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If You Can't Beat 'Em, Join 'Em: A Pragmatic Approach to Nonprecedential Opinions in the Federal Appellate Courts

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I. INTRODUCTION

For some number of years, judges and academics have debated the pros and cons of "unpublished," or "nonprecedential," judicial opinions in the federal appellate courts. Academics largely, although not unanimously, decry the practice of issuing opinions that the courts designate, by rule, as nonbinding. They argue that issuing non-precedential opinions runs counter to the rule of law by permitting arbitrary decisionmaking, violating the Due Process and Equal Pro-

1. I use the term nonprecedential in this Article rather than unpublished because, at least in the federal appellate courts, these opinions are published in the sense of being made publicly available, either electronically or in print. See infra note 13 and accompanying text. Accordingly, although most circuit rules still use the term unpublished opinion, that term is a misnomer, and I use it only when referring to circuit rules or other sources that use that term.

2. The seminal article on nonprecedential opinions was published thirty years ago. William L. Reynolds & William M. Richman, The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals, 78 COLUM. L. REV. 1167 (1978). In 2000, however, the Eighth Circuit ruled that the circuit's rules regarding nonprecedential opinions were unconstitutional because they exceeded the court's Article III judicial power. Anastasoff v. United States, 223 F.3d 898, 899–900, vacated en banc as moot, 235 F.3d 1054 (8th Cir. 2000). That decision brought renewed energy to the debate. Most commentators criticize nonprecedential opinions, although the practice has some defenders. See generally Symposium, Anastasoff, Unpublished Opinions, and "No Citation" Rules, 3 J. APP. PRAC. & PROCESS 175 (2001) (collecting eleven articles on the topic); Symposium, Have We Ceased to be a Common Law Country? A Conversation on Unpublished, Depublished, Withdrawn, and Per Curiam Opinions, 62 WASH. & LEE L. REV. 1429 (2005) (collecting eleven articles on the topic). The following sentiment is typical of academic commentary on the practice: "[W]e join the chorus of those who contend that the practice of resolving the vast majority of appellate cases in unpublished, nonprecedential, and uncitable opinions is a stain on our appellate justice system." David C. Vladeck & Mitu Gulati, Judicial Triage: Reflections on the Debate over Unpublished Opinions, 62 WASH. & LEE L. REV. 1667, 1671 (2005).

3. See, e.g., Richard B. Cappalli, The Common Law's Case Against Non-Precedential Opinions, 76 S. CAL. L. REV. 755, 788–91 (2003) (questioning whether cases resolved through nonprecedential opinions truly receive full judicial consideration and arguing that lack of public accountability likely results in less thorough consideration); Jeffrey O. Cooper, Response, Citability and the Nature of Precedent in the Courts of Appeals: A Response to Dean Robel, 35 IND. L. REV. 423, 428 (2002) (arguing that prospective ability to determine the precedential value of an opinion creates the appearance, if not the reality, of arbitrary decisionmaking); Penelope Pether, Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts, 56 STAN. L. REV. 1435, 1504–14 (2004) (arguing that nonprecedential opinions developed in response to increased access by outsider populations to the
tection Clauses,\textsuperscript{4} and rendering meaningless the principles of stare
decisis that presumably constrain judicial decisionmaking.\textsuperscript{5}

Judges largely, although not unanimously, defend the use of non-
precedential opinions,\textsuperscript{6} primarily on the ground that they are essen-
tial for docket management.\textsuperscript{7} Judges say that the number of cases on
their dockets makes it impossible to draft precedential opinions in
every case while still resolving cases within a reasonable time.\textsuperscript{8} Fur-
ther, they say that limiting the number of precedential opinions is
necessary for doctrinal coherence and consistency,\textsuperscript{9} as well as to keep
the number of precedents litigants must research to a manageable
quantity.\textsuperscript{10} Finally, they say that most cases are routine and do not
break new legal ground, thus making their disposition with short, un-
oficial opinions both efficient and appropriate.\textsuperscript{11}

\textsuperscript{4} See, e.g., Jessie Allen, \textit{Just Words? The Effects of No-Citation Rules in Federal
Courts of Appeals}, 29 Vt. L. Rev. 555, 574-91 (2005); Melissa H. Weresh, \textit{The

\textsuperscript{5} See, e.g., Sloan, supra note 3, at 727-33; Pether, supra note 3, at 1483-1504.

\textsuperscript{6} See, e.g., Hart v. Massanari, 266 F.3d 1155, 1175 (9th Cir. 2001) (rejecting Anas-
tasoff's conclusion that courts are required by the Constitution to follow prior
decisions); accord Symbol Techs. v. Lemelson Med., 277 F.3d 1361, 1367 (Fed. Cir. 2002) (concluding, based on Hart's analysis, that local rules that authorize
nonprecedential opinions are valid). \textit{But see} Anastasoff, 223 F.3d at 900-03
(holding that the issuance of nonprecedential opinions exceeds the judiciary's Ar-
ticle III judicial power).

\textsuperscript{7} See, e.g., \textit{Unpublished Judicial Opinions: Hearing Before the Subcomm. on
Courts, the Internet, and Intellectual Property of the Comm. on the Judiciary
H.R.}, 107th Cong. 8 (2002) \textit{[hereinafter Hearing]} \textit{(statement of then-Judge Sa-
uel A. Alito, Jr., Third Circuit)} (explaining that the appellate courts would be
unable to stay current with their dockets if precedential opinions were required
in every case).

\textsuperscript{8} See, e.g., \textit{id.} at 10-11 \textit{(statement of Judge Alex Kozinski, Ninth Circuit)} \textit{(conclud-
ing that, based on current docket levels, Ninth Circuit judges do not have enough
time to write precedential opinions in all cases).}

\textsuperscript{9} See, e.g., 11TH CIR. R. 36-3 I.O.P. 5, \textit{available at} http://www.ca11.uscourts.gov/
documents/pdfs/BlueDEC07.pdf \textit{("The unlimited proliferation of published opin-
ions is undesirable because it tends to impair the development of the cohesive
body of law."); Hearing, supra note 7, at 12 \textit{(statement of Judge Kozinski}} \textit{(argu-
ing that restricting citation to nonprecedential opinions is necessary for a circuit
to maintain a coherent, predictable, and consistent body of law).}

\textsuperscript{10} See, e.g., \textit{Hearing, supra note 7, at 7 \textit{(statement of Judge Alito}} \textit{(noting that use
of nonprecedential opinions limits the amount of case law that attorneys must re-
search and the number of reporter volumes they must purchase).}

\textsuperscript{11} See supra notes 7-9. Local circuit rules reflect these same sentiments. See, e.g.,
2d CIR. R. 32.1(a), \textit{available at} http://www.ca2.uscourts.gov/Docs/Rules/FRAP_
LR.pdf \textit{(authorizing summary orders because \"[t]he demands of contemporary}
This is not an abstract legal debate. Nonprecedential opinions have become the dominant mode of disposition for cases resolved on the merits in the federal appellate courts. The numbers vary somewhat by circuit, but overall 84% of opinions issued by the federal courts of appeals are nonprecedential.12 Although frequently referred to as unpublished opinions, nonprecedential opinions are, in fact, published in any meaningful sense of the word.13 Accordingly, they exist

12. During the twelve months ending September 30, 2006, 84.1% of cases terminated on the merits in twelve of the federal circuits were disposed of by unpublished opinion. Statistics Div., Admin. Office of the U.S. Courts, 2006 Annual Report of the Director: Judicial Business of the United States Courts 52 (2007) [hereinafter Table S-3], available at http://www.uscourts.gov/judbus2006/completejudicialbusiness.pdf. For these twelve circuits, the percentage ranged from a low of 59.9% in the District of Columbia Circuit to a high of 93.7% in the Fourth Circuit. Id. The Federal Circuit does not report the number of nonprecedential opinions it issues to the Administrative Office of the U.S. Courts. Id. One study, however, concluded that the Federal Circuit resolved 77% of its cases from October 1, 1982, through October 23, 2003, with nonprecedential opinions, with annual figures ranging from a low of 62% in 1983 to a high of 84% in 1996. Beth Zeitlin Shaw, Comment, Please Ignore This Case: An Empirical Study of Nonprecedential Opinions in the Federal Circuit, 12 Geo. Mason L. Rev. 1013, 1028 (2004).

13. Although in the not too distant past, some federal appellate opinions were truly unpublished, today all are published, either in print in West's Federal Appendix ("Federal Appendix") reporter, or electronically on Westlaw, LexisNexis, or on the courts' own websites. The Third, Fifth, and Eleventh Circuits did not originally make their nonprecedential opinions available on Westlaw or LexisNexis or in the Federal Appendix. 1 F. App'x vii–xxiii (2001) (listing no cases from the Third, Fifth, or Eleventh Circuits in the table of cases reported by circuit); Judith A. McKenna et al., Federal Judicial Center, Case Management Procedures in the Federal Courts of Appeals 21 (2000) (noting the three circuits that did not initially make nonprecedential opinions available electronically). However, all federal circuits now make their nonprecedential opinions available. See 57 F. App'x xxiii, xxvi, xxx (2003) (listing cases from the Third, Fifth, and Eleventh Circuits in the table of cases reported by circuit); Thomson West, Product Information—Federal Appendix, http://west.thomson.com/store/product.aspx?r=12379 &product_id=40015694 (last visited Dec. 29, 2007) (describing the coverage of the
as statements of law whose status is indeterminate. Do these opinions bind the conduct of actors in society? Can or should lawyers use them to advise clients?14 When, if ever, should courts feel constrained by nonprecedential opinions? The bottom line is that the federal appellate courts have created a new substratum of precedent that does not fit neatly within the recognized hierarchy of federal decisional law but into which the majority of federal appellate opinions fall.15 As one commentator recently stated: "Anyone who states that lawyers and judges have a common understanding of how to handle unpublished decisions is either misinformed or less than candid."16

Although the utility, necessity, and advisability of nonprecedential opinions remain interesting issues to debate, at this point they are somewhat beside the point. Academics have lost the debate on nonprecedential opinions. Judges feel like nonprecedential opinions are necessary for the very survival of the federal appellate judiciary.17 Judges control whether nonprecedential opinions are permissible, ei-

14. To give just one practical example, some courts have said that legal principles stated in nonprecedential opinions are not clearly established for purposes of a government official’s claim of qualified immunity. See, e.g., Bell v. Johnson, 308 F.3d 594, 611 (6th Cir. 2002); Sorchini v. City of Covina, 250 F.3d 706, 708–09 (9th Cir. 2001). How should an attorney advising government officials regarding their constitutional duties approach these decisions? For several practical examples of the uncertainty Third Circuit nonprecedential opinions have created, see generally Sarah E. Ricks, The Perils of Unpublished Non-Precedential Federal Appellate Opinions: A Case Study of the Substantive Due Process State-Created Danger Doctrine in One Circuit, 81 WASH. L. REV. 217 (2006) [hereinafter Ricks, A Case Study].

15. See infra notes 66–74, 150–57 and accompanying text.


17. This is not an exaggeration. One member of the Advisory Committee on the Federal Rules of Appellate Procedure (Appellate Rules Committee) characterized nonprecedential opinions as “essential for the survival of the federal appellate courts.” Advisory Comm. on Appellate Rules, Minutes of the Spring 2002 Meeting of Advisory Committee on Appellate Rules 25 (Apr. 22, 2002) [hereinafter April Meeting], http://www.uscourts.gov/rules/Minutes/app0402.pdf (listing points raised by unnamed committee members).
ther by adjudicating challenges brought through litigation or through changes to existing procedural rules. And judges are not going to give up nonprecedential opinions.

So, as the saying goes, if you can't beat 'em, join 'em. Although some people would clearly prefer to eliminate this category of authority altogether, that is simply not going to happen. The better course of action now is to find a principled way to integrate nonprecedential opinions into the judicial system, both to provide clarity regarding the weight of the opinions and to preserve the legitimacy of the federal courts.

The federal courts, with congressional approval, have begun to address this issue with the adoption of Federal Rule of Appellate Procedure (FRAP) 32.1, a new procedural rule permitting citation of all nonprecedential opinions issued on or after January 1, 2007. FRAP 32.1 now supplants the patchwork of citation norms and practices previously put in place through local circuit rules.

Although FRAP 32.1 is a step in the right direction, it still leaves some important questions unanswered. By its language, the rule addresses only citation practices. It can be read, however, to authorize nonprecedential opinions implicitly. Because it does not expressly authorize nonprecedential opinions, FRAP 32.1 fails to address a number of procedural questions regarding their issuance. More importantly, the rule does not address the authoritative weight of nonprecedential opinions. FRAP 32.1's silence on these matters adds to the uncertainty about the role of nonprecedential opinions in the federal judicial system and leaves to local circuit rules matters that would better be addressed nationally.

This Article addresses the problems (and opportunities) that FRAP 32.1 creates in three parts. Part II discusses the history of FRAP 32.1, explaining how FRAP 32.1 came to be in its present iteration. Part III analyzes the language of FRAP 32.1 and the interplay between the new rule and local circuit rules regarding nonprecedential opinions. FRAP 32.1 effectively formalizes a new substratum of appellate juris-

18. Bradley Scott Shannon, May Stare Decisis Be Abrogated by Rule?, 67 OHIO ST. L.J. 645, 690-91 (2006) (identifying the difficulty of having judges in charge of evaluating the validity of rules of precedent of their own making). Although Congress could also alter rules regarding nonprecedential opinions, the chances of legislative action are extremely low.
20. See Sloan, supra note 3, at 716 n.25 (listing local circuit rules regarding citation of nonprecedential opinions as of 2004).
22. Local circuit rules, however, often do address these procedural matters. See infra section III.B and app. A.
23. See infra section III.C.
24. See infra section III.C.
25. See infra Part II.
prudence but leaves, by default, important questions, including the authoritative value of these opinions, to confusing and inconsistent local circuit rules. Part IV proposes the next step in addressing non-precedential opinions: expressly authorizing nonprecedential opinions, establishing uniform procedures for their issuance, and clearly establishing their authoritative value. Further, Part IV argues that the law of the circuit rule should be amended to define non-precedential opinions as binding unless overruled by a later “published” panel decision. The courts could implement this proposal acting in their adjudicative capacity. Alternatively, FRAP 32.1 could be revised to authorize nonprecedential opinions expressly and define their authoritative value. However implemented, this proposal would allow the federal appellate courts to continue to issue nonprecedential opinions while preserving the system of precedent that they purport to follow. The Article concludes that FRAP 32.1 is an improvement over the prior situation and is perhaps the best that could be hoped for as a first step in figuring out how nonprecedential opinions fit within the federal judicial system. If the federal judiciary is unwilling to forego nonprecedential opinions, it should take further steps to institutionalize them in a way that preserves judicial legitimacy and the system of precedent.

II. THE HISTORY OF FRAP 32.1

FRAP 32.1 provides as follows:

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:
   (i) designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like; and
   (ii) issued on or after January 1, 2007.
(b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

This rule went into effect on December 1, 2006, in accordance with the rulemaking procedures established by the Rules Enabling Act.31

26. See infra Part III.
27. See infra Part IV.
28. See infra Part V.
30. Id. (note in 28 U.S.C.A. (Supp. 2007)).
The road to adoption for this rule has been long and arduous. The protracted history of the development of nonprecedential opinions in the federal appellate courts over the past thirty-five years has been detailed elsewhere, and that history does not need to be repeated here. The history of this particular rule, however, is of some interest. FRAP 32.1 originated from a proposal submitted by the Department of Justice to the Advisory Committee on the Federal Rules of Appellate Procedure (Appellate Rules Committee). The Appellate Rules Committee revised the Justice Department's proposal, consid-

five Advisory Committees appointed by the Judicial Conference considers new or amended rules. James C. Duff, *The Rulemaking Process: A Summary for the Bench and Bar* (Oct. 2007), http://www.uscourts.gov/rules/proceduresum.htm. If an Advisory Committee is inclined to approve a new or amended rule, it must first obtain permission from the Committee on Rules of Practice and Procedure (Standing Committee) to publish the proposed rule for public comment and hold public hearings on the proposal. *Id.* If the Standing Committee approves a rule promulgated by the Advisory Committee after publication and comments, the rule then goes before the Judicial Conference. *Id.* If the Judicial Conference approves the rule, the rule is then submitted to the Supreme Court. *Id.* If the Supreme Court approves the rule, it transmits the rule to Congress. *Id.* Congress then has seven months to review the rule. *Id.* If Congress does not act, the new or amended rule goes into effect. *Id.* If Congress does not approve the rule, it must act legislatively to reject, modify, or defer the rule. *Id.*


33. For a more detailed history of the rule, see Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429 (2005) [hereinafter Schiltz, *Much Ado About Little*]. Schiltz was the Reporter for the Appellate Rules Committee during the consideration of FRAP 32.1. See *id.* at 1429–32.

34. *Id.* at 1441–42. In fact, nonprecedential opinions and no-citation rules were on the Judicial Conference's agenda as early as 1990:

In 1990, the Federal Courts Study Committee recommended that the Judicial Conference establish an ad hoc committee to study whether technological advances gave reason to reexamine the policy on “unpublished” opinions. The committee did not endorse a universal publication policy, but it noted that “non-publication policies and non-citation rules present many problems.” The [Judicial] Conference did not act on that recommendation.

During the past decade, amendments to the rules have been periodically proposed to the Advisory Committee on the Federal Rules of Appellate Procedure to establish uniform procedures governing “unpublished” opinions. *Hearing, supra* note 7, at 7 (statement of Judge Alito). Aside from FRAP 32.1, none of the proposals sent to the Appellate Rules Committee survived the rulemaking process. See *ADVISORY COMM. ON APPELLATE RULES, MINUTES OF THE FALL 2002 MEETING* 37–38 & n.1 (Nov. 18, 2002) [hereinafter NOVEMBER MEETING], http://www.uscourts.gov/rules/Minutes/appll02.pdf (noting that a proposal to require the federal appellate courts to make their unpublished opinions available electronically was removed from the Committee's study agenda in April 1998). Therefore, the Justice Department's 2001 proposal was the first serious
ing three alternative versions of a proposed rule, all of which took stronger positions on the validity and weight of nonprecedential opinions than does the final version.

