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Constitutional Solipsism: Toward a
Thick Doctrine of Article III Duty; or
Why the Federal Circuits'
Nonprecedential Status Rules are
(Profoundly) Unconstitutional

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**CONSTITUTIONAL SOLIPSISM: TOWARD A THICK
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CIRCUITS' NONPRECEDENTIAL STATUS RULES ARE
(PROFOUNDLY) UNCONSTITUTIONAL**

Penelope Pether*

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A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.¹

Judge Arnold’s opinion in *Anastasoff* is remarkable for its portrayal of our judicial system as guilty of the same kinds of ill-conceived miscalculations that the courts daily unveil in the context of administrative agencies and large corporations.²

[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concerns for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.³

INTRODUCTION

In the post-*Brown* era, many Americans have come to believe that the federal courts, and the judges who embody them, are their best protectors against government overreaching or unfair or unequal treatment at the hands of the state.⁴ It was not

¹ Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

² Salem M. Katsh & Alex V. Chachkes, *Constitutionality of “No-Citation” Rules*, 3 J. APP. PRAC. & PROCESS 287, 290 (2001).

³ *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

⁴ See U.S. COURTS OF APPEALS—NATURE OF SUIT OR OFFENSE IN CASES ARISING FROM THE U.S. DISTRICT COURTS, BY CIRCUIT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2007, tbl.B-7, <http://www.uscourts.gov/judbus2007/appendices/B07Sep07.pdf> (documenting rates and classes of appeals); Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 771 (1983) (concluding that “[t]he swelling influx of cases in large part reflects more legal protections, benefits, and access for those groups that previously only encountered the law as a weapon aimed against them”). For an example of these types of cases, see also Mike Gangloff, *The Invisible Docket*, THE ROANOKE TIMES (Va.), Apr. 27, 2008, at 1, 6

always this way. A small plaque in the National Parks' Service Liberty Bell exhibit in Philadelphia tells an older, different, and abiding story: at one time in the bell's peripatetic history, it was housed in the same building as the federal district court that enforced the Fugitive Slave Act of 1850.⁵

What should the federal courts of appeals do when confronted with assertions from among their ranks that their own judging practices are themselves unconstitutional? Practices such as enacting rules that would strike many common-law lawyers as bizarre, ostensibly for rational reasons, when there is evidence that they function and are in part designed to give cover to shoddy practices, including denying similarly situated litigants equal treatment; systematically structurally subordinating “have-nots;”⁶ and delegating most of their workload to often under-supervised staff whose competence the judges mistrust? Although this Article goes on to propose one answer, another deserves mention: in 2001, a respected intellectual leader of the federal appellate bench⁷ threw a bomb⁸ into the way the federal courts have come to exercise

(documenting the large increase in prison condition lawsuits brought by inmates, especially in the Western District of Virginia and the Fourth Circuit).

⁵ The plaque, located on one of the Liberty Bell Center's exhibit panels, reads as follows: “The Fugitive Slave Act of 1850 strengthened the federal government's commitment to the survival of slavery. It required federal officials to capture and return runaway slaves, and obligated all citizens to cooperate. The United States District Court administered the 1850 Act on the second floor of Independence Hall, above the museum in which the Liberty Bell was enshrined.”

⁶ I am using Marc Galanter's terminology here. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974); see also William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 277, 292 (1996) [hereinafter Richman & Reynolds, *Elitism*] (noting that “those without power receive less (and different) justice,” and registering that “the effect of staff participation is felt most keenly in cases brought by the poor—the group most in need of the services of the federal judiciary”); Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23, 32, 49 (2005) [hereinafter Schiltz, *Citation*] (“Large institutional litigants—and the big firms that represent them—disproportionately receive careful attention to their briefs, an oral argument, and a published decision written by a judge. Others—including the poor and the middle class, prisoners, and pro se litigants—disproportionately receive a quick skim of their briefs, no oral argument, and an unpublished decision copied out of a bench memo by a clerk.”). In addition to the evidence of disproportionately poor outcome for “have-not” litigants whose appeals are effectively adjudicated by court staff, see *infra* notes 55–56 and accompanying text, institutionalized unpublication enables “haves” to “stack the precedential deck” in their favor. Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 958 (1989) [hereinafter Robel, *Myth of the Disposable Opinion*].

⁷ For a posthumous tribute to Judge Richard S. Arnold, see Frank I. Michelman, *Anastasoff and Remembrance*, 58 ARK. L. REV. 555 (2005).

⁸ John Borger and Chad Oldfather called the decision an “explosive charge.” John P. Borger & Chad M. Oldfather, *Anastasoff v. United States and the Debate over Unpublished Opinions*, 36 TORT & INS. L.J. 899, 899 (2001).

Article III office since the late 1950s.⁹ The Eighth Circuit's Judge Richard S. Arnold, since deceased, held that an aspect of the local rules of that circuit, reflected in the rules of each circuit,¹⁰ was unconstitutional because ultra vires Article III power.¹¹ The constitutional infirmity lay in the part of the ubiquitous local "unpublished opinion" rules—developed since the early 1960s¹² as an incident of institutionalizing "unpublication" of judicial opinions—decreeing that unpublished opinions are not precedent (hereinafter "nonprecedential status rules").

Given the nature and scope of his holding in *Anastasoff v. United States*, which had the capacity to undermine the legitimacy of most federal appellate judging and to require a paradigm shift in the way the circuit courts operate, Judge Arnold's metaphorical bomb caused a relatively modest explosion. While a member of the Ninth Circuit shortly thereafter found the opportunity to author an opinion holding that the Ninth Circuit's nonprecedential status rule was constitutional,¹³ what is remarkable is how small the reaction has been.

There was a modest flurry of scholarship on the constitutionality of various aspects of local rules providing for unpublished opinions,¹⁴ much of it in the student

⁹ See, e.g., Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1436–37, 1471–72, 1567–79 [hereinafter Pether, *Inequitable Injunctions*]. This practice has spread to federal district and state courts. See *id.* at 1472–73, 1536–67.

¹⁰ 1ST CIR. R. 32.1.0(a); 2D CIR. R. 32.1(a)(b); 3D CIR. R. 5; 4TH CIR. R. 32.1; 5TH CIR. R. 47.5.3–4; 6TH CIR. R. 206(c); 7TH CIR. R. 32.1(a)(b); 8TH CIR. R. 32.1A; 9TH CIR. R. 36-3(a); 10TH CIR. R. 32.1; 11TH CIR. R. 36-2, 36-3; D.C. CIR. R. 32.1(b)(1)(B), 36(c)(2); FED. CIR. R. 32.1(d); D.C. Circuit Handbook of Practice and Internal Procedures § I.XII.A, at 52 (2007).

¹¹ *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated en banc as moot*, 235 F.3d 1054 (8th Cir. 2000).

¹² See, e.g., Pether, *Inequitable Injunctions*, *supra* note 9, at 1442–74; Amy E. Sloan, *A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule*, 79 IND. L.J. 711, 717–19 (2004) [hereinafter Sloan, *Government of Laws*].

¹³ *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001).

¹⁴ Jessie Allen, *Just Words? The Effects of No-Citation Rules in Federal Courts of Appeals*, 29 VT. L. REV. 555 (2005) (making a Due Process Clause argument on the constitutionality of unpublished opinions); David R. Cleveland, *Draining the Morass: Ending the Judicially Unsound Unpublication System*, 92 MARQ. L. REV. (forthcoming 2009) [hereinafter Cleveland, *Draining the Morass*] (advocating Supreme Court adjudication of the constitutionality of nonprecedential status rules, advancing equal protection and due process arguments against the rules' constitutionality, and briefly summarizing litigant arguments on the constitutionality issue in prior petitions for certiorari); David R. Cleveland, *Overturing the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. APP. PRAC. & PROCESS (forthcoming 2009) (briefly describing earlier arguments for the unconstitutionality of nonprecedential status rules); David Greenwald & Frederick A. O. Schwarz, Jr., *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133 (2002) (making a First Amendment argument on the constitutionality of unpublished opinions); Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43 (2001) (arguing on historical grounds that stare decisis is not constitutionally mandated); Daniel N. Hoffman, *Publicity and the Judicial Power*, 3 J. APP. PRAC. & PROCESS 343 (2001) (arguing on policy grounds that authorizing courts not to

note genre,¹⁵ after Judge Arnold's decision in *Anastasoff* was handed down. Earlier scholarship has advanced various thinly articulated arguments—based variously on separation of powers,¹⁶ due process,¹⁷ and First Amendment¹⁸ grounds—for the

follow precedent, delivering unreasoned judgments, and using inherently political rather than legal methods of decision making are ultra vires Article III); Katsh & Chachkes, *supra* note 2; Amy E. Sloan, *If You Can't Beat 'Em, Join 'Em: A Pragmatic Approach to Nonprecedential Opinions in the Federal Appellate Courts*, 86 NEB. L. REV. 895 (2008) [hereinafter Sloan, *Pragmatic Approach*]; Sloan, *Government of Laws*, *supra* note 12; Melissa H. Weresh, *The Unpublished, Non-Precedential Decision: An Uncomfortable Legality?*, 3 J. APP. PRAC. & PROCESS 175, 193–96 (2001) (briefly asserting that nonprecedential status rules violate due process because they deny “reasoned explanation” and entail “arbitrary adjudication,” and because stare decisis may be “fundamental to the scheme of ordered liberty,” they violate equal protection because they disadvantage the poor and treat similarly situated litigants differently); see also Schiltz, *Citation*, *supra* note 6, at 32, 50–51 (noting that the Advisory Committee on Appellate Rules at one point “allude[d] to a potential First Amendment problem” with citation bans and articulating the possible First Amendment problems with citation bans); Bradley Scott Shannon, *May Stare Decisis Be Abrogated by Rule?*, 67 OHIO ST. L.J. 645 (2006) (making a nonconstitutional case for the illegitimacy of nonprecedential status rules).

¹⁵ Charles R. Eloschway, Note, *Say it Ain't So: Non-Precedential Opinions Exceed the Limits of Article III Powers*, 70 GEO. WASH. L. REV. 632, 633, 643 (2002) (arguing that nonprecedential status rules are ultra vires Article III power on originalist grounds, that U.S. federal courts are common law courts, and, thus, cannot disregard precedent, and that the fettering of litigant argument based on precedent is “substantive” rather than “procedural”); Kenneth Anthony Laretto, Note, *Precedent, Judicial Power, and the Constitutionality of “No-Citation” Rules in the Federal Courts of Appeals*, 54 STAN. L. REV. 1037, 1038 (2002) (making an originalist argument for the constitutionality of precedent as an incident of Article III power while arguing that “no-citation rules are . . . constitutionally justified as applied to decisions that are objectively non-precedential”); Drew R. Quitschau, Note, *Anastasoff v. United States: Uncertainty in the Eighth Circuit—Is There a Constitutional Right to Cite Unpublished Opinions?*, 54 ARK. L. REV. 847, 848 (2002) (arguing that “Judge Arnold was correct and . . . the no-citation rule is unconstitutional because: (1) it violates stare decisis; and (2) it abridges free speech and denies meaningful court access”); Jon A. Strongman, Comment, *Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value is Unconstitutional*, 50 U. KAN. L. REV. 195, 196, 219–20 (2001) (arguing that “refusing to recognize unpublished opinions as precedent potentially violates both the procedural due process and equal protection guarantees of the Fifth Amendment,” and the “fundamental right . . . to a fair judicial process”).

¹⁶ William M. Richman & William L. Reynolds, *The Supreme Court Rules for the Reporting of Opinions: A Critique*, 46 OHIO ST. L.J. 313, 321 & n.54 (1985) (asserting that nonprecedential status rules breach the separation of powers because “a common law court that is not bound by its own decisions has, in some sense, ceased to act purely as a court and may be exercising power that is decidedly nonjudicial,” and that “[a] court deciding cases that lack precedential effect separates its dispute-settling function from its law-making function. Thus, the court leaves behind a substantial part of its essential and inherent judicial functions” (citation omitted)).

¹⁷ David Dunn, Note, *Unreported Decisions in the United States Courts of Appeals*, 63 CORNELL L. REV. 128 (1977).

¹⁸ Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the*

alleged unconstitutionality of the rules and the judging practices that they justify and enable. Two earlier circuit court opinions had also cast doubt on the constitutionality of nonprecedential status rules.¹⁹

Why is the modest reaction to Judge Arnold's *Anastasoff* opinion remarkable? First, every circuit²⁰ has a rule that effectively²¹ renders unpublished opinions nonprecedential *ab initio*. Second, the percentage of federal appellate decisions that are unpublished presently runs at almost eighty-five percent,²² and that percentage is rising.²³ That is, *the vast majority of the opinions issued—which are the products of judging done—in the federal courts are arguably the product of an unconstitutional practice.*

Next, when they make these local rules, courts authorize themselves to decide an issue one way, and then to refuse to decide the appeal of a similarly situated litigant the same way—whether applying a rule or not applying it—without the characteristic reasons for deciding to break from *stare decisis*.²⁴ More troubling still, these opinions cluster in certain kinds of cases,²⁵ where those on the margins of the nation's life—the poor,²⁶

Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?, 50 S. C. L. REV. 235, 248 (1998).

¹⁹ *In re* Rules of the U.S. Court of Appeals for the Tenth Circuit, 955 F.2d 36 (10th Cir. 1992); *Jones v. Superintendent*, Va. State Farm, 465 F.2d 1091 (4th Cir. 1972).

²⁰ *See supra* note 10.

²¹ It is possible to categorize the different rules as more or less completely rendering unpublished opinions nonprecedential. *See Sloan, Pragmatic Approach, supra* note 14, at 918–22.

²² For the twelve-month period ending September 30, 2006, in the twelve circuits that report this data, 84.1% of cases terminated on the merits were determined in unpublished opinions. JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, 2006 JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR 52 (2007), available at <http://www.uscourts.gov/judbus2006/completejudicialbusiness.pdf>.

²³ In the period 1990–2000, the percentage increased from 68.4% to 79.8%. Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 202–03 (2001).

²⁴ *See, e.g., Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833, 854–55 (1992) (noting the importance of *stare decisis*, but acknowledging that, at times, prudential and pragmatic considerations overrule strict adherence to the doctrine). I should register here that there seems nothing problematic with the descriptive fact that different opinions will have different precedential status, depending on the quality of the legal reasoning and whether the issues addressed make it a leading case on a particular issue.

²⁵ *See, e.g., Pether, Inequitable Injunctions, supra* note 9, at 1504–07 (suggesting that disadvantaged groups are more likely to be adversely affected by institutionalized unpublication).

²⁶ *See Richman & Reynolds, Elitism, supra* note 6, at 280 (noting that appeals where “briefing is *pro se*, bad, or non-existent” disproportionately end up on the screening track); Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399, 402 (2002) (noting that *pro se* appeals disproportionately terminate in unpublished opinions); Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 HARV. C.R.-C.L. L. REV. 109 (1995) [hereinafter Slavitt, *Selling the Integrity*] (noting that

persons of color,²⁷ immigrants,²⁸ prisoners,²⁹ members of sexual minority groups³⁰—appeal to the federal courts to do justice. What really drives this marginalization of the marginalized, however, is even more troubling.

Nonprecedential status rules exist because, to paraphrase the Ninth Circuit’s (now Chief) Judge Alex Kozinski, unpublished opinions are “not safe for human consumption,”³¹ because of the “[judicial] fear that they may say something that is *wrong*.”³² Judge Kozinski admitted that “[u]npublished dispositions—unlike opinions—are often drafted entirely by law clerks and staff attorneys.”³³ Later, writing to (then circuit judge) Samuel Alito, he was even more blunt:

Any nuances in language [in unpublished opinions], any apparent departures from published precedent, may or may not reflect the view of the three judges on the panel—most likely not—but they cannot conceivably be presented as the view of the Ninth Circuit Court of Appeals. To cite them as if they were—as if they represented more than the bare result as explicated by some law clerk

appeals brought by the indigent are over-represented in those terminating in unpublished opinions).

²⁷ See, e.g., Pether, *Inequitable Injunctions*, *supra* note 9, at 1445 (documenting the evidence that institutionalized unpublication was developed in response to civil rights appeals, as well as pro se prisoner conviction appeals); Penelope Pether, *Take a Letter, Your Honor: Outing the Judicial Epistemology of Hart v. Massanari*, 62 WASH. & LEE L. REV. 1553, 1585 n.205 (2005) (recording correspondence from Professor Brian K. Landsberg revealing that many important federal district court opinions on race relations were unpublished); Slavitt, *Selling the Integrity*, *supra* note 26, at 110–12 (noting the impact of institutionalized unpublication on members of minority groups).

²⁸ See, e.g., Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 14, 20 & n.104 (2007) [hereinafter Pether, *Sorcerers*] (concluding that asylum cases are often “singled out for decision making by clerks and staff attorneys”).

²⁹ See, e.g., Pether, *Inequitable Injunctions*, *supra* note 9, at 1506 (discussing the evidence that prison conditions litigation appeals are disproportionately screened into the track that culminates in unpublished opinions).

³⁰ See, e.g., *id.* at 1505 n.404 (citing evidence that opinions operate to disadvantage gays).

³¹ Tony Mauro, *Difference of Opinion*, LEGAL TIMES, Apr. 12, 2004, at 10 (quoting Judge Alex Kozinski, who said that “[u]npublished dispositions—unlike opinions—are often drafted entirely by law clerks and staff attorneys There is simply no time or opportunity to fine-tune the language of the disposition When the people making the sausage tell you it’s not safe for human consumption, it seems strange indeed to have a committee in Washington tell people to go ahead and eat it anyway”).

³² William T. Hangle, *Opinions Hidden, Citations Forbidden: A Report and Recommendations of the American College of Trial Lawyers on the Publication and Citation of Nonbinding Federal Circuit Court Opinions*, 208 F.R.D. 645, 651 (2002).

³³ Mauro, *supra* note 31.

or staff attorney—is a particularly subtle and insidious form of fraud.³⁴

Thus, any complete analysis of the constitutional problems with nonprecedential status rules must address more than nonprecedential status rules and their result, that the issuing court is not bound to follow what it holds in unpublished opinions in like cases, which is where the current scholarly focus on the constitutional status of nonprecedential status rules begins and ends. It must also include the widespread de facto delegation of Article III power to persons who are not Article III judges, and who presumptively lack both the qualifications that Article III office demands, and the independence that life tenure and constitutionalized salary protections give Article III officeholders. Independence is particularly significant in the U.S. constitutional context: the types of matters that are overwhelmingly clustered in the corpus of unpublished opinions have the government as defendant.³⁵

Finally, the material practices that led to the development of nonprecedential status rules and are implicated in them mean that what are held out by the courts as appeals as of right can amount, in fact, to no more than bad faith certiorari procedures.³⁶ Thus, an adequate constitutional analysis should address—as none of the earlier jurisprudence or scholarship has—the fundamental right of access to the courts doctrine that lies in the interstices of “fundamental interests” equal protection doctrine and procedural due process, and its intersection with what is within and what is ultra vires Article III power.

In Part I, I document the history of the development of nonprecedential status rules and the practices they justify and enable, the delegation of Article III power to often inadequately supervised adjuncts, and the adjudicatory processes that arguably deny genuine appeals to many federal appellants, enabling the substitution of an

³⁴ Letter from Judge Alex Kozinski, U.S. Court of Appeals for the Ninth Circuit, to Judge Samuel A. Alito, Jr., Chairman, Advisory Comm. On Appellate Rules 7 (Jan. 16, 2004) [hereinafter Kozinski Letter] (on file with the author); see also Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang Over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429, 1487–88 (2005) [hereinafter Schiltz, *Much Ado*] (“Consider . . . the way that the Ninth Circuit handles about 40% of its merits dispositions: A three-judge panel will assemble to decide fifty or more cases in a single day. The judges will generally not read the briefs, the records, or anything else in advance. Instead, they will rely entirely on an oral description of the case provided by a staff attorney. The staff attorney will describe how he or she believes the case should be resolved and present an opinion that he or she has drafted. The panel will glance at the opinion, give its consent, and move on to the next case. It is not uncommon for an appeal to be disposed of in this manner in as few as five minutes.”).

³⁵ See Richman & Reynolds, *Elitism*, *supra* note 6, at 286.

³⁶ A point forcefully made by Richman & Reynolds, *id.*, at 293–96. See also William L. Reynolds & William M. Richman, *The New Certiorari Courts*, 80 JUDICATURE 206, 206–07 (1997); William M. Richman, *An Argument on the Record for More Federal Judgeships*, 1 J. APP. PRAC. & PROCESS 37, 38 (1999).

unsafe certiorari process. I also outline the evidence that most federal appeals are decided by inadequately supervised junior court staff, whose attitudes to “have-not” litigants produce structurally subordinating effects. I go on to document the case law on the constitutionality of nonprecedential status rules.

Part II describes the jurisprudence and legal scholarship on the constitutionality of nonprecedential status rules, beginning with a brief account of constitutional analysis based on the First Amendment, and on due process and equal protection doctrine. It continues by anatomizing three different bodies of work bearing on the question of whether nonprecedential status rules and the practices they justify and enable are ultra vires Article III: originalist and other historical work; narrow scholarship dealing specifically with the constitutionality of nonprecedential status rules and citation bans; and mainstream Article III inherent powers scholarship and contributions to debates about the constitutionality of the doctrine of precedent. It documents the narrow, formalistic, and largely misdirected ultra vires Article III discussion that has taken place thus far, much of which has centered on the citation bans prospectively abolished by Federal Rule of Appellate Procedure (FRAP) 32.1, and the fruitless efforts to find originalist evidence to authorize or negate the constitutionality of nonprecedential status rules. Because prior scholarship has largely failed to inquire into the relevance of work by leading constitutional law and federal courts scholars in determining whether Article III power is consistent with nonprecedential status rules, it engages with Adrian Vermeule’s account of “freestanding” Article III power, and Richard H. Fallon, Jr.’s work on the constitutionality of precedent, the latter of which deals in passing with nonprecedential status rules in the lower Article III courts. Part II concludes, first, by identifying what this body of work suggests is of relevance to a plenary account of Article III power; second, by describing the inadequacies of this prior scholarship for an adequate assessment of the constitutional status of nonprecedential status rules; and third, by exploring two potential doctrinal bases for assessing the rules’ constitutionality, the branch of fundamental interests doctrine dealing with the right of access to the courts, and adjudicatory non-delegation doctrine.

In Part III, I go on to propose a “thick” doctrine of Article III power,³⁷ engaging with three sources: a critical reading of the leading separation of judicial power cases, from *Hayburn’s Case*³⁸ to *Miller v. French*;³⁹ an analysis of whether the doctrine on what Article III power is “essential to the administration of justice”⁴⁰ determines the constitutionality of nonprecedential status rules and the practices they justify and enable; and an account of the guidance to this constitutional inquiry that inconclusive

³⁷ This doctrine is of a kind radically different from that advanced by James Liebman and William Ryan. See James S. Liebman & William F. Ryan, “Some Effectual Power”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696 (1998).

³⁸ *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792).

³⁹ *Miller v. French*, 530 U.S. 327 (2000).

⁴⁰ *Michaelson v. United States*, 266 U.S. 42, 65 (1924).

but relevant bodies of doctrine on nonprecedential status rules and Article III power, discussed in Part II, might provide.

Finally, in Part IV, registering both the practical limitations on “guarding the guardians”⁴¹ in context, and the evidence of the widespread institutional and cultural failure of national judicial ethics implicated in nonprecedential status rules, I move through the analysis of Article III power that results from that engagement to the Article’s conclusion: the generation of a doctrine of Article III duty.⁴² That account is informed by the stakes involved in Article III judging of “others” in the “post-9/11 constitutional” judging context.

I. HISTORY

A. Nonprecedential Status Rules; Delegated Adjudication; and Abbreviated Appellate Processes

Unreported judicial opinions in the U.S. are as old as the inauguration of West’s national reporter service.⁴³ However, institutionalized unpublication developed in the federal courts of appeals in the middle of the twentieth century.⁴⁴ It combines the issuing of a so-called “unpublished,” or not officially reported, opinion⁴⁵ with the assigning of the case, generally at the outset, to a separate judging track (“the screening track”).⁴⁶

The screening track proceeds without oral argument and terminates in the writing of an unpublished opinion—and often the making of the judgment itself⁴⁷—by a junior court staff member, an elbow clerk, or a staff attorney,⁴⁸ with more or less adequate

⁴¹ My (contextually ironic) reference is to MARTIN SHAPIRO, *WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION* (1988), a seminal work on judicial review of administrative action after the development of the U.S. administrative state.

⁴² While nonprecedential status rules also occur at the state appellate level and while the material practices that make them constitutionally suspect also affect the judging practices of federal trial courts, I focus on federal appellate courts in this Article because my interest is in the federal constitutional problems that characterize various aspects of institutionalized unpublication and because of the limited precedential value of district court opinions.

⁴³ See Pether, *Inequitable Injunctions*, *supra* note 9, at 1438 n.8.

⁴⁴ *Id.* at 1437–38.

⁴⁵ These “unpublished” opinions may or may not actually be “published” in the Federal Appendix, on Lexis, Westlaw, a court database, or some other reporting medium.

⁴⁶ For an account of this process as of 2000, see JUDITH A. MCKENNA ET AL., *CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS 7–14* (2000) [hereinafter *FJC CASE MANAGEMENT PROCEDURES*].

⁴⁷ See Pether, *Sorcerers*, *supra* note 28, at 6, 10–17, 33–39 (describing the evidence of delegated adjudication).

⁴⁸ While it is common for “supervisory staff attorneys [to] have career positions . . . line staff attorneys often have limited, [or presumptively limited employment] terms” of two or three years and are frequently as junior as elbow clerks, being employed immediately after law school graduation or within a year or two of graduation. *FJC CASE MANAGEMENT PROCEDURES*, *supra* note 46, at 7.

or genuine supervision by the formally issuing panel. The original assignment to this track during the “screening” process may itself be made by staff rather than by judges,⁴⁹ and although circuits usually have rational criteria— contained in each court’s local unpublished opinion rule— for labeling an opinion “unpublished,” these criteria are frequently not the operative basis for putting cases on the screening track.⁵⁰ Rather, as indicated in the Introduction, certain types of appeals and/or the appeals of certain types of appellants are diverted there when they enter the court: collateral criminal appeals, prison conditions appeals, social security appeals,⁵¹ veterans’ benefits appeals,⁵² asylum appeals, and civil rights appeals⁵³ of varying kinds. The government, often in the form of an administrative agency, is frequently the appellee.⁵⁴

Appellants do disproportionately poorly when their cases are “decided” this way;⁵⁵ there is some good empirical evidence that this pattern of outcomes does not reflect the merits of their cases.⁵⁶ Rather, as I have argued elsewhere,⁵⁷ the poor outcomes

⁴⁹ See, e.g., William M. Richman & William L. Reynolds, *Appellate Justice Bureaucracy and Scholarship*, 21 MICH. J. L. REFORM 623, 628–29 (1988); Richman & Reynolds, *Elitism*, *supra* note 6, at 275 (noting that “[i]n most cases . . . [c]lerks and central staff screen the appeals”).

