U.C.L.A. Law Review

Rethinking the Nonprecedential Opinion

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ABSTRACT

Nearly 90 percent of the opinions issued by the federal courts of appeal are unpublished and lack precedential effect, and where these cases lay out new legal rules, this phenomenon cannot be reconciled with the Supreme Court's settled retroactivity jurisprudence. *Harper v. Virginia Board of Taxation* and *Griffith v. Kentucky*, both moored in Article III, require that any case's new rule apply not only to future litigants but also to those whose cases are pending. A nonprecedential case by definition has no application beyond its litigants. This raises no problem where a case adds nothing new, as other litigants already have access to the precedents on which it relies. However, the majority of circuits allow nonprecedential opinions to break new ground, and these nonprecedential opinions frequently make law, command dissents, create or deepen circuit splits, and go up on certiorari to the Supreme Court.

Many commentators have debated the practical and legal implications of nonprecedential opinions, but this Article is the first to identify the inconsistency between groundbreaking nonprecedential opinions and settled principles of adjudicative retroactivity. This Article concludes that permitting nonprecedential opinions as an exception to adjudicative retroactivity threatens to drain *Harper* and *Griffith* of all but symbolic significance. Although a handful of circuits have guidelines for when an opinion must have precedential effect, this Article proposes use of the "new rule" construct, already familiar and well-developed in the context of habeas corpus and official immunity, as a mechanism for differentiating those opinions that may be designated nonprecedential from those that—under settled doctrine—may not.

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 I am very grateful to Lisa Bressman, Amanda Frost, and Brent Newton for their helpful comments on an earlier draft and to Laura Collins and Desislava Kireva for their research and editorial assistance.

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INTRODUCTION

A staggering 88.7 percent of the work product of the federal appellate courts consists of opinions that lack precedential effect.[1] This phenomenon rests uneasily with settled retroactivity doctrine. These nonprecedential[2] opinions can break new ground, draw dissents, and deepen circuit splits.[3] On occasion, they even go up to the U.S. Supreme Court.[4] Although litigants can cite to these opinions,[5] subsequent courts have no duty to grapple with them, even when they have altered or clarified preexisting rules, and even when they have applied settled rules to brand new contexts.[6] Commentators have often debated, and sometimes lamented, the role that nonprecedential opinions play in our system.[7] To date, however, no one has recognized the clear conflict between a groundbreaking nonprecedential opinion and settled principles of adjudicative retroactivity.

In a series of opinions spanning several decades, the Supreme Court has developed a bright-line rule requiring full retroactivity for opinions in all or nearly all pending civil cases[8] and all criminal cases pending on direct review.[9] On the books, the Court has made clear that, when it applies a legal

1. U.S. COURTS OF APPEALS—TYPES OF OPINIONS OR ORDERS FILED IN CASES TERMINATED ON THE MERITS, BY CIRCUIT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2016, UNITED STATES COURTS (2016), http://www.uscourts.gov/sites/default/files/data_tables/jb_b12_0930.2016.pdf [https://perma.cc/V8CA-9FCD]; *see also In re* Grant, 635 F.3d 1227, 1232 (D.C. Cir. 2011) (collecting cases). In *Grant*, the D.C. Circuit noted its agreement with the First, Second, Fourth, Seventh, Eighth, Ninth, Tenth, Eleventh, and Federal Circuits that "unpublished orders . . . may be considered persuasive authority, but they do not constrain a panel of the court from reaching a contrary conclusion in a published opinion after full consideration of the issue." *Id.*
2. Although "nonprecedential" and "unpublished" can be used interchangeably, this Article prefers the term "nonprecedential" given post–2001 publication of all opinions in West's *Federal Appendix*. *See Federal Appendix (National Reporter System)*, THOMSON REUTERS, http://legalsolutions.thomsonreuters.com/law-products/Reporters/Federal-Appendix-National-Reporter-System/p/100000796 [https://perma.cc/4HH6-Q9KY].
3. *See infra* notes 56–59 and accompanying text.
4. *See infra* notes 60–62 and accompanying text.
5. *See* FED. R. APP. P. 32.1.
6. *See infra* Subpart III.B and accompanying text.
7. *See infra* Subpart I.A and accompanying text.
8. Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993).
9. Griffith v. Kentucky, 479 U.S. 314, 322 (1987). These settled adjudicative retroactivity principles apply not merely to rules laid down by the Supreme Court but also to rules laid down by courts of appeal, as all courts that have considered the issue agree. *See*

rule to litigants before it, the rule then applies to all similarly situated litigants "as to all events, regardless of whether such events predate or postdate our announcement of the rule."[10] The Court has frequently suggested that its approach is grounded in Article III and the separation of powers.[11] While unrelated doctrines like procedural default or qualified immunity may operate to blunt or negate the benefit of a rule,[12] and while a subsequent court may recharacterize or abandon it,[13] the doctrine of adjudicative retroactivity creates—at a minimum—a duty to grapple with a new rule *ab initio*.[14] The Supreme Court has firmly resisted efforts to undermine this core principle.[15]

At present, the system squeamishly tolerates the phenomenon of nonprecedential opinions. In 2000, Eighth Circuit Judge Arnold issued a shot-across-the-bow opinion in *Anastasoff v. United States*[16] declaring nonprecedential opinions unconstitutional. His opinion met firm resistance in Ninth Circuit Judge Kozinski's point-counterpoint decision one year later in *Hart v. Massanari*.[17] Because the Eighth Circuit vacated *Anastasoff* on other grounds as moot,[18] the battle ended in stalemate and never reached the Supreme Court. Judge Arnold cast his objection in fairly amorphous constitutional terms, urging that failure to accord precedential effect to a judicial decision violated the concept of "the judicial power" embedded in Article III.[19] Although Judge Kozinski disclaimed any content to "the judicial power," the bulk of his retort was practical: According precedential force to every opinion would compel judges to divert resources from other

Herman v. Héctor I. Nieves Transp., Inc., 244 F.3d 32, 37–38 (1st Cir. 2001); Laborers' Int'l Union of N. Am. v. Foster Wheeler Corp., 26 F.3d 375, 386 n.8 (3d Cir. 1994) (stating that there is "no cogent basis for distinguishing decisions handed down by the inferior federal courts"); Newport News Shipbuilding & Dry Dock Co. v. Garrett, 6 F.3d 1547, 1554 (Fed. Cir. 1993) (applying circuit precedent retroactively after *Harper*).

10. *Harper*, 509 U.S. at 97.
11. *See infra* notes 229–233 and accompanying text.
12. *See infra* note 199 and accompanying text.
13. *See infra* notes 200–204 and accompanying text.
14. *See* Davis v. United States, 564 U.S. 229, 243 (2011) (stating that under retroactivity "a new rule is available on direct review as a *potential* ground for relief").
15. *See, e.g.*, Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 753–54 (1995) (rejecting a litigant's remedial argument because it would drain adjudicative retroactivity doctrine of all but "symbolic significance").
16. 223 F.3d 898 (8th Cir. 2000), *vacated on other grounds as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc).
17. 266 F.3d 1155 (9th Cir. 2001); *see infra* notes 90–100 and accompanying text (outlining Judge Kozinski's defense of nonprecedential opinions).
18. *Anastasoff*, 235 F.3d at 1056.
19. *Anastasoff*, 223 F.3d at 900–03.

opinions deserving full argument and reasoned analysis, leading to hasty, even erroneous, opinions that could only be corrected by the cumbersome en banc process[20] or the (unlikely) grant of certiorari by the Supreme Court. The debate between Judges Arnold and Kozinski ignited a firestorm of commentary, much of it searching for a more precise constitutional justification for Judge Arnold's position or finding insurmountable practical difficulty with anything other than Judge Kozinski's position.[21]

In overlooking the interplay between nonprecedential opinions and the Court's already extant adjudicative retroactivity jurisprudence, this commentary missed a fundamental, vexing problem. If clearly articulated retroactivity doctrine requires that a new rule laid down on day one apply to other pending cases, then a new rule laid down on day one that has no application to any other litigants plainly offends. Adjudicative retroactivity principles require that if a case's rule goes beyond the application of clearly settled law, then it must have precedential effect. Restricting other litigants' access to the new rule creates an exception to adjudicative retroactivity principles that is both unrecognized and doctrinally indefensible given the largely unconstrained discretion courts exercise in deciding an opinion's precedential effect.[22]

20. *Hart*, 266 F.3d at 1175–78.

21. *See, e.g.*, Jessie Allen, *Just Words? The Effects of No-Citation Rules in Federal Courts of Appeals*, 29 VT. L. REV. 555, 583–91 (2005) (arguing that no-citation rules violate due process); 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, 382–83 (2001) (disputing Judge Arnold's suggestion that doctrine of precedent was a "background assumption" of the Framers); David R. Cleveland, *Draining the Morass: Ending the Jurisprudentially Unsound Unpublication System*, 92 MARQ. L. REV. 685, 701–10 (2009) (examining whether the practice of nonprecedential opinions comports with procedural due process and equal protection); David Greenwald & Frederick A.O. Schwarz, Jr., *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133, 1159–66 (2002) (contending that rules restricting citation violate the First Amendment); Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235, 1275 (2004) (criticizing the phenomenon of nonprecedential opinions as inconsistent with the notion of precedent); Penelope Pether, *Constitutional Solipsism: Toward a Thick Doctrine of Article III Duty; or Why the Federal Circuits' Nonprecedential Status Rules Are (Profoundly) Unconstitutional*, 17 WM. & MARY BILL RTS. J. 955, 1018–31 (2009) (contending that nonprecedential opinions trench on a "thick" conception of Article III power); Melissa H. Weresh, *The Unpublished, Non-Precedential Decision: An Uncomfortable Legality?*, 3 J. APP. PRAC. & PROCESS 175, 192–96 (2001) (examining whether nonprecedential opinions comport with due process and equal protection).

22. *See, e.g.*, Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 753–54 (rejecting the effort to insert a balancing of factors into the remedial inquiry because it would drain the adjudicative retroactivity doctrine of all but "symbolic significance").

That many opinions currently denominated as nonprecedential should not be, however, does not mean that every opinion must have precedential effect. Some opinions involve straightforward applications of existing rules or standards to familiar fact patterns. Others break new ground. When an opinion falls into the former category, a court may circumscribe its effect to the instant litigants with impunity and need not expend resources that distract from other more important cases. In that situation, the "rule" is by definition then already retroactively available to all other litigants. As such, restricting the effect of the decision is perfectly consistent with adjudicative retroactivity principles, which require only decisions breaking new ground to be precedential.

Some courts appear to have endorsed this approach, at least intuitively. A handful of circuits have rules that require or encourage publication and precedential effect when a case is "of first impression" or "alters, modifies, or significantly clarifies" a preexisting rule.[23] These rules are at times honored in the breach. However, a clear majority of courts impose no such publication requirements or restrictions, either making newness a mere factor to consider or permitting panels to decide without apparent constraint when an opinion merits precedential treatment.[24]

This Article endorses the instincts of the minority of courts and, for clarity, suggests importing the "new law" construct that is already familiar from *Teague v. Lane*[25] in the habeas context and *Harlow v. Fitzgerald*[26] in the official immunity context.[27] Where a rule is "new" or not "clearly settled"

23. D.C. CIR. R. 36(c)(2); *see also* 1st CIR. LOC. R. 36.0(b)(1); 5th CIR. R. 47.5.1; 9th CIR. R. 36-2.
24. *See, e.g.*, 4th CIR. LOC. R. 36(a) (making newness a mere factor to consider); 6th CIR. I.O.P. 32.1(b) (same); 2d CIR. I.O.P. 32.1.1 (laying out no criteria to govern the decision); 3d CIR. I.O.P. 5.3 (same); 7th CIR. R. 32.1 (same); 8th CIR. R. 47B (same); 11th CIR. R. 36-2 (same); FED. CIR. R. 36 (permitting a nonprecedential opinion any time the panel affirms).
25. 489 U.S. 288 (1989).
26. 457 U.S. 800 (1982).
27. This approach owes much to Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991). The article examined the concept of "new law" in the different contexts of qualified immunity, retroactivity in criminal cases, and governmental liability for the collection of unconstitutional taxes. Fallon and Meltzer traced the concept of "new law" through its various iterations in the law, thus tying disparate strands together and seeing it as a unified approach best understood through the lens of remedy. *Id.* at 1733–38. Recently, Professors Neal Katyal and Thomas Schmidt recognized that "the distinction between a new rule and an application of an old one is already familiar to courts; whole areas of law are built upon it." Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109,

within the meaning of our existing legal framework, it must emerge in a precedential opinion. Where the rule is not "new" or is "clearly settled," a court may dispense with formal treatment and circumscribe the opinion's reach beyond the instant litigants. Part I examines the increasing phenomenon of nonprecedential opinions, the *Anastasoff-Hart* debate, and the practical difficulties with Judge Arnold's "everything is precedential" approach that inspired such divisive and vehement response. Part II sketches out the Supreme Court's retroactivity jurisprudence, concluding that the Court has ultimately reached doctrinal equipoise by loosely tying retroactivity to Article III and, in so doing, created a settled rule necessitating justification for any contrary approach. Finally, Part III analyzes nonprecedential opinions through an adjudicative retroactivity lens and concludes that, to a significant degree, nonprecedential opinions are not doctrinally defensible. It then examines the operation of a "clearly established precedent" / "new rule" dividing line, already familiar in other contexts, to ascertain what opinions may and may not be accorded nonprecedential effect under existing doctrinal constraints.

I. THE DRAMATIC SURGE OF NONPRECEDENTIAL OPINIONS

A. Post-1964 Explosion of the Phenomenon

Responding to a rapidly increasing workload, the Judicial Conference of the United States first recommended that courts consider limiting the number of published opinions to those of "general precedential value" in 1964.[28] Within a decade, the practice had found general acceptance in every federal circuit.[29] The published opinion, "once the hallmark of the appellate courts'

2118 n.32 (2015). They offered that, if the doctrine is "workable and useful" in one context, it may have utility in others. *Id.*

28. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 11 (1964) (hereinafter 1964 JUDICIAL CONFERENCE REPORT); *see also* Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. REV. 705, 708 (2006) (noting that movement toward unpublished opinions "did not emerge until 1964"). Interestingly, the Judicial Conference was motivated in part by the "practical difficulty and economic cost of establishing and maintaining accessible private and public law library facilities . . . ." 1964 JUDICIAL CONFERENCE REPORT 11. The Judicial Conference made no attempt to define "general precedential value." *Id.*

29. *See* Dione Christopher Greene, *The Federal Courts of Appeals, Unpublished Decisions, and the "No-Citation Rule"*, 81 IND. L.J. 1503, 1503 (2006).

work,"[30] has been in retreat ever since. This is in part because the exploding caseload of the federal courts has outpaced the number of judgeships, which has held steady since 1990.[31] The number of unpublished decisions has risen dramatically,[32] and statistics reflect that a scant 11.3 percent of federal appellate court opinions were officially "published" in 2016.[33]

At first, the Judicial Conference permitted individual courts to develop their own rules regarding publication, deciding whether to allow litigants to cite to unpublished opinions and what precedential effect, if any, to accord them.[34] Before 2006, the circuit courts adopted rules generally barring litigants from citing to unpublished opinions and restricting their precedential value solely to the named litigants.[35] In a pre-Internet world, the phenomenon of unpublished opinions commanded little attention. Opinions that courts did not publish were available only by visit to the courthouse.[36] Only the most enterprising (and well-funded) litigant was likely to encounter an unpublished opinion, and rules limiting their use thus engendered little controversy. But by 2001, with the rise in electronic

30. Edith H. Jones, *Back to the Future for the Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1492 (1995) (book review).
31. Just under 4000 appeals were filed in 1960; over fourteen times that were filed in the federal courts of appeals in 2016. *Compare* Will Shafroth, *A Summary of the 1960 Report of the Administrative Office of the U.S. Courts*, 47 A.B.A. J. 52, 54 (1961) (reporting 3900 cases filed in courts of appeals in 1960), *with U.S. Court of Appeals—Judicial Caseload Profile*, UNITED STATES COURTS (2016), http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appprofile1231.2016.pdf (reporting that 59,417 were cases filed in 2016). Although proposals surface from time to time, Congress has not increased the number of federal judgeships since 1990. *See* Judicial Improvement Act of 1990, Pub. L. No. 101-650, § 202(a), 104 Stat. 5089 (1990) (codified at 28 U.S.C. § 44 (2009)).
32. An analysis of nearly 400,000 cases between 1976 and 1997 demonstrated "a precipitous drop in the proportion of publication rates up to the early 1980s, followed by a small rise and ending with a steady decline post–1985." John Szmer et al., *The Efficiency of Federal Appellate Decisions: An Examination of Published and Unpublished Opinions*, 33 JUST. SYS. J. 318, 325 (2012). This pattern was uniform across the circuits. *Id.*
33. *U.S. Court of Appeals—Types of Opinions or Orders Filed in Cases Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2016*, UNITED STATES COURTS (2016), http://www.uscourts.gov/sites/default/files/data_tables/jb_b12_0930.2016.pdf.
34. *See* Gant, *supra* note 28, at 709; William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1170 (1978).
35. *See, e.g.*, David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate Over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1669–70 (2005) (noting that, in most circuits, unpublished opinions "are consigned to a jurisprudential 'Neverland,' where litigants are either forbidden or discouraged from citing them").
36. *See* Gant, *supra* note 28, at 709.

databases and the print publication of West's *Federal Appendix*, the term "unpublished" opinion became a clear misnomer.[37] Litigants could search out factually analogous dispositions and find potentially beneficial legal propositions online, so rules restricting citation and precedential effect became more controversial.

