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The Vanishing Precedent: Eduardo Meets Vacatur

Jill E. Fisch*

I was sitting in my office, debating whether to get a second cup of coffee before preparing for class, when there was a knock at the door. I answered warily, anticipating yet another student who wanted me to "explain" why he or she had done poorly on the exam. Although the face at the door was vaguely familiar, it did not belong to one of my students.

"Rodrigo?" I asked hesitantly. I could think of no reason why Rodrigo would be coming to see me and wondered how he could have become so confused as to be not only at the wrong professor's office, but at the wrong law school.¹

"I see you are acquainted with my brother," the visitor replied. "I am often mistaken for him as he is, of course, so well known among legal academics. I am Eduardo."

"I'm pleased to meet you, Eduardo. I didn't realize there was

* Associate Professor, Fordham University School of Law. B.A., Cornell University, 1982; J.D., Yale Law School, 1985. I am indebted to Richard Delgado and Bill Eskridge for their development and analysis of the narrative form and for inspiring me to direct the use of narrative to a nontraditional setting—traditional doctrinal scholarship. This article is, however, not the first to employ the dialogic method to explore the subject of federal courts. See Henry Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362 (1953). Thanks are due to Marc Arkin, Mike Gerhardt, Dan Richman, Tony Sebok, Steve Thel, Bill Treanor, and my mother for their helpful comments on earlier drafts and to Richard Delgado both for his comments and for permission to use the Crenshaw family personae.


² The Professor, the questioner in the Rodrigo dialogues, is also a fictional character, described as "a man of color teaching in a law school located in a large American city . . . ." Delgado, Rodrigo's Eighth Chronicle, supra note 1, at 504 n.8.
another member of the Crenshaw family. What brings you here?"

"Rodrigo suggested I seek you out. I have a problem and could use your advice."

"You must be mistaking me for the Professor. I have no expertise in critical race theory or jurisprudence," I cautioned.

Eduardo smiled. "Now you must be mistaking me for my brother. Although I too am a lawyer, I am not an academic. I practice law with the Legal Services Housing Project. My office is right down the street. But my question is not about landlord-tenant law. I understand you have some expertise on the subject of vacatur."

I acknowledged that I had written on the subject.

"An interesting problem has arisen in connection with my representation of tenants in condemned buildings. I'd like your reaction. May I take a few minutes of your time?"

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3 Eduardo and Rodrigo are half brothers of Geneva Crenshaw, the fictional activist civil rights attorney described in Derrick Bell, And We Are Not Saved: The Elusive Quest For Racial Justice (1987). For personal background on Rodrigo, see Delgado, Rodrigo's Third Chronicle, supra note 1, at 587 n.1. Like his siblings, Eduardo is a fictional composite, reflecting concerns and observations expressed to me over the past several years in connection with my work on vacatur.

4 Rodrigo's discussions with the Professor have focused on critical race theory. In the past, the narrative form has been used primarily by nontraditional legal scholars speaking as outsiders to standard legal norms. See William N. Eskridge, Jr., Gaylegal Narratives, 46 Stan. L. Rev. 607, 608-09 (1994) (recounting examples and typical subject areas of narrative scholarship). For further reflections on the role of narrative in legal scholarship, see Richard Delgado, Storytelling for Oppositionists and Others: A Plea for Narrative, 87 Mich. L. Rev. 2411 (1989); Daniel A. Farber & Suzanna Sherry, The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth, 46 Stan. L. Rev. 647 (1994); Daniel A. Farber & Suzanna Sherry, Telling Stories out of School: An Essay on Legal Narratives, 45 Stan. L. Rev. 807 (1993).


6 Eduardo shares his brother's appreciation for the utility of dialogue as a form of analysis, see, e.g., Delgado, Rodrigo's Eighth Chronicle, supra note 1, at 531, to such a degree that he is willing to take the tool beyond its traditional role as a means of adding out-
"Of course," I replied. "Would you like some coffee while we talk? I'm afraid I can't offer you the Professor's espresso, but our faculty lounge has a serviceable coffee machine."

"I'd love some coffee, thank you. Black, please."

We settled back with matching mugs of strong black coffee, and Eduardo began to recount his story.

I. DEFENDING THE HOMELESS OR HOW EDUARDO ENCOUNTERS VACATUR

"For the past two years," Eduardo explained, "my office has been involved in litigation on behalf of a group of homeless tenants who are living in a condemned apartment building. In defending the tenants against government action, we have argued that the tenants, although squatters, have various privacy and property rights in their housing that the government must respect."

"Didn't I read something about this case in the *Times*?"

"Probably. Last summer we went to trial in the Southern District, and the court found in favor of our clients. The case was a significant victory for the homeless and was prominently mentioned in the press."

sider perspectives and social commentary and extend it to more traditional legal analysis. Eduardo's insight is not unprecedented. Legal scholars have valued the dialogic form for hundreds of years. See, e.g., PLATO, THE REPUBLIC (F. Cornfeld trans. 1945) (describing Socrates' use of dialogic questioning). Indeed, Socratic questioning remains the dominant educational method employed by American law schools.

7 In keeping with the Professor's urbane image, his office contains such accoutrements as a compact refrigerator and a machine that grinds beans and prepares freshly-made espresso. See, e.g., Delgado, Rodrigo's Third Chronicle, supra note 1, at 388. One commentator has read these possessions to indicate that the Professor has "sold out." See Richard Posner, *Legal Scholarship and Disciplinary Politics: Discussion*, 45 STAN. L. REV. 1671, 1680 (1993).

8 The litigation described by Eduardo is fictional although both the subject matter and the vacatur issue are based on events that have occurred in real litigation. See, e.g., Marvine Howe, *Squatters Brace as City Focuses on East 13th Street*, N.Y. TIMES, July 17, 1994, § 13, at 5 (discussing City's efforts to evict long-term squatters from city-owned buildings). For a general discussion of litigation on behalf of the right of the homeless to live on public property, see Andrea Sachs, *A Right to Sleep Outside?*, 79 A.B.A. J., Aug. 1993, at 38. For an example of an attempt to use vacatur to remove precedents important to public interest litigation, see Joint Motion to Grant the Petitions for a Writ of Certiorari, Vacate the Judgment of the Court of Appeals, and Remand with Directions to Vacate the Judgment of the District Court and to Remand the Case to the District Court for Consideration of the Parties' Settlement Agreement, Shalala v. Schoolcraft, 114 S. Ct. 902 (1994) (Nos. 92-1392, 92-1395) [hereinafter Joint Motion, Schoolcraft] (requesting Court to vacate lower court decision upholding jurisdiction of federal courts to review manner in which government evaluated claims for disability benefits); see also Schoolcraft v. Sullivan, 971 F.2d 81 (8th Cir. 1992).
"If your litigation was successful, what is the problem? Is the city refusing to comply with the terms of the decision?"

"Not at all," Eduardo replied. "In fact, following the trial court decision, various government officials met with us and worked out housing placements for the tenants. Our clients are no longer squatters, and the case has become moot. I think the government was concerned, especially in an election year, about the publicity generated by the decision. The housing officials wanted us to acknowledge publicly that the tenants' housing problem had been addressed, which we did."

"It sounds as if you were able to reach a solution that met everyone's needs," I observed.

"It seemed that way to me as well. But apparently the government does not feel that it can live with the trial court decision. The privacy rights established by our case would require the government to change its policies for treatment of the homeless in a number of different ways. Although it provided our clients with appropriate housing, the government simultaneously filed a notice of appeal. Now the government lawyers have approached me and asked if we will agree to settle the case and move to have the trial court decision vacated. I'm not sure I understand what the significance of vacatur would be or why, if the case is moot, either settlement or vacatur is necessary."

II. MAKING DECISIONS DISAPPEAR OR HOW EDUARDO LEARNS THE SIGNIFICANCE OF VACATUR

"I'm not surprised at your lack of familiarity with the practice of postsettlement vacatur," I said. "Until several years ago, postsettlement vacatur was virtually unknown in the profession. Those who were using vacatur to destroy decisions and manipulate case law were doing so in secret."

"We never talked about vacatur in law school," Eduardo admitted. "In fact, we discussed little in civil procedure other than Fed. R. Civ. P. 23, but I went to Yale you know. Where do courts

9 Similarly, in Schoolcraft the plaintiffs were awarded disability benefits while the litigation was pending. The government then argued that the case was moot in an effort to prevent the Eighth Circuit from addressing the jurisdictional issue. See Schoolcraft, 971 F.2d at 83 n.3.

10 For example, when I explained the practice of postsettlement vacatur at a conference at New York University, the audience primarily indicated surprise at its existence. See Colloquium on the Implications of Secrecy in Environmental Law, 2 N.Y.U. ENVTL. L. REV. 187 (1993) (publishing the proceedings of the Colloquium).
get the authority to vacate a final judgment?"¹¹

"The federal courts have both inherent power to vacate their own decisions and statutory power from a variety of sources such as Fed. R. Civ. P. 60(b)," I explained.

"Do you mind if I take notes on this?" Eduardo rapidly pulled out a laptop computer.

"That's really a small one," I admired.

"It’s been a time saver. So much of my practice involves fieldwork, and I see so many clients in a day that I need to keep track of things as they happen. You were talking about the courts’ power to vacate?"

"The statutes and common law suggest," I continued, “that vacatur is a means of addressing decisions that are defective or unjust, either because of the circumstances under which they were rendered or because of subsequent events. For example, Rule 60(b) allows a court, on motion, to vacate a judgment obtained by fraud or mistake.¹² Cases also suggest that vacatur is part of the court’s inherent power over its own judgments."

"Appellate courts can also vacate lower court judgments, right?" Eduardo inquired.

"Yes. The circuit courts and the United States Supreme Court both have the power to vacate lower court judgments as part of their general power of review.¹⁴ In many cases settled during the appellate process, the circuit court vacates the lower court judg-

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¹¹ A final judgment can result from a trial verdict or the resolution of a dispositive motion such as a motion for summary judgment.

¹² See Fed. R. Civ. P. 60(b) (allowing relief, on motion, from a final judgment, order or proceeding, for various reasons including fraud, mistake, newly discovered evidence, or any other reason justifying relief). The circuit courts have not reached agreement on whether Rule 60(b) permits courts to vacate sua sponte. See Clifton v. Attorney General, 997 F.2d 660, 664 (9th Cir. 1993) (discussing split in circuits).

¹³ See, e.g., Chambers v. NASCO, Inc., 501 U.S. 52, 44 (1991) (district court has inherent power “to vacate its own judgment upon proof that a fraud has been perpetrated upon the court”); In re First Fin. Dev. Corp., 960 F.2d 23 (5th Cir. 1992) (vacating own prior opinion and holding, sua sponte, for lack of jurisdiction); Tucker v. American Sur. Co., 191 F.2d 999, 961 (5th Cir. 1951) (“At common law a court has full control over its orders or judgments during the term at which they are made, and may, on sufficient cause shown amend, correct, open, or vacate such judgments.” (quoting 49 C.J.S. Judgments § 229 (1947))); Wood Bros. Constr. Co. v. Yankton, 54 F.2d 304, 309-10 (8th Cir. 1931) (discussing inherent power of court to vacate, sua sponte, judgment that is void for want of jurisdiction or procured by fraud).

¹⁴ 28 U.S.C. § 2106 (1994) provides:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review . . . .
ment. Vacatur is not limited to district court judgments; courts have been asked to vacate judgments after a circuit court decision and even after the Supreme Court has granted certiorari.15 As to the effect of vacatur, the black letter rule is that a vacated decision has no legal force or effect.16

“Vacatur makes sense if the court has rendered a defective judgment,” Eduardo observed, “such as when a litigant has defrauded the court. Under those circumstances, it also makes sense that the decision should be completely eradicated. But I don’t see how it follows that the same rules should apply if a case is mooted by settlement. Settlement doesn’t necessarily indicate any defect with the underlying judgment.17 Why should it be erased simply because the parties decide to terminate the litigation?”