⁵⁰ Compare FJC CASE MANAGEMENT PROCEDURES, *supra* note 46, at 33–34 tbl.18 (summarizing circuits’ criteria for nonpublication of opinions), *with id.* at 7 (noting that “[i]n some courts, [the staff attorneys] concentrate on pro se cases”), and *id.* at 10 tbl.5 (noting that in the Fifth Circuit “[s]taff attorneys do initial screening for pro se cases, prisoner cases challenging conditions of confinement, habeas corpus cases, civil federal question cases, immigration cases, cases in which the United States is a party, civil rights cases other than Title VII, and Social Security cases”).

⁵¹ See Richman & Reynolds, *Elitism*, *supra* note 6, at 275–76.

⁵² See *id.* at 281.

⁵³ See William M. Richman, *Rationing Judgeships Has Lost Its Appeal*, 24 PEPP. L. REV. 911, 913 (1997).

⁵⁴ See Richman & Reynolds, *Elitism*, *supra* note 6, at 286.

⁵⁵ See, e.g., Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 99–100, 104, 105 (1999) (concluding that while “contrary to popular media accounts, defendants prevail in more than ninety-three percent of reported ADA employment discrimination cases decided on the merits at the trial court level. Of those cases that are appealed, defendants prevail in eighty-four percent of reported cases. These results are worse than results found in comparable areas of the law; only prisoner rights cases fare as poorly. . . . The plaintiff win rate in employment discrimination cases at the district court level, for example, is four times higher in published than in unpublished opinions,” and, thus, that “it appears that reliance on publicly available opinions overstates plaintiffs’ success rates both at trial and on appeal”).

⁵⁶ See, e.g., Thomas Y. Davies, *Gresham’s Law Revisited: Expedited Processing Techniques and the Allocation of Appellate Resources*, 6 JUST. SYS. J. 372, 381–83 (1981) (concluding from his case study of institutionalized unpublication in a state appellate court, which tested his thesis and the conclusions of other scholars of institutionalized unpublication, that hierarchical allocation of adjudicatory resources to differing classes of cases negatively affected outcomes in judicially unpopular criminal appeals, and suggesting both that court staff reversed criminal appeals less frequently than judges, and that differential merit did not explain the difference in outcomes); Deborah Jones Merritt & James J. Brudney, *Stalking*

Secret Law: What Predicts Publication in the United States Courts of Appeals, 54 VAND. L. REV. 71, 117, 119 (2001) (concluding that it “appears . . . that unpublished [unfair labor practices] decisions [in the federal courts of appeals] increasingly rejected union claims between 1987 and 1993, while published opinions showed no such tendency,” and that “outcomes among unpublished opinions [in National Labor Relations Board cases] showed significant associations with political party affiliation, specific professional experiences, and other characteristics of judges adjudicating the cases”); Pether, *Inequitable Injunctions*, *supra* note 9, at 1495–1507. Lauren Robel argues:

Decisions that result in nonpublication have been made in gross rather than individually, at least on the initial level, and judges have few incentives to examine these initial decisions closely. Existing data reveal that judges rarely disagree with the initial decision to decide an appeal on the briefs alone. This means that staff determinations about the relative merits of the cases almost always prevail, and as noted above, staff determinations may be guided largely by the subject matter of the opinion.

In effect, then, the determination not to publish occurs very early in the appellate process, and necessarily so, for to delay the publication decision until after an opinion is written would be to lose the time savings the plans hope to achieve by having judges write with nonpublication in mind. Yet it seems unlikely that it will usually be possible to predict the information value of an opinion before it is written. In fact, many judges have noted how frequently a case’s complexities are revealed through the process of writing an opinion. It seems likely, therefore, that an opinion’s ultimate information value would be hard to predict at the time when the publication decisions are usually made.

All of the circuits have mechanisms by which members of the panel of judges that decides the case can force a decision’s publication. Available information suggests, though, that panel members rarely do this in cases that have been initially identified for nonpublication by staff, perhaps because in many circuits these opinions are drafted by central staff rather than the judges themselves or their own clerks. If the opinions are drafted by staff, judges will have little investment in the final product. Even if a staff attorney, then, believes that the decision warrants publication, that attorney will have to do additional work to justify a publication decision, and the judges will have to do additional work to gain confidence in the staff attorney’s product (or worse, draft an entirely new opinion themselves). In the face of these extra efforts, institutional pressures operate to preserve the initial decision identifying a case for nonpublication.

Robel, *Myth of the Disposable Opinion*, *supra* note 6, 953–54; *see also* Pether, *Sorcerers*, *supra* note 28, at 42–44 (interpreting data analysis in an empirical study of Ninth Circuit asylum cases, *see* David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. CIN. L. REV. 817 (2005), and concluding that while “no matter the party or president who appointed the judge, asylum seekers do worse in unpublished decisions than published ones, although they do worse in the face of Republican panels than Democratic ones. . . . [C]lerks and staff attorneys, aggregated, tend to decide cases against asylum seekers, finding for them in the range of 7.5% to 20.5% of cases, well short of the rate for even Republican-appointed panels, with the difference between the proportion of unpublished opinions finding against asylum-seekers in Republican and Democratic

may be explained by a court culture that disparages these matters and litigants,⁵⁸ and by shoddy decisional practices⁵⁹ that often mean that rather than a genuine appellate review by a panel of Article III judges, what the litigant gets is a denial of certiorari⁶⁰ based on unsafe grounds⁶¹ and made by a junior staff member.

I am not contending here either that every appeal merits oral argument, nor that more than what is legally required by the standard of review prescribed for any category of appellate review should be delivered in any case.⁶² Rather, at least as long as the legislature specifies and the circuit courts hold themselves out as providing appeals to an Article III court as of right,⁶³ I am suggesting that there should be limits to internal court delegation of Article III appellate power to staff that exceed the limits placed on delegation of adjudicatory duties to bankruptcy and magistrate judges; that such limits should, at minimum, reflect standards and practices of supervision and training that make the courts confident that decisions made in the name of Article III judges are likely to be soundly based; and that adjudicatory practices are likewise designed and implemented with safe and fair decision making as firmly in mind as administrative convenience and the efficient rationing of limited adjudicatory resources.

This latter limit would mean, at minimum, an end to “deciding” appeals in cases where the actual—and, arguably, also the nominal—adjudicator has not read such appellate documentation as exists,⁶⁴ and the consistent providing of transparent and

panels plausibly being attributable to the effect of judicial ideology on decisions made in chambers by elbow clerks”).

⁵⁷ See Pether, *Sorcerers*, *supra* note 28.

⁵⁸ *Id.* at 53–60.

⁵⁹ *Id.* at 33–40.

⁶⁰ A decision not to grant appellate review; Richman and Reynolds rightly label this certiorari. See Richman & Reynolds, *Elitism*, *supra* note 6, at 277.

⁶¹ See Pether, *Sorcerers*, *supra* note 28, at 9–17.

⁶² Nor do I expect that in a national adjudicatory context that has institutionalized delegation of a broad range of adjudicatory duties to elbow clerks, despite evidence, for example, that Supreme Court clerks manipulate “cert pool” decisions for naked if naïve and paranoid reasons of professional advancement, see Stephanie Ward, *Clerks Avoid Getting Their DIGs In: They Just Say No to Cert Petitions, as the Court’s Docket Shrinks*, ABA J., Mar. 18, 2007, and has not adopted front-end or transparent appellate load management techniques used elsewhere in the common law world, such as adopting a default rule that losing litigants bear their opponents’ as well as their own costs, or explicit criteria for bringing even primary appeals, most of my readership would dissent from Judge Wald’s conclusion that it is “especially unreal” to expect judges to “do every speck of their work themselves.” Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 766 (1983). I do, however, agree with Justice Alito that delegated adjudicatory practices such as those employed by the Ninth Circuit have gone too far. See *infra* note 69 and accompanying text.

⁶³ For example, see 28 U.S.C. § 1291 (2006), providing for appeals as of right from final decisions, inter alia, of District courts. See also 28 U.S.C. § 1292, §§1294–1296 (2006).

⁶⁴ See Pether, *Sorcerers*, *supra* note 28, at 11–16, 33–37 (surveying evidence about who in the courts of appeals reads what in adjudicating appeals).

informative, if brief, reasons for judicial decisions. It would also require establishing and adhering to procedures ensuring that screening decisions are informed, independent, searching, and made by judges rather than staff, and conducting regular audits to uncover and prevent what Judge Wald called “danger signals includ[ing] the presence of obviously difficult issues or the predominance of certain kinds of cases (for example § 1983 prisoner cases) on one track, inconsistencies between published and unpublished results and rationales, and widely differing rates of published and unpublished opinions among different judges,”⁶⁵ all of which proliferate in the current institutionalized unpublication system.⁶⁶ Finally, as long as nonprecedential status rules persist, meaningful appellate review also requires the development of research protocols and information management practices that minimize the arbitrary decision making authorized by nonprecedential status rules.⁶⁷ Judge Alito put my position more succinctly when, discussing Judge Kozinski’s revelations about the processing of unpublished opinions in the Ninth Circuit,⁶⁸ he said, “If these comments are accurate, the described practices should be changed.”⁶⁹

Further, while adjudicating the volume of federal appellate litigation clearly requires law reform—my own suggestions to this end would include the creating of a class of appropriately qualified judicial adjuncts resembling the federal magistracy and bankruptcy judges but appointed under Article III; the establishing of independent, adequately resourced, and effective federal ombuds to investigate and resolve the majority of prison conditions complaints where appropriate; and reforming underlying

⁶⁵ Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI L. REV. 1371, 1376 (1995) [hereinafter Wald, *Rhetoric of Results*].

⁶⁶ See, e.g., *Wilson v. Layne*, 526 U.S. 603, 616 (1997); *United States v. Edge Broad. Co.*, 509 U.S. 418, 425 n.3 (1993); *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, 261 (5th Cir. 2001), cert. denied, 534 U.S. 1042 (2001); Robel, *Myth of the Disposable Opinion*, supra note 6, at 953–54; Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 312–13 (1990); Wald, *Rhetoric of Results*, supra note 65.

⁶⁷ See, e.g., *Williams*, 256 F.3d at 261 (Smith, J., dissenting) (criticizing successive Fifth Circuit holdings, less than two years apart, in an unpublished and a published opinion respectively, that Dallas Area Rapid Transit did and did not have Eleventh Amendment immunity from suit); see also Merritt & Brudney, supra note 56 (noting that their study uncovered “a surprising number of reversals, dissents, and concurrences . . . suggest[ing] that panels authoring unpublished opinions reach some results with which other reasonable judges would disagree,” and concluding that “failing to give unpublished opinions precedential effect raises the very specter described by the Eighth Circuit [in *Anastasoff*]: that like cases will be decided in unlike ways”).

⁶⁸ Mauro, supra note 31 (quoting Kozinski); Kozinski Letter, supra note 34.

⁶⁹ Samuel A. Alito, *How Did We Get Here? Where Are We Going?*, Keynote Address at the Washington and Lee University Law Review Symposium: *Have We Ceased to be a Common Law Country? A Conversation on Unpublished, Depublished, Withdrawn and Per Curiam Opinions* (Mar. 18, 2005), available at http://www.law.com/pdf/dc/alito_unpublished.pdf.

primary adjudication practices in areas that produce high volumes of appeals with a view to producing independent, good-quality, first-tier adjudication and reducing the demands for appellate adjudication⁷⁰—it is difficult to credit the intellectual honesty of judicial claims that nonprecedential status rules are necessary and should apply to the vast majority of federal courts of appeals merits decisions because the judges need to be free to produce what, with reasonable frequency, may be more than eighty drafts⁷¹ of a small corpus of super-precedential opinions whose authors imagine that this extravagant skewing of scarce adjudicatory resources can foreclose the interpretability⁷² that many would uncontroversially hold to be characteristic of common law adjudication. This is especially the case where members of the federal appellate bench oppose an increase in its size in order to preserve the elite status of their office.⁷³

The official story of the development of nonprecedential status rules, based on the discourse of an overwhelming volume of appeals and an unmanageable archive of precedent,⁷⁴ is that institutionalized unpublication was the product of a formal law reform process that was first instigated in 1964, and took place in the mid-1970s.⁷⁵

⁷⁰ For an especially thoughtful account of rational law reform solutions to the problem of appellate volume, see Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11.

⁷¹ Kozinski Letter, *supra* note 34. It is worth noting in context that Ninth Circuit judges produce an average of twenty published opinions a year. See Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, CAL. LAW., June 2000, at 43–44.

⁷² *Hart v. Massanari*, 266 F.3d 1155, 1176–77 (9th Cir. 2001).

⁷³ See Pether, *Sorcerers*, *supra* note 28, at 22–23.

⁷⁴ There is undoubted validity in these claims. See, e.g., Chad M. Oldfather, *Remedying Judicial Activism: Opinions as Informational Regulation*, 58 FLA. L. REV. 743, 768 (2006) (“The federal courts of appeals in 2003 faced more than fifteen times as many cases as in 1960. While the number of judges has increased over this same period, expansion has not kept pace with the dockets. Appeals per judge have grown by some 450% over this same period.”). However, there is good evidence that much of the “problem” is at least exacerbated by judicial opposition to creating more federal judgeships because of fears of diluting the prestige of the office, and irrational and obtuse or disingenuous allocation of adjudicatory resources. See Pether, *Sorcerers*, *supra* note 28, at 30. Further, the judiciary has been clear since the inauguration of institutionalized unpublication that it was certain types of appeals, not overall volume, that needed aggressive management. See, e.g., Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1493 (1995) (“[A]s the docket is ‘dumbed-down’ by an overwhelming number of routine or trivial appeals, judges become accustomed to seeking routine methods of case disposition. . . . The situation is like that of a competitive tennis player forced to spend the bulk of his time rallying with novices. Just as the player’s competitive edge will erode from lack of peer contact, so are judges’ legal talents jeopardized by a steady diet of minor appeals.”).

⁷⁵ Reynolds and Richman give the most complete account of the process, although they do not register the leading role the Fourth Circuit played in developing institutionalized unpublication. See William J. 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, 1168–72 (1978).

Nonprecedential status rules were not, however, a product of that reform process;⁷⁶ rather, they grew up, without law reform rationalization, alongside institutionalized unpublication. According to one legal historian, when the Federal Judicial Center reported to the Judicial Conference in 1972 that circuits should establish “publication plans,” while it

observed that unpublished opinions would not require the work necessary for an opinion “intended to enter the body of precedent,” that oblique reference to the precedential value of opinions was not understood as a prescriptive point—that unpublished opinions should be assigned no precedential value—but rather as a descriptive one—that unpublished opinions in fact lack precedential value.⁷⁷

The concept of relative precedential authority seems unexceptionable.⁷⁸ However, it has limits: for example, that only four circuits prescribe publication of opinions that “appl[y] an established rule of law to a factual situation significantly different from that in published opinions”⁷⁹ would on some views fall short of what transparency, predictability, fairness, and a principled common law method require.

Those court insiders responsible for developments in institutionalized unpublication have entertained fears that nonprecedential status rules exceed constitutional limits on eradicating precedential status by fiat.⁸⁰ Indeed, when in 1973 one of the bodies involved in reform of federal appellate court publication practices “endorsed the need for a selective publication plan [in the federal courts of appeals] and drafted a model rule,”⁸¹ it expressed the view that including a nonprecedential status rule in the model rule “was inadvisable”⁸² because it would “take[] us into a morass of jurisprudence.”⁸³ At once echoing and focusing this anxiety, during the recent battle

⁷⁶ See Norman R. Williams, *The Failings of Originalism: The Federal Courts and the Power of Precedent*, 37 U.C. DAVIS L. REV. 761, 769–70 (2004).

⁷⁷ *Id.* at 770 n.28 (quoting BD. OF THE FED. JUDICIAL CTR., RECOMMENDATIONS AND REPORT TO APRIL MEETING OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 7 (Mar. 21, 1972)).

⁷⁸ For example, a poorly reasoned case would generally be agreed to have less precedential value than a well-reasoned one, and a leading case more precedential value than one applying a settled rule of law to a non-novel factual scenario.

⁷⁹ FJC CASE MANAGEMENT PROCEDURES, *supra* note 46, at 33 tbl.18.

⁸⁰ See, e.g., *Jones v. Superintendent*, Va. State Farm, 465 F.2d 1091, 1094 (4th Cir. 1972); Williams, *supra* note 76, at 770–71.

⁸¹ See Williams, *supra* note 76 at 770.

⁸² *Id.* at 770–71 (alteration in original) (citing STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS: A REP. OF THE COMMITTEE ON USE OF APPELLATE COURT ENERGIES OF THE ADVISORY COUNCIL FOR APPELLATE JUSTICE 20 (Aug. 1973)).

⁸³ *Id.* at 771 (internal quotations omitted).

to pass FRAP 32.1, prospectively ending citation bans formerly applied by local court rules to unpublished opinions, those leading the rule change process self-consciously stayed away from the nonprecedential status rules that the circuits still maintain, because they were worried about the constitutionality question.⁸⁴

In fact, nonprecedential status rules, like institutionalized unpublication, have their origin in the immediate post-*Brown* period, 1956–1957, and, like institutionalized unpublication, were inaugurated by the United States Court of Appeals for the Fourth Circuit.⁸⁵ While the formal enactment of nonprecedential status rule postdated institutionalized unpublication, then, during the time of and in at least the *geographical* heart of “massive resistance,” the court which began institutionalized unpublication, the United States Court of Appeals for the Fourth Circuit, also began both the practice of delegating Article III power to an institution it likewise inaugurated, the staff attorneys, and the expression of the felt necessity of treating unpublished opinions as nonprecedential.⁸⁶ Additionally, it registered at least some level of anxiety about the constitutionality of its own “peculiar institution.”⁸⁷

In *Jones v. Superintendent, Virginia State Farm*, the United States Court of Appeals for the Fourth Circuit focused on ultra vires Article III and due process concerns in indirectly asserting the *constitutionality* of those aspects of institutionalized unpublication that it invented: denying precedential value to unpublished opinions, delegating at least part of the Article III judicial function in particular types of appeals, and developing the abbreviated appellate “review” used in these screening track cases.⁸⁸ It is worth quoting from *Jones* the language of that constitutional defense:

We believe that our screening procedures and disposition by unreported memorandum decisions accords with due process and our duty as Article 3 judges, but we confess its imperfection. We concede, of course, that any decision is by definition a precedent, and that we cannot deny litigants and the bar the right to urge upon us what we have previously done. But because memorandum decisions are not prepared with the assistance of the bar, we think it reasonable to refuse to treat them as precedent within the meaning of the rule of stare decisis.⁸⁹

⁸⁴ Memorandum from Judge Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules, to Judge Anthony J. Scirica, Chair, Standing Comm. on Rules of Practice & Procedure 30 (May 22, 2003), available at <http://www.uscourts.gov/rules/app0803.pdf> (noting that FRAP 32.1 “takes no position on whether refusing to treat an ‘unpublished’ opinion as binding precedent is constitutional”).

⁸⁵ See *Jones*, 465 F.2d at 1094–96.

⁸⁶ See *id.* at 1094 (“[A]ny decision is by definition a precedent.”).

⁸⁷ See *id.* at 1093–94.

⁸⁸ *Id.* at 1094 (holding that its process of “screening” collateral criminal appeals, using staff to process them, and disposing of them via unpublished opinions “accords with due process” and the court’s “duty as Article 3 judges”).

⁸⁹ *Id.*

Here, then, is the earliest suggestion—cast as a denial—that delegation and abbreviated appellate review violate the Constitution, linked explicitly to treating the unpublished opinions that result as having nonprecedential status.

In its earliest version, institutionalized unpublication of judicial opinions was characterized by solipsistic and convenience-driven law reform and a discourse of necessity masking selective application of the practice to classes of litigants unpopular among judges: those lodging pro se collateral criminal appeals;⁹⁰ there is some evidence that in addition to pro se prisoner post-conviction or “habeas” appeals, institutionalized unpublication “was developed in response to (some) federal judges’ perception that they were being overwhelmed . . . by civil rights . . . litigation.”⁹¹

B. Living History: What Really Goes On in the Sausage Factory

Nonprecedential status rules do not stand alone. They are necessitated by and provide cover for other practices, which raise additional constitutional questions about both the delegation of Article III power and unfairness or procedural deficiencies of various kinds. The latter result both from the delegation of some of the work involved in deciding specific classes of appeals to staff, and from specific types of appeals being designated for the screening track.

Today, on the Ninth Circuit, (which, thanks to Chief Judge Kozinski, is the circuit whose current judging practices we have the most information about), the forty percent of all Ninth Circuit opinions that emerge from “process[ing]”⁹² on the screening track and in which a “merits ruling” is issued are

drafted by [staff attorneys] and presented to a panel of three judges in camera, with an average of five to ten minutes devoted to each case. During a two- or three-day monthly session, a panel of three judges may issue 100 to 150 such rulings. We are very careful to ensure that the *result* we reach in every case is right, and I believe we succeed. But there is simply no time or opportunity for the judges to fine-tune the language of the disposition, which is presented as a final draft by staff attorneys.⁹³

⁹⁰ *See id.* For a flavor of the debates over the balance of federal and state power and the role of federal courts in habeas actions in this period, see *Brown v. Allen*, 344 U.S. 443, 532 (1953) (Jackson, J., concurring); ANTHONY LEWIS, *GIDEON’S TRUMPET* (1964) (describing the increasing federal court control over state criminal cases during the first eleven years of the Warren Court, 1953–1964).

⁹¹ Pether, *Inequitable Injunctions*, *supra* note 9, at 1446.

⁹² Alex Kozinski, *The Appearance of Propriety*, LEGAL AFFAIRS, Jan.–Feb. 2005, at 19.

⁹³ Kozinski Letter, *supra* note 34, at 5. This begs questions about how a judgment can be detached from the reasons for reaching it, and how a “result” detached from reasoning by an Article III judge can fairly be called a judgment.

On the contemporary Ninth Circuit, the staff attorneys, not the judges,

read the briefs, review the record, research the law, and prepare a proposed disposition, which they then present to a panel of three judges during a practice we call “oral screening”—oral, because the judges don’t see the briefs in advance, and because they generally rely on the staff attorney’s oral description of the case in deciding whether or not to sign on to the proposed disposition.⁹⁴

It is unsurprising, then, that “[a]fter you decide a few dozen such cases on a screening calendar, your eyes glaze over, your mind wanders, and the urge to say O.K. to whatever is put in front of you becomes almost irresistible,”⁹⁵ particularly as “[i]t is common for a panel to spend as little as five minutes on an unpublished opinion.”⁹⁶

The federal courts are a black box⁹⁷ into which outsider scholar vision is partial,⁹⁸ but what slips or is passed out suggests that practices about delegating Article III judging to staff vary across the federal appellate system and within courts. Some courts use judges themselves to screen cases to the staff processing track.⁹⁹ Hopefully, some actually follow their own criteria for screening or heed former Judge Wald about the kinds of screening practices that should give a court pause.¹⁰⁰ Some courts rely less on staff attorneys than do the Ninth and Second Circuits.¹⁰¹ Courts can, too, train

⁹⁴ Kozinski, *The Appearance of Propriety*, *supra* note 92.

⁹⁵ *Id.* at 19–20; *see also* RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 162 (2d ed. 1996) (recording the “tendency to sign on the dotted line with little real consideration of the case”).

⁹⁶ Schiltz, *Citation*, *supra* note 6, at 33. Schiltz does not confine this account to the activities of the Ninth Circuit.

⁹⁷ *See* David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1670 (2004).

⁹⁸ *See, e.g.*, Richman & Reynolds, *Elitism*, *supra* note 6, at 290.

⁹⁹ *See* ROBERT TIMOTHY REAGAN ET AL., FED. JUDICIAL CTR., *CITING UNPUBLISHED OPINIONS IN FEDERAL APPEALS* 76 (2005) [hereinafter FJC REPORT] (claiming that while other circuits “employ legions of staff attorneys to process” unpublished opinions, on the Federal Circuit “non-precedential opinions are handled in chambers”); *see also* FJC CASE MANAGEMENT PROCEDURES, *supra* note 46, at 8–10, tbl.5 (indicating that, as of 2000, in the Tenth Circuit all screening is done by judges, and that on the Third and Fifth Circuits some screening is done by judges).

¹⁰⁰ *See* Wald, *Rhetoric of Results*, *supra* note 65 (noting “danger signals” in screening practices).

¹⁰¹ *See* Former Chief Judge Edward R. Becker, Statement to Advisory Committee on Appellate rules (Apr. 13, 2004), http://nonpublication.com/Becker_statement.pdf (noting, in relation to Third Circuit practice, that “[m]ost [unpublished opinions] are *not* cursory; in fact they average over seven pages. . . . [T]hey uniformly set forth the ratio decidendi of the decisions. These opinions are prepared in chambers under the close supervision of the judge. They are usually drafted by clerks but, to repeat, carefully reviewed and edited by Judges. In

and supervise staff well, and seek to appoint staff attorneys who have the intellect, character, knowledge, skills, and practice experience to do better work in exercising Article III power than is often the case.

Some judges see their responsibility to the bulk of the federal courts' judging practice as more than that of editors of draft opinions.¹⁰² Some judges on screening panels do try to have all the relevant documents read and the law researched in chambers by themselves and/or their elbow clerks before participating in mass oral presentation by staff and virtual opinion-signing (or rather signing off on) sessions.¹⁰³

There is evidence that at least some courts do none of these things.¹⁰⁴ Judge Posner has written that

[t]oday, most judicial opinions, including many Supreme Court opinions, are ghostwritten by law clerks. Many appellate judges have never actually written a judicial opinion. Some judges do expansive editing of their law clerks' opinion drafts, others not, and this is the pattern in the Supreme Court as well as in the lower courts.¹⁰⁵

my chambers they are written by me"); see also Stephen L. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. CAL. INTERDISC. L.J. 67, 83–84 (2004) (noting that Seventh Circuit unpublished opinions in some cases in which an *Anders* brief has been filed are comparatively thoroughly reasoned, that in the Fourth Circuit and Eighth Circuit even "canned" unpublished opinions "provide some reason beside boilerplate," and that "dispositions of the Sixth Circuit are often of moderate length or longer"). Wasby's addition of "like those in the Ninth Circuit," *id.* at 84, to that final phrase both conflicts with his earlier account of the use of uninformative formulaic opinions on the Ninth Circuit, *id.* at 79–80, and suggests that reliance on staff attorneys may enable more relatively lengthy unpublished opinions, without necessarily improving their quality. I have recently been (reliably) informed that the judges of at least one circuit deal with staff dispositions of screened cases via email, not even meeting for the screening panel procedures used by the Ninth Circuit.