Alternative A for proposed Rule 32.1 provided that "[a] court of appeals may designate an opinion as non-precedential." Alternative A also addressed the authoritative value of nonprecedential opinions, providing that "[a]n opinion designated as non-precedential may be cited for its persuasive value, as well as to support a claim of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees, or a similar claim." Alternatives B and C did not expressly authorize nonprecedential opinions, but they both addressed the authoritative value of such decisions. Alternative B simply reiterated the citation language from Alternative A but omitted the language expressly authorizing nonprecedential opinions. Alternative C also omitted express authorization of nonprecedential opinions and permitted citation in the same or a related case for purposes of establishing claims such as law of the case or claim preclusion. In subdivision (b), entitled "Persuasive Value," this version further provided that "[a]n opinion designated as non-precedential may be cited for its persuasive value regarding a material issue, but only if no precedential opinion of the forum court adequately addresses that issue. Citing non-precedential opinions for their persuasive value is disfavored."

Alternatives A and C were rejected by the Appellate Rules Committee. The Committee rejected Alternative A almost immediately, saying it did not want to pronounce by rule that nonprecedential opinions are, in fact, constitutional. Thus, it does not seem that this language was ever intended to be included in the rule, nor was it considered seriously by the Appellate Rules Committee. Alternative C

35. NOVEMBER MEETING, supra note 34, at 23.
36. Id.
37. Id. at 28, 31–32.
38. Id. at 28. Alternative B provides in full as follows:

An opinion designated as non-precedential may be cited for its persuasive value, as well as to support a claim of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees, or a similar claim. A court must not impose upon the citation of non-precedential opinions any restriction that is not generally imposed upon the citation of other sources.

Id.
39. Id. at 31–32.
40. Id. at 32.
41. Id. at 35.
42. Id.
was rejected as well for reasons that are not clearly articulated in the minutes summarizing the deliberations of the Appellate Rule Committee's meeting. Apparently, the majority of the committee thought Alternative C was too restrictive because it affirmatively discouraged citation of nonprecedential opinions.\footnote{Id.}

The Committee ultimately went with a version of Alternative B, the Goldilocks version,\footnote{Id.} but it amended the rule to omit the reference to the persuasive value of nonprecedential opinions.\footnote{Compare id. at 28 (listing the original Alternative B proposal) with SAMUEL A. ALITO, JR., REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES 28-29 (May 22, 2003) [hereinafter ADVISORY COMMITTEE REPORT], http://www.uscourts.gov/rules/app0803.pdf (listing an amended proposal for FRAP 32.1 that omitted the first sentence from the original Alternative B proposal and retained a modified version of the original second sentence).}

The version sent out for public comment provided as follows:

\begin{quote}
No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.\footnote{ADVISORY COMMITTEE REPORT, supra note 45, at 28-29; see also Tony Mauro, Courts Move Forward on Citation Change, LEGAL TIMES (Wash., D.C.), May 26, 2003, at 8 (discussing a proposed version of FRAP 32.1).}
\end{quote}

As the Committee explained in the note accompanying the proposal, the proposed rule was "extremely limited":

\begin{quote}
[Rule 32.1] takes no position on whether refusing to treat an "unpublished" opinion as binding precedent is constitutional. It does not require any court to issue an "unpublished" opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that decision. It says nothing about what effect a court must give to one of its "unpublished" opinions or to the "unpublished" opinions of another court. The one and only issue addressed by Rule 32.1 is the citation of judicial dispositions . . . .\footnote{This same language, in slightly revised form, appears in the note following the rule as adopted: Rule 32.1 is extremely limited. It does not require any court to issue an unpublished opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that determination. It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court. Rule 32.1 addresses only the citation of federal judicial dispositions that have been designated as "unpublished" or "non-precedential"—whether or not those dispositions have been published in some way or are precedential in some sense.}
\end{quote}
The Committee received an unprecedented (pun intended) number of comments on the proposal, both positive and negative;\(^{48}\) the majority of the negative comments were generated from the Ninth Circuit in a campaign to derail the proposal that may have been organized by Judge Alex Kozinski.\(^{49}\) After considering the comments, the Appellate Rules Committee sent the rule to the Judicial Conference's Committee on Rules of Practice and Procedure (Standing Committee), recommending adoption.\(^{50}\) The Standing Committee, although apparently favorably inclined toward the rule, remanded the rule to the Appellate Rules Committee for further study.\(^{51}\) The Appellate Rules Committee studied the rule's probable effects\(^{52}\) and ultimately revised the proposed rule again to delete the language saying that courts could only impose restrictions on citation of nonprecedential opinions that they also impose on citations to other forms of authority.\(^{53}\) The proposed rule in its revised form simply prohibited restrictions on citation.\(^{54}\) The Appellate Rules Committee then forwarded the revised proposal to the Standing Committee, and the Standing Committee accepted it.\(^{55}\) The Standing Committee forwarded the proposed rule to the Judicial Conference, which added a provision limiting application of the rule to opinions issued on or after January 1, 2007, and then forwarded it to the Supreme Court.\(^{56}\) The Supreme Court forwarded the proposed rule to Congress.\(^{57}\) When Congress did not act within the statutory period, the rule as submitted became effective.\(^{58}\)

### III. FRAP 32.1 AND LOCAL CIRCUIT RULES GOVERNING NONPRECEDENTIAL OPINIONS

In adopting FRAP 32.1, the federal courts have, for the first time, acknowledged the existence of nonprecedential opinions in the na-

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51. Id. at 1453–54.
52. Schiltz, Citation of Unpublished Opinions, supra note 16, at 58–64 (describing research conducted by the Federal Judicial Center that evaluated the effects of permitting citation to nonprecedential opinions).
53. Schiltz, *Much Ado About Little*, supra note 33, at 1431 n.8 (noting that the Committee tinkered with the language of the rule).
54. Id.
55. Id. at 1457–58.
56. Id. at 1458.
tional rules. This national recognition of nonprecedential opinions is an improvement over the prior situation. The federal courts endangered their own legitimacy when they tried to make their own prior opinions nonexistent. And allowing citation to nonprecedential opinions was not a huge leap because, by the time FRAP 32.1 went into effect, the majority of the circuits already permitted citation of nonprecedential opinions as persuasive or nonbinding authority. But the rule failed to establish clear procedures for the issuance of nonprecedential opinions, and more importantly, failed to define the authoritative value of nonprecedential opinions. Through these omissions, FRAP 32.1 missed an opportunity to clarify the role of nonprecedential opinions in the hierarchy of federal decisional law and left important questions regarding their issuance to a confusing and inconsistent mélange of local circuit rules and internal operating procedures.

A. FRAP 32.1 Implicitly Endorses Nonprecedential Opinions.

Opponents of FRAP 32.1 consider the rule to be the first step toward prohibiting nonprecedential opinions, even though the Advi-

59. The only other reference to nonprecedential opinions in the national rules is in FRAP 35, which concerns grounds for rehearing en banc. Fed. R. App. P. 35. The rule states that rehearing en banc is appropriate when a panel's decision conflicts with an "authoritative" decision from another circuit. Id. The terminology change in the rule is an oblique acknowledgement of nonprecedential opinions; the only overt reference is the Advisory Committee's note, not in the rule itself. Id. advisory committee's note. The Advisory Committee's note indicates that the rule was amended in 1998 to refer to "authoritative" decisions rather than "published" decisions because of the differences among the circuits regarding the treatment of "unpublished," or nonprecedential, opinions. Id.

60. Pether, supra note 3, at 1483-1528 (analyzing in significant depth the effects of nonprecedential opinions on litigants and the judicial system to demonstrate how they delegitimize the judiciary); Schiltz, Much Ado About Little, supra note 33, at 1470 (noting that opponents of nonprecedential opinions view such opinions as undermining judicial legitimacy).


62. APRIL MEETING, supra note 17, at 25 ("Those speaking against a national rule pointed out the following: ... Many circuit judges will view this as the first step on a path that will eventually lead to the abolition of non-precedential opinions, which are unpopular among practitioners but essential for the survival of the federal appellate courts."); see also Schiltz, Much Ado About Little, supra note 33, at 1483 (explaining that one reason many judges opposed FRAP 32.1 was because they expected or feared that it was the first step toward eliminating non-precedential opinions). I first explored the implications of the rule's language in conjunction with the slightly different version sent out for public comment. Sloan, supra note 3, at 722-27.
sory Committee's note has expressly stated that that is not the rule's intent.\textsuperscript{63} The rule's opponents argued that allowing citation will effectively convert nonprecedential opinions into precedential opinions for two reasons. First, judges will have to put as much work into nonprecedential opinions as precedential ones if the nonprecedential ones can be cited by parties in later cases.\textsuperscript{64} Second, once parties cite nonprecedential opinions, judges will feel constrained to consider and address the nonprecedential opinions just as they would precedential opinions.\textsuperscript{65} If these arguments turn out to be correct and the distinctions between precedential and nonprecedential opinions become illusory, judges may choose to publish more opinions and to rely less frequently on nonprecedential opinions. Conversely, they may choose to issue more one-word dispositions.

Far from signaling the demise of nonprecedential opinions, however, the rule's implicit validation of nonprecedential opinions legitimates them and formalizes their status as a subordinate class of appellate authority.\textsuperscript{66} Although the rule does not endorse issuance of

\textsuperscript{63} \textit{FED. R. APP. P.} 32.1 advisory committee's note.

\textsuperscript{64} Sloan, \textit{supra} note 3, at 724.

\textsuperscript{65} \textit{Hearing, supra} note 7, at 13 (statement of Judge Kozinski) (“If unpublished dispositions could be cited as precedent, conscientious judges would have to pay much closer attention to their precise wording. Language that might be adequate when applied to a particular case might well be unacceptable if applied to future cases raising different fact patterns.”). The effect would be for judges to treat all of the opinions they write as precedential. \textit{See id.; see also} Barnett, \textit{From Anastasoff to Hart, supra} note 61, at 12 (expressing the opinion that allowing citation of nonprecedential opinions will cause them to be followed more often than if they cannot be cited).

\textsuperscript{66} \textit{See} K.K. DuVivier, \textit{Are Some Words Better Left Unpublished?: Precedent and the Role of Unpublished Decisions}, 3 J. APP. PRAC. & PROCESS 397 (2001) (recognizing that the federal appellate courts now have two tiers of precedent); Ricks, \textit{A Case Study, supra} note 14, at 222 (arguing that nonprecedential opinions have uncertain legal significance and that their indeterminate status confuses courts and litigants); Schiltz, \textit{Much Ado About Little, supra} note 33, at 1469 (noting two classes of federal appellate opinions: “first class” precedential opinions and “second class” nonprecedential opinions); \textit{see also} Stephen B. Burbank, \textit{Judicial Accountability to the Past, Present, and Future: Precedent, Politics and Power}, 28 U. Ark. LITTLE ROCK L. REV. 19 (2005) (discussing the impact of “tiered appellate decisionmaking” on judicial accountability); Martha Dragich Pearson, \textit{Citation of Unpublished Opinions as Precedent}, 55 HASTINGS L.J. 1235, 1303 (2004) (noting that constraints of time and resources may force the judiciary to maintain two decisional tracks).

Interestingly, this layer of precedent is similar to one that would have been created by a 1998 proposal by the Commission on Structural Alternatives for the Federal Courts of Appeals. \textit{Comm'n on Structural Alternatives for the Fed. Courts of Appeals, Final Report} 59–66 (1998). This Commission studied the courts' structure and caseloads and made a variety of recommendations for restructuring the courts to improve their performance. \textit{Id.} One of the recommendations was for Congress to authorize the circuit courts to create District Court Appellate Panels (DCAPs). \textit{Id.} at 64–66. These panels would consist of two dis-
nonprecedential opinions, merely permitting citation to them creates the inference that those opinions can validly be issued. If nonprecedential opinions are impermissible, why would the Federal Rules of Appellate Procedure contain a rule affirmatively permitting citation to them? If courts cannot validly issue nonprecedential opinions, the appropriate rule would prohibit their issuance, not permit citation to them. It would be strange indeed for a rule to regulate an impermissible practice.

The Advisory Committee attempted to avoid this very issue in the note accompanying the rule by stating that the rule neither requires nor forbids the issuance of nonprecedential opinions. This statement is not effective, however, for two reasons. First, the note cannot overcome the implications of the rule's language. Although the Advisory Committee's note can aid in the interpretation of a rule, the note cannot change the meaning of the rule itself.

Second, the Advisory Committee's note does not take into account the interplay between FRAP 32.1 and FRAP 47. FRAP 47 authorizes courts to promulgate local rules. As local circuit rules developed, conflicts between those rules and the Federal Rules of Appellate Procedure began to emerge. Thus, when FRAP 47 was amended in 1995, the Advisory Committee stated in its note that local circuit rules "may not bar any practice that these rules explicitly or implicitly permit." Local rules providing for the issuance of nonprecedential opinions did not contravene the Federal Rules of Appellate Procedure when the federal rules were silent on nonprecedential opinions; however, now that FRAP 32.1 addresses nonprecedential opinions, the local and national

67. Sloan, supra note 3, at 725.
68. FED. R. App. P. 32.1 advisory committee's note.
70. E.g., Whitehouse v. U.S. Dist. Court for Dist. of R.I., 53 F.3d 1349, 1358 n.12 (1st Cir. 1995) ("[T]he Comment [to a rule] cannot substantively change the text of the Rule."). In that case, the court refused to limit local rulemaking power based on language in a comment that did not appear in the rule itself. Id. at 1365.
71. FED. R. App. P. 47.
73. FED. R. App. P. 47 advisory committee's note (1995 amend.) (emphasis added). The note accompanying FRAP 47 is different from that accompanying FRAP 32.1 in that the FRAP 47 Advisory Committee's note explains the intent of the rule, whereas the note accompanying FRAP 32.1 attempts to change the meaning of the rule's language. Sloan, supra note 3, at 726 n.78.
rules must be read together. Because FRAP 32.1 permits citation of nonprecedential opinions, that must mean that their issuance does not contravene the national rules. It would be contradictory for the national rules either expressly or implicitly to prohibit the issuance of nonprecedential opinions while simultaneously authorizing citation of them. Thus, by operation of FRAP 47, the implication of FRAP 32.1 is that local rules authorizing the designation of opinions as non-precedential are valid.74

B. FRAP 32.1 Preserves Inconsistent Local Rules Governing Issuance of Nonprecedential Opinions.

By lifting the citation restrictions, the rule has formalized and institutionalized on a national level a new substratum of appellate authority in the federal system.75 In one sense, the rule's recognition of this layer of authority does not change anything because this layer has existed for some number of years.76 But the lack of uniform procedures for the issuance of nonprecedential opinions creates confusion and unnecessary inconsistency in the federal circuits.

Local rules governing the issuance of nonprecedential opinions are inconsistent across circuits in a number of respects,77 as I have described below.

1. The presumptions favoring or disfavoring issuance of nonprecedential opinions

The circuits' local rules create varying presumptions regarding the issuance of precedential and nonprecedential opinions. The First78 and Fifth79 Circuits' rules create an express presumption in favor of precedential opinions, providing that precedential opinions will be issued unless certain criteria are met. The Fourth,80 Ninth,81 and Eleventh82 Circuits' rules create an express presumption against the

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74. Sloan, supra note 3, at 726.
75. See supra note 66 and accompanying text.
76. See Hannon, supra note 32, at 207 (tracing the history of nonprecedential opinions from 1964 forward).
77. A chart highlighting the differences among circuit rules relating to nonprecedential opinions appears in Appendix A infra.
79. 5TH CIR. 1974-1975.5.2.
81. 9TH CIR. R. 36-2, available at http://www.ca9.uscourts.gov (follow "FRAP & Local Circuit Rules" and then select "Federal Rules of Appellate Procedure (FRAP) & Local Circuit Rules-2007 version"). In the Ninth Circuit, the label "opinion" is reserved for precedential dispositions; nonprecedential decisions are called memoranda, and all other types of dispositions are called orders. 9TH CIR. R. 36-1.
82. 11TH CIR. R. 36-2.
issuance of precedential opinions, providing that precedential opinions will be issued only if certain criteria are met. The Seventh,\textsuperscript{83} Eighth,\textsuperscript{84} and Federal\textsuperscript{85} Circuits have policies designed to limit the number of precedential opinions issued, thereby creating implied presumptions against the issuance of precedential opinions. The remaining circuits—the Second,\textsuperscript{86} Third,\textsuperscript{87} Sixth,\textsuperscript{88} Tenth,\textsuperscript{89} and District of Columbia\textsuperscript{90} Circuits—are neutral; their rules do not contain provisions that expressly or implicitly either favor or disfavor the issuance of nonprecedential opinions.

2. The effect of content

In most, but not all, circuits, the content of an opinion is a factor affecting whether it is issued as precedential or nonprecedential. Seven circuits—the Fourth,\textsuperscript{91} Fifth,\textsuperscript{92} Sixth,\textsuperscript{93} Eighth,\textsuperscript{94} Ninth,\textsuperscript{95} District of Columbia,\textsuperscript{96} and Federal\textsuperscript{97} Circuits—provide for issuance of a precedential opinion when specific content requirements, such as altering or modifying an existing rule of law, are satisfied. The First Circuit's rule\textsuperscript{98} is to the same effect. Because of that circuit's presumption in favor of precedential opinions, however, the rule is stated in the reverse such that an opinion will be published unless it fails to

\textsuperscript{83} 7TH CIR. R. 32.1(a), \textit{available at} \url{http://www.ca7.uscourts.gov/Rules/rules.pdf} (stating a policy to avoid unnecessary opinions).
\textsuperscript{84} 8TH CIR. APP. I(4) (providing that an opinion should be published when specific criteria are satisfied, thus suggesting that all other opinions should not be published).
\textsuperscript{85} FED. CIR. IOP 10(4) (announcing the court's policy of limiting precedent to dispositions meeting specific criteria).
\textsuperscript{86} 2D CIR. R. 32.1(a).
\textsuperscript{87} 3D CIR. IOP 5.3, \textit{available at} \url{http://www.ca3.uscourts.gov/Rules/IOP-Final.pdf}.
\textsuperscript{89} 10TH CIR. R. 36.1, 36.2, \textit{available at} \url{http://www.ca10.uscourts.gov/downloads/2008_Rules.pdf}. The Tenth Circuit rules do contain one provision that favors issuance of precedential opinions in limited circumstances. If the disposition of a subsidiary tribunal has been published, the Tenth Circuit "ordinarily designates its disposition for publication." 10TH CIR. R. 36-2.
\textsuperscript{90} D.C. CIR. R. 36(a)(1), \textit{available at} \url{http://www.cadc.uscourts.gov} (select "Rules & Operating Procedures" and then select "Circuit Rules"). The rule provides that the court's policy is to publish opinions in cases of general interest to the public. \textit{Id.} Because this does not create a presumption either for or against the issuance of nonprecedential opinions, I characterize the rule as neutral.
\textsuperscript{91} 4TH CIR. R. 36(a).
\textsuperscript{92} 5TH CIR. R. 47.5.1.
\textsuperscript{93} 6TH CIR. R. 206(a).
\textsuperscript{94} 8TH CIR. APP. I(4).
\textsuperscript{95} 9TH CIR. R. 36-2.
\textsuperscript{96} D.C. CIR. R. 36(a)(2).
\textsuperscript{97} FED. CIR. IOP 10(4).
\textsuperscript{98} 1ST CIR. R. 36.0(b)(1).
meet specific content requirements. The remaining circuits—the Second,99 Third,100 Seventh,101 Tenth,102 and Eleventh103 Circuits—do not have rules setting forth specific content-based criteria justifying issuance of a precedential opinion; instead, their rules contain general provisions stating, in essence, that decisions with precedential value will be issued as precedential opinions.