“Well, the possibility of seeking vacatur when a case settled pending appeal stemmed from the Supreme Court’s decision in a 1950 case, United States v. Munsingwear,” I explained. “Munsingwear was the second action brought by the government alleging that Munsingwear had violated a price-fixing regulation. The first action had been dismissed as moot after an initial trial court judgment in favor of Munsingwear.”

“So the government decided to try again.”

“Yes. Munsingwear sought to have the second action dismissed based on the res judicata effect of the first judgment.19 In opposition, the government argued that res judicata did not apply because the first case had become moot during the appellate process.20 The Court refused to relieve the government from the res

15 See, e.g., Manufacturers Hanover Trust Co. v. Yanakas, 11 F.3d 381, 384 (2d Cir. 1993) (court asked to vacate judgment of the Second Circuit); infra notes 33-35 and accompanying text (describing settlement of Bonner Mall litigation after Supreme Court granted certiorari).


17 But see infra notes 140-47 and accompanying text (describing settlement as a possible response to an aberrational decision).


19 In the first suit, the United States sought only injunctive relief. After the trial court found that Munsingwear’s pricing complied with the regulation, the commodity in question was deregulated, and Munsingwear successfully moved the court of appeals to dismiss the case as moot. The United States then filed a second suit, covering a later time period, and sought damages for violation of the regulation. See Munsingwear, 340 U.S. at 37 (describing procedural history of litigation).

20 The cases are in conflict regarding the appropriate disposition of a case that be-
judicata effect of the judgment, holding that it could have protected itself by having the first judgment vacated when it became moot."

"That sounds more like a case about res judicata than about vacatur," Eduardo observed.

"That's true," I acknowledged. "The Munsingwear opinion contains some broad language about vacatur, however, suggesting that vacatur is the Court's normal response to a case that becomes moot during the appellate process.\textsuperscript{2} The government has recently argued to the Supreme Court that Munsingwear stands for the general proposition that a court is \emph{required} to vacate the judgment in a case that becomes moot pending appeal.\textsuperscript{2} And there are some cases in which the Supreme Court has followed that practice, although without explicitly considering its propriety.\textsuperscript{24}

"That approach seems to go too far. Aren't most cases, even those that result in a trial court judgment, ultimately resolved by settlement? And a litigant can always render a case moot by complying with the terms of the judgment.\textsuperscript{25} It's not logical to resolve moot during the appellate process. The general mootness doctrine requires dismissal unless one of several specified exceptions applies. See Kipp D. Snider, Note, \textit{The Vacatur Remedy for Cases Becoming Moot Upon Appeal: In Search of a Workable Solution for the Federal Courts}, 60 Geo. Wash. L. Rev. 1642, 1643-46 (1992) (describing exceptions to mootness doctrine). Whether the court should also vacate its own judgment, or that of a lower court, when a case becomes moot, is less clear. See infra notes 22-26 and accompanying text. In determining whether mootness compels vacatur, courts have considered variously the circumstances rendering the case moot, whether mootness occurred before or after some level of appellate review, and whether the case is "certworthy." See, e.g., Clarke v. United States, 915 F.2d 699 (D.C. Cir. 1990) (en banc); id. at 709 (Edwards, J., dissenting) (discussing whether and under what circumstances decision to vacate judgment is discretionary and distinct from finding of mootness).

\textsuperscript{21} Munsingwear, 340 U.S. at 41 (holding that government "slept on its rights" by failing to move for vacatur).

\textsuperscript{22} Id. at 39 ("The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.") (footnote omitted).

\textsuperscript{23} See Brief for the United States as Amicus Curiae Supporting Petitioner at 4, United States Bancorp Mortgage Co. v. Bonner Mall Partnership, 2 F.3d 899 (9th Cir. 1993), cert. granted, 114 S. Ct. 681 (1994) (No. 93-714) [hereinafter U.S. Amicus Brief, Bonner Mall] (arguing that federal courts are "required to grant a motion to vacate the judgment below when a case becomes moot while the process of appellate review is ongoing").

\textsuperscript{24} E.g., Great W. Sugar Co. v. Nelson, 442 U.S. 92 (1979) (per curiam); see Official Transcript of Proceedings before the Court at 48 (Oct. 12, 1993), Izumi Seimitsu Kabushiki Kaisha v. United States Philips Corp., 114 S. Ct. 425 (1993) [hereinafter Transcript, Kaisha] (indicating that the Court had not focused on the precise implications of Munsingwear for settled cases).

\textsuperscript{25} See In re Memorial Hosp., 862 F.2d 1299, 1301 (7th Cir. 1988) (finding case set-
quire vacatur in all those cases," Eduardo argued.

"Nor does that appear to be what Munsingwear held. In a subsequent decision, Karcher v. May,\textsuperscript{27} the Court held that the Munsingwear language addressed cases that become moot through 'happenstance' and distinguished them from cases in which mootness is caused by the voluntary actions of the parties."\textsuperscript{28}

"That distinction makes sense," Eduardo said. "It may be unfair to cause a party to be bound by a decision that it is prevented from challenging through no fault of its own. But litigants voluntarily give up the right to challenge a decision when they settle the case; that's simply the consequence of settlement.\textsuperscript{29} I don't understand," he continued, "the continued uncertainty about vacatur. You referred to a pending Supreme Court case. If Karcher clarifies the Munsingwear holding, why is the propriety of vacatur still before the Court?"

"There is indeed a pending case, Bonner Mall,\textsuperscript{30} in which the Court will be faced with the question of whether Munsingwear applies when a case is settled pending appeal," I responded. "The reason for the confusion is that the Munsingwear Court did not directly consider the issue of when vacatur is appropriate.\textsuperscript{31} In Karcher, the Court simply held that vacatur was not compelled by Munsingwear; it did not conclude whether vacatur should be employed as a discretionary doctrine."

\textsuperscript{26} See Penguin Books USA Inc. v. Walsh, 929 F.2d 69 (2d Cir. 1991) (where prevailing party deliberately took action causing case to become moot prior to appellate review, court would vacate district court judgment sua sponte). The court explained: "Were it otherwise, appellees could deliberately moot cases on appeal, thereby shielding erroneous decisions from reversal." Id. at 73.

\textsuperscript{27} 484 U.S. 72 (1987).

\textsuperscript{28} Id. at 83 (explaining that the "controversy did not become moot due to circumstances unattributable to any of the parties" and therefore "the Munsingwear procedure is inapplicable . . . ").

\textsuperscript{29} Accord Oklahoma Radio Assocs. v. FDIC, 3 F.3d 1436, 1439 (10th Cir. 1993) ("[s]ettlements are, by definition, attributable to the parties and not happenstance").


\textsuperscript{31} In the oral argument of Bonner Mall, Justice Scalia characterized the pending case as the first time the Court was considering the issue of vacatur upon settlement in an adversary context. See Official Transcript of Proceedings before the Court at 22-25 (Oct. 4, 1994), United States Bancorp Mortgage Co. v. Bonner Mall Partnership, 2 F.3d 899 (9th Cir. 1993), cert. granted, 114 S. Ct. 681 (1994) (No. 93-714) [hereinafter Transcript, Bonner Mall].
“Will the Court be doing that in *Bonner Mall*?” Eduardo asked.

“Possibly,” I answered. “The Court originally granted certiorari in *Bonner Mall* to consider a question of bankruptcy law. Before the case was briefed or argued to the Supreme Court, the litigants agreed to a settlement and confirmed a consensual plan of bankruptcy organization. The petitioner then advised the Court that the case was moot because of the settlement and requested that it vacate the lower court decision based on *Munsingwear*. The Court responded by asking for briefing and argument on the question of whether the rule in *Munsingwear* should be extended to cases that become moot due to voluntary settlement pending appeal.”

“So the Court is likely to decide whether vacatur is mandated when a case is settled pending appeal,” said Eduardo.

“Or at least when a case is settled after a grant of certiorari.” The Court attempted to consider the propriety of routine vacatur more broadly last year in the *Kaisha* case, I went on, “but ultimately dismissed the writ of certiorari on standing grounds, over the dissent of two Justices, without reaching

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32 See United States Bancorp Mortgage Co. v. Bonner Mall Partnership, 2 F.3d 899 (9th Cir. 1993), cert. granted, 114 S. Ct. 681 (1994) (No. 93-714). The Court was to consider the propriety of the new value exception to the absolute priority rule in bankruptcy. For a description of the litigation history in *Bonner Mall*, see David F. Pike, *Stoel Rives Attorney to Argue a “Hot” Issue of Procedure*, WASH. J., Apr. 11, 1994, at 1.


34 See *Bonner Mall*, 114 S. Ct. 1367 (1994) (directing parties to brief and argue the following question: “Should the rule announced in United States v. Munsingwear, 340 U.S. 36 (1950), extend to cases that become moot in this Court because of the voluntary settlement of the parties?”).

35 See Reply Brief of Petitioner at 3, *Bonner Mall* (No. 93-714) (arguing that the case only presents the issues of whether vacatur is appropriate for “certworthy” cases that are settled in the Supreme Court). Settlement of certworthy cases arguably presents unique policy considerations because the Supreme Court’s grant of certiorari may have indicated that the lower court decision was worthy of review. *Id.* at 11; *see also* Clarke v. United States, 915 F.2d 699, 713 (D.C. Cir. 1990) (en banc) (Edwards, J., dissenting) (distinguishing cases that become moot in the Supreme Court because further appellate review of those cases is not a matter of right); *cf.* Joint Motion, *Schoolcraft*, *supra* note 8 (requesting Supreme Court to grant certiorari for the sole purpose of vacating the lower court decisions after case was settled during the pendency of petitions for certiorari).


37 *Id.* at 428 (dismissing writ of certiorari as improvidently granted because petitioner was not a party to the appeal below).

38 Justices Stevens and Blackmun dissented from the dismissal and indicated that they considered it appropriate to reach the merits and that, on the merits, they would reverse the judgment of the Federal Circuit which had granted the motion to vacate.
the issue of vacatur."

"One thing that confuses me about vacatur," Eduardo observed, "is the jurisdiction of the courts. If settlement renders the case moot,\(^9\) as the litigants argue in *Bonner Mall*, there is no longer a case or controversy for Article III purposes.\(^40\) How then does a court have the authority for vacatur, an affirmative judicial act beyond what is necessary to resolve the ongoing litigation?"\(^41\)

"It is true that the decision on vacatur appears to be divorced from resolution of the particular litigation before the court.\(^42\) In a sense, the court is simply articulating the future consequences of its decision, an action that arguably extends beyond the proper role of the judiciary. I think that issue may be broader than vacatur, however, and depend on how you view the structural role of the judiciary with respect to lawmaking generally."

"Isn't this question analogous to that raised by retroactivity in adjudication?" Eduardo asked. "In cases in which a court applies a new rule of law prospectively, the court has similarly divorced its announcement of rules to govern future cases from the application of those rules to the case before it."\(^43\)

"I don't see the relationship."

"It's two sides of the same coin," Eduardo explained. "When a court announces a new rule of law but holds that its ruling will be purely prospective, it is announcing a principle for future litigants, not for the parties before it. When a court vacates a previous judgment, it is announcing that its prior decision will *not* be the law for future litigants, in spite of the fact that it had been applied to the parties in that case. In both cases, the court's decision

\(^9\) The settlement may also present Article III standing issues. See *infra* notes 115-30 and accompanying text.