¹⁰² See, e.g., Wasby, *supra* note 101, at 88–89, nn.94 & 97–98 (including the opinion that "[t]here must be better ways to make our clerks feel good" than publishing their "slightly revised bench memos" as unpublished opinions (quoting Memorandum from Judge Alfred T. Goodwin to Ninth Circuit Bench Colleagues (Aug. 4, 1998))).

¹⁰³ See Pether, *Sorcerers*, *supra* note 28, at 34 n.213 (reporting a conversation with a former Ninth Circuit clerk indicating that in the chambers in which the former clerk served, much work was done in chambers to prepare the judge for screening panels).

¹⁰⁴ See Schiltz, *Citation*, *supra* note 6, at 35 (noting that unpublished opinions are "written quickly by court staff or law clerks, and judges give them only cursory attention"); see also Carolyn Dineen King, Comment, *A Matter of Conscience*, 28 HOUS. L. REV. 955, 957–58 (1991) (quoting William Rehnquist, Chief Justice, U.S. Supreme Ct., *The Cult of the Robe*, Remarks at the Annual Dinner of the American Bar Association (Aug. 9, 1976)); Hon. Stephen Breyer, *Administering Justice in the First Circuit*, 24 SUFFOLK U. L. REV. 29, 32–33 (1990).

¹⁰⁵ Richard A. Posner, *The Supreme Court, 2004 Term: Foreword: A Political Court*, 119 HARV. L. REV. 31, 61 (2005).

Judging is delegated overtly for reasons of efficiency; thus, it is unlikely that most or even many judges read the documents,¹⁰⁶ or do more than edit or sign off on completed opinions—that would duplicate work.¹⁰⁷ Sometimes even the staff, the people actually making the decisions, may not read the papers.¹⁰⁸ And, thus, it is unsurprising that nonprecedential status rules exist because the people who are doing most of the Article III judging get it wrong.¹⁰⁹

It is not just nuances of language or “apparent departures from published precedent”¹¹⁰—getting the articulation of the applicable law wrong¹¹¹—for which clerks or staff attorneys are responsible. It can also be getting the decision itself “wrong,” by making that decision,¹¹² for example, without reading the transcript of the underlying trial,¹¹³ or without sufficient knowledge and experience to make the judgment the matter calls for,¹¹⁴ or with inadequate basic legal skills to do the research¹¹⁵ and analysis that might lead to a sound review to the required standard.

¹⁰⁶ See Kozinski, *The Appearance of Propriety*, *supra* note 92 (noting that on the Ninth Circuit, judges on screening panels do not read even the briefs in advance of “deciding” cases).

¹⁰⁷ See Wasby, *supra* note 101, at 93 & n.116 (noting the admission by Ninth Circuit Judge Goodwin that “we spend very little judge time now” on screening track cases); *see also id.* at 95 (noting Judge Goodwin’s acknowledgment that judges “rely on recent graduates from supposedly excellent law schools for the writing and most of the editing” of unpublished opinions and “we all know that a lot of that stuff is written by externs and checked by law clerks” (quoting E-mails from Judge Alfred T. Goodwin to Stephen L. Wasby (Aug. 4, 2000 and Apr. 6, 2000)) (internal quotation marks omitted)).

¹⁰⁸ See Pether, *Sorcerers*, *supra* note 28, at 14–15 (analyzing evidence demonstrating that staff may decide cases without reference to any part of the appellate record).

¹⁰⁹ *See id.* at 25–26 (noting that elbow clerks can miss even Supreme Court cases in doing research); *see also* FJC REPORT, *supra* note 99, at 68, 70–71, 73.

¹¹⁰ Kozinski Letter, *supra* note 34.

¹¹¹ For evidence of this phenomenon, see Wasby, *supra* note 101, at 78 (citing an unpublished study, Michael Wepsiec & Stephen L. Wasby, *Ninth Circuit Border Searches: Doctrines and Inconsistencies* (2000)). Wasby’s generally uncritical account of unpublished opinion cases was based on privileged access to the decisional practices of the Ninth Circuit, *see id.* at 69, and he notes that in “chambers [of judges formally signing an opinion but] not doing the writing, . . . the judge may simply direct that no cite check be performed or may ask only for a ‘lite cite check’ rather than a more extensive one,” *id.* at 95. *See also* Schiltz, *Citation*, *supra* note 6, at 33 (noting that “because unpublished opinions are hurriedly drafted by staff and clerks, and because they receive little attention from judges, they often contain statements of law that are imprecise or inaccurate”).

¹¹² *See* Schiltz, *Much Ado*, *supra* note 34, at 1483 (noting that judges who opposed the passage of FRAP 32.1 opposed it because they thought it would lead to the end of nonprecedential status rules: “The courts of appeals have issued hundreds of thousands of unpublished opinions, and judges have no idea what is in them. They know, however, that those opinions generally are not as well crafted as published opinions and often were not carefully scrutinized by any judge”).

¹¹³ *See supra* note 108 and accompanying text.

¹¹⁴ JONATHAN MATTHEW COHEN, *INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS* 148 (2002).

¹¹⁵ *See* Pether, *Sorcerers*, *supra* note 28, at 25–27.

There is also evidence that the staff, exercising most Article III appellate power, practice systematically biased anti-appellant decision making,¹¹⁶ often in cases where the appellee is the federal government or one of its administrative agencies. This has a negative impact on members of already structurally subordinated groups.¹¹⁷

Further, when basic documents are not read by anyone, or by anyone with the competence to discern reversible error, for example, what happens on the screening track¹¹⁸ may not be genuine appellate review, albeit conducted by staff rather than judges, but inadequate second-class processing that functions de facto as a certiorari process.¹¹⁹ Indeed, just like meaningful appellate review, the implicit value of *panel* appellate review ostensibly practiced in the courts of appeals—the avoidance of bias or partiality—is functionally undermined when the exercise of Article III judicial power is de facto delegated to a single junior and often inexperienced court staff member. This is particularly the case when that staff member works in a culture that stigmatizes screened cases as frivolous or boring or lacking merit.¹²⁰

These employees work in an environment that engenders disrespect for certain types of litigants, and boredom and professional status anxiety in deciding their cases.¹²¹ The work culture encourages shoddy decision-making practices, ranging from overt disparagement of litigants, to not reading key documents, to making decisions for federal appellate courts when one knows little about the world or the law, to generating disingenuous rationales for institutionalized unpublication,¹²² to normalizing a decision-making charade in which one appears before three judges who

¹¹⁶ See *supra* notes 55–56 and accompanying text.

¹¹⁷ See Pether, *Inequitable Injunctions*, *supra* note 9, at 1504–07; Pether, *Sorcerers*, *supra* note 28, at 20–21, 27–32, 39–45.

¹¹⁸ Using the (resource-expensive) panel system as cover for staff decision making rather than, for example, using randomized single judge review to grant or deny certiorari, or alternatively to decide appeals, not only lacks transparency, but also compromises the efficiency end that is used to justify the means of the system of delegation.

¹¹⁹ See POSNER, *supra* note 95 (noting that in screened cases, conferences between the judges on the panel may also be abandoned, increasing the unlikelihood that any real judicial consideration of such an appeal will take place). It also tends to produce the “affirmance effect” registered by Guthrie and George. See Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the “Affirmance Effect” on the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 357 (2005).

¹²⁰ See, e.g., Pether, *Sorcerers*, *supra* note 28, at 56–58.

¹²¹ JOE S. CECIL & DONNA STIENSTRA, FED. JUDICIAL CTR., DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS 72–74 (1987).

¹²² Compare Kozinski & Reinhardt, *supra* note 71, which reasons that nonprecedential opinions are necessary to keep published, precedential law “clean” and that it “is important to omit irrelevant facts [from unpublished opinions] that could form a spurious ground for distinguishing the opinion,” with Wasby, *supra* note 101, at 79, which notes that “there are numerous [Ninth Circuit] memdispos containing extensive fact statements,” which Wasby speculates “may result from the court’s issuing an only slightly recycled clerk-prepared bench memorandum as its disposition.”

typically know little and may know nothing about the cases they are deciding that you can decide for them, and dispose of scores of cases in a short session.¹²³

Although litigants have appeals as of right to the federal courts of appeals, what happens in a wrongly or sloppily or unsafely or arbitrarily decided case is effectively a certiorari decision masquerading as an appeal as of right based on the applicable standard of review. Many of these cases cluster in areas where deep-seated socio-legal problems produce high rates of appeals, where the government is the target of the lawsuit, and the paradigmatic governmental response (often by more than one of the three—or four—branches) is to jurisdiction strip,¹²⁴ to attempt to control decision making by non-independent officers both by removing decisional responsibility from them¹²⁵ and by employing disciplinary mechanisms to encourage them to decide against litigants,¹²⁶ and to impose penalties that are designed to discourage appeals.¹²⁷

C. History of Unconstitutionality Jurisprudence

Judge Arnold was not, as indicated above, the first federal appellate judge to manifest an awareness of the constitutional problem constituted by nonprecedential status rules. The Fourth Circuit judges who began the practice of “institutionalized unpublication”¹²⁸ in the late 1950s both branded these opinions nonprecedential,¹²⁹ and registered the intellectual embarrassment inherent in doing so.¹³⁰ They claimed, defensively, that there were no Article III or due process problems with the various institutionalized unpublication practices that denying precedential status to unpublished opinions justified and enabled.¹³¹

The quickly silenced murmur of the collective judicial conscience in Richmond in 1972 was next discernible two decades later in Denver. On Valentine’s Day in 1992, the entire bench of the United States Court of Appeals for the Tenth Circuit handed down a curious opinion, published in the Federal Reporter under the cumbersome title *Re: Rules of U.S. Court of Appeals for Tenth Circuit, Adopted Nov. 18*.¹³² The

¹²³ See *supra* notes 104, 107.

¹²⁴ See, e.g., Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 375 (2006); Richman & Reynolds, *Elitism*, *supra* note 6, at 326–27, 331–34 (documenting the federal courts’ encouragement of jurisdiction stripping).

¹²⁵ See, e.g., Legomsky, *supra* note 124, at 372–73.

¹²⁶ See, e.g., *id.* at 373–77.

¹²⁷ I have in mind here the provisions of the Prison Litigation Reform Act imposing filing fees on claims made by even indigent prisoners, 28 U.S.C. § 1915(b)(1)–(2) (2006), and the “three strikes” bar, *id.* § 1915(g).

¹²⁸ Pether, *Inequitable Injunctions*, *supra* note 9, at 1437.

¹²⁹ See *Jones v. Superintendent*, Va. State Farm, 45 F.2d 1091, 1094 (4th Cir. 1972), *cert. denied*, 410 U.S. 944 (1973).

¹³⁰ See *id.*

¹³¹ See *id.*

¹³² 955 F.2d 36 (10th Cir. 1992).

court ordered the publication of a previously suppressed dissent more than five years old.¹³³ Attacking the “essential [in]justice and fundamental [un]fairness” of non-precedential status rules, Chief Judge Holloway went on to suggest that they may be unconstitutional: “to deny a litigant this right may well have overtones of a constitutional infringement because of the arbitrariness, irrationality, and unequal treatment of the rule.”¹³⁴

Inferentially, the bases of the problematic constitutional status of the Tenth Circuit’s nonprecedential status rule were (1) violations of both the due process guarantee of the Fifth and Fourteenth Amendments, and the Equal Protection Clause of the Fourteenth Amendment,¹³⁵ and (2) the suggestion that it was ultra vires Article III judicial power.¹³⁶

At that stage, the Supreme Court had passed up “two opportunities to rule on the constitutionality of the Seventh Circuit’s no-citation rule,”¹³⁷ denying certiorari in one case¹³⁸ and not reaching the issue in the second.¹³⁹ It has since consistently denied

¹³³ See Williams, *supra* note 76, at 778 & n.64.

¹³⁴ *Re Rules*, 955 F.2d at 37 (Holloway, C.J., dissenting).

¹³⁵ *Id.*

¹³⁶ *Id.* at 37 n.1 (“In *Jones v. Superintendent, Virginia State Farm*, the Fourth Circuit expressed the view that its procedure for screening and disposing of cases by unpublished decisions accords with due process and the court’s duty as Article 3 judges. However, although the court said it would not treat its unpublished decisions as precedent and said it prefers they not be cited, it acknowledged that it *cannot deny litigants and the bar the right to urge upon us what we have previously done*. . . . [A]t least one commentator has expressed concern over the due process and equal protection implications of no-citation rules adopted in the federal courts.” (citations omitted)).

¹³⁷ *Id.* (“In *Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit*, the Court, in a single sentence disposition, denied leave for the petitioners to file petitions for writs of mandamus and prohibition after the Seventh Circuit struck the petitioners’ citation of an unpublished decision. In *Bowder [sic] v. Director, Department of Corrections of Illinois*, the Court did not mention the no-citation question, although it had granted certiorari on the issue.” (citations omitted)). David Cleveland catalogs an additional two denials of certiorari before 1992. David R. Cleveland, *Draining the Morass*, *supra* note 14 (manuscript at 4 n.14) (citing *Friedman v. Montgomery County*, 489 U.S. 1042 (1996); *Van Sant v. U.S. Postal Serv.*, 475 U.S. 1082, 476 U.S. 1131 (1986)).

¹³⁸ *Do-Right Auto Sales v. U.S. Court of Appeals for the Seventh Circuit*, 429 U.S. 917 (1976). The Seventh Circuit’s reply brief in the certiorari application in *Do-Right* responded in terms that suggest the relevance of the petitioners’ grounds for appeal to a consideration of whether nonprecedential status rules and delegation of Article III power is within judicial power. The circuit court argued that the “[petitioners’] case against the rule is grounded in the doctrine of *stare decisis*,” which they classified as “judicially-created policy” rather than constitutionally mandated: “Courts do modify and overrule their prior decisions. By definition, therefore, courts do have authority to determine whether a given decision has value as a precedent for future cases.” *Dunn*, *supra* note 17, at 143.

¹³⁹ *Browder v. Dir., Dep’t of Corr. of Ill.*, 434 U.S. 257, 258 (1978).

certiorari.¹⁴⁰ Subsequent to those two cases, in what are arguably the two most frequently cited cases in the literature on institutionalized unpublication, panels of the Eighth and Ninth Circuits successively ruled respectively that their circuits' unpublication rules were unconstitutional because they were ultra vires Article III power, and constitutional.¹⁴¹

In *Anastasoff*, the Eighth Circuit held that the rule "that declares that unpublished opinions are not precedent is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the 'judicial.'"¹⁴² The author of that opinion, Judge Richard Arnold, had the previous year (in an article highly critical of the Eighth Circuit's nonpublication rule) written:

Article III [judges] . . . can exercise no power that is not "judicial." That is all the power that we have. When a governmental official, judge or not, acts contrary to what was done on a previous day, without giving reasons, and perhaps for no reason other than a change of mind, can the power that is being exercised properly be called "judicial"? Is it not more like legislative power, which can be exercised whenever the legislator thinks best, and without regard to prior decisions? In other words, is the assertion that unpublished opinions are not precedent and cannot be cited a violation of Article III?¹⁴³

In both opinion and article, Judge Arnold characterized unprincipled and unreasoned decision making of the kind justified and enabled by nonprecedential status rules as akin to legislating.¹⁴⁴

¹⁴⁰ *Schmier v. Supreme Court of Ca., cert. denied*, 543 U.S. 818 (2004). David Cleveland documents an additional thirty denials. See Cleveland, *Draining the Morass*, *supra* note 14, (manuscript at 4 n.14).

¹⁴¹ See *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001); *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot en banc*, 235 F.3d 1054 (8th Cir. 2000).

¹⁴² *Anastasoff*, 223 F.3d at 899.

¹⁴³ Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 226 (1999).

¹⁴⁴ See, e.g., *Anastasoff*, 223 F.3d at 905 ("The judicial power of the United States is limited by the doctrine of precedent. Rule 28A(i) allows courts to ignore this limit. If we mark an opinion as unpublished, Rule 28A(i) provides that is not precedent. Though prior decisions may be well-considered and directly on point, Rule 28A(i) allows us to depart from the law set out in such prior decisions without any reason to differentiate the cases. This discretion is completely inconsistent with the doctrine of precedent; even in constitutional cases, courts have always required a departure from precedent to be supported by some special justification. Rule 28A(i) expands the judicial power beyond the limits set by Article III by allowing us complete discretion to determine which judicial decisions will bind us and which will not. Insofar as it limits the precedential effect of our prior decisions, the Rule is therefore unconstitutional." (internal citations and quotation marks omitted)).

He relied for that characterization on the centrality to Article III power of a principled understanding of precedent, which “must be applied in subsequent cases to similarly situated parties,”¹⁴⁵ “is based on reason, not *fiat*,”¹⁴⁶ and may be departed from “[i]f the reasoning of a case is exposed as faulty, or if other exigent circumstances justify it,”¹⁴⁷ providing that the “burden of justification” is discharged.¹⁴⁸ This requires the giving of reasons.¹⁴⁹

¹⁴⁵ *Id.* at 900 (citing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)). *Beam* is a case on the narrow question of retroactive application of newly established precedent in civil cases, and the section of the opinion cited, for all its relatively unexceptionable nature, was adopted by only two Justices. *Beam*, 501 U.S. at 531. The concurring opinion of Justice Scalia, joined by Justices Marshall and Blackmun, although likewise uttered in the case’s specific context, contains dicta of some use to determining what the Supreme Court’s authority on the question of Article III power provides. Justice Scalia writes:

“The judicial power of the United States” conferred upon this Court and such inferior courts as Congress may establish, Art. III, § 1, must be deemed to be the judicial power as understood by our common-law tradition. That is the power “to say what the law is,” not the power to change it. I am not so naïve (nor do I think our forebears were) as to be unaware that judges in a real sense “make” law. But they make it *as judges make it*, which is to say *as though* they were “finding” it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be. Of course this mode of action poses “difficulties of a . . . practical sort,” when courts decide to overrule prior precedent. But those difficulties are one of the understood checks upon judicial lawmaking; to eliminate them is to render courts substantially more free to “make new law,” and thus to alter in a fundamental way the assigned balance of responsibility and power among the three branches.

Id. at 549 (citations omitted). Justices Souter and Stephens also identify the retrospective operation of newly announced precedent as being based on the “equality principle, that similarly situated litigants should be treated the same.” *Id.* at 540. The *Cohens* citation is even more tenuous: it indicates that dicta does not control subsequent cases.

[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

19 U.S. at 399–400.

¹⁴⁶ *Anastasoff*, 223 F.3d at 904.

¹⁴⁷ *Id.* at 904–05.

¹⁴⁸ *Id.* at 905.

¹⁴⁹ *Id.*

Judge Arnold framed his constitutional holding in *Anastasoff* in terms of an originalist theory of constitutional interpretation,¹⁵⁰ the plausibility of which is discussed in Part II.A.2.a. However, Judge Arnold's vision of Article III power is based on equality of treatment by judges of those who appeal to the federal courts, and the separation of powers understood as a check on unfettered or unprincipled exercises of governmental power.¹⁵¹ Additionally, the emphasis on reasoned decision making (of which that part of a judicial opinion that sets out what in other common law countries are called the "reasons for judgment" is the trace or symbolic performance) and on making decisions based in something more than mere policy suggests that the judicial power gestured towards by Judge Arnold¹⁵² is both distinctively legal rather than political, and that the judge has a responsibility to the law as well as to those on whom she passes judgment.

Judge Arnold's rhetoric of reasoning emphasizes facticity,¹⁵³ as well it might; it is attentiveness to facticity which enables common law legal development or change.¹⁵⁴ Such a model of the doctrine of precedent as necessary for legal change is not, however, the sum of Judge Arnold's constitutional case.¹⁵⁵ He expands on the constitutional logic of the separation of Article III power, reasoning that the separation of judicial and legislative power protects individual freedom.¹⁵⁶ There is a collateral invocation of judicial expertise,¹⁵⁷ and Judge Arnold makes an appeal to the role of

¹⁵⁰ *Id.* at 899–900.

¹⁵¹ *See id.* at 900.

¹⁵² *See id.* at 900–01.

¹⁵³ *Id.* at 902 (“Hamilton, like Blackstone, recognized that a court ‘pronounces the law’ arising upon the facts of each case. [Hamilton] explained the law-declaring concept of judicial power in the term, ‘jurisdiction’: ‘This word is composed of *JUS* and *DICTIO*, *juris dictio*, or a speaking and pronouncing of the law,’ and concluded that the jurisdiction of appellate courts, as a law-declaring power, is not antagonistic to the fact-finding role of juries.” (citations omitted)).

¹⁵⁴ Thanks are due to Judith Resnik, Arthur Liman Professor, Yale Law School, for this insight.

¹⁵⁵ *Anastasoff*, 223 F.3d at 901 (“In addition to keeping the law stable, this doctrine is also essential, according to Blackstone, for the separation of legislative and judicial power.”). This rhetorical gesture makes an implicit appeal in a cultural context where “activist judge” carries the same kind of ideological freight and invites the same kind of opprobrium as does “political correctness” and “sexual preference.”

¹⁵⁶ *Id.* at 901 (“In his discussion of the separation of governmental powers, Blackstone identifies this limit on the ‘judicial power,’ i.e., that judges must observe established laws, as that which separates it from the ‘legislative’ power and in which ‘consists one main preservative of public liberty.’”).

¹⁵⁷ *Id.* at 903 (“Hamilton anticipated that the record of federal precedents ‘must unavoidably swell to a very considerable bulk. . . .’ But precedents were not to be recorded for their own sake. He expected judges to give them ‘long and laborious study’ and to have a ‘competent knowledge of them.’ Likewise, Madison recognized ‘the obligation arising from judicial expositions of the law on succeeding judges.’ Madison expected that the accumulation of

precedent and transparent and reasoned decision making in keeping the judiciary honest.¹⁵⁸ Emphasis is placed on democracy, and on the virtues that a common law system has over a civil law system for constraining (implicitly tyrannical) royal or executive power.¹⁵⁹ As is characteristic of judicial and much scholarly discourse on the purported unconstitutionality of nonprecedential status rules, then, Judge Arnold wields a broad brush, sounding in fundamental constitutional values rather than the intricacies of the available doctrine.¹⁶⁰

Anastasoff was subsequently vacated as moot for reasons irrelevant to the Article III constitutional point; this had the formal effect, nonetheless, of vacating its constitutional holding.¹⁶¹ A year later, in *Hart v. Massanari*, Judge Alex Kozinski, writing for a panel of the United States Court of Appeals for the Ninth Circuit, held constitutional the Ninth Circuit's nonprecedential status rule.¹⁶²

While the most material jurisprudential difference between the *Anastasoff* and *Hart* opinions is arguably the differing account of the doctrine of precedent given in each case, and the implications, derivable from *Hart*, that the U.S. federal courts are not, strictly speaking, common law courts,¹⁶³ these issues are beyond the scope of the present Article. The two opinions, however, have something in common of salience here: making substantively opposing arguments about what the limits of Article III judicial power are (with respect to declaring opinions nonprecedential), both the *Anastasoff* and *Hart* courts nonetheless appeal to the *doxa* of judicial restraint.

Judge Kozinski's account of Article III power in *Hart* likewise differs from that advanced in *Anastasoff* in that it seeks authority for a doctrine of Article III power

precedents would be beneficial: '[a]mong other difficulties, the exposition of the Constitution is frequently a copious source, and must continue so until its meaning on all great points shall have been settled by precedents.'" (alteration in original) (citations omitted)).

¹⁵⁸ *Id.* at 902 n.12 ("In a government which is emphatically styled a government of laws, the least possible range ought to be left for the discretion of the judge . . . perhaps nothing conduces more to that object than the publication of reports. Every case decided is a check upon the judge. He can not decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public." (quoting William Cranch, Preface, 1 Cranch iii (1804))).

¹⁵⁹ *Id.* ("Other early authorities confirm the connection between the doctrine of precedent and the separation of powers. See 1 *Kent's Commentaries*, Lect. XXI at 479: 'Those nations, which have adopted the civil law as the main foundation of their own [recognize precedent to a far less degree than our own]. . . . With them the necessity of judiciary independence upon the executive, is not so clearly acknowledged. . . . It has been shown already that this independence requires, in a considerable degree, the acknowledgment of precedential authority.'" (alteration in original)).

¹⁶⁰ *See id.* at 903.

¹⁶¹ *See Anastasoff v. United States*, 235 F.3d 1054, 1056 (8th Cir. 2000) (vacating on rehearing en banc the prior *Anastasoff* opinion).

¹⁶² 266 F.3d 1155 (9th Cir. 2001).

¹⁶³ *Compare Anastasoff*, 223 F.3d 898, with *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001).

that is more than purely descriptive,¹⁶⁴ that is, that has any content, in the explicit, constitutionally textualized jurisdictional limitation to “rule only in ‘Cases’ or ‘Controversies’”;¹⁶⁵ or in “explicit [constitutional] constraints, such as the requirements of due process, trial by jury, the availability of counsel in criminal cases, the ex post facto clause and the prohibition against bills of attainder.”¹⁶⁶

Concluding that “[t]he judicial power clause . . . has never before been thought to encompass a constitutional limitation on how courts conduct their business,”¹⁶⁷ Judge Kozinski advances an argument against recognizing the existence of a substantive Article III power, should one exist. His argument is paradoxically framed in terms of restraint and yet nakedly instrumentalist: “If we nevertheless were to accept *Anastasoff*’s premise that the phrase ‘judicial Power’ contains limitations separate from those contained elsewhere in the Constitution, we should exercise considerable caution in recognizing those limitations, lest we freeze the law into the mold cast in the eighteenth century.”¹⁶⁸

The dangers of constitutionalizing common law rules are enhanced “when the constitutional rule in question is not explicitly written into the Constitution, but rather is discovered for the first time in a vague, two-centuries-old provision.”¹⁶⁹ Such rules attract “[t]he risk that this will allow judges to pick and choose those ancient practices they find salutary as a matter of policy, and give them constitutional status,”¹⁷⁰ an instrumentalist vice of which Judge Kozinski goes on to accuse Judge Arnold.¹⁷¹ Common law practices at the date of the drafting of the Constitution, he reasons, should only be constitutionalized if “the practice in question was one the Framers considered so integral and well-understood that they did not have to bother stating it.”¹⁷²

Since *Hart*, the Federal Circuit has likewise held its nonprecedential status rule constitutional,¹⁷³ and a member of the Fifth Circuit has agreed in a dissent with the Arnold analysis.¹⁷⁴ Additionally, in *Smith*, a disgruntled law school graduate who had passed the Colorado Bar examination and the required ethics examination, but was refused admission to the Colorado Bar “primarily” because he refused to submit to a mental status examination, filed a series of suits in both state and federal courts.¹⁷⁵

¹⁶⁴ For a brief scholarly endorsement of this position, see Greenwald & Schwarz, *supra* note 14, at 1159–61.

¹⁶⁵ *Hart*, 266 F.3d at 1160.

¹⁶⁶ *Id.* at 1161 n.4.

¹⁶⁷ *Id.* at 1160.

¹⁶⁸ *Id.* at 1162.

¹⁶⁹ *Id.* at 1163.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Symbol Techs., Inc. v. Lemelson*, 277 F.3d 1361, 1368 (Fed. Cir. 2002).

