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MAKING DECISIONS DISAPPEAR: DEPUBLICATION AND STIPULATED REVERSAL IN THE CALIFORNIA SUPREME COURT

*Stephen R. Barnett**

I. INTRODUCTION

The California Supreme Court has embraced two modes of exercising judicial power that appear to be unique among courts in this country, if not in the world. Both procedures serve the purpose, broadly speaking, of making judicial decisions disappear. One is the court's practice of "depublishing" selected opinions of the court of appeal. The other is "stipulated reversal," endorsed by the court recently in *Neary v. Regents of the University of California*.¹ *Neary* holds that when litigants ask a court of appeal to reverse a trial court's judgment as part of a stipulation settling their case, the court ordinarily should comply with their request.²

Depublication and stipulated reversal are similar in some ways, different in others. Both practices entail nullifying the judicial act of a lower court—depublishing its opinion, reversing its judgment—without the judicial act that such a result normally requires of an appellate court: deciding a case and giving reasons for the decision. Both practices involve erasing or revising the public record of a judicial decision. Both practices are defended on grounds of judicial economy, while both are opposed as undermining the integrity of the judicial system. Chief

* Elizabeth Josselyn Boalt Professor of Law, Boalt Hall School of Law, University of California, Berkeley. I am grateful to my colleagues Preble Stolz and Einer Elhauge for acute comments; to David Moss for able research assistance; to Jerome Falk, Stephen Landuyt, Steven Mayer and Stanley Sapiro for helpful information; and, as always, to the superb reference staff of the Boalt Hall Library. All are innocent of any complicity in the opinions expressed here.

1. 3 Cal. 4th 273, 834 P.2d 119, 10 Cal. Rptr. 2d 859 (1992). Stipulated "vacatur" of trial court judgments exists in some American courts, though it is rejected by others; the United States Supreme Court has agreed to resolve the existing conflict among the federal circuits. See *U.S. Philips Corp. v. Windmere Corp.*, 971 F.2d 728 (Fed. Cir. 1992), *cert. granted sub nom.*, *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 61 U.S.L.W. 3557 (U.S. Feb. 22, 1993) (No. 92-1123); *infra* note 187 and accompanying text. A rule granting "reversal" of the trial court's judgment at the behest of the parties appears to exist only in California. See *infra* notes 116-241 and accompanying text.

2. *Neary*, 3 Cal. 4th 273, 834 P.2d 119, 10 Cal. Rptr. 2d 859.

among their differences, stipulated reversal and depublication reflect radically opposed conceptions of the purpose of courts—the purpose of resolving disputes for the parties on the one hand, of making law for society on the other.

This Article assesses separately the practices of depublication³ and stipulated reversal.⁴ In doing so it pays special attention to California Rule of Court 979, which now governs depublication, and to the *Neary* decision. The Article then appraises the major similarities and differences between the two practices.⁵

II. DEPUBLICATION

Depublication, or “decertification,” is the California Supreme Court’s practice of ordering that a court of appeal opinion, certified by the court of appeal as important enough for publication in the Official Reports under the standards of California Rule of Court 976,⁶ not be published after all and therefore not be citable as precedent.⁷ The court

3. See *infra* part II.

4. See *infra* part III.

5. See *infra* part IV.

6. California Rule of Court 976 provides in part:

(b) [Standards for publication of opinions of other courts]

No opinion of a Court of Appeal or appellate department of the superior court may be published in the Official Reports unless the opinion:

(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;
 (2) resolves or creates an apparent conflict in the law;
 (3) involves a legal issue of continuing public interest; or
 (4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.

(c) [Publication procedure]

(1) [*Courts of Appeal and appellate departments*] An opinion of a Court of Appeal or an appellate department of the superior court shall be published if a majority of the court rendering the opinion certifies, prior to the decision’s finality in that court, that it meets one or more of the standards of subdivision (b).

(2) [*Supreme Court*] An opinion certified for publication shall not be published, and an opinion not so certified shall be published, on an order of the Supreme Court to that effect.

CAL. R. CT. 976(b)-(c).