3. The necessity of a unanimous decision in the case

Most circuits’ rules do not specify whether a panel’s decision in the underlying case must be unanimous for the panel to issue a nonprecedential opinion. The local rules in seven circuits—the Fourth, Seventh, Eighth, Tenth, Eleventh, District of Columbia, and Federal Circuits—make no mention of whether an opinion must be unanimous to be nonprecedential. The Third Circuit specifically provides that nonprecedential opinions may be issued “without regard to whether the panel’s decision is unanimous.”104 By contrast, the First105 and Second106 Circuits require an opinion to be unanimous to be issued as nonprecedential. The three remaining circuits—the Fifth,107 Sixth,108 and Ninth109—take the existence of concurring or dissenting opinions into consideration when deciding whether to issue an opinion as nonprecedential.

99. 2d Cir. R. 32.1(a) (providing for issuance of so-called summary orders when no jurisprudential purpose would be served by a precedential opinion).
100. 3d Cir. IOP 5.2 (providing that an opinion is designated as precedential when it has precedential value).
101. 7th Cir. R. 32.1(a) (providing only that the court’s policy is “to avoid issuing unnecessary opinions”). Interestingly, before FRAP 32.1 necessitated a change in the Seventh Circuit’s citation rules, the circuit had specific criteria for publication similar to the criteria used by the Fourth, Fifth, Sixth, Eighth, Ninth, District of Columbia, and Federal Circuits. 7th Cir. R. 53(c)(1) (2006) (rescinded effective Jan. 1, 2007). It is not clear why the court eliminated these guidelines for methods of disposition in the face of FRAP 32.1, but that is what the circuit did, in addition to including a policy of avoiding unnecessary opinions.
102. 10th Cir. R. 36.1 (calling for issuance of a nonprecedential opinion when a “case does not require application of new points of law that would make the decision a valuable precedent”).
103. 11th Cir. R. 36-3 I.O.P. 6 (providing that opinions with “no precedential value are not published”).
104. 3d Cir. IOP 5.3.
105. 1st Cir. R. 36.0(b)(2). The First Circuit has an exception permitting a nonprecedential opinion even in a case that is not unanimous if all judges on the panel agree not to publish the opinion. Id.
106. 2d Cir. R. 32.1(a).
107. 5th Cir. R. 47.5.1 (providing that opinions “may” be published if “accompanied by a concurring or dissenting opinion”).
108. 6th Cir. R. 206(a)(4) (listing the existence of separate opinions as a factor to be considered in the publication decision).
109. 9th Cir. R. 36-2(g) (calling for publication when there are separate opinions but only if the author of a separate opinion so requests).
4. The effect of the nature of the disposition

Another variation among circuit rules concerns the effect of the nature of the disposition, e.g., affirmance or reversal of the decision below, on whether the opinion will be issued as nonprecedential. The rules in nine circuits—the First, Second, Fourth, Seventh, Eighth, Ninth, Tenth, Eleventh, and Federal Circuits—say nothing about whether the type of disposition affects an opinion’s precedential status. The Third Circuit specifically provides that an opinion may be issued as nonprecedential regardless of the nature of the disposition.111 The remaining three circuits consider the nature of the disposition. The Sixth Circuit lists reversal as one factor it takes into account in deciding whether to issue a precedential opinion,112 whereas the District of Columbia Circuit issues a precedential opinion if it reverses or affirms a published agency or district court decision on different grounds than those upon which the lower tribunal relied.113 In the Fifth Circuit, an opinion “may” be published if it “reverses the decision below or affirms it upon other grounds.”114

5. The process for deciding the status of an opinion

Presumably, the panel that decides the case also decides whether the opinion is precedential or nonprecedential, but four circuits—the Seventh,115 Ninth, Tenth, and District of Columbia Circuits—do not so specify in their rules. The First,116 Second,117 and Fifth118 Circuits require the panel to be unanimous in its decision regarding the precedential status of the opinion, whereas the Third119 and Eleventh120 Circuits require only a majority of the panel. The Fourth Circuit pro-

110. This is another change in the Seventh Circuit’s rules post-FRAP 32.1. See supra note 101. The prior rule included a provision that “[a] published opinion will be filed when the decision . . . (v) reverses a judgment or denies enforcement of an order when the lower court or agency has published an opinion supporting the judgment or order.” 7TH CIR. R. 53(c)(1)(v) (2006) (rescinded effective Jan. 1, 2007).
111. 3D CIR. IOP 5.3.
112. 6TH CIR. R. 206(a)(5) (providing that reversal is a consideration “unless: (A) the reversal is caused by an intervening change in law or fact, or, (B) the reversal is a remand (without further comment) to the district court of a case reversed or remanded by the Supreme Court”).
114. 5TH CIR. 47.5.1.
116. 1ST CIR. R. 36.0(b)(2).
117. 2D CIR. R. 32.1(a).
118. 5TH CIR. R. 47.5.2.
119. 3D CIR. IOP 5.1.
120. 11TH CIR. R. 36-3 I.O.P. 6.
vides for publication of an opinion upon a determination, by "the au-
author or a majority of the joining judges," that at least one of the
publication criteria has been satisfied. The Sixth Circuit publishes
upon the request of any panel member, and the Eighth and Fed-
eral Circuits' rules provide that the panel makes the decision with-
out specifying whether that decision must be unanimous.

6. The procedures for reissuing a nonprecedential opinion as
precedential

A final area of inconsistency concerns procedures for converting
nonprecedential opinions into precedential opinions. The local rules of
ces— the Second, Third, Fifth, Sixth, and Tenth— do not ad-
address the process for requesting that a nonprecedential opinion be
made precedential.

The remaining circuits have rules that vary regarding the persons
titled to request reissuance, the timing of the request, the format of
the opinion upon reissuance, and the bases for granting such a re-
quest. In the First Circuit, any party or interested person may move
for reissuance of an opinion. In the Fourth, Eighth, and Elev-
henth Circuits, only parties or their counsel may request that a non-
precedential opinion be made precedential. The Seventh, Ninth,

121. 4TH CIR. R. 36(a).
122. 6TH CIR. R. 206(b).
123. 8TH CIR. IOP § IV(B), available at http://www.ca8.uscourts.gov/newrules/coa/IOP.
pdf.
Reader12.03.071.pdf.
125. 1ST CIR. R. 36.0(b)(2)(D). It is not clear who an interested person other than a
party would be. This rule could be construed broadly to allow virtually any per-
son to move for reissuance, or it could be construed more narrowly to restrict
motions for reissuance to persons with some direct interest in a case.
126. 4TH CIR. R. 36(b). The Fourth Circuit's rule actually says that "counsel," not
parties, may request reclassification of an opinion. Id. An earlier portion of the
rule, however, says that nonprecedential dispositions are for the benefit of "coun-
sel, the parties, and the lower court or agency." Id. Thus, the later reference to
counsel in the context of motions to reclassify opinions appears to be limited to
counsel acting on behalf of the parties in a case resolved by a nonprecedential
opinion and not a reference to all counsel. It would be odd indeed for the rule to
permit any attorney acting as counsel in any case to move for reissuance of an
opinion but not allow the parties themselves to do so.
127. 8TH CIR. IOP § IV(B). Like the Fourth Circuit's rule, the Eighth Circuit's rule
also states that "counsel" may move for reissuance, which presumably refers to
counsel for parties to the case and which presumably also includes the parties
themselves. Id.
129. 7TH CIR. R. 32.1(c).
130. 9TH CIR. R. 36-4. Although this rule does not use the exact phrase "any person,"
it leaves the parties who may request publication unspecified; thus, the rule im-
plies that any person may request publication.
District of Columbia,131 and Federal132 Circuits allow any person to make such a request, although two of these circuits have notice requirements directed toward persons who might be affected by the reissuance of an opinion. In the Ninth Circuit, parties must be served with requests for reissuance and are permitted to notify the court of any objections to reissuance.133 The Federal Circuit’s rule provides that

[t]he requester must notify the court and the parties of any case that person knows to be pending that would be determined or affected by reissuance as precedential. Parties to pending cases who have a stake in the outcome of a decision to make precedential must be given an opportunity to respond.134

The timing of the request also varies. In the Eleventh Circuit,135 the request must be made prior to the issuance of the mandate. In the District of Columbia Circuit,136 the time limit is thirty days after the judgment, whereas the Ninth137 and Federal138 Circuits allow sixty days after issuance of the opinion. The First, Fourth, Seventh, and Eighth Circuits do not specify a time limit for making a request.

Additionally, the format of the opinion may vary. In the Federal Circuit, if a request to reissue is granted, “the opinion or order may be revised as appropriate.”139 The Fourth Circuit, by contrast, is the only circuit specifically to say that the content of a reissued opinion will not be changed.140 The others that expressly authorize reissuance—the First, Seventh, Eighth, and Ninth Circuits—do not specify whether the opinion will be reissued in its original form or subject to alteration.

Although only the District of Columbia Circuit141 formally discourages requests to reissue opinions, the First,142 Fourth,143 Seventh,144 Ninth,145 and Federal146 Circuits all require a statement of reasons or a showing of good cause that suggests that the requests will not rou-

131. D.C. Cir. R. 36(d).
132. Fed. Cir. R. 32.1(e).
133. 9th Cir. R. 36-4.
134. Fed. Cir. R. 32.1(e).
135. 11th Cir. R. 36-3.
136. D.C. Cir. R. 36(d). If a timely petition for rehearing is submitted, the deadline for requesting publication becomes thirty days after the court’s action on the rehearing petition. Id.
137. 9th Cir. R. 36-4.
139. Fed. Cir. R. 32.1(e).
140. 4th Cir. R. 36(b).
141. D.C. Cir. R. 36(d).
142. 1st Cir. R. 36.0(b)(2)(D).
143. 4th Cir. R. 36(b).
144. 7th Cir. R. 32.1(c).
145. 9th Cir. R. 36-4.
146. Fed. Cir. R. 32.1(e).
tinely be granted. Only the Eighth Circuit\textsuperscript{147} permits a motion without requiring any particular showing to justify the reissuance, although presumably some justification would have to support the request.

Under these rules, a person litigating a case or advising a client in the First or Seventh Circuits could petition at any time to convert a nonprecedential opinion into a precedential one to gain an advantage in a current legal matter. It is unclear how, if at all, the courts will consider the passage of time in ruling on such a motion; a person might move for reissuance immediately after becoming aware of a helpful nonprecedential opinion, even if the opinion has existed for some number of years. In the Fourth, Eighth, and Eleventh Circuits, only parties may request reissuance, but that advantages institutional parties, such as the Department of Justice, that litigate many cases. Such institutional parties can identify nonprecedential opinions that favor their positions and, at least in the Fourth and Eighth Circuits, request reissuance at any time.

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While these differences may not seem significant when considered individually, in the aggregate, they reflect very different policies regarding the development of precedential law among the circuits. The overall presumption regarding issuance of precedential or nonprecedential opinions, the types of dispositions meriting precedential treatment, and the need for judges to gain a majority or act affirmatively for opinions to be issued as precedential or nonprecedential all contribute to the atmosphere affecting the degree to which a given circuit encourages issuance of nonprecedential opinions.\textsuperscript{148} The effects of the differences in persons eligible to request reissuance of nonprecedential opinions and the time limits on the requests have special potential to affect the development of the law. If nonprecedential opinions continue to account for 84\% of dispositions on the merits,\textsuperscript{149} the procedures and criteria for their issuance should be subject to uni-

\textsuperscript{147} 8TH CIR. IOP § IV(B).

\textsuperscript{148} Statistics show that the District of Columbia Circuit, which does not have a presumption for either precedential or nonprecedential opinions, issued the fewest nonprecedential opinions (59.9\%) in the twelve months ending September 30, 2006. \textit{Table S-3, supra note 12, at 52.} During the same time period, the First Circuit, which has the strongest presumption in favor of issuing precedential opinions, was a close second with 61.7\% of its opinions issued as nonprecedential. \textit{Id.} The Fourth Circuit, with a presumption in favor of nonprecedential opinions, issued the most (93.7\%). \textit{Id.} What is not clear is whether the rules encourage relative reliance on nonprecedential opinions or whether tendencies toward use of nonprecedential opinions inspired the choice of language in the rules.

\textsuperscript{149} \textit{Id.}
form national standards, but FRAP 32.1 in its present form maintains these inconsistencies.

C. FRAP 32.1 Perpetuates Confusion Regarding the Authoritative Value of Nonprecedential Opinions.

In addition to preserving inconsistencies among local circuit rules governing nonprecedential opinions, FRAP 32.1 also perpetuates the confusion over the position of nonprecedential opinions in the hierarchy of decisional law. As presently understood, the hierarchy of precedent in the federal system is as follows: Federal district court opinions are not binding on any tribunal;\textsuperscript{150} federal appellate decisions are binding on all appellate panels within the circuit (unless overruled en banc)\textsuperscript{151} and on all subsidiary tribunals (e.g., federal district courts

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\textsuperscript{150} Hart v. Massanari, 266 F.3d 1155, 1163 (9th Cir. 2001) (noting that federal trial court opinions are not binding precedent); Threadgill v. Armstrong World Indus., Inc., 928 F.2d 1366, 1371 (3d Cir. 1991) (explaining that "there is no such thing as the law of the district," such that federal district court opinions are not binding in later cases); Charles A. Sullivan, \textit{On Vacation}, 43 Hous. L. Rev. 1143, 1179 (2006) (noting that federal district court opinions do not bind later courts).
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\textsuperscript{151} Every circuit follows the law of the circuit rule. \textit{See}, e.g., Brubaker Amusement Co. v. United States, 304 F.3d 1349, 1360 (Fed. Cir. 2002); Brooks v. Walls, 279 F.3d 518, 522–23 (7th Cir. 2002); \textit{In re Cont’l Airlines, Inc.}, 279 F.3d 226, 233 & n.4 (3d Cir. 2002); Walker v. S. Co. Servs., 279 F.3d 1289, 1293 (11th Cir. 2002); United States v. King, 276 F.3d 109, 112 (2d Cir. 2002); Valentine v. Francis, 270 F.3d 1032, 1035 (6th Cir. 2001); \textit{Hart}, 266 F.3d at 1171; Martin v. Medtronic, Inc., 254 F.3d 573, 577 (5th Cir. 2001); Nat’l Council of Resistance of Iran v. Dept of State, 251 F.3d 192, 198 (D.C. Cir. 2001); Mentavlos v. Anderson, 249 F.3d 301, 312 n.4 (4th Cir. 2001); United States v. Pollard, 249 F.3d 738, 739 (8th Cir. 2001); Summum v. Callaghan, 130 F.3d 906, 912 n.8 (10th Cir. 1997); \textit{In re Grand Jury Subpoenas}, 123 F.3d 695, 697 n.2 (1st Cir. 1997). \textit{See generally} Alan R. Gilbert, Annotation, \textit{In Banc Proceedings in Federal Courts of Appeals}, 37 A.L.R. FED. 274, § 5 (1978 & Supp. 2007) (collecting cases).
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Exceptions to the law of the circuit rule exist. Federal appellate panels are not bound by prior panel decisions if later rulings affect the validity of the prior opinion, such as a later ruling by the Supreme Court, the circuit court sitting en banc, or a state’s courts (on questions of state law). \textit{See}, e.g., Cooper v. Cent. & Sw. Servs., 271 F.3d 1247, 1251 (10th Cir. 2001) (stating that, unless a state’s courts have changed the law, a prior panel decision on a question of state law is binding on a later panel); \textit{Martin}, 254 F.3d at 577 (recognizing that a Supreme Court decision may render a prior panel decision invalid); United States v. Doe, 819 F.2d 206, 209 n.1 (9th Cir. 1985) (explaining circumstances under which a panel opinion undermined by a later en banc opinion can be reexamined).

Circuit courts have both disregarded and modified the law of the circuit rule from time to time. The rule has been disregarded in unusual circumstances. \textit{See}, e.g., N.C. Utils. Comm’n v. FCC, 552 F.2d 1036, 1044–45 (4th Cir. 1977) (determining that circumstances preventing en banc review freed the panel from the obligation to follow a prior panel opinion). \textit{But see In re} Charleston v. United States, 444 F.2d 504, 505–06 (9th Cir. 1971) (refusing to disregard the law of the circuit rule even though en banc consideration was impossible).