¹⁷⁴ *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260 (5th Cir. 2001) (Smith, J., dissenting from denial of rehearing en banc).

¹⁷⁵ *Smith v. U.S. Court of Appeals, Tenth Circuit*, 484 F.3d 1281, 1283–84 (2007).

Two of those suits involved First Amendment-based constitutional challenges to rules of the Colorado Supreme Court and of the Tenth Circuit, based on their bestowing nonprecedential status on unpublished opinions.¹⁷⁶ The Tenth Circuit resolved both challenges on the grounds that Smith did not have standing.¹⁷⁷

II. CONSTITUTIONAL ANALYSIS

A. Predecessor Scholarship

Much of the scholarship on the constitutional problems of various aspects of institutionalized unpublication addresses local rules imposing citation bans of varying degrees of rigidity, which have now been abolished, albeit prospectively. There is a much smaller universe of work on nonprecedential status rules. Only part of it implicates Article III. Four significant contributions to the constitutionality analysis of nonprecedential status rules are made in both the jurisprudential core of Judge Arnold's reasoning in *Anastasoff*, and its historical sources; in an historical study of early "vested property" cases, suggesting that the doctrine of precedent is critical to protecting individual rights against state tyranny; in an analysis of the formal rule-making power of federal courts; and in Adrian Vermeule's proposal for a non-justiciability doctrine in separation of powers adjudication.¹⁷⁸

1. Non-Article III Arguments

Non-Article III arguments sound in due process, equal protection, and First Amendment grounds, the last-mentioned encompassing restraint both on freedom of speech and on the right to petition.¹⁷⁹ The end of the citation bans both reduces the significance of the First Amendment problems that had been identified with them, and also reduces the likelihood that the Supreme Court would decide to grant certiorari on that basis. The equal protection and due process arguments generally suffer from their being the apprentice scholarly work of students.¹⁸⁰

¹⁷⁶ *Id.* at 1284.

¹⁷⁷ *Id.* at 1284–87.

¹⁷⁸ For a detailed discussion of Vermeule's proposal, see *infra* notes 260–69 and accompanying text.

¹⁷⁹ See Greenwald & Schwarz, *supra* note 14, at 1161–66, for a short argument that citation bans are infirm on both these First Amendment grounds. Relying on *Anastasoff* and English sources, Drew Quitschau argues for the constitutionality of the doctrine of precedent based on its limitation of Article III power, and additionally that citation bans violate the First Amendment and a constitutional right of court access, which he locates in the First Amendment. See Quitschau, *supra* note 15.

¹⁸⁰ See, e.g., Dunn, *supra* note 17, at 142 (arguing that the only source for a right referred to by the *Jones* Court as "the right to urge upon us what we have previously done" can be "the due process clause" (quoting *Jones v. Superintendent, Va. State Farm*, 465 F.2d 1091,

The success of any Due Process Clause-based constitutional claim depends on establishing the loss of “life, liberty, or property.”¹⁸¹ A Due Process Clause-based theory of the unconstitutionality of nonprecedential status rules would thus neither reach the crux of what nonprecedential status rules formally authorize—the creation of a binary system of precedential and nonprecedential opinions, and treating similarly situated litigants differently—nor squarely address the denial of a meaningful appeal that may result from delegation of adjudicatory power to underqualified and inadequately supervised staff, at least some of whose work demonstrates anti-appellant bias.¹⁸² It would also affect a limited number of cases. Additional procedural and interpretive hurdles stand in the path of a successful challenge on due process grounds to the constitutionality of nonprecedential status rules.¹⁸³ Due process jurisprudence also begs questions of what process is due, particularly in the context of appeals. As to equal protection challenges, proving an equal protection violation requires proving intent, the doctrine features multiple standards, and there is in addition in most cases the problem of proving an unconstitutional burden on a suspect or quasi-suspect class.

2. Article III Arguments

Scholarship on Article III and nonprecedential status rules clusters in three areas. There is historical work addressing whether originalist or other historicist constitutional hermeneutics answers the question as to whether nonprecedential status rules are ultra vires Article III. Then, there is narrow inherent judicial power work, which seeks to determine whether federal courts possess the constitutional authority to impose nonprecedential status rules as a result of the inherent power doctrine; and narrow separation of powers work, which seeks to determine whether the federal legislature could constitutionally end nonprecedential status rules by legislation or through the federal courts’ rule-making process. Finally, there is scholarship by established federal courts and constitutional law scholars: broad inherent Article III power work drawn from the separation of powers literature; and a subset of work on the constitutionality of the doctrine of precedent.

a. Originalist Fantasies: The Arnold-Kozinski Debate and its Commentators

Judge Arnold’s argument for the unconstitutionality of nonprecedential status rules in *Anastasoff* moves from the statement that “[t]he Framers accepted this

1094 (4th Cir. 1972)); see also Allen, *supra* note 14, at 574–91 (analyzing the constitutionality of citation bans); Lance A. Wade, *Honda Meets Anastasoff: The Procedural Due Process Argument Against Rules Prohibiting Citation to Unpublished Judicial Decisions*, 42 B.C. L. REV. 695, 718 (2001).

¹⁸¹ See Williams, *supra* note 76, at 795–98, 799–801, for a more detailed account of this critique. See also *Bd. of Regents v. Roth*, 408 U.S. 564, 571, 577–78 (1972); *Perry v. Sindermann*, 408 U.S. 593, 601–03 (1972).

¹⁸² See *supra* notes 55–56 and accompanying text.

¹⁸³ See *infra* Parts II.B & II.C.1.

understanding of judicial power (sometimes referred to as the declaratory theory of adjudication) and the doctrine of precedent implicit in it,”¹⁸⁴ via voluminous citation to and selective quotation of a heteroglot selection of “the Framers” and others whose texts can be yoked to the wheel of his argument linking fidelity to the doctrine of precedent to Article III judicial power. It concludes that

as the Framers intended, the doctrine of precedent limits the ‘judicial power’ delegated to the courts in Article III. No less an authority than Justice (Professor) Joseph Story is in accord:

The case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them, when they first emigrated to this country; and it is, and always has been considered, as the great security of our rights, our liberties, and our property. It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice or will of judges. 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.

This known course of proceeding, this settled habit of thinking, this conclusive effect of judicial adjudications, was in the full view of the framers of the constitution. It was required, and enforced in every state in the Union; and a departure from it would have been justly deemed an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all the just checks upon judicial authority.¹⁸⁵

A close reading of Judge Arnold’s text against its sources establishes that Judge Arnold’s citations in support of these propositions, and those that follow in his

¹⁸⁴ *Anastasoff v. United States*, 223 F.3d 898, 901–02 (8th Cir. 2000), *vacated as moot en banc*, 235 F.3d 1054 (8th Cir. 2000).

¹⁸⁵ *Id.* at 903–04 (citation omitted) (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 377–78 (1833)). But see WILFRED J. RITZ ET AL., REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE (Wyth Holt & L. H. LaRue eds., 1990) for a revisionist history, *inter alia*, of Justice Story’s account of the operation of precedent in the early Republic.

originalist justification for a content to Article III power that would render non-precedential status rules unconstitutional, are generally problematic. They are often quoted out of context; contradictory material is frequently glossed over; and above all, the opinion quotes selectively from frequently complex and nuanced accounts of precedent, which themselves can admit of some disagreement with each other. That said, given the recency of the development of nonprecedential status rules, it would be extraordinary if anything in the Framing-era historical record either legitimized it or unequivocally established their inconsistency with contemporary understandings of judicial power.

Whatever his fidelity to the historical record, the primary reason Judge Arnold ascribed to the Framers the “very favorable” view he concluded they had of precedent was that they saw it “as a bulwark of judicial independence” and “the rule of law against the arbitrary power of government” in “past struggles for liberty.”¹⁸⁶ The only anti-precedent authority in the relevant period, writes Judge Arnold, was Thomas Hobbes, “who regarded the authority of precedent as an affront to the absolute power of the Sovereign.”¹⁸⁷

The other value of precedent that Judge Arnold draws from his reading of historical sources—English, and Framing-era and post-Framing-era American—is its restraining of judicial arbitrariness.¹⁸⁸ Judge Arnold’s citation to Blackstone on the relevance of the doctrine of precedent to determining the nature of judicial power is buttressed by citations to Sir Edward Coke and Sir Matthew Hale framed so as to underscore the contextually appealing rhetoric of a human judge constrained by a text,¹⁸⁹ the story about judging for which “a government of laws but not of men” is, in its most literal signification, a metaphor.

Judge Kozinski’s originalist argument from contemporary Framing-era sources,¹⁹⁰ such as it is, depends on a literal reading of Hale’s and Mansfield’s¹⁹¹ differentiation

¹⁸⁶ *Anastasoff*, 223 F.3d at 900.

¹⁸⁷ *Id.* at 900 n.6 (citing THOMAS HOBBS, *LEVIATHAN* 323–26 (Penguin Books 1985) (1651)).

¹⁸⁸ *See id.* at 901–03.

¹⁸⁹ *Id.* at 901 (“The derivation of precedential authority from the law-declaring nature of the judicial power was also familiar to the Framers through the works of Sir Edward Coke and Sir Matthew Hale. See 4 E. Coke, *Institutes of the Laws of England* 138 (1642) (a prior judicial decision on point is sufficient authority on a question of law because ‘a judicial decision is to the same extent a declaration of the law’); 1 Coke, *Institutes* 51 (1642) (‘It is the function of a judge not to make, but to declare the law, according to the golden mete-wand of the law and not by the crooked cord of discretion.’); Sir Matthew Hale, *The History of the Common Law of England* 44–45 (Univ. of Chicago ed., 1971) (‘Judicial Decisions [have their] Authority in Expounding, Declaring, and Publishing what the Law of this Kingdom is’)).”

¹⁹⁰ *See Hart v. Massanari*, 266 F.3d 1155, 1164 n.8, 1166–68 (9th Cir. 2001). These references stand in contrast to the modern glosses on which most of his originalist case relies.

¹⁹¹ Kozinski also refers to Coke’s work by way of SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* (1938). *See Hart*, 266 F.3d at 1164 n.9.

between the law as such and the writings that evidence it, rather than reading them in context. The remainder of Judge Kozinski's case on the constitutional question, drawing on post-Framing sources, depends, first, on casting the doctrine of precedent as ironclad, allowing for none of the shifts, variations and changes that can characterize principled judging in a common law system, and, second, on tying it to the bureaucratic developments of court hierarchy and parallel U.S. federal jurisdictions.¹⁹²

Of the four detailed critical studies of Judge Arnold's originalist argument for a doctrine of Article III power that does not empower judges to selectively confer precedential status on classes of opinions, only one¹⁹³ is not flawed by partisanship,¹⁹⁴ or by confusing a general understanding of common law judicial method and practice with the much more specific national history of development and reception of colonial law and of novel republican forms of law and government.¹⁹⁵ This nonpartisan study concludes that "the historical materials are too opaque and the views of the Framers regarding the role of precedent in judicial decision-making are too ill-formed to justify the conclusion that the no-precedent rules are unconstitutional or, conversely, that they are constitutional."¹⁹⁶ My own reading of Judge Arnold's sources in the pre-Framing English era and in America in the Framing era is generally in accord.

However, close reading of the Framing-era sources, both English and American, cited by Judges Arnold and Kozinski, provides insights into the jurisprudential underpinnings of Judge Arnold's theory of Article III power. Leaving to one side philosophical debates centered on narrowly Anti-Federalist sentiment and fundamental opposition to judicial review grounded in the norms of parliamentary democracy,¹⁹⁷ Anti-Federalists were concerned about concentration of judicial power in a centralized court system; the unbridled discretion that might be allowed by granting equity powers to federal judges in the absence of a settled body of equitable precedent; and misuse of judicial power in courts only required to use juries as fact-finders in a limited number of cases.¹⁹⁸

More generally, Anti-Federalists were concerned about difficulties in "obtaining . . . justice," for which "organiz[ation] on the common law principles of the

¹⁹² Hart, 266 F.3d at 1169–80.

¹⁹³ Williams, *supra* note 76.

¹⁹⁴ See Thomas R. Lee & Lance S. Lehnhof, *The Anastasoff Case and the Judicial Power to "Unpublish" Opinions*, 77 NOTRE DAME L. REV. 135 (2001) (making a claim for the pragmatic necessity of the binary system of precedential and nonprecedential opinions).

¹⁹⁵ See, e.g., R. Ben Brown, *Judging in the Days of the Early Republic: A Critique of Judge Richard Arnold's Use of History in Anastasoff v. United States*, 3 J. APP. PRAC. & PROCESS 355 (2001); Healy, *supra* note 14.

¹⁹⁶ Williams, *supra* note 76, at 766.

¹⁹⁷ See, e.g., *Essays of Brutus*, No. XV (Mar. 20, 1788), in 2 THE COMPLETE ANTI-FEDERALIST 437, 440–41 (Herbert J. Storing ed., 1981).

¹⁹⁸ Prior to the passage of the Seventh Amendment. U.S. CONST. amend. VII. See SAUL CORNELL, *THE OTHER FOUNDERS* 31–33 (1999).

country,” albeit unprovided for in the Constitution itself, might prove a palliative.¹⁹⁹ They were also concerned about the building of a secret body of precedent, which would follow from constitutional disputes between private parties whose decisions were not effectively made public, thereby increasing federal government power.²⁰⁰

Of influential Federalists, Hamilton thought that a system of precedent would constrain “arbitrary” judicial “discretion.”²⁰¹ Madison’s post-Framing-era discourse on judicial precedent²⁰² proceeded as follows:

[W]hy are judicial precedents, when formed on due discussion and consideration, and deliberately sanctioned by reviews and repetitions, regarded as of binding influence, or, rather, of authoritative force in settling the meaning of a law? . . . 1st. Because it is a reasonable and established axiom, that the good of society requires that the rules of conduct of its members should be certain and known, which would not be the case if any judge, disregarding the decision of his predecessors, should vary the rule of law according to his individual interpretation of it. . . . 2. Because an exposition of the law publicly made, and repeatedly confirmed by the constituted authority, carries with it, by fair inference, the sanction of those who, having made the law through their legislative organ, appear, under such circumstances, to have determined its meaning through their judiciary organ.²⁰³

James Wilson praised the virtues of open courts;²⁰⁴ court hierarchy as a means of avoiding inconsistency in legal rules;²⁰⁵ and equal justice as a marker of the rule of law;²⁰⁶ and advanced a sophisticated account of the claims of precedent on “prudent and cautious” judges.²⁰⁷

¹⁹⁹ *Letters from The Federal Farmer*, No. III (Oct. 10, 1787), in *THE COMPLETE ANTI-FEDERALIST*, *supra* note 197, at 234, 244.

²⁰⁰ *Essays of Brutus*, No. XV, *supra* note 197, at 441.

²⁰¹ *THE FEDERALIST* No. 78, at 529 (Alexander Hamilton) (Sarah E. Cooke ed., 1961).

²⁰² As opposed to legislative precedent, which his Framing-era letter on precedent appears to address. *See Williams*, *supra* note 76, at 818.

²⁰³ Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), *reprinted in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 391 (Marvin Myers ed., 1981).

²⁰⁴ James Wilson, *Of the Nature of Courts*, in 2 *THE WORKS OF JAMES WILSON* 494, 494–95 (Robert Green McCloskey ed., 1967).

²⁰⁵ *Id.* at 495–96.

²⁰⁶ Wilson, *Of the Nature of Courts*, *supra* note 204, at 497–98.

²⁰⁷ James Wilson, *Of the Constituent Parts of Courts—Of the Judges*, in *THE WORKS OF JAMES WILSON* *supra* note 204, at 500, 502. Wilson’s discussion of Article III is purely descriptive, and, thus, does not necessarily support Williams’s implied argument that Wilson’s

Likewise reaching for fundamentals, Polly Price, a former clerk of Judge Arnold and now Professor of Law at Emory University School of Law, makes a signal contribution to determining whether Article III power authorizes nonprecedential status rules.²⁰⁸ Her sources suggest that a doctrine of judicial power comprising principled fidelity to the authority of the common law, symbolized by the doctrine of precedent, may be understood as critical to the protection of fundamental individual rights, especially in the absence of entrenched constitutional protection of those rights.²⁰⁹ They also suggest that judicial power itself is a critical protection of subjects against legislative incursions into fundamental rights.²¹⁰

b. Narrow Article III Arguments

Most of this work has missed the real constitutional mark, both because it focuses on separation of powers conundrums that are both incapable of predictive resolution and largely beside the point in this specific context²¹¹ (given the location of the allegedly unconstitutional practice in the judicial branch itself), and because it has failed to address what is really implied in nonprecedential status rules: who is really writing the opinions and “deciding” the appeals, and whether appeals as of right are in fact being processed as de facto, often poor quality,²¹² and selectively structurally subordinating certiorari decisions.

Salem Katsh and Alex Chachkes focus on citation bans, not on nonprecedential status rules, and their constitutionality analysis principally depends on First Amendment grounds.²¹³ Their separation of powers analysis attempts to anatomize a body

more general remarks on judicial power have no relevance to the kind of inquiry into influential Framers’ understanding of judicial power that I am undertaking here. See Williams, *supra* note 76, at 818–19; James Wilson, —*Of the Judicial Department*, in THE WORKS OF JAMES WILSON *supra* note 204, at 446, 454–58.

²⁰⁸ Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81 (2000).

²⁰⁹ See *id.* at 94–99.

²¹⁰ See *id.*

²¹¹ Sloan, *Government of Laws*, *supra* note 12, at 715 (arguing for the “constitutionality of a national procedural rule or federal statute prohibiting the federal appellate courts from” adopting nonprecedential status rules); Sloan, *A Pragmatic Approach*, *supra* note 14, at 901 (proposing using the federal rule-making process to make nonprecedential, or “unpublished” opinions binding until overruled by a subsequent “published” panel of the issuing court).

²¹² For detailed studies of the poor quality of unpublished opinions, see William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981); William L. Reynolds & William M. Richman, *Limited Publication in the Fourth and Sixth Circuits*, 28 DUKE L.J. 807 (1979).

²¹³ Thus, they argue that “citation prohibitions do indeed interfere with the separation of powers, not because they deny unpublished case law any precedential value, but because the courts lack the power under Article III to limit the substance of the non-frivolous arguments that litigants choose to advance before them.” Katsh & Chachkes, *supra* note 2, at 315.

of law with “conceptual and definitional problems . . . that have bedeviled commentators for years,”²¹⁴ where there is little federal law, and where that which exists has used the “generic term [inherent powers] to describe several distinguishable court powers,”²¹⁵ and which additionally has “relied occasionally on precedents involving one form of power to support the . . . use of another.”²¹⁶ While other scholars have characterized them differently,²¹⁷ Katsh and Chachkes’s tripartite model for inherent federal judicial power is useful for determining whether nonprecedential status rules are ultra vires Article III.

The first type, which the leading separation of Article III power cases involve, “protect[s] from legislative encroachment judicial activities *deemed indefeasibly vested in the judicial branch*.”²¹⁸ It might be invoked if the federal legislature passed a statute outside of the normal federal rule-making process, banning nonprecedential status rules, or if the subject matter of a federal rule banning local nonprecedential status rules was challenged as exceeding legislative power.²¹⁹ As a practical matter, however, the process of developing such a federal rule would make such a holding unlikely, given the involvement of the Federal Judicial Conference in crafting and the Supreme Court in approving such rules, formally embodied in federal legislation.²²⁰

²¹⁴ *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 561 (3d Cir. 1985).

²¹⁵ *Id.* at 562.

²¹⁶ *Id.* Scott Shannon refers to the “nature and limits” of both the general Article III power and federal courts’ inherent rule-making power as “murky.” Shannon, *supra* note 14, at 672–73.

²¹⁷ See, e.g., Evan Caminker, *Allocating the Judicial Power in a “Unified Judiciary,”* 78 TEX. L. REV. 1513, 1517 (2000) (advancing a “tripartite taxonomy of specific judicial power attributes: intrinsic, hierarchical, and systemic”); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 741–42 (2001) (proposing two categories of inherent judicial power, “implied indispensable” powers and “beneficial” powers); Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480, 485 (1958) (quoting with approval *Eash v. Riggins Trucking Inc.*, for the proposition that “those cases that have employed inherent power appear to use that generic term to describe several distinguishable court powers. To compound this lack of specificity, courts have relied occasionally on precedents involving one form of power to support the court’s use of another” (citations omitted)).

²¹⁸ Katsh & Chachkes, *supra* note 2, at 317 (emphasis added).

²¹⁹ This of course raises (situationally insoluble) conundrums about how one might discern whether the rule was made under delegated Article I power, or inherent Article III power. See Linda D. Jellum, “Which Is To Be Master,” *The Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 U.C.L.A. L. REV. (forthcoming 2009) for a thoughtful account on limits on Congress’s power to prescribe operating rules for Article III courts.

²²⁰ There is the possibility that a rebel circuit might hold that they retained inherent Article III rule-making power to maintain a local nonprecedential status rule. *Contra* Katsh & Chachkes, *supra* note 2, at 315–17 (claiming that delegated Article I rule-making power is “subsumed within the scope of” inherent Article III rule-making power); Jack B. Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905, 927–30 (1976) (characterizing federal courts’ rule-making power as delegated Article I power). The better

As to legislation banning nonprecedential status rules, it seems likely that such legislation, bypassing the federal rule-making process, would both indicate the presence of and be met with judicial opposition, and, thus, whatever the formal constitutional analysis might suggest, the likelihood is high that the courts would find such a statute breached the separation of powers. As the discussion of the inherent judicial power cases in Part III.A suggests, where the Court has approved of jurisdiction stripping, this has accorded with the self-interest of the federal bench, for example in being “protected” from the burden of prison conditions litigation; where the Court has resisted it and struck down legislation, such legislation has also been subject specific, rather than affecting a broad general aspect of how the courts do business.²²¹

The second type of judicial power, distinct from formal rule-making power and not deployed defensively against legislative incursions into judicial prerogatives

justif[ies] actions *essential* to the administration of justice or functioning of the judiciary. . . . Courts have frequently relied on this second species of inherent power to impose contempt sanctions, to “act sua sponte to dismiss a suit . . . and enter [a] default judgment” for failure to prosecute a case, or, less frequently, “to file restrictive pre-filing orders against vexatious litigants.”²²²

Are nonprecedential status rules and the practices justified and enabled by them “essential”? The rules themselves may not be, given the Fifth Circuit’s ability to function without one in relation to unpublished opinions issued before January 1, 1996.²²³ However, given the rationales for nonprecedential status rules, which range from allocating resources to published opinions in order to “develop[] a coherent and internally consistent body of caselaw to serve as binding authority for themselves and the courts below them”²²⁴ and avoid creating “spurious bas[es] for distinguishing the case in the future,”²²⁵ to avoiding wasting judicial time on matters characterized

view seems to be that inherent Article III rule-making power is separate from—albeit supplementary of—delegated Article I rule-making power. *See* A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 33 (1958) (giving a history of the development of concurrent legislative and judicial rule-making power in the U.S., and noting that “the outer boundaries of this sphere of total judicial autonomy have been difficult to locate with precision”).

²²¹ *See infra* Part III.A.

²²² Katsh & Chachkes, *supra* note 2, at 318 (alteration in original) (citations omitted); *see also* Pushaw, *supra* note 217, at 742 (discussing the implied authority of federal courts granted by the Constitution).

²²³ 5TH CIR. R. 47.5.3. Katsh and Chachkes make an analogous suggestion in relation to circuits that did not have citation bans prior to FRAP 32.1. *See* Katsh & Chachkes, *supra* note 2, at 320–21.

²²⁴ *Hart v. Massanari*, 266 F.3d 1155, 1176 (9th Cir. 2001).

²²⁵ *Id.* at 1176.

as not deserving of appellate judicial energy, it is entirely possible that appellate courts might consider the practices justified and enabled by nonprecedential status rules, like the rules themselves, “essential.”

However, there is authority for the proposition that neither “essential” rules nor practices would stand if they were held to “circumvent or conflict with” the Constitution, federal legislation, or federal rules.²²⁶ I will argue in Part III.B that close critical reading of the authority on what is “essential to the administration of justice” may provide a basis for establishing that nonprecedential status rules circumvent or conflict with the Constitution, at least on the basis of a broad normative reading of what is traceable to other Bill of Rights provisions.

The third type of inherent judicial power from Katsh and Chachkes’s tripartite model is formal “practice and procedure” rule-making power.²²⁷ Such rule making can

²²⁶ *Carlisle v. United States*, 517 U.S. 416, 426 (1996); *see also* *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991) (stating that “the exercise of the inherent power of lower federal courts can be limited by statute and rule, for ‘[t]hese courts were created by act of Congress’” (quoting *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 511 (1874))); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) (“[I]t is well established that ‘[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions.’” (alteration in original) (quoting *Thomas v. Arn*, 474 U.S. 140, 148 (1985))). While the position about constitutional conflicts is clear, there are differences of view about the extent to which inherent Article III rule-making power, although clearly subject to limits where it conflicts with a constitutional guarantee, is itself subject to federal legislative or regulatory control. In *Michaelson v. United States*, 266 U.S. 42, 66 (1924), the Court wrote of “limits not precisely defined” to Congress’s power to regulate courts. Pushaw claims that where it is “essential” rather than merely “useful” judicial rule-making power is not subject to federal legislative or regulatory control

[b]ecause 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. Rather, the Constitution allows only legislation that facilitates the courts’ exercise of their implied indispensable powers or that reasonably regulates minor details of such powers. For example, Article I’s vesting in Congress of “legislative power” (i.e., to make prospective rules of general applicability) over judicial matters should be read as incorporating the English understanding that statutes could not thwart the courts’ ability to function. Likewise, the Necessary and Proper Clause should be construed as authorizing Congress to enact appropriate laws regarding essential inherent powers that help federal courts “carry into execution” (in other words, effectuate) their express Article III duties.

Pushaw, *supra* note 217, at 742. William F. Ryan, *Rush To Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761, 778–79 (1997), claims that exercises of power in the first category may be “control[led]” and those in the second category “completely abrogate[d]” by the legislature. *But see* David E. Engdahl, *Intrinsic Limits of Congress’ Power Regarding the Judicial Branch*, 1999 BYUL. REV. 75, 104–06 (theorizing a very narrow legislative power to regulate the courts, based in a revisionist reading of the Necessary and Proper Clause).

²²⁷ *See* Katsh & Chachkes, *supra* note 2, at 318.

legitimately be made in the exercise of delegated legislative power under Article I,²²⁸ or in the exercise of inherent judicial rule-making power under Article III.²²⁹ Delegated Article I *national* federal appellate court rules are limited to “general rules of practice and procedure” consistent with federal statutes,²³⁰ and not “abridg[ing], enlarg[ing], or modify[ing] any substantive right.”²³¹ *Local* delegated Article I federal appellate court rules are made both pursuant to FRAP 47, itself authorized by 28 U.S.C. § 2072, and pursuant to 28 U.S.C. § 2071.²³² FRAP 47 enables each circuit court to “make and amend rules governing its practice” that are “consistent with—*not* duplicative of—Acts of Congress” and national rules.²³³ Section 2071 requires that local rules be “for the conduct of [the court’s] business” and consistent with federal statutes, including 28 U.S.C. § 2072,²³⁴ and rules.