In 2006, after years of debate,[38] the Appellate Rules Advisory Committee adopted Federal Rule of Appellate Procedure 32.1, which barred federal courts from restricting or prohibiting citation to unpublished opinions.[39] Unpublished opinions became fair game. But the rule said nothing about what precedential effect, if any, unpublished opinions would have, leaving each court of appeals to develop its own rules.[40] As of 2017, every circuit has rules permitting litigants to cite to unpublished opinions, but these rules specifically disclaim unpublished opinions' precedential effect.[41] Thus, Rule 32.1 did little more than allow unpublished opinions out

37. West's *Federal Appendix* publishes the opinions of federal courts of appeal subsequent to 2001 that are not selected by the court for publication in the Federal Reporter. *See* FEDERAL APPENDIX (NATIONAL REPORTER SYSTEM), *supra* note 2.

38. Rule 32.1 presented "the most controversial issue in the history of the judicial rule-making process." Tony Mauro, *Difference of Opinion: Should Judges Make More Rulings Available as Precedent? How an Obscure Proposal is Dividing the Federal Bench*, LEGAL TIMES, Apr. 12, 2004, at 10 (quoting Professor Patrick Schiltz, an Advisory Committee reporter). Professor Schiltz, the hapless reporter, noted that he "devoted more attention to the unpublished-opinions issue than to all of the other issues the Advisory Committee has faced—combined" and joked that, on his death, "[his] obituary would be unpublished." Patrick J. Schiltz, *Much Ado About Little: Explaining the* Sturm und Drang *Over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429, 1429–30 (2005).

39. *See* FED. R. APP. P. 32.1(a).

40. *See* Gant, *supra* note 28, at 724 (noting then-Judge Alito's report that the rule affected citation but not weight or precedential value); *see also* David R. Cleveland, *Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. APP. PRAC. & PROCESS 61, 62 (2009) (noting that questions of precedential effect "were expressly avoided by the Committee").

41. *See, e.g.*, D.C. CIR. R. 36(e)(2) (an unpublished opinion means the panel sees "no precedential value" in the disposition); 1st CIR. LOC. R. 32.1.0(a) (unpublished decisions have persuasive value only); 2d CIR. I.O.P. 32.1.1(a) (same); 3d CIR. I.O.P. 5.1–5.3 (a panel may designate an opinion as precedential or nonprecedential); 4th CIR. LOC. R. 32.1 (citation of unpublished opinions is disfavored except for purposes of *res judicata*, estoppel, or law of the case); 5th CIR. R. 47.5.4 (unpublished decisions issued on or after January 1, 1996 are non-precedential); 6th CIR. R. 32.1(a) (only published decisions are binding on subsequent panels); 7th CIR. R. 32.1 (unpublished opinions "are not treated as precedents"); 8th CIR. R. 32.1A (unpublished opinions "are not precedent"); 9th CIR. R. 36-3(a) (same); 10th CIR. R. 32.1(A) (unpublished opinions may be cited "for their persuasive value"); 11th CIR. R. 36-2 (unpublished opinions "are not considered binding precedent"); FED. CIR. R. 32.1(d) (unpublished opinions are suitable "for guidance or persuasive reasoning" but are not given binding effect).

from under their rock. If anything, by abandoning the pretense that litigants were simply barred from citing to unpublished opinions (a pretense that enabled courts to avoid answering the question of precedential effect directly), the new rule obliged courts to be more forthright about the inapplicability of nonprecedential opinions to the universe of other potential litigants.

Proponents justify the rise in unpublished opinions out of concern for efficiency.[42] With too many cases allocated amongst too few judges, panels are hard-pressed to devote the time, energy, and care necessary to craft a thorough, well-reasoned opinion in each and every case.[43] Data confirm that published decisions are more time consuming.[44] Published decisions require more of courts; as Judge Kozinski observed, judges writing a precedential decision must choose carefully amongst alternative formulations of the rule and provide explanations both for the choices they make and for their rejection of alternate paths.[45] The court must address itself not only to the facts at hand but also to the many possible permutations it might face in the future. In committing its reasoning to published form, the court "sets the course of the law for hundreds or thousands of litigants and potential litigants."[46]

Added to the burden of writing such a thoroughly conceived opinion is the consequence of committing to it. A circuit court panel decision binds all subsequent panels and cannot be overruled by a subsequent panel, notwithstanding concern that it may misperceive the law or result in an unworkable standard.[47] Generally, the only way a circuit court can "right" a panel's misstep is by convening an en banc hearing, an exceedingly rare and

42. *See* Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 190–91 (1999) (arguing that unpublished opinions enhance judicial productivity and prevent depreciation in the quality of published opinions); Erica S. Weisgerber, Note, *Unpublished Opinions: A Convenient Means to an Unconstitutional End*, 97 GEO. L.J. 621, 625 (2009) (citing time pressure, increasing caseloads, and the need for legal clarity as efficiency-based justifications for the dramatic rise in the unpublished opinion phenomenon).

43. *See* Martin, *supra* note 42, at 182–83 (noting the dramatic expansion in the Sixth Circuit's workload since the author, a Sixth Circuit judge, had himself clerked on that court).

44. Szmer et al., *supra* note 32, at 325. The Szmer study found that "[p]ublished cases, on average, take seven weeks longer to dispose of than unpublished cases . . . ." *Id.* at 330. Judge Kozinski wrote perhaps the most impassioned defense of the practice of unpublished nonprecedential opinions in *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001). When done right, he noted, writing a published opinion "is an exacting and extremely time-consuming task." *Id.* at 1177.

45. *Hart*, 266 F.3d at 1176–77.

46. *Id.* at 1177.

47. *Id.* at 1171–72.

increasingly infrequent occurrence.[48] Practically speaking, then, the draw of the unpublished opinion is twofold: Precedential opinions cost too much in that they take too much judicial time and energy, and at the same time, they impair flexibility by binding all other panels, constraining colleagues or at least creating additional work for everyone through the seldom-invoked en banc process.[49]

48. *See* Aaron S. Bayer, *En Banc Review Has Declined in the Past Decade*, NAT. L.J., May 9, 2011, at 1 (noting a steep downward trend in en banc review across the circuits). A study by the New York Law Journal found that, in the five-year period from 2011–2016, the circuit courts of appeal had heard a total of only 145 cases en banc, with seven circuits hearing fewer than ten cases en banc during this five-year period. *See* Martin Flumenbaum & Brad S. Karp, *The Rarity of En Banc Review in the Second Circuit*, N.Y. L.J., Aug. 24, 2016, at 2. Several circuits have adopted a mechanism for informal en banc review. *See generally* Alexandra Sadinsky, Note, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 FORDHAM L. REV. 2001, 2024–29 (2014) (describing nine circuits' adoption of the technique). The D.C. Circuit, for example, uses a mechanism called "the Irons footnote," after *Irons v. Diamond*, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981), by which a panel may obtain the endorsement of the en banc court for a proposition that does not merit full hearing. But this mechanism is largely limited to situations where prior D.C. Circuit decisions conflict or have been rendered obsolete. *See Policy Statement on En Banc Endorsement of Panel Decisions* (Jan. 17, 1996), https://www.cadc.uscourts.gov/internet/home.nsf/650f3eec0dfb990fca25692100069854/a4f637b0b7081fa0852573d8005fbc67/$FILE/IRONS.PDF.

49. Despite its pragmatic appeal, the tidal wave of nonprecedential opinions has met considerable criticism in the academy. Balanced against the costs and inconvenience of creating precedential opinions are the "vital functions" precedential opinions play in our system. *See* William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 282 (1996). Professors Richman and Reynolds found that precedential opinions foster quality, predictability, and accountability and permit mechanisms for additional review. *See id.* at 282–86. They argue that the phenomenon of nonprecedential opinions as well as other mechanisms like dispensing with oral argument and farming out judicial and quasi-judicial tasks to an ever-growing bureaucracy has effectively given rise to a "new certiorari," whereby courts of appeal sift through the sea of appeals to select cases deserving of plenary review. *See id.* at 293–94; *see also* William M. Richman, *Much Ado About the Tip of an Iceberg*, 62 WASH. & LEE L. REV. 1723, 1731 (2005) ("Without statutory authority, [appellate courts] have transformed themselves from courts of mandatory jurisdiction (whose primary function is error correction) into de facto certiorari courts, taking only those cases suitable for making law."). Professors Vladeck and Gulati call the increased phenomenon of "black box" cases disposed of in brief, unpublished, unsigned, and nonprecedential opinions "a stain on our appellate justice system." Vladeck & Gulati, *supra* note 35, at 1670–71. Among other things, they note that unpublished opinions are more likely to be insulated from en banc and Supreme Court review, thus removing a valuable check on judicial power. *See id.* at 1680–81. Judge Patricia Wald begrudgingly accepted the existence of nonprecedential opinions but noted that she had seen colleagues on the D.C. Circuit "purposely compromise on an unpublished opinion" on occasion in an effort to "sweep troublesome issues under the rug." Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1374 (1995).

B. Nonprecedential Opinions Can Break New Ground

It is useful, at this point, to be precise about what exactly nonprecedential opinions look like and what factors may incline a court to craft a nonprecedential opinion. After all, if the nonprecedential opinion is merely an application of settled law, the case says nothing new by definition. Under these circumstances, the applicable rule is already available to prospective litigants, and the "nonprecedential" aspect of the case is almost circular: Having said nothing, the opinion by very definition has no utility as a precedent.

Each of the circuit courts of appeal has rules or internal procedures to govern when a panel may opt to issue a nonprecedential opinion,[50] and these rules vary widely. Four circuits' rules require that panels publish an opinion if it "alters, modifies, or significantly clarifies a rule of law,"[51] but these standards are loosely defined and generally permit nonpublication of opinions that draw dissents.[52] Two other circuit courts make novelty of the rule a mere factor to consider.[53] Six other courts give panels free rein to designate any opinion as nonprecedential that they believe should lack precedential effect.[54] The universe of nonprecedential opinions undoubtedly includes cases that do not stake out new ground; however, only a handful of circuits have rules that specifically restrict nonprecedential opinions to these cases, and even circuits with stricter rules permit panels to accord nonprecedential effect to opinions that lack unanimity.[55]

50. *See, e.g.*, D.C. CIR. R. 36(c)(2); 1ST CIR. R. LOC. R. 36.0(b)(1); 2D CIR. I.O.P. 32.1.1(a); 3D CIR. I.O.P. 5.3; 4TH CIR. LOC. R. 36(a); 5TH CIR. R. 47.5.1; 6TH CIR. I.O.P. 32.1(b); 7TH CIR. R. 32.1; 8TH CIR. R. 47B; 9TH CIR. R. 36-2; 10TH CIR. R. 36.1; 11TH CIR. R. 36-2; FED. CIR. R. 36.
51. D.C. CIR. R. 36(c)(2)(B). *See, e.g.*,1ST CIR. LOC. R. 36.0(b)(1); 5TH CIR. R. 47.5.1; 9TH CIR. R. 36-2.
52. *See* D.C. CIR. R. 36(c)(2) (excluding opinions that draw dissents from the list of criteria that, if met, requires publishing an opinion); 1ST CIR. LOC. R. 36(b)(1) (preferring that opinions be published but noting that policy can be overcome when the opinion does not "serve otherwise as a significant guide to future litigants"); 10TH CIR. R. 36.1 (requiring publication in the event of separate opinions); 5TH CIR. R. 47.5.1 (allowing that an opinion "may" be published if it is accompanied by a concurring or dissenting opinion); 9TH CIR. R. 36-2(g) (requiring publication if a dissenting or concurring judge specifically requests it).
53. *See, e.g.*, 4TH CIR. LOC. R. 36(a); 6TH CIR. I.O.P. 32.1(b)(1)(A).
54. *See, e.g.*, 2D CIR. I.O.P. 32.1.1; 3D CIR. I.O.P. 5.3; 7TH CIR. R. 32.1; 8TH CIR. R. 47B; 11TH CIR. R. 36-2; FED. CIR. R. 36.
55. *See, e.g.*, 5TH CIR. R. 47.5.1 (permitting but not requiring publication in the event of a dissenting or concurring opinion); 9TH CIR. R. 36-2(g) (requiring publication of a fractured decision only if the dissenting or concurring judge specifically requests it).

In practice, the majority of circuits permit nonprecedential opinions in a broad swath of situations that may break new ground. Nonprecedential decisions frequently include dissents,[56] even in circuits whose rules specify that an opinion "shall be designated" precedential if it alters, modifies, or clarifies existing law.[57] In a 2001 study, Professors Deborah Merritt and James Brudney found that, rather than consisting of "routine applications of existing law with which all judges would agree," nonprecedential decisions included "a noticeable number" of reversals, dissents, and concurrences.[58] The Supreme Court has granted certiorari to review numerous unpublished decisions, even recently, and often has reversed.[59] In several cases, the

56. *See, e.g.*, United States v. White, 683 F. App'x 549 (8th Cir. 2017) (affirming over Judge Loken's dissent); United States v. Meraz-Olivera, 472 F. App'x 610, 612 (9th Cir. 2012) (affirming over Judge Reinhardt's dissent urging a due process violation); United States v. Turnage, 222 F. App'x 251 (4th Cir. 2007) (affirming over Judge Motz's dissent); Access for Am., Inc. v. Associated Out-Door Clubs, Inc., 188 F. App'x 818, 820 (11th Cir. 2006) (affirming over Judge Barkett's dissent arguing that the panel's opinion was inconsistent with prior Eleventh Circuit precedent); U.S. Cellular Inv. Co. v. Sw. Bell Mobile Sys., Inc., 124 F.3d 218 (10th Cir. 1997) (affirming over Judge Baldock's dissent). *See generally* Gant, *supra* note 28, at 729 & n.115 (emphasizing that many unpublished opinions contain dissents and do not merely unanimously affirm lower court holdings).