The rule has been modified in more than half of the circuits. At least seven circuits allow abbreviated procedures under which a panel can overrule an earlier
and bankruptcy courts) within the circuit;\textsuperscript{152} and United States Supreme Court decisions, which are not binding on the Supreme Court itself, are binding on all subsidiary tribunals in the federal system.\textsuperscript{153}

Nonprecedential opinions do not fit neatly into this hierarchy of authority. Because they are issued by circuit court panels, they should be binding on later panels and lower tribunals within the circuit under the law of the circuit rule. But clearly they are not; if they were binding, they would not be nonprecedential. When local circuit rules prohibited citation to nonprecedential opinions, these opinions were, in essence, not "authority" or "sources" at all; they had no authoritative value whatsoever because they did not exist, at least prece-

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\item 40(e) (allowing a panel to overrule a prior panel opinion as long as the opinion is circulated to the full court and a majority do not vote to hear the issue en banc); United States v. Brutus, 505 F.3d 80, 87 n.5 (2d Cir. 2007) (overruling a prior panel opinion after circulating the opinion to all active members of the court and obtaining acquiescence to the change); United States v. Flowers, 464 F.3d 1127, 1130 n.1 (10th Cir. 2006) (overruling several prior panel opinions after circulating the opinion to all active members of the court and obtaining acquiescence to the change); Gallagher v. Wilton Enters., Inc., 962 F.2d 120, 124 n.4 (1st Cir. 1992) (noting that in the rare instance when it is clear that a prior panel decision was wrongly decided, a later panel will overrule the earlier panel using an informal procedure by which the overruling opinion is circulated to all active judges); Three Buoys Houseboat Vacations U.S.A. Ltd. v. Morts, 921 F.2d 775, 779 n.5 (8th Cir. 1990) (overruling a prior panel opinion after noting that the opinion had been circulated to the full court en banc); Dornbusch v. Comm'r, 860 F.2d 611, 612 n.1 (5th Cir. 1988) (concluding that the panel was authorized to depart from a prior panel opinion because the opinion in this case was circulated to all active judges, with attention called to the departure from the prior precedent, with no objection or request to hear the case en banc); Irons v. Diamond, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981) (explaining that the portion of the opinion that resolved a conflict between earlier panel opinions had been approved by the full court).

These exceptional procedures raise questions about the degree to which the federal appellate courts feel constrained by the law of the circuit rule. They show that the law of the circuit rule is a fairly elastic concept subject to modification by the courts as necessary. Additionally, the fact that these modified procedures originated both through case law and local rules supports the conclusion that the courts can modify the law of the circuit rule both acting in their judicial capacity and acting with delegated legislative authority through procedural rules. See infra section IV.B.

152. One exception to this rule concerns cases within the jurisdiction of the United States Court of Appeals for the Federal Circuit. This court's jurisdiction is based on subject matter, not geography. See 28 U.S.C. § 1295 (2000). Accordingly, on matters within the Federal Circuit's jurisdiction, district courts across the country are bound by the Federal Circuit's opinions.

153. See, e.g., Lawrence v. Texas, 539 U.S. 558, 576–77 (2003) (overruling Bowers v. Hardwick, 478 U.S. 186 (1986)). As the Supreme Court has explained, adherence to precedent is the preferred course of action, but "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" Payne v. Tennessee, 501 U.S. 808, 827 (1991) (quoting Smith v. Allwright, 321 U.S. 649, 665 (1944)).
The only way to keep nonprecedential opinions of no value is to make them precedentially nonexistent by restricting citation. As some circuits gradually liberalized citation policies, nonprecedential opinions in those circuits acquired an ill-defined authoritative value as persuasive or nonbinding precedent, remaining of no value in those circuits that retained strict no-citation rules.

When FRAP 32.1 took away the option of restricting citation, it moved all nonprecedential opinions out of the non-authority category and into a category of authority with uncertain value. FRAP 32.1 does not define the weight or status of nonprecedential opinions, as the Advisory Committee's note emphasizes. The circuits use their local rules to exempt, to varying degrees, nonprecedential opinions from the usual rules of precedent. By default, therefore, FRAP 32.1 accepts the local rules' definitions of the weight of nonprecedential opinions.

All circuits except the District of Columbia Circuit at least implicitly designate nonprecedential opinions as nonbinding. The circuits characterize the authoritative value of nonprecedential opinions in three ways. The First, Tenth, Eleventh, and Federal

154. Nonprecedential opinions existed as a factual matter, as evidenced by exceptions to no-citation rules allowing citation for purposes of establishing the law of the case or res judicata, but they did not exist legally as precedent. See infra note 156 (discussing pre-FRAP 32.1 citation rules).
155. As Judge Kozinski has explained, allowing citation of nonprecedential opinions effectively requires judges to treat all the opinions they write as precedential. Hearing, supra note 7, at 13.
156. Compare these examples of pre-FRAP 32.1 local rules as they existed in 2004: First Circuit Rule 32.3 permitted, but disfavored, citation to nonprecedential opinions for persuasive value; Second Circuit Rule 0.23 authorized nonprecedential opinions and prohibited citation to nonprecedential opinions "before this or any other court" but did not address the opinions' authoritative value; and Federal Circuit Rule 47.6 authorized nonprecedential opinions and prohibited citation to nonprecedential opinions "as precedent," but did not otherwise define their authoritative value. See Sloan, supra note 3, at 716–17 n.25. Many of these rules remain unchanged with respect to the authoritative value of nonprecedential opinions, although the citation restrictions have been removed per FRAP 32.1. For a list of pre-FRAP 32.1 citation rules, see id. and Barnett, From Anastassoff to Hart, supra note 61, at 4–5.
157. FED. R. APP. P. 32.1 advisory committee's note.
158. See infra notes 159–85 and accompanying text.
159. The First Circuit considers unpublished dispositions "for their persuasive value but not as binding precedent." 1ST CIR. R. 32.1.0.
160. 10TH CIR. R. 32.1(A) ("Unpublished decisions are not precedential, but may be cited for their persuasive value.").
161. 11TH CIR. R. 36-2 ("Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority."); see also 11TH CIR. R. 36-3 I.O.P. 6 ("Although unpublished opinions may be cited as persuasive authority, they are not considered binding precedent.").
162. FED. CIR. R. 32.1(d) ("The court may refer to a nonprecedential disposition in an opinion or order and may look to a nonprecedential disposition for guidance or persuasive reasoning, but will not give one of its own nonprecedential disposi-
Circuits specifically state that nonprecedential opinions have only persuasive value. Whatever the meaning of “persuasive value,” it is at least clear that these circuits do not consider nonprecedential opinions binding authority.

In contrast, six circuits—the Second, Third, Fifth, Seventh, Eighth, and Ninth—do not expressly define nonprecedential opinions as persuasive but do expressly characterize them as some form of nonprecedent, at least with respect to nonprecedential opinions issued after January 1, 2007. Specifically, these circuits define nonprecedential opinions as “not having precedential effect” (Second Circuit\(^{163}\)), “not . . . precedents that bind the court” (Third Circuit\(^{164}\)), “not precedent” (Fifth,\(^{165}\) Eighth,\(^{166}\) and Ninth\(^{167}\) Circuits), and “not treated as precedents” (Seventh Circuit\(^{168}\)). The Seventh Circuit’s local rules\(^{169}\) and the Third Circuit’s internal operating procedures\(^{170}\) further provide that only published opinions constitute the law of the circuit. This necessarily means that opinions not treated or regarded as prece-

\(^{163}\) 2D CIR. R. 32.1(b) (“[S]ummary order[s] do not have precedential effect.”).

\(^{164}\) 3D CIR. IOP 5.7 (“The court by tradition does not cite to its not precedential opinions as authority. Such opinions are not regarded as precedents that bind the court . . .”). Note that the rule refers to the court’s practice, but does not establish a rule for parties. Before the adoption of FRAP 32.1, this was seen as giving tacit approval to parties to cite nonprecedential opinions. Barnett, From Anastasoff to Hart, supra note 61, at 5-6 n.25.

\(^{165}\) 5TH CIR. R. 47.5.4. In the Fifth Circuit, 1996 is the dividing line for treatment of nonprecedential opinions. Those “issued before January 1, 1996[ ], are precedent. Although every opinion believed to have precedential value is published, an unpublished opinion may be cited pursuant to FED. R. APP. P. 32.1(a).” 5TH CIR. R. 47.5.3. “Unpublished opinions issued on or after January 1, 1996[ ], are not precedent” but may be cited pursuant to FRAP 32.1. 5TH CIR. R. 47.5.4.

\(^{166}\) 8TH CIR. R. 32.1A (“Unpublished opinions . . . are not precedent.”), available at http://www.ca8.uscourts.gov/newrules/coa/localrules.pdf. Nonprecedential opinions “issued on or after January 1, 2007, may be cited in accordance with FRAP 32.1,” but those issued earlier “generally should not be cited.” Id. The rule continues, however, by saying that parties may cite an unpublished opinion (presumably a reference to an opinion issued before January 1, 2007, since those issued after that date may freely be cited) “if the opinion has persuasive value on a material issue.” Id.

\(^{167}\) 9TH CIR. R. 36-3(a) (“Unpublished dispositions and orders of this Court are not precedent . . . .”).

\(^{168}\) In the Seventh Circuit, so-called orders “are not published . . . and are not treated as precedents,” whereas so-called opinions “are published . . . and constitute the law of the circuit.” 7TH CIR. R. 32.1(b).

\(^{169}\) Id.

\(^{170}\) 3D CIR. IOP 9.1 (“It is the tradition of this court that the holding of a panel in a precedential opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a precedential opinion of a previous panel. Court en banc consideration is required to do so.”).
dent do not bind later panels. Notwithstanding any technical distinctions among an opinion that is not a precedent, one that is not a precedent that binds the court, and one that is not treated as precedent, the clear import of these circuits' rules is that nonprecedential opinions are not binding. Whether, and to what degree, nonprecedential opinions from these circuits have persuasive value is not clear from the rules.

In the third category are circuits in which the authoritative value of nonprecedential opinions is unclear from the local rules. The Fourth, Sixth, and District of Columbia Circuits fall into this category. The implication of the rules in two of these circuits is that nonprecedential opinions are not binding, but the rules do not expressly address the issue. In the Fourth Circuit, nonprecedential opinions issued before January 1, 2007, may be cited if a party thinks the opinion has precedent value (whatever that means), but there is no mention of the weight of nonprecedential opinions issued after January 1, 2007.\textsuperscript{171} In accordance with FRAP 32.1, such opinions may be cited, but nothing in the local rules addresses their authoritative value.\textsuperscript{172} Although these rules can be read to imply that all Fourth Circuit opinions have precedent value, with citation to pre-FRAP 32.1 nonprecedential opinions disfavored and to post-FRAP 32.1 nonprecedential opinions unrestricted,\textsuperscript{173} the Fourth Circuit has repeatedly stated in the pre-FRAP 32.1 context that its nonprecedential opinions are not binding precedent.\textsuperscript{174} Given this treatment of nonprecedential opinions issued before January 1, 2007, it seems likely that the Fourth Circuit will continue to treat its nonprecedential opinions as nonbinding.

In the Sixth Circuit, the rules provide that “[r]eported panel opinions are binding on subsequent panels” and cannot be overruled without en banc consideration.\textsuperscript{175} Although the Sixth Circuit says nothing

\textsuperscript{171} 4TH CIR. R. 32.1.
\textsuperscript{172} The Fourth Circuit’s local rules contain no specific definition of the weight of nonprecedential opinions issued after January 1, 2007, but for those issued before that date, citation is disfavored. \textit{Id.} (“If a party believes, nevertheless, that an unpublished disposition of this Court issued prior to January 1, 2007, has precedent value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited . . . ”). The implication of the rules is that post-FRAP 32.1 decisions are not binding, but nothing says so directly.


\textsuperscript{174} \textit{E.g.}, United States v. Adams, 39 F. App’x 36, 38 (4th Cir. 2002); Mueller v. Angelone, 181 F.3d 557, 579 n.15 (4th Cir. 1999); Hogan v. Carter, 85 F.3d 1113, 1118 (4th Cir. 1996).

\textsuperscript{175} 6TH CIR. R. 206(c).
about the weight of nonprecedential opinions, the implication of the rule regarding reported decisions\textsuperscript{176} is that nonprecedential opinions do not bind subsequent panels and do not require en banc consideration to be overruled.

The District of Columbia Circuit's rule is especially tricky. The dividing line in this circuit is January 1, 2002; nonprecedential opinions issued before that date "are not to be cited as precedent," and those decided on or after that date "may be cited as precedent."\textsuperscript{177} Although nonprecedential opinions may be cited "as precedent,"\textsuperscript{178} "a panel's decision to issue [a nonprecedential opinion] means that the panel sees no precedential value in that disposition."\textsuperscript{179} What does this mean? A nonprecedential opinion may be cited as precedent, but the panel that issued it saw no precedential value in it. Aside from being contradictory, these rules provide no guidance on how litigants or later panels should treat the nonprecedential opinion. Some other circuits' rules specifically say nonprecedential opinions are "not precedent" as a way of saying that they are not binding.\textsuperscript{180} For the District of Columbia Circuit to allow citation as precedent then implies that nonprecedential opinions are binding and subject to the law of the circuit rule. But another way to read the rule is that precedent is a broad category of all previously decided opinions and that binding precedent is only a subset. By not specifying that nonprecedential opinions are binding precedent, Local Rule 32.1(b)(1) allows, but does not require, the District of Columbia Circuit to treat nonprecedential opinions as binding. The District of Columbia Circuit may have been attempting to distinguish cases cited for their substance in later, unrelated cases (i.e., precedent, whether binding or persuasive) from the "same case" exceptions that all circuits provided to their no-citation rules (i.e., law of the case, res judicata, etc.). It is not possible to determine the intent of the rule with certainty based solely upon its language.

The District of Columbia Circuit's treatment of its nonprecedential opinions does not clear up the confusion. Few cases from the District of Columbia Circuit discuss the authoritative value of nonprecedential opinions, and only one of those was decided under the present iteration of the local rule. In \textit{Consumer Electronics Association v. FCC}, the court rejected the reasoning in an earlier decision by noting that the prior opinion was a "nonbinding unpublished order."\textsuperscript{181} It went on, however, to say that, because part of the \textit{Consumer Electronics Association} decision rejected a prior statement of law, it was "considered

\textsuperscript{176} See id.
\textsuperscript{177} D.C. Cir. R. 32.1(b)(1).
\textsuperscript{178} Id.
\textsuperscript{179} D.C. Cir. R. 36(c)(2).
\textsuperscript{180} See supra notes 163–70 and accompanying text.
\textsuperscript{181} 347 F.3d 291, 297 n.2 (D.C. Cir. 2003).
separately and approved by the full court\textsuperscript{182} using a modification of the en banc procedure that the court has authorized for overruling prior panel opinions.\textsuperscript{183} In other words, the court treated the non-precedential opinion the same way it would have treated a precedential opinion. \textit{Consumer Electronics Association} was decided in 2003, well before FRAP 32.1 went into effect, but the District of Columbia Circuit’s rule was the same in 2003 as it is today. This opinion suggests that the prior nonprecedential opinion was, in some sense, binding upon the court to the extent that the approval of the full court was necessary to reject it.\textsuperscript{184} Thus, although the common wisdom is that nonprecedential opinions are not binding in any circuit,\textsuperscript{185} at least in the District of Columbia Circuit, the rules and cases create some uncertainty in that regard.

The variations in the circuits’ rules regarding the authoritative value of nonprecedential opinions and the indeterminacy of the language used to define that value are problematic. They make it difficult, if not impossible, to determine the weight of nonprecedential opinions. As one commentator on the proposed version of FRAP 32.1 explained:

\begin{quote}
No one knows what to do with unpublished circuit decisions. . . . [T]hey represent a limbo of pseudo-precedent that is not binding but yet has more effect than merely legal advocacy. The respect they are given varies from near zero to that given binding precedent; they may be treated like a law review article, a Federal Supplement decision from another circuit, or a published opinion of the authoring court itself.\textsuperscript{186}
\end{quote}

The problem of lack of consistency in the treatment of non-precedential opinions as a category of authority is significant. First, as noted above, nonprecedential opinions may still constitute the law of the circuit within the District of Columbia Circuit; their status is simply unclear under both the language of the rule and the courts’ application of it.

\textsuperscript{182} \textit{Id.} The decision also rejected dicta from a prior published opinion. \textit{Id.} Rejection of such dicta also should not have required review by the full court.

\textsuperscript{183} This modification was authorized by the court in \textit{Irons v. Diamond}, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981). \textit{See supra} note 151 (discussing modifications of the en banc procedure in other circuits).

\textsuperscript{184} Although the District of Columbia Circuit has also rejected opinions based on their nonprecedential status, it did so under the pre-2002 rule rather than the present rule. \textit{See, e.g., Slinger Drainage, Inc. v. EPA}, 244 F.3d 967, 968 (D.C. Cir. 2001) (stating that a prior unpublished opinion cited by a party did not apply, and that, "[m]ore importantly," the opinion was not binding precedent); Milton S. Kronheim & Co. v. District of Columbia, 91 F.3d 193, 197 (D.C. Cir. 1996) (stating that the court was bound only by prior published, rather than unpublished, opinions).

\textsuperscript{185} \textit{See, e.g., Hearing, supra} note 7, at 8 (statement of Judge Alito) ("All courts of appeals agree that unpublished opinions are not binding precedent.").

\textsuperscript{186} Cooper Letter, \textit{supra} note 16, at 3.
Beyond that, what exactly does it mean for a prior opinion to be persuasive, not binding, or not precedent? As Stephen Barnett has argued, persuasive value is elusive; he sees it as persuasive force based on the substantive arguments rather than on status derived from principles of stare decisis.  

*Black's Law Dictionary,* however, defines persuasive precedent, as opposed to persuasive authority more generally, as “precedent that is not binding on a court, but that is entitled to respect and careful consideration.” This suggests that, if a nonprecedential opinion is a persuasive precedent, it is entitled to some weight by virtue of its status; its substantive merits cannot be rejected without some sort of explanation. Along the same lines, Charles Alan Sullivan explains that the meaning of persuasive in the context of court opinions is different from the meaning of persuasive when applied to other forms of authority. He suggests that judges, either consciously or unconsciously, use a sliding scale to assess the authoritative value of various sources and give some weight to persuasive court opinions because of their status. Thus, while “persuasive precedents can be rejected, . . . they cannot be ignored.” This is consistent with Larry Alexander’s natural model of precedent, under which the existence of a prior similar opinion is one factor a decisionmaker weighs in deciding how a later case should be resolved, but not a dispositive factor by itself. But Frederick Schauer contends that an argument based on so-called persuasive precedent is not an argument based on precedent at all: “Only if a rule makes relevant the result of a previous decision regardless of a decisionmaker’s current belief about the correctness of that decision do we have the kind of argument from precedent routinely made in law and elsewhere.” In other words, if a prior decision does not constrain today’s decisionmaker by virtue of its status and without regard for the persuasiveness of its content, it is not precedent at all.