Thus, in order to be constitutional, local nonprecedential status rules must first either be within the inherent Article III power of federal courts, on the one hand; or, if not within inherent Article III power, not exceed Congress’s delegated Article I power to make rules for federal courts.²³⁵ Second, in any event, in the case of both Article I and Article III procedural rule-making power, such rules must not abridge a constitutional right,²³⁶ nor otherwise fall foul of the Constitution. As with exercises of the courts’ *essential* rule-making power, there is authority for the proposition that

²²⁸ Article I power to make court rules derives from the Tribunals Clause and the Necessary and Proper Clause. *See, e.g.,* *Willy v. Coastal Corp.*, 503 U.S. 131, 136 (1992); *Hanna v. Plumer*, 380 U.S. 460, 472 (1965); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9–10 (1941); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 22 (1825).

²²⁹ Scott Shannon, by contrast, suggests that formal rules are beyond Article III power, which can only be exercised “through the adjudication of ‘Cases’ and ‘Controversies.’” Shannon, *supra* note 14, at 681–84.

²³⁰ 28 U.S.C. § 2072(a) (2006).

²³¹ *Id.* § 2072(b).

²³² Providing, *inter alia*, that “all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business,” and that such rules “shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072.” *Id.* § 2071(a).

²³³ FED. R. APP. P. 47(a)(1).

²³⁴ *Colgrove v. Battin*, 413 U.S. 149, 163 n.22 (1973).

²³⁵ Shannon argues that rules that exceed delegated Article I power are not “strictly” unconstitutional. Shannon, *supra* note 14, at 661. The difficulty in discerning whether a local rule is made under delegated Article I or inherent Article III power limits the utility of this argument. Some commentators have argued that there are areas of concurrent Article I and Article III power to prescribe how federal courts conduct business. *See, e.g.,* 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, 487–90 (1991); Jack B. Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905, 906 (1976).

²³⁶ *See, e.g.,* *Colgrove*, 413 U.S. at 151–60 (holding that a local rule for six-person juries was consistent with the Seventh Amendment).

its Article III *procedural* rule-making power cannot conflict with federal statutes or rules, and this case is arguably rather stronger for merely “procedural” than for “essential” exercises of inherent power.²³⁷

Additionally, local court rules made under delegated Article I power cannot make “substantive” law,²³⁸ which must be made by decisions in cases and controversies.²³⁹ Patrick Schiltz, formerly the Reporter for the Appellate Rules Committee and now a federal judge, has expressed the view that a “rule that prescribed the legal force that must be accorded unpublished opinions would likely ‘abridge, enlarge or modify’ the ‘substantive right[s]’ of the parties.”²⁴⁰ Such rights likely extend beyond

²³⁷ See *supra* note 226 and accompanying text.

²³⁸ See *Bonner v. City of Prichard*, 661 F.2d 1206, 1210–11 (11th Cir. 1981) (“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.’ [FRAP 47], 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.”). While national and local rules made under delegated Article I power may incidentally affect substantive rights, as shown in *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 445–46 (1946), if they do so they must be “reasonably necessary to maintain the integrity of [the court’s] system of rules.” *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5 (1987).

²³⁹ See Shannon, *supra* note 14, at 666–71 (discussing subconstitutional limitations on making a rule abrogating stare decisis and using as an example the Eleventh Circuit’s adoption of Fifth Circuit precedent in *Bonner*, 661 F.2d 1206); see also Leslie M. Kelleher, *Taking “Substantive Rights” (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47 (1998) (proposing a multi-factor test for a contextual analysis of the “practice and procedure” and “substantive right” binary).

²⁴⁰ Schiltz, *Much Ado*, *supra* note 34, at 1484 n.273. But see John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503, 504, 506–30 (2000) (arguing that Congress could validly “legislate [a] rule of stare decisis,” provided that such a rule is one “that a court reasonably could recognize” because rules of precedent are federal common law not constitutional law); accord Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effects of Roe and Casey?*, 109 YALE L.J. 1535 (2000) (arguing for the constitutionality of a statute abrogating stare decisis in constitutional cases); see also Engdahl, *supra* note 226 (arguing for the constitutional infirmity of the Rules Enabling Act as exceeding congressional power); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001) (arguing for the “constitutional status of stare decisis”); Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 194 (2001) (arguing that “Congress may not by statute tell the federal courts whether or in what way to use precedent”); Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 272 (1993) (arguing

constitutionally guaranteed “rights.”²⁴¹ There is, additionally, some primary authority suggesting that rule making about the precedential value of opinions does not fall within the ambit of “procedural” rule making.²⁴²

Following from the limitation of rule making about matters of substance, even non-precedential status rules made by federal courts *pursuant to their inherent Article III power* would arguably be ultra vires. Inherent Article III rule-making power is said to derive from “the notion that a federal court, sitting in equity, possesses all of the common law equity tools of a chancery court (subject, of course, to congressional limitation) to process litigation to a just and equitable conclusion.”²⁴³ There is some authority for the proposition that such “court rules . . . [must be] consistent with the policies of 28 U.S.C. § 2071—that is, those that prescribe the conduct of court business . . . [and] are subservient to the supremacy of statutory or constitutional dictates.”²⁴⁴ Thus, local procedural rules made under Article III power cannot be inconsistent with a national federal rule or statute, such as 28 U.S.C. § 2072(b)’s proscription against “abridg[ing], enlarg[ing], or modify[ing] any substantive right.”²⁴⁵

that Congress’s powers to make law are limited to matters “peculiarly within the jurisdiction or competence of Congress—that is, to be laws that do not tread on the retained rights of individuals or states, or the prerogatives of federal executive or judicial departments”); Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697 (1995) (identifying limits to Congress’s power to prescribe court rules where such rules affect how cases are decided).

²⁴¹ See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941), the seminal case defining “procedure” in 28 U.S.C. § 2072 as “the judicial process for enforcing rights and duties recognized by substantive law.” See also *Hanna v. Plumer*, 380 U.S. 460, 475 (1965) (Harlan, J., concurring); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (detailing the origins of the Rules Enabling Act); Paul D. Carrington, “Substance” and “Procedure” in the Rules Enabling Act, 1989 DUKE L.J. 281, 287 (arguing that “procedure” and “substance” are not mutually exclusive); John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974) (arguing that a correct reading of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), would give state rules greater weight); Carole E. Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction*, 28 STAN. L. REV. 397 (1976) (discussing the effect of procedural rules on jurisdictional tests); Shannon, *supra* note 14, at 665–66 (discussing the non-procedural nature of rules defining weight of authority in the context of rules abrogating stare decisis, although his analysis applies equally to a rule-altering principles of stare decisis. He adds that such a rule also is not procedural in nature because it would not primarily be directed toward acts necessary to enforce rights and duties, or in other words, conduct necessary to resolve a case); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004) (stressing the importance of using procedural rules to increase participation and legitimacy); 1 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 1.05[2][b], at 1–29 (3d ed. 2008).

²⁴² See Shannon, *supra* note 14, at 666–71.

²⁴³ *Katsh & Chachkes*, *supra* note 2, at 318 (quoting *ITT Cmty. Dev. Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978)).

²⁴⁴ *Id.* 319.

²⁴⁵ There is also authority suggesting two other limitations on local rule-making power. The first suggests that the Supreme Court has the “inherent supervisory power” to strike down

c. Inherent Article III and Constitutionality of Precedent Scholarship

The considerable literature debating the constitutionality of the Supreme Court's specifically constitutional precedent is generally peripheral to considering whether the adoption of nonprecedential status rules and the practices justified and enabled by them lies within Article III power. However, Richard Fallon, arguing that lengthy post-Framing practice can "constitutionalize" stare decisis, reasons that "Article III's grant of '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," and thus, as itself constitutional.²⁴⁶ He concludes that "[t]o recognize a congressional power to determine the weight to be accorded to precedent . . . would infringe [the] core judicial function" of the Supreme Court: deciding what the Constitution means and how it applies in a constitutional case.²⁴⁷

While Fallon argues in passing that there "is no structural anomaly in the view that judicial precedents also enjoy limited constitutional authority in the [lower federal] courts that rendered them,"²⁴⁸ his footnoted conclusion about the *Anastasoff* doctrine is dismissive: "Unlike a total elimination of stare decisis effect, the special treatment of unpublished opinions does not threaten the overall fabric of constitutional doctrine by putting everything at issue at once;"²⁴⁹ that is, by obliging the Court "to reconsider every potentially disputable [constitutional] issue as if it were being raised for the first time."²⁵⁰ This conclusion skirts his core reasoning for the constitutionality of (at least constitutional) precedent: a hybrid "moral" and positivist standard for constitutionalizing practices that meet the standard of judicial legitimacy, which in turn requires that those practices "accord[] with the positive law of a legal system that is reasonably just,"²⁵¹ and which in turn attracts "acceptance" by the governed.²⁵²

"Reasonable justice" likely requires the similar treatment of similarly situated litigants. Thus, especially given that the Fifth Circuit copes without a nonprecedential status rule as to its earlier precedents, while the range of more or less reasonable—

local rules in order "to protect the integrity of the federal system," where such local rules are "[in]consistent with principles of right and justice." *Frazier v. Heebe*, 482 U.S. 641, 645 (1987); see also James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1452–54 (2000). The second limitation authorizes the Supreme Court to strike down local rules that constitute impermissible "basic procedural innovations," *Miner v. Atlas*, 363 U.S. 641, 650 (1960), at least where those procedural innovations involve "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).

²⁴⁶ Fallon, *supra* note 240, at 577–78.

²⁴⁷ *Id.* at 592–93.

²⁴⁸ *Id.* at 581.

²⁴⁹ *Id.* at 596 n.115.

²⁵⁰ *Id.* at 573.

²⁵¹ *Id.* at 586.

²⁵² *Id.* at 589.

that is, formally legitimate—claims for the rules’ practical necessity may trump their costs to justice, the actual reasons for the rules are less likely to do so.

Further, as to the practices justified and enabled by nonprecedential status rules, given the general judicial reticence to admit of them publicly, it seems unlikely that the litigants who file appeals in large and increasing numbers do so with the understanding that their appeals may be decided by someone other than a judge, or that the level of scrutiny they receive may not include the decision maker reading such critical documents as the appellate record,²⁵³ or that appeals are processed in a culture that believes that they and their subjects “dumb down” the jurisprudential environment of the federal courts of appeals.²⁵⁴ Thus, the justice or legitimacy that would ground the “assent of the governed” to the practices justified and enabled by the rules is lacking.

Similarly, Fallon’s assertion that “unlike a denial of precedential effect to opinions addressing particular subjects (or resolving particular issues in a particular way), the rule challenged in *Anastasoff* was not an attempt to manipulate or alter substantive outcomes and was unlikely to have any systematic effect in doing so”²⁵⁵ exists in a degree of tension with the evidence of structurally subordinating effects of nonprecedential status rules. There is, additionally, evidence that it provides cover for manipulating outcomes in a range of differing ways.²⁵⁶

Finally, Fallon’s assertion that “the rule involved in *Anastasoff* did not constitute an assault on the traditional, entrenched core of stare decisis—it involved a judicially, rather than congressionally, mandated adjustment at the doctrine’s fringes,”²⁵⁷ while clearly rooted in his position on the separation of powers and his engagement with Michael Stokes Paulsen’s crusade against constitutional precedent, misses both my point and his own. In an adjudicatory system where constitutional judging is diffuse rather than concentrated, and, thus, one where examining incursions by government into individual constitutional rights is generally done outside the Supreme Court, it makes little sense to suggest that an incident of Article III power applies to its full extent only when the *Supreme Court* decides a “constitutional” question. This is especially the case in context: the vast majority of federal appellate decisions are nonprecedential. And either stare decisis has a normative basis, as Fallon asserts in

²⁵³ JONATHAN MATTHEW COHEN, *INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS* 69 (2002).

²⁵⁴ Jones, *Back to the Future*, *supra* note 74 (discussing THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* (1994)).

²⁵⁵ Fallon, *supra* note 240, at 596 n.115. See William L. Reynolds & William M. Richman, *Studying Deck Chairs on the Titanic*, 81 *CORNELL L. REV.* 1290, 1291 (1996), for an account of the circumstantial evidence that judicial outcomes are affected by limited consideration of cases on appeal.

²⁵⁶ See, e.g., Robel, *Myth of the Disposable Opinion*, *supra* note 6, at 955–58 (arguing that unpublished opinions shift substantive outcomes in favor of frequent litigants).

²⁵⁷ Fallon, *supra* note 240, at 596 n.115.

making his argument for the constitutionality of constitutional precedent, or it does not; given that it does, it makes little difference beyond the narrow context of ideological turf wars over the balance of powers between the elected and appointed branches of government, which branch is eroding it.

While Fallon's argument for the constitutionality of stare decisis depends on its "deep roots in historical and contemporary practice,"²⁵⁸ precisely that historical rootedness might militate in favor of questioning the constitutionality of a mandate that departs as radically from it as nonprecedential status rules arguably do and that are as identifiably neologistic. Nonetheless, Fallon's criticism gestures towards the practical difficulties in crafting a doctrine of Article III power that is equal to addressing the constitutional infirmities in the regime of nonprecedential status rules and the practices justified and enabled by them: "arguments that deeply entrenched practices violate the Constitution seldom succeed,"²⁵⁹ *a fortiori* when the judiciary are policing themselves rather than another branch of government.

A proposal for an Article III power doctrine of some practical serviceability in crafting a thick doctrine of Article III power and duty is Adrian Vermeule's argument for a "non-justiciability" doctrine,²⁶⁰ which would require judges to "declare nonjusticiable any claim that legislation intrudes upon the freestanding grant of the 'judicial power.'"²⁶¹ The proposed doctrine has two exceptions: "claims that legislation either violates specific constitutional provisions governing judicial authority, such as a clause protecting judicial salaries from reduction,"²⁶² or claims that legislation circumscribes constitutionally protected individual liberties with a special connection to the judicial process "such as the right to jury trial."²⁶³

This "thin" inherent Article III power doctrine is premised on "safeguard[ing] legislative authority from the predictable and insistent cognitive pressures that cause judges to press judicial prerogatives to implausible extremes,"²⁶⁴ and a taste for a hybrid of "Thayerian restraint,"²⁶⁵ and formalist constitutional hermeneutics, which together value the overprotection of the authority of the "political branches."²⁶⁶ The institutionalized failure of judicial ethics evidenced and constituted by the federal

²⁵⁸ Fallon, *supra* note 240, at 582.

²⁵⁹ *Id.*

²⁶⁰ Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 361.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* at 398.

²⁶⁴ *Id.* at 361.

²⁶⁵ *Id.* at 431. The reference is to James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). See Symposium, *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 NW. U. L. REV. 1 (1993), for a comprehensive treatment of Thayer's essay.

²⁶⁶ *Id.* at 432.

courts of appeals' half century and more of structurally subordinating jurisdiction stripping, whether proceeding from selective complicity with initiatives at least formally proceeding from other branches of government, or originating in the material practices of the courts themselves, resonates with Vermeule's concern for judicial overreaching in the service of judicial branch self-interest, and contrary to (whatever one takes to be) fundamental constitutional values.

Vermeule situates his doctrinal proposal in the context of judicial review of "legislative encroachment on judicial prerogative."²⁶⁷ My estimation is that genuine legislative encroachment²⁶⁸ on nonprecedential status rules is unlikely, that the courts' own self-interest is likely to lead them to strike down any such legislative intervention, and that the prospects for Judicial Conference-based reforms are presently poor. The scope of any such doctrine's application to nonprecedential status rules and the practices they justify and enable is thus limited. Nonetheless, as discussed later in this Article, Vermeule's nonjusticiability doctrine provides some productive orientation towards a thick doctrine of Article III power.²⁶⁹ So too does the constitutionalist core of Judge Arnold's reasoning in *Anastasoff*, and its historical sources, as does the importance of the doctrine of precedent for protecting individual rights emerging from the early "vested property" cases.²⁷⁰ Additionally, as previously indicated in Part II.A.2.b, an analysis of the formal rule-making power of federal courts suggests that it does not authorize nonprecedential status rules.

B. Why Existing Models for the Ultra Vires Analysis Are Inadequate

The most telling deficiency in the scholarship on nonprecedential status rules, authorizing courts to treat similarly situated litigants differently, is that no matter how troubling such a departure from mainstream understandings of common law method might be, the practices they justify and enable are more troubling still. Thus, any account of the constitutional status of nonprecedential status rules that fails to address those practices they justify and enable—delegating Article III power, enabling a shoddy certiorari system to function under cover of the promise of genuine appeals as of right, and systematically producing structural subordination—is inadequate.

Once Article III must be read through other constitutional provisions, leaving aside the problem that none of the equal protection, due process, or First Amendment analyses advanced to date are soundly and comprehensively jurisprudentially grounded, one is faced with the problems that beset the due process and equal protection arguments for the unconstitutionality of nonprecedential status rules discussed

²⁶⁷ *Id.* at 358.

²⁶⁸ That is, not driven by Judicial Conference-based reform that finds its expression in a Federal Rule of Appellate Procedure through formal enactment by Congress.

²⁶⁹ *See infra* Part III.C.

²⁷⁰ *See supra* text accompanying notes 208–10.

in Part II.A.1, as well as the broader factual, procedural, or strategic barriers to bringing constitutional challenges to the rules themselves and the practices they justify and enable. Chief among these are basic questions of standing; the difficulty in persuading federal courts, up to and including the Supreme Court, to rule that what has become business as usual is unconstitutional;²⁷¹ and the fact that proving, for example, who actually decided one's appeal, and how he decided it, would in most cases be well-nigh impossible.

C. And What of the Unexplored (Doctrinal) Alternatives?

There are, however, two possible doctrinal bases for constitutional infirmity of nonprecedential status rules that existing scholarship on the constitutionality of aspects of institutionalized unpublication has not addressed: access to courts and nondelegation doctrine.²⁷²

1. Article III and Fundamental Interests: The Right of Access to Courts

Bounds v. Smith marked the high-water mark of the jurisprudence developing the most salient constitutional right that might, considered in combination with Article III, bear on the constitutionality of nonprecedential status rules and their underlying practices, at least in relation to criminal cases.²⁷³ In *Bounds*, the Court announced it “beyond doubt that prisoners have a constitutional right of access to the courts,”²⁷⁴ a principle said to owe its origins²⁷⁵ to *Griffin v. Illinois*.²⁷⁶ The constitutional standard for access to the courts is that it is “adequate, effective, and meaningful.”²⁷⁷

Announcing in *Griffin* a right to trial transcripts for indigent defendants in state criminal appeals, the Court's plurality, drawing on both “due process and equal

²⁷¹ Justice Kennedy is reported to have responded angrily to a vigorous critic of institutionalized unpublication that “[i]f you guys want us to do it right, we'd need 1,000 more judges.” Frank J. Murray, *Justices to Review Access to Opinions: Appellate Courts Vary Widely on Issue*, WASH. TIMES, Oct. 27, 2000, at A8, available at <http://www.Nonpublication.com/MURRAY.html>.

²⁷² See *infra* Parts II.C.1, II.C.2.

²⁷³ 430 U.S. 817 (1977).

²⁷⁴ *Id.* at 821.

²⁷⁵ See, e.g., KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 651 (16th ed. 2007) (noting that *Griffin v. Illinois* “launched the ‘access to courts’ strand of equal protection” when the Supreme Court held that “[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts” (quoting *Griffin v. Illinois*, 351 U.S. 12 (1956))).

²⁷⁶ 351 U.S. 12 (1956). *But see Bounds*, 430 U.S. at 822 (citing *Ex Parte Hull*, 312 U.S. 546, 549 (1941) (holding that “the state and its officers may not abridge or impair . . . [the] right to apply to a federal court for a writ of habeas corpus”), as the source of access to courts doctrine).

²⁷⁷ *Bounds*, 430 U.S. at 822.

protection,”²⁷⁸ held that just as criminal trial procedures “which allow no invidious discriminations” based on poverty are constitutionally mandated, so there “is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance.”²⁷⁹ Dissenting, Justice Harlan inaugurated his framing of the right of court access in due process alone,²⁸⁰ sounding in considerations of “fundamental fairness.”²⁸¹ The right of access to the courts articulated by Justice Harlan was “simply the right not to be denied an appeal for arbitrary or capricious reasons.”²⁸²

Subsequently, in *Douglas v. California*, the right of court access was held to mandate state-appointed counsel for indigent defendants for an initial appeal as of (statutory) right from a conviction.²⁸³ Once again, and in dissent, pressing a pure due process framework for the right of court access, Justice Harlan used the formula of *contextual* arbitrariness or unreasonableness to characterize the kinds of rules that might infringe on the right of court access.²⁸⁴ While *Ross v. Moffitt* refused to extend the right of access to mandate the provision of state-appointed counsel on a discretionary appeal from a criminal conviction, Justice Rehnquist’s opinion for the court held that what was required was “an adequate opportunity to present . . . claims fairly in the context” of the relevant appellate process.²⁸⁵ The *Ross* Court reasoned that because error correction is not the primary function of subsequent discretionary appeals,²⁸⁶ and because an appellant at that stage would have a record of the trial proceedings, an appellate brief from the first appeal as of right, and often an opinion on the first appeal, the *Douglas* reasoning did not apply.²⁸⁷

²⁷⁸ See Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 557 (1999) (arguing for a “universal right of court access . . . [derived] from . . . the Petition Clause of the First Amendment”); James E. Pfander, *Restoring the Right to Petition*, 94 NW. U.L. REV. 219, 225 (1999) (reasserting the author’s claim that the Petition Clause demonstrates that the “framers perceived the right to petition as an affirmation of government accountability”); James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U.L. REV. 899, 899 (1997) (arguing for “interpret[ing] the Petition Clause as a guaranteed right to pursue judicial remedies for unlawful government conduct”).

²⁷⁹ *Griffin*, 351 U.S. at 17–18.

²⁸⁰ *Id.* at 34–39 (Harlan, J., dissenting).

²⁸¹ *Id.* at 36.

²⁸² *Id.* at 37.

²⁸³ 372 U.S. 353 (1963).

²⁸⁴ *Id.* at 361–63 (Harlan, J., dissenting).

²⁸⁵ 417 U.S. 600, 616 (1974).

²⁸⁶ *Id.* at 615.

²⁸⁷ *Id.*

In 2005, the Court returned to the “right of access” doctrine in criminal cases in *Halbert v. Michigan*,²⁸⁸ holding that because these appeals were direct,²⁸⁹ and on the merits;²⁹⁰ because indigent defendants pursuing them were “generally ill equipped to represent themselves;”²⁹¹ and because such appeals were conducted as error-correcting appeals;²⁹² the Equal Protection and Due Process Clauses required that prisoners convicted on pleas of guilty or no contest be provided with appointed counsel in *initial* discretionary appeals.²⁹³

Noting that there is no federal constitutional right to appellate review of criminal convictions,²⁹⁴ the Court reasoned that where appellate review is provided by a state government, it “may not ‘bolt the door to equal justice’ to indigent defendants,”²⁹⁵ and that “[t]he equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs,’ while ‘[t]he due process concern homes in on the essential fairness of the . . . proceedings.’”²⁹⁶ The Court drew attention to the *Ross* Court’s emphasis on the following:

[A] defendant seeking State Supreme Court review following a first-tier appeal as of right earlier had the assistance of appellate counsel. The attorney appointed to serve at the intermediate appellate court level will have reviewed the trial court record, researched the legal issues, and prepared a brief reflecting that review and research. The defendant seeking second-tier review may also be armed with an opinion of the intermediate appellate court addressing the issues counsel raised. A first-tier review applicant, forced to act *pro se*, will face a record unreviewed by appellate counsel, and will be equipped with no attorney’s brief prepared for, or reasoned opinion by, a court of review.²⁹⁷

The criminal right of access cases do not directly address adjudication by an Article III actor in the federal appellate courts. Nonetheless, they require facilities likely to result in fair procedures and error correction: the provision of appointed counsel on initial appeals as of right and other direct error-correcting appeals on the merits; the provision of transcripts and other aids in preparing cases, including those

²⁸⁸ 545 U.S. 605 (2005).

²⁸⁹ *Id.* at 619.

²⁹⁰ *Id.* at 611, 617.

²⁹¹ *Id.* at 617.

²⁹² *Id.* at 611, 617–18.

²⁹³ *Id.* at 610.

²⁹⁴ *Id.*

²⁹⁵ *Id.* (quoting *Griffin v. Illinois*, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring)).

²⁹⁶ *Id.* at 610–11 (quoting *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996)).

²⁹⁷ *Id.* at 619 (citation omitted).

seeking collateral review of convictions and § 1983 civil rights violations; and subsequent appeals and collateral and civil rights proceedings constitutionally require “less process” than initial direct appeals. Further, the federal courts have embraced appellate jurisdiction stripping in habeas²⁹⁸ and prisoner civil rights²⁹⁹ cases.

All that being said, even in the face of evidence of the ability of some on the federal appellate bench to rationalize differentially “rationed justice”³⁰⁰ on overt efficiency grounds, procedures that tend to provide differential access to statutorily granted appellate review to the economically disadvantaged might infringe against Justice Rehnquist’s modest account of what equal protection in the fundamental right of access to courts context constitutionally requires: “an adequate opportunity to present . . . claims fairly”³⁰¹ in context, especially when the function of such appeals is error correction. Likewise, and again underscored by the statutory conferring of appeal rights, denial of genuine appellate review by an Article III actor arguably crosses the threshold of Justice Harlan’s requirement of procedural fairness, as “arbitrary or unreasonable, *in the context of the particular appellate procedure . . . established.*”³⁰²

Nonetheless, not only is the practical political likelihood of a federal court of appeals or the Supreme Court finding the practices that are justified and enabled by nonprecedential status rules unconstitutional extremely slim, but establishing the evidentiary basis for a claim of denial of court access based on decision making by non-Article III actors—or lack of meaningful review, let alone one based on systematically biased decision making—also seems to face insurmountable barriers. Further, given the narrowness and limited scope of the existing doctrine on the rights of access in civil cases—holding filing fees for divorce applications³⁰³ and for appeals against orders terminating parental rights³⁰⁴ unconstitutional, but fees for voluntary bankruptcy applications³⁰⁵ and applications for judicial review of administrative denial of welfare benefits³⁰⁶ constitutional—we are confronted once again, as with due process analysis, with a range of doctrinal frameworks for constitutional analysis of what appellate process is needed to provide appellants a fundamental right of access to the federal courts of appeals.

