that it exists

¹¹⁵ *Id.* at 43–44 (citations and quotation marks omitted); *see also id.* at 58 (Scalia, J., dissenting):

I agree with the Court that Article III courts, as an independent and coequal Branch of Government, derive from the Constitution itself, once they have been created and their jurisdiction established, the authority to do what courts have traditionally done in order to accomplish their assigned tasks. Some elements of that inherent authority are so essential to “[t]he judicial Power,” U. S. Const., Art. III, § 1, that they are indefeasible, among which is a court’s ability to enter orders protecting the integrity of its proceedings.

Justice Scalia “disagree[d], however, with the Court’s statement that a court’s inherent power reaches conduct beyond the court’s confines that does not interfere with the conduct of trial.” *Id.* at 60 (Scalia, J., dissenting) (internal quotation marks omitted).

Incidentally, just as the Supreme Court, by virtue of its ability to promulgate not just local, but also supervisory, rules, has greater *formal* rulemaking power than do the lower federal courts, *see Part III supra*, it might well be that the Supreme Court also has greater *inherent* rulemaking power. *See, e.g.,* Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1473 (1984) (“Even assuming a sufficiently broad grant of ancillary authority under article III, the *constitutional* authority of the lower federal courts to establish procedural rules is nevertheless problematic.”); *see also infra* notes 136–38 and accompanying text (discussing possible statutory and rule-based limits to lower federal court inherent rulemaking power). Nonetheless, this Article assumes that the lower federal courts possess whatever inherent rulemaking power is possessed by the Supreme Court.

¹¹⁶ *See* Burbank, *Rules, supra* note 59, at 1115 (“The Supreme Court has never satisfactorily explained—indeed it has hardly discussed—the place of court rulemaking in our constitutional framework.”); Caminker, *Judicial Power, supra* note **Error! Bookmark not defined.**, at 1519 n.20 (“[T]he [Supreme] Court has yet to establish clear guidelines as to whether and when federal courts’ inherent managerial powers are entirely defeasible by Congress or subject to some congressional regulation so long as the powers remain adequate for their essential purposes.”).

at all, lies *exclusively* in the judicial branch.¹¹⁷ Such status appears to be reserved for those exercises of the inherent judicial power that go to what it means to be a federal court,¹¹⁸ which “at its core” consists of the “power . . . to render ‘dispositive judgments’ in particular cases and controversies.”¹¹⁹ But given the breadth of the Article I power generally, as well as the lack of any connection between the abrogation of stare decisis and the federal courts’ ability to render dispositive judgments, the notion that the power to promulgate such a rule lies exclusively in the judicial branch is “doubtful in the extreme.”¹²⁰ (Indeed, such a conclusion would fly in the face of those nonprecedential decision rules already on the books, rules that (at least

¹¹⁷ Cf. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 799 (1987) (“[W]hile the exercise of the contempt power is subject to reasonable regulation, ‘the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative.’”) (quoting *Michaelson v. United States ex rel. Chicago, St. Paul, Minneapolis, & Omaha Ry. Co.*, 266 U.S. 42, 66 (1924)).

Along these lines, some have questioned whether and to what extent Congress has any federal court rulemaking power. See, e.g., David E. Engdahl, *Intrinsic Limits of Congress’ Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 172; Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1297–98 (1993). But it is now well established (as evidenced by the many Supreme Court cases discussed *supra*) that Congress has at least some power in this regard. See also *Willy v. Coastal Corp.*, 503 U.S. 131, 136 (1992) (“From almost the founding days of this country, it has been firmly established that Congress, acting pursuant to its authority to make all laws ‘necessary and proper’ to their establishment, also may enact laws regulating the conduct of those courts and the means by which their judgments are enforced.”) (footnote omitted) (quoting U.S. CONST. art. I, § 8, cl. 18); 1 *TRIBE, supra* note 13, § 3–5, at 280 (“Congress clearly has authority to fix the rules of procedure . . . which Article III courts must apply.”). Indeed, the consensus viewpoint is that Congress, not the courts, has primary rulemaking authority. See, e.g., Ryan, *supra* note 112, at 764–65 (finding “overwhelming historical evidence that, since the founding era, procedural rulemaking has been considered a legislative function”).

¹¹⁸ See Ryan, *supra* note 112, at 783–98.

¹¹⁹ *Id.* at 787. More specifically, Professor Ryan argues that another branch’s “practice is objectionable as unduly interfering with the judiciary’s core inherent power to decide contested cases when it interferes with the judiciary’s decisionmaking function and poses a risk of decreasing judges’ impartiality, blurring lines of public accountability or increasing the potential for arbitrary decisions.” *Id.* at 798; accord Robert J. Pushaw, Jr., *Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 742 (2001) (“Because the Constitution itself gives federal courts implied authority that is essential to their independent exercise of judicial power, Articles I and III cannot reasonably be interpreted as allowing Congress to negate this grant by eliminating or materially abridging such authority.”).

¹²⁰ Paulsen, *supra* note 3, at 1565–66 n.90 (citing *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 22 (1825)); accord Harrison, *supra* note 4, at 506 (“Nothing in the nature of the rules of precedent keeps Congress from legislating on this subject.”). Though Paulsen and Harrison are speaking of the Article I legislative power more generally, this same conclusion certainly would apply here.

purportedly) were promulgated pursuant to delegated Article I authority.)¹²¹ At the other end of the continuum, it might be that the promulgation of a rule abrogating stare decisis is (at most) a matter exclusively within the power of the *legislative* branch.¹²² That might well be the correct conclusion, though if so, we can stop the analysis now. A final possibility (again assuming that such a power exists at all) is that the power to promulgate a rule abrogating stare decisis lies concurrently in *both* branches.¹²³ For the sake of argument, this Article assumes that such is the case.¹²⁴

¹²¹ Recall also that any argument that stare decisis may be abrogated by rule assumes that there would be no constitutional impediment to such a rule, an assumption that necessitates a rejection of the notion that the Article III “judicial Power” requires some adherence to this doctrine. But if that is true, then how is it that the judicial branch would have exclusive rulemaking power over that subject? It seems somewhat odd to argue, on the one hand, that Article III includes no concept of stare decisis, and on the other hand, that Article III courts are exclusively empowered to regulate stare decisis.