57. *See, e.g.*, *In re* Martin, 398 F. App'x 326 (10th Cir. 2010) (denying authorization for successive habeas petition over Judge Hartz's dissent); Bias v. Woods, 288 F. App'x 158 (5th Cir. 2008) (finding that a physician acted with deliberate indifference over Judge Owen's dissent); United States v. Novosel, 139 F. App'x 985 (10th Cir. 2005) (rejecting a sentencing challenge over Judge Briscoe's dissent); Singh v. Ashcroft, 87 F. App'x 69 (9th Cir. 2004) (granting an asylum petition over Judge Beam's dissent).

58. Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 120 (2001). Further belying the notion that unpublished decisions were straightforward applications of settled legal principles, Professors Merritt and Brudney also found that judges with different backgrounds and demographic profiles reached different results. *See id.* at 110–11.

59. *See, e.g.*, McWilliams v. Dunn, 137 S. Ct. 1790 (2017) (reversing an unpublished Eleventh Circuit decision, *McWilliams v. Commissioner, Alabama Department of Corrections*, 634 F. App'x 689 (11th Cir. 2015), granting a habeas petition in a capital case); Mata v. Lynch, 135 S. Ct. 2150 (2015) (reversing an unpublished Fifth Circuit decision, *Mata v. Holder*, 588 F. App'x 366 (5th Cir. 2014)); Trevino v. Thaler, 133 S. Ct. 1911 (2013) (vacating an unpublished Fifth Circuit decision, *Trevino v. Thaler*, 449 F. App'x 415 (5th Cir. 2011)); Watson v. United States, 552 U.S. 74 (2007) (reversing a criminal conviction affirmed in an unpublished Fifth Circuit decision, *United States v. Watson*, 191 F. App'x 326 (5th Cir. 2006)); Los Angeles County v. Rettele, 550 U.S. 609, 612 (2007) (reversing an unpublished Ninth Circuit decision, *Rettele v. Los Angeles County*, 186 F. App'x 765 (9th Cir. 2006)); Lachance v. Erickson, 522 U.S. 262, 265 (1998) (reversing an unpublished Federal Circuit decision, *King v. McManus*, 92 F.3d 1208 (Fed. Cir. 1996)); Terrell v. Morris, 493 U.S. 1, 3 (1989) (vacating an unpublished Sixth Circuit decision, *Terrell v. Marshall*, 872 F.2d 1029 (6th Cir. 1989)); C.I.R. v. McCoy, 484 U.S. 3, 7 (1987) ("We note in passing that the fact that the Court of

Supreme Court has granted certiorari to resolve a circuit split where one of the decisions was an unpublished opinion.[60] For example, an indignant Supreme Court in *United States v. Edge Broadcasting Co.* deemed it "remarkable and unusual" that a divided Fourth Circuit panel had invalidated an Act of the U.S. Congress in an unpublished and unsigned opinion.[61] In *Los Angeles County v. Rettele*, Justice Stevens noted in his concurrence in the judgment that the case raised two questions, and "[t]he fact that the judges on the Court of Appeals disagreed on both questions convinces me that they should not have announced their decision in an unpublished opinion."[62]

The Fourth Circuit's decision in *Syncor International Corp. v. McLeland*[63] provides an illustrative example of an unpublished decision that breaks new ground. *Syncor* involved an employer's effort to enforce an *ex parte* arbitration order against a former employee, David McLeland.[64] While prior Fourth Circuit precedent required a court to overturn an arbitrator's order only where it manifestly disregarded existing law,[65] the arbitration agreement at issue provided that "[t]he arbitrator shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected by judicial review for any such error."[66] In other words, precedent

Appeals' order under challenge here is unpublished carries no weight in our decision to review the case.") (reversing an unpublished Sixth Circuit decision); Burlington N. R.R. Co. v. Okla. Tax Comm'n, 481 U.S. 454, 460 (1987) (reversing after noting that an unpublished Tenth Circuit opinion below had created a conflict with the Eighth Circuit); County of Los Angeles v. Kling, 474 U.S. 936, 936, 938 n.2 (1985) (reversing an unpublished Ninth Circuit order that was unpublished at the time certiorari was filed, *Kling v. Los Angeles County*, 769 F.2d 532 (9th Cir. 1985)); McDonald v. City of West Branch, 466 U.S. 284, 285 (1984) (reversing an unpublished Sixth Circuit decision, *McDonald v. City of West Branch*, 709 F.2d 1505 (6th Cir. 1983)); Hughes v. Rowe, 449 U.S. 5, 6–7 (1980) (reversing a Seventh Circuit unpublished order, *Hughes v. Rowe*, 605 F.2d 559 (7th Cir. 1979), "dispos[ing] of the novel question presented by petitioner").

60. *See, e.g.*, Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 583 n.5 (2008) (noting there was an unpublished Fourth Circuit opinion on one side of the split); Johnson v. United States, 529 U.S. 694, 699 n.3 (2000) (noting there was an unpublished First Circuit opinion on one side of the split); *see also* Plumley v. Austin, 135 S. Ct. 828, 830–31 (2015) (Thomas, J., dissenting from denial of certiorari) (observing that an unpublished Fourth Circuit opinion had deepened an existing circuit split).
61. United States v. Edge Broad. Co., 509 U.S. 418, 425 n.3 (1993).
62. *Rettele*, 550 U.S. at 616 (Stevens, J., concurring in the judgment).
63. No. 96-2261, 1997 WL 452245 (4th Cir. Aug. 11, 1997).
64. *See id.* at *2–3.
65. *See id.* at *5–6 (citing Upshur Coals Corp. v. United Mine Workers of Am., Dist. 31, 933 F.2d 225, 228 (4th Cir. 1991)).
66. *Id.* at *6 (joint appendix citation omitted).

allowed the court to intervene only when the arbitrator had disregarded existing law, but the agreement sought to allow intervention in circumstances beyond mere disregard. McLeland argued that, given this contractual language, the district court ought to have reviewed the arbitrator's award *de novo*.[67] Having no precedent on point, the Fourth Circuit looked to an analogous Fifth Circuit opinion and ultimately agreed with McLeland's argument.[68] This conclusion, novel in the Fourth Circuit, was not unassailable, and ultimately, the Ninth and Tenth Circuits reached opposite conclusions, holding that parties could not contract for expanded judicial review under the Federal Arbitration Act.[69] The Supreme Court settled the split amongst circuits in *Hall Street Associates, LLC v. Mattel, Inc.*, rejecting the Fourth Circuit's conclusion and siding with the Ninth and Tenth Circuits.[70]

Amid the 88.7 percent of the work of the federal courts of appeals that is currently unpublished and thus nonprecedential, it is beyond question that there are opinions that state new legal principles or seemingly draw controversial conclusions.

C. Judicial Point-Counterpoint on the Practice

Against this backdrop, Judge Richard Arnold, writing for a unanimous Eighth Circuit panel, shook things up in August 2000.[71] In *Anastasoff v. United States*, appellant Faye Anastasoff sought a refund for overpayment of federal taxes. Her refund claim, postmarked within the three-year limitations period, was received three years and one day after her overpayment.[72] After the IRS denied her refund because she had paid the taxes more than three years before her claim, Anastasoff argued that the federal "mailbox rule,"[73] under which a claim is validly filed as of the postmark date, should operate to permit the refund. But Anastasoff faced an unfavorable prior opinion: *Christie v.*

67. *See id.* at *5–6.
68. *See id.* at *6–7 (citing Gateway Techs., Inc. v. MCI Telecomms. Corp., 64 F.3d 993, 996–97 (5th Cir. 1995).
69. *See* Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 1000 (9th Cir. 2003) (en banc); Bowen v. Amoco Pipeline Co., 254 F.3d 925, 936 (10th Cir. 2001).
70. *See* Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 590–91 (2008).
71. The Supreme Court had previously punted on this issue, finding that, in light of its disposition of a case, it could "leave . . . to another day" petitioner's challenge to rules limiting citation to unpublished opinions. Browder v. Dir., Ill. Dep't of Corr., 434 U.S. 257, 258 n.1 (1978).
72. *See* 223 F.3d 898, 899 (8th Cir. 2000), *vacated on other grounds as moot*, 235 F.3d 1054 (8th Cir. 2000).
73. *See* 26 U.S.C. § 7502 (2012).

United States, a prior unpublished Eighth Circuit opinion, had rejected precisely this argument about the mailbox rule.[74] Anastasoff urged the court to ignore *Christie*, arguing that since it was unpublished pursuant to Eighth Circuit Rule 28A(i), the unpublished *Christie* rule lacked precedential effect.[75]

The *Anastasoff* panel disagreed, concluding that the portion of Rule 28A(i) that stripped *Christie* of precedential effect violated Article III.[76] Citing Sir Edward Coke and Sir Matthew Hale, Judge Arnold observed that the nature of "the judicial power" is to decide cases and, in so doing, to declare the law.[77] Judge Arnold saw the obligation to adhere to precedent as a necessary limitation on the judicial function, preventing judges from exercising purely discretionary authority and keeping them within their proper judicial roles. Per Judge Arnold, the obligation to adhere to precedent "derive[d] from the nature of the judicial power itself," separating it "from a dangerous union with the legislative power."[78] The system of precedent kept judges within the boundaries of their prescribed function and, in so doing, safeguarded liberty.[79] Judge Arnold clarified, though, that he was not suggesting that the system contemplated blind, unyielding adherence to precedent: At times a court might overrule a prior decision, but the system of precedent envisioned by the Framers—so important to the separation of powers—created "a burden of justification" in doing so.[80]

Judge Arnold soundly rejected the argument that nonprecedential opinions were a necessary evil.[81] If "[w]e do not have time to do a decent enough job," he reasoned, "the remedy is not to create an underground body of law good for one place and time only."[82] The answer was either to create

74. *See* Christie v. United States, No. 91-2375NM, 1992 U.S. App. LEXIS 38446 (8th Cir. Mar. 20, 1992) (per curiam) (unpublished). In its possible utility in the *Anastasoff* case, *Christie* is obviously an unpublished decision that broke new ground.
75. *Anastasoff*, 223 F.3d at 899.
76. *Id.* at 899–901.
77. *Id.* (citing Sir Edward Coke, *The Fourth Part of the Institutes of the Laws of England* 51 (1642) and Sir Matthew Hale, *The History of the Common Law of England* 44–45 (U. Chi. ed., 1971)); *see also* Johanna S. Schiavoni, Comment, *Who's Afraid of Precedent?: The Debate Over the Precedential Value of Unpublished Opinions*, 49 UCLA L. REV. 1859, 1868–70 (2002) (analyzing separation of powers and judicial function as rationales for the panel's decision).
78. *Anastasoff*, 223 F.3d at 903.
79. *Id.*at 901–03.
80. *Id.* at 904–05.
81. *Id.* at 904.
82. *Id.*

more judgeships "or, if that is not practical, for each judge to take enough time to do a competent job with each case."[83]

After the August issuance of the panel decision, Anastasoff filed a petition for rehearing en banc. During the pendency of her petition, the United States paid Anastasoff's tax refund claim in full. The en banc court, again per Judge Arnold, concluded that the government's actions had mooted the case and vacated the panel's decision regarding the question of nonprecedential opinions, despite the issue's "great interest and importance."[84]

The following year, *Hart v. Massanari*,[85] a unanimous Ninth Circuit decision authored by Judge Kozinski, staked out a contrary position. In *Hart*, appellant Patricia Hart had cited to an unpublished disposition, *Rice v. Chater*,[86] in a footnote in her opening brief despite then-prevailing Ninth Circuit Rule 36-3 barring citation to unpublished decisions. The Ninth Circuit invited counsel to show cause why he should not face discipline for violating the rule, and counsel responded that Rule 36-3 violated the Constitution.[87] The panel noted that *Anastasoff*, though vacated as moot, "continues to have persuasive force" and "may seduce members of our bar into violating Rule 36-3 . . . ."[88] The panel wrote "to lay these speculations to rest."[89]

Judge Kozinski rejected the premise that rules permitting nonprecedential opinions were inconsistent with the judicial function and, indeed, disclaimed the notion that "the judicial Power" in Article III had any independent content at all: "The judicial power clause . . . has never before been thought to encompass a constitutional limitation on how courts conduct their business."[90] Citing Professor Henry Hart's famous Dialogue, Judge Kozinski

83. *Id.*
84. Anastasoff v. United States, 235 F.3d 1054, 1056 (8th Cir. 2000).
85. 266 F.3d 1155 (9th Cir. 2001).
86. No. 95-35604, 1996 WL 583605 (9th Cir. Oct. 9, 1996).
87. *Hart*, 266 F.3d at 1159.
88. *Id.* Certainly, despite the withdrawal of *Anastasoff*, the issue continued to percolate. In *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260 (5th Cir. 2001) (per curiam), three Fifth Circuit judges dissented from denial of rehearing en banc because the case would have permitted the court to consider the question of unpublished decisions and their precedential effect.
89. *Hart*, 266 F.3d at 1159.
90. *Id.* at 1160. Judge Kozinski's conclusion is not unassailable here. Even setting aside the retroactivity cases, the political question doctrine has at its roots a conception of the judicial function, as captured in Article III and as distinguished from the functions of coordinate branches. *See, e.g.*, Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189, 202 (2012) (Sotomayor, J., concurring in part and concurring in the judgment) (observing that the political question doctrine is a function of separation of powers and

contended that, because "Congress could abolish the inferior federal courts" entirely, there were very few, if any, constitutional imperatives circumscribing the business of the lower courts.[91] Judge Kozinski only found limits in the "case or controversies" requirement and in the side constraints of due process and the Seventh Amendment; to him, "the judicial power" in itself was simply descriptive, not prescriptive.[92] Rejecting any reading of "the judicial power" that might freeze outmoded practices in place, Judge Kozinski recited several examples of practices that had gone by the wayside, like appellate judges each writing an opinion in every case and judges participating in the appeals of their own decisions.[93]

Judge Kozinski likewise dismissed the notion that the Framers had envisioned a robust system of precedent, noting that the Framers lived in a Blackstonian universe in which judges "found" rather than "made" the law and reporters were few and far between.[94] The common law system, he reasoned, was inherently flexible and allowed judges to respond to changed circumstances. The modern concept of precedent, he noted, was largely a creature of the nineteenth and twentieth centuries, and thus the publication of a judicial decision necessarily played no part in the Framers' calculus in crafting Article III.[95] To early Americans, in Judge Kozinski's view, prior cases had the effect of persuasive, not binding, authority.[96] Whether to follow a particular case or line of cases was a policy judgment, and many of the facets of our current system were simply "a matter of judicial administration."[97]

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derived from Article III); Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 113 & n.141 (2000) (citing the political question doctrine and *Marbury* itself as reflecting interpretations of the "judicial power" that circumscribe what courts can and cannot do).

91. *Hart*, 266 F.3d at 1161–62 (citing Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1363–64 (1953)).
92. *See id.* at 1161.
93. *See id.* at 1162.
94. *See id.* at 1167–68; *see also* 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, 1046 (2002) (noting Judge Kozinski's position that, to common law judges, opinions were merely examples and evidence of the law).
95. *See Hart*, 266 F.3d at 1168–69.
96. *See id.* at 1175.
97. *See id.* at 1175–76 (listing strict binding authority, the circuit court system, and circuit boundaries as examples of judicial administration rather than constitutional law or imperative).

Having dispensed with any constitutional basis to bar nonprecedential opinions, Judge Kozinski moved to an impassioned defense of their necessity. He forthrightly differentiated the work entailed in a precedential opinion—with its anticipation of various permutations, its thoughtful development of the legal principle, and its thorough treatment of prior precedential cases—from the work anticipated in a nonprecedential opinion, which need not be written in a way "fully intelligible to those unfamiliar with the case."[98] An unpublished decision, in Judge Kozinski's estimation, was "more or less, a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the court's decision."[99] Judge Kozinski observed that, given the staggering workload of the federal courts, judges lacked time, energy, and resources to give precedential treatment to the innumerable appeals that presented themselves.[100] In effect, the power to issue nonprecedential opinions and orders was a power exercised by necessity. To create legal principles worth enforcing, the court simply had to pick and choose.