Additionally, some of the procedural hurdles that face challenges to constitutionality, based on a combination of Article III and another Bill of Rights provision mentioned above, also apply when Article III is read through the right of access. Chief among these is standing. The challenge to constitutionality of the rule or practice

²⁹⁸ Felker v. Turpin, 518 U.S. 651, 654 (1996).

²⁹⁹ Miller v. French, 530 U.S. 327 (2000).

³⁰⁰ See Jones, *supra* note 74.

³⁰¹ Ross v. Moffitt, 417 U.S. 600, 612 (1974).

³⁰² Douglas v. California, 372 U.S. 353, 365 (1963) (Harlan, J., dissenting).

³⁰³ Boddie v. Connecticut, 401 U.S. 371 (1971).

³⁰⁴ M.L.B. v. S.L.J., 519 U.S. 102 (1996).

³⁰⁵ United States v. Kras, 409 U.S. 434 (1973).

³⁰⁶ Little v. Streater, 452 U.S. 1 (1981).

must arise in the context of litigation before the court: “a circuit non-publication rule may be challenged in the circuit court when application of the rule in a live proceeding before that court directly implicates the interest of a party or counsel in that proceeding.”³⁰⁷ And the “case or controversy” requirement of Article III jurisdiction requires a “case . . . not [an] issu[e]”:³⁰⁸

[This standing requirement] contains three elements. First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”³⁰⁹

Satisfying the “case or controversy” requirement would only appear to be readily achievable where a court frankly relied on its nonprecedential status rule in refusing to follow an earlier decision in relation to a similarly situated litigant. But as *Anastasoff* itself suggests,³¹⁰ a court can reason that matters other than the mere existence of the rule mandated such an outcome.

2. Nondelegation Doctrine

While detailed analysis of this body of law and the contours of Article III power that it establishes is beyond the scope of this Article,³¹¹ one group of leading inherent Article III power cases, *Crowell v. Benson*,³¹² *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,³¹³ *Thomas v. Union Carbide Agricultural Products*

³⁰⁷ *Smith v. U.S. Court of Appeals, Tenth Circuit*, 484 F.3d 1281, 1286–87 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 1334 (2008).

³⁰⁸ *Anastasoff v. United States*, 235 F.3d 1054, 1056 (8th Cir. 2000).

³⁰⁹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–61 (1992) (citations omitted).

³¹⁰ *Anastasoff v. United States*, 223 F.3d 898, 904–05 (8th Cir. 2000), *vacated as moot en banc*, 235 F.3d 1054 (8th Cir. 2000) (“Cases can be overruled. Sometimes they should be. . . . If the reasoning of a case is exposed as faulty, or if other exigent circumstances justify it, precedents can be changed.”). More frequently, a court may determine that there is a basis for factually distinguishing one case from another.

³¹¹ See RICHARD H. FALLON, JR., ET AL., *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 362–403 (5th ed. 2003 & Supp. 2008) for the standard account of this doctrine.

³¹² 285 U.S. 22 (1932).

³¹³ 458 U.S. 50 (1982) (plurality opinion).

Co.,³¹⁴ *Commodity Futures Trading Commission v. Schor*,³¹⁵ and *Granfinanciera v. Nordberg*,³¹⁶ together with the leading case on delegating Article III power to magistrate judges, *United States v. Raddatz*,³¹⁷ addresses an issue of particular relevance to one of the practices justified and enabled by nonprecedential status rules: delegation of primary Article III decision making to non-Article III actors. The constitutionality of such delegation is governed both by Article III itself and, at least in some circumstances, by the Due Process Clauses.³¹⁸

Because these cases concern delegation of primary decision making rather than of appellate review, and transparent delegation of Article III decision-making power to a body other than an Article III court rather than intra-court delegation to adjuncts, they are of limited direct use in evaluating the constitutionality of delegation of federal appellate decision making to staff. Nonetheless, in part because the hierarchy of constitutionally authorized delegation of Article III power that these cases establish is similar to that which the courts' internal operating procedures apply to intra-court delegation to non-Article III actors, close reading of the decisions is instructive in determining the varying constitutional values the Court has found to be at stake in the delegating of federal judging. The differing contours of the Supreme Court jurisprudence on what is and is not a constitutionally permissible delegation likewise suggest the real constitutional stakes entailed in both nonprecedential status rules and the adjudicatory practices that underpin them. This is particularly the case where they mandate judicial review by an Article III court as a condition of constitutionality of delegated adjudication. These cases also suggest what safeguards might be put in place to minimize decisional infirmity, should intra-court delegation to non-Article III actors persist, as I have suggested is more likely than not.³¹⁹

Richard Fallon identifies the constitutional values advanced by constitutional limitations on delegating Article III power as those safeguarded by the separation of judicial power,³²⁰ and rule of law values,³²¹ specifying that "there are at least three Article III values at stake in cases such as *Crowell*":

³¹⁴ 473 U.S. 568 (1985).

³¹⁵ 478 U.S. 833 (1986).

³¹⁶ 492 U.S. 33 (1989).

³¹⁷ 447 U.S. 667 (1980).

³¹⁸ Margaret G. Farrell, *The Function and Legitimacy of Special Masters*, 2 WIDENER L. SYMP. J. 235, 289 (1997); see also *Crowell v. Benson*, 285 U.S. 22, 46, 47, 49, 51 (1932); *id.* at 87 (Brandeis, J., dissenting) ("If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the jurisdiction of the federal district courts as such, but because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process.").

³¹⁹ See *supra* notes 303–10 and accompanying text.

³²⁰ Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 937 (1988).

³²¹ *Id.* at 938.

(I) ensuring fair adjudication to individual litigants, (ii) maintaining a system of judicial review and judicial remedies that suffices to keep government generally within the bounds of law, and (iii) preserving judicial integrity by not requiring a court to accept an agency's erroneous decision as conclusive of a legal issue and to make that decision a predicate for the judicial imposition of civil or criminal penalties.³²²

Another scholar emphasizes the commitment to values, including those reflected in the Bill of Rights and procedural fairness more generally; judicial independence *per se*; and the absence of bias and neutrality supposedly achieved through adjudication by judicial officers with the independence thought to be guaranteed by life appointments and constitutional salary protections.³²³

These values exist in considerable tension³²⁴ with those that have led both to the proliferation of Article I tribunals and administrative adjudication, and to the Court's authorization of such adjudicatory bodies and ratification of the delegation of Article III power to them. They include: the desirability of delegating administrative decision making to bodies with regulatory and subject matter expertise; Congress's interest in the flexibility to "implement a substantive regulatory agenda;" maintaining "reasonable efficiency and order in . . . the traditional domain of public rights cases . . . tax, welfare, customs and immigration,"³²⁵ limiting litigation costs to government and citizens;³²⁶ the political and practical flexibility entailed in assembling an adjudicatory workforce without life tenure to prevent burdening judges;³²⁷ and the possible enhancement of the quality and fairness of decision making emerging from agencies with subject matter specialization.³²⁸

The delegational subset of Article III power cases shows a split in the constitutional doctrine on the requirement of review of adjudicatory decisions by Article III courts applicable to private and public rights disputes, respectively. While the contours of what a public right is and is not is rooted in history rather than being amenable to ready definition,³²⁹ judicial review by an Article III court of delegated adjudication is not required³³⁰ in disputes between individuals and the government that are

³²² FALLON ET AL., *supra* note 311, at 369.

³²³ Farrell, *supra* note 318, at 290.

³²⁴ See FALLON ET AL., *supra* note 311, at 367 ("[T]he strains that acceptance of administrative adjudication puts on efforts to develop a coherent theory of the necessary role of courts under Article III, the separation of powers, and the Due Process Clause.").

³²⁵ Fallon, *supra* note 320, at 935.

³²⁶ *Id.* at 936, 937.

³²⁷ *Id.* at 936.

³²⁸ *Id.*

³²⁹ FALLON ET AL., *supra* note 311, at 370.

³³⁰ See Fallon, *supra* note 320, at 923; Farrell, *supra* note 318, at 290–91. See also Fallon, *supra* note 320, at 921–26, 928 for a discussion of differences between the doctrine in

adjudicated by specialized Article I courts, such as the federal Tax Court, the Court of Veteran's Appeals, and the Court of Claims;³³¹ decisions of territorial courts,³³² courts in the District of Columbia,³³³ and military Courts;³³⁴ and those that involve determination of "public rights" by administrative agencies.³³⁵ They largely involve civil suits against the federal government for "money, land, or other things,"³³⁶ and also include "[d]isputes arising from coercive governmental conduct outside the criminal law,"³³⁷ and immigration law.³³⁸ By contrast, when the adjudication of private rights is carried out by a non-Article III decision maker, judicial review by an Article III court is constitutionally mandated.³³⁹

Crowell v. Benson, notoriously a case which in its time was significant in limiting delegation of Article III power, but which history has judged as authorizing the vesting of large and increasing extents of adjudicatory authority in the organs of the

legislative courts and administrative agencies contexts. *But see* *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 584–87 (1985) (criticizing the *Northern Pipeline* plurality's distinction between the Article III requirements for adjudicating private and public rights disputes, and drawing attention to the indeterminate contours of the class of private rights disputes); *N. Pipeline Constr. Co. v. Marathon Pipe line Co.*, 458 U.S. 50, 69 n.23 (1982) (plurality opinion) ("[I]t is . . . clear that even with respect to matters that arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Art. III courts."); FALLON ET AL., *supra* note 311, at 370–71 (suggesting that this bright line overstates the case that "public rights disputes can be removed from the purview of the courts altogether").

³³¹ FALLON ET AL., *supra* note 311, at 378–79.

³³² *N. Pipeline*, 458 U.S. at 64–65.

³³³ *Id.* at 65.

³³⁴ *Id.* at 66.

³³⁵ *Id.* at 67–69. The seminal case on the public rights doctrine is *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272 (1856).

³³⁶ *Ex parte Bakelite Corp.*, 279 U.S. 438, 452 (1929); FALLON ET AL., *supra* note 311, at 379.

³³⁷ FALLON ET AL., *supra* note 311, at 370.

³³⁸ *Id.* *But see* *INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (concluding that "some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution'" (quoting *Hekkila v. Barber*, 345 U.S. 229, 235 (1953))).

³³⁹ *See, e.g., N. Pipeline*, 458 U.S. at 67–70, 77; Fallon, *supra* note 320, at 914 & n.56; Farrell, *supra* note 318, at 291; *see also* *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 50–55 (1989) (holding that while Congress cannot constitutionally strip parties disputing matters of private rights, as opposed to public rights, of their right to trial by jury, and while an apparently private right "closely intertwined" with a federal regulatory program that Congress has power to enact is characterizable as "public," the recovery of the object of a fraudulent conveyance is properly a private right, and thus, the Seventh Amendment entitled the party sued by the bankruptcy trustee a jury trial). The holding was limited. The Court did not rule on the question of the constitutionality (on either Article III or Seventh Amendment grounds) of having jury trials in bankruptcy courts overseen by bankruptcy judges with provision for review by Article III courts, rather than in an Article III court and overseen by an Article III judge. *Id.* at 50; *see also* *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986).

administrative state,³⁴⁰ involved a no-fault statutory compensation scheme for maritime workers that delegated initial fact-finding authority to the United States Employees' Compensation Commission. The *Crowell* Court held that when *private rights* are subject to adjudication by a non-Article III tribunal, the Constitution requires that questions of law in such cases remain in the authority of Article III judges;³⁴¹ and also that authority to review ordinary questions of fact de novo, restricted to the record before the original non-Article III fact-finder, likewise resides in Article III judges.³⁴² The delegation of fact-finding authority on constitutional or jurisdictional matters to non-Article III personnel was constitutional only where Article III courts retained the final decision-making power, determined by review de novo, based on a plenary record not restricted to that used by the non-Article III fact-finder.³⁴³

It was critical to the *Crowell* Court's holding that some delegation of fact-finding was constitutional where "fundamental rights are in question," Article III judges exercised "constant superintendence," "direction," and "the court's . . . control" of the non-Article III fact-finder,³⁴⁴ and that final decisional authority remained in an Article III court.³⁴⁵ Further, the Court registered the tensions in delegation jurisprudence between constitutional values including due process and the separation of powers on the one hand, and the phenomenon of the rise of the administrative state on the other. Noting the threat to judicial power and thus the separation of powers if final determinations of fact lie outside the authority of Article III courts,³⁴⁶ "wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law,"³⁴⁷ it emphasized at the same time the virtues of delegation in areas, like the compensation for maritime workers' death

³⁴⁰ Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1374–78 (1953).

³⁴¹ *Crowell v. Benson*, 285 U.S. 22, 46, 49 (1932). The holding in *Crowell* is one on which the rise of administrative adjudication and *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), cast considerable doubt. See, e.g., FALLON ET AL., *supra* note 311, at 372–73.

³⁴² *Crowell*, 285 U.S. at 46, 49.

³⁴³ *Id.* at 54, 56, 61, 62.

³⁴⁴ See *id.* at 61; Farrell, *supra* note 318, at 292 (characterizing *Crowell* as holding that "delegations of essential fact finding authority to . . . adjuncts was permitted only if Article III federal judges exercised 'close supervision,' and the adjunct had no independent authority to enforce its own orders").

³⁴⁵ *Crowell*, 285 U.S. at 61–63. See Farrell, *supra* note 318, at 292 & n.234, 294–95, for an account of the effects of the Administrative Procedure Act and due process cases after *Crowell* on its holding concerning decisional authority on administrative and constitutional facts. See also FALLON ET AL., *supra* note 311, at 371 (suggesting that the delegation of fact-finding to non-Article III actors might invite a critical evaluation of the Court's holding that the "the essential attributes of judicial power" remained in an Article III court); Fallon, *supra* note 240, at 926 & n.67 (explaining the erosion of this aspect of *Crowell's* doctrine).

³⁴⁶ *Crowell*, 285 U.S. at 56–57.

³⁴⁷ *Id.* at 57.

and disability at issue in *Crowell*, with a high caseload, “thus relieving the courts of a most serious burden while preserving their complete authority to insure the proper application of the law.”³⁴⁸ Fallon et al. gloss the *Crowell* decision thus: “Article III concerns were implicated when Congress assigned adjudication to an administrative agency . . . [b]ecause federal agencies may be . . . susceptible . . . to manipulation or control by Congress or the President.”³⁴⁹

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, the leading case on constitutional limitations on vesting judicial powers in legislative courts, the Court struck down a bankruptcy statute that permitted an Article I court to adjudicate contract disputes between private parties, subject to review by one or more Article III Courts based on a “clearly-erroneous standard.”³⁵⁰ The *Northern Pipeline* plurality distinguished the bankruptcy statute at issue in that case from the compensation statute at issue in *Crowell* on the basis that the latter involved “the adjudication of congressionally created rights”³⁵¹ and because of the narrow fact-finding role assigned to the commissioners in that case, their lack of enforcement power, and the relatively wide-ranging appeals available.³⁵²

As to the intra-court delegation case *United States v. Raddatz*,³⁵³ which had authorized the statutory delegation to federal magistrate judges of initial decision making on pretrial motions, including those which concerned alleged violations of constitutional—rather than purely statutory—rights, the *Northern Pipeline* plurality distinguished it on the basis of “sufficient control” being retained by an Article III court.³⁵⁴ This was achieved through “the magistrate’s proposed findings and recommendations . . . [being] subject to *de novo* review [of the transcript] by the district court, which was free to rehear the evidence or to call for additional evidence,” and the provisions specifying that “the magistrate considered motions only upon reference from the district court, and that the magistrates were appointed, and subject to removal, by the district court,” thus “clearly” reposing “ultimate decisionmaking authority . . . with the district court.”³⁵⁵ In the language of *Raddatz*, delegation does not violate Article III of the Constitution so long as “the ultimate decision is made by the district court.”³⁵⁶

³⁴⁸ *Id.* at 54.

³⁴⁹ FALLON ET AL., *supra* note 311, at 369.

³⁵⁰ 458 U.S. 50, 55–56 & n.5, 87 (1982).

³⁵¹ *Id.* at 78.

³⁵² *Id.*

³⁵³ 447 U.S. 667 (1980).

³⁵⁴ *N. Pipeline*, 458 U.S. at 79.

³⁵⁵ *Id.*; *see also id.* at 81 (referring to the “authority—and the responsibility—to make an informed, final determination . . . [which] remains with the judge” (quoting *Mathews v. Weber*, 423 U.S. 261, 271 (1976)), and the requirement that “the ultimate decision is made by the district court” (quoting *Raddatz*, 447 U.S. at 683)); Fallon, *supra* note 320, at 294.

³⁵⁶ *Raddatz*, 447 U.S. at 683.

Thus the “essential attributes of the judicial power”³⁵⁷ remained with an Article III court. For the *Northern Pipeline* plurality, two principles guided questions of the constitutionality of delegation of Article III adjudicatory power: there is “substantial discretion to . . . assign[] to an adjunct . . . some functions historically performed by judges;”³⁵⁸ however, “the functions of the adjunct [decision maker] must be limited in such a way that ‘the essential attributes’ of judicial power are retained in the Art. III court.”³⁵⁹ The provision of judicial review was not sufficient to render the delegation to bankruptcy judges constitutional, because “constitutional requirements for the exercise of judicial power must be met at all stages of adjudication, and not only on appeal.”³⁶⁰ Accordingly, the power to delegate adjudicatory functions in relation to constitutional rights was more limited than was the case where statutory rights were involved.³⁶¹

Relevant to the unconstitutionality of the bankruptcy statute were the breadth of the kinds of determinations the bankruptcy court made;³⁶² its plenary jurisdiction,³⁶³ the range of its powers, which encompassed “all ordinary powers of district courts, including the power to preside over jury trials, the power to issue declaratory judgments, the power to issue writs of habeas corpus, and the power to issue any order, process, or judgment appropriate for the enforcement of the provisions of [the bankruptcy statute];”³⁶⁴ the fact that appellate review of the bankruptcy court’s decision was on the deferential “clearly erroneous” standard rather than the de novo review provided for by the statute at issue in *Crowell*; and the fact that the bankruptcy court’s judgments were final and “binding and enforceable even in the absence of an appeal.”³⁶⁵ Ironically in context, Congress had not constituted the bankruptcy courts as Article III courts in part because of

an aggressive lobbying effort by the Judicial Conference of the United States . . . and Chief Justice Warren Burger to prevent the conferral of Article III status on bankruptcy judges. . . . [T]he Article III judiciary must remain relatively small to retain the elite status that has traditionally lured first-rate lawyers to the federal bench.³⁶⁶

³⁵⁷ *N. Pipeline*, 458 U.S. at 77 (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932)).

³⁵⁸ *Id.* at 80.

³⁵⁹ *Id.* at 81.

³⁶⁰ *Id.* at 86 n.39.

³⁶¹ *Id.* at 81, 83.

³⁶² *Id.* at 85.

³⁶³ *Id.*

³⁶⁴ *Id.* (citations omitted).

³⁶⁵ *Id.* at 85–86.

³⁶⁶ FALLON ET AL., *supra* note 311, at 384–85.

While rights of appeal to the circuits are statutory rather than constitutional, they are of a different quality to the delegated adjudication of statutory workers' compensation entitlements in *Crowell*, "incidental to Congress' power to define the [compensatory] right that it has created."³⁶⁷ And while the Article III nondelegation doctrine may reveal an "indifferen[ce] to where cases are adjudicated in the first instance,"³⁶⁸ there is much emphasis in *Crowell* and the language of the *Northern Pipeline* plurality—sounding in thick Article III values of guarding against arbitrary government power, fairness to litigants, and rule of law values³⁶⁹—on requiring some level of appellate review by an Article III court of delegated primary decision making.³⁷⁰ Leading federal courts scholars have made versions of this argument, Fallon suggesting that "sufficiently searching appellate review by an Article III court as both necessary and sufficient to legitimate initial adjudication by a federal legislative court or administrative agency;"³⁷¹ Richard Saphire and Michael Solimine³⁷² and Daniel Meltzer³⁷³ arguing that it is necessary but not sufficient; and James Pfander suggesting that oversight of inferior tribunal adjudication by Article III actors might be constitutionally exercised by the availability of the prerogative writs and not just by conventional appellate review.³⁷⁴

What of public rights cases? Judith Resnik has suggested the irony of denying Article III review of decisions in disputes between individuals and the government while requiring them in disputes between private parties.³⁷⁵ Paradoxically, given the

³⁶⁷ *N. Pipeline*, 458 U.S. at 83.

³⁶⁸ Fallon, *supra* note 320, at 940.

³⁶⁹ *See id.* at 937–43.

³⁷⁰ *See id.* at 949–92 for an elaboration of the theory. *See also* Judith Resnik, *Judicial Independence and Article III: Too Little and Too Much*, 72 S. CAL. L. REV. 657, 661 & n.19 (1999).

³⁷¹ *See* FALLON ET AL., *supra* note 311, at 387.

³⁷² Richard B. Saphire & Michael E. Solimine, *Shoring Up Article III: Legislative Court Doctrine in the Post CFTC v. Schor Era*, 68 B.U. L. REV. 85, 87–88, 145 (1988).

³⁷³ Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 304–05 (1990).

³⁷⁴ James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 743–47 (2004).

³⁷⁵ Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 600 (1985); *see also* FALLON ET AL., *supra* note 311, at 379 (posing the rhetorical question "[w]hy is the need for an independent adjudicator not greatest, rather than weakest, in cases between the government and an individual?"); Erwin Chemerinsky, *Ending The Marathon: It Is Time to Overrule Northern Pipeline*, 65 AM. BANKR. L.J. 311, 321–22 (1991); Kenneth S. Klein, *The Validity of the Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 HASTINGS CONST. L.Q. 1013 (1994); Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL RTS J. 407, 420–29 (1995); Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L.J. 2589, 2610 (1998) ("Current rules about delegation permit

normative discourse of the majority in *Crowell* and the plurality in *Northern Pipeline*, access to review of governmental action by the Article III judiciary has been eroded in categories of cases where litigants are particularly vulnerable to abuses of government power, and typically receive little protection from the institutions of majoritarian democracy,³⁷⁶ for example in asylum matters,³⁷⁷ military court and veteran's benefits appeals. Article III values are likewise compromised in cases when primary decision making is also intra-institutionally delegated, for example where a district court assigns to staff attorneys the "processing" of § 1983 prison conditions cases.³⁷⁸ The role of appellate review is, then, becoming increasingly rather than decreasingly important in protecting individuals against unfair treatment by the government and overreaching exercises of government power.

In *Commodity Futures Trading Commission v. Schor*,³⁷⁹ the Court moved away from formalist distinctions between public and private rights cases in determining delegated Article III power questions and established a balancing test³⁸⁰ for the constitutionality of the delegating of Article III power to a person not holding Article III office. That balancing test weighs the compromising of "Article III values (fairness to individual litigants based on an independent judiciary and separation of powers)" against "the benefits of delegations of authority to settle civil disputes (efficiency and expertise)."³⁸¹ The *Schor* Court's list of the factors to be weighed in functionalist separation of powers analysis comprises

the thinnest protection of 'Article III values' to [public rights cases] . . . in which the government is often a litigant and in which the reasons to have an independent judiciary appear to be at their height.").

³⁷⁶ See, e.g., David S. Udell & Rebekah Diller, *Access to the Courts: An Essay for the Georgetown University Law Center Conference on the Independence of the Courts*, 95 GEO. L.J. 1127, 1142–51 (2007).

³⁷⁷ See, e.g., Nancy Morawetz, *Back to Back to the Future? Lessons Learned from Litigation Over the 1996 Restrictions on Judicial Review*, 51 N.Y.L. SCH. L. REV. 113 (2007).

³⁷⁸ See FED. JUDICIAL CTR., RESOURCE GUIDE FOR MANAGING PRISONER CIVIL RIGHTS LITIGATION 27, 35 (1996) (acknowledging the employment of pro se law clerks to screen pro se filings, including prisoner civil rights actions and habeas corpus petitions); Ann H. Mathews, Note, *The Inapplicability of the Prison Litigation Reform Act to Prisoner Claims of Excessive Force*, 77 N.Y.U. L. REV. 536, 544 & n.46 (2002) (noting that the federal district courts began to rely heavily on pro se law clerks to limit prisoner litigation in the early 1980s).

³⁷⁹ 478 U.S. 833 (1985).

³⁸⁰ The balancing test emerged in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985). See Fallon, *supra* note 320, at 929–31. It was arguably abandoned in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54–55 (1989). See FALLON ET AL., *supra* note 311, at 397–99.

³⁸¹ Farrell, *supra* note 318, at 293 (glossing *Schor*, 478 U.S. 833, 850–56, 863 (Brennan, J., dissenting) ("The Court requires that the legislative interest in convenience and efficiency be weighed against the competing interest in judicial independence.")).

the extent to which the ‘essential attributes of judicial power’ are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.³⁸²

Thus *Schor*, especially when viewed from the hindsight cast by *Granfinanciara*’s return to functionalism,³⁸³ leaves us with a binary: the Court’s deferential treatment of delegated primary review in public rights cases; and its continuing, albeit eroding, requirement of Article III oversight in private rights cases. The functionalist balancing *Schor* deploys emphasizes that this body of doctrine, whether formalist or functionalist, is riddled with articulation of norms that pull in opposite directions, as when the Court emphasized in one breath the relevance to the determination of the constitutionality of delegation of Article III power and “the degree of judicial control saved to the federal courts, as well as the congressional purpose behind the jurisdictional delegation, the demonstrated need for the delegation, and the limited nature of the delegation.”³⁸⁴

This binary pull contrasts with the more abstract and yet foundational concerns expressed in Justice Brennan’s dissent, in which Justice Marshall joined, where constitutional values speak with one voice: the “impartial adjudication” and protection of Constitutional rights that might be “expected” from judges with constitutional security of tenure and salary protections,³⁸⁵ and the understanding that “a principal benefit of the separation of the judicial power . . . would be the protection of individual litigants from decisionmakers susceptible to majoritarian pressures.”³⁸⁶

What is the specific relevance of this body of doctrine taken as a whole, to questions of the constitutionality of intra-court delegation of Article III power? Discussing federal magistrate judges, Fallon et al. have asked whether the fact that they function inside Article III courts rather than outside them makes it “clear that . . . [this] should alleviate, rather than heighten, constitutional concern.”³⁸⁷ Citing what they describe as “a provocative student Note,” Fallon et al. raise questions about whether intra-court delegation of Article III power will produce “discrimination both among classes of litigants and areas of the law, with some receiving disproportionate inattention,” and surrogates being delegated responsibility for adjudicating claims involving

³⁸² *Schor*, 478 U.S. at 851. The Court additionally notes that the petitioner “voluntarily dismissed the federal court action and presented its debit balance claim by way of a counterclaim in the CFTC reparations proceeding.” *Id.* at 838 (emphasis added).

³⁸³ See FALLON ET AL., *supra* note 311, at 397–99.

³⁸⁴ *Schor*, 478 U.S. at 855.

³⁸⁵ *Id.* at 860–61 (Brennan, J., dissenting).

³⁸⁶ *Id.* at 860.

³⁸⁷ FALLON ET AL., *supra* note 311, at 406.