¹²² See Murphy, *supra* note 4, at 1080 (concluding that although “courts cannot constitutionally eliminate their obligation, deeply rooted in common law, to show measured (though not absolute) deference to their own precedents,” “Congress possesses power to release the courts from this constraint”); see also MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 20–22 (2d ed. 1990) (challenging generally the inherent rulemaking power of the federal courts); Kelleher, *supra* note 62, at 70 (“[T]he inherent authority of the judicial branch to regulate procedure is not coextensive with Congress’, in that it does not extend to all matters rationally capable of classification as procedural.”); Pushaw, *supra* note 119, at 743 (concluding that “the Necessary and Proper Clause authorizes Congress alone to determine whether or not to bestow beneficial [inherent] powers,” which “consist[] of those that are merely helpful, useful, or convenient to federal judges in performing their Article III duties”); Ralph U. Whitten, *Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4*, 40 ME. L. REV. 41, 46 (1988) (“[S]ome purely procedural matters may be addressed only by the legislative branch of government.”).

¹²³ See, e.g., Beale, *supra* note 115, at 1466 (concluding “that the federal courts do possess implied constitutional authority to regulate judicial procedure, concurrent with and largely subsidiary to the power of Congress”). Professor Ryan further breaks down such exercises of the inherent rulemaking power (i.e., those “involving procedural gap filling”) into two subcategories—those where gap filling is “essential,” and those where it is “merely useful.” Ryan, *supra* note 112, at 778. Though not important for the purpose of this Article, it seems virtually inconceivable that the abrogation of stare decisis could be regarded as essential to the operation of the federal courts, however useful such a rule might be.

¹²⁴ This Article assumes further that a rule abrogating stare decisis, if promulgated pursuant to this concurrent form of the Article III inherent power, would not otherwise conflict with (and therefore be superseded by) the Constitution or any federal statute or procedural rule. See *Carlisle v. United States*, 517 U.S. 416, 426 (1996) (acknowledging the supremacy of constitutional and statutory authorities in this context); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) (acknowledging same); see also Paulsen, *supra* note 3, at 1565 n.90 (arguing that such laws “surely” constrain the

This then brings us to the *nature* of this concurrent, inherent rulemaking power, again in comparison with the Article I rulemaking power. As to which matters may the inherent rulemaking power be invoked? It turns out that although the inherent rulemaking power has been invoked in a number of settings, its focus (presumably due largely to separation of power concerns) has remained quite narrow.¹²⁵ In fact, the description of the inherent power frequently given by the Supreme Court—that power “necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases”¹²⁶—sounds remarkably like the standard employed for rules promulgated under the Rules Enabling Act.¹²⁷ By parallel reasoning, it is difficult to see how a rule abrogating stare decisis helps the judicial branch carry out its constitutionally mandated duties. Such a rule no more achieves the “orderly and expeditious disposition of cases”¹²⁸ than it relates to the “conduct of [the court’s] business.”¹²⁹

inherent rulemaking power); Ryan, *supra* note 112, at 778–79 (“Congress can control, though not eliminate, essential procedural devices such as the contempt power, and can completely abrogate nonessential procedural gap filling.”) (footnote omitted).

¹²⁵ Consider, for example, the various invocations described in *Chambers*. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43–44 (1991); see also Beale, *supra* note 115, at 1465 (“[T]he federal courts’ implied constitutional authority encompasses the power to formulate procedural rules only in a narrow sense: that is, technical details and policies intrinsic to the litigation process, not the regulation of primary behavior and policies extrinsic to the litigation process.”); Struve, *supra* note 77, at 1130 (“[T]he federal courts’ inherent powers . . . may be limited to powers necessary to the fulfillment of the courts’ Article III responsibilities—a far narrower range than is covered by the current Federal Rules.”). Consider also that if this inherent power is more or less plenary, then why the perceived need for a Rules Enabling Act? Cf. Pushaw, *supra* note 119, at 864 n.665 (“Why bother to have a formal, deliberative rulemaking process if federal judges can, at their whim, either ignore or add to the rules promulgated?”).

¹²⁶ *Chambers*, 501 U.S. at 43 (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962)).

¹²⁷ See *supra* notes 49–55 and accompanying text.

¹²⁸ *Chambers*, 501 U.S. at 43.

¹²⁹ 28 U.S.C. § 2071(a) (2000). Admittedly, in some ways, a rule abrogating stare decisis might lead to a more expeditious (if not orderly) disposition of cases. For example, with respect to the federal appellate courts’ various nonprecedential decision rules, much has been made of the time savings (and other, related benefits) supposedly resulting therefrom. See, e.g., *Hart v. Massanari*, 266 F.3d 1155, 1176–79 (9th Cir. 2001); see also Healy, *supra* note 23, at 111 (observing that “the practice [of issuing nonprecedential decisions] likely increases judicial efficiency”). But whatever net benefits might derive from a rule abrogating stare decisis must be weighed against the net benefits that derive from the *maintenance* of stare decisis, and given the volumes that have been written in support of the latter, it is doubtful that the former would survive this test. Certainly, the “restraint and discretion” with which we are to approach exercises of this power, *Chambers*, 501 U.S. at 44, should counsel against the promulgation of a rule of this nature. See also Pushaw, *supra* note 119, at 782 (“The constitutional basis of

Equally serious are what might be termed the *functional* problems associated with the notion of a rule abrogating stare decisis being encompassed by the inherent power of federal courts. The functions of the federal judicial decision-making process have been summarized as follows:

A judicial decision has two functions in a common law system. The first, which is not, to be sure, peculiar to the common law, is to define and to dispose of the controversy before the court. . . .

Whether the court discovers or creates the law that it applies, its resolution of the controversy has an impact that extends beyond the parties before it. This is because the second function of a judicial decision, and one that is characteristic of the common law, is that it establishes a precedent so that a like case arising in the future will probably be decided in the same way. This doctrine is often called by its Latin name, *stare decisis*¹³⁰

How might a rule abrogating stare decisis impair these functions? And how might these functions affect the promulgation of a rule abrogating stare decisis?

Consider, first, the *precedent-setting* function. The precedent-setting function relates to the notion that judicial decisions are to be followed in indistinguishable, later cases, absent overruling or abrogation by some

inherent authority is indispensable necessity rather than convenience, and therefore such powers should be exercised sparingly.”).