That then leads naturally to the question of what it means when a prior opinion is not “binding precedent”—or not precedent at all. Is that the same as having persuasive value, or is it something different? If an opinion is not precedent at all, it arguably has less weight than

188. Black’s Law Dictionary 1215 (8th ed. 2004). Persuasive authority, by contrast, is defined as “[a]uthority that carries some weight but is not binding on a court.” Id. at 143.
190. Id. at 1201–03.
191. Id. at 1206.
194. See Allen, supra note 4, at 570–72 (arguing that a distinction exists between an argument for similar treatment with an earlier case and an argument based on precedent).
an authority that is a persuasive precedent. Authorities that are not precedents, such as law review articles or treatises, will often be given less weight than nonbinding precedents, such as opinions from courts outside the jurisdiction.195

The circuits apparently share this confusion. In the Second Circuit, the court states in commentary accompanying its rule that denying nonprecedential opinions "precedential effect does not mean that the court considers itself free to rule differently in similar cases."196 If the court feels constrained to rule similarly in later cases, then it seems that nonprecedential opinions have some indeterminate value that is less than fully binding, but more than simply persuasive, and that renders the status of nonprecedential opinions in the Second Circuit unclear. In the Sixth Circuit, whose rules only implicitly define nonprecedential opinions as nonbinding, panels have described nonprecedential opinions as "without precedential value,"197 as having "limited precedential force,"198 and as having "persuasive weight."199 These various characterizations of nonprecedential opinions create confusion regarding their authoritative value.

In decisions that have discussed the value of nonprecedential opinions, courts frequently invoke nonprecedential status as a justification for rejecting nonprecedential opinions, but they often also give an additional reason, usually distinguishing the case.200 Sometimes, however, courts reject prior opinions based solely on their status, even in circuits that say the opinions are persuasive.201 And although the decisions that discuss the status of nonprecedential opinions are of some use, courts frequently cite nonprecedential opinions without any discussion of their weight. Shepard's Federal Citations (Shepard’s) in print form presently includes two hard bound volumes recording citations to cases published in volumes 1 through 169 of West's Federal Appendix (Federal Appendix), a reporter that began publication in 2001; these hard bound volumes together comprise 820 pages of Shep-

196. 2d Cir. R. 32.1 cmt.
199. United States v. Webber, 208 F.3d 545, 551 n.3 (6th Cir. 2000) (following a nonprecedential opinion).
201. See, e.g., United States v. Santillana, 109 F. App'x 665, 667 (5th Cir. 2004), vacated on other grounds, 543 U.S. 1114 (2005); Hain v. Mullin, 324 F.3d 1146, 1148 n.2 (10th Cir. 2003).
ard’s entries cataloguing citations to nonprecedential opinions. By contrast, West’s digest topic of COURTS, key number 107 (Operation and effect in general), a key number categorizing cases addressing the authoritative value of prior opinions, lists approximately 630 cases dating back to 1941, far fewer than the number of cases that contain citations to nonprecedential opinions.

202. 26 Shepard’s Federal Citations 777–1132 (9th ed. LexisNexis 2006); 27 Shepard’s Federal Citations 3–468 (9th ed. LexisNexis 2006). Shepard’s Federal Citations (Shepard’s) in print is almost universally considered a dinosaur in legal research. Interestingly, however, compilation of the data regarding treatment of cases published in the Federal Appendix is one of the few research tasks most easily accomplished with the print version of Shepard’s. Examination of treatment codes assigned to later cases citing Federal Appendix decisions provides a snapshot view of how the courts treat these opinions. This research would be difficult, if not impossible, to do online.

203. A Westlaw search for 106k107 (COURTS topic; key number for Operation and effect in general), run on September 4, 2007, retrieved 632 cases. Of course, some cases that discuss the value of nonprecedential opinions could be categorized under different topics or key numbers, especially if they address the constitutionality of the opinions. On the other hand, cases under this key number cover a variety of topics in addition to the precedential weight of nonprecedential opinions, such as the weight of vacated opinions. Thus, although the comparison between the number of Shepard’s pages and the number of cases under the West key number is not an exact comparison, the disparity in the volume of cases does illustrate the fact that courts often cite nonprecedential opinions without discussing the weight of the opinions. See Robert Timothy Reagan, A Snapshot of Briefs, Opinions, and Citations in Federal Appeals, 8 J. App. Prac. & Process 321 (2006) (analyzing empirical data regarding citation to nonprecedential opinions in briefs and opinions).

The uncertainty about the status of nonprecedential opinions also affects legal research. When later panels reject prior nonprecedential opinions, the nonprecedential opinions may or may not be characterized as “overruled” in Shepard’s and KeyCite. Compare the treatment of the following cases. In United States v. Montanez, 442 F.3d 485, 489–92 (6th Cir. 2006), the court undertook an extended analysis of Gibbs v. United States, 3 F. App’x 404 (6th Cir. 2001), and United States v. Coteat, 133 F. App’x 177 (6th Cir. 2005), recognizing the inconsistency among the circuit’s nonprecedential opinions and ultimately rejecting both Gibbs and Coteat as “wrongly decided.” Shepard’s characterizes Gibbs and Coteat as “overruled” with red stop sign Shepard’s signals, but KeyCite lists them as “disagreed with” by the later case and assigns yellow status flags. In this instance, it is hard to think of the earlier cases as being anything other than overruled, although the court did not use that precise language. The only reason they would not be overruled is either because, as nonprecedential opinions, they were never controlling in the first place or because they cannot be overruled under the law of the circuit rule (which prevents one panel from overruling another panel’s decision). In this context, KeyCite would not characterize the case as overruled because the court did not use the term overruled. Nevertheless, another option, “abrogated by,” which merits a red status flag, could have been used instead.

Similarly, in Moore v. Parker, 425 F.3d 250, 256 n.4 (6th Cir. 2005), the court “repudiated[d]” statements of dicta in two prior nonprecedential opinions, Eskridge v. Konteh, 88 F. App’x 831 (6th Cir. 2004), and Davis v. Burt, 100 F. App’x 340 (6th Cir. 2004), rather than outright overruling them. Shepard’s characterizes Eskridge and Davis as overruled with red stop sign Shepard’s signals, but
No other form of primary authority is given, by virtue of its status, one weight in one circuit and a different weight in a different circuit. This affects the legitimacy of the courts; the requirement that courts give the same weight to the various categories of authority is fundamental both to the reality and the perception of fair decisionmaking.\textsuperscript{204} As one judge put it: "Inconsistency is the antithesis of the rule of law."\textsuperscript{205} Further, the fact that one circuit, by its local rules, can define a category of authority differently than its sister circuits highlights the difficulty of having the weight of authority defined by local rule. Something as fundamental to the judicial system as the hierarchy of authority should not be left to the vagaries of local rules. Indeed, in the Third Circuit, nonprecedential opinions are addressed only in internal operating procedures that are not subject to the notice and comment requirements applicable to local rules.\textsuperscript{206}

Of course, one could say that this is splitting hairs—that the terms used in the local circuit rules are close enough in meaning to convey basically the same idea. But this is not the case. Lawyers value precision in language and would certainly question the use of one term in one part of a statute or contract and a similar, but not identical, term in another part. Even if the terms used in the rules were close enough in meaning to convey basically the same idea, it is still unclear exactly

\begin{itemize}
    \item KeyCite lists them as "rejected by" the later case and assigns yellow status flags. In this instance, it seems like the KeyCite disagreed with characterization would have been more accurate given that the portions of the opinions that Moore repudiated were dicta. Of the treatment code options in Shepard's, "criticized" is probably a more accurate choice, although overruled is justifiable.
    
    In contrast, both services characterize \textit{United States v. Guerrero}, 89 F. App'x 140 (10th Cir. 2004), as overruled, and the case shows a red stop sign Shepard's signal and a red KeyCite status flag. The overruling case is another panel decision, \textit{United States v. Flowers}, 464 F.3d 1127, 1130 n.1 (10th Cir. 2006), and the "overruling" of the prior opinion appears in a footnote: "We have circulated this opinion to the en banc court pursuant to our rules. Each member of the en banc court has concurred with our holding [overruling Guerrero and several other precedent and nonprecedential opinions]."
    
    Of course, thorough research requires investigation of any Shepard's or KeyCite negative treatment indicators. But the fact remains that not assigning nonprecedential opinions a clear position within the hierarchy of decisional law creates confusion in citator characterizations of the opinions' treatment and has consequences for legal research. See generally Andrew T. Solomon, \textit{Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?,} 26 Miss. C. L. Rev. 185 (2007) (describing research problems that nonprecedential opinions create).
\end{itemize}

\textsuperscript{204} See Pearson, supra note 66, at 1251 (discussing the role of precedent as a tool for providing judicial accountability and legitimacy by minimizing inconsistency, standardizing decisions, and dampening variability in the decisionmaking process).

\textsuperscript{205} LaShawn A. v. Barry, 87 F.3d 1389, 1393 (D.C. Cir. 1996).

\textsuperscript{206} For description of the public notice and comment requirements applicable to local rules, see 28 U.S.C. § 2071(b) (2000) and FRAP 47(a).
what that idea is. May nonprecedential opinions truly be disregarded based on their status with no substantive consideration? Or are they are entitled to some degree of deference, even if they are not binding in the sense of controlling later cases, such that they cannot be rejected without explanation? The local rules, commentary accompanying the rules, and judicial interpretations of the rules do not answer these questions.

Determining the authoritative value of a category of authority, particularly one used so frequently by the federal appellate courts, should not be this hard. Members of the public, litigants, and the courts themselves should know how nonprecedential opinions, as a group, fit within the hierarchy of decisional law. Consistency in the treatment of nonprecedential opinions is essential for judicial legitimacy, as are uniform procedures for their issuance. It would have been better for FRAP 32.1 to address these issues head on.

IV. NEXT STEPS FOR FRAP 32.1

FRAP 32.1 is a good start for bringing consistency to the treatment of nonprecedential opinions in the federal appellate courts. Unifying citation practices is a necessary first step. Now that this goal has been accomplished, the rule could be improved if it were amended to authorize nonprecedential opinions expressly and establish uniform procedures for their issuance. More importantly, the status of nonprecedential opinions within the hierarchy of decisional law needs to be definitively established, either through an amended version of FRAP 32.1 or by the courts acting in their adjudicative capacity.

A. Authorizing Issuance of and Establishing Uniform Procedures for Nonprecedential Opinions

An amended version of FRAP 32.1 should expressly authorize the issuance of nonprecedential opinions. Opponents of nonprecedential opinions would undoubtedly disagree with that assertion; they would say that the rule should prohibit the opinions, not authorize them. But viewing the situation pragmatically, if nonprecedential opinions are going to remain a fixture of appellate jurisprudence, it would be better to recognize them nationally, and it would be better for the rule to do so expressly. Even if this invited constitutional challenge, that

207. The comment regarding FRAP 32.1 mentioned in this Article's introduction captures this sentiment exactly: "Anyone who states that lawyers and judges have a common understanding of how to handle unpublished decisions is either misinformed or less than candid." Cooper Letter, supra note 16, at 3; cf. Sullivan, supra note 150 (showing that courts assign various degrees of authoritative value to vacated opinions, even though technically such opinions are legally void).
would at least get the issue out into the open and invite a resolution one way or the other.\textsuperscript{208}

In taking this step, a revised version of FRAP 32.1 should additionally establish uniform procedures for issuing nonprecedential opinions to bring consistency to the range of procedures specified (or not) in local circuit rules.\textsuperscript{209} The revised rule should specify whether a presumption in favor of issuing precedential or nonprecedential opinions exists, whether specific content in an opinion (e.g., an opinion that criticizes existing law) affects whether a panel can issue a nonprecedential opinion, whether an opinion must be unanimous for a panel to issue a nonprecedential opinion, whether the nature of the disposition (e.g., reversal or affirmance) affects whether an opinion can be nonprecedential, whether all of the judges on the panel must agree that the opinion should be precedential or nonprecedential, and whether and how a nonprecedential opinion can be reissued as precedential.\textsuperscript{210} The better course of action in my view would be to choose the most restrictive procedures because nonprecedential opinions leave me with a queasy feeling.\textsuperscript{211} The specific procedures ultimately adopted, however, are not the point of debate. Although there may be advantages or disadvantages to the various procedural options applicable to issuance of nonprecedential opinions, this is one instance in which it is more important for the matter to be settled than to be set-

\textsuperscript{208} \textit{November Meeting}, supra note 34, at 35 (explaining that the Committee rejected language authorizing nonprecedential opinions in part to avoid saying that they are constitutional). This Article proceeds from the premise that nonprecedential opinions are constitutional. If that premise is wrong, then, of course, nonprecedential opinions should be eliminated, and if affirmatively authorizing them encourages resolution of the constitutional question, that would be a salutary effect of amending FRAP 32.1. In keeping with a pragmatic view, however, it seems unlikely that the federal courts will invalidate nonprecedential opinions on constitutional grounds. Further, although an express authorization of nonprecedential opinions appears at first glance to make a constitutional challenge likely, in fact, it would be difficult to find a case with the correct procedural posture for such a challenge. Sloan, supra note 3, at 713–14 (discussing the barriers to challenging the constitutionality of nonprecedential opinions through litigation).

\textsuperscript{209} See supra section III.B.

\textsuperscript{210} Amendment of FRAP 32.1 to include uniform publication guidelines has been proposed elsewhere. See, e.g., Diane Adams-Strickland, Comment, Don't Quote Me: The Law of Judicial Communications in Federal Appellate Practice and the Constitutionality of Proposed Rule 32.1, 14 COMM LAW CONSPECTUS 133, 166–67 (2005). I do not propose specific language here because I do not think it matters tremendously what the particulars of the standards are so long as they are uniform. See infra note 211 and accompanying text.

\textsuperscript{211} See generally Sloan, supra note 3, at 727–33 (discussing the legitimacy problems that nonprecedential opinions create).
The goal should simply be to provide uniformity of procedure for issuing the form of precedent that comprises 84% of dispositions on the merits in the federal appellate courts.213

B. Formalizing the Role of Nonprecedential Opinions in the Hierarchy of Precedent

A revised version of FRAP 32.1 should also formalize the role of nonprecedential opinions in our system of precedent. For the rule to make nonprecedential opinions fully binding and subject to the law of the circuit rule is not a realistic option. It would make no sense for the rule to authorize the issuance of nonprecedential opinions but then make them fully precedential. As noted earlier, the only reason to have nonprecedential opinions is to give them a different status than that of precedential opinions; otherwise, all opinions would simply be precedential and the nonprecedential category would go away.214 More importantly, a rule mandating that all opinions be fully binding may not be constitutional.215

A more realistic option would be to go back to one of the earlier proposed versions of FRAP 32.1 providing that nonprecedential opinions may be cited for their persuasive value. This would be better than the rule's present silence on the matter because nonprecedential opinions must have some weight. Otherwise, why cite them? By expressly defining nonprecedential opinions as persuasive authority, an amended FRAP 32.1 would reduce the uncertainty caused by the varying expressions of authoritative value that presently appear in the local rules.216 But it would do so in a way that would not be a big leap for the courts because four circuits already say that nonprecedential opinions are persuasive and eight others provide at least implicitly that they are not binding.217 At a minimum, this would clear up the confusion in the District of Columbia Circuit and bring consistency to the terminology used in all of the circuits.218 Of course, the designa-

212. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right.").

213. Table S-3, supra note 12, at 52 (providing statistics on the number of nonprecedential opinions issued in the federal appellate courts).

214. See supra notes 155–57 and accompanying text.


216. See supra notes 186–207 and accompanying text.

217. See supra notes 159–76 and accompanying text.

218. See supra notes 177–85 and accompanying text.
tion of authority as persuasive is not definitive; as noted earlier, the meaning of persuasive precedent is not entirely clear, and different nonbinding authorities have different degrees of persuasive value in different circumstances. On the other hand, a uniform national standard, albeit an imprecise one, would still be an improvement. A consistent standard at least provides a starting point for developing a coherent understanding of the role of nonprecedential opinions within the federal judiciary.

But a better approach, and certainly a more provocative one, is for an amended FRAP 32.1 to specify a value for nonprecedential opinions that corresponds to their position within the traditional hierarchy of federal decisional law. A revised FRAP 32.1 should modify the law of the circuit rule so that nonprecedential opinions are binding unless overruled by a later panel's precedential opinion. In other words, nonprecedential opinions could be overturned without resort to the en banc procedure. This would confer on them an "overrulable" status and place them in between federal district court decisions, which are not binding at all, and precedential, or published, panel decisions, which are binding unless overruled en banc. This change should be prospective only to avoid the problems that converting thousands of older nonprecedential opinions to overrulable status could create.

Stephen Barnett first raised the possibility of giving overrulable status to nonprecedential opinions in 2002, although he discussed it in the context of advocating for courts to amend the law of the circuit rule acting in their adjudicative capacity. As Barnett has explained, this modification to norms of precedent "would promote, not subvert, the [law of the circuit] rule's purpose of avoiding intra-circuit conflicts: As between two conflicting panel decisions, it would be clear which one governed—the one that was published." Unlike proposals to make all nonprecedential opinions fully precedential, this proposal gives the appellate courts a workable option for undoing erroneous nonprecedential opinions because "[p]anels . . . would not have to resort to finespun factual distinctions or aggressive claims of dictum in order to avoid the force of an unpublished precedent with which they disagreed. They could simply overrule it, if willing to do so in a published opinion." This avoids a situation in which multiple unpublished decisions conflict with each other, creating confusion about

219. See supra notes 187-94 and accompanying text.
220. See Ricks, A Case Study, supra note 14, at 273-76 (outlining reasons why giving nonprecedential opinions persuasive status would be better than the present situation in which they have indeterminate status); Ricks, A Modest Proposal, supra note 173, at 24-29 (advocating persuasive status for nonprecedential opinions as an interim step during a period of adjustment to FRAP 32.1).
222. Id. at 24.
223. Id.
what the law of the circuit actually is, and forces a panel that wants to
go in a different direction to "put its precedential money where its
mouth is."224

This approach would also be consistent with most circuits' publication
policies. The First,225 Fourth,226 Fifth,227 Sixth,228 Eighth,229
Ninth,230 District of Columbia,231 and Federal232 Circuits all provide
by local rule for publication of opinions that criticize or modify existing
rules of law or create conflicts with previously decided cases. Al-
though the Second,233 Third,234 and Tenth235 Circuits do not specifically
provide for publication under those circumstances, they do provide for publication when a jurisprudential purpose is served or
when a precedent would be valuable. Publishing to change a non-
precedential ruling would certainly satisfy those rules.