At day's end, then, Judges Arnold and Kozinski manifested sharp differences on whether Article III's allocation of "the judicial power" to the federal courts restrained writing nonprecedential opinions or indeed, had any content at all. The Federal Circuit joined the Ninth the following year, citing the "comprehensive, scholarly treatment of the issue" in *Hart*.[101] Given the withdrawal of the Eighth Circuit opinion, the stalemate has left nonprecedential opinions intact in every court of appeals, an outcome frequently lamented but invariably perceived as a necessary evil. As noted, the phenomenon has increased sharply over time.

II. ADJUDICATIVE RETROACTIVITY AND THE DUTY TO GRAPPLE

Surprisingly unnoticed in the debate on published and precedential opinions has been the Supreme Court's doctrine of adjudicative retroactivity, which has evolved from a blurry and vacillating compromise to a well-defined, decades-old doctrine. The doctrine affects—indeed, resolves—the debate here, but to understand the application of adjudicative retroactivity to this debate, it is necessary to understand the context in which the doctrine emerged and the ideas that it rejected.

98. *Id.* at 1177–78.
99. *Id.* at 1178.
100. *Id.*
101. Symbol Techs., Inc. v. Lemelson Med., 277 F.3d 1361, 1367 (Fed. Cir. 2002).

A. The Substrate: *Linkletter* and *Chevron Oil*

The doctrine of adjudicative retroactivity has followed the serpentine path typical of many federal jurisdiction doctrines over the past few decades. Until the early 1960s, the generally accepted view was that all Supreme Court decisions were given full retroactive effect, at least within the permissible boundaries of *res judicata* and final criminal convictions.[102] As a remedy, habeas was not very expansive,[103] and the key protections for criminal defendants in the Bill of Rights had yet to be incorporated by way of the Due Process Clause to bind the states.[104] Therefore, the doctrine imposed few systemic burdens with its requirement that all litigants got the benefit of the most current rule, even if the Court had handed down that rule long after initiation of their lawsuit.[105]

102. *See* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 106 (1993) (Scalia, J., concurring). Justice Scalia cited Justice Holmes for the proposition that "[j]udicial decisions have had retrospective operation for near a thousand years." *Id.* (citing Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)); *see also* John Bernard Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied"*, 61 N.C. L. REV. 745, 746 (1983) (noting that retroactivity was presumed under common law).

103. Not until 1867 did Congress even confer on the federal courts the authority to grant habeas relief to state prisoners. *See* Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (codified as 28 U.S.C. §§ 2241–2255 (2012)).

104. As far as criminal defendants go, the bulk of incorporation occurred in the 1960s. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1 (1964) (extending the Fifth Amendment right against self-incrimination to the states); Gideon v. Wainwright, 372 U.S. 335 (1963) (extending the Sixth Amendment right to counsel to the states); Mapp v. Ohio, 367 U.S. 643 (1961) (extending the Fourth Amendment right to freedom from unreasonable searches and seizures to the states).

105. The seminal case on point was the old chestnut *The Schooner Peggy* from 1801, in which Chief Justice Marshall observed:

> It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation.

United States v. Schooner Peggy, 5 U.S. 103, 110 (1801). Chief Justice Marshall wrote specifically about treaties, and he cautioned that the rule might be different where private parties were concerned. *Id.* But over the next century, the retroactive application of judicial decisions in all civil and criminal cases found general—and unchallenged—acceptance. So settled was retroactivity that in *Vandenbark v. Owens-Illinois Glass Co.*, the Court observed that "the dominant principle" is that courts "should conform their orders to the state law as of the time of the entry. Intervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered." Vandenbark v. Owens-Illinois Glass Co,. 311 U.S. 538, 543 (1941).

Beneath the Court's notion of retroactivity lurked a Blackstonian understanding of the judicial function that some commentators, at least, believed crucial to the courts' power and legitimacy:[106] Judges were not law*makers*; instead they declared legal principles that were already in existence.[107] Because the rules described in any given case predated that case in some metaphysical sense, it worked no offense to anyone to apply them broadly to other, similarly situated litigants.[108] Thus, the rule declared in any case "was not 'new law but an application of what is, and theretofore had been, the true law.'"[109]

Then came the Warren Court, which ushered in dramatic, sweeping changes in the conception of federal judicial power and with them, decisive movement away from the Blackstonian orthodoxy. Significant to this discussion, the Warren Court greatly expanded the protections of the Bill of Rights and incorporated these new protections into the Fourteenth Amendment Due Process Clause so that they were equally binding against the states.[110] At the same time, cases like *Brown v. Allen*[111] and *Fay v. Noia*[112] broadened the substantive scope of habeas corpus so that it became an indispensable step in the process for virtually every criminal defendant.[113]

106. *See, e.g.*, Paul J. Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 62 (1965) ("Despite (and perhaps also because of) its shortcomings as a description of reality, the 'declaratory theory' expresses a symbolic concept of the judicial process on which much of courts' prestige and power depend." (footnote omitted)).

107. *See* Kermit Roosevelt III, *A Retroactivity Retrospective, With Thoughts for the Future: What the Supreme Court Learned From Paul Mishkin, and What It Might*, 95 CALIF. L. REV. 1677, 1680–81 (2007). William Blackstone said that, when courts issue a decision that departs from prior law, "even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law* . . . ." 1 WILLIAM BLACKSTONE, COMMENTARIES 69–70 (Oxford, Clarendon Press 1765).

108. *See* Mishkin, *supra* note 106, at 56–59.

109. Linkletter v. Walker, 381 U.S. 618, 623 (1965) (quoting Harry Shulman, *Retroactive Legislation*, 13 ENCYCLOPAEDIA SOC. SCIS. 355, 356 (1934)). Kermit Roosevelt notes that "[t]he consequence of this idea of law as an apotheosized immutable is that the concept of retroactivity has no place; 'old law' and 'new law' are necessarily the same." Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1083 (1999).

110. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 654–55 (1961); Malloy v. Hogan, 378 U.S. 1, 6–7 (1964); Gideon v. Wainwright, 372 U.S. 335, 342–43 (1963).

111. 344 U.S. 443 (1953).

112. 372 U.S. 391 (1963).

113. *Brown* established the principle that decisions of state courts were not *res judicata* and could be reconsidered by federal courts on habeas. 344 U.S. at 457–59. *Fay* permitted habeas petitioners to raise issues that they had not presented at trial, provided they had

The Court's approach to rights-creation during this activist era was frequently more legislative than judicial, and in this environment, "Blackstone's notion that a court's duty is not to 'pronounce a new law, but to maintain and expound the old one,' could only have seemed quaint."[114]

In conjunction with its expansion of constitutional rights and the habeas remedy, the Court took a fresh look at the doctrine of retroactivity. In *Linkletter v. Walker*,[115] the Court held that the Constitution permitted it to limit the retroactive application of its decisions in recognition of their possible disruptive systemic effects.[116] *Linkletter* addressed the applicability of *Mapp v. Ohio*'s exclusionary rule to an already-finalized case. Faced with the prospect of reversing thousands of state convictions procured using evidence seized in violation of the Fourth Amendment, the Court decided that, in fact, *Mapp* could apply to the defendant in that case and otherwise have prospective effect only.[117] Although *Linkletter* arose in the context of a habeas proceeding, the Court did not limit its discussion of retroactivity and prospectivity by means of a "habeas is different" argument. Instead, the Court created a balancing test that examined "the prior history of the rule in question, its purpose and effect, and whether retrospective operation [would] further or retard its operation."[118]

Two years later, in *Stovall v. Denno*,[119] the Court expressly grappled with, and rejected, the possible unfairness of selective prospectivity. Two other cases, issued the same day as *Stovall*, had held that criminal defendants appealing on direct review had a Sixth Amendment right to counsel for post-indictment lineups.[120] In *Stovall*, the Court rejected retroactive

not deliberately decided to bypass available state procedures in an effort to manipulate. 372 U.S. at 433–35.

114. Fallon & Meltzer, *supra* note 27, at 1739 (quoting BLACKSTONE, *supra* note 107, at 69) (footnote omitted).
115. 381 U.S. 618 (1965).
116. *Id.* at 627–29.
117. *Id.* at 636–41; *see also* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1059 (1997) (noting that nonretroactivity was initially an attempt to minimize the impact of Warren Court decisions and avoid the systemic disruption of freeing defendants convicted under prior legal standards); Roosevelt, *supra* note 109, at 1078–79 (observing the Court's shift from what the law was at the time of the decision to what it was in effect at the time of actions underlying the lawsuit).
118. *Linkletter*, 381 U.S. at 629.
119. 388 U.S. 293 (1967).
120. *See* United States v. Wade, 388 U.S. 218, 236–38 (1967); Gilbert v. California, 388 U.S. 263, 271–72 (1967).

application of this new rule due to the states' reliance on the prior rule.[121] Acknowledging that petitioners in the other cases had received the benefit of the new rule and that some might see this as inequitable, the Court decided that the creation of "chance beneficiaries" was an unavoidable consequence of Article III's command that the Court decide concrete cases in an adversarial posture.[122]

The Court's early and unanimous acceptance of selective prospectivity emerged from two very different impulses.[123] Conservatives, reluctant to give broad compass to rules laid out by the Warren Court majority, initially sought to mitigate damages by restricting the scope of rules they disfavored.[124] At the other end of the spectrum, prospectivity allowed an activist Court to blunt the considerable costs of its actions, permitting the Court to find new protections under the law without massive systemic impact.[125] This, in turn, curbed the hue and cry that might result from a change in the rules and gave the Court a measure of institutional protection.[126] This period marked a sea-change in the Court's

121. *See Stovall*, 388 U.S. at 299–301. Although Mr. Stovall was a habeas petitioner whose conviction had already become final, again the Court deemed the posture of the case irrelevant, holding the rule nonretroactive even as to cases still pending on direct. *Id.*

122. *Id.*

123. *See* Fallon & Meltzer, *supra* note 27, at 1739–40.

124. *See id.* In *Desist v. United States*, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting), Justice Harlan admitted in dissent that, although he had initially joined the Court's decisions denying retroactive effect, "I did so because I thought it important to limit the impact of constitutional decisions which seemed to me profoundly unsound in principle." *See also* Mackey v. United States, 401 U.S. 667, 676 (1971) (Harlan, J., concurring in the judgment in part and dissenting in part) ("Some members of the Court, and I have come to regret that I was among them, initially grasped [retroactivity] doctrine as a way of limiting the reach of decisions that seemed to them fundamentally unsound.").

125. *See* Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 974 (2006) (footnote omitted) (observing that "the lure of making new decisions less than fully retroactive proved impossible to resist, both for Justices anxious to contain the harms of what they saw as badly flawed decisions and those wanting to ensure that 'long[]overdue reforms' would not be inhibited" (quoting Jenkins v. Delaware, 395 U.S. 213, 218 (1969)). For example, Fallon and Meltzer note that "[i]t was much easier for the Court to lay down the *Miranda* rules, for example, knowing that the prison doors need not necessarily swing open for every inmate convicted with the aid of confessions not preceded by the requisite warnings." Fallon & Meltzer, *supra* note 27, at 1739.

126. As Chief Justice Warren candidly observed, the technique of selective prospectivity had its "impetus" in the need for "the implementation of long overdue reforms, which otherwise could not be practicably effected." *Jenkins*, 395 U.S. at 218. Mishkin noted that a contrary rule mandating retroactivity "would seem to operate as an 'inherent restraint' on judicial lawmaking because it compels the Court to confront in sharpest form the possible undesirable consequences of adopting a new rule . . . ." Mishkin, *supra* note 106, at 70; *see also* Pamela J. Stephens, *The New Retroactivity Doctrine:*

understanding of the judicial function, with the Warren Court forthrightly acknowledging that its rules broke new ground.[127] Armed with this understanding of old and new rules, the *Linkletter* and *Stovall* Courts found no constitutional impediment to a court's decision, "in the interest of justice," to occasionally make a new rule solely prospective.[128]

A flexible approach to retroactivity in the civil context soon followed suit. In *Chevron Oil Co. v. Huson*,[129] a statute of limitations case, the Court crafted a similar balancing test that took into account reliance interests and potential for disruption.[130] The plaintiff had relied on a federal maritime doctrine of laches in filing suit and let the one-year state statute of limitations lapse.[131] During the lower court litigation, a Supreme Court decision in another case established that the state—not the federal—statute of limitations governed.[132] The *Chevron Oil* Court decided that it would be unfair to give its intervening decision retroactive effect.[133] The Court balanced the weightiness of the "new principle of law," the "prior history of the rule in question," and the possible "inequit[ies] imposed by retroactive application."[134] On the facts before it, the Court found that the unfairness of giving effect to this unforeseeable change in the law mandated prospective application of the new rule.[135]

Equality, Reliance and Stare Decisis, 48 SYRACUSE L. REV. 1515, 1521 (1998) (citing Mishkin's conclusion that nonretroactivity "made it easier for the Warren Court to make sweeping changes in constitutional doctrine without having to face the consequences in the form of serious disruptions of the criminal justice system"). To Mishkin, the restraint was optimal, particularly given an Article III judge's insulation from the political process. Mishkin, *supra* note 106, at 72.

127. Professor Mishkin argued that "[p]rospective limitation of judicial decisions wars with" what he described as "the strongly held and deeply felt belief that judges are bound by a body of fixed, overriding law, that they apply that law impersonally as well as impartially, that they exercise no individual choice and have no program of their own to advance." Mishkin, *supra* note 106, at 62, 64.

128. Linkletter v. Walker, 381 U.S. 618, 627–28 (1965). As Justice Souter noted for the Court in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 536 (1991) (plurality opinion), this approach "tends to relax the force of precedent, by minimizing the costs of overruling, and thereby allows the courts to act with a freedom comparable to that of legislatures."

129. 404 U.S. 97 (1971).

130. *Id.* at 105–07.

131. *Id.* at 98–99, 105.

132. *Id.* at 99 (citing Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352, 365–66 (1969)).

133. *Id.* at 107–08.

134. *Id.* at 106–07.

135. *Id.* at 109.