And there might be other, more fundamental reasons why a rule abrogating stare decisis could not be promulgated pursuant to the courts’ inherent rulemaking power. Gary Lawson has suggested that unlike more “traditional” invocations of this power, the abrogation of stare decisis is not a rule of law per se, but rather represents a decision-making *methodology*. In other words, when a court decides a case, it employs (explicitly or, presumed, implicitly) some decision-making process or method of reasoning. For example, in a case involving a question of statutory interpretation, a court might employ some particular method of statutory interpretation. But may the court further compel future courts to decide similar questions in the same manner? Arguably not. (This observation also might be considered from the perspective of stare decisis itself. Does the holding of a court (i.e., that portion of a court’s decision that is entitled to binding precedential effect) include the precedent-setting court’s decision-making methodology? Again, arguably not.) Conversely, if decision-making methodologies *are* within the purview of the inherent rulemaking power, then we must acknowledge that the issue is *not* whether to adopt some concept of stare decisis; the federal courts already have. Rather, the issue (as the title of this Part suggests) is whether stare decisis may now be *abrogated*—an issue that seemingly implicates the workings of the doctrine of stare decisis. *See infra* notes 151–56 and accompanying text. But if that is so, then *Chambers* might represent the wrong test.

¹³⁰ E. ALLEN FARNSWORTH, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE UNITED STATES 50–51 (3d ed. 1996).

superior form of authority.¹³¹ Without question, a rule abrogating stare decisis, even if applied only to certain judicial decisions, would impair this function; indeed, it would eliminate it. Though this fact, of itself, might not be a sufficient basis for concluding that a federal court may not promulgate a rule abrogating stare decisis, such a rule certainly would be quite inconsistent with the American common law tradition.¹³²

¹³¹ See *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993) (“When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.”); *Anastasoff v. United States*, 223 F.3d 898, 899–900 (“Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties.”) (citation omitted), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000); see also *supra* note 2 (describing the doctrine of stare decisis generally).

¹³² In the words of one founding father:

To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived, from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them.

THE FEDERALIST NO. 78, at 430 (Alexander Hamilton); see also BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 20 (1921) (“*Stare decisis* is at least the everyday working rule of our law.”); 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 377, at 279–80 (1833) (“A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.”); 1 *TRIBE*, *supra* note 13, § 1-16, at 82 (“In the American legal system, given its common law character, the principle of *stare decisis* has been at the very heart of the rule of law.”); Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 748 (1988) (“Precedent is, of course, part of our understanding of what law is.”).

Some have observed that the role of precedent at the time of the writing of the Constitution might have differed somewhat from today’s understanding. See, e.g., *Hart v. Massanari*, 266 F.3d 1155, 1168 (9th Cir. 2001) (“The modern concept of binding precedent—where a single opinion sets the course on a particular point of law and must be followed by courts at the same level and lower within a pyramidal judicial hierarchy—came about only gradually over the nineteenth and early twentieth centuries.”). Though this observation might have some relevance in conjunction with an argument concerning the *constitutionality* of a rule abrogating stare decisis, it says nothing of the aberrational nature of such a rule in light of current law. As Professor Healy has argued:

[E]ven if stare decisis is not dictated by the founding generation’s assumptions or by the system of checks and balances, it might nonetheless be essential to the

And then there is the decisional, or *adjudicative*, function (i.e., the *vehicle* by which the federal courts are to carry out their constitutional duties) as it might relate to the creation of a rule abrogating *stare decisis*. Apparently without exception, the “rules” created pursuant to the inherent power of the judiciary are not the statute-like procedural rules with which lawyers, in the early twenty-first century, are more familiar; rather, they are simply rules of law created in the manner by which courts typically make law: in conjunction with adjudication and announced in the course of a judicial decision.¹³³ As a result, the notion that the federal courts have the inherent power to promulgate *statute-like* rules *relating* to the disposition of cases (assuming, again, that such rules are so related) seems doubtful.¹³⁴ Certainly,

legitimacy of the courts. By following the doctrine consistently for the better part of two centuries, the courts may have created an expectation that they will continue to do so. And to the extent that their legitimacy now rides on this expectation, they may no longer be free to abandon the doctrine.

Healy, *supra* note 23, at 51; *see also* Price, *supra* note 23, at 113 (“The spate of court rules declaring non-published opinions not to be precedent are a radical departure from any court practice of the past. This is true even in periods in which courts have not felt themselves strictly bound by past precedent.”). Thus, like it or not, *stare decisis* is now the norm, at least in the federal appellate courts. *See Anastasoff*, 223 F.3d at 904 (“Courts may decide, for one reason or another, that some of their cases are not important enough to take up pages in a printed report. Such decisions may be eminently practical and defensible, but in our view they have nothing to do with the authoritative effect of any court decision.”); *Re* Rules of the United States Court of Appeals for the Tenth Circuit, 955 F.2d 36, 37 (10th Cir. 1992) (Holloway, C.J., joined by Barrett and Baldock, J.J., concurring in and dissenting from the revision of the Rules of the Tenth Circuit) (“Each ruling, published or unpublished, involves the facts of a particular case and the application of law—to the case. Therefore all rulings of this court are precedents, like it or not, and we cannot consign any of them to oblivion by merely banning their citation.”); *see also* *Eastern Associated Coal Corp. v. United Mine Workers of Am.*, Dist. 17, 531 U.S. 57, 61 (2000) (recognizing a split of authority among circuits based upon an unpublished decision). Indeed, if *stare decisis* is not now the norm, then why the need for nonprecedential decision rules? This very modern notion of the “nonprecedential” judicial decision therefore should be seen for what it really is—yet another example of the disunification of the adjudicative and precedential functions of the judicial decision-making process. *Cf.* Shannon, *supra* note 7, at 833–34 (describing this disunification with respect to a strictly prospective application of judicial decisions). Indeed, the “nonprecedential” decision problem (i.e., the notion that a court can decide a case, yet make no law) can be thought of as the mirror image of the prospectivity problem (i.e., the notion that a court can make law, yet decide no case).

¹³³ *See, e.g.*, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43–44 (1991) (citing examples); *Carlisle v. United States*, 517 U.S. 416, 438 nn.1–2 (1996) (Stevens, J., dissenting) (citing additional examples).