Relying on the current publication policies, however, is not
enough.236 A change to the rule to define the authoritative value of
nonprecedential opinions is necessary for two reasons. First, as noted
above, the publication policies are not specific in all circuits, and the
Seventh237 and Eleventh238 Circuits lack any criteria other than gen-
eral policies to avoid publication of too many opinions. Second, if non-
precedential opinions do not count as precedent, then it is not clear

224. Id.
225. 1ST CIR. R. 36.0(b)(1). Because of the presumption in favor of precedential opin-
ions in the First Circuit, the publication criteria are stated in the negative; that
is, an opinion will be published unless it does not modify an established rule,
among other criteria. Id.
226. 4TH CIR. R. 36(a).
227. 5TH CIR. R. 47.5.1.
228. 6TH CIR. R. 206(a).
229. 8TH CIR. APP. I(4).
230. 9TH CIR. R. 36-2.
232. FED. CIR. IOP 10(4).
233. 2d CIR. R. 32.1(a) (providing for issuance of a nonprecedential opinion when "no
jurisprudential purpose would be served by an opinion").
234. 3d CIR. IOP 5.2 (providing for issuance of a precedential opinion when the opinion
"has precedential or institutional value").
235. 10TH CIR. R. 36.1 (providing for issuance of a nonprecedential opinion when "the
case does not require application of new points of law that would make the deci-
sion a valuable precedent").
236. This assumes that the federal appellate courts actually can and do follow their
publication criteria, a suggestion that has been challenged. J. Lyn Entrikin Go-
ering, Legal Fiction of the "Unpublished" Kind: The Surreal Paradox of No-Cita-
tion Rules and the Ethical Duty of Candor, 1 SETON HALL CIRCUIT REV. 27, 73–75
(2005); Dean A. Morande, Comment, Publication Plans in the United States
Courts of Appeals: The Unattainable Paradigm, 31 FLA. ST. U. L. REV. 751,
775–79 (2004).
237. 7TH CIR. R. 32.1(a) (stating a policy "to avoid issuing unnecessary opinions").
238. 11TH CIR. R. 36-3 I.O.P. 5 (stating a policy to "reduce the volume of published
opinions").
that not following them merits publication because that may not constitute a modification of existing law.

If a revised FRAP 32.1 were to give nonprecedential opinions overrutable status, federal appellate courts could still follow those opinions if they wanted to, as they do now. Looking at the treatment of nonprecedential opinions in Shepard’s, it is clear that nonprecedential opinions are followed much more often than they are given negative treatment. A review of 465 pages of entries in volume 27 of Shepard’s, listing citations to nonprecedential opinions published in volumes 66 through 169 of the Federal Appendix reporter, shows that these opinions were followed 289 times in later federal appellate opinions versus questioned 3 times in later federal appellate opinions. Consequently, even if FRAP 32.1 amended the law of the circuit rule, most federal appellate opinions could continue to be nonprecedential because they would mostly be followed.

There would, of course, be some uncertainty, as a single panel could undo a whole series of consistent nonprecedential opinions. But that uncertainty exists now. No one understands the authoritative value of nonprecedential opinions under the various local rules, and precedential opinions can be overruled en banc or by the Supreme Court. Clearly defining the role of nonprecedential opinions in the hierarchy of authority would strengthen, not undermine, the predictability of the law.

Further, courts could still issue as many nonprecedential opinions as they wanted to as long as those opinions follow prior decisions (whether precedential or nonprecedential). The only increase in precedential opinions would be among those panels that overrule prior nonprecedential opinions. All the amended rule would really do is require the appellate courts to follow their own nonprecedential opinions when issuing other nonprecedential opinions.

A revised rule would not put any greater burden on the courts than FRAP 32.1 already does. Now that parties can cite nonprecedential opinions, judges may feel the need to address them even if they are not binding. Moreover, courts already address nonprecedential opinions frequently. As noted earlier, hard bound volumes of Shepard’s include 820 pages of entries cataloguing citations to nonprecedential opinions. An average page lists approximately 21 citations to nonprecedential opinions in later, unrelated cases, which means that nonprecedential opinions were cited more than 17,000 times during the


240. Schiltz, Much Ado about Little, supra note 33, at 1469 n.213 (quoting a comment on proposed FRAP 32.1 stating that citation of nonprecedential opinions will require judges to explain, distinguish, or otherwise address those opinions).

period covered by these volumes.\textsuperscript{242} If these cases are already being cited by the courts themselves in significant numbers, it is hard to see how conferring overrulable status adds significantly to the courts' need to address their prior opinions. Moreover, because the change would be prospective only, the courts would not have any greater need to address older nonprecedential opinions than they do now.

Conferring overrulable status on nonprecedential opinions also should not increase the burden of researching or reading nonprecedential opinions any more than lifting citation restrictions already has. Because precedential opinions would continue to carry the greatest weight, those opinions would continue to be the focus of research and argument. Nonprecedential opinions would have to conform to the principles stated in precedential opinions, so the only times nonprecedential opinions would gain prominence is when they either address a question of first impression, such that there are no prior precedential opinions for the court to follow, or when the nonprecedential opinion is factually analogous to a pending case. But these are precisely the circumstances under which lawyers and judges are likely to look to nonprecedential opinions now. People find, read, and cite these cases when they are helpful; clarifying their position in the hierarchy of precedent can only be an improvement.

As far as subsidiary tribunals, such as federal district courts, are concerned, clarifying the weight of nonprecedential opinions would be insignificant in one respect and significant in another. It would be insignificant because these tribunals are already following nonprecedential opinions. Again, \textit{Shepard's} provides useful data. A review of 465 pages of entries in volume 27 of \textit{Shepard's}, listing citations to nonprecedential opinions published in volumes 66 through 169 of the \textit{Federal Appendix} reporter, shows that these opinions were followed 813 times by federal district courts, bankruptcy courts, and courts of military justice.\textsuperscript{243} If lower federal tribunals are already mostly following nonprecedential opinions, conferring overrulable status on those opinions is not going to be significant for the results of their decisions. Making the opinions overrulable will only define with clarity what authoritative value those opinions carry.

And this clarity is significant. Federal district courts especially are caught between a rock and a hard place with regard to nonpreceden-

\textsuperscript{242} Review of a representative sample of pages in volumes 26 and 27 of \textit{Shepard's}, listing citations to cases published in the \textit{Federal Appendix}, showed an average of 21.5 citations per page, not counting decisions in the direct history of the case (e.g., denials of certiorari, same case citations, connected case citations) or citations in secondary sources. Multiplying 820 pages by 21.5 citations per page yields a total of 17,630 citations. Of course, this figure is not exact because I estimated the average number of citations per page rather than counting each citation individually.

\textsuperscript{243} 27 \textit{Shepard's Federal Citations} 3-468 (9th ed. LexisNexis 2006).
tial opinions. On the one hand, they are bound to follow the courts above them, and nonprecedential opinions from appellate courts provide at least some indication of those courts' views.\textsuperscript{244} On the other hand, federal district courts have been criticized for relying on nonprecedential opinions,\textsuperscript{245} even though the appellate courts themselves follow the opinions with some frequency.\textsuperscript{246} It would be better for lower federal tribunals to know the authoritative value of nonprecedential opinions in resolving the cases before them.

Defining the status of nonprecedential opinions as overrulable would improve the legitimacy of the courts. Because the deciding panel is not in the best position to assess the future value of its opinion,\textsuperscript{247} allowing citation plus overrulability allows well-reasoned opinions to influence later cases and provides a mechanism for taking those opinions that do not hold up as well under later scrutiny out of the mix—a sort of common law Darwinism.\textsuperscript{248} This is entirely consistent with both the law declaring and error correction functions of intermediate appellate courts.\textsuperscript{249} It also puts the definition of the weight of authority in the national rules. It looks bad for courts to define weight of authority through local rules, and it is bad for the weight to be uncertain at best and inconsistent at worst.\textsuperscript{250}

\begin{itemize}
\item \textsuperscript{245} See, e.g., United States v. Daychild, 357 F.3d 1082, 1095 n.21 (9th Cir. 2004) (affirming the district court but noting "that the district court should not have relied on an unpublished decision").
\item \textsuperscript{246} See supra note 239 and accompanying text (noting the frequency with which federal appellate courts follow nonprecedential opinions).
\item \textsuperscript{247} See Allen, supra note 4, at 597–99 (noting the problems that occur when appellate courts determine at the time of decision that an opinion is either a lawmaking or error correcting opinion, an artificial distinction created by the use of nonprecedential opinions). See generally 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, 726–32 (2006) (suggesting that the principle that judges can determine the future impact of their decisions is a "legal fiction").
\item \textsuperscript{248} See Allen, supra note 4, at 604–10 (arguing that bifurcating opinions between precedential and nonprecedential puts too much weight on precedential opinions as irrevocable speech acts with consequences that are difficult to undo); Pearson, supra note 66, at 1258–60 (discussing the respective roles of the panel issuing a decision and a subsequent panel applying a decision in developing precedent).
\item \textsuperscript{250} The desire for consistency is what led the Framers of the Constitution to believe that courts should be bound by precedent in the first instance. The Federalist No. 78, at 502–03 (Alexander Hamilton) (Robert Scigliano ed., 2000) ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . . ").
\end{itemize}
One could reasonably argue that changing FRAP 32.1 in this way would effectively eliminate nonprecedential opinions because it assigns a precedential value to the opinions, thereby fulfilling the fears of the rule's opponents. This is only partially true. Making nonprecedential opinions overrulable does give them precedential status as far as subsidiary tribunals are concerned. It is not, however, the same as prohibiting nonprecedential opinions outright and making all opinions fully precedential; rather, it involves defining the role of a new layer of precedent. The proposal does keep nonprecedential opinions from being valueless non-authority, but eliminating citation restrictions has already had the same effect. Again, all this proposal does is define with clarity what role these opinions play in the hierarchy of federal decisional law.

Moreover, it is not nearly as significant a change as simply pronouncing that courts may not issue nonprecedential opinions. Under the law of the circuit rule as it presently exists, courts must convene en banc to overrule a prior panel decision. Thus, to outright prohibit nonprecedential opinions and then require courts to resort to the en banc procedure to overrule panel decisions would create a significant burden on the courts. Giving nonprecedential opinions a subsidiary status, rather than the "hyperprecedential" status that fully precedential opinions have, would not significantly burden the courts, especially if the change applied only to nonprecedential decisions issued after a specific date. All appeals have to be heard by panels; altering the rule to create a procedure by which one panel can overrule another panel therefore does not require a separate procedure or the involvement of additional judges. It does require the later panel to issue a precedential opinion, which arguably creates an additional, but not unreasonable, amount of work. Indeed, the length and complexity of nonprecedential opinions vary widely, so in any individual case, requiring the opinion to be precedential instead of nonprecedential might not entail any additional work at all. Viewing the issue pragmatically, defining the status of nonprecedential opinions this way would not create the problems that advocates of their use fear would occur if all opinions had to be fully precedential, espe-

251. Hearing, supra note 7, at 13 (statement of Judge Kozinski); Schiltz, Much Ado About Little, supra note 33, at 1483–84.
253. Indeed, the majority of the circuits have already modified their procedures for overruling prior panel opinions. See supra note 151.
254. November Meeting, supra note 34, at 36 ("[O]pinions designated as 'non-precedential' . . . [range] from one-paragraph, per-curiam orders to 20-page, signed opinions containing exhaustive legal analysis.").
cially in light of the knowledge that courts follow nonprecedential opinions much more often than they disagree with or criticize them.255

One objection to this approach is that the Federal Rules of Appellate Procedure are not an appropriate vehicle for defining the weight of precedent. Perhaps it would be better to leave the determination of something as integral to the judicial process as the weight of precedent to the courts themselves, acting in their judicial capacity. After all, if the courts, acting in their adjudicatory capacity, are the source of the law of the circuit rule, they may be best suited to use adjudication to make any changes to that rule.

This is a good argument. It would be better for the courts to make this change on their own. Indeed, precedent exists for courts to make rulings in their adjudicative capacity regarding weight of authority. In Bonner v. City of Prichard, the Eleventh Circuit adopted the decisions of the Fifth Circuit, from which the Eleventh Circuit was carved, as binding precedent.256 The court stated that a judicial decision, rather than a procedural rule, was the appropriate manner in which to implement such a decision.257 Although statutes and procedural rules directed toward the en banc procedure recognize the law of the circuit rule, no statute or rule establishes the law of the circuit rule or mandates its application. The Supreme Court recognized the courts' authority to convene en banc in Textile Mills Securities Corp. v. Commissioner,258 and the federal appellate courts have seen fit to modify the law of the circuit rule from time to time.259 Thus, alteration of the parameters of the rule is entirely within the courts' judicial power acting in an adjudicative capacity.

However, the problem is that the courts, by and large, have not followed Bonner's approach. Instead, they purport to define the weight of nonprecedential opinions in their local rules.260 Thus, resort to a national procedural rule is consistent with the approach the courts themselves have chosen to take. If they were to address, through adjudication, the role of nonprecedential opinions in the hierarchy of precedent, then perhaps an amended version of FRAP 32.1 would be altogether unnecessary. Further, the idea that determining the weight of precedent is integral to the judicial process supports ac-

255. See supra note 239 and accompanying text.
256. 661 F.2d 1206, 1207 (11th Cir. 1981).
257. Id. at 1211; see also Hearing, supra note 7, at 6, 9 (statement of Judge Alito) (noting that the courts have traditionally established and developed principles of stare decisis through adjudication as part of the common law).
258. 314 U.S. 326, 333 (1941).
259. See supra note 151 and authorities cited therein. It has been argued that the law of the circuit rule is not constitutionally required. Salem M. Katsh & Alex V. Chachkes, Constitutionality of "No-Citation" Rules, 3 J. App. PRAC. & PROCESS 287, 288 n.5 (2001). Thus, the rule could possibly be eliminated altogether.
260. See supra notes 158–80 and accompanying text.
tion on a national level. Something that important should not be left to inconsistent local rules and internal operating procedures. 261 By leaving the matter to local procedural rules, the courts open themselves up to regulation in kind on the national level. Finally, a rule-based approach is the best way to give the change prospective effect only. Changing the rule to become effective only as of a specific date, the way FRAP 32.1 did with citation of nonprecedential opinions, avoids the problems that judges fear will occur if all previously issued nonprecedential opinions suddenly become precedential. 262

Yet another possible objection is that using an amended version of FRAP 32.1 to define the authoritative value of nonprecedential opinions goes beyond the rulemaking authority delegated by Congress. Viewing this issue pragmatically, however, the courts have boxed themselves into a corner. Because the courts have used local rules to define the weight of nonprecedential opinions, it would be difficult, if not impossible, for them to invalidate an amended FRAP 32.1 that modifies the law of the circuit rule without simultaneously invalidating their own local rules.

The Rules Enabling Act, through which the Federal Rules of Appellate Procedure are promulgated, authorizes the Supreme Court to make "general rules of practice and procedure" that are consistent with federal statutes. 263 These rules "shall not abridge, enlarge or modify any substantive right." 264 Thus, the Federal Rules of Appellate Procedure must be general rules of practice and procedure and cannot abridge, enlarge, or modify substantive rights.

Patrick Schiltz, the Reporter for the Appellate Rules Committee during the time when FRAP 32.1 was under consideration, has said that a "rule that prescribed the legal force that must be accorded unpublished opinions would likely 'abridge, enlarge or modify' the 'substantive right[s]' of the parties" and, therefore, would exceed the

261. Cf. Pearson, supra note 66, at 1299 ("If the constraining effect of precedent is fundamentally important to our legal system, judges cannot be freed from it on grounds of efficiency.").

262. Schiltz, Much Ado About Little, supra note 33, at 1483–84 (describing judicial concerns about uses of nonprecedential opinions). As Schiltz explains:

Several judges who oppose Rule 32.1 have told me privately that what really concerns them is not that unpublished opinions will be cited, but that courts will eventually be forced to treat unpublished opinions as precedential. The courts of appeals have issued hundreds of thousands of unpublished opinions, and judges have no idea what is in them. . . . Judges are terrified that they will wake up one day and find themselves bound by this mountain of unpublished opinions.

Id. at 1483. Requiring courts to use the en banc procedure to correct every mistake in nonprecedential opinions issued over the years would create decades of work. Id. at 1484.


264. Id. § 2072(b).
rulemaking authority delegated to the courts. Bradley Scott Shannon agrees and adds that such a rule also would not be procedural in nature because it would not primarily be directed toward acts necessary to enforce rights and duties, or in other words, conduct necessary to resolve a case.

They may be right, but accepting either objection carries consequences for the entire house of cards created by local rules regarding nonprecedential opinions. With respect to Schiltz's concern about the scope of rulemaking authority, he provides no explanation for his conclusion that a rule prescribing the authoritative value of nonprecedential opinions exceeds the statutory delegation. Even if his conclusion is correct with respect to a rule making all nonprecedential opinions fully binding, it may not be true of one that simply provides a procedure for not following nonprecedential opinions (i.e., issuing a precedential opinion). Moreover, it is interesting to note that this concern was not one of the reasons why the Appellate Rules Committee rejected proposed versions of FRAP 32.1 that contained language allowing citation of nonprecedential opinions for persuasive value.


266. See Shannon, *supra* note 18, at 666. Shannon discusses the nonprocedural nature of rules defining weight of authority in the context of rules abrogating stare decisis, but his analysis applies equally to a rule altering principles of stare decisis.