B. Movement to Retroactivity in the Criminal Context

Over time, however, the tenuous consensus on prospectivity fractured. In *Desist v. United States*[136] and *Mackey v. United States*,[137] Justice Harlan urged that "[r]etroactivity must be rethought."[138] Justice Harlan depicted the Court's rulings on retroactivity in its criminal procedure decisions as a haphazard mess, noting in *Desist*:

> We have held that certain "new" rules are to be applied to all cases then subject to direct review; certain others are to be applied to all those cases in which trials have not yet commenced; certain others are to be applied to all those cases in which the tainted evidence has not yet been introduced at trial; and still others are to be applied only to the party involved in the case in which the new rule is announced and to all future cases in which the proscribed official conduct has not yet occurred.[139]

Justice Harlan's primary concern was with the arbitrariness of the "chance beneficiaries"—that is, the litigants in whose cases the Court laid down new rules and who, generally, got the benefit of those new rules—as compared to other similarly situated litigants whose cases were in different stages of litigation and would therefore not benefit from the new rules.[140] At a more fundamental level, though, he articulated a very different conception of the judicial function and took issue with approaches that permitted the Court "to act, in effect, like a legislature."[141] Because of these concerns,

136. 394 U.S. 244 (1969).
137. 401 U.S. 667 (1971).
138. *Desist*, 394 U.S. at 258 (Harlan, J., dissenting). Justice O'Connor noted in *Teague v. Lane* that commentators had "'had a veritable field day' with the *Linkletter* standard, with much of the discussion being 'more than mildly negative.'" 489 U.S. 288, 303 (1989) (quoting Francis X. Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1558 & n.3 (1975)).
139. *Desist*, 394 U.S. at 257 (Harlan, J., dissenting) (citations omitted). One could certainly argue that the Court's decisions, though seemingly random, were actually organized around the principle that its rules should apply backward where the state actor knew or could have known of the rule but failed to heed it. So, for example, if the rule was announced before tainted evidence was introduced at trial, and the state actor proceeded to introduce such evidence, there could be no reliance argument. Similarly, if the rule related to lineups, it made sense to limit its retroactive effect to cases in which the lineups had not taken place when the rule was announced. Viewed this way, the Court appears far less unmoored—its decisions actually seem to make sense. Moreover, the decisions even have a little bit of predictability, because a state actor could generally know that it will not be punished for heeding an existing rule.
140. *Id.* at 258–59.
141. *Mackey*, 401 U.S. at 677 (Harlan, J., concurring in judgment in part and dissenting in part). Justice Harlan was almost certainly influenced by Professor Mishkin's influential

Justice Harlan advocated full retroactivity for cases pending on direct review, though in doing so, he indicated that habeas cases raised different issues.[142]

In the decades that followed, Justice Harlan's views gained traction, ushering in changes in the criminal context as the Burger and Rehnquist Courts took the stage. In 1987's *Griffith v. Kentucky*, the Court formally balked at selective prospectivity.[143] At issue in *Griffith* was whether *Batson v. Kentucky*[144] ought to be given retroactive effect to other cases pending on direct. Relying heavily on Harlan's *Desist* and *Mackey* opinions, the Court firmly shut down the notion that it had power to selectively apply certain rules prospectively.[145] The *Griffith* Court rejected *Linkletter* and held that all new rules would henceforth apply to all cases pending on direct.[146] The Court limited its decision to the criminal context, specifically noting that *Chevron Oil Co. v. Huson* would have continued sway in the civil context.[147]

The *Griffith* Court grounded its decision in two main rationales. First, it looked loosely to Article III, echoing the concerns about prospective rulemaking articulated by Justice Harlan nearly two decades before. The Court observed that it could only decide "cases and controversies," and if the court decided upon a new rule, "the integrity of judicial review" required its application to other cases pending on direct.[148] Quoting Harlan, the Court noted that, if it did not resolve all cases "in light of our best understanding of governing constitutional principles," it would be acting inconsistently with the judicial function.[149] Thus, to retain integrity, judicial power was limited: A court must apply current law to

post-*Linkletter* article decrying prospectivity as an approach that might well undermine the legitimacy of the Court as an institution. Mishkin, *supra* note 106, at 64–68; Fallon & Meltzer, *supra* note 27, at 1743 ("For Justice Harlan, the rethinking began with an article by Paul Mishkin, which had concluded that all new decisions should be fully retroactive on direct review.").

142. *Desist*, 394 U.S. at 258, 260 (Harlan, J., dissenting). Harlan offered a means of differentiating between clearly settled rules and new rules in the habeas context that anticipated the line drawn by Justice O'Connor two decades later in *Teague v. Lane*. *See Teague*, 489 U.S. at 305–09.
143. 479 U.S. 314 (1987).
144. 476 U.S. 79 (1986). *Batson* invalidated race-based use of peremptory challenges in the petit jury on Equal Protection Clause grounds. *Id.* at 89.
145. *Griffith*, 479 U.S. at 322–23.
146. *Id.* at 322–23.
147. *Id.* at 322 n.8.
148. *Id.* at 322–23.
149. *Id.* at 323 (quoting Mackey v. United States, 401 U.S. 667, 679 (1971) (Harlan, J., concurring in the judgment in part and dissenting in part)).

pending cases; any contrary power smacked of legislation.[150] Second, the Court agreed with Justice Harlan that it was arbitrary which case presenting a particular issue it might take up on certiorari, and "selective application of new rules violate[d] the principle of treating similarly situated defendants the same."[151] Although the Court did not tie this concept explicitly to due process or equal protection, its decision was clear, pronouncing decisively that the time for tolerating such inequity "has come to an end."[152] With these two rationales—Article III and arbitrariness—*Griffith* reversed *Linkletter*.

On the heels of *Griffith* came *Teague v. Lane* in 1989. *Teague* qualified the rule of retroactivity laid down in *Griffith* and made clear that it did not apply in the habeas context.[153] In *Teague*, the Court refused to make a new rule regarding the Sixth Amendment "fair cross-section" requirement in a habeas action, holding that, with two narrow exceptions, it would neither make nor apply new rules on habeas.[154] The Court allowed that it would make or apply a new rule only where it placed "certain kinds of primary . . . conduct beyond the power of the criminal law-making authority to proscribe" or set forth a "watershed rule[] of criminal procedure" without which there was an impermissibly large risk of an inaccurate conviction.[155] The *Teague* plurality premised its departure from the *Griffith* rule of full retroactivity on comity and finality and the potential for massive disruption in the habeas context.[156]

Together, *Griffith* and *Teague* laid out bright-line rules as to when retroactivity was mandated in the criminal context: In short, it applies in all cases pending on direct (and, necessarily, in all cases arising thereafter) and in some small subset of cases on collateral review. In so doing, the Court's preoccupation with the proper judicial function pointed at an Article III

150. *Id.* at 322–23.
151. *Id.* at 323.
152. *Id.* (quoting United States v. Johnson, 457 U.S. 537, 555–56 n.16 (1982)).
153. 489 U.S. 288, 305–10 (1989).
154. *Id.* at 292, 310–11. Justice O'Connor wrote for a plurality of four justices, but the majority adopted her opinion four months later in *Penry v. Lynaugh*, 492 U.S. 302, 313–14 (1989).
155. *Teague*, 489 U.S. at 311 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in the judgment in part and dissenting in part)). In *Whorton v. Bockting*, 549 U.S. 406, 417–18 (2007), the Court noted that since *Teague*, no new rule has ever qualified as a "watershed rule of criminal procedure" within this second exception.
156. *Teague*, 489 U.S. at 309–10.

mooring, and concern for equity amongst litigants sounded a plausible equal protection or due process refrain.

C. The Civil Context Follows Suit

Selective prospectivity had a longer reign in the civil context. It was not until the developing dormant commerce clause jurisprudence in the 1980s and 1990s invalidated several discriminatory state tax schemes that the Court reassessed selective prospectivity's continued vitality.

Two important lines of cases marked the downfall of selective prospectivity in civil cases: one finding dormant commerce clause violations in state tax schemes that preferred in-state entities and one requiring meaningful remedy for such violations.[157] The conjunction of these two lines of cases had serious implications for states that had wrongfully collected discriminatory taxes. Immediately, states sought to evade potentially catastrophic refund orders by invoking *Chevron Oil Co. v. Huson* as a limiting principle. In *American Trucking Ass'ns v. Smith*,[158] a case involving a complicated tax scheme that preferred in-state truckers, the Court split three different ways on whether *Chevron Oil Co. v. Huson* applied.[159] During the pendency of *Smith*, the Supreme Court had ruled in another case, *American Trucking Ass'ns v. Scheiner*,[160] that such preference-based taxes unconstitutionally discriminated against interstate commerce.[161]

157. In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270–73 (1984), the Supreme Court invalidated a discriminatory Hawaii excise tax that preferred in-state liquor producers. The Court did not address the question of remedy for the improper collection of taxes under this scheme because the issue had not been presented to the state courts. *Id.* at 277. On the other hand, in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 22 (1990), the remedy question was front and center. The Florida Supreme Court had invalidated a state excise tax based on *Bacchus* but refused to order refund of any monies collected pursuant to the discriminatory tax. The Supreme Court held that, because Florida had provided no meaningful process by which taxpayers could challenge the assessment before paying, it had to provide a meaningful post-deprivation remedy curing the underlying discrimination, which the state could do either by giving the money back to the out-of-state producers or by collecting back taxes from the in-state producers to whom it had wrongfully granted an exemption. *Id.* at 22–23.
158. 496 U.S. 167 (1990).
159. *Id.* at 172.
160. 483 U.S. 266 (1987).
161. *Id.* at 286–87. *Scheiner* itself had remanded the question of remedy to the state court in the first instance. *See id.* at 297–98.

Smith presented the question whether *Scheiner* should apply retroactively,[162] and while five justices rejected retroactive application, the Court supplied no clear or coherent rationale for why this was the case. Justice O'Connor, writing for herself and three others, followed *Chevron Oil v. Huson*, which *Griffith* had pointedly left intact,[163] and concluded that the potential disruption of the *Scheiner* rule for state treasuries warranted prospective effect.[164] Concurring in the judgment, Justice Scalia likewise did not believe *Scheiner* should have retroactive application, but he based his decision on disagreement with *Scheiner*'s underlying premise, not on *Chevron Oil v. Huson*.[165] Indeed, rather than embracing Justice O'Connor's view of prospectivity, Justice Scalia agreed with the dissent that "prospective decision-making is incompatible with the judicial role" and, thus, inconsistent with Article III.[166] Although Article III compelled retroactive application, he determined that the inquiry in the next case, in this case *Smith*, was a question of stare decisis. To Justice Scalia, stare decisis, in contrast to retroactivity, was "a flexible command" that could yield where, as here, *Scheiner* was (1) wrongly decided in the first instance and (2) states had reasonably relied on the pre-*Scheiner* universe.[167] Although Justice O'Connor's plurality and Justice Scalia's dissent both permitted prospective application, they did so on the basis of very contradictory rationales.

162. *Smith*, 496 U.S. at 176.
163. Griffith v. Kentucky, 479 U.S. 314, 322 n.8 (1987).
164. *Smith*, 496 U.S. at 182–83, 187. Fallon and Meltzer observe that the plurality employed a "starkly positivist outlook: sometimes courts make new law, and, when they do, they must determine the new law's effective date." Fallon & Meltzer, *supra* note 27, at 1757. This approach, they note, is incompatible with the judicial function as conceptualized in *Griffith*. *See id.* Justice O'Connor did not think *Griffith* militated in favor of a different result because she saw the criminal context as fundamentally distinct. *Smith*, 496 U.S. at 197. *Griffith*, she explained, was tied to the unfairness of subjecting two similarly situated criminal defendants to different procedural rules. It was a situation-specific rejection of the idea that reliance interests of law enforcement should factor into the calculus. *Id.* at 197–99.
165. *Smith*, 496 U.S. at 201–02 (Scalia, J., concurring in the judgment).
166. *Id.* Several commentators remarked at Justice Scalia's neo-Blackstonian instincts in this passage. *See, e.g.*, Fallon & Meltzer, *supra* note 27, at 1757; Stephens, *supra* note 126, at 1536. Justice Stevens, writing for himself and three colleagues, dissented. He grounded his conclusion that the decision merited retroactive effect in "[f]undamental notions of fairness and legal process." *Smith*, 496 U.S. at 212–14 (Stevens, J., dissenting). Justice Stevens saw *Chevron Oil Co. v. Huson* as an outlier case that ought to be confined to its statute of limitations context. *See id.* at 221–22.
167. *Id.* at 204–05 (Scalia, J., concurring in the judgment). Justice O'Connor did not take significant issue with Justice Scalia's approach. In fact, her plurality characterized *Chevron Oil Co. v. Huson* as a "part of the doctrine of *stare decisis*." *Id.* at 196 (plurality opinion) (citing Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932)).

The Supreme Court took a halting step toward easing the doctrinal confusion the following year in *James B. Beam Distilling Co. v. Georgia*.[168] The case concerned the retroactive application of *Bacchus Imports, Ltd. v. Dias*, but *James B. Beam* also failed to command a majority opinion.[169] Nominally, at least, the result was 6–3 for retroactive application of *Bacchus* to compel refund of improperly collected excise taxes. However, the majority broke into three camps anchored by Justices Souter, White, and Blackmun/Scalia, each of whom conceptualized the problem very differently.

In the first camp, ostensibly announcing the judgment of "the Court," Justice Souter started with the premise that retroactive application is "overwhelmingly the norm," noting that it reflects the "declaratory theory of law" and is "in keeping with the traditional function of the courts."[170] He observed that *Bacchus* itself had remanded the case to the state court for imposition of a remedy and thereby signified intent to give the litigants the benefit of the rule it announced.[171] Because the result in *Bacchus* had applied to the *Bacchus* litigants, *James B. Beam* squarely presented the question whether the Court would continue to approve of a rule of selective prospectivity. To this, Justice Souter gave an emphatic "no," deeming selective prospectivity inconsistent with *Griffith*, which "cannot be confined to the criminal law."[172] He took issue with the notion that similarly-situated litigants could ever be treated differently, with different rules applicable to their nonfinal cases.[173] He determined that "[o]nce retroactive application is chosen for any assertedly new rule," it is "chosen for all others who might seek its prospective application."[174] Although the opinion addressed itself to selective prospectivity, Justice Souter's opinion called pure prospectivity into question as well: Even "[a]ssuming that pure prospectivity may be had at all," he reasoned, "its scope must necessarily be limited to a small number of cases."[175]

Leading the second camp, Justice White agreed that the principles of equity amongst similarly situated litigants articulated in *Griffith* compelled

168. 501 U.S. 529 (1991) (plurality opinion).
169. *Id.*
170. *Id.* at 535 (Souter, J., opinion).
171. *Id.* at 539.
172. *Id.* at 540.
173. *Id.* Justice Souter noted that retroactivity would necessarily be limited by notions of finality, and that expiration of a statute of limitations or principles of *res judicata* might preclude application of new rules. *Id.* at 541.
174. *Id.* at 543.
175. *Id.* at 541.

rejection of selective prospectivity.[176] However, he took issue with Justice Souter's suggestion that "pure prospectivity" was in any jeopardy. He reasoned that a rule of automatic retroactivity in all cases would require the Court to overrule *Chevron Oil Co. v. Huson* and other decisions—decisions with which he had agreed and from which he did not intend to depart.[177] Justice White noted, in this connection, that pure prospectivity did not give rise to similar inequity issues.[178]

In the last camp, Justices Blackmun and Scalia were willing to go much further. Justice Blackmun sought a rule of full retroactivity in all nonfinal cases and indicated that to do otherwise would "warp the role that we, as judges, play in a Government of limited powers."[179] He tied his conclusion not only to separation of powers but also to the integrity of the judicial system, noting that "[r]espect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy."[180] Justice Scalia made the constitutional point more explicitly: He argued that the function of judges under Article III is to make law "*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."[181] To permit courts to lay down prospective rules, in his view, would strip Article III courts of a fundamental, and crucial, constitutional check on their office.[182] At day's end, the Court's three camps could not settle on a clear rationale for rejecting selective prospectivity in *James B. Beam*.

The Court finally unified the various strands of its civil retroactivity jurisprudence in 1993's *Harper v. Virginia Department of Taxation*.[183] *Harper* involved a challenge to a state tax scheme that the Supreme Court had invalidated in *Davis v. Michigan Department of the Treasury*,[184] under which the state had taxed federal retiree benefits but exempted state retiree benefits. Petitioners, federal retirees, sought recovery of taxes wrongfully collected pursuant to this unconstitutional scheme. The state supreme

176. *Id.* at 545 (White, J., concurring in the judgment).
177. *Id.* at 545–46.
178. *Id.*
179. *Id.* at 547 (Blackmun, J., concurring in the judgment).
180. *Id.* at 548 (quoting Mahnich v. S. S.S. Co., 321 U.S. 96, 113 (1944) (Roberts, J., dissenting)).
181. *Id.* at 549 (Scalia, J., concurring in the judgment).
182. *Id.*
183. 509 U.S. 86 (1993).
184. 489 U.S. 803 (1989).

court, applying *Chevron Oil Co. v. Huson*, determined that the *Davis* rule ought to have prospective application only.[185] In the Supreme Court's ruling, Justice Thomas held that *James B. Beam* controlled the case and stated plainly for the Court that "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."[186] *Harper* thus provided the clear holding on selective prospectivity that had eluded the *James B. Beam* plurality.