¹³⁴ As summarized by Professor Kelleher:

The [Supreme] Court’s decisions are fairly read as recognizing only an inherent authority in the judicial branch to control procedure in the context of adjudicating

precedent for such rules (pun intended) is lacking.¹³⁵ Instead, it appears more likely that such an exercise of the “judicial Power” may only be achieved through the adjudication of “Cases” and “Controversies.”¹³⁶

particular cases. That power to adjudicate and regulate procedure on a case-by-case basis does not necessarily imply the power to establish general rules of procedure, whether local or supervisory, which is like a legislative power in that it is essentially prospective.

Kelleher, *supra* note 62, at 66–67 (footnote omitted); accord Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 725 (1995) (“Exercise of the judicial power is inherently characterized by the adjudication of individualized, live disputes. Promulgation of free-standing rules of general applicability does not fit within this model, even when those rules deal with matters that are intimately intertwined with performance of the adjudicatory function.”) (footnote omitted); Martin H. Redish, *Separation of Powers, Judicial Authority, and the Scope of Article III: The Troubling Cases of Morrison and Mistretta*, 39 DEPAUL L. REV. 299, 317 (1990) (“[W]hat activity could represent a more striking departure from the traditional judicial function of case adjudication than the direct enactment of legislation?”) [hereinafter Redish, *Separation of Powers*]; Ryan, *supra* note 112, at 780 n.89 (“[I]f Congress were silent as to court procedure, courts would be able to use common law methods to develop rules of procedure on a case-by-case basis. They would not, however, be able to promulgate a comprehensive code of procedure like the Federal Rules.”) (citations omitted); Whitten, *supra* note 122, at 57 (“In and of itself, the power to adjudicate an issue cannot establish the legitimacy of rulemaking power over the same issue.”); see also *Mistretta v. United States*, 488 U.S. 361, 392 (1989) (“To be sure, all rulemaking is nonjudicial in the sense that rules impose standards of general application divorced from the individual fact situation which ordinarily forms the predicate for judicial action.”). This is not to say that federal courts have *no* power of this nature *whatsoever*; rather, it is just that, again, this power—in the absence of that delegated by Congress—must be extremely limited. See, e.g., Redish, *Separation of Powers, supra*, at 318 (recognizing “only common sense exceptions for the performance of the minimal administrative tasks essential to the effective performance of the adjudicatory function”). Separation of powers and relative institutional competency seems to lie at the core of these conclusions. As the Court has stated more generally:

The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts.

Diamond v. Chakrabarty, 447 U.S. 303, 317 (1980).

¹³⁵ As further evidence, the reader is challenged to produce a copy of, say, the Inherent Rules of the Supreme Court (though if one is able to publish “unpublished” decisions, who knows?). Cf. Carrington, *supra* note 25, at 981 (“There is no hint in the [Supreme] Court’s opinions suggesting that it could codify federal common law, however desirable such a codification might be.”).

Indeed, it is possible that the (formal) federal rule governing the promulgation of local appellate rules forecloses any other possibility, at least with respect to the courts of appeals. Federal Rule of Appellate Procedure 47(a) (“Local Rules”), paragraph (1), provides:

Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A *generally applicable direction to parties or lawyers regarding practice before a court*

¹³⁶ U.S. CONST. art. III, § 2; *see* Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982) (“The constitutional power of federal courts cannot be defined, and indeed has no substance, without reference to the necessity ‘to adjudge the legal rights of litigants in actual controversies.’”) (quoting Liverpool S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1885)); THE FEDERALIST NO. 78, at 425 (Alexander Hamilton) (“The Judiciary . . . has no influence, over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither *force* nor *will*, but merely judgment . . .”); Redish, *Separation of Powers*, *supra* note 134, at 302 (“[B]ecause the judiciary is unrepresentative, it is important that its functioning be confined to the performance of the traditional judicial function of adjudication, lest the judiciary be in a position to usurp the function and authority of the political branches.”) (footnote omitted).

Admittedly, some legal scholars disagree, or at least shy away from taking a hard-line position on this issue. For example, what if Congress enacted no statutes (“enabling” or otherwise) regarding the practice to be followed in the federal courts? Professors Carrington and Merrill at least imply that the federal courts would then be authorized to “enact” their own rules, perhaps even legislative-type rules. *See* Carrington, *supra* note 25, at 974; Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 24 (1985). It must be conceded, though, that any such legislative-type rulemaking by the judicial branch would be extraordinary. *See, e.g.,* Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 95 (1981) (“[F]ederal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers. . . . [W]e consistently have emphasized that the federal lawmaking power is vested in the legislative, not the judicial, branch of government . . .”); Caminker, *Judicial Power*, *supra* note **Error! Bookmark not defined.**, at 1519 (“[T]he core of the judicial power . . . is the authority to adjudicate and resolve Article III cases and controversies.”); Ryan, *supra* note 112, at 781 (“Procedural rulemaking is, after all, a form of legislating. In contrast to the prototypical work product of courts—the resolution of particular disputes through judicial opinions—formally codified procedural rules are exclusively forward looking, framed in general terms, and promulgated outside the context of any particular conflict.”). Moreover, one must acknowledge the fact that Congress *has* legislated in this area, leaving little need (and perhaps even authority) for any federal court to legislate beyond the confines of that legislation already in place. Finally, to the extent that such inherent rulemaking power exists, it must be narrowly confined to the making of adjective law, for certainly the federal courts lack any sort of plenary legislative power. And as suggested in Part III of this Article, whether a rule abrogating *stare decisis* fairly could be considered as falling within those narrow confines seems highly questionable.

must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.¹³⁷

Though this provision evidently was concerned that “generally applicable direction[s]” be promulgated in the *form* of local rules (to the exclusion of all other forms), this rule (which closely tracks the local rule promulgation procedure specified in 28 U.S.C. § 2071) also appears to be specifying the *manner* by which such “direction[s]” may be promulgated: by *formal* (Article I) local rule.¹³⁸ This reading is buttressed by Rule 47(b) (“Procedure When There Is No Controlling Law”), which provides: “A court of appeals may regulate practice *in a particular case* in any manner consistent with federal law, these rules, and local rules of the circuit.”¹³⁹ In other words, Rule 47(b) seems to recognize the inherent rulemaking power of the federal courts—but *only* as to matters other than “generally applicable directions,” and then *only* as to that rulemaking accomplished through the course of *adjudication* (rather than through some more “traditional” rulemaking

¹³⁷ FED. R. APP. P. 47(a)(1) (emphasis supplied).