\(^41\) The Constitution requires the federal courts to dismiss cases that become moot during the litigation process. See, e.g., *Burke v. Barnes*, 479 U.S. 361, 363 (1987) ("Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case . . . .").

\(^42\) The issues are separate so long as settlement is not conditioned on vacatur. See *infra* note 47 and accompanying text.

\(^43\) See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 547 (1991) (Blackmun, J., concurring in the judgment); *see also id.* at 548 (Scalia, J., concurring in the judgment) (questioning constitutionality of prospective adjudication under Article III).
is concerned exclusively with the future consequences of the rule of law rather than the resolution of a pending case.”

“I suppose that is true,” I admitted. “In retroactivity analysis the debate seems to be between those who view the appropriate role of courts as making the law and those, like Justice Scalia, who argue that courts should ‘find’ the law.”

“The characterization of judges as ‘discovering’ the law is actually attributable to Blackstone,” Eduardo pointed out. “Justice Scalia doesn’t go quite that far. He is simply arguing for a greater fidelity by the courts to textual analysis by calling for judges to decide cases as though they were finding the law.”

“Nonetheless your point is well taken,” I said. “Carrying the analogy through, by requesting vacatur, the litigants are asking a court to ‘lose’ the law it has previously ‘found.’”

“Put in those terms, vacatur seems like a type of precedential hide and seek,” Eduardo observed. “Allowing routine vacatur also seems inconsistent with the broader structure of adjudicative lawmaking.”

“That concern is more properly addressed to the propriety of routine vacatur than to the courts’ power to vacate. Vacatur does raise a number of interesting policy issues.”

“With respect to the courts’ power, I suppose the Article III issue can be avoided,” Eduardo mused, “by litigants with a little foresight. If the parties incorporated vacatur into the terms of the settlement agreement or conditioned settlement upon vacatur, the case would not be moot, and the court would be compelled to resolve the motion.”

“That’s exactly what the litigants did in *Nestle Co. v. Chester’s Market, Inc.*, the leading Second Circuit decision on the propri-

44 See 1 *WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND* 69 (15th ed. 1809) (expounding declaratory theory of adjudication). Although the view that judges discover rather than create the law is generally attributed to Blackstone, a similar view was expressed by Sir Matthew Hale 13 years before Blackstone was born. See *Linkletter v. Walker*, 381 U.S. 618, 623 n.7 (1965) (citing *GRAY, NATURE AND SOURCES OF THE LAW* 206 (1st ed. 1909)).

45 *James B. Beam Distilling Co.*, 501 U.S. at 549 (Scalia, J., concurring in the judgment).

46 See Brief of Respondent at 36, United States Bancorp Mortgage Co. v. Bonner Mall Partnership, 2 F.3d 899 (9th Cir. 1993), *cert. granted*, 114 S. Ct. 681 (1994) (No. 93-714) [hereinafter Respondent’s Brief, *Bonner Mall*] (characterizing request for vacatur as “asking this Court to take the law that the Ninth Circuit has ‘found’ and, through vacatur, to ‘lose’ that law so it may be found another day”).

47 756 F.2d 280 (2d Cir. 1985).
ety of postsettlement vacatur. The court in Nestle agreed that the case was not moot and reached its decision by balancing the policies implicated by the motion. Because so many settlements explicitly address the issue of vacatur," I added, "it's possible that the Supreme Court will move beyond the Munsingwear question and address at least some of the policy considerations of postsettlement vacatur."

III. SETTLEMENT TOOL OR BARGAINING CHIP? EDUARDO DEBATES THE POLICY CONSIDERATIONS BEHIND ROUTINE VACATUR

"If vacatur is discretionary, the question is whether Munsingwear should be extended to cases that are settled pending appeal. Alternatively, what standard should the courts apply in ruling on a motion to vacate?" I said. "This is the subject that has generated the broadest disagreement among the lower courts."48

"Why is there so much disagreement?" Eduardo asked.

"Primarily because the courts differ on the policy reasons for and against routine vacatur," I suggested.

"Let's talk about the policy arguments. I understand why a litigant would seek vacatur—to erase the preclusive or precedential effect of a decision with which the litigant disagrees. But why do courts condone this manipulation?" Eduardo asked.

"There are several reasons why courts allow vacatur when a case is settled pending appeal. Possibly the dominant rationale is that vacatur is seen as encouraging settlement. This is the argument espoused by the Second Circuit, which would be ruling on a motion to vacate in your case."49

"What do you mean? How can vacatur encourage settlement?"

"A number of circuit courts, like the Second Circuit, maintain extensive settlement programs at the appellate level.50 These pro-

48 See Fisch, *Rewriting History*, supra note 5, at 602-06 (describing varying approaches to motions to vacate taken by the Second, Seventh, and Ninth Circuits); see also Clarendon, Ltd. v. Nu-West Indus., Inc., 936 F.2d 127 (3d Cir. 1991) (adopting general policy against vacatur when case is settled pending appeal); *In re United States*, 927 F.2d 626 (D.C. Cir. 1991) (same); Federal Data Corp. v. SMS Data Prods. Group, Inc., 819 F.2d 277 (Fed. Cir. 1987) (favoring routine vacatur).

49 The motion to vacate when a case is settled after final judgment can be made either to the district court that rendered the decision or to the circuit court once an appeal has been filed. Fisch, *Rewriting History*, supra note 5, at 596-98.

grams are consistent with a strong policy of encouraging voluntary settlement to conserve public and judicial resources. Obviously one impediment to settlement on appeal is the adverse consequences of the lower court decision for the losing party. If the vitality of the decision can be negotiated away as part of the settlement process, it will be easier to persuade the losing party to give up its right to appeal.

"The losing litigant buys off its adversary in exchange for freedom from any collateral consequences of the decision?" asked Eduardo.

"That's right," I said. "Several circuits have adopted a policy of expressly allowing vacatur as part of the settlement process in order to encourage the settlement of cases pending appeal."

"Isn't encouraging settlement at the appellate level really a false economy?" Eduardo questioned. "If the litigants know they can routinely escape the adverse consequences of a trial court decision through post-trial settlement and vacatur, the stakes of going to trial are lower. I would think this would encourage litigants to go to trial more often."

"I've made precisely that argument myself," I agreed. "By permitting vacatur, courts are making the risk of a trial less costly, thereby reducing the incentive for early settlement. A recent study of settlement rates in California lends support to this view. Professor Stephen Barnett studied settlement rates in the California appellate courts and found that cases settled twice as often in the one appellate division that refused to grant motions to vacate when cases were settled after trial."

"And because the largest litigation expenses occur at the pretrial and trial stages, the delay in settlement until after trial is extremely costly," Eduardo observed. "So the rationale that vacatur appellate settlement programs in response to judicial policy of encouraging settlement)."


52 See Fisch, Rewriting History, supra note 5, at 635-38 (using economic analysis to argue that availability of routine vacatur encourages litigants to delay settlement).


54 This consumption of resources occurs to a substantial, albeit lesser, extent when a case is resolved by a motion for summary judgment. Current litigation practices typically involve the resolution of the majority of factual issues through pretrial procedures such as discovery. To the extent that the litigants complete discovery and resolve the case through a motion for summary judgment, that judgment is the result of substantial com-
conserves judicial resources doesn’t make sense as a reason to allow vacatur." 55

"Well, deference to the request of the litigants, when they settle a case and request vacatur, can be read more broadly than a desire to conserve judicial resources," I said. "Vacatur is also consistent with the view of litigation as a process driven by private parties for the resolution of private disputes. By denying a request to vacate in a case in which settlement is conditioned on vacatur, a court is, in a sense, forcing the litigants to continue the litigation against their wills." 56

"I understand that litigation was traditionally conceptualized as a private dispute resolution mechanism, but hasn't modern jurisprudence evolved toward a more public law model? If you look at cases like Brown v. Board of Education 57 or Planned Parenthood v. Casey, 58 the point of the litigation is to develop and enforce social norms, not to resolve the dispute in an isolated transaction."

"That certainly is one strand in the development of modern civil litigation," I acknowledged, "and I think it extends beyond so-called 'public interest' litigation. Even classically private areas of law such as tort and contract litigation are now being viewed as furthering societal goals. Toxic tort cases like asbestos litigation alter societal safety and cleanup standards, 59 for example, and

mitment of resources as well. Moreover, a case may result in the creation of multiple trial opinions and even appellate opinions prior to the completion of a trial.

55 See Benavides v. Jackson Nat'l Life Ins. Co., 820 F. Supp. 1284, 1288 (D. Colo. 1993) (The experience of "this and other district courts" demonstrates "that vacatur saves far less in circuit court resources than, by its perverse incentive for litigants to stall on settlement until after judgment, it costs the district courts and the parties.").

56 See Nestle Co. v. Chester's Mkt., Inc., 756 F.2d 280, 284 (2d Cir. 1985) (refusing to deny vacatur on the basis that it would force litigants to continue litigation they were willing to settle). There is support in other contexts for a court's power to review and reject a settlement agreement as unfair. See, e.g., FED. R. CIV. P. 23.1 (providing for court approval of settlement of shareholder derivative litigation); FED. R. BANKR. P. 9019 (providing for judicial review of settlement of claims by and against bankruptcy estates); Evans v. Jeff D., 475 U.S. 717, 727 & n.13 (1986) (discussing judicial authority to authorize class action settlements). Moreover, the courts have consistently imposed limitations on litigants' ability to control their jurisdiction through stipulation. See, e.g., Dannenberg v. Software Toolworks Inc., 16 F.3d 1073 (9th Cir. 1994) (dismissing appeal where litigants attempted, by stipulation, to convert order of partial summary judgment into final appealable order).


59 See PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 268-76 (1986) (explaining and distinguishing between public and private law approaches to toxic tort litigation); see also Cass R. Sunstein, Judicial Relief and Public Tort
products liability suits encourage manufacturers and sellers to provide safer products. One commentator has even argued that the development of public values through litigation justifies freeing courts from the traditional case or controversy limitations on their jurisdiction.61

"That seems like an extreme position," Eduardo observed.

"It also reflects only one side of the public law/private law debate.62 There’s an equally compelling argument that courts are, and should be, increasingly focusing on how to facilitate dispute resolution. The appellate settlement programs I mentioned earlier are simply one example of this trend. Look at the growth in alternative dispute resolution (“ADR”) procedures such as arbitration and mediation and the courts’ reaction to those processes.63 Courts are not simply deferring to litigants’ desire to use these tools, they are actively encouraging and in some cases mandating ADR.64 In a recent case, a court tried to force the parties to undergo a nonbinding summary jury trial as a means of inducing settlement."65

"I suppose the increasingly litigious nature of U.S. society and the scarcity of judicial resources encourage that outlook," Eduardo said. "It’s hard to understand why courts would accept a role purely as arbiters of private disputes. That characterization would seem

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61 Lee, supra note 40 (arguing that the “public values” model of litigation justifies removing constitutional perspective from mootness and recasting the doctrine as purely prudential).


63 See, e.g., Raymond J. Broderick, Yes to Mandatory Court-Annexed ADR, 18 Litig. 3 (1992) (describing development and use of court-annexed ADR programs).

64 Congress recently joined in the effort by enacting the Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended in scattered sections of 28 U.S.C.), which requires each of the federal district courts to develop plans to promote the reduction of “expense and delay” in civil litigation.

to diminish the prestige and importance of the judicial role. I would think courts would be anxious to preserve the role of the courts as lawmakers."

"In a way, arbitration and other forms of ADR do preserve that role, by separating the dispute resolution process from the traditional trial. The problem is that it tends to leave the courts operating primarily as case managers." 66

"But the emphasis on ADR should also increase the significance of cases that go to trial," Eduardo countered. "If the courts are wary of allowing the consumption of resources involved in a full trial on the merits, they should be more interested in preserving the results of that trial."