The *Harper* majority opinion adverted both to "basic norms of constitutional adjudication" and to concern that legal rights might "shift and spring," resulting in differential treatment of similarly situated litigants.[187] While the opinion itself focused in on selective prospectivity, Justice O'Connor charged in dissent that the Court's logic readily intimated that "pure" prospectivity was in peril as well.[188] The majority spent little time

185. Harper v. Va. Dep't of Taxation, 401 S.E.2d 868, 874 (Va. 1991).

186. *Harper*, 509 U.S. at 97.

187. *Id.*

188. *Id.* at 115 (O'Connor, J., dissenting); *see also* Fisch, *supra* note 117, at 1062 ("Justice Thomas's five-Justice majority opinion in *Harper* went further and appeared to invalidate pure, as well as selective, prospectivity." (footnote omitted)). The Court said in dicta in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), that, "[w]hile it was accurate in 1974 to say that a new rule announced in a judicial decision was only *presumptively* applicable to pending cases, we have since established a firm rule of retroactivity." *Id.* at 278 n.32 (citing *Harper*, 509 U.S. at 86). Lower courts have divided on the question of the continued vitality of pure prospectivity after *Harper*. *Compare, e.g.*, Nunez-Reyes v. Holder, 646 F.3d 684, 690–91 (9th Cir. 2011) (en banc) (stating, post–*Harper*, that a court could choose between pure prospectivity and full retroactivity so long as it did not employ selective prospectivity), *and* Crowe v. Bolduc, 365 F.3d 86, 93 (1st Cir. 2004) ("A court in a civil case may apply a decision purely prospectively . . . ."), *and* Glazner v. Glazner, 347 F.3d 1212, 1216–17 (11th Cir. 2003) (en banc) (noting that the Court had retained the possibility of pure prospectivity), *with* Kolkevich v. Att'y Gen., 501 F.3d 323, 337 n.9 (3d Cir. 2007) (noting that the status of pure prospectivity is uncertain after *Harper*), *and* Hulin v. Fibreboard Corp., 178 F.3d 316, 333 (5th Cir. 1999) (stating that pure prospectivity is "an indistinct possibility" reserved for the "extremely unusual and unforeseeable case"), *and In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 925 (8th Cir. 1997) (stating that "language in the Court's recent opinions convinces us that purely prospective adjudication is at least unwise and most likely beyond our power" as an advisory opinion), *and* Fairfax Covenant Church v. Fairfax Cty. Sch. Bd., 17 F.3d 703, 710 (4th Cir. 1994) ("Though the precise issue in *Harper* was so-called 'selective prospectivity,' every indication in the opinion of the Court is that its logic would also forbid all types of prospectivity."). The Supreme Court has never expressly settled the question. *See* RICHARD H. FALLON JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 55 (7th ed. 2015).

developing the constitutional underpinnings of its result; a more elaborate justification for the rule emerged in Justice Scalia's separate concurring opinion, in which he stated—again—that "prospective decision-making is quite incompatible with the judicial power, and . . . courts have no authority to engage in the practice."[189] As Justice Scalia conceived it, fully retroactive decisionmaking was the singular distinction between judicial and legislative power, carefully grounded in the separation of powers.[190]

D. Efforts to Craft Exceptions

By 1993, then, firm scaffolding for adjudicative retroactivity was in place both in the civil and criminal contexts. In 1995, the Court confronted, and rejected, an attempted workaround in *Reynoldsville Casket Co. v. Hyde*,[191] a case involving a statute of limitations tolling provision that applied to benefit in-state actors over out-of-state actors. In *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*,[192] the Court had invalidated such tolling provisions and applied its rule to the litigants before it.[193] *Reynoldsville Casket* asked whether states had discretion to bring *Chevron Oil* balancing in at the remedy stage. In other words, under *Harper*, if the state court was bound to apply a rule retroactively, could it nonetheless use principles of equity, fairness, and reliance to blunt or even counter its effect?[194] Straightforward application of *Harper* required application of the *Bendix* rule to dismiss the suit in *Reynoldsville Casket*. Yet the Ohio Supreme Court opted to permit the time-barred suit anyway.[195]

189. *Harper*, 509 U.S. at 106 (Scalia, J., concurring).
190. *Id.* at 107. Justice Scalia observed that even supporters of prospective judicial decisionmaking admitted it to be a "technique of judicial lawmaking." *Id.* at 108 (quoting Beryl Harold Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 6 (1960)).
191. 514 U.S. 749 (1995).
192. 486 U.S. 888 (1988).
193. *Id.* at 891.
194. *Id.* at 753–54. To a degree, the approach urged by Hyde, the respondent, resembles the sleight of hand that Justice Scalia employed in his concurrence in the judgment in *Smith*: Courts must require retroactivity but employ some different rubric to effectively deny the effect of prior precedent. *See* Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 204–05 (1990) (Scalia, J., concurring in judgment) (invoking flexibility inherent in stare decisis to avoid retroactive application of a precedent).
195. *Reynoldsville*, 514 U.S. at 751. The Ohio court did not expressly state that it was invoking remedial discretion in doing so; this, however, was how the respondent justified the court's decision before the Supreme Court. *See id.* at 752–53.

In an opinion by Justice Breyer, the Court rejected the invocation of "remedy" to avoid retroactive application of the *Bendix* rule. The Court admitted that the concept of remedial discretion had surfaced in its tax refund opinions but observed that, in those cases, discretion lay in the state's two possible solutions to a discriminatory tax: Either the state could refund the tax (tax neither) or it could assess in-state actors and thus eliminate the underlying discrimination (tax both).[196] Selecting between these two options fell soundly within the state's remedial discretion because both resolved the underlying unconstitutionality. In the case before it, in contrast, the Court found that the state's chosen remedy, allowing respondent's suit to proceed against an out-of-state defendant even though it would have been time-barred against an in-state defendant, did not rectify the underlying unconstitutionality.[197] The state was permitted remedial discretion to choose among alternatives in curing the constitutional violation; it could not, in the name of "remedial discretion," opt not to provide any cure at all.[198]

In reaching this conclusion, the *Reynoldsville Casket* Court was unmoved by other contexts where it had effectively refused to apply "new" decisions for other reasons. Hyde had pointed to the doctrine of qualified immunity, under which the Court precludes recovery of civil damages where a state officer has relied on clearly established precedent, and *Teague*, under which the Court generally refuses to apply new rules to cases arising in habeas,[199] to urge that the *Harper* retroactivity rule was frequently overridden.[200] The Court rejected this gambit, answering that each of these situations raised very different policy considerations. Qualified immunity reflects concern that state officers not be chilled in the performance of their duties and represents an independent legal ground for barring a claim, unrelated to retroactivity.[201] *Teague* is not an exception to retroactivity, but rather, it reflects a limitation on the principle itself to cases that are nonfinal: "New legal principles, even when applied retroactively, do not apply to cases already closed."[202] The Court found that neither situation represented a qualification of the underlying principle set out in *Griffith* and *Harper* that

196. *Id.* at 755.
197. *Id.* at 756.
198. *Id.* at 753–54.
199. *See id.* at 757–58 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)); *id.* at 758–59 (citing Teague v. Lane, 489 U.S. 288 (1989)).
200. *Id.* at 757–59.
201. *See id.* at 757–58 (citing *Harlow*, 457 U.S. at 818).
202. *Id.* at 758.

new rules would apply retroactively to all nonfinal criminal and civil cases.[203] The Court altogether rejected any effort to craft a general "remedial" exception to the firm rule of retroactivity, concluding that doing so would reduce *Harper* to little more than "symbolic significance."[204]

The Court again addressed possible exception to the firm *Griffith/Harper* adjudicative retroactivity doctrine in *Davis v. United States*.[205] In *Davis*, police acting pursuant to appellate precedent construing *New York v. Belton*[206] had searched the passenger compartment of defendant's car incident to his arrest and thereby found a revolver. After his conviction on the firearm charge, and while his appeal was pending, the Supreme Court handed down *Arizona v. Gant*,[207] which substantially and materially changed the law related to vehicle searches such that the search of the defendant's car was no longer legal under the Fourth Amendment. *Davis* presented the question whether, consistent with the required retroactive application of *Gant*, defendant could have the firearm evidence excluded under the exclusionary rule.[208] Building upon the good-faith exception to the exclusionary rule recognized in *United States v. Leon*,[209] the Supreme Court agreed with the Eleventh Circuit that the officers' good-faith reliance on existing precedent precluded application of the exclusionary rule, even when the Supreme Court had subsequently overruled that precedent while the case was pending on direct appeal.[210]

203. *Id.* at 759.
204. *Id.* at 754; *see also* Brooke A. Weedon, Note, *New Limits on General Personal Jurisdiction: Examining the Retroactive Application of* Daimler *in Long-Pending Cases*, 72 WASH. & LEE L. REV. 1549, 1573 (2015) (noting *Reynoldsville Casket*'s rejection of a proposed remedial exception as means of circumventing *Harper*).
205. 564 U.S. 229 (2011). In 2008, the Court touched upon retroactivity in *Danforth v. Minnesota*, 552 U.S. 264 (2008). *Danforth* raised the question whether states could give effect to "new" rules in state habeas even where *Teague* might bar their use in federal habeas. The Court held that *Teague*'s rule of nonretroactivity did not bind state courts. *Id.* at 290–91. In dissent, Chief Justice Roberts derided the majority on the grounds that it permitted different results for similarly situated litigants. *Id.* at 301–03 (Roberts, C.J., dissenting).
206. 453 U.S. 454 (1981).
207. 556 U.S. 332 (2009).
208. *Davis*, 564 U.S. at 236.
209. 468 U.S. 897 (1984). *Leon* recognized a "good faith" exception to the exclusionary rule, predicating it on an understanding that the exclusionary rule is a device employed to deter unlawful police conduct. *Id.* at 922–25. The *Leon* Court recognized that the exclusionary rule is not a necessary corollary to the Fourth Amendment but a practical device to be employed when its benefits (deterrence) outweigh its costs (exclusion of incriminating evidence). *Id.* at 906–08.
210. *Davis*, 564 U.S. at 241.

In reaching its decision, the Court had to wrestle with the question of what, exactly, retroactivity really meant. Justice Alito, writing for the Court, said that "[o]ur retroactivity jurisprudence is concerned with whether, as a categorical matter, a new rule is available on direct review as a *potential* ground for relief."[211] Thus, *Griffith* lifted a "categorical bar" to obtaining relief and gave rise to a subsequent court's duty to grapple with the new rule; it did not, however, guarantee that relief would be available despite other, independent bars.[212] Retroactive application of *Gant* thus meant *Gant* would apply unless other independent doctrines operated to bar its effect. Given *Gant*, a defendant could pass through the gate and raise a *Gant* claim. However, an independent doctrine—like a good-faith exception premised on reliance on existing legal precedent—might preclude further advance.[213] Application of the good-faith exception, the Court concluded, "neither contravenes *Griffith* nor denies retroactive effect to *Gant*."[214] The Court acknowledged, in so doing, that reasonable reliance on existing precedent was a concept that had been embedded in the old *Linkletter/Chevron Oil* balancing tests that retroactivity jurisprudence had rejected; however, "[t]hat reasonable reliance by police was once a factor in our retroactivity cases does not make it any less relevant under our *Leon* line of cases."[215]

211. *Id.* at 243.
212. *Id.*
213. *Davis* reflects the Supreme Court's omnipresent concern with minimizing the disruptive effects of legal change. If retroactivity doctrine is not availing, the same concepts surface as a horse of another color. *See generally* Toby J. Heytens, *The Framework(s) of Legal Change*, 97 CORNELL L. REV. 595, 609 (2012) (arguing that "it is inevitable that the Supreme Court will be acutely concerned about the disruptive effects of law-changing decisions on previously decided cases and that it will actively search for ways to limit those effects").
214. *Davis*, 564 U.S. at 244.
215. *Id.* at 245. In a dissent joined by Justice Ginsburg, Justice Breyer charged the majority with resurrecting the very problems that *Griffith* had sought to address in overruling *Linkletter*. *See id.* at 254 (Breyer, J., dissenting). The defendant in *Gant* had received the benefit of the *Gant* rule, while other litigants whose seemingly identical cases were proceeding on appeal could not, a prospect that raised every horrible outcome envisioned decades prior by Justice Harlan. Surprisingly, Justice Breyer did not reckon with his own opinion in *Reynoldsville Casket*, in which he had carefully distinguished retroactivity on the one hand from independent doctrines that might operate to preclude a particular remedy on the other. *See* Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 758–59 (1995). It was certainly possible to see *Davis* as mired in its exclusionary rule context, a decision emanating fairly from its *United States v. Leon* antecedents. But Justice Breyer rejected any effort to recognize an additional independent doctrine—much like qualified immunity—that might practically impede a particular form of relief and instead saw the case as an affront to the doctrine of retroactivity itself.

E. Constitutional Moorings of Retroactivity and the Duty to Grapple

After a couple of messy decades, the Supreme Court has ultimately concluded that, generally speaking, a new rule applies to any nonfinal criminal or civil case, regardless of what rule obtained at the time of the events giving rise to the legal action.[216] The Court has left the status of pure prospectivity vague in the civil context. However, the unqualified logic of *Harper* suggests that pure prospectivity, like selective prospectivity, is in peril, as the *Harper* dissent charged[217] and subsequent Supreme Court cases have appeared to assume.[218] Moreover, retroactivity is firmly in place despite the Court's recognition of a couple of independent doctrines—like stare decisis, official immunity, and the *Davis* rule—that may operate to preclude a specific form of relief. The *Davis* Court carefully decoupled two questions: whether the rule applies retroactively to nonfinal cases (yes), and whether a litigant is entitled to the particular relief requested (not necessarily, given the operation of an independent doctrine). Along the way, the Court has hinted that adjudicative retroactivity is justified by constitutional imperative. The Court has never clearly identified the constitutional cubby-hole into which it places retroactivity, but several lurking constitutional doctrines may underlie its compulsion and are worth examining separately.[219]

First, beginning with Justice Harlan's opinions in *Desist* and *Mackey* and continuing in the majority opinion in *Griffith*, a strong undercurrent in the Court's retroactivity jurisprudence has been its rejection of the arbitrariness and inequity of giving one litigant the benefit of a new rule

216. *See* Roosevelt, *supra* note 109, at 1103 ("The end of all the Court's explorings has been to arrive, more or less, where it started . . . .").

217. Harper v. Va. Dep't of Taxation, 509 U.S. 86, 115 (1993) (O'Connor, J., dissenting).

218. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 278 n.32 (1994) (observing that the Court has "established a firm rule of retroactivity"). Lower courts are in some disarray on this point, see *supra* note 187, given the absence of a definitive Supreme Court holding, with some courts seeing significance in the *Harper* Court's confinement of its holding to selective prospectivity and that others extrapolating from the *Harper* Court's Article III rationale. The Ninth Circuit noted in *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (en banc), that "even if 'recent Supreme Court jurisprudence has perhaps called into question the continuing viability of [its precedent], we are bound to follow a controlling Supreme Court precedent until it is explicitly overruled by that Court.'" *Id.* at 692 (quoting United States v. Weiland, 420 F.3d 1062, 1079 n.16 (9th Cir. 2005)). On that basis, the court felt constrained to apply *Chevron Oil*. *Id.*

219. *See* Fisch, *supra* note 117, at 1062 ("[T]he Court [has not] explained whether its apparent rejection of pure prospectivity is based on prudential considerations or is constitutionally compelled."); *id.* at 1073 ("[T]he Court has not fully confronted the issue of whether and to what extent the Constitution limits judicial or legislative ability to define the temporal effect of a new legal rule.").

while denying it to others who are similarly situated. Justice Harlan decried as fundamentally unfair the notion that a court might "[s]imply fish[] one case from the stream of appellate review, us[e] it as a vehicle for pronouncing new constitutional standards, and then permit[] a stream of similar cases subsequently to flow by unaffected by that new rule . . . ."[220] The *Griffith* Court said selectively applying new rules "violates the principle of treating similarly situated defendants the same;"[221] the Court then quoted a Justice Marshall dissent in which he lamented that "[d]ifferent treatment of two cases is justified under our Constitution only when the cases differ in some respect relevant to the different treatment."[222] Echoing *Griffith*, the *Harper* Court was "[m]indful of the 'basic norms of constitutional adjudication'" when it banned the "selective application of new rules."[223] More recently, Chief Justice Roberts, dissenting in *Danforth v. Minnesota*,[224] observed that "Justice Story, writing for the Court, noted nearly two centuries ago that the Constitution requires '*uniformity* of decisions throughout the whole United States, upon all subjects within [its] purview.'"[225] Certainly, all of this sounds in due process and equal protection.[226] Yet the Court has not gone so far as to say so explicitly. The *Griffith* majority's quotation of Justice Marshall, suggesting that different treatment of like cases offends the Constitution, is about as close as the Court has come.