¹³⁸ The conclusion that this portion of Rule 47 refers to the formal Article I rulemaking power (as effectuated through § 2071) and not the inherent Article III rulemaking power also is confirmed by the fact that Rule 47 *itself* was promulgated pursuant to the formal rulemaking power.

Incidentally, a similar argument has been advanced with respect to § 2071(f), which provides: “No rule may be prescribed by a district court other than under this section.” This subsection also may be interpreted as requiring that all local district court rules (except, presumably, those exclusively within the inherent power of the courts) be promulgated pursuant to § 2071. See Linda J. Rusch, *Separation of Powers Analysis as a Method for Determining the Validity of Federal District Courts’ Exercise of Local Rulemaking Power: Application to Local Rules Mandating Alternative Dispute Resolution*, 23 CONN. L. REV. 483, 490–91 n.26 (1991). (It is unclear why § 2071(f) (which was added in 1988; see Pub. L. No. 100-702, Title IV, § 403(a)(1), 102 Stat. 4651) was limited to district courts, as there appears to be no sound reason to exclude the courts of appeals; perhaps Congress simply perceived the problems surrounding local federal court rulemaking to be greater at the district court level. Nonetheless, the 1995 amendment to Federal Rule of Appellate Procedure 47, resulting in language quoted above, see FED. R. APP. P. 47 advisory committee’s notes, appears to have corrected this disparity. Indeed, the *district* court rule governing local rulemaking (Federal Rule of Civil Procedure 83)—which also was amended in 1995, see FED. R. CIV. P. 83 advisory committee’s notes, and which should be essentially identical to the analogous courts of appeals rule—conspicuously omits the “must be in a local rule” language, presumably because such language already was included in § 2071(f).)

¹³⁹ FED. R. APP. P. 47(b) (emphasis supplied).

process).¹⁴⁰ Stated another way: To the extent that the federal rulemaking power is concurrently shared by Congress and by the federal judiciary, the inherent rulemaking power may be limited by Congress, either by statute or by formal procedural rule.¹⁴¹ This superseding power would seem to include not only power over the *substance* of such rules, but also power over the *procedure* by which any such rules may be promulgated. Through its exercise of the latter power, Congress (through § 2071 and Rule 47) seemingly has prescribed that local rules falling (again, at least concurrently) within the scope of Article I (as limited by the Rules Enabling Act) may be prescribed only pursuant to formal local rulemaking procedures. But by so specifying the rulemaking procedure to be followed, Congress also has, in effect, *proscribed* the exercise of the concurrent, inherent rulemaking power (at least with respect to the lower federal courts) *except* through adjudication. Thus, for this reason also, it appears that there is no general, inherent federal court rulemaking power. Whatever inherent federal court rulemaking power remains—and it must be quite limited—may only be accomplished through adjudication.

None of this sounds very promising for a rule abrogating stare decisis promulgated pursuant to some Article III inherent rulemaking authority. But this Article promised at the outset that neither constitutional nor pragmatic considerations would stand in the way,¹⁴² and so this Article will continue to proceed on the assumption that a rule abrogating stare decisis is within the

¹⁴⁰ Cf. FED. R. CIV. P. 83(b) (“A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and local rules of the district.”).

Professor Burbank has raised the possibility that Federal Rule of Civil Procedure 83(b) (and therefore, by analogy, Federal Rule of Appellate Procedure 47(b)) are invalid in that 28 U.S.C. § 2072(a) only authorizes the prescription of *general* rules of practice and procedure. See Burbank, *Rules*, *supra* note 59, at 1193 n.763. But Federal Rule of Civil Procedure 83(b) and Federal Rule of Appellate Procedure 47(b) are general in a “procedural” sense in that they may be read as doing little more than formally acknowledging the authority of judges in individual cases (generally) to “regulate practice” as to matters not regulated by any other authority. Neither of these rules authorizes such judges to “prescribe” anything; rather, to the extent that local rules may be prescribed at all, each specifies that they may be prescribed only by each particular court en banc, and then only pursuant to 28 U.S.C. § 2071.

¹⁴¹ See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991).

¹⁴² Of course, constitutionality on one basis does not necessarily mean constitutionality on all bases; for example, many who have found rules abrogating stare decisis constitutionally wanting seem to presume constitutionality as a matter of Article I, and find difficulties instead with other provisions. See *supra* note 23. And certainly, acts constitutionally permissible if undertaken by one branch of government might be unconstitutional if undertaken by a different branch. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 233–34 (1995). Nonetheless, this Article assumes the constitutionality of a rule abrogating stare decisis on *all* constitutional bases.

Article III inherent rulemaking power, and thus that federal courts indeed have the power to create such a “rule,” at least by adjudication.¹⁴³ Do any further problems remain?

The answer might depend in part on how such a “rule” comes into being. For example, a court wishing to abrogate stare decisis might attempt to do so simply by tacking onto its opinion additional language to this effect.¹⁴⁴ One difficulty with this approach, though, is that such additional language (regardless of whether it is worded generally or directed only at the decision under consideration), being “statements . . . that are not necessary to support the decision reached by the court,”¹⁴⁵ would clearly be dicta.¹⁴⁶ Such a statement would have nothing to do with the judgment reached by the decisional court, and for that reason, may be disregarded entirely by any later court, the clarity of the decisional court’s command notwithstanding.¹⁴⁷ In other words, according to the doctrine of stare decisis, it is what a court *does*, not what it says, that is important and must be followed. Though the clarity of a court’s declaration that stare decisis has been abrogated (and even the prefacing of the declaration with the words, “we hold that”) might increase the chances that a later court will, in fact, agree that such a declaration is “the law,” such posturing by the earlier, decisional (or “precedent-setting”) court would not be binding.¹⁴⁸

¹⁴³ Of course, here also the federal courts are quite constrained in their ability to announce forward-looking rules of general applicability. *See, e.g.*, Beale, *supra* note 115, at 1481 (“The appellate courts’ announcement of general procedural rules with *only* prospective effect poses special problems, since it is well settled that article III does not authorize the federal courts to render advisory opinions.”). Hence, our rule has become a “rule,” for it bears little functional resemblance to the sort of formal rules discussed in Part III of this Article.

¹⁴⁴ Though accomplished by local rule rather than by decision, this is, in fact, remarkably close to current federal appellate court practice. *See, e.g.*, 3D CIR. R. 5.1 (“The face of an opinion states whether it is precedential or not precedential.”).