"It does seem counterintuitive for a court that wants to discourage the litigants from going to trial to allow them to erase the result of the trial so easily."

"Preserving the judgment presumably has value in obviating the need for future litigation by others," Eduardo continued.

"Absolutely," I agreed. "The doctrines of res judicata and collateral estoppel are designed to preserve judicial resources by preventing relitigation of issues that had been thoroughly aired in a prior proceeding. 67 Eliminating the preclusive effect of the judgment is one of the primary reasons for seeking vacatur. 68

"How important is the potential for preclusion in a court's determination as to whether vacatur is appropriate?" Eduardo asked.

"It depends on the circuit," I answered. "The Federal Circuit

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granted the motion to vacate in *Kaisha* over the direct objection of the third party litigant who sought to rely on the judgment.\(^{69}\) Other courts will consider the existence of third parties who will benefit from the judgment or future litigation that can be avoided through preclusion doctrines in the vacatur decision. The Ninth Circuit, for example, has enunciated a balancing test under which the interests of third parties in the preclusive effect of the judgment is one relevant factor.\(^{70}\)

"Should the courts' approach to motions to vacate really be determined by concern about preclusion?" Eduardo asked. "I mean, couldn't courts just continue to rely on vacated decisions for preclusive effect?"\(^{71}\)

"In fact, a few courts have done so,"\(^{72}\) I said. "Under current practice, however, that approach is dangerous. After all, the vacatur decision may be based on factors other than the settlement, such as a defect in the underlying decision.\(^{73}\) Current methods of
reporting frequently do not distinguish cases vacated solely as a result of settlement from cases vacated on other grounds. Thus, a court should reasonably be wary of concluding when a case has been vacated that it nonetheless offered the losing litigant a "full and fair opportunity to litigate." 

"I can see the problem with having a court rely on a decision that isn't really good law or on erroneous findings of fact," Eduardo acknowledged. "But this could be addressed by changing our methods of reporting subsequent case history to indicate when a case is vacated as a result of mootness or settlement, thereby identifying when reliance by a subsequent court is justified." 

"Even that identification process might prove unreliable," I suggested. "To what extent should a court indicate, in a decision to vacate, its reservations about the validity of the original judgment? Does a failure to record such reservations demonstrate a willingness for the verdict to have preclusive effect?"

"Presumably many cases that are settled pending appeal present legitimate appealable issues," Eduardo observed.

"But should the availability of a nonfrivolous appeal deprive the verdict of validity if the appeal process is not completed?" I asked.

"I suppose it depends upon the extent to which the verdict is defective."

"But how do we assess that?" I pressed. "For example, a court in Florida recently vacated a jury verdict in a securities fraud class action suit. Although vacatur was based on a settlement

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75 See Letter from Richard A. Givens to Matthew Cheney, Shepard's/McGraw Hill (Jan. 26, 1994) (on file with author) (suggesting Shepard's adopt a case history symbol indicating when a case has been vacated due to settlement).
76 Courts have been known to take precisely the opposite approach. For example, the vacatur order in Bankers Trust Co. v. Hartford Accident & Indem. Co., 621 F. Supp. 685 (S.D.N.Y. 1981), states that the court was vacating its judgment so Hartford could submit additional affidavits regarding Bankers Trust's motion for summary judgment. Id. In fact, the parties had settled the litigation with the understanding that the trial court would vacate its judgment based on the settlement. See infra notes 124-25 and accompanying text (describing Bankers Trust litigation).
77 See Transcript, Bonner Mall, supra note 31, at 14 (counsel for U.S. Bancorp arguing that, so long as court of appeals has not completed its review, decision of lower court is not final); id. at 28 (argument by Solicitor General that Supreme Court's grant of certiorari renders court of appeals' decision "tentative").
78 The Solicitor General urged the Supreme Court to adopt a procedure of partial review in settled cases, in which it would determine if the matter were certworthy and, if so, vacate without granting full review. See id. at 19.
agreement, the court explicitly stated in granting the motion to vacate that the jury verdict 'didn’t comply with any of the evidence' and that the defendants had reasonable grounds for appeal. Should those statements prevent a subsequent court from giving the verdict preclusive effect?

“It sounds as if there was a problem with the jury verdict,” Eduardo said.

“Possibly. On the other hand, notwithstanding its articulated reservations about the verdict, the court had previously refused to grant a new trial or a judgment notwithstanding the verdict. Although the court may have believed the verdict was defective, it may also have been influenced by the parties’ express desire to prevent the verdict from being used in a related pending case. If preclusion depends on how vacatur is labeled or whether it appears to result from a defective judgment, savvy litigants are going to attempt to control the record.”

“And I suppose the same factors that lead courts like the Second Circuit to grant initial requests for vacatur would cause them to defer to litigants’ requests regarding the subsequent designation of the case,” Eduardo admitted. “In that case, a new la-

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80 The court also issued a final judgment of vacatur in which it stated that it had “serious reservations about the award and . . . the legal rulings upon which it is based.” Final Judgment Approving Settlement and Order of Dismissal at 4, Purcell.

81 See Order on Plaintiffs’ Motion to Amend Judgment to Add Prejudgment Interest at 4, Purcell. (“This Court cannot say that the jury’s verdict was irrational or without factual and evidentiary foundation, and has accordingly denied Defendants’ motions for judgment as a matter of law and in the alternative for a new trial in prior orders.”).

82 At the time the Purcell litigation was settled, the parties were aware that the Purcell verdict might have preclusive effect in Levan v. Capital Cities/ABC, Inc. (S.D. Fla.) (No. 92-325-GIV ATKINS). The Purcell settlement agreement was conditioned on the court both vacating the judgment and jury verdict in their entirety and “decree[ing] that such verdict and judgment shall have no res judicata, collateral estoppel, or any preclusive effect whatsoever . . . .” Stipulation of Settlement at 20, Purcell.

83 An example of this deference can be found in the recent settlement of securities fraud litigation involving Miniscribe. As part of a post-trial settlement of a lawsuit involving several major defendants in the litigation, the court agreed to sign decisions indicating that the prior jury verdicts were “not supported by sufficient evidence” and “contrary to the great weight and preponderance of evidence.” Andrew Pollack, Big Defendants Settle in Miniscribe Lawsuit, N.Y. TIMES, Feb. 19, 1992, at D4. According to Pollack’s article, the judge indicated in an interview that he had acted solely out of a desire to facilitate the settlement. “I did strike the jury verdict down but only as a result of the settlement, not as an independent decision that the jury verdict was bad or anything.” Id. Notably, at the time of the settlement, there were several pending lawsuits based on the same transactions, including a shareholder suit and an action by the Securities and Exchange
beling method wouldn’t solve anything. Moreover, if we allow courts to rely on vacated decisions, aren’t we depriving the litigants of the benefit of their bargain? You just said that removing the preclusive effect of a decision was a substantial factor in many requests for vacatur.”

“That’s a fair point,” I said. “If a court is going to defer to the litigants by granting vacatur, it hardly seems appropriate to take back part of the value of the settlement by allowing the judgment to continue to have collateral effects. And if the Second Circuit is correct in believing that vacatur encourages settlement, a vacatur with reduced consequences will be less effective in achieving that objective, by making vacatur less of a ‘bargaining chip.’”

“It would be even worse if reliance on vacated decisions varied from case to case,” Eduardo warned. “With a uniform rule, parties could assess the value of vacatur as part of the settlement negotiation. How is a litigant to decide whether a settlement addresses problems such as the collateral consequences of the judgment, if the litigant cannot determine what those collateral consequences are?”

“You’re right. Inconsistent use of vacated decisions would inject additional uncertainty into the settlement process. Since uncertainty is already the most significant barrier to settlement, courts would be making settlement more difficult and defeating the rationale for permitting vacatur.”

“I suppose if reliance on vacated opinions became sufficiently widespread, vacatur would have little value to litigants considering settlement after trial. This just takes us back to the initial question

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84 See, e.g., United States v. Phillips, No. 922-6064, 1993 U.S. App. LEXIS 4643, at *6 n.2 (4th Cir. Mar. 9, 1993) (“The very purpose of vacating the district court’s order is to insure that no collateral consequences flow from an order which has escaped appellate review on the merits.”).

85 Manufacturers Hanover Trust Co. v. Yanakas, 11 F.3d 381, 385 (2d Cir. 1993) (quoting In re Memorial Hosp. v. United States Dept. of Health & Human Servs., 862 F.2d 1299, 1302 (7th Cir. 1988)).

about whether or not vacatur is desirable."

"Well, remember that the value of a judicial decision is not limited to preclusion," I said. "A judgment is a precedent, and the effect of a precedent extends beyond a particular dispute. Vacatur destroys that precedential value as well. Of course, most requests are for vacatur of trial court decisions which, although they may have preclusive effect, are of little value as precedent."

"Presumably, the value of encouraging settlement diminishes once a case has generated not merely a trial level but also an appellate decision," Eduardo observed. "I don't think you're right to dismiss the importance of trial court decisions though. Is it really true that these decisions are not valid as precedent? They're cited all the time."

87 Most courts have assumed without detailed analysis that vacatur eliminates the precedential effect of a decision. See, e.g., Izumi Seimitsu Kogyo Kabushiki Kaisha v. United States Philips Corp., 114 S. Ct. 425, 431 (1993) (Stevens, J., dissenting) (describing routine vacatur as objectionable because judicial precedents are presumptively correct and valuable and should not be eliminated at the parties' request); Manufacturers Hanover Trust Co., 11 F.3d at 384 (refusing to allow vacatur of appellate court judgment where it would allow "a party with a deep pocket to eliminate an unreviewable precedent it dislikes"); In re Memorial Hosp. of Iowa County, Inc., 862 F.2d 1299, 1302 (7th Cir. 1988) (vacatur would improperly turn a precedent into the parties' property); Loudenslager, supra note 71, at 1242-43 nn.132-35 (citing cases).

The government has also argued that vacatur renders a decision of no precedential effect. See Transcript, Kaisha, supra note 24, at 45. But see id. at 36-40 (debate during oral argument in which effect of vacated opinion was described variously ranging from persuasive authority, the equivalent of a law review article, to binding on the same district court under principles of stare decisis, to constituting the law of the circuit and binding precedent). The effect of vacatur upon the precedential effect of a decision was a primary subject of questioning during the Bonner Mall argument. See, e.g., Transcript, Bonner Mall, supra note 31, at 4-7, 21, 26-28.

88 The distinction in precedential value between trial and appellate court decisions could justify application of a different standard to requests to vacate appellate court judgments. See Manufacturers Hanover Trust Co., 11 F.3d at 385 (distinguishing between trial and appellate decisions and holding that, with respect to appellate decisions, the public interest in preserving precedent takes precedence over the interest in encouraging settlement). It would also be possible to distinguish cases that become moot in the U.S. Supreme Court due to settlement from other appellate decisions. See supra note 35 (describing effort of petitioner in United States Bancorp to distinguish "certworthy" cases).

89 See, e.g., In re Smith, 964 F.2d 636, 638 (7th Cir. 1992) (district court decisions have no precedential effect); Lee, supra note 40, at 668 n.360 (stating although there is some authority that, in the absence of higher authority, district courts should follow the decisions of other district courts within the same state, the weight of authority is to the contrary); Brief for the United States as Amicus Curiae Supporting Respondents at 25-26, Izumi Seimitsu Kogyo Kabushiki Kaisha v. United States Philips Corp., 114 S. Ct. 425 (1993) (No. 92-1123) [hereinafter U.S. Amicus Brief, Kaisha] (characterizing precedential value of district court decisions as "debatable").