Despite the superficial appeal of a due process or equal protection mooring, it is doubtful that the Supreme Court will get any closer to it. Although the Court has frequently suggested a constitutional dimension to

220. Mackey v. United States, 401 U.S. 667, 679 (1971) (Harlan, J., concurring in the judgment in part and dissenting in part).
221. Griffith v. Kentucky, 479 U.S. 314, 323 (1987).
222. *Id.* at 327 (quoting Michigan v. Payne, 412 U.S. 47, 60 (1973) (Marshall, J., dissenting)).
223. Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993) (quoting *Griffith*, 479 U.S. at 322–23).
224. 552 U.S. 264 (2008).
225. *Id.* at 301 (Roberts, C.J., dissenting) (quoting Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347–48 (1816)). Chief Justice Roberts also cited Justice O'Connor for the "fundamental principle" of our Constitution "that a single sovereign's laws should be applied equally to all." *Id.* at 301–02 (quoting Sandra Day O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 4 (1984–1985)).
226. "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (quoting Plyler v. Doe, 457 U.S. 202, 216 (1982)). The Court has likewise linked due process to equal treatment for some time. *See*, *e.g.*, Maxwell v. Dow, 176 U.S. 581, 603 (1900) ("[D]ue process of law, within the meaning of the Constitution, is secured when the laws operate on all alike . . . .").

the requirement of equal treatment amongst litigants, tethering retroactivity expressly to the Due Process or Equal Protection Clauses would have incidental undesirable consequences: If the Court *were* to expressly link the application of different rules to similarly situated litigants directly to the Due Process Clause or the Equal Protection Clause, it would follow that state courts would have to give retroactive effect to their decisions, too—even those concerning purely state law questions. The prospect of this intrusion on state prerogatives, and the corresponding surge in the federal docket, may well lead the Court to stop short of connecting the dots in any specific way, preferring instead to leave concerns of unfairness and inequity vague at the margins.[227] At the end of the day, the problems of inequity may be less that unequal treatment offends a principle requiring equal treatment and more that such inequity does more intangible harm, such as to the institutional legitimacy of Article III courts.[228]

A more compelling constitutional mooring for the concept of retroactivity is found in Article III and emerges primarily in separate opinions in *James B. Beam* and *Harper*.[229] The Article III justification has a case or controversy component and a more generalized separation of powers component. First and foremost, the case and controversies component

227. The Supreme Court has already fielded, and rejected, a petition for certiorari raising the claim that West Virginia's invocation of selective prospectivity regarding a state court decision violated the Equal Protection and Due Process Clauses. *See* Findley v. State Farm Mut. Auto. Ins. Co., 539 U.S. 942 (2003) (mem.). In *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932), the Supreme Court said that "the federal constitution has no voice upon the subject" of state retroactivity, and that states may choose prospective application. Mooring adjudicative retroactivity in due process or equal protection would certainly necessitate revisiting this opinion. If due process or equal protection are offended by the application of different rules to similarly situated litigants, they would presumably be offended whether those rules are state or federal in their origin.

228. It bears mention, moreover, that the inequity rationale supports abandonment of selective prospectivity only; it does nothing to imperil the operation of pure prospectivity. This accounts for Justice White's opinion in *James B. Beam Distilling Co. v. Georgia*, in which he decried the unfairness of selective prospectivity while simultaneously endorsing pure prospectivity. 501 U.S. 529, 545–46 (1991) (White, J., concurring in the judgment).To date, no other justice has joined Justice White in viewing inequity as the sole justification for retroactivity.

229. *See* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 106 (1993) (Scalia, J., concurring) ("[P]rospective decisionmaking is quite incompatible with the judicial power . . . ."); *James B. Beam*, 501 U.S. at 547 (Blackmun, J., concurring in the judgment) (stating that anything other than full retroactivity would "warp the role that we, as judges, play in a Government of limited powers"); *id.* at 549 (Scalia, J., concurring in the judgment) (suggesting that retroactivity is critical to maintaining the proper judicial role in our federal system).

sounds in the nature of the judicial function. What federal judges do, per Article III, is decide cases and controversies, disputes that are "appropriately resolved through the judicial process."[230] They apply rules where necessary in the context of concrete disputes, and they expound and interpret the law only as an incidental byproduct of the task of adjudicating such controversies.[231] Under this theory, a decision that applies merely prospectively represents an impermissible advisory opinion (a case or controversy problem) and threatens to usurp the province of the legislature (a related separation of powers problem).[232] In discussing the second component, separation of powers, the Court has suggested that refusing to apply extant rules in adjudicating a case or controversy itself trenches on the legislative function; thus, to ensure a separation between the judiciary and the legislature, Article III requires some tethering to prior rules and permits the creation of new rules only out of necessity.[233]

The Court has consistently sounded this separation of powers refrain over various contexts. A majority of five in *Harper* assented that "'the nature of judicial review' strips us of the quintessentially 'legislat[ive]' prerogative to make rules of law retroactive or prospective as we see fit."[234] Elsewhere, the Court has remarked that the Framers "lived among the ruins of a system of intermingled legislative and judicial powers," as a result of which they felt "sharp necessity" to keep legislative and judicial powers separate.[235] The Roberts Court has repeatedly suggested that rulemaking is only a byproduct of adjudication between real litigants. In *Spokeo, Inc. v. Robins*,[236] the Court, per Justice Alito, deemed it necessary, under Article III, to "confine[] the federal courts to a properly judicial role" to "'prevent the

230. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

231. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (stating that courts "of necessity expound and interpret" rules in connection with "particular cases"); *see also* Fisch, *supra* note 117, at 1076 ("[S]eparation of powers considerations can be used to argue that adjudication should be exclusively retroactive.").

232. *See* Fallon & Meltzer, *supra* note 27, at 1798–99; *see also James B. Beam*, 501 U.S. at 547 (Blackmun, J., concurring in the judgment) ("Unlike a legislature, we do not promulgate new rules 'to be applied prospectively only' . . . ."); *id.* at 549 (Scalia, J., concurring in the judgment) (noting that although judges most certainly make law, they are constrained to do so "*as judges make it*").

233. *See* Griffith v. Kentucky, 479 U.S. 314, 323 (1987) (mooring adjudicative retroactivity in "the integrity of judicial review" under Article III).

234. *See* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 95 (1993) (quoting *Griffith*, 479 U.S. at 322).

235. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219, 221 (1995).

236. 136 S. Ct. 1540 (2016).

judicial process from being used to usurp the powers of the political branches."[237] The Court made clear in *DaimlerChrysler Corp. v. Cuno*[238] that the case or controversy requirement "ensur[es] that the Federal Judiciary respects 'the proper—and properly limited—role of the courts in a democratic society."[239] In *Chafin v. Chafin*,[240] a unanimous Court stated firmly that federal courts may not "decide questions that cannot affect the rights of litigants in the case before them,"[241] which comes about as close as one can imagine to a statement that pure prospectivity is incompatible with Article III, equivocation in *Harper* notwithstanding.[242]

At day's end, retroactivity probably has a core constitutional component, but despite much harrumphing over inequity amongst similarly situated litigants, its ready cubby-hole is most likely to be Article III.[243] Tethering the rule to Equal Protection or Due Process imposes too many implications for state laws and state retroactivity principles. The Court's adjudicative retroactivity jurisprudence, with its emphasis on the proper exercise of the judicial function, seemingly finds a comfortable place amongst standing, advisory opinion, and other separation of powers cases.

III. CONFLICT BETWEEN RETROACTIVITY AND THE NONPRECEDENTIAL OPINION

Reducing retroactivity to its simplest terms, a rule laid down in a case on day one, whether criminal or civil, must also apply to any nonfinal case pending

237. *Id.* at 1547 (quoting Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013)).
238. 547 U.S. 332 (2006).
239. *Id.* at 341 (quoting Allen v. Wright, 468 U.S. 737, 750 (1984)).
240. 568 U.S. 165 (2013).
241. *Id.* at 172 (quoting Lewis v. Cont'l Bank Corp., 494 U.S. 472, 477 (1990)).
242. In related contexts, the Roberts Court has leaned heavily on formalist conceptions of separation of powers, with Chief Justice Roberts opining for the Court in *Stern v. Marshall*, 564 U.S. 462 (2011), that the Framers considered it absolutely essential to separate "the power of judging" from the legislative and executive powers. *Id.* at 483 (quoting THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). The Court repeated this as recently as 2015 in *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015), noting that Article III "established a judiciary 'truly distinct from both the legislature and the executive.'" *Id.* at 1951 (quoting THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).
243. Professor Henry Paul Monaghan tied the doctrine of stare decisis to Article III as well, noting its role in maintaining the legitimacy of judicial review. *See* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 754 (1988). Professor Michael C. Dorf similarly found a home for "the precept that like cases should be treated alike" in Article III's conception of the judicial power. Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 1997 (1994).

on day one and to any case that arises on any day after that. Its application can be somewhat metaphysical, as *Davis* makes clear: The rule can "apply" but find its impact blunted, or even negated, by the operation of independent doctrines. Moreover, even the staunchest adherents of stare decisis admit that a rule may be circumscribed—even overruled—if it becomes fundamentally unworkable or loses its logical underpinnings.[244] At a minimum, though, settled retroactivity jurisprudence imposes a duty to grapple with the new rule in any currently pending cases and in all cases yet to arise. But in the absence of an independent doctrine or fundamental unworkability,[245] the Court has not permitted departure from its baseline retroactivity jurisprudence post–*Harper*, and it has strongly hinted that this law has its root in the judicial power and Article III.[246]

At this point, we journey back to the nonprecedential opinion. Does the proliferation of nonprecedential opinions in our system have anything to do with the Supreme Court's adjudicative retroactivity jurisprudence? The answer depends on whether a nonprecedential opinion breaks new ground or whether it merely applies settled rules, and the substantial body of nonprecedential opinions today certainly includes examples of each.[247] This Part starts by identifying fundamental conflict between the nonprecedential opinion and adjudicative retroactivity where opinions break new ground. Then, because differentiating between opinions that "break new ground" and opinions that "merely apply settled rules" is itself a struggle, this Part proceeds to recommend importation of familiar "new rule" constructs developed in other contexts.

A. Retroactivity Requires Precedential Effect for New Rules

Neither Judge Arnold nor Judge Kozinski adverted to the Court's adjudicative retroactivity jurisprudence in grappling with Article III courts' ability to control the precedential effect of their decisions. *Hart*

244. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992) (noting that stare decisis is not an "inexorable command" (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405–11 (1932) (Brandeis, J., dissenting))).

245. Of course, even a departure from stare decisis requires courts to grapple with precedent, so it necessarily assumes application of the "old" rule in the first instance. *See* Price, *supra* note 90, at 109.

246. Recall Justice Breyer's conclusion in *Reynoldsville Casket Co. v. Hyde*, that, unless there is a "special reason" grounded in independently justified norms not to apply *Harper v. Virginia Department of Taxation*, retroactivity principles control. Reynoldsviille Casket Co. v. Hyde, 514 U.S. 749, 758–59 (1995); *see* Va. Dep't of Taxation, 509 US 86 (1993).

247. *See supra* notes 56–62 and accompanying text.

contains no citation to *Griffith*, *Harper*, or *James B. Beam*. *Anastasoff* cites *James B. Beam* for the proposition that a declaration of law "must be applied in subsequent cases to similarly situated parties" but does not invoke adjudicative retroactivity as a rationale for questioning nonprecedential opinions.[248] Both *Anastasoff* and *Hart* addressed the precedential effect of unpublished decisions with presumed impact in the case; the litigants sought to rely on them (or distinguish them) because they had an apparent impact on the dispute at bar.[249]

At first blush, their failure to consider adjudicative retroactivity may be understandable; it is tempting to see adjudicative retroactivity and the nonprecedential opinion as distinct. Whether it is permissible to restrict the precedential effect of a decision, after all, is a question about the opinion's *future*. It asks whether a court can, consistent with the Constitution, dictate that an opinion is to have *no future effect*. The Supreme Court's retroactivity cases have assumed without question that rules will apply to future events; instead, adjudicative retroactivity cases have looked backward, asking whether and to what extent rules may apply to cases that are *already* in the pipeline, arising from facts and circumstances that have already occurred.

But superficial dissimilarity between adjudicative retroactivity and issues presented by nonprecedential opinions fades upon further inspection. A court limiting the precedential effect of an opinion is saying, in essence, that it will apply solely to the litigants before it. It will not apply to cases that emerge in the future *and it also will not apply to other cases pending today*. If refusing to apply a rule to pending cases offends,[250] the nonprecedential opinion is plainly offensive. This exclusive, one-time applicability is even more restrictive than selective prospectivity, which applies to litigants before the court and to future litigants, as well. But plainly settled rules laid down in *Griffith* and *Harper* require that a novel decision released on day one and applied to the litigants on day one must also apply to other litigants whose

248. Anastasoff v. United States, 223 F.3d 898, 900 (8th Cir. 2000) (citing James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 544 (1991)).

249. Patricia Hart's lawyer had attempted to cite *Rice v. Chater*, to flag that a particular legal question was open in the Ninth Circuit; *Rice* had expressly declined to reach the issue. Rice v. Chater, 98 F.3d 1346 (9th Cir. 1996); *see* Opening Brief of Appellant at 13 n.6, Hart v. Apfel, No. 99-56472 (9th Cir. Dec. 13, 1999).

250. *Harper* certainly made this much clear. *Harper*, 509 U.S. at 86; *see supra* notes 183–190 and accompanying text. *Harper* goes beyond this, of course, in stating that a rule must be retroactive "as to all events, regardless of whether such events predate *or postdate* our announcement of the rule." *Id.* at 97 (emphasis added). This is a seemingly ringing endorsement of the notion that the Supreme Court simply assumes application to litigants in the future.

cases are pending on day one.[251] On its face, then, the nonprecedential opinion that breaks new ground trenches on settled adjudicative retroactivity jurisprudence. It then goes further and works even more offense on the principles underlying adjudicative retroactivity, by circumscribing the opinion's utility in cases in which everyone has, heretofore at least, agreed that an opinion would apply: the case arising on day two.