“simple cases and needy litigants.”³⁸⁸ They go on to quote at length from the note, which identifies the “role problems arising from the magistrate’s dual position as judicial subordinate and independent adjudicator,”³⁸⁹ strikingly similar to those which I have argued³⁹⁰ characterize clerk and staff attorney adjudicatory behavior:

[T]he magistrate is not a judge. In addition to the familiar “control” of appellate review that all higher federal tribunals exercise over the judges of lower courts, the magistrate is also subject to a qualitatively different form of bureaucratic control that may attend district court authority to determine his reappointment prospects and, more importantly, the day-to-day contents of his docket. Moreover, district judges must evaluate the magistrate’s decisional record in the course of exercising their administrative functions, if only in order to maintain the standards of the court. This ongoing, informal oversight creates the risk of impermissible intrusion on the magistrate’s substantive decisions. The danger is not that magistrates will come to function as judicial alter egos, but rather that they may be encouraged to adopt a risk-averse strategy of adjudication by the pressure of judicial scrutiny, a strategy eschewing unconventional decisions that might otherwise be prompted by novel legal claims or by pressing factual idiosyncracies. Such “judicious” decisionmaking would be inconsistent with the premise that the magistrate is capable of serving as the functional equivalent of the judge. It would be equally inconsistent with the broader policy of autonomous adjudication within the federal courts that underlies the Article III judicial office.³⁹¹

The note additionally documents concerns about the constitutionality of delegating Article III adjudication to surrogates that accompanied the authorization by the Judicial Conference (under color of amendments to the Magistrates Act) of increasing use of magistrates in the 1960s and 1970s,³⁹² concluding that “the acceptance achieved by magistrate habeas hearings may reveal less about the [constitutional] risks [of delegated adjudication] that they entail than about the countervailing pressures on overcrowded courts that have rendered those risks acceptable.”³⁹³ Also of salience to this Article, the note reports legislative history of the Magistrates Act amendments which

³⁸⁸ *Id.* at 406–07 (quoting Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 YALE L.J. 1023, 1053 (1979)).

³⁸⁹ Note, *supra* note 388.

³⁹⁰ Pether, *Sorcerers*, *supra* note 28, at 53–58.

³⁹¹ Note, *supra* note 388, at 1056–57.

³⁹² *Id.* at 1041–58.

³⁹³ *Id.* at 1046.

registered that “law clerks performed the specific function of reviewing and reporting on prisoner petitions,”³⁹⁴ and concludes that

one characteristic that habeas petitions share with prisoner civil rights petitions makes them especially poor subjects for experiments conducted on the edges of Article III: for the most part, they are brought by state prisoners requesting a federal court to set aside a state court verdict, often on grounds already rejected by a state’s highest tribunal. Prior to *Wedding*, [which briefly outlawed magistrate fact-finding in habeas cases, in part because of concerns³⁹⁵ about delegated adjudication, before itself being overtaken by Magistrates Act amendments authorizing a broad scope of Magistrate work] it was suggested that under these circumstances less confident magistrates may sometimes be reluctant to grant relief even when it is warranted. Yet a more pressing constitutional argument against magistrate evidentiary hearings rests on comity and federalism principles. The resentment already felt by state court judges at being overturned by a district court may be heightened by the suspicion that the reversal was in practice the work of a magistrate, and de facto magistrate adjudication also triggers concern about impermissible forms of federal intervention in the state judiciary.³⁹⁶

Where do the Article III delegation cases leave us on the question of intra-court delegation without formally “legislative” authority to court staff, the majority of whom have much less legal experience than the contemporary federal magistracy? The language of “Article III courts” rather than “Article III judges” in *Schor* might suggest the federal courts of appeals’ delegation practices are managing to skirt constitutional infirmity. The clustering of “public rights” cases on the screening track, reflecting the formalist group of delegation cases, might also suggest this conclusion. The appellate courts’ hierarchy of treatment of appeals³⁹⁷ adjudicated by Article III personnel and those consigned to the “screening” track corresponds roughly with the hierarchy of values established in the jurisprudence on delegation of primary decision making.

Nonetheless, values like the fair treatment of litigants and the independence promoted by the tenure and salary protections of Article III office, the insistence in

³⁹⁴ *Id.* at 1042 n.101.

³⁹⁵ *Id.* at 1043.

³⁹⁶ *Id.* at 1046–47 (citations omitted).

³⁹⁷ See Judith Resnik, *Trials as Errors, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837 (1984) (critiquing the unfairness produced by a stratified adjudicatory system).

formalist cases like *Crowell* and *Northern Pipeline* on the necessary safeguard of Article III review for constitutional delegated adjudication, and the emphasis *Raddatz* places on decisions being made by Article III officeholders do not suggest that the delegation of Article III adjudication to junior, often under-supervised adjuncts whose competence the judges themselves do not trust passes constitutional muster. Nor does the balancing of functionalist separation of powers values—“fairness to individual litigants based on an independent judiciary and separation of powers,” measured against “efficiency and expertise”—undergird the nonprecedential status rules and the practices they justify and enable as they do the decision in *Schor*. Rather, asserted efficiency with admitted lack of expertise trumps all other values.

Likewise, the silent and obscure delegation of Article III power to under-supervised and underqualified adjuncts within the courts themselves is not the equivalent of the transparent delegation of Article III power, as in *Raddatz* and *Schor*: the *Schor* Court relied significantly on apparent legislative approbation of the CFTC’s actions in authorizing the CFTC’s adjudication of common law counterclaims arising out of reparations actions for violations of the Commodity Exchange Act under color of regulations the CFTC had issued.³⁹⁸ Additionally, given the frequency with which the government wins—not always because of the merits—in unpublished opinion cases,³⁹⁹ neither the Article III guarantees of what might be characterized as litigants’ rights of access to “impartial and independent federal adjudication,”⁴⁰⁰ nor “the constitutional system of checks and balances,”⁴⁰¹ are advanced by the federal appeals courts’ delegation practices. Rather, the circuits become laws unto themselves.

The discourse on the unworthiness of pariah classes of matters and litigants for actual Article III appellate adjudication documented in Part I.A and analysis of the results in the other leading Article III cases in Part III.A indicates that the hierarchy of adjudicatory treatment institutionalized in the contemporary courts of appeals is the product of constitutional solipsism, of highly interested adjudication, which sees courts privileging their interests rather than focusing on their responsibility to fair and disinterested balancing of the claims of state and subject within the bounds established by differing standards of review.

All this said, current inherent Article III nondelegation doctrine provides limited assistance in determining the constitutionality of one of the practices that undergird nonprecedential status rules: intra-court delegation. It has more than one standard. The logic of the hierarchy of standards is counter-intuitive from a perspective valuing judicial independence and the separation of powers as protections for individuals challenging overreaching government power or unfair treatment at the hands of the state. Private (property) rights and private disputes trump all others as meriting Article III

³⁹⁸ *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 845–47 (1986).

³⁹⁹ *See supra* notes 55–56 and accompanying text.

⁴⁰⁰ *Schor*, 478 U.S. at 848, 850.

⁴⁰¹ *Id.* at 850.

adjudication. And the administrative state is a fact of legal institutional life, its judicial review norms arguably infecting the operations of the courts themselves. Further, while unlike the right of access doctrine, the delegation doctrine operates within the four corners of Article III, it is likewise facially incapable of addressing the constitutionality of nonprecedential status rules themselves or of practices other than delegation, and is beset by the same standing and evidentiary difficulties.

III. TOWARD A “THICK” DOCTRINE OF ARTICLE III POWER

Thus, the authority bearing on the constitutionality of nonprecedential status rules and the practices they justify and enable is fragmented, none of it provides a conclusive doctrinal basis for a doctrine of Article III power that would resolve the constitutionality question, and a plethora of practical barriers complicates bringing a constitutionality challenge. The existing thin doctrines of Article III power are unequal to the crisis of injustice in federal appellate adjudication.

Nonetheless, the existing authority discussed in Parts I.C and II.C points to constitutional logic which insistently calls into question the constitutionality of nonprecedential status rules and the practices that underpin them. In this Part, I critically analyze two bodies of inherent Article III power jurisprudence that suggest the content of a thick doctrine of Article III power.

A. *Critical Reading of Inherent Article III Separation of Powers Cases*

The leading separation of federal constitutional powers cases arise procedurally when the legislature (or executive) encroaches on “judicial prerogatives.” As indicated in Part II.A.2.b, the practical likelihood of legislative action in relation to nonprecedential status rules is not high; as a pragmatic matter, if such action were to be taken, the Court is unlikely to find in Congress’s favor. Nonetheless, these are among the most developed articulations of the scope and nature of the inherent powers of Article III courts, and thus any theory of Article III power must address them.

Their doctrinal essences yield little. *Hayburn’s Case* has been held to “stand[] for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch.”⁴⁰² In *Plaut v. Spendthrift Farm, Inc.*, finding

⁴⁰² *Plaut v. Spendthrift Farm*, 514 U.S. 211, 218 (1995); see also *Miller v. French*, 530 U.S. 327, 343 (2000) (further citing *Plaut’s* proposition). See Mark Tushnet, *Dual Office Holding and the Constitution: A View from Hayburn’s Case*, SUPREME COURT HISTORICAL SOCIETY 1990 YEARBOOK (1990), available at http://www.supremecourthistory.org/04_library/subs_volumes/04_c12_i.html, for a critical account of the various judges’ two Article III arguments in the case: that making factual determinations and on that basis recommending the payment of war service pensions to Revolutionary War veterans was not judicial in nature; and that the fact that the Secretary of War had jurisdiction to decide whether to act on the recommendations contravened the separation of powers by providing for appellate review by the executive, rather than as constitutionally required by an Article III court. Tushnet notes that the decision was influenced by the judges’ concern about their workload.

unconstitutional a federal statute which reinstated jurisdiction that the Court had stripped itself of, the Court identified three types of unconstitutional incursions on Article III power: statutes “prescrib[ing] rules of decision to the Judicial Department of the government in cases pending before it;”⁴⁰³ *Hayburn*-type, “vest[ing] review of the decisions of Article III courts in officials of the Executive Branch;”⁴⁰⁴ and those entrenching on the authority “to *decide* . . . [cases], subject to review only by superior courts in the Article III hierarchy,”⁴⁰⁵ contravened in *Plaut* by the legislature “retroactively commanding the federal courts to reopen final judgments.”⁴⁰⁶ This last group is most germane to assessing the constitutionality of nonprecedential status rules and the practices they justify and enable. The nondelegation subset of that group has been analyzed in Part II.C.2.

There is another way of making sense of the leading inherent judicial power cases, through close critical reading which attends to what really makes a difference between what powers are ruled to be “indefeasibly vested” in Article III courts, and those where legislation changing the way federal courts traditionally do business is held by the Court to pass constitutional muster. Such analysis yields evidence of norms of Article III judging practice of use in generating a thick theory of Article III power.

Expanding on the nature of Article III power, the *Plaut* Court distinguished the legislative power to “prescribe the rules by which the duties and rights of every citizen are to be regulated,”⁴⁰⁷ from the judicial power of “the interpretation of the laws,”⁴⁰⁸ a formulation that sounds in Scalian contempt for the common law.⁴⁰⁹ Inferential support for nonprecedential status rules can also be found in the articulation of unconstitutionality of the legislature “revis[ing] a judicial sentence . . . revers[ing] a determination once made, in a particular case.”⁴¹⁰

Similarly tending to support the constitutionality of nonprecedential status rules and their underlying practices is the Court’s emphasis on the “binding effect[s] of . . . [the judicial branch’s] acts . . . [being] limited to particular cases and controversies,”⁴¹¹

⁴⁰³ *Id.* at 218 (quoting *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872) (“Whatever the precise scope of *Klein* . . . later decisions have made [it] clear that its prohibition does not take hold when Congress ‘amends applicable law.’”)).

⁴⁰⁴ *Id.* (citing *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792)).

⁴⁰⁵ *Id.* at 218–19.

⁴⁰⁶ *Id.* at 219.

⁴⁰⁷ *Id.* at 222 (quoting THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (J. Cooke ed., 1961)).

⁴⁰⁸ *Id.* (quoting THE FEDERALIST NO. 78, at 525 (Alexander Hamilton) (J. Cooke ed., 1961)).

⁴⁰⁹ ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37–41 (1997).

⁴¹⁰ *Plaut*, 514 U.S. at 222 (quoting THE FEDERALIST NO. 81, at 545 (Alexander Hamilton) (J. Cooke ed., 1961)); *see also id.* at 226 (referring to the unconstitutionality of “revision,” “control,” or “suspension” of decisions of Article III courts by the legislature).

⁴¹¹ *Id.* at 223, 226 (“[J]udgments of Article III courts are ‘final and conclusive upon the rights of the parties.’” (quoting Chief Justice Taney in *Gordon v. United States*, 117 U.S. 697, app. at 702 (decided 1864, reported 1885))); *see also id.* at 227 (holding that a “judicial

and thus limiting the judiciary's ability to endanger "the general liberty of the people."⁴¹² Justice Scalia's quotation for the Court from Lincoln on *Dred Scott* and the doctrine of precedent is particularly salient in context:

I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit. . . . And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be over-ruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice.⁴¹³

Likewise offering inferential support for a limited doctrine of precedent, Justice Breyer's concurrence identifies "ordinary legislative activity" as normally "provid[ing] . . . assurances against 'singling out' . . . [including] prospectivity and general applicability."⁴¹⁴

Those who lost out as a result of the Court's *sua sponte* jurisdiction stripping in *Plaut* were one-shotters,⁴¹⁵ and Justice Stevens's dissent has a signally different emphasis from the opinion of the Court on what characterizes judicial power:

The Framers rejected that [colonial legislatures'] practice [of appellate review of judicial decisions], not out of a mechanistic solicitude for 'final judgments,' but because they believed the impartial application of rules of law, rather than the will of the majority, must govern the disposition of individual cases and

decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that *very case* was something other than the courts said it was"). Justice Breyer's concurrence also approvingly quotes Chief Justice Marshall in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810), to the effect that "[i]t is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." *Plaut*, 514 U.S. at 242 (Breyer, J., concurring); *see also id.* at 246 (identifying generality as a characteristic of legislation).

⁴¹² *Id.* at 223 (quoting THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (J. Cooke ed., 1961)).

⁴¹³ *Id.* at 225 (quoting 4 R. BASLER, THE COLLECTED WORKS OF ABRAHAM LINCOLN 268 (1953) (First Inaugural Address 1861)).

⁴¹⁴ *Id.* at 243 (Breyer, J., concurring) (emphasis added).

⁴¹⁵ *See id.* (observing that "the legislation disfavors not plaintiffs but defendants"); *see also id.* at 248 (Stevens, J., dissenting) (identifying Congress's intent to benefit the "aggrieved class" of investors).

controversies. Any legislative interference in the adjudication of the merits of a particular case carries the risk that political power will supplant even-handed justice, whether the interference occurs before or after the entry of final judgment. . . . [The disputed amendment] neither commands the reinstatement of any particular case nor directs any result on the merits. Congress recently granted a special benefit to a single litigant in a pending civil rights case [which “was intended to exempt a single disparate impact lawsuit against the Wards Cove Packing Company”], but the Court saw no need even to grant certiorari to review that disturbing legislative favor. In an ironic counterpoint, the Court today places a higher priority on protecting the Republic from the restoration to a large class of litigants of the opportunity to have Article III courts resolve the merits of their claims. . . . We should regard favorably . . . legislation that enables the judiciary to overcome impediments to the performance of its mission of administering justice impartially, even when, as here, the Court has created the impediment.⁴¹⁶

In the Court’s most recent inherent Article III power case, *Miller v. French*,⁴¹⁷ by contrast to the holding in *Plaut*, the Court found constitutional a provision of the Prison Litigation Reform Act, a paradigmatic jurisdiction-stripping statute, which disadvantaged prisoners bringing § 1983 prison conditions actions.

Responding to the prisoner’s contention that the time limit imposed by the provision offended against separation of powers principles, the Court privileged the role of the judiciary over the safeguarding of individual rights, and, separating Bill of Rights protections from its model of Article III power, articulated an Article III power doctrine with the narrowest of scopes:

Respondents’ concern with the time limit . . . must be its relative brevity. But whether the time is so short that it deprives litigants of a meaningful opportunity to be heard is a due process question, an issue that is not before us. We leave open, therefore, the question whether this time limit, particularly in a complex case, may implicate due process concerns.

In contrast to due process, which principally serves to protect the personal rights of litigants to a full and fair hearing, separation of powers principles are primarily addressed to the structural

⁴¹⁶ *Id.* at 265–66 (citations omitted).

⁴¹⁷ 530 U.S. 327, 327–29 (2000).

concerns of protecting the role of the independent Judiciary⁴¹⁸ within the constitutional design. In this action, we have no occasion to decide whether there could be a time constraint on judicial action that was so severe that it implicated these structural separation of powers concerns.⁴¹⁹

Concurring in part and dissenting in part, Justices Souter and Ginsburg took a broader view of Article III power, and one sounding in a conventional understanding of common law precedent. They agreed “that applying the automatic stay may raise the due process issue” and “may also raise a serious separation-of-powers issue if the time it allows turns out to be inadequate for a court to determine whether the new prerequisite to relief is satisfied in a particular case.”⁴²⁰

Dissenting, Justice Breyer, with whom Justice Stevens joined, drew dramatic attention to the stakes potentially involved in prison conditions litigation, vividly cataloging inhumane breaches of the Eighth Amendment in the prison conditions case *Morales Feliciano v. Romero Barcelo*.⁴²¹ The dissent emphasized not only the centrality of “fairness” to Article III power, but also the responsibility of those exercising Article III power to safeguard the constitutional rights of the powerless, those for whom the institutions of majoritarian democracy provide little protection. The dissent’s account of Article III power also suggested that Article III power and Bill of Rights protections are intertwined: “So read, the statute directly interferes with a court’s exercise of its traditional equitable authority, rendering temporarily ineffective pre-existing remedies aimed at correcting past, and perhaps ongoing, violations of the Constitution.”⁴²²

⁴¹⁸ Underscoring the Court’s focus on shoring up its own power, rather than on protecting litigants’ rights.

⁴¹⁹ *Miller*, 530 U.S. at 350.

⁴²⁰ *Id.* at 350–51 (Souter, J., concurring in part and dissenting in part).

⁴²¹ *Id.* at 355–56 (Breyer, J., dissenting) (citing *Morales Feliciano v. Romero Barcelo*, 497 F. Supp. 14, 32 (D.P.R. 1979)).

⁴²² *Id.* at 357. On the question of what process is due, Margaret Farrell notes that fairness evaluation in Article III power questions shades into “due process analysis at some point.” Farrell, *supra* note 318, at 294–97.

Due process analysis balances the private and government interests at stake in the litigation, the tendency of the procedure adopted to enhance decisional quality, and what the procedure costs the government. See *Matthews v. Eldridge*, 424 U.S. 319, 321 (1976). “The goal of the balancing exercise is the efficient and accurate application of law to facts.” Farrell, *supra* note 318, at 296. The larger values underlying the confluence of Article III and due process analysis are “the collective interests in the separation of powers, the cost of the procedure to the public, and the accuracy it would produce, as well as individual interests in neutrality and fairness.” *Id.* at 297. Thus, while it may be possible to design and administer a system of constitutionally delegating Article III power in appellate decision making to surrogates, the present system does not achieve this.

Just as separation of powers disputes about prison conditions appeals and the equitable injunction lie at the heart of *Miller v. French*, so questions of humanity arise, and echoes of the nation's founding inequality reverberate in *United States v. Klein*.⁴²³ In an opinion sounding in both equality and the centrality of fairness and fair procedures to Article III power, making a stand on behalf of those out of favor with the state, the Court emphasized that the original confiscation legislation did not divest confederate property holders of their property "unless in pursuance of a judgment rendered after due legal proceedings," recognizing "to the fullest extent the humane maxims of the modern law of nations, which exempt private property of noncombatant enemies from capture as booty of war," and sparingly applying the law of confiscation.⁴²⁴

While registering that Congress has constitutional power "to make exceptions and prescribe regulations" of the appellate power of Article III courts,⁴²⁵ the Court emphasized procedural fairness and the importance of judicial independence in disputes between individuals and the state. The Court held that in "allowing one party to [a] . . . controversy to decide it in its own favor . . . [and] allowing that the legislature may prescribe rules of decision to the Judicial Department . . . in cases pending before it,"⁴²⁶ the legislation "passed the limit which separates the legislative from the judicial power."⁴²⁷ Posing a rhetorical question of considerable salience to this Article, given the evidence of structural subordination that is justified and enabled by nonprecedential status rules, the *Klein* Court said:

Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself.⁴²⁸

In *Mistretta*, the Court considered an aspect of nondelegation doctrine and Article III power that goes to an essential characterizing of judicial power rather than to the legality of de facto delegation of Article III appellate judging to staff: the permissible delegation of power that appeared to be prima facie political, because it involved making policy, to the judiciary, and the collateral erosion of the "integrity of the Judicial Branch."⁴²⁹ The Court characterized making sentencing policy, like

⁴²³ 80 U.S. (13 Wall.) 128 (1871).

⁴²⁴ *Id.* at 137.

⁴²⁵ *Id.* at 145, 146.

⁴²⁶ *Id.* at 146.

⁴²⁷ *Id.* at 147.

⁴²⁸ *Id.*

⁴²⁹ *Mistretta v. United States*, 488 U.S. 361, 383 (1989) (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986)), *aff'd without opinion sub nom.* *United*

making procedural rules for the lower federal courts,⁴³⁰ as falling in a “‘twilight area’ in which the activities of the separate Branches merge,”⁴³¹ because Congress may vest in the Article III judiciary “nonadjudicatory functions that do not trench on the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary.”⁴³² It concluded that “the significantly political nature of the Commission’s work [did not] render[] unconstitutional its placement within the Judicial Branch,”⁴³³ and that this placement was authorized by the Necessary and Proper Clause.⁴³⁴ Its reasoning was as follows: “sentencing,” the Court concluded, “is a field in which the Judicial Branch long has exercised substantive or political judgment,”⁴³⁵ and in which it possesses “special knowledge and expertise.”⁴³⁶ Indeed, sentencing is a “uniquely judicial subject,” lying “close to the heart of the judicial function.”⁴³⁷

The *Mistretta* Court’s analogy between the making of sentencing policy by the Federal Sentencing Commission and the making of rules under Article I delegation for the lower federal courts by the Judicial Conference and the Supreme Court would not apparently stretch to encompass the making of local nonprecedential status rules. This is because, as indicated in Part II.A.2.b, as they apparently affect substantive rights, they exceed legitimate delegated rule-making power.

What of the alchemical *Mistretta* logic that assigning policy-making to the Federal Sentencing Commission and to individual Article III judges is constitutionally permissible because the subject matter of such policy “is a field in which the Judicial Branch long has exercised substantive or political judgment;”⁴³⁸ in which it possesses “special knowledge and expertise;”⁴³⁹ and is a “uniquely judicial subject,” lying “close to the heart of the judicial function”?⁴⁴⁰ Surely judgments about the doctrine of precedent lie even closer to the core of the judicial function?

The flaw in this suggested analogy lies in the distinction between making essentially political decisions about what conduct should be criminalized and how crimes should be punished (which in the U.S. constitutional context, with the largely seamless *doxa* that there can be no common law crimes, is a matter thought to be within the exclusive power of the legislature), and the quintessentially legal quality of judgments about the doctrine of precedent. The latter is legal, not political, and thus the

States v. Willis, 873 F.2d 1446 (8th Cir. 1989), *cert. denied*, 490 U.S. 1073 (1989), *disapproved sub nom.* United States v. Urrego-Linares, 879 F.2d 1234 (4th Cir. 1989).

⁴³⁰ *Id.* at 388.

⁴³¹ *Id.* at 386.

⁴³² *Id.* at 388.

⁴³³ *Id.* at 393.

⁴³⁴ *Id.* at 389–90.

⁴³⁵ *Id.* at 396.

⁴³⁶ *Id.*

⁴³⁷ *Id.* at 408.

⁴³⁸ *Id.* at 396.

⁴³⁹ *Id.*

⁴⁴⁰ *Id.* at 408.

constitutionality of making nonprecedential status rules cannot be determined through *Mistretta*'s logic. Rather, if such rule-making power is constitutional, it must lie within the four corners of Article III.

B. Essential to the Administration of Justice/Functioning of the Judiciary

Even if essential to the administration of justice or the functioning of the judiciary, exercises of Article III power cannot stand if they circumvent or are in conflict with the Constitution. As discussed in Part II.A.2.b, they may also be ultra vires if they conflict with legislation or regulations. Thus, the authority on "essential" Article III judicial power does not stand alone in determining the constitutionality of nonprecedential status rules or the practices they justify and enable. It can, however, provide guidance in generating a thick doctrine of Article III power.

Young v. United States ex rel. Vuitton held that federal district courts could, in the exercise of the inherent power to initiate prosecutions for criminal contempts extending to cases of out-of-court contempts, appoint private attorneys as prosecutors of such contempts.⁴⁴¹ They could not, however, appoint counsel acting for a party that was a beneficiary of a court order as a prosecutor in a case of alleged contempt of that order;⁴⁴² and they should exercise the power to appoint private attorneys to prosecute contempts only where the public prosecutorial authorities deny a request to prosecute.⁴⁴³

The Court's reasoning emphasized the "underlying concern" of avoiding the appearance of interested prosecuting: "diminish[ing] faith in the fairness of the criminal justice system in general."⁴⁴⁴ It also stressed the imbalance of power between a citizen prosecuted for a crime and the government.⁴⁴⁵ The purpose of the prosecution of contempt as "essential to the administration of justice,"⁴⁴⁶ and to maintaining "respect for the judicial system itself,"⁴⁴⁷ is protecting the authority and thus the independence of the judicial branch.⁴⁴⁸ However, that authority is limited by considerations of propriety, disinterest, and the restraint implied in "necessity,"⁴⁴⁹ reflected in the development of a body of procedural fairness doctrine in contempt cases.⁴⁵⁰ What

⁴⁴¹ 481 U.S. 787, 793 (1987).

⁴⁴² *Id.* at 802.

⁴⁴³ *Id.* at 801.

⁴⁴⁴ *Id.* at 811.

⁴⁴⁵ *Id.* at 813–14.

⁴⁴⁶ *Id.* at 795 (quoting *Michaelson v. United States ex rel Chi., St. Paul, Minn. & Omaha Ry. Co.*, 266 U.S. 42, 65–66 (1924)).

⁴⁴⁷ *Id.* at 800.

⁴⁴⁸ *Id.* at 795 n.7, 796.

⁴⁴⁹ *Id.* at 801 (opining that the courts' authority to prosecute contempt should entail "only '[t]he least possible power adequate to the end proposed'" (quoting *United States v. Wilson*, 421 U.S. 309, 319 (1975)), and the private prosecutors should be appointed "as a last resort").