90 Furthermore, many issues such as discovery disputes and other collateral orders
"A case may be cited for its persuasive or informational value without being a binding precedent," I said. "Witness the fact that lower court decisions are cited to the courts of appeals and the Supreme Court. Clearly those decisions aren't cited because they are binding authority."

"Does a decision have to be binding upon a court to constitute a precedent?" Eduardo wondered. "I suppose I'm asking how you define precedent before you discount the value of these district court opinions."

"I've always considered a precedent to be a prior decision that the court deciding a particular case must follow; so, yes, I would think a decision must be binding upon the court to be a precedent."

"But surely the issue of how binding is a matter of degree, which still makes any definition illusive," Eduardo persisted. "We know, for instance, that lower courts routinely seek to distinguish precedents that they do not want to follow. Because subsequent cases are rarely identical, the degree to which a precedent will be binding is limited only by the creativity of the decisionmaker. Moreover the Supreme Court continues to vacillate on the degree

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91 See John F. Olson et al., *The End of the Section 10(b) Aiding and Abetting Liability Fiction*, INSIGHTS, Jun. 1994, at 8 n.7 (citing circuit court decisions).

92 Any attempt to define precedent must include an examination of the values that are promoted by judicial adherence to precedent, such as finality, coherence, fairness, predictability and efficiency. See Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 748 (1988) (describing justifications for a system of adherence to precedent). A full treatment of this subject is beyond the scope of this article.

93 See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818 (1994) ("longstanding doctrine dictates that a court is always bound to follow a precedent established by a court 'superior' to it"); Monaghan, supra note 92, at 754-55 (arguing that, in some sense, a precedent must be binding upon a subsequent court, but concluding that "binding authority" is a social construct without some "immutable essence[ ]" and that the extent to which a precedent is binding depends to a large extent on the role of stare decisis).


95 See Monaghan, supra note 92, at 765-67 (discussing degree to which courts can distinguish precedents to avoid them).
to which its prior decisions can be overruled.⁹⁶ If, as Justice Mar-
shall has warned, the Court is reducing its fidelity to established
precedents,⁹⁷ it would seem to be inviting lower courts and legis-
latures to continue to challenge them."

"A number of recent scholars have gone even further and
suggested that inferior courts have no legal duty whatsoever to
obey hierarchical precedent,"⁹⁸ I acknowledged, "although I think
this is a fairly radical proposition."

"I agree. Speaking of radical, can I trouble you for more of
that excellent coffee?" Eduardo asked.

"It is a good coffee machine. When we decided to get a cof-
fee machine, we had so many debates about who would clean it
that we had to find a machine that didn't require daily mainte-
nance. The unexpected benefit was that this machine brews each
cup of coffee on request and to individual specifications."

"I like my coffee strong and high-test. I'm afraid I share my
brother's addiction to caffeine."⁹⁹ Cup in hand, Eduardo con-
tinued. "In addition to questions over the extent to which a prece-
dent is binding, I think there's a fair amount of debate over what
aspect of a decision constitutes precedent. Does the precedent
consist of the decision, the rules formulated
by
the decisionmaker,
and/or the reasons for those rules?"¹⁰⁰

"I'm afraid the coffee break threw me off," I said. "Why are
we debating the meaning of precedent?"

"I'm trying to understand the effect of vacatur on precedent,"
Eduardo explained, "and I'm having trouble with your character-
ization of vacatur as destroying the precedential value of a deci-
sion. Unlike preclusion, where a decision either is or is not bind-

⁹⁶ See, e.g., Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992); Payne v. Tennes-
⁹⁷ Payne, 111 S. Ct. at 2619, 2623 n.2 (Marshall, J., dissenting) (describing a variety
of Supreme Court decisions as "endangered precedents").
⁹⁸ See, e.g., Caminker, supra note 93, at 820-21 (describing recent academic challeng-
es to the doctrine of hierarchical precedent); Gary Lawson, The Constitutional Case Against
Precedent, 17 HARV. J.L & PUB. POL'Y 23 (1994) (claiming that fidelity to the Constitution
is more important than fidelity to precedent); Michael Stokes Paulsen, Accusing Justice:
Some Variations on the Themes of Robert M. Cover's Justice Accused, 7 J.L. & RELIGION 33, 85
(1990) (arguing that it is neither insubordinate nor improper for a lower court to repu-
date the precedent of a higher court).
⁹⁹ See Delgado, Rodrigo's Eighth Chronicle, supra note 1, at 524 (describing Rodrigo's
love of coffee).
¹⁰⁰ See Monaghan, supra note 92, at 763-67 (describing the problem of defining pre-
cedent and the implications of different approaches).
ing, precedent strikes me as a more flexible concept. This leads me to conclude that vacated decisions can still have a role in the development of the law through precedent."

"That goes back to my point that decisions have informational value as well as precedential value," I said. "The many published volumes of the Federal Supplement bear testimony to the importance of judicial decisions beyond their role as precedent. The market demonstrated by LEXIS and WESTLAW for unreported and unpublished decisions, many of which expressly lack precedential value, provides further evidence that the informational content of decisions is important."

"What exactly do you mean by informational content?" asked Eduardo.

"Judicial opinions have persuasive value, provide analysis for future courts, and explain the application of the law to future transactions. In other words, they explain the law."

"I agree that decisions provide a public value through their legal analysis," Eduardo said. "But I think the informational value of decisions extends beyond that analysis, which relates to my point about the definition of precedent. Judicial decisions announce what the law is."

"What do you mean?" I asked.

"We've already talked about the fact that courts make law, however one characterizes the process."

"Yes, and judicial precedents are the articulation of judge-made law, in the same way that statutes constitute the law that results from the legislative process," I responded.

"Under positivism that's true," Eduardo agreed. "I don't think positivism is useful for analyzing the law that results from judicial decisions. An opinion isn't constructed like a statute. It

101 Unpublished decisions are reproduced on LEXIS and WESTLAW despite court rules that, in many cases, limit or forbid their citation in subsequent litigation and deny them precedential value. See generally 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) (describing limited citation and non-publication rules in the federal courts of appeal). A trend to permit broader citation of unpublished opinions appears to be developing. See Richard C. Reuben, New Cites for Sore Eyes, A.B.A. J., June 1994, at 22 (reporting that the Tenth Circuit recently joined the Sixth Circuit as the only federal appeals courts to allow citation of unpublished opinions). This development does not, however, affect the use of such opinions as precedent. Id. (quoting Stephanie K. Seymour, Chief Judge of the Tenth Circuit, as stating that unpublished opinions "are not binding and have only persuasive authority").

doesn't have the same clear scope of application to future situations."

"But judges clearly do articulate legal rules."

"The legal rules we deduce from judicial opinions don't really come from the court's description of the rule. I think it's more accurate to describe judicial lawmaking as common law adjudication," Eduardo suggested.

"How is that different?" I asked.

"Common law adjudication involves the development of legal rules through generalization from a series of analogies. In order to find the rule applicable to a given transaction, we look at the cases to locate similar transactions. In other words, cases give us a series of discrete examples of the application of a general principle to a fact pattern. The examples themselves provide the meaning for the general rule."

"That sounds like a fairly accurate way of describing the use of precedent," I acknowledged.

"The general principle extends beyond the adjudicative process," Eduardo conceded. "The process of developing the meaning of a rule from a series of discrete examples has been explored by everyone from Wittgenstein to Sesame Street."

"Okay, let's start with the easy one. How is adjudication like Sesame Street?" I asked.

"Martha Minow, I think, is the source of this explanation." Minow explains that the little game they play on Sesame Street—'one of these things is not like the others'—exemplifies the type of analysis used by lawyers. What she means, I think, is that when we use case research to find the rule of law applicable to a particular situation we look for cases that are similar in relevant aspects to that situation. When presented by an opposing precedent, we seek to distinguish it by saying it is 'not like the others' in the relevant way."

"I remember hearing about the reference to Sesame Street. Didn't Minow discuss this in an address to the annual meeting of the Association of American Law Schools?" I asked.


104 See MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 1 (1990) (describing the game played on Sesame Street as reflecting how lawyers think).

105 Minow has used the example in several of her works, including a speech given before the Association of American Law Schools at its annual meeting on January 4,
"I don't know the exact source, but Minow's point is that legal reasoning involves reasoning by analogy," Eduardo responded. "Minow went on to consider the difficulties with this reasoning process, particularly the problem with determining when a given case was or was not 'like the others.' In other words, when does difference matter?"

"Your point then is the existence of past decisions matters, whether or not they are technically controlling, in order to provide guidance for future actors with respect to the legal consequences of their primary conduct?"

"Exactly. We develop an understanding of the rule through observing the results in a series of examples. Wittgenstein explains the process of understanding concepts in this manner throughout much of Philosophical Investigations."

"I thought you weren't an academic. I admit that I'm a little surprised to hear a legal services lawyer citing Wittgenstein."

"I am a Crenshaw, after all," Eduardo reminded me. "I was also a math major in college. For a mathematician, Wittgenstein's writing is particularly fascinating. Both his material on the meaning of language and his mathematical examples demonstrate that a series of examples can convey understanding even of concepts for which a formal rule cannot be articulated. Think about how we understand the meaning of the color 'green.' Can you define green? Not easily. But you can convey the concept of green quite readily through a series of examples."

"I don't think green is a concept."

"Okay, so I'm not as much of a philosopher as my brother," Eduardo admitted. "Let's try to avoid the quagmire of philosophical debate. The idea is that some things that are not subject to a precise definition can nonetheless be understood through examples."

"And the more examples you have, the better your understanding of the underlying concept. I see where you're going with 1991. For the text of this speech, see Martha Minow, Differences Among Difference, 1 UCLA WOMEN'S L.J. 165 (1991).

106 See generally LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans.) (Macmillan 3d ed. 1969) (explaining that our understanding of the meaning of words, rules, and other abstractions is derived from generalization about discrete events).

107 Eduardo's siblings are extremely well read and cite to such authorities with ease. See, e.g., Delgado, Rodrigo's Fifth Chronicle, supra note 1, at 1585-1605 (in which Rodrigo discusses Aristotle and Hegel).
this. If the informational content of decisions is so substantial, removing them is costly."

"Exactly," Eduardo agreed. "The problem I have with this argument is that, if the cases are relevant for their informational content rather than their technical value as precedent, vacatur seems relatively less important. Vacating a case shouldn't destroy its persuasive value. And courts frequently rely on nonbinding authorities such as law review articles for their reasoning. Finally, the opinion remains as a guide for future litigants seeking to predict how judges will decide the relevant issues."

"The same concerns that we talked about earlier regarding the use of vacated decisions for preclusion may affect a court's willingness to rely on a vacated case for its precedential and/or informational content," I replied. "A more serious concern is that vacatur is usually connected to other methods of hiding or erasing an opinion, such as depublication, withdrawal or expungement."

108 "You mean the vacated opinion actually disappears from the case reporters?" Eduardo asked.

"Precisely. If the judgment is vacated before the publication of the permanent reporter volume, there will simply be a citation in the published volume indicated that the opinion, previously published at that location in the advance sheet, has been vacated."109

"But even unpublished opinions appear on LEXIS and WESTLAW."

"Both on-line reporting services have similar policies to that of West and will usually remove110 cases that are vacated and do not

108 See Transcript, Kaisha, supra note 24, at 37 (question by Justice Ginsburg indicating that, if vacated opinion is caught in time, it will not be published in the official reporters).

109 For an illustration of this process, see the following entry in the official reporter:

EDITOR'S NOTE: The opinion of the United States District Court, S.D.N.Y., Mason Tenders Council Welfare Fund v. Akaty Construction Corp., published in the advance sheet at this citation, 724 F. Supp. 209-224, was withdrawn from the bound volume because the opinion was vacated and withdrawn by order of the Court.