267. The Appellate Rules Committee discussed the original Department of Justice proposal for a rule to eliminate citation restrictions at its April 2002 meeting, with a majority concluding that a national rule addressing citation practices was appropriate. *April Meeting, supra* note 17, at 23–27. The minutes of the Appellate Rules Committee's November 2002 meeting contain the three original versions of FRAP 32.1, including the ones that limited the weight of nonprecedential opinions to their “persuasive value;” these proposals were discussed at length, but no mention was made of whether the proposals in general or the “persuasive value” language in particular were beyond the rulemaking authority conferred by the Rules Enabling Act. *November Meeting, supra* note 34, at 34–39. In May 2003, the proposal later approved for public comment (Alternative B), which did not contain the “persuasive value” language, was presented to the committee, thus obviating the need for any discussion of whether that language presented a problem under the Rules Enabling Act. *Advisory Comm. on Appellate Rules, Minutes of the Spring 2003 Meeting* 11 (May 15, 2003), http://www.uscourts.gov/rules/Minutes/app0503.pdf (last visited Oct. 4, 2007). Concerns about the rule as sent out for comment did arise in comments objecting to the proposal. See Schiltz, *Citation of Unpublished Opinions*, supra note 16, at 43 (summarizing a comment arguing that FRAP 32.1 "is not a 'general rule[ ] of practice and procedure' because, if the rule is adopted, 'some judges will make the opinion more elaborate in order to make clear the context of the ruling, while other judges will shorten the opinion in order to provide less citable material,'” and, by affecting “the construction and import of opinions,” the rule would go beyond the rulemaking authority conferred by the Rules Enabling Act (quoting Letter from John M. Walker, Jr., Chief Judge, U.S. Court of Appeals for the Second Circuit, to Peter G. McCabe, Sec'y, Comm. on Rules of Practice & Procedure 5 (Feb. 11,
Because local rules cannot conflict with national rules, specifying that nonprecedential opinions may be cited for persuasive value could have prohibited a circuit from giving precedential weight to nonprecedential opinions.\textsuperscript{268} This is a limitation on the authoritative value of nonprecedential opinions that no one seemed to find problematic from the standpoint of rulemaking authority.

If a version of FRAP 32.1 that gives nonprecedential opinions binding weight in limited situations would exceed the scope of rulemaking authority, then the local rules purporting to define the weight of nonprecedential opinions are similarly invalid.\textsuperscript{269} Local rules are subject to the same strictures that national rules are, with the additional caveat that local rules cannot contravene the national rules.\textsuperscript{270} Thus, if a version of FRAP 32.1 that defined nonprecedential opinions as binding in limited contexts and subject to overruling by later panels would exceed the rulemaking power delegated by Congress, then the entire local rules system defining the weight of nonprecedential opinions is similarly invalid. Approaching the problem pragmatically, either the rule would stand as a valid exercise of rulemaking authority, which would improve the situation with nonprecedential opinions, or the rule would fall, bringing the local rules down along with it, thereby eliminating the very local rules that are the source of the problem.

This same situation insulates a revised version of FRAP 32.1 from a constitutional challenge. An amended version of FRAP 32.1 could be challenged on separation of powers grounds. Because the \textit{Federal Rules of Appellate Procedure} are creatures of delegated statutory authority, they cannot validly accomplish anything that Congress could not do by statute.\textsuperscript{271} Indeed, if the courts were unwilling to amend FRAP 32.1 on their own, Congress could change the rule statuto-

\textsuperscript{268} See supra notes 71–74 and accompanying text (discussing the interplay between local and national rules).

\textsuperscript{269} See generally Shannon, supra note 18 (arguing that local rules defining the authoritative value of nonprecedential opinions are invalid).


\textsuperscript{271} Through the Rules Enabling Act, Congress delegates its legislative authority to the courts. Sloan, supra note 3, at 734–35. The courts propose procedural rules, and the proposed rules are submitted to Congress. \textit{Id.} at 735. If Congress does nothing, the rules go into effect as submitted. \textit{Id.} at 735–36. To reject or change a rule, Congress must act legislatively. \textit{Id.} at 735 n.108. For a more detailed description of the rulemaking process, see supra note 31. Because the ultimate control over procedural rulemaking in the federal courts rests with Congress, the rules cannot be used to accomplish tasks that Congress could not directly legislate. Sloan, supra note 3, at 733–45.
The local rules are subject to the same restrictions. They are authorized by the Rules Enabling Act and by FRAP 47. Thus, they are as much creatures of delegated statutory authority as are the national rules. If an amended version of FRAP 32.1 is unconstitutional because Congress cannot legislate in a way that affects the weight courts give to their own opinions, then the local rules scheme that uses the statutory mechanism to do just that must also fail on constitutional grounds.

The one potential difficulty with this position is that local rules operate in a pocket of air created by the courts' inherent rulemaking power. While Congress has legislative authority to regulate procedure in the courts, the courts also have inherent judicial authority to regulate procedure. To a large degree, these sources of power overlap, but, at the outer limits, there are some aspects of procedure that can only be defined legislatively (such as jurisdiction) and others that can only be defined judicially (such as the length of a judicial opinion). National rules are subject to direct congressional control and, therefore, must be limited to aspects of procedure that Congress could accomplish by statute. Local rules, by contrast, are not subject to direct congressional control. Although their scope is limited—they must regulate procedure and cannot alter substantive rights or conflict with federal statutes or procedural rules—they are subject to review only by the judicial council of the circuit, not by Congress. Accordingly, it is possible that some local rules derive from Article III judicial power, not delegated statutory authority, and therefore could be directed toward a matter that the national rules could not regulate.

It has been argued that any inherent judicial rulemaking power that exists is the power to regulate procedure in individual cases through the adjudicative process, not the power to promulgate generally applicable rules in statutory form like the local rules regarding


273. E.g., Chambers v. NASCO, Inc., 501 U.S. 32, 35 (1991) (holding that the district court "properly invoked its inherent power in assessing as a sanction for a party's bad-faith conduct attorney's fees and related expenses"); see also Shannon, supra note 18, at 672–74 (discussing areas in which courts have rulemaking authority); Sloan, supra note 3, at 737 (discussing areas in which courts have rulemaking authority).

274. Sloan, supra note 3, at 737–40.

275. Id. at 743–44.

nonprecedential opinions. If that is right, then local circuit rules, although not directly controlled by Congress, are still derived from delegated legislative authority and are subject to the same limitations to which national rules are subject because they are promulgated pursuant to the Rules Enabling Act. This makes sense. It would be anomalous for the local rules to be subordinate to federal statutes and national rules, as 28 U.S.C. § 2071(a) and FRAP 47 provide, but then still somehow independent such that they could regulate matters beyond legislative and national rulemaking power. Further, to the extent that local rules can be changed or invalidated altogether by national rules (FRAP 32.1's elimination of citation restrictions is a case in point), then they are, albeit indirectly, subject to congressional control. It would be hard to think of a matter beyond Congress's reach over which courts have inherent rulemaking authority that the courts could or would address in their local rules.

And yet, if there is such a matter, it is the authoritative value of precedent. Although it seems unlikely that local circuit rules are derived from a different source of constitutional power than are national rules, I will assume for the sake of argument that they are. If that is the case, then an amended version of FRAP 32.1 derives from a different source of authority, delegated legislative authority, and thus raises separation of powers concerns that need to be addressed. Congress cannot constitutionally tell the courts that they must give full precedential value to all of their own prior opinions. Whether amending FRAP 32.1 to alter the law of the circuit rule (either by the courts through the Rules Enabling Act process or by Congress statutorily) is constitutional is a close question. The answer might depend on the analytical framework used to resolve the constitutional question. It is possible, however, to characterize this proposal as a procedure courts must use to categorize opinions as either precedential or nonprecedential rather than as a rule defining weight of authority, thus making it constitutional.

To determine whether one branch has stepped on another branch's constitutional toes, the Supreme Court employs two different analyti-
The functionalist approach begins with the premise that it is impossible to completely segregate government powers within the individual branches. Thus, functionalist analysis requires an evaluation of the effect of legislative action on the relative balance of power among the branches of government; it seeks to ensure that no one branch becomes too powerful relative to the others even if, at the margins, one branch performs some tasks that belong to one of the other branches. As long as one branch does not usurp all of another branch's power, some power sharing is permissible. In contrast to the functionalist balancing approach, the formalist approach is a categorical approach that evaluates whether the action of one branch usurps any function that the Constitution vests in another branch. The categorization of a function as executive, legislative, or judicial determines which branch of government can perform it. Under a formalist approach, therefore, Congress is prohibited from enacting legislation that gives to itself or delegates to the executive any function that Article III commits to the federal courts as part of the judicial power. A version of FRAP 32.1 designating nonprecedential opinions as binding unless overruled by a subsequent precedential panel decision passes constitutional muster under a functionalist approach; its validity using formalist analysis, however, is less certain.

279. The functionalist and formalist methods of analysis have been described in many previous articles; the description here is not unique. See Sloan, supra note 3, at 746-53 (describing and applying functionalist and formalist analysis); see also Linda S. Mullenix, Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers, 77 MINN. L. REV. 1283, 1290-92 (1993); Redish, supra note 277, at 709-12; Adrian Vermeule, The Judicial Power in the State (and Federal) Courts, 2000 SUP. CT. REV. 357, 362-63.

280. Sloan, supra note 3, at 748.

281. Id. at 762. As James Madison explained, the Constitution permits the three branches of government to have "partial agency in," or "control over, the acts of each other." THE FEDERALIST NO. 47, at 309 (Robert Scigliano ed., 2000); see also Redish, supra note 277, at 711-12 (describing the indeterminate nature of functionalist balancing); Mullenix, supra note 279, at 1293-94 (explaining the balancing required in functionalist analysis).

282. Madison saw separation of powers problems only "where the whole power of one department is exercised by the same hands which possess the whole power of another department." THE FEDERALIST NO. 47, supra note 281, at 309; see also Vermeule, supra note 279, at 363 (describing the limits of power sharing).

283. Sloan, supra note 3, at 748.

284. Redish, supra note 277, at 709-10; Vermeule, supra note 279, at 363.

The functionalist approach would assess whether amending the law of the circuit rule through FRAP 32.1 unduly interferes with the federal appellate courts' ability to perform their core function of deciding cases and whether it risks accumulating too much power in the legislative branch. An analysis of the scope of an amended FRAP 32.1, the degree to which it leaves traditional judicial functions with the courts, and the concerns that would motivate Congress to amend FRAP 32.1 suggests that such a rule would not diminish the judicial power. In addition, the amended rule would not aggrandize legislative power. Because an amended FRAP 32.1 would not upset the balance of power between Congress and the federal courts, it would be constitutional under a functionalist analysis.

The scope of a statute is one of the factors the Supreme Court has used to evaluate the legislation's effect on judicial power. An amended version of FRAP 32.1 would undoubtedly have a broad scope because it would affect all nonprecedential opinions, roughly 84% of opinions issued by the federal appellate courts. Compare this with the statute upheld in Commodity Futures Trading Commission v. Schor. In that case, the Court used a functionalist approach to uphold a statute allowing the Commodity Futures Trading Commission (CFTC) to hear certain state law counterclaims arising out of claims under the Commodity Exchange Act. One reason the Court gave

286. See supra notes 280–82 and accompanying text; see also Mistretta v. United States, 488 U.S. 361, 383–84 (1989) (rejecting the argument that congressional delegation of authority to promulgate sentencing guidelines improperly usurped judicial power); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851–52 (1986) (discussing whether congressional delegation of authority to the Commodity Futures Trading Commission (CFTC) was a violation of separation of powers). Although the sentencing guidelines upheld in Mistretta were later rendered advisory, rather than mandatory, in United States v. Booker, 543 U.S. 220, 226–27 (2005), the Booker court relied on Sixth Amendment grounds, not separation of powers concerns. Id. Thus, Mistretta remains a useful precedent for analyzing separation of powers claims.

287. A similar functionalist analysis of separation of powers concerns arising out of legislative action affecting judicial power appears in an earlier article. Sloan, supra note 3, at 762-65 (analyzing Congressional power to prohibit nonprecedential opinions by statute). Because federal procedural rules are promulgated pursuant to delegated legislative authority, analogous reasoning applies to an evaluation the constitutionality of a revised version of FRAP 32.1.

288. Id. at 762; see, e.g., Schor, 478 U.S. at 852 (explaining that the limited jurisdiction of the CFTC provided one justification for upholding a statute that transferred jurisdiction for some claims from the courts to the agency).

289. Table S-3, supra note 12; cf. Sloan, supra note 3, at 762 (analyzing the scope of a statute prohibiting nonprecedential opinions in terms of the number of nonprecedential opinions issued).


291. Id. at 836–41. As the Court explained, in resolving the case, it “declined to adopt formalistic and unbending rules,” choosing instead to “weigh[,] a number of factors, . . . with an eye to the practical effect that the congressional action will have
for upholding the statute was that, even though it took some cases away from the courts and gave them to an agency for adjudication, it affected a small number of cases. Amending FRAP 32.1 to define nonprecedential opinions as overrulable would affect many more cases.

There is, however, another way to view the statute. The statute at issue in Schor removed some claims from consideration by Article III courts. A revised FRAP 32.1 would not do so; thus it could be seen as having a narrower scope than the statute upheld in Schor. Further, a broad scope does not necessarily render a statute unconstitutional under a functionalist analysis, as Mistretta v. United States shows. In Mistretta, the Court again used functionalist analysis to evaluate the constitutionality of the statute that created the United States Sentencing Commission (USSC), an independent agency within the judiciary charged with creating sentencing guidelines for federal judges to follow. Criminal cases constitute a large part of the federal courts' dockets, and the sentencing guidelines affected all of those cases. Yet the Court upheld the statute. Similarly, the fact that a rule conferring overrulable status on nonprecedential opinions would affect a large number of cases is not, by itself, dispositive in a functionalist analysis.

The "extent to which the 'essential attributes of judicial power' are reserved to Article III courts" is a second factor to consider. Amending the law of the circuit rule to give a defined weight to nonprecedential opinions would not interfere with the courts' core function of deciding cases, thus leaving the essential attributes of judicial power with the federal courts. The rule would not dictate the results in individual cases because courts could avoid following prior non-

292. Id. at 852. As the Court noted, the CFTC "deals only with a 'particularized area of law.'" Id. (quoting N. Pipeline Constr. v. Marathon Pipe Line Co., 458 U.S. 50, 85 (1982)).

293. Cf Sloan, supra note 3, at 762 (comparing the effect of a statute prohibiting nonprecedential opinions with the effect of the statute at issue in Schor).


295. Id. at 367–68. Mistretta can be characterized as employing functionalist reasoning because the court recognized criminal sentencing as a matter subject to shared control among the branches of government, id. at 390, and because it evaluated the effect of the statutory scheme on the balance of power between the legislative and judicial branches, id. at 393–97.

296. Id. at 412.

297. Cf Sloan, supra note 3, at 762 (comparing the scope of a statute prohibiting nonprecedential opinions with the scope of the sentencing guidelines).

298. Schor, 478 U.S. at 851 (quoting Northern Pipeline, 458 U.S. at 81).

299. Sloan, supra note 3, at 762.
precedential opinions simply by issuing precedential opinions when they disagreed with a prior opinion.

Using FRAP 32.1 to amend the law of the circuit rule would affect the judiciary in a manner similar to the sentencing guidelines upheld in *Mistretta*, in which the discretion to determine criminal sentences was taken from individual judges and given to the USSC.300 Similarly, a rule defining nonprecedential opinions as overrulable would take the discretion to determine whether a particular opinion is binding or non-binding away from the panel deciding the case and give it to the panel applying the case. The applying panel would then have the power to determine first whether the prior opinion applies to the present case and then, if it did, to disregard the prior case by issuing a precedential opinion. Thus, rather than diminishing judicial power, an amended FRAP 32.1 would merely shift the discretion to determine the authoritative value of an opinion from one judicial actor to another.301

Amending the law of the circuit rule through a revised FRAP 32.1 could be seen as interfering with traditional judicial functions by interfering with docket management.302 This argument posits that giving precedential value to nonprecedential opinions would keep judges from resolving pending cases in a timely fashion because they would have to devote too much time to writing opinions in routine cases.303 This argument is unpersuasive for several reasons. For one, it is usually raised in the context of proposals to make nonprecedential opinions fully binding; it is not clear that this argument in any way applies to a proposal to make them overrulable. For another, to the extent that this is a valid concern, it is not clear that making nonprecedential opinions overrulable creates any greater problem for docket management than removing the citation restrictions already has. Further, as noted above, any arguable increase in work that the proposal might create is likely to be small. Finally, the rule would not mandate com-

300. *Mistretta*, 488 U.S. at 396 (noting that the USSC, which divested judges of some sentencing discretion, is located in the judicial branch).

301. Cf. Sloan, *supra* note 3, at 763 (comparing the effect of a statute prohibiting nonprecedential opinions on judicial power with the effect of the sentencing guidelines and arguing that shifts in discretion among judicial actors does not diminish judicial power).

302. *Id.* at 763.

303. As Judge Alito has explained,

> It would be virtually impossible for the courts of appeals to keep current with their case loads if they attempted to produce [a precedential] opinion in every case. Responsible appellate judges must devote more time to an opinion that changes the law or clarifies it in an important way (and may thus affect many litigants in future cases) than to an opinion that simply applies well-established law to specific facts (and thus affects solely the litigants at hand).

*Hearing, supra* note 7, at 8.
prehensive opinions in every case. It would not require written opinions at all. The federal appellate courts would be free to dispose of cases orally, with one-line dispositions, with short opinions, or in any other manner they see fit. Because the rule would dictate neither the form nor the content of judicial opinions, it would leave with the courts the traditional attributes of judicial power.304

The concern motivating legislative action is the third factor the Supreme Court has used to determine whether Congress has impermissibly intruded on the judicial branch's power.305 The concerns over the problems arising from having a layer of precedent with indeterminate status are at least as significant as those motivating the legislation at issue in Mistretta and Schor. Mistretta is, again, a good analogy. Congress's concerns over inconsistent criminal sentences motivated creation of the USSC.306 Concerns over inconsistent judicial decisionmaking would similarly justify amending the law of the circuit rule through a revised version of FRAP 32.1. Although the rule creates some minimal risk of increasing the number of one-word dispositions, that risk may be worth taking,307 especially given the acknowledgement by some judges that nonprecedential opinions do not always reflect the actual reasoning of the courts.308 On the other hand, the fact that the rule would leave open the option for federal appellate courts to issue nonprecedential opinions so long as those opinions follow earlier rulings mitigates that concern. Finally, as noted above, eliminating citation restrictions, as FRAP 32.1 has already done, is just as likely to lead to more summary dispositions; establishing the status of nonprecedential opinions definitively is probably not going to increase the number of summary dispositions any more than lifting the citation restrictions already has.