⁴⁵⁰ *Id.* at 808–09.

might be characterized as fundamental constitutional values of procedural fairness are also reflected in Justice Blackmun's concurrence, characterizing the appointment of an "interested party's counsel to prosecute for criminal contempt" as a "violation of [Constitutional] due process,"⁴⁵¹ once again illustrating the close relationships between Article III power and due process.

By contrast, Justice Scalia, concurring in the judgment, concluded that Article III judicial power "necessary to the exercise of all others"⁴⁵² is narrow:

The [Article III] judicial power is the power to decide, in accordance with law, who should prevail in a case or controversy. That includes the power to serve as a neutral adjudicator in a criminal case, but does not include the power to seek out law violators in order to punish them—which would be quite incompatible with the task of neutral adjudication.⁴⁵³

His thin account of inherent federal judicial power is confined to "those powers necessary to protect the functioning of . . . [the Judicial Branch's] own processes."⁴⁵⁴ Advancing a version of his argument against the federal courts being considered common law courts,⁴⁵⁵ he characterizes "modern judicial decrees" as having "the binding effect of laws for those to whom they apply."⁴⁵⁶ Thus, narrow as it is, his view of Article III power might well embrace nonprecedential status rules themselves, unless the "cases and controversies" limitation led him to conclude that this type of Article III power did not authorize abstract generalized ex ante rule making.⁴⁵⁷

In *Michaelson v. United States*—authority for the proposition that while Congress may "reasonably" regulate Article III power to punish contempt, "the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative,"⁴⁵⁸—the Supreme Court upheld the constitutional validity of a federal statute which provided for trial by jury rather than summary prosecution of what the Court characterized as (out of court) criminal contempts "where the act or thing constituting the contempt is also a crime in the ordinary sense."⁴⁵⁹ For the *Michaelson* Court, the legislature's providing individuals charged with contempts with *expanded* procedural fairness rights, analogous to those provided by constitutional

⁴⁵¹ *Id.* at 814–15 (Blackmun, J., concurring).

⁴⁵² *Id.* at 819 (Scalia, J., concurring) (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)).

⁴⁵³ *Id.* at 816 (citation omitted).

⁴⁵⁴ *Id.* at 821.

⁴⁵⁵ *Id.* at 825.

⁴⁵⁶ *Id.* at 822.

⁴⁵⁷ See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 60 (1991) (Scalia, J., dissenting).

⁴⁵⁸ *Michaelson v. United States*, 266 U.S. 42, 66 (1924).

⁴⁵⁹ *Id.*

criminal procedural guarantees, was that which authorized statutory limitations on the Article III power of lower federal courts.⁴⁶⁰

Chambers v. NASCO upheld the constitutionality of an exercise of “essential” judicial power sanctioning a litigant for “abuse[] of process occurring beyond the courtroom”⁴⁶¹ where those sanctions were not authorized by Federal Rule of Civil Procedure 11. The Court relied, inter alia, on the fact that Chambers was given an “appropriate hearing”⁴⁶² on the abuse of process charges and that the sanctions were imposed after detailed fact-finding by the sanctioning court.⁴⁶³

Given the emphasis on procedural fairness and constitutional values in the “essential” judicial power jurisprudence, then, as well as the focus on comparatively uncontroversial powers like that to sanction or to hold a litigant in contempt, it seems unlikely that nonprecedential status rules are authorized by this type of inherent judicial power, and *a fortiori* (leaving aside apparently insurmountable practical problems of proof of matters internal to courts) that treating similarly situated litigants differently; delegating Article III authority; substituting certiorari review for genuine appellate review to the requisite standard; or structurally subordinating decision making, would be within Article III judicial power.

C. Constitutional Logic

The judicial diplomats who prompted the national adoption of institutionalized unpublication in the 1970s and their successors who, almost three decades later, achieved the passage of FRAP 32.1 were uneasy about the constitutionality of nonprecedential status rules.⁴⁶⁴ As well they might have been: to the extent that they mean what they say, that is, that they authorize treating similarly situated litigants differently if the authority that a litigant seeks to rely on is a formally nonprecedential opinion, there is authority for the proposition that nonprecedential status rules are ultra vires Article III courts because they render substantive lawmaking under color of court rules.⁴⁶⁵ Further, as discussed in Part III.B, there are plausible grounds for concluding that Article III courts do not possess the *essential* power to strip their decisions of precedential value.

That said, there is presently a split between the circuit court opinions that have addressed the question of the constitutionality of nonprecedential status rules.

⁴⁶⁰ *See id.*

⁴⁶¹ *Chambers*, 501 U.S. at 57.

⁴⁶² *Id.*

⁴⁶³ *Id.* at 57–58.

⁴⁶⁴ *See, e.g.*, Minutes of Fall 2002 Meeting of Advisory Committee on Appellate Rules 35 (Nov. 18, 2002), <http://www.uscourts.gov/rules/Minutes/app1102.pdf> (“Members expressed concern about using a procedural rule to embrace one side of the debate over the constitutionality of non-precedential opinions. Members were unanimous in wanting to limit the involvement of the Committee to the issue of citation.”).

⁴⁶⁵ *See, e.g.*, *Bonner v. City of Prichard*, 661 F.2d 1206, 1210–11 (11th Cir. 1981).

Anastasoff and *Hart* spend much energy on making opposing originalist cases which are, in the end, unpersuasive. *Hart*'s other reasoning is disingenuous: the discourse on the necessity for nonprecedential status rules sounds overtly in the necessity to free judicial time for crafting a small universe of tightly reasoned published opinions,⁴⁶⁶ at the considerable cost to litigants denied genuine access to an Article III decision maker, and the opinion does not acknowledge what its author has acknowledged elsewhere, that it is not Article III judges who do the writing of the opinions to which precedential status is denied.⁴⁶⁷

What remains in the leading authority on nonprecedential status rules and on Article III power is a thick residue of normative constitutional standards. As to *Anastasoff* and the *Tenth Circuit Rules* case, their reasoning is explicitly based in such constitutional logic. The crux of the reasoning in the *Tenth Circuit Rules* case is that a litigant "who can point to a prior decision of the court and demonstrate that he is entitled to prevail under it should be able to do so as a matter of *essential justice and fundamental fairness*,"⁴⁶⁸ and that nonprecedential status rules suggest "constitutional infringement because of . . . *arbitrariness, irrationality, and unequal treatment*."⁴⁶⁹ The normative crux of Judge Arnold's ultra vires jurisprudence likewise sounds in the arbitrariness of the rules and what they formally justify,⁴⁷⁰ their lack of principle, and their authorizing unreasoned decision making.⁴⁷¹ It manifests an ontological commitment to a domain of legality, distinct from the merely political, and argues for equality of treatment of litigants, the duty of constitutional judges to protect individual liberties and constrain excesses of state power. He additionally articulates values of judicial expertise and integrity.⁴⁷²

Because of the imbrication of Article III power and due process, the jurisprudential underpinning of the leading authority on the constitutional right of access to the courts, a right grounded in another overlapping set of doctrines, due process and equal protection, informs a thick doctrine of Article III power, for all that it lies doctrinally outside the four corners of Article III. From this jurisprudence comes the constitutional standard of adequate, effective, and meaningful⁴⁷³ access, emphasis on procedural

⁴⁶⁶ See Kozinski Letter, *supra* note 34 (revealing that it is "not unusual [for circuit judges] to go through 70–80 drafts of an opinion over a span of several months").

⁴⁶⁷ *Id.* ("[U]npublished dispositions—unlike opinions—are often drafted by law clerks and staff attorneys.").

⁴⁶⁸ *In re Rules of the United States Court of Appeals for the Tenth Circuit*, 955 F.2d 36, 37 (10th Cir. 1992) (emphasis added).

⁴⁶⁹ *Id.* (emphasis added).

⁴⁷⁰ Arnold, *supra* note 143 (posing the rhetorical question, "[w]hen a governmental official, judge or not, acts contrary to what was done on a previous day, without giving reasons, and perhaps for no reason other than a change of mind, can the power that is being exercised properly be called 'judicial'?").

⁴⁷¹ *Anastasoff v. United States*, 223 F.3d 898, 900, 904–05 (2000).

⁴⁷² *Id.* at 901–03.

⁴⁷³ *Bounds v. Smith*, 430 U.S. 817, 822–23 (1977).

fundamental or “essential”⁴⁷⁴ fairness, Justice Harlan’s narrow formulation of the “right not to be denied an appeal for arbitrary or capricious reasons,”⁴⁷⁵ and the equally narrow *Ross v. Moffitt* standard for discretionary criminal appeals, that litigants have “an adequate opportunity to present . . . claims fairly” in context.⁴⁷⁶ In its context, *Ross*, especially when read against *Halbert v. Michigan*, might be said to imply the requirement of a genuine opportunity for error correction in the right of access at the primary appellate stage.⁴⁷⁷ Additionally, although equal protection is not as imbricated in Article III power as is due process, the emphasis of the Supreme Court on equal protection in the most recent access to courts decision, *Halbert*, counsels against the constitutionality of an exercise of Article III power that treats certain classes of litigants as deserving of less access than others,⁴⁷⁸ *a fortiori* when differing standards of review already do this work, transparently.

Nondelegation doctrine, by contrast, reveals a degree of doctrinally encoded tolerance for differential treatment of litigants in public rights cases of the kinds that cluster in screening track appeals, and a privileging of private property rights over others. Nonetheless, the emphasis on Article III actor control over surrogates and limitations on the range of adjudicatory tasks performed by them, as on practices like evidentiary scrutiny that instantiate that control, and the insistence that “ultimate” decision making remain in an Article III court, all counsel for some limitations on delegation of appellate review, or safeguards against its unconstitutional exercising. So does the *Schor* discourse on judicial independence and separation of powers, for all its “private rights” context. This is especially so in cases where, either overtly or covertly, primary decision making has itself been consigned to surrogates, *a fortiori* where those surrogates work in conditions which compromise their independence, for example in the immigration context or in prison conditions litigation. The nondelegation doctrine authority shows both a split on the Rehnquist Court over how much delegation of Article III power is constitutionally permissible, and the influence of judicial self-interest in the permissiveness of adjudicatory delegation doctrine.

These two phenomena also characterize the outcomes of, and the differences of view that emerge in the recent *inherent* Article III power cases, *Plaut* and *Miller v. French*. Consider the normative difference between Justice Stevens’s dissenting opinion in *Plaut* and that of Justice Scalia, writing for the Court, on what Article III power comprises: for Justice Stevens, impartial justice, a rule of law that trumps expressions of majoritarian political will, and a skepticism about acceding to jurisdiction

⁴⁷⁴ *Halbert v. Michigan*, 545 U.S. 605, 610–11 (2005).

⁴⁷⁵ *Griffin v. Illinois*, 351 U.S. 12, 37 (1956) (Harlan, J., dissenting).

⁴⁷⁶ 417 U.S. 600, 612 (1974).

⁴⁷⁷ Which would, on *Ross*’s reasoning, suggest that the right of access requires less of Courts on subsequent, discretionary appeals. *Id.* at 611, 614–15.

⁴⁷⁸ Compare *Ross*, 417 U.S. at 612, 615 (1974) (refusing to mandate state-appointed counsel on discretionary appeal), with *Halbert*, 545 U.S. at 610–11, 617–19 (2005) (demanding prisoners be provided with state-appointed counsel on *initial* discretionary appeal).

stripping;⁴⁷⁹ for Justice Scalia, an idiosyncratically narrow view of the ambit of the common law.⁴⁸⁰

The *Miller v. French* concurrences emphasize the significance of a common law method for doing justice,⁴⁸¹ and the dissenters place stress on both procedural fairness as a touchstone of Article III power, and the stakes that can be involved when powerless individuals have their rights circumscribed by the state.⁴⁸² By contrast, the majority opinion advances a thin formulation of Article III power, and one notable for its self-interest and solipsistic regard.⁴⁸³ Resonating with the emerging normative thrust of the liberal wing of the Court are both the early inherent judicial power case, *United States v. Klein*,⁴⁸⁴ and Justice Thomas's disquisition on Article III power in *Missouri v. Jenkins*, where, in a poignantly ironic condemnation of the use of the equitable injunction in civil rights jurisprudence in the wake of *Brown*, he excoriates these "extravagant uses of judicial power [as] . . . at odds with the history and tradition of the equity power and the Framers' design."⁴⁸⁵ Both remind us of the abiding historical context in which Article III jurisprudence operates: the historical and persisting inadequacy of institutions of majoritarian democracy, and of the law that the elected branches of government makes, to doing equal justice.

Finally, the leading authority on *essential* Article III power likewise emphasizes procedural fairness, the role of the judicial branch in correcting imbalances of power between state and subject, and the limitations that disinterest, rather than solipsism, should place on judicial power. It is more tolerant of legislative interventions in "judicial" matters where such interventions expand rather than contract legal protections of the rights of individuals in the face of exercises of power by any branch of government, including the judicial branch. Here too, Justice Scalia's concurrence in *Young v. U.S. ex rel. Vuitton* evidences his narrow view of both Article III power and the doctrine of precedent.⁴⁸⁶

The norms that emerge from these diverse groups of cases on Article III power suggest that while a thick doctrine of Article III power might have variable application in differing types of appellate cases, such as criminal and civil, those affecting constitutional and other rights and those with less material impacts, the logic of the non-delegation doctrine is at sharp odds with the normative emphasis across the range of Article III jurisprudence on the responsibility of Article III judiciary to be especially vigilant when the subject of adjudication is a dispute between the state and a relatively

⁴⁷⁹ *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 266–67 (1995) (Stevens, J., dissenting).

⁴⁸⁰ *Id.* at 223.

⁴⁸¹ *Miller v. French*, 530 U.S. 327, 350–52 (2000) (Souter, J., concurring in part and dissenting in part).

⁴⁸² *Id.* at 353–62 (Breyer, J., dissenting).

⁴⁸³ *See id.* at 336–41.

⁴⁸⁴ 80 U.S. (13 Wall.) 128 (1871).

⁴⁸⁵ *Missouri v. Jenkins*, 515 U.S. 70, 126 (1995).

⁴⁸⁶ *See supra* notes 451–56 and accompanying text.

powerless individual. Further, the recurring emphasis on procedural fairness and judicial independence suggests that any delegation of appellate decision making to surrogates must be limited by scrupulous supervision by Article III officers, the mandating of adjudicatory procedures that tend to produce safe outcomes, and keen attentiveness to any evidence that screening procedures are based on categories of defendants and matters. “Meaningful” access to the courts requires no less.

Vermeule does not recognize *Miller v. French* for the canary in his doctrinal coalmine: judicial and political branch interests may coincide as regards persons whose interests are as under protected by unreflective judicial elitism as by the (formally political) institutions of majoritarian democracy. When there is a conflict of interest between the constitutional values for which the separation of powers is a placeholder and the bureaucratic tunnel vision that Vermeule describes as the basis of the “cognitive”⁴⁸⁷ tendency “toward judicial overprotection of judicial power and prerogatives,”⁴⁸⁸ and I identify as constitutional solipsism, a thick rather than thin Article III doctrine is called for, because, as Vermeule himself recognizes, without recognizing its significance for his reading of *Miller v. French*,

[t]he federal judiciary has, both before and since the New Deal, acquiesced in the congressional creation of an extraordinary range of administrative and quasi-administrative agencies and tribunals that exercise adjudicatory power outside the Article III system. If some or all of those responsibilities had been vested in the federal judiciary, then . . . [i]nstead of the federal judiciary currently visible—an elite corps of several hundred life-tenured generalist judges sitting, for the most part, in courts possessed of the full range of federal jurisdiction—the federal judiciary would encompass a broader range and variety of courts, officers, and programs,⁴⁸⁹

which, in a way not visible to Vermeule, in the jurisdiction of “the last plantation,”⁴⁹⁰ it does.

CONCLUSION: THE GROUNDS FOR—AND TIMELINESS OF—A JURISPRUDENCE OF ARTICLE III *DUTY*

The practical unlikelihood of legislative action that encroaches on nonprecedential status rules is not the only reason why any doctrine of Article III *power* provides an

⁴⁸⁷ Vermeule, *supra* note 260.

⁴⁸⁸ *Id.* at 360.

⁴⁸⁹ *Id.* at 428.

⁴⁹⁰ See Pether, *Sorcerers*, *supra* note 28, at 59–60 (citation omitted).

inadequate cure for the ethical malaise infecting the nation's Article III appellate courts. Consistent with Vermeule's argument that courts may be prone to declare unconstitutional legislation that makes "debatable" inroads into "core [judicial and curial] functions,"⁴⁹¹ the emergent pro-subordination bias diagnosable in the leading inherent judicial power and nondelegation doctrine cases suggests that they are likely to do so in the event of a legislative challenge to the constitutional legitimacy of non-precedential status rules, where the net effect of such legislation is not to spare them the ennui of adjudicating matters they consider unworthy of their time, energy, and expertise, but rather the reverse.

The likelihood of such a legislative challenge is low, given that federal rules are characteristically made by a formally legislative process that is in fact driven by the courts themselves. This likelihood is decreased by the fact that, as to the constitutionally suspect practices that nonprecedential status rules justify and enable, problems of standing and evidence render the appellate courts practically immune from any disruptions of business as usual beyond any embarrassment caused by imprudent admissions about what the reasons for the rules really are, and the shoddy adjudicatory practices that underpin them.⁴⁹² Borrowing from Robin West's indictment of Melville's Captain Vere, nonprecedential status rules and the practices they authorize and enable constitute a betrayal of judicial office, and of the law's fabric and logic, as well as its texts, "for the most personal and perverted reasons."⁴⁹³

In such a context, no doctrine of Article III *power* is adequate to address this pervasive institutional failure of judicial ethics. What is called for is a doctrine of Article III *duty*, a refocusing of the gaze of the Article III appellate judge away from personal or institutional power, interests, and convenience, and towards those on whom he passes judgment, to rule of law and constitutionalist values, and to the constitutional logic of existing Article III jurisprudence.

Constitutional challenges turning on judicial power and the doctrine of precedent have a history of association with perceived crises in relations between state and subject. These include the reflections of natural law theory⁴⁹⁴ in the early cases on precedent as the failsafe protector of private property rights. We find them too in responses of the Article III judiciary to the nation's constitutive inequality, the law as an agent of structural subordination, as in the origins of nonprecedential status rules in the Fourth Circuit's reaction to *Brown*,⁴⁹⁵ and Justice Thomas's meditations on the

⁴⁹¹ Vermeule, *supra* note 260, at 397.

⁴⁹² See Pether, *Sorcerers*, *supra* note 28, at 16–17.

⁴⁹³ Robin West, *The Lawless Adjudicator*, 26 CARDOZO L. REV. 2253, 2253 (2005).

⁴⁹⁴ For seminal accounts of the natural law tradition in U.S. constitutional thought, see Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928); Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914); and Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

⁴⁹⁵ West argues that the "current form" of what she takes to be an ethos of faith in

asserted limits of the equitable injunction in modern desegregation jurisprudence.⁴⁹⁶ Thus a doctrine of Article III duty includes an articulation of responsibility for protecting individuals against unconstitutional exercises of government power, and the development of a judicial culture of genuine restraint, directed to checking the improper use of judicial power against have-not litigants, rather than against the charge of judicial overreaching in the conventional context of disputes over separation of powers infeasibly vested in the judicial branch.

The most interesting and productive aspect of Vermeule's proposal is the possibility that the discursive force of doctrine may operate to shift what he labels the cognitive bias that leads judges to overprotect judicial prerogatives in separation of powers cases, grounded in part in "habituation," skewing of knowledge towards what is most familiar, that is, judicial prerogative.⁴⁹⁷ In the light of my conclusions in Part III, any heuristic available to shift settled patterns of thought and vision, circumscribed by unreflective self-interest and clothed in the rhetoric of necessity, is of use in generating a thick Article III duty doctrine and in having it affect the material practices of Article III judging both in and beyond the context of direct separation of powers challenges.

For Article III courts to realize the promise aggrieved citizens continue to perceive in the promise of *Brown*, rather than to confirm their abiding agency in maintaining the nation's constitutive inequality, might be thought enough to counsel that a doctrine of Article III duty is overdue. A contemporary constitutional crisis in which questions both of state power and of inequality are imbricated suggests that the need for such a doctrine and the changed rules and practices it would mandate is presently especially acute. While the enemy combatant cases, from *Rasul v. Bush*⁴⁹⁸ and *Hamdi v. Rumsfeld*⁴⁹⁹ to *Boumediene v. Bush*,⁵⁰⁰ have all addressed questions of the jurisdiction of Article III courts in the context of alleged overreaching of state power into the civil liberties of persons whom majoritarian democracy imperfectly protects, it could be argued that a thick doctrine of Article III power, or duty, is redundant when the nation has a written and entrenched Bill of Rights. Who needs a thick doctrine of Article III power when you have the Suspension Clause? This would be to fail to register that the kinds of issues that have emerged in this group of Article III power cases, including the procedural protections afforded by statute or common law to noncitizens, those detained outside the U.S., and those who are not seamlessly accommodated by conventional law of war doctrine, and the question of what is constitutionally due to such persons, do not neatly fit within the imagined four corners of the Constitution.

adjudication, paradoxically coupled with the "grip [of the indeterminacy thesis] on the modern and postmodern legal imagination," derives from *Brown*. West, *supra* note 493, at 2257–59.

⁴⁹⁶ *Missouri v. Jenkins*, 515 U.S. 70, 124–37 (1995) (Thomas J., concurring).

⁴⁹⁷ Vermeule, *supra* note 260, at 391.

⁴⁹⁸ 542 U.S. 466 (2004).

⁴⁹⁹ 542 U.S. 507 (2004).

⁵⁰⁰ 128 S. Ct. 2229 (2008).

While a detailed consideration of the contours of the doctrine of Article III power emergent in the enemy combatant cases is beyond the scope of this Article, there are signs in *Boumediene*'s robust invocation of the language of the separation of powers as well as its articulation of the scope of the Suspension Clause, that the Court itself increasingly understands the role of the Article III courts to be informed by *constitutionalist* logic. There is likewise some recent evidence suggesting that the lower federal courts at the business end of Guantánamo proceedings are also developing such a consciousness. Take, for example, the recent response by Chief Judge Lamberth of the U.S. District Court for the District of Columbia to the Attorney General's suggestion that the legislature should design the procedures to be applied in his court's hearing of the habeas actions brought by Guantánamo detainees in the wake of *Boumediene*.⁵⁰¹

Arguably less amenable to resolution by recourse to the Suspension Clause was the case of Ali Saleh Kahlah al-Marri, a legal resident alien arrested on U.S. soil, detained in military custody for five years without trial, *without seeing his wife and children*, and allegedly tortured.⁵⁰² A sharply split Fourth Circuit held that indefinite detention of an enemy combatant in these circumstances had been authorized by Congress and was lawful, but that al-Marri "ha[d] not been afforded sufficient process to challenge his designation as an enemy combatant."⁵⁰³

The Bush government's position in *al-Marri v. Pucciarelli* was that the "President has both statutory and inherent constitutional authority" to detain suspected terrorists without criminal trial, and that indefinite detention of citizens is likewise permissible; the majority of the Fourth Circuit Court of Appeals agreed.⁵⁰⁴ Despite the Obama government's decision to criminally prosecute al-Marri, and the Supreme Court's vacating of the decision, the nation's federal courts still face considerable challenges

⁵⁰¹ See Ari Shapiro, *Mukasey Urges Congress To Create Detainee Rules*, ALL THINGS CONSIDERED (NPR Radio broadcast, Jul. 21, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=92768076> (noting that, in response to the Attorney General's expressed preference for Congress, and not the courts, to make procedural rules to govern habeas proceedings anticipated by Guantánamo detainees in the wake of *Boumediene*, "[U.S. District Court for the District of Columbia Chief Judge Royce] Lamberth said guidance from Congress is always welcome. 'Because we are on a fast track, however, such guidance sooner rather than later would certainly be most helpful'"). The U.S. District Court for the District of Columbia's Executive Session had resolved on July 1, 2008, that Senior Judge Hogan would "[t]o the extent possible . . . rule on procedural issues" in these cases, and on July 2, 2008, had issued a press release announcing this decision. Press Release, U.S. Dist. Court, D.C., DC Chief Judge Meets with Judges to Discuss District Court Procedures for Guantanamo Cases (July 2, 2008), <http://www.dcd.uscourts.gov/Guantanamo-PressRelease070208.pdf>.

⁵⁰² *al-Marri v. Pucciarelli*, 534 F.3d 213, 220 (4th Cir. 2008), *cert. granted*, 129 S. Ct. 680 (2008), *vacated and remanded*, 129 S. Ct. 1545 (2009).

⁵⁰³ *Id.* at 216 (per curiam).

⁵⁰⁴ See, e.g., *id.* at 217; see also U.S. Dep't of Justice, Office of Legal Counsel Memoranda, <http://www.usdoj.gov/opa/documents/olc-memos.htm> (last visited Apr. 21, 2009).

in fashioning Article III doctrine responsive to impending constitutional crises. The scope of such challenges is indicated by recent suggestions, given the likely closing of the detention camp at Guantánamo Bay, and the likelihood that many among the remaining detainees are neither repatriable nor likely to be tried in U.S. courts, that “preventive detention” on U.S. soil is an acceptable response to the problem of suspected terrorists detained by the U.S. in circumstances where they are not amenable to criminal trial because of problems of proof, and of “classified” evidence, nor yet squarely covered by the law of war.⁵⁰⁵ Such might also be said of the various challenges to conventional constitutional criminal procedural norms that “War on Terror” cases have brought to the lower federal courts: these include the taking of secret evidence and the issuing of secret opinions,⁵⁰⁶ and the question of whether hearsay evidence is adequate to authorize indefinite detention.⁵⁰⁷

Boumediene and *al-Marri* make it plain that a Bill of Rights is nothing without the judicial subjects who give it meaning, particularly in an historical context where an expansionist doctrine of state power over “outsider” individuals, and a willingness to create jurisdictions of exception to give that doctrine meaning, hold sway in the Executive and Legislative branches, as has recently been the case.

The history of Article III power which this Article records begins and ends, then, in the Fourth Circuit, and with the ancient prerogative writ of habeas corpus. As *al-Marri* compellingly demonstrates, what those who hold Article III office make of the current passage of history is of relevance to us all. The abiding quotidian national history documented in this Article, less dramatic than the annals of the “War on Terror,” might lead us to conclude that its relevance is pressing, and that the institutional culture of the courts of appeals means that many who hold Article III office are ill equipped to discharge their responsibility to constitutionalism. The grim history of the development of nonprecedential status rules suggests that for aliens and others, replacing constitutional solipsism with constitutional duty is long overdue.

⁵⁰⁵ Bruce Ackerman is among the scholars advocating such detention under an “emergency constitution.” See, e.g., Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004).

⁵⁰⁶ See Robert Timothy Reagan, *Classified Information in Federal Courts*, 53 VILL. L. REV. (forthcoming 2008).

⁵⁰⁷ *al-Marri*, 534 F.3d at 218 (Motz, J., concurring).