724 F. Supp. 209. As this example illustrates, unless a researcher had examined (and preserved) the West advance sheets, she would be unlikely to discover that this case involved the relitigation of an issue which had been decided in an earlier lawsuit involving the same plaintiff. The prior lawsuit had also been vacated. Mason Tenders Dist. Council Welfare Fund v. Dalton, 648 F. Supp. 1309, vacated upon request of the parties, 648 F. Supp. 1318 (S.D.N.Y. 1986).

110 The on-line services have procedures for determining which cases are placed on-
appear in the official reporters. Of course, if vacatur is delayed until the case is published in the bound volume of the reporter, the opinion will remain available. But vacatur has the potential to destroy even the informational value of a case by causing it to disappear without a trace.

"So even if the Supreme Court were to decide to accord precedential value to vacated opinions, future litigants might be unable to find the relevant precedents?" Eduardo asked.

"That's right."

"I suppose litigants could also take the next logical step and provide in their settlement agreement that the motion to vacate will also seek depublication or withdrawal of any preliminary published opinion," Eduardo observed.

"If a court is willing to grant vacatur on the theory that it promotes settlement, I expect it would be equally receptive to a motion to depublish," I said.

"Isn't there a way that future beneficiaries of the decision can prevent its destruction by objecting to vacatur or intervening in the motion to vacate?"

"Courts face one obvious difficulty in ruling on motions to

line. They report that they sometimes continue to publish cases that have been vacated. See Resnik, Whose Judgment?, supra note 50, at 1497-1500 (describing publishing practices of LEXIS and WESTLAW). It is rare to find a case included on-line that has been removed from the official reporter.

111 See Fisch, Rewriting History, supra note 5, at 620 n.163 (describing the general practice whereby vacated opinions are withdrawn from the online Reporting Services (LEXIS and WESTLAW) as well as from the bound editions of the federal reporter).

112 Because vacated cases can be rendered invisible, it is impossible to determine the extent to which useful decisions are being destroyed. For example, one commentator has been misled into arguing that the relitigation costs associated with vacatur are insubstantial because of the absence of reported decisions involving relitigation. Henry E. Klingeman, Note, Settlement Pending Appeal: An Argument for Vacatur, 58 FORDHAM L. REV. 233, 249-50 (1989). As the previous example demonstrates, the destructive effect of vacatur makes this conclusion unreliable.

113 See, e.g., Oklahoma Radio Assocs. v. FDIC, 3 F.3d 1436 (10th Cir. 1993) (indicating that the parties' settlement agreement contemplated withdrawal of the court's opinion as well as vacatur).

114 Publication of federal court opinions is at the discretion of the judge rendering the opinion. The vast majority of trial court opinions are not published. See Jack B. Weinstein, Factors in Determining the Degree of Public Availability of Judicial Opinions, 2 N.Y.U. ENVT. L.J. 244 (1993) (describing publication system and factors considered by judges in publication decision). Some state systems of depublication are more elaborate. For example, the California rules of court allow the California Supreme Court to order that a lower court opinion not be published. CAL. R. CT. 976(c)(2) ("An opinion certified for publication shall not be published ... on an order of the Supreme Court to that effect."); see Fisch, Captive Courts, supra note 5, at 192 n.7 (describing California's depublication rules); Loudenslager, supra note 71, at 1239 n.100 (same).
vacate: determining the significance of the decision for future litigants. For example, the Ninth Circuit’s balancing test requires the court to consider the impact on future litigants and suggests that vacatur is improper if the decision has substantial precedential or preclusive value. But how is the court to ascertain the future value of the decision? Future beneficiaries are seldom present before the court; they may not even be aware of the decision."

“If the future parties can somehow be located, are they permitted to defend the decision’s precedential or preclusive value in the context of the court’s ruling on the motion?"

“Sometimes,” I replied. “In one fairly recent case, the Ninth Circuit allowed intervention by third parties who eventually benefited from the collateral estoppel effect of the decision. In Kaisha, on the other hand, the Federal Circuit denied Kaisha’s motion to intervene to oppose vacatur, and the Supreme Court ultimately dismissed the case for lack of standing.”

“An attempt by a third party to intervene does present an unusual standing issue,” Eduardo observed. “On one hand, the standing doctrine articulated in Lujan would seem to preclude intervention. Subsequent litigation by or against third parties would seem to be the kind of ‘conjunctural’ harm that does not give rise to a case or controversy, especially since it would be difficult for a court, in ruling on a motion to vacate, to ascertain whether its decision will actually be given preclusive effect in a later proceeding, the parameters of which have not yet been determined.”

115 This was one basis for the Second Circuit’s refusal to allow the potential interest by third parties in the preclusive value of the decision to defeat a motion for vacatur. See Nestle Co. v. Chester’s Mkt., Inc., 756 F.2d 280, 284 (2d Cir. 1985) (finding the interests of "hypothetical" future litigants to be speculative).


117 The Supreme Court found that Kaisha had failed to preserve for review the propriety of the Court of Appeals’ denial of the motion to intervene. Izumi Seimitsu Kogyo Kabushiki Kaisha v. United States Philips Corp., 114 S. Ct. 425, 428 (1993). In dissent, Justice Stevens argued that the intervention issue was fairly included in the question presented for certiorari and further, that if routine vacatur was improper, Kaisha had a sufficient stake in the outcome of the motion to vacate to justify intervention. Id. at 429 (Stevens, J., dissenting).


119 Id. at 2136 (explaining constitutional minimum of standing as including requirement that plaintiff’s injury be “actual or imminent, not conjectural or hypothetical”) (citations and internal quotations omitted).

120 Id. (“[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.”).

121 Id. (explaining standing requirement that it be “likely” as opposed to “speculative”
“Nor, since the first court cannot control the subsequent preclusion decision, does the potential harm from vacatur appear to be redressable."122 The first court cannot require a later court to apply collateral estoppel, even if it has refused to vacate,” I said.

“On the other hand, the third parties potentially affected by the decision to vacate are really more legitimate defenders of the judgment than the original litigants,” Eduardo continued.

“What do you mean?”

“A motion to vacate doesn’t present the normal adversarial situation. Instead of having one party on each side of the issue, both parties support, or at least accept, vacatur.123 Indeed, I would think that a winning litigant would be able to extract a more favorable settlement in exchange for its support of vacatur. This gives both parties an incentive to persuade the court that vacatur is desirable and leaves no one to defend the judgment.”

“In fact, I’ve heard of a case where that’s just what happened,” I agreed. “An insurance pollution case resulted in a finding that the insurance company was liable. The case was then settled and vacated.124 Through an unusual circumstance, the terms of the settlement came to light seven years later in another litigation, and it was revealed that the defendant insurance company had agreed in the settlement to pay $200,000 more than the amount of the plaintiff’s claim in order to destroy the adverse district court judgment.”

“Unfortunately, not every decision worth defending has potential preclusive value,” Eduardo went on. “Even if courts interpret the injury requirement of Lujan sufficiently broadly to grant standing to litigants seeking to preserve the collateral estoppel effect of a judgment, there won’t be anyone to defend a decision that is simply an important precedent. Intervention for that purpose

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122 Id. at 2140-42 (describing the redressability requirement of standing); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 74-75 (1978) (same).
123 Indeed, counsel for Bonner Mall acknowledged at oral argument that his defense of the Ninth Circuit decision was not based on the partnership’s future interest in the decision and that he was really arguing as a “friend of the Court.” Transcript, Bonner Mall, supra note 31, at 47-48.
would certainly be denied for lack of standing.”

“A litigant or future litigant’s interest in a precedent presumably does not constitute the type of tangible interest that gives rise to standing,” I observed. “Allowing intervention on this basis would open the courthouse doors by granting standing to nonparties for the purpose of appealing decisions with which they disagree, as well as prolonging the appellate process beyond the resolution of the dispute.”

“Suggesting that Article III would bar such claims,” Eduardo responded. “But if seeking to defend a judgment because of its precedential value is an insufficient interest to confer standing, doesn’t the converse hold true? Wouldn’t Article III prevent litigants from seeking—and courts from granting—vacatur of a settled case for the purpose of destroying its precedential effect? And isn’t the court’s order in such a case merely an advisory opinion with respect to the continuing value of the decision as precedent?”

“Put that way, vacatur seems even less defensible,” I agreed. “It really seems as if routine vacatur allows the parties to create a market in precedents. And part of the point of a system of precedent is that the parties don’t have to keep coming back to court on the same issue.”

126 See In re Smith, 964 F.2d 636, 638 (7th Cir. 1992) (discussing fact that allowing intervention by litigants simply seeking to attack or defend the precedential value of a decision would violate Article III).


128 Litigation by nonparties about the precedential value of a decision would appear to be litigation about the opinion rather than the judgment to which it is attached, because the intervenors are not aggrieved by the judgment. See Transcript, Kaisha, supra note 24, at 34 (argument by appellee distinguishing between vacating opinions and vacating a judgment); id. at 36 (question by Justice Ginsburg) (“What would the status of an opinion stripped of the underlying—of the ultimate judgment be?”); id. (answer by appellee to subsequent question by Justice Scalia) (“the precedential effect . . . comes from the judgment, not from the opinion, that the opinion is the rationale behind the judgment, but the judgment is what is the precedential effect”).

129 See New Jersey v. Heldor Indus., 989 F.2d 702, 710 (3d Cir. 1993) (Nygaard, J., concurring and dissenting) (basis of appeal or motion to vacate is an order, not an opinion; federal courts do not have the power to vacate an opinion where a party is not aggrieved by the order to which it is attached).

130 Cf. Reich v. Contractors Welding, 996 F.2d 1409, 1412-13 (2d Cir. 1993) (The Occupational Safety and Health Review Commission sought to preserve the underlying reasoning of a vacated order as valid precedent, based on its conclusion that, in spite of the vacatur which resulted from settlement, its analysis in the decision remained correct. Because the Commission’s opinion was issued after the parties had reached a settlement, the court concluded that it constituted an improper and unauthorized advisory opinion.).
“Not just the parties,” Eduardo corrected me. “Remember your point that third parties benefit from a judicial decision, both through preclusion and precedent. Presumably that means third parties can also suffer from an adverse decision.”

“Third parties can’t be bound by principles of preclusion if they weren’t a party to the lawsuit,” I reminded him.

“They could be considerably affected by an adverse precedent, though. I would think that certain litigants or industry groups who expect to contest particular issues regularly would have a substantial stake in the development of case law in their area and would be willing to pay to make that development more favorable.”

“You’re saying an industry group or institutional litigant unconnected with a particular lawsuit would get involved financially in order to control the development of case law that would affect it in the future?” I asked.

“Why not? Even if the losing litigant isn’t a repeat player and is therefore unconcerned whether the precedent remains on the books, there is nothing to preclude a third party interested in the precedent but otherwise unrelated to the litigation from contributing the money necessary to effectuate a settlement on appeal for the purpose of having the precedent vacated.”

“So you think routine vacatur would operate disproportionately to favor wealthy litigants,” I said.

“Absolutely. The legal system is already skewed in favor of the wealthy, who have greater access to the courts and to legal advice. Precedent allows those with a lesser degree of access to enjoy the benefits of legal rules. Through vacatur, those who are likely to face an issue repeatedly in litigation can eradicate or at least retard the development of unfavorable rules and then argue to the courts that the weight of authority is in their favor.”

“There is clear evidence of insurance companies purposefully using vacatur in precisely this way,” I added. “And I’m sure it is equally possible in other industries.”

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131 See Loudenslager, supra note 71, at 1242-43 (describing interest of institutional litigants in controlling the development of precedent).

132 See Marc Galanter, Why the Haves Come Out Ahead: Speculation on the Limits of Legal Change, 9 LAW & SOC’Y REV. 95 (1974) (describing litigation objectives of “repeat players” as including development of particular regime of rules as well as case-specific outcomes).