Obviously, as *Reynoldsville Casket* and *Davis* recognized, theoretical application of an opinion to pending or future cases does not guarantee victory for a litigant who stands to benefit from that rule: It merely imposes on a court a duty to grapple with the new rule.[252] Recovery may elude a plaintiff due to presence of an independent doctrine, like official immunity or good-faith reliance on prior cases (even if they have subsequently been overruled).[253] So, too, an opinion can technically apply but a court may choose to overrule it, finding its faulty premises or unworkability sufficient to justify departure from principles of stare decisis, as Justice Scalia was willing to do in *American Trucking*.[254] These doctrines represent separate, discrete reasons that a litigant may not get much, if any, benefit from a rule. None of them tell a court that an opinion is inapplicable *ab initio* or discharge a court of its duty to grapple.[255]

The nonprecedential opinion, however, does just this, precluding application of a decision to pending and future cases without invocation of any independent, separately motivated doctrine save purported convenience. The proliferation of nonprecedential opinions that break new

251. As I have argued, *supra* notes 217–218, it also applies to preclude "pure" prospectivity, but nonprecedential opinions, which necessarily apply to the litigants presenting the issues, do not raise pure prospectivity questions.
252. *See supra* notes 199–215 and accompanying text.
253. *See* Davis v. United States, 564 U.S. 229, 239–40 (2011); *see generally* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (conferring immunity on government officials performing discretionary functions so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").
254. Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 204–05 (1990) (Scalia, J., concurring in the judgment). In *Ryder v. United States*, 515 U.S. 177, 184–85 (1995), the Court rejected an attempt to carve out an additional exception for cases where targets of an enforcement action brought Appointments Clause challenges, noting that retroactive application to the seven to ten pending cases would create neither grave disruption nor major inequity.
255. *See* Price, *supra* note 90, at 109 (explaining that "the judicial power" requires that the decisionmaking process "at least *begins* from prior precedent, whether the court then considers itself 'bound' by precedent, able to 'overrule' precedent," or able to distinguish it).

ground thus represents a previously unrecognized exception to adjudicative retroactivity jurisprudence. Because in a majority of circuits, courts operate without substantive check in determining whether an opinion has precedential effect,[256] this "exception," like the remedial flexibility urged in *Reynoldsville Casket*,[257] threatens grave damage to the underlying rule. If an opinion must, under settled doctrine, have applicability in pending and future cases, but only if the panel feels like it or believes the subject important enough, then the doctrine of adjudicative retroactivity is very porous, if not altogether bereft of substance. The pragmatic considerations urged by Judge Kozinski cannot in themselves justify a recognized "exception" to adjudicative retroactivity. *Harper* and *Griffith* firmly put to rest the idea courts can refuse enforcement of a "new rule" simply because it is inconvenient, potentially disruptive, or even catastrophic,[258] and *Reynoldsville Casket* specifically refused an exception premised on fairness and pragmatism that threatened to eviscerate this baseline rule.[259]

B. Invoking the "New Rule" Paradigm

Examining the phenomenon of nonprecedential opinions through a retroactivity lens, it seems doctrinally clear enough that any decision that breaks new ground must have precedential effect as to both pending and future cases.[260] However, the same need not be said for opinions that merely apply settled law. If an opinion simply works within the confines of existing rules, there is no "new rule" and therefore no need to ponder its precedential effect: The underlying rules are already available to litigants.[261] Put simply,

256. *See supra* note 24 and accompanying text.
257. *See* Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 754 (1995).
258. *See supra* notes 143–152, 183–190 and accompanying text.
259. *See supra* notes 199–204 and accompanying text.
260. *See* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993) ("[T]hat [new] rule . . . must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."). For an analysis reaching similar conclusions that does not contemplate retroactivity doctrine, see Kenneth Anthony Laretto, *Precedent, Judicial Power, and the Constitutionality of "No-Citation" Rules in the Federal Courts of Appeals*, 54 STAN. L. REV. 1037, 1052 (2002) ("Cases in which a court can rely upon an existing precedent without making an analogical leap are not therefore properly identified as precedents themselves, since they do not engage in legal reasoning but rather assume as correct the reasoning of the cases upon which they rely.").
261. *See* United States v. Johnson, 457 U.S. 537, 549 (1982) ("[W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively.").

there is no necessary requirement that the *Jones* case should have applicability beyond the *Jones* facts when all it does is perform a straightforward application of the *Smith* rule. The next set of litigants already has *Smith* at its disposal; *Jones* by definition has broken no new ground and thus is not needed in any subsequent lawyer's arsenal. Conversely, if the *Jones* case alters *Smith* in some substantive way or applies it in a novel or unanticipated situation, then settled adjudicative retroactivity principles ought to require that *Jones* be available to litigants whose cases are pending or will arise in the future.

Although a handful of courts of appeal have attempted to track this distinction,[262] the "new rule" construct,[263] developed in the context of both habeas corpus[264] and official immunities,[265] may provide a better-developed, readily applicable paradigm for differentiating permissible and impermissible restrictions on precedential effect.[266] *Teague* itself acknowledged difficulty in defining new rules precisely.[267] However, at this

262. *See supra* notes 50–55 and accompanying text.

263. Professors Fallon and Meltzer, *supra* note 27, at 1735–36, first remarked upon and systematically analyzed use of the "new law" construct in several different and seemingly unrelated areas of the law.

264. *See* Teague v. Lane, 489 U.S. 288, 310 (1989) ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.").

265. *See* Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982) (shielding officers from liability unless their conduct violates "clearly established" rules of which they should have been aware).

266. *See* Katyal & Schmidt, *supra* note 27, at 2118 n.32 (noting that, because "whole areas of law" have been built upon the distinction between new and old rules, it has utility in other contexts). To be sure, the standard in *Teague*, 489 U.S. at 288, has its critics, and differentiating "new" from "old" rules has often divided the Court. In *Butler v. McKellar*, 494 U.S. 407, 408–10, 414 (1990), a habeas petitioner challenged officers' interrogation of him regarding another crime after he had invoked his right to counsel. A prior case, *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981), had established that interrogation was to stop once a suspect asked for a lawyer. In *Butler v. Aiken*, 846 F.2d 255, 257–59 (4th Cir. 1988), the Fourth Circuit rejected Butler's claim that *Edwards* ought to encompass interrogation for other potential crimes. While Butler's appeal was pending, the Supreme Court issued *Arizona v. Roberson*, 486 U.S. 675, 677–78 (1988), which stated that initiating interrogation regarding other crimes violated *Edwards*. Although *Roberson* itself seemed to feel the compulsion of *Edwards*, the Court in *Butler*, 494 U.S. at 415, determined that *Roberson* had set forth a "new rule." *See generally* Linda Meyer, *"Nothing We Say Matters"*: Teague *and New Rules*, 61 U. CHI. L. REV. 423, 440–42 (1994) (arguing that the *Butler* Court strips the "new rule" inquiry of content because no two cases will be identical).

267. *See Teague*, 489 U.S. at 301 ("It is admittedly often difficult to determine when a case announces a new rule . . . .").

point, after decades of elaboration, it is possible to sift through the *Teague* precedents to glean some core principles.

In the habeas context, a rule is generally "new" if it "breaks new ground" and is not "dictated" by prior precedent.[268] The Court has applied the "dictated by" standard parsimoniously. A rule may be "new" even where it is a logical outgrowth of an existing opinion or is strongly suggested by an existing opinion.[269] A rule may be "new" even where the Court itself says that prior case law requires the Court to announce it.[270] Where a rule is subject to debate amongst reasonable jurists, it is not compelled by prior cases, and disagreement evinced by judges writing separate opinions is strong evidence of novelty.[271] The concept of newness will obviously depend on the level of generality employed; the more specifically the "old" rule is conceived, the more likely it is that any subsequent application of it will be perceived as novel.[272]

Conversely, a case does not announce a new rule if it merely applies a governing principle from a prior case to a nonidentical set of facts. A rule is developed in contemplation of a set of factual circumstances in which it is likely to apply. When a case whose facts fall within the anticipated compass of a rule arises, "when all we do is apply a general standard to the kind of factual circumstances it was meant to address, we will rarely state a new rule . . . ."[273] Put more concretely, when the Court applies the *Strickland v. Washington*[274] standard governing ineffective assistance of counsel to a lawyer's behavior at

268. Saffle v. Parks, 494 U.S. 484, 488 (1990) (emphasis omitted) (quoting *Teague*, 489 U.S. at 301).

269. *See, e.g.*, Sawyer v. Smith, 497 U.S. 227, 234–35 (1990) (holding that a rule is new where it represents a "gradual development in the law over which reasonable jurists may disagree . . . .").

270. *See Butler*, 494 U.S. at 415.

271. *See* O'Dell v. Netherland, 521 U.S. 151, 159–60 (1997) (observing that an "array of views" expressed in a prior opinion precluded the conclusion that it laid out a clear "old" rule); Lambrix v. Singletary, 520 U.S. 518, 535–36 (1997) (noting that the existence of several concurring and dissenting opinions to support the conclusion that the rule was not "dictated" by precedent); *Butler*, 494 U.S. at 415 (citing differing opinions amongst court of appeals judges to support the conclusion that the rule was new); *Sawyer*, 497 U.S. at 236–37 (noting the dissent of three justices in a prior case to support the conclusion that the rule was new).

272. *See* Meyer, *supra* note 266, at 457.

273. Chaidez v. United States, 568 U.S. 342, 347–48 (2013); *see also* Wright v. West, 505 U.S. 277, 309 (1992) (Kennedy, J., concurring in judgment) ("Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.").

274. 466 U.S. 668 (1984).

trial, it does not state a new rule.[275] A lawyer may fail to present key witnesses, skip vital objections, or sleep through trial; in each case, application of the familiar *Strickland* standard stakes out no new ground. When, however, a court confronts the question whether defendants are entitled to effective assistance of counsel during the parole process, and thus whether *Strickland* is susceptible of a categorically new application, it would create a new rule.[276] This distinction requires both grasp of the intended scope of a rule and familiarity with its garden-variety applications.

The law has evolved in a similar fashion in the official immunity context, albeit using slightly different terminology. An official is immune from damages liability unless her conduct violates "clearly established law," whose existence is "beyond debate."[277] The Court has repeatedly instructed lower courts "not to define clearly established law at a high level of generality."[278] Thus, an official is not liable merely because she is expected to understand that the Fourth Amendment bars unreasonable searches and seizures; instead, she must know, and have no cause to doubt, that the specific actions she plans to undertake represent a violation.[279] Where there are no prior published decisions on point, or where whatever opinions exist have only cursory analysis, a right is not "clearly established."[280] Where judges themselves have split on the question, as evinced either in circuit splits or in dissenting opinions, a rule is not "clearly established."[281] As in the *Teague* context, application of the new rule construct in the immunity context seemingly requires a rule with reasonably specific definition and knowledge of its garden-variety applications. A court need not have previously encountered the precise facts to conclude that an officer's actions violate the expected scope of the rule.

Synthesizing these two contexts provides a helpful framework for determining how and when an opinion ought to have precedential effect under adjudicative retroactivity doctrine. An opinion creates "new" law,

275. *See Chaidez*, 568 U.S. at 348–49.
276. *See id.* at 352–53. This distinction also explains *Butler*, 494 U.S. at 414–15, which differentiated between routine applications of *Edwards v. Arizona*, 451 U.S. 477 (1981), and applications of *Edwards* to a new situation.
277. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011).
278. *Id.* at 742; *see also* Wilson v. Layne, 526 U.S. 603, 615 (1999) ("[T]he right allegedly violated must be defined at the appropriate level of specificity . . . .").
279. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1866–67 (2017) (indicating that the relevant question is whether particular conduct is plainly in violation of the Fourth Amendment).
280. *See Wilson*, 526 U.S. at 616.
281. *See id.* at 618.

and thus must serve as precedent, if it is not dictated by prior, well-reasoned, and specific precedent.[282] Disagreement among members of the panel is enough to call into question whether an opinion is "dictated" by prior law or whether its holding is debatable amongst reasonable jurists.[283] Where the panel does not agree, the opinion is "new" and thus should have precedential effect.[284] So, too, if an opinion takes familiar principles but imports them into a new context beyond the expected compass of the rule, it should have precedential effect.[285]

On the other hand, not all opinions need be precedential. An opinion need not serve as precedent where it says nothing that has not previously been said.[286] This is so when the result is plainly dictated by well-reasoned precedent with unquestioned applicability and sharp contours, even when the opinion involves application of these uncontroverted principles to a novel, but expected, set of facts. The *Strickland* application illustrates this point well. In that event, the relevant legal principles exist already in the litigants' toolbox; all pending and future litigants have the benefit of all pertinent legal rules, and the principle of adjudicative retroactivity is not offended.

Applying this framework, the Fourth Circuit's *Syncor International Corp. v. McLeland*,[287] discussed in Part I,[288] is an illustrative example of an unpublished decision that ought to have precedential effect. Had the case merely required application of settled precedent governing review of an arbitrator's order, the court could have dispatched the case in a nonprecedential opinion. However, the case posed a new question that was not settled by existing Fourth Circuit precedent: whether the parties could contract around the judicial review provisions set forth in the Federal Arbitration Act.[289] Having no case law on point, the Fourth Circuit adopted the analysis of a sister circuit.[290] Because

282. *See* Whorton v. Bockting, 549 U.S. 406, 416 (2007) (stating that a rule is not dictated by prior cases when it has overruled a prior case).
283. *See* Beard v. Banks, 542 U.S. 406, 416 (2004) (stating that, where reasonable jurists disagree, a prior case does not compel a particular result).
284. In this respect, this paradigm parts ways with the approach used by the four circuits that employ something resembling a new rule construct. *See supra* note 51 and accompanying text.
285. *See* Chaidez v. United States, 568 U.S. 342, 352–53 (2013).
286. *See, e.g.*, *id.* at 348–49.
287. No. 96-2261, 1997 WL 452245 (4th Cir. Aug. 11, 1997).
288. *See supra* notes 63–70 and accompanying text.
289. *See Syncor*, 1997 WL 452245, at *5–6.
290. *See id.* at *6–7 (citing Gateway Techs., Inc. v. MCI Telecomms. Corp., 64 F.3d 993, 996–97 (5th Cir. 1995)).

in doing so, the court laid down a rule that was not "dictated by" prior Fourth Circuit precedent, principles of adjudicative retroactivity ought to have mandated that the case bear precedential weight. The Supreme Court ultimately resolved the question against the Fourth Circuit, noting that the Fourth Circuit's part of the split had taken the form of an unpublished decision.[291] Under settled adjudicative retroactivity doctrine, the case creating a new rule should not have gone unpublished.

CONCLUSION

The overwhelming federal judicial workload has understandably inspired many judges and panels to seek some method of triage. But the responding uptick in shadowy nonprecedential case law cannot be squared with the Supreme Court's retroactivity jurisprudence unless the body of unpublished opinions is restricted to cases whose results are foreordained by prior precedents—that is, opinions that do not create new rules. A handful of circuits have responded intuitively by limiting nonprecedential opinions to the routine, unexceptional, and humdrum; far more have not. The resulting unpublished work product from a majority of jurisdictions frequently stakes out new ground, creates circuit splits, and gives rise to fractured opinions, quietly carving out a sizable exception to settled retroactivity doctrine. This exception has gone unrecognized by courts and commentators. It is also indefensible. It is premised on convenience and systemic burden. *Harper* and *Griffith* rejected the relevance of both, and *Reynoldsville Casket* firmly resisted an effort to bring them in through the backdoor. Thus, nonprecedential opinions that create new rules lack justification.

Adjudicative retroactivity jurisprudence has probable basis in Article III and a proper conception of the judicial function. The doctrine has clearly rejected efforts to restrict the precedential effect of new rules and specifically rejected efforts to deprive litigants in pending cases of the benefit of those rules. Where a nonprecedential opinion stakes out new ground, it plainly violates these settled principles. Restricting the nonprecedential opinion to the case that stakes out no new ground—the garden-variety application of settled rules to expected fact patterns—brings the phenomenon into harmony with the Supreme Court's retroactivity jurisprudence and is consistent with conceptions of the judicial power underlying Article III. Using the familiar "new rule" construct, the

291. *See* Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 583 n.5 (2008).

nonprecedential opinion becomes just that—an opinion that actually lacks utility as precedent. Declaring nothing new under the sun, it definitionally relies on settled legal principles that are available to subsequent litigants and, as such, threatens no violence to existing doctrine.