¹⁴⁵ Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000 (1994).

¹⁴⁶ *See id.* (defining “dicta” in this manner).

¹⁴⁷ *See* Shannon, *supra* note 7, at 847–48. Another way to look at this aspect of stare decisis is to consider that a later court, in the course of interpreting and applying any given precedent, always gets the last word concerning the scope of the earlier court’s holding. As explained by Judge Posner:

Realistically, a precedent is the joint creation of the court that decides the case later recognized as a precedent and the courts that interpret that case in the later cases. No part of the first opinion will be neatly labeled “precedent.” The precedent will be declared, and its scope delineated, in later cases that rely on the opinion.

POSNER, *supra* note **Error! Bookmark not defined.**, at 374.

¹⁴⁸ In this regard, one might consider the *Hart* court’s criticism that “*Anastasoff*’s reasoning . . . cast[s] doubt on the authority of courts of appeals to adopt a body of circuit

So let us assume that our hypothetical federal appellate court is aware of all of this and chooses instead to incorporate its “rule” abrogating stare decisis into the court’s decision itself. For example (to return to the example used at the beginning of this Article), what if a majority of the members of the Supreme Court, in the context of some future abortion rights case, set out to overrule whatever remains of *Roe v. Wade*?¹⁴⁹ Assume further that the Court, in its opinion, were to begin by stating:

We¹⁵⁰ are mindful of our precedents on this subject, and that previous efforts to overrule those precedents under the constraints imposed by the doctrine of stare decisis have not been successful. At the same time, a majority of the members of this Court would reach a contrary decision if it were not constrained by these precedents. In order to achieve a result more consistent with our best, current understanding of the Constitution, we hereby abrogate stare decisis. From this point forward, no decision of this Court shall have binding precedential effect; instead, this Court shall decide each case according to our best, current understanding of the law.

May the Court do this? Do any (nonconstitutional) problems yet remain?

Yes, additional problems remain. The first problem relates to Justice Scalia’s statement in *Casey* that “stare decisis ought to be applied even to the doctrine of stare decisis.”¹⁵¹ In other words, we already know that, according to the doctrine of stare decisis, one may not overrule precedent simply

law on a wholesale basis, as did the Eleventh Circuit in *Bonner*.” *Hart v. Massanari*, 266 F.3d 1155, 1176 (9th Cir. 2001).

Circuits could, of course, adopt individual cases from other circuits as binding in a case raising a particular legal issue. But adopting a whole body of law, encompassing countless rules on matters wholly unrelated to the issues raised in a particular case, is a very different matter. If binding authority were a constitutional imperative, it could only be created through individual case adjudication, not by a decision unconstrained by the facts before the court or its prior caselaw.

Id. (citation omitted). One problem with this criticism, though, is that it might represent a misreading of *Bonner* (despite what the *Bonner* court itself might have said). If one takes it as given that a court has the authority (constitutional or otherwise; it might not matter) to decide the case before it and nothing more, then what the *Bonner* court *actually* held was only that it was adopting Fifth Circuit precedent as binding in its decision *in that particular case*—albeit with a strong suggestion (doubtless true) that there is no reasoned basis by which to distinguish the adoption of Fifth Circuit precedent in that case from a similar adoption in all other, future Eleventh Circuit cases.

¹⁴⁹ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁵⁰ This hypothetical quotation uses the much more common (today) “we” rather than the much more appropriate “the Court,” in part because it is much more likely that “we” would write such an opinion.

¹⁵¹ *Planned Parenthood v. Casey*, 505 U.S. 833, 993 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part). This Article presumes the correctness of this statement notwithstanding the fact that it comes from a minority opinion and arguably went unheeded in that case.

because one now disagrees with that precedent; rather, there must be *reasons*, beyond mere disagreement, of sufficient magnitude, so as to overcome the presumptive validity of that precedent.¹⁵² But if this is so with respect to precedent generally, then this reasoning seemingly would apply with equal (if not greater) weight when it comes to overruling the precedent that established the doctrine of stare decisis *itself*.¹⁵³ And if so, the question then becomes whether, under the doctrine of stare decisis, the current legal climate is such that the doctrine of stare decisis is ripe for abrogation.¹⁵⁴ Is it? Let us see.

Casey (ironically enough) represents the Supreme Court's most recent, comprehensive elaboration of the doctrine of stare decisis. In that case, the Court explained the operation of the doctrine as follows:

[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.¹⁵⁵

So how does the doctrine of stare decisis fare under this standard? Has this doctrine proved practically unworkable? Is so little reliance now placed on this doctrine that its overruling would come at little cost? Has the law developed to the point that this doctrine has all but been abandoned? And can it fairly be said that this doctrine has been robbed of its justification? It seems doubtful that much would be gained by a protracted analysis of these factors; suffice it to say (if the doctrine itself is to be believed) that the argument that

¹⁵² See *supra* note 2.

¹⁵³ Of course, such overruling, if done at all, must be done by the Supreme Court, and not by any lower federal court. See *id.*

¹⁵⁴ This assumes (again) that decision-making methodologies such as stare decisis (or the abrogation of stare decisis) are themselves entitled to precedential effect in the first instance (though if not, then a rule abrogating stare decisis would be beyond the inherent rulemaking power by definition). See *supra* note 129.

¹⁵⁵ *Casey*, 505 U.S. at 854–55 (citations and quotation marks omitted); see also Paulsen, *supra* note 3, at 1551 (interpreting *Casey* as also including a fifth factor, “the need to preserve public impressions of judicial integrity”).

the doctrine of stare decisis is ripe for abrogation cannot seriously be made.¹⁵⁶

A second problem relates to the practice currently employed by the courts of appeals—that of *selective* abrogation. May stare decisis be abrogated, by judicial decision, in certain cases, but not in others? The answer again appears to be no. Certainly, even under the doctrine of stare decisis, precedents may be distinguished. Thus, one may adhere to some particular precedent generally while reaching different results in different (distinguishable) cases. But on what basis may a precedent purporting to abrogate stare decisis be distinguished in any later case? No reasonable basis for making such a distinction comes to mind.¹⁵⁷ Thus, if the abrogation of stare decisis is to occur at all, it seems as though it is going to have to occur on a wholesale (rather than a piecemeal) basis.