133 See Loudenslager, supra note 71, at 1242 (citing arguments used by institutional litigants about the “weight of authority”).

134 See Fisch, Captive Courts, supra note 5, at 205-07 (describing efforts of insurance industry to control development of insurance law through vacatur and related practices).

135 See, e.g., Respondent’s Brief, Bonner Mall, supra note 46, at 35 n.19 (suggesting
“Think of how interested the tobacco industry would be, for example, in maintaining a record of successfully defending all claims against it and erasing any decision imposing liability.\textsuperscript{135} By erasing and hiding any adverse decision, the industry perpetuates the myth that smoking isn’t dangerous and that tobacco companies aren’t responsible for its harms. The cost for the industry would be tiny, and the effect would be a manipulation of the judicial system.”

“Why do you consider it manipulation?” I inquired.

“Of course it is manipulation for wealthy repeat litigants to buy and sell judicial precedents,” Eduardo exclaimed. “I admit to a bias against well funded institutional litigants, because so much of my practice is based on trying to redress the damage they do to the poor and uninformed, but I don’t think I’m wrong about vacatur favoring the rich. Only a litigant with substantial funds can afford settlement and vacatur. A poor litigant unhappy with a lower court decision is forced to hope his or her appeal will be successful. Some litigants can’t even afford the cost of that appeal.”

“That’s true,” I admitted. “On the other hand, a poor litigant who is successful at the trial level may benefit from the availability of vacatur. Consider, for example, the case of George Neary, who sued the University of California and won a multimillion dollar verdict at trial.\textsuperscript{137} The case dragged on for twelve years before trial, and Neary, who was getting on in age, was tired of the litigation. When the defendants agreed to settle the case pending appeal,\textsuperscript{138} Neary was happy to agree to the settlement, which would both reduce the uncertainty of collecting, prevent him from incurring further litigation costs, and, most importantly, get him the money right away.”\textsuperscript{139}

\textsuperscript{135} See Fisch, Rewriting History, supra note 5, at 622 n.174 (describing successful track record of tobacco industry in cigarette litigation).

\textsuperscript{136} See Fisch, Captive Courts, supra note 5, at 198-99 (describing the Neary litigation); Loudenslager, supra note 71, at 1238-42 (same).
“Don’t you see how vacatur simply increases a wealthy defendant’s ability to make use of his or her leverage? The cost of litigation, the further cost and delay of the appellate process, already operate to favor the wealthy. With vacatur available, the one potential downside for a litigant who refuses to settle before trial—the risk of an unfavorable adverse judgment with consequences extending beyond the present case—has been removed. A litigant with the resources to pursue litigation can outwait an adversary, secure in the knowledge that if it goes to trial and loses, it can erase the consequences.”

“You seem to be assuming that settlement and vacatur stem from a litigant’s unjustified failure to settle promptly. Think for a moment about the counterargument,” I pressed. “Couldn’t settlement on appeal result, in part, from the fact that the lower court decision is aberrational? If the successful litigant recognizes that the victory is unlikely to survive appeal, he or she has a greater incentive to settle. Moreover, the losing litigant may be willing to pay some amount in settlement, even if the prospects on appeal look good, to avoid further litigation costs. In these cases, settlement operates as a form of compromise verdict. By allow-

140 Brainerd Currie’s famous railroad hypothetical illustrates one possible problem with maintaining erroneous judgments: the possibility that such a judgment will unfairly operate to preclude a party who has repeatedly defended itself successfully in multi-party or repeat litigation. See Brainerd Currie, Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine, 9 STAN. L. REV. 281 (1957) (describing example of litigant who, having been successful in defending twenty-five lawsuits, loses the twenty-sixth and is thereafter precluded from defending itself on the basis of offensive nonmutual collateral estoppel). To the extent that this result is unfair, the problem seems to lie primarily with the application of collateral estoppel to multiple-plaintiff lawsuits. See Michael D. Green, The Inability of Offensive Collateral Estoppel to Fulfill its Promise: An Examination of Estoppel in Asbestos Litigation, 70 IOWA L. REV. 141, 144-45 (1984) (suggesting it may be inappropriate to apply offensive collateral estoppel to asbestos litigation).

141 We might expect to be able to distinguish these compromises by the terms of the settlement. See, e.g., Transcript, Bonner Mall, supra note 51, at 10 (counsel for U.S. Bancorp characterizing settlement in which losing party “essentially pays the full amount of the judgment” as “in fact not a settlement”). But see Purcell v. BankAtlantic Fin. Corp. (S.D. Fla) (Nos. 89-1284, 89-1605, 89-1850), discussed supra notes 79-82. In Purrell, the losing party characterized the settlement as a compromise even though it had agreed to pay the full amount of the jury verdict. See Plaintiffs’ Responsive Memorandum, Levan, supra note 71, at 5-6 (characterizing settlement as a compromise because the settlement amount was substantially less than the original amount in controversy); Defendants’ Opening Memorandum in Support of Their Motion for Summary Judgment upon Magistrate Judge’s Reconsideration Thereof at 6, Levan v. Capital Cities/ABC, Inc. (S.D. Fla.) (No. 92-0325-CIV-ATKINS) (“The Stipulation of Settlement . . . calls for Levan and BFC to pay the class eight million dollars—the full amount of the damages assessed by the jury against them in the securities fraud action.”).
ing vacatur, we permit the parties not to manipulate but to rid the system of weak or erroneous cases more efficiently than through appeal."

"Why should we allow the litigants to make that judgment?" Eduardo persisted. "If litigants are unwilling to settle prior to trial because of the novelty or complexity of the issues presented, can we trust them to determine at the time of appeal that there is something wrong with the trial court's decision? It seems to be that the litigants' openness to settlement is far more likely to be influenced by resources, willingness to continue litigation, concerns about timing of any relief, and so on—like your earlier example of George Neary."

"Surely the likelihood of success upon appeal will also be a factor," I insisted.

"Even if we believe that litigants vacate only in hard cases with aberrational results, we cannot condone that process. First, I don't trust the litigants, particularly in difficult cases, to recognize an aberrational result. Would you consider the recent verdict against McDonalds aberrational?"

"You mean the case in which the jury awarded almost three million dollars in punitive damages because it found McDonalds' coffee too hot? It's certainly a weird result," I agreed.

"But does that suggest vacatur of the judgment is particularly appropriate if the parties now settle? Second, hard cases involve precisely the expenditure of time and effort that justifies preservation of the result. These are the cases in which the public informational value of the decisions is so important."

"What about the saying that hard cases make bad law?" I asked.

"Proponents of vacatur would like us to believe that." But a

142 See Washington Metro. Area Transit Auth. v. One Parcel of Land, No. HAR 88-618, 1993 U.S. Dist. LEXIS 18485, at *12 (D. Md. Oct. 22, 1993) (observing, in connection with its refusal to vacate, that "perhaps this Court erred in its interpretation or application of the law concerning severance damages, but that is a determination properly left for the Fourth Circuit, not private agreement.").

143 See, e.g., Big Jury Award for Coffee Burn, N.Y. TIMES, Aug. 19, 1994, at D5 (describing verdict); Jury Says Coffee Was too Hot, USA TODAY, Aug. 19, 1994, at 1B (same). The jury verdict was subsequently reduced by the court. See Court Refuses to Raise Award for Coffee Spill, CHI. TRIB., Oct. 14, 1994, at 3; see also Michael S. Froman, Spilled and Burned: Not Open and Shut, CHI. DAILY L. BULL., Oct. 13, 1994, at 6 (describing factors that influence jury verdicts).

144 Vacatur returns a difficult legal issue to its former state of ambiguity. This result has been defended on the basis that it is better to have an issue unresolved than re-
litigant can always argue to a subsequent court that the prior decision is unreliable. And for decisional law to develop, our system must retain the novel cases, which are often the hard cases. Vacatur is unnecessary in cases in which the result is obvious, and those cases are likely to be settled before trial anyway.”

“That’s true,” I agreed. “The reason so few civil cases go to trial is that litigation costs reduce the value of the judgment for both litigants. If the parties can agree on a range of possible outcomes, settlement is the economically efficient solution.”

“So if a case goes to trial, it is often because the litigants had very different expectations about the likely result. In that case, one side is likely to view the result as aberrational.”

“Which may be how the government views the result in your case. Speaking of your case, we should get back to it. I may be able to avoid preparing for class, but eventually I have to go teach it.”

solved incorrectly. Commentators have identified a value, however, in well-developed and predictable rules of law which is distinct from the law’s substantive content. For example, the well-developed and predictable nature of Delaware corporation law has been described as a rationale for incorporating in Delaware regardless of whether Delaware’s rules are substantively superior. See, e.g., Barry E. Adler, Financial and Political Theories of American Corporate Bankruptcy, 45 STAN. L. REV. 311, 339 (1993); Melvin Aron Eisenberg, The Structure of Corporation Law, 89 COLUM. L. REV. 1461, 1508 (1989); Jonathan R. Macey & Geoffrey P. Miller, Toward an Interest-Group Theory of Delaware Corporate Law, 65 TEX. L. REV. 469, 505-09 (1987).

145 See, e.g., Richard A. Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. LEGAL STUD. 399, 417-18 & n.27 (1973) (two parties with any common bargaining range “rarely” fail to settle); George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. LEGAL STUD. 1, 17 (1984) (“In litigation, as in gambling, agreement over the outcome leads parties to drop out.”).

146 See, e.g., Steven C. Salop & Lawrence J. White, Economic Analysis of Private Antitrust Litigation, 74 GEO. L.J. 1001, 1027 (1986) (uncertainty about the outcome of a trial makes the parties less likely to settle); Claire Finkelstein, Note, Financial Distress as a Noncooperative Game: A Proposal for Overcoming Obstacles to Private Workouts, 102 YALE L.J. 2205, 2211 (1993) (suggesting that possible explanation for low level of settlement in Chapter 11 litigation is existence of greater uncertainty about bankruptcy law); see also Lucian Bebchuk, Litigation and Settlement Under Imperfect Information, 15 RAND J. ECON. 404 (1984).

147 This leads to the question of how the parties’ expectations are affected by trial. Economists often assume that trial resolves the uncertainty associated with a novel legal position or disputed issue of fact, allowing the parties to agree on a post-trial settlement range. See Fisch, Rewriting History, supra note 5, at 635. It is possible for one or both parties, however, to view the trial court judgment as aberrational. Such an assessment is likely to affect the post-trial settlement process.
IV. FACING THE FACT OF VACATUR—EDUARDO CONSIDERS HOW TO DEAL WITH THE GOVERNMENT’S REQUEST

“I appreciate your taking all this time to talk with me about vacatur. Hopefully it isn’t at the expense of your students,” Eduardo said. “But even understanding the general principles of vacatur, I’m not sure how to respond to the government’s request.”

“Why is the government seeking vacatur of the trial court decision?” I asked. “Since the case was resolved, the government can’t be concerned about res judicata, as it was in Munsingwear. And the doctrine of nonmutual collateral estoppel doesn’t apply to the government, so the other potential litigants can’t make preclusive use of your case.”

“I think the government is primarily concerned about the influence of this decision in subsequent cases,” Eduardo mused. “You probably hit the nail on the head when you said the government views the case as aberrational. The government attorneys have repeatedly warned me that the case will not stand up on appeal.”

“Even though the case is not technically binding as precedent, it is likely to be influential because it breaks new legal ground. If the decision remains on the books, it makes it more difficult for the government to take a contrary approach in a subsequent case. The government has been extremely conscious of the difficulty of continuing to espouse legal arguments that have been rejected by the courts, and this concern has led it to become a major defender of postsettlement vacatur.”