304. Cf. Sloan, supra note 3, at 763 (arguing that a statute prohibiting nonprecedential opinions would not interfere with traditional judicial functions as long as it did not dictate the form or content of judicial opinions).
305. Id. at 762.
306. Mistretta, 488 U.S. at 365–66 (explaining that Congress's dissatisfaction with sentencing disparities was one reason for creating the United States Sentencing Commission).
307. See Schiltz, Citation of Unpublished Opinions, supra note 16, at 73 (arguing that, to the extent FRAP 32.1 prevents judges from "averting their gaze" from the uncomfortable problem of nonprecedential opinions, such an improvement over the prior situation might warrant tolerance of some concomitant increase in one-line orders). But see Sarah M.R. Cravens, Judges as Trustees: A Duty to Account and an Opportunity for Virtue, 62 Wash. & Lee L. Rev. 1637, 1649–50 (2005) (arguing that judges, as trustees of the law, abdicate their judicial role when they issue decisions without explanation).
308. E.g., Hearing, supra note 7, at 13 (statement of Judge Kozinski) (explaining that a nonprecedential opinion does not always reflect all of the three panel judges' actual reasoning); November Meeting, supra note 34, at 36–37 (noting that judges may join an opinion when they agree with the result, even if they do not agree with the reasoning, when they know the opinion will be nonprecedential).
The functionalist approach also requires analyzing the effect of the proposed rule on legislative power. Amending the law of the circuit rule through a revised version of FRAP 32.1 would not upset the balance of power between the branches because it would not aggrandize the legislature at the judiciary's expense. Congress, either by acting on its own or delegating its authority through the Rules Enabling Act, would not gain any power by changing the law of the circuit rule. All the rule does is create a procedure for categorizing cases to determine whether they can be issued as nonprecedential or must be issued as precedential. Opinions that follow prior nonprecedential opinions may themselves be issued as nonprecedential opinions. Opinions that do not follow prior nonprecedential opinions must be issued as precedential opinions. As in Schor, any de minimis intrusion on judicial power occasioned by amending FRAP 32.1 would not inure to Congress's benefit.

An amended version of FRAP 32.1 defining nonprecedential opinions as overrulable precedent would not diminish the judiciary's power. It would not interfere with core judicial functions. It would not reallocate judicial power to Congress. It would address valid concerns about arbitrary judicial decisionmaking. Thus, an amended version of FRAP 32.1 would be constitutional under the functionalist approach.

Using formalist analysis, the outcome is less clear. Formalism limits each branch of government to the functions the Constitution assigns to it; thus, Congress is prohibited from performing functions assigned to the judiciary in Article III. A rule that defines nonprecedential opinions as binding unless overruled by a precedential panel opinion will not survive formalist scrutiny if it usurps the judicial function of defining the weight of nonprecedential opinions. If the proposed rule is viewed as legislative definition of the weight of authority, it would not pass constitutional muster using formalist analysis. If it is viewed as a procedural device for categorizing opinions, then it would.

The result would turn on whether the Supreme Court views the rule as analogous to a retroactive extension of a statute of limitations, which was invalidated in Plaut v. Spendthrift Farm, Inc., or the imposition of an automatic stay if a court does not rule on a matter within a defined time period, which was upheld in Miller v. French.

309. Sloan, supra note 3, at 764.
310. Cf. id. (comparing a statute prohibiting nonprecedential opinions with the statute at issue in Schor).
311. Id. at 765.
312. See supra notes 283-85 and accompanying text.
Both cases involved statutorily created procedural devices affecting judicial decisionmaking, yet the Court reached opposite conclusions in each.

*Plaut* concerned legislation that retroactively extended the limitations period for selected claims under the Securities Exchange Act of 1934, reopening final judgments in some cases dismissed as untimely before the statute was passed. The Supreme Court used a formalist approach to rule the statute unconstitutional on separation of powers grounds. After defining the judicial power as the power to decide cases finally on the merits, the *Plaut* majority held that the statute usurped the judicial function of rendering dispositive judgments in individual cases. Thus, the statute violated separation of powers principles. The majority explained that, "the doctrine of separation of powers is a structural safeguard rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified." The majority thus characterized separation of powers doctrine as a "prophylactic device" used to define unambiguous boundaries between legislative and judicial power. This overprotective approach to guard against encroachments on judicial power has been described as "alarm-clock formalism," an approach "akin to setting an alarm clock one hour ahead of the time at which the sleeper must rise; even if the sleeper sleeps for an hour after the alarm goes off, he will awaken at the right time."

Using *Plaut* formalism, amending the law of the circuit rule through a revised version of FRAP 32.1 would almost certainly be unconstitutional. The rule would necessarily define nonprecedential opinions as binding authority in some contexts (for example, for federal district courts within a circuit). Defining the weight of authority is a quintessential judicial function integral to the process of deciding cases. If Congress could tell courts what weight to give to individual authorities, it could effectively direct the outcome of cases, thereby usurping the judicial function.

316. *Plaut*, 514 U.S. at 225–28. The concurring and dissenting opinions, by contrast, used functionalist analysis. Justice Breyer, in his concurrence, reasoned that, although a statute reopening final judgments did not always risk giving too much power to Congress, the statute at issue in *Plaut* did. *Plaut*, 514 U.S. at 241–44 (Breyer, J., concurring). The dissenters' functionalist balancing led to the opposite result. They argued that retroactively reopening the judgments affected by the longer statute of limitations "merely remove[d] an impediment to judicial decision on the merits," and therefore, did not violate separation of powers principles. *Plaut*, 514 U.S. at 260–61. See Sloan, supra note 3, at 749, for a more detailed discussion of the concurring and dissenting opinions.
318. Id. at 239.
319. Id.
In the second case, *Miller v. French*, the Supreme Court upheld provisions of the Prison Litigation Reform Act (PLRA), which imposed new substantive standards for the grant of an injunction in cases challenging prison conditions using formalist analysis. At issue was a provision of the PLRA that automatically stays injunctions issued by district courts in prison litigation unless the court makes specific findings required by the Act within a prescribed period of time. Once the district court makes the necessary findings, the stay is lifted and the injunction is dissolved, modified, or continued, as appropriate.

In analyzing the separation of powers arguments, the *Miller* majority employed a fairly narrow definition of judicial power, saying that it is the power "to render dispositive judgments . . . ." The majority then focused on the temporary nature of the stay, noting that it suspends an existing injunction only when the district court fails to rule within the statutory time limit and that the injunction goes back in force when and if the district court makes the factual findings required for its continuation. Thus, the imposition of the automatic stay does not usurp the judicial function of rendering dispositive judgments; it "does not by itself 'tell judges when, how, or what to do.'"

Having determined that the automatic stay provision did not present a separation of powers problem, the majority next considered the time limit triggering the automatic stay. Courts have generally resisted statutorily imposed time limits for judicial decisionmaking.

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322. *Id.* at 331–32, 348–50.
323. This is a bit unusual. When reviewing legislation for violations of separation of powers, Supreme Court reliance on formalist reasoning generally signals that the legislation will be struck down, whereas reliance on functionalism signals that the legislation will be upheld. *E.g.*, *Mullenix*, *supra* note 279, at 1292 n.31.
325. *Id.*
326. *Id.* at 342–44 ("[B]ecause Article III 'gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy,' the 'judicial Power is one to render dispositive judgments . . . ." (citations omitted)); *Sloan*, *supra* note 3, at 753 (citing *Miller* and characterizing the majority's definition of judicial power as narrow).
328. *Id.* at 346–48 (quoting the lower court's opinion in *French v. Duckworth*, 178 F.3d 437, 449 (7th Cir. 1999) (Easterbrook, J., dissenting from the denial of rehearing en banc)).
329. When faced with statutory time limits for making decisions, federal courts typically have not invalidated the statutes, but, rather, have found creative ways to avoid direct conflicts between legislative and judicial power. For example, courts have ruled that they have the equitable power to adjust a statutory time limit, both when the statute itself does and does not provide such an exception. *Hadix v. Johnson*, 144 F.3d 925, 946 (6th Cir. 1998) (upholding the Prison Litigation Reform Act's automatic stay provision by ruling that the court had the equitable power to stay the stay, even though the statute did not provide such an exception); *United States v. Brainer*, 691 F.2d 691, 695–99 (4th Cir. 1982) (upholding
and one of the main arguments in *Miller* was that the deadline trig-
nering the automatic stay interfered with core judicial functions.\(^3\)
The majority disagreed, noting that the PLRA “does not deprive courts of their adjudicatory role, but merely provides a new legal standard for relief and encourages courts to apply that standard promptly.”\(^3\)

Viewed one way, an amended version of FRAP 32.1 runs the risk of telling courts how or what to do. It would arguably tell courts what results to reach by requiring them to follow nonprecedential opinions in limited contexts. And it would arguably tell courts how to issue opinions by requiring them to publish precedential opinions to over-

Viewed differently, however, an amended version of FRAP 32.1 is similar to the automatic stay provision in that, although it has an ef-

tect on the decisionmaking process, it does not deprive the courts of their adjudicatory role. If nonprecedential opinions gained overrul-

able status, district courts and other subsidiary tribunals would have to follow them, but these lower court decisions would be subject to ap-

peal as of right. Federal appellate panels would not be bound to follow a prior nonprecedential opinion. If they wanted to overrule a prior nonprecedential opinion, all they would have to do is follow the proce-

dure set out in the proposed rule—issue a precedential opinion—just as a district court could avoid imposition of an automatic stay under the PLRA by ruling on a prison litigation injunction within the statu-
tory time limit. If the *Miller v. French* analogy holds sway, the amended version of FRAP 32.1 arguably does survive constitutional scrutiny, even using formalist analysis.\(^3\)

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331. Id. at 350.
332. Both *Plaut* and *Miller* seem wrongly decided. Retroactively extending the statute of limitations to reopen previously dismissed claims does not interfere with the courts’ adjudicatory function but rather simply “removes an impediment to judicial decision on the merits.” *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 260 (1995) (Stevens, J., dissenting). Under the statute at issue in *Plaut*, the courts were free to allow the claims to continue or to dismiss them on the merits. It is hard to understand why the majority thought that the statute interfered with the courts’ ability to resolve individual cases on the merits because if anything, the statute allowed the courts to consider the merits of cases that otherwise would have been dismissed for being untimely. See id. at 260–61. *Miller*’s automatic stay provision seems much more intrusive because it effectively determines the merits of the claim for the court, albeit temporarily. The intrusiveness of this
It would be advisable as a matter of policy, permissible under the Rules Enabling Act, and constitutional for an amended version of FRAP 32.1 to authorize nonprecedential opinions expressly and to modify the law of the circuit rule to give those opinions overrulable status. Is it likely to happen? No. Given the vehemence of the views on both sides on citation norms alone, the battle over making these types of changes to FRAP 32.1 would be insurmountable. This is especially true because the rulemaking process is generally a consensus-based process. Even if supporters of such a change outnumbered opponents, the rulemaking process is not a likely vehicle for resolving a matter about which members of the judiciary disagree. Although such an amendment is unlikely to make it through the rulemaking process, initiating the proposal could be worthwhile; it could jump-start the conversation within the judiciary regarding uniform definition of the weight of nonprecedential opinions and could potentially spur serious consideration of creation of the overrulable category of precedent.

V. CONCLUSION

Nonprecedential opinions are here to stay in the federal appellate courts for the foreseeable future. At this point, they will be discontinued only if their issuance is determined to be unconstitutional (an unlikely prospect), if they are eliminated by federal statute or procedural rule (an even less likely prospect), or if the judicial system is significantly restructured (the least likely prospect). Instead of wringing our hands over how bad nonprecedential opinions are, it is more constructive to explore ways to minimize their negative effects. FRAP 32.1 was a good first step in that direction. But it was just a first step, and progress should not stop here. The courts should use the momentum FRAP 32.1 created to keep working to resolve the problems that nonprecedential opinions create and to institutionalize nonprecedential opinions in a way that preserves the legitimacy of the judicial system.

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provision is especially noteworthy in light of the fact that the time limit is so short that it is unclear whether a district court realistically could make the requisite findings quickly enough to avoid the automatic stay. And historically, courts have rejected time limits for decisionmaking because they interfere with the judicial function. See supra note 329 and accompanying text. Although their results seem anomalous, these modern separation of powers cases are the most likely analogues for analyzing an amended version of FRAP 32.1, and the outcome would turn on which analogy is more persuasive to the Court if it uses a functional approach.
### APPENDIX A: VARIATIONS IN LOCAL CIRCUIT RULES REGARDING NONPRECEDENTIAL OPINIONS

<table>
<thead>
<tr>
<th>Circuit &amp; Rules</th>
<th>Presumption</th>
<th>Effect of Content</th>
<th>Necessity of a Unanimous Decision in the Case</th>
<th>Nature of the Disposition</th>
<th>Process for Deciding Status</th>
<th>Procedures for Reissuance</th>
</tr>
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<tbody>
<tr>
<td>1st R. 36.0</td>
<td>For precedential opinions</td>
<td>Specific criteria for not publishing</td>
<td>Unanimous decision required</td>
<td>Nothing specified</td>
<td>All panel judges must agree with nonpublication</td>
<td>Any party or interested person, No limit, Nothing specified</td>
</tr>
<tr>
<td>2d R. 32.1</td>
<td>Neutral</td>
<td>No specific criteria based on content</td>
<td>Unanimous decision required</td>
<td>Nothing specified</td>
<td>All panel judges must agree no jurisprudential purpose is served by publication</td>
<td>No procedure specified</td>
</tr>
<tr>
<td>3d IOPs 5.1, 5.2, 5.3, &amp; 5.7</td>
<td>Neutral</td>
<td>No specific criteria based on content</td>
<td>Unanimous decision not required</td>
<td>Publication decision is independent of action (affirm, reverse, or grant other relief)</td>
<td>Majority of the panel decides</td>
<td>No procedure specified</td>
</tr>
<tr>
<td>4th R. 32.1 &amp; 36</td>
<td>For nonprecedential opinions</td>
<td>Specific criteria</td>
<td>Unanimous decision not required</td>
<td>Nothing specified</td>
<td>Author or a majority of the panel must agree that publication criteria are met</td>
<td>Parties, No limit, Reissued opinion will not be changed from original</td>
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<tr>
<td>5th R. 47.5</td>
<td>Implied for nonprecedential opinions</td>
<td>Specific criteria</td>
<td>Unanimous decision not required; opinion &quot;may&quot; be published if it has separate concurrence or dissent</td>
<td>Opinion &quot;may&quot; be published if it reverses or affirms on different grounds</td>
<td>Each panel member must determine that publication is not required or justified</td>
<td>No procedure specified</td>
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<td>6th R. 206</td>
<td>Neutral</td>
<td>Specific criteria</td>
<td>Unanimous decision not required; existence of concurrence or dissent is a factor in the publication decision</td>
<td>Reversal is a factor in the publication decision except under limited circumstances</td>
<td>Publishes upon the request of any panel member</td>
<td>No procedure specified</td>
</tr>
<tr>
<td>7th R. 32.1</td>
<td>Implied for nonprecedential opinions</td>
<td>No specific criteria based on content</td>
<td>Unanimous decision not required</td>
<td>Nothing specified</td>
<td>Nothing specified</td>
<td>Any person</td>
</tr>
<tr>
<td>8th R. 32 1A; IOP § IV(B); App 1</td>
<td>Implied for nonprecedential opinions</td>
<td>Specific criteria</td>
<td>Unanimous decision not required</td>
<td>Nothing specified</td>
<td>Panel decides, but no provision for whether that decision must be unanimous</td>
<td>Parties</td>
</tr>
<tr>
<td>9th R. 36-1, 36-2, 36-3, &amp; 36-4</td>
<td>For nonprecedential opinions</td>
<td>Specific criteria</td>
<td>Opinion is published when it has a concurrence or dissent, but only at the request of the author of a separate opinion.</td>
<td>Nothing specified</td>
<td>Nothing specified</td>
<td>Any person</td>
</tr>
<tr>
<td>Circuit</td>
<td>Neutral</td>
<td>Criteria Based on Content</td>
<td>Findings</td>
<td>Publication</td>
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<td>-----------------</td>
<td></td>
</tr>
<tr>
<td>10th R. 32.1, 36.1, &amp; 36.2</td>
<td>Neutral</td>
<td>No specific criteria based on content</td>
<td>Unanimous decision not required</td>
<td>Nothing specified</td>
<td>No procedure specified</td>
<td></td>
</tr>
<tr>
<td>11th R. 36-2 &amp; 36-3; R. 36-3 I.O.P. 5, 6, &amp; 7</td>
<td>Implied for nonprecedential opinions</td>
<td>No specific criteria based on content</td>
<td>Unanimous decision not required</td>
<td>Nothing specified</td>
<td>Majority of the panel decides</td>
<td></td>
</tr>
<tr>
<td>D.C. R. 32.1 &amp; 36</td>
<td>Neutral</td>
<td>Specific criteria</td>
<td>Unanimous decision not required</td>
<td>Opinion is published if it reverses or affirms a published lower tribunal opinion on different grounds</td>
<td>Nothing specified</td>
<td>Any person</td>
</tr>
<tr>
<td>Fed. R. 32.1; IOP 9 &amp; 10</td>
<td>Implied for nonprecedential opinions</td>
<td>Specific criteria</td>
<td>Unanimous decision not required</td>
<td>Nothing specified</td>
<td>Panel decides, but no provision for whether that decision must be unanimous</td>
<td>Any person</td>
</tr>
</tbody>
</table>

Note: The table above summarizes the significant differences among circuit rules governing nonprecedential opinions, as discussed in section III.B supra.