But that brings us to a final problem, a problem that is, in essence, one of logic. Even assuming that one were inclined to abrogate stare decisis by judicial decision, could one, really? For once one obliterates the obligation to follow precedent, where would be the obligation to follow *that* decision (the decision abrogating stare decisis)? Stare decisis has just been abrogated! Does this not mean that this overruling decision *also* could be ignored—

¹⁵⁶ This is not to say that some of these factors actually might weigh in favor of the abrogation of stare decisis, at least in part. Moreover, the apparent malleability of the doctrine of stare decisis—at least as it has been applied by the Supreme Court—has led some to question whether the doctrine has, in effect, been abandoned. *See, e.g.*, Paulsen, *supra* note 3, at 1538. Some have further argued that judicial integrity would be better served if judges were to decide cases based upon their best current understanding of the law, rather than upon some precedent now believed to be erroneous. *See, e.g., id.* at 1564–67. But given the strong reliance placed on this doctrine and the continued vitality of its justifications (as demonstrated by *Casey* itself), there is no doubt that this doctrine, if challenged on this basis, would be sustained.

¹⁵⁷ As a foil, one might consider the bases by which the various circuits currently determine whether a decision is entitled to binding precedential effect. Recall, for example, Ninth Circuit Rule 36-2 (recited in note 28 *supra*). Could any lawyer trained in the American legal system seriously argue, “Well, your Honor, X is a decision of this court, and it does seem indistinguishable from the case at bar, but X does not offer any criticism of existing law” (or does not involve an issue of sufficient public importance, or does not satisfy any of the other bases prescribed in Rule 36-2) “and therefore this court should feel free to ignore it”? One would think not (or at least hope not), despite the fact that this is essentially what is now occurring.

The question of whether stare decisis should apply in some cases but not in others should be distinguished from the question of whether stare decisis might have lesser *force* depending upon the context in which it is asserted. *See, e.g.*, *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (recognizing that stare decisis has less force in constitutional cases). In such contexts, the overruling of precedent might be easier than in other contexts. But there do not appear to be any instances in which the Court has suspended the operation of the doctrine *entirely* with respect to any particular case or class of cases.

meaning that one would be right back to where one started (with an obligation to follow precedent)?¹⁵⁸ One can imagine a judicial system in which precedent never has been considered binding; indeed, that is essentially the norm in civil law courts.¹⁵⁹ One can even imagine a *statute* proscribing any sort of strict adherence to binding precedent. But one cannot prescribe a *rule, through precedent*, proscribing adherence to precedent.¹⁶⁰ In this regard, stare decisis may be likened to a boomerang—once one has it,¹⁶¹ it is difficult to get rid of it.¹⁶²

¹⁵⁸ Such paradoxes (or apparent paradoxes) are abundant in philosophy. Consider, for example, what has become known as the paradox of the liar. How does one assess the truth of the statement, “The statement I am now making is a lie”? This statement can only be true if the speaker is lying, which would then make it false; it is, therefore, inherently contradictory. See ANIL GUPTA & NUEL BELNAP, *THE REVISION THEORY OF TRUTH* 5–6 (1993). This does not necessarily mean that such contradictions (or apparent contradictions) cannot be reconciled. Thus, it might be possible for one to formulate a coherent theory by which the abrogation of stare decisis by judicial decision might be enforced, but the burden would lie with the proponent.

¹⁵⁹ See, e.g., MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 130–31 (2d ed. 1999).

¹⁶⁰ As an alternative, one might attempt to add language in the decision abrogating stare decisis exempting that decision *itself* from the operation of that rule. But even assuming that such language would not be dicta, see *supra* notes 145–148 and accompanying text, where would lay the obligation to follow even that exception? At best, stare decisis would become a switch that could be turned on and off at the whim of the decisionmaker. Certainly, a later court *could* adhere to the no-stare decisis rule, but it would be under no *obligation* to do so.

¹⁶¹ Some have observed that the *creation* of the doctrine of stare decisis through judicial decision making raises its own set of logical problems. See, e.g., Michael B.W. Sinclair, *Anastasoff Versus Hart: The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions*, 64 U. PITT. L. REV. 695, 721 (2003) (“The precedential force of the case purporting to establish stare decisis would itself depend on the rule it announced, a bootstrapping circularity.”). Indeed, on this basis, at least one legal scholar has argued that it would be “logically possible” for a court to free itself from the force of binding precedent, for upon realizing that it is not truly bound by its own prior decisions, it could simply overrule the precedent that purported to establish the doctrine. GLANVILLE WILLIAMS, *SALMOND ON JURISPRUDENCE* § 56, at 188 (11th ed. 1957) (observing further that this argument, “though circular, would be no more circular than the opposite argument usually employed in following precedents”). One problem with this argument, though, is that the doctrine of stare decisis, unlike other areas of the common law, was not established simply through some statement in a judicial decision (though certainly such statements can be found); rather, it was established through a long and consistent practice of adherence to prior decisions. In other words, common law courts do not follow precedent simply because some earlier court declared such to be the law; rather, such courts follow precedent because that is, in fact, what they do. Indeed, in a very real sense, it is only because of the doctrine of stare decisis that such courts have the ability to make law at all. Accordingly, “[i]t is nonsensical . . . to suggest that a

Thus, just because a rule abrogating stare decisis may not now be promulgated by a federal court pursuant to its delegated Article I power does not mean that it may be created under Article III. Indeed, if anything, the inherent Article III rulemaking power is *more* restrictive than that power provided under the Rules Enabling Act. Moreover, though federal courts certainly have the power to “make” law, they generally lack the power to do so by anything resembling legislation. Rather, the lawmaking of the federal courts generally must be accomplished through adjudication, and the special problems associated with the abrogation of stare decisis by judicial decision seem, in the end, insuperable.

V. CONCLUSION

Despite the fact that the United States Court of Appeals, by rule, are at least purporting to abrogate stare decisis with respect to thousands of decisions each year, they may not properly do so. For a rule abrogating stare decisis, even if constitutional as an exercise of Congress’s Article I rulemaking power, would exceed the federal court’s statutory rulemaking power as delegated by Congress through the Rules Enabling Act and those rules properly promulgated thereunder. Such a rule also would represent an improper exercise of the federal court’s inherent rulemaking power.