“So the government’s request in my case is not unusual?” Eduardo asked.

“Quite the contrary. Not only does the government have substantial experience with vacatur as a litigant, but it has championed routine vacatur as an amicus in Kaisha and Bonner Mall.”

“I would have thought the government would have opposed vacatur, based on the factors we discussed earlier, as contrary to the public interest in preserving the finality of decisions and conserving judicial resources,” Eduardo said.

149 See, e.g., Stipulation [of Settlement before the District Court] at 10, Appendix to Joint Motion, Schoolcraft, supra note 8 (conditioning settlement on vacatur of lower court decisions).
"That was my initial reaction as well," I admitted. "Apparently the government’s interests as a litigant overrode any need to defend the public values threatened by vacatur. In explaining its position to the Supreme Court, the government explained that it is a party to a far greater number of cases on a nationwide basis than even the most litigious private entity."

"So the government is the classic 'repeat player,'" Eduardo responded.

"Yes, and your victory will make it harder for the government to deal with the homeless in subsequent litigation. You recognized that by characterizing your case as a significant victory not just for your clients, but for the homeless in general."

"I think that’s accurate. The case sends a message both about the rights of the homeless and the ability of the poor to prevail against the power and resources of the government. I suppose that message is what the government is trying to take away. If the decision is vacated, the government will try to proceed against other homeless people the same way it proceeded against my clients."

"That’s right," I said. "Of course, other homeless tenants could always make the same argument that you made."

"The homeless have limited legal services available to them. I think we were fortunate in being able to raise and litigate this issue successfully, but I’m not confident that the average pro bono lawyer will be able to make the case successfully with no available precedent. I would hope the existence of this decision would encourage them to try," Eduardo said.

"If you believe the issue is worth defending on behalf of the homeless, why not simply refuse to settle? You said that your original clients had already been given adequate housing, so you aren’t compelled to agree to settlement and vacatur on their account."

"If we don’t settle, the government will pursue its appeal," Eduardo explained. "My first problem with that is my reluctance to devote additional resources to a case when the needs of our

150 Alternatively, the government’s position may be defended on the basis of the value of acceding to the parties’ wishes and promoting settlement. See U.S. Amicus Brief, Kaisha, supra note 89, at 15 (arguing that vacatur promotes settlement); id. at 27 (arguing that parties’ interest in resolving dispute outweighs any public interest in the decision).


152 Professor Resnik describes the government as a “repeat player par excellence.” Resnik, Whose Judgment?, supra note 50, at 1489.
tenants have been met. It's laudable to defend cases on the grounds of principle or to make the world a better place for future claimants, but the Legal Services Center's mission is a more narrow one. Our limited resources are supposed to be devoted to addressing discrete legal problems of identifiable individuals, not to engage in pro-active rights-oriented litigation. We leave those issues for organizations like the ACLU."

"I can understand your concern with starting down that road," I acknowledged. "But here you have a readily identifiable class of potential plaintiffs who will benefit from your defense of this decision. Moreover, the bulk of resources necessary to defend this case has already been expended at the trial level. Surely defending the decision on appeal will not prove overwhelmingly burdensome?"

"Not if that were the only problem," Eduardo replied. "I also wonder if the decision will stand up on appeal. The trial court judge was a fairly liberal Carter-appointee, and I'm not sure her reasoning will be accepted by the appellate court. If the decision is reversed on appeal, the homeless will be worse off than if the decision is vacated."

"You've identified a valid concern. An adverse appellate court decision is likely to be quite damaging to your cause. In addition to its greater visibility and credibility, it will have greater precedential value, making it difficult for tenants who did not participate in the original case to raise similar challenges on their own."

"Isn't it unfair for the government to force me into this position?" Eduardo questioned.

"Well, as you've admitted, the government can always proceed with its appeal and seek reversal of the trial court decision on the merits. I assume you wouldn't view that as unfair."

"No," Eduardo agreed.

"The government is simply giving you the option of avoiding defending the decision on appeal. You might view the government as doing you a favor rather than forcing you into an unfair choice."

"So you're saying that I can't avoid vacatur unless I'm willing to devote the resources to pursuing an appeal that is both unnecessary and potentially destructive to my cause."

"That's right. This appeal is unnecessary because your clients are no longer homeless. I'd forgotten that," I mused. "Maybe you do have an alternative."

"The mootness issue," replied Eduardo, anticipating my next
thought. "I could argue that the case should be dismissed on appeal as moot and that, under *Karcher v. May*, the mootness does not result from happenstance but from deliberate actions by the government." He began typing rapidly. "If there is no settlement agreement, *Nestle* technically isn't controlling, and the court wouldn't be compelled to vacate. I think we may have something here."

"The government is likely to respond with the same arguments it made in *Bonner Mall*," I warned him. "The government has typically taken the position that vacatur is generally appropriate when a case becomes moot pending appeal, citing *Munsingwear*. According to the government, this is true even if the mootness results from the conduct of the parties."

"That reminds me, you said two Justices had dissented from the dismissal in *Kaisha*, but you never told me what they decided," Eduardo remembered. "Did they reach the merits? Is there anything in that opinion that I can use to oppose vacatur in this case?"

"I suppose I didn't think the dissent's view of the merits in *Kaisha* was too important. It's only the view of two Justices, and one of them, Justice Blackmun, is no longer on the Court."

"Where the standard set by the Supreme Court is unclear, the opinion of even a single Justice can bind the lower courts," Eduardo explained. "Remember the Third Circuit opinion in *Planned Parenthood v. Casey*? The court, in a fascinating analysis of the stare decisis effect of plurality and splintered opinions, concluded it was obligated to follow the reasoning of Justice O'Connor in the recent abortion cases, because her opinion provided the narrowest grounds necessary to secure a majority of the Court."

"True, but Justice O'Connor was part of the majority in the

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154 Id. at 12-13.
155 947 F.2d 682 (3d Cir. 1991).
157 See *Planned Parenthood*, 947 F.2d at 692-94 (describing procedure for identifying precedent from plurality and splintered Supreme Court opinions); id. at 719 (concluding that Justice O'Connor's standard represented the narrowest grounds in the majority and is therefore "at present the law of the land"); Blum v. Witco Chem. Corp., 888 F.2d 975, 981 (3d Cir. 1989) ("Although there is some awkwardness in attributing precedential value to an opinion of one Supreme Court justice to which no other justice adhered, it is the usual practice when that is the determinative opinion . . . .").
abortion cases," I responded. "The key to that reasoning is that a single Justice may issue the determinative opinion in a case, but only where he or she joins in the judgment. Justice Stevens' opinion in Kaisha is a dissent."

"But, because the majority didn't reach the merits, Justice Stevens' opinion isn't a real dissent."

"Well, for whatever it's worth, Justice Stevens did reach the merits in Kaisha. He concluded that the Federal Circuit's practice of routinely granting the parties' motions to vacate settled cases was objectionable and inappropriate."158

"Did he base his decision on the policy considerations we've discussed?" Eduardo asked.

"His discussion of the merits was only two paragraphs long," I said, "but it incorporated a number of the factors we talked about. Essentially, he came out against routine vacatur for two reasons. First, he said that the discretion of the court to vacate a judgment should only be exercised if vacatur would serve the public interest."

"Implicitly rejecting the notion that the judgment is the private property of the litigants, to dispose of as they will?" Eduardo interjected.

"Justice Stevens explicitly stated that precedents are not the property of private litigants. He went on to reject the argument that a policy of routine vacatur will encourage settlement, finding that although the availability of vacatur might affect the terms of some settlements, it was unlikely to affect the number of cases settled. He also observed, as you did, that the settlement through vacatur represents a false economy if subsequent courts have to relitigate previously decided issues."159

"Did Justice Stevens articulate standards for the lower courts to apply in ruling on a motion to vacate?" Eduardo asked.

"He didn't set forth any precise formula, but he did reject the policy of routinely granting motions to vacate. The opinion concludes with the point that the 'public interest in preserving the work product of the judicial system should always at least be weighed in the balance before such a motion is granted.'"160

"It sounds as if at least one Justice is convinced that routine

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159 Id. at 431-32.
160 Id. at 432.
vacatur is contrary to the public interest,” Eduardo speculated.

“Nonetheless, I don’t see how his opinion can be binding on lower courts,” I said, “although I admit that the Second Circuit seemed to be strongly influenced by it in its recent decision in Manufacturers Hanover Trust Co. v. Yanakas.”

“So there have been lower court decisions on vacatur since Kaisha?”

“Yes. Manufacturers Hanover was, I believe, the first case to address post-settlement vacatur after the Kaisha decision. In Manufacturers Hanover, the litigants settled their case after the Second Circuit had filed its opinion and then jointly moved for vacatur.”

“I thought the Second Circuit routinely granted such requests in the interest of encouraging settlement,” Eduardo said.

“The court distinguished Nestle on the basis that Nestle involved vacatur of a district court decision. The public interest in favor of preserving the decision is greater, the court said, when a judgment has received appellate scrutiny.”

“I can see a basis for distinguishing between vacatur of a district court decision and an appellate judgment, but I’m not sure the difference is all that great,” Eduardo reflected.

“That’s why the Manufacturers Hanover opinion is interesting. In addition to adopting a different rule for motions to vacate appellate decisions, the Second Circuit took the opportunity to expound on the public interests inherent in a judicial decision and the destructive effect of vacatur on those interests, citing Justice Stevens’ dissent in Kaisha. Although it didn’t overrule Nestle, the court’s approach in Manufacturers Hanover was almost the direct opposite.”

“That suggests there’s hope for me to get a dismissal without vacatur in my case after all,” Eduardo said eagerly. “Maybe the tide is turning even in the Second Circuit, and courts will be amenable to my argument that mootness doesn’t require vacatur of the district court opinion.”

“Given the Second Circuit’s reliance on Justice Stevens’ opinion in

161 11 F.3d 381 (2d Cir. 1993).
162 The settlement was reached prior to the issuance of the mandate; therefore, the court still had jurisdiction. Id. at 382.
163 Id. at 384.
164 See id. at 384 (citing Kaisha, 114 S. Ct. at 431 (Stevens, J., dissenting)) (arguing that allowing party with deep pocket to buy its way out of a precedent is improper use of judicial system); id. at 385 (citing Kaisha, 114 S. Ct. at 431 (Stevens, J., dissenting)) (concluding that public interest in judicial decision may outweigh interest in promoting settlement); id. (citing Kaisha, 114 S. Ct. at 431-32 (Stevens, J., dissenting)) (acknowledging that promise of judicial economy provided by routine vacatur may be illusory, again citing Justice Stevens’ dissent).
Kaisha, it may also consider his specific rejection of the government's argument that mootness automatically compels vacatur. Justice Stevens distinguished Kaisha from Munsingwear and concluded that the principles justifying vacatur upon mootness do not apply when the mootness is "achieved by purchase."

"That reasoning could be important when the Court decides Bonner Mall," Eduardo observed. "Well, you've given me plenty to work with. What time did you say your class was?"

"It started two minutes ago," I realized, looking at my watch. I frantically began to scour the office for my class notes, casebook, etc. When I looked up, Eduardo was gone.

POSTSCRIPT

Eduardo vanished as completely as a vacated decision. Reflecting later on our conversation, I thought about his characterization of routine vacatur as manipulation of the judicial system. I wondered if his distaste for judicial sanction of a system in which the litigants can buy and sell precedents was a function of his ideological views. And I wondered whether, if it reached the issue, the Supreme Court would view it with similar concern.

165 The Second Circuit stated that Munsingwear did not compel vacatur even of district court judgments when a case is settled pending appeal and characterized its holding in Nestle as an exercise of discretion. 11 F.3d at 384.
166 Kaisha, 114 S. Ct. at 431.