But arguing that a rule abrogating stare decisis would be improper is one thing; persuading a federal court is another. The biggest problem is that the judges responsible for promulgating such a rule would be the same judges responsible for determining its propriety. Though one hopes that a federal court (of all institutions) would accede to legitimate challenges to its authority, regardless of the consequences,¹⁶³ human nature might be difficult

limited power to make ‘law,’ which flows from the existence of stare decisis, can form a legal basis for the courts to abandon that doctrine.” Murphy, *supra* note 4, at 1125.

¹⁶² This Article analogizes stare decisis to a boomerang, rather than, say, a ratchet, because it might well be possible to loosen the doctrine to some limited extent. *See, e.g.*, Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 3 (2004). But complete abrogation, at least through a judicial decision, is an entirely different matter.

¹⁶³ *See* Paul J. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1687 (1974) (arguing that “where the limits are being imposed on the courts themselves . . . the judicial constraints to act in accordance with legislatively imposed limits should be even stronger in order to counter the inherent tendency of any institution to extend its own reach and power”); *see also* *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 444 (1946) (“The fact that this Court promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency.”).

to overcome.¹⁶⁴ Indeed, one need look no further than the nonprecedential decision rules themselves; despite strenuous extrajudicial criticism of these rules, there appears to be little intrajudicial movement toward their abrogation,¹⁶⁵ and the vacated *Anastasoff* decision aside, no federal appellate court has yet invalidated any rule of this nature.¹⁶⁶

Moreover, even if the courts of appeals *were* inclined to consider the propriety of a rule abrogating stare decisis, in what procedural context may the issue be raised? One might attempt to raise the issue directly, in connection with the deprivation of binding precedential effect with respect to some particular decision. But wherein lies the harm, given that this deprivation presumably played no role in, and had no effect on, the underlying decision itself? Alternatively, one might attempt to appeal a lower court's failure to give binding precedential effect to a contrary, prior decision that (but for the operation of the rule) would have been dispositive. The difficulty with that approach, though, is that it seemingly would involve a collateral attack on a prior court's (i.e., the "precedent setting" court's) application of the rule to its prior decision. In other words, even if some later court were inclined to invalidate that court's rule abrogating stare decisis, would the later, nullifying decision necessarily undo all such prior abrogations? Arguably not.¹⁶⁷ Doubtless, the courts of appeals could

¹⁶⁴ See, e.g., Order of Jan. 21, 1963, 374 U.S. 865, 870 (1963) (Black & Douglas, JJ.) (lamenting the "embarrassment of having to sit in judgment on . . . rules which we have approved and which as applied in given situations might have to be declared invalid").

¹⁶⁵ As well summarized by Professor Sloan:

Of course, the federal appellate courts could end the practice on their own by changing their local rules. This is unlikely. The federal appellate courts have placed increasing reliance on non-precedential opinions over the past thirty years, using them as a docket management tool, and are not inclined to abandon the practice unilaterally now.

Sloan, *supra* note 16, at 713 (footnotes omitted).

¹⁶⁶ It is probably overstating the strength of the arguments made in this Article to suggest that the reason might be that these arguments have not yet been adequately considered. Still, the author of this Article is aware of only one case in which such arguments were even made. See Petition for Writ of Certiorari at 12–21, *Test v. Comm'r*, 538 U.S. 961 (2003) (No. 02-1170) (Bradley Scott Shannon, Counsel of Record) (on file with author).

¹⁶⁷ Cf. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374–75 (1940) (discussing generally the effect of a judicial determination of statutory unconstitutionality); 1 NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 2:7 (6th ed. 2002) (discussing same); 1 *TRIBE*, *supra* note 13, § 3-3, at 213–16 (discussing same). Admittedly, the *Anastasoff* panel apparently thought that its invalidation of that court's nonprecedential decision rule had this effect, at least with respect to the precedential case in question. See *Anastasoff v. United States*, 223 F.3d

overcome this nonreviewability paradox, were they so inclined.¹⁶⁸ But the battle to obtain review (let alone victory) in this context might be more steeply uphill than usual.¹⁶⁹

So at least with respect to the various nonprecedential decision rules, the Supreme Court, whether acting in its formal rulemaking capacity¹⁷⁰ or in some inherent supervisory capacity,¹⁷¹ might represent the last, best hope for reform.¹⁷² In the meantime, nonprecedential “precedent” presumably will remain the primary product of the United States Court of Appeals.

898, 899, *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000); *accord* Sloan, *supra* note 16, at 715 (“If the [nonprecedential decision] local rules were invalidated [through adjudication], all previously issued non-precedential opinions, no matter when decided, could change status and become precedential.”). It is not clear, though, that either of these authorities fully considered the ramifications of such a decision.

¹⁶⁸ *Cf.* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712 (1996) (discussing the collateral order doctrine).

¹⁶⁹ *See also* Sloan, *supra* note 16, at 714 (discussing similar obstacles). *See generally* 12 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3153, at 512 (2d ed. 1997) (concluding that “review on appeal seems intrinsically flawed as a method for correcting excesses in local rules”).

¹⁷⁰ *See* 28 U.S.C. § 2072 (2000). As noted previously, though, there also might be problems associated with a rule abrogating such rules. *See supra* note 108.

¹⁷¹ *See* Frazier v. Heebe, 482 U.S. 641, 645, 648 n.7 (1987).

¹⁷² There are some indications (prior inaction notwithstanding) that the Court is not entirely pleased with the current state of affairs. *See* United States v. Edge Broad. Co., 509 U.S. 418, 425 n.3 (1993) (“We deem it remarkable and unusual that although the Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished per curiam opinion.”); County of Los Angeles v. Kling, 474 U.S. 936, 938 (1985) (Stevens, J., dissenting from summary reversal) (“Th[e] decision not to publish the [Court of Appeals for the Ninth Circuit’s] opinion or permit it to be cited—like the decision to promulgate a rule spawning a body of secret law—was plainly wrong.”). *But see* Ruth Bader Ginsburg, *The Obligation to Reason Why*, 37 U. FLA. L. REV. 205, 223 (1985) (“The court [of appeals] . . . should not cite a decision it has labeled as lacking general precedential value.”).

Of course, the Judicial Conference of the United States is also empowered to abrogate these various local nonprecedential decision rules. *See* 28 U.S.C. § 2071(c)(2) (2000). Perhaps Congress is as well. But the fact that neither has yet done so provides little hope that either will do so in the future.