7. California Rule of Court 977(a) provides that, with certain exceptions, an unpublished opinion “shall not be cited or relied on by a court or a party in any other action or proceeding.” The terms “depublishing” and “decertification” are used interchangeably, though the overtones differ. “Decertification,” which sounds antiseptic, traditionally has been preferred by the court; “depublishing,” which rings of Orwell, is favored by opponents of the practice. (I am indebted to Preble Stolz for this observation.) “Depublishing” has been the more common usage, and even the court now appears to have thrown in the towel; while “decertification” formerly could be called, by virtue of the “certification” procedure in Rule 976, *see supra* note 6 and accompanying text, “the term derived from the language of the Rules of Court,”

takes this action without hearing the case or giving reasons, but also without affecting the result; despite depublishment of the opinion, the *decision* of the court of appeal stands. Begun in 1971 with three depublishment orders,⁸ the practice reached a high of 142 depublished opinions in 1988-1989⁹ and has now receded to about 100 per year.¹⁰ This is still more cases than the supreme court decides each year by signed written opinion.¹¹ Depublishment thus is a major way in which the California Supreme Court shapes California's law.

Until the adoption of Rule 979 in 1990, the purpose and meaning of a depublishment order commanded a certain consensus. It was clear, and still is, that the supreme court in issuing such an order is not disagreeing, except in the rarest case, with the court of appeal's judgment that the opinion meets the Rule 976 standards for publication.¹² Rather, as then-Justice Joseph R. Grodin wrote in 1984 (confirming earlier explanations by the late Chief Justice Donald R. Wright¹³ and then-Chief Justice Rose Elizabeth Bird),¹⁴ the court, in the "vast majority" of cases, orders depublishment "because a majority of the justices consider the opinion to be wrong in some significant way, such that it would mislead the bench and bar if it remained citable as precedent."¹⁵ Justice Grodin added that depublishment was most frequently used when the court considered the result correct "but regard[ed] a portion of the reasoning to be wrong or

Joseph R. Grodin, *The Depublishment Practice of the California Supreme Court*, 72 CAL. L. REV. 514, 514 n.1 (1984), the new Rule 979, adopted in 1990, is titled "Requesting Depublishment of Published Opinions" and uses that term exclusively. CAL. R. CT. 979; see *infra* note 62.

8. See Julie H. Biggs, Note, *Decertification of Appellate Opinions: The Need for Articulated Judicial Reasoning and Certain Precedent in California Law*, 50 S. CAL. L. REV. 1181, 1200 (1977).

9. See Gerald F. Uelmen, *Mainstream Justice*, CAL. LAW., July 1989, at 37, 40.

10. See Gerald F. Uelmen, *Plunging into the Political Thicket*, CAL. LAW., June 1992, at 31, 34 [hereinafter Uelmen, *Plunging*]; Gerald F. Uelmen, *The Disappearing Dissenters*, CAL. LAW., June 1991, at 35, 39 [hereinafter Uelmen, *Disappearing Dissenters*].

11. Uelmen, *Plunging*, *supra* note 10, at 33; Uelmen, *Disappearing Dissenters*, *supra* note 10, at 37.

12. See Grodin, *supra* note 7, at 514.

13. See Biggs, *supra* note 8, at 1185 n.20, which quotes retired Chief Justice Wright: With few exceptions, the only opinions which are ordered to be nonpublished are those in which the correct result has been reached by the court of appeal but the opinion contains language which is an erroneous statement of the law and if left on the books would not only disturb the pattern of the law but would be likely to mislead judges, attorneys and other interested individuals.

Id.

14. Chief Justice Rose Elizabeth Bird, Address before the Conference of Delegates at the State Bar Convention in San Francisco, California (Sept. 10, 1978), in *Report*, L.A. DAILY J., Oct. 6, 1978, at 4, 8 (speaking of depublished opinions as ones "with which the court does not agree" and as "erroneous ruling[s]").

15. Grodin, *supra* note 7, at 514-15.

misleading," though "[t]here are times . . . when the supreme court considers the result to be wrong as well."¹⁶ (Such times seem not so rare, given the court's common practice, when faced with conflicting decisions among courts of appeal, of depublishing the opinions decided one way while leaving the opposing ones on the books.)¹⁷ Prior to adoption of Rule 979, then, an observer could write that "everyone is aware" that a depublishation order means "a rejection by the supreme court of some significant aspect" of a court of appeal opinion.¹⁸

Whether everyone can still be aware of that is not so clear. Rule 979(e) provides that an order depublishing a court of appeal opinion "shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion."¹⁹ The impact of this rule on the meaning and effect of depublishation will be considered presently.²⁰ It remains clear, in any event, that depublishation eliminates the opinion as a citable precedent.

In these days of overloaded supreme court dockets and proliferating appellate case law, depublishation would seem to have signal attraction for a state supreme court. When presented with a court of appeal opinion it considers wrong in result or reasoning, the supreme court can zap the opinion by way of depublishation with a much smaller expenditure of judicial resources than would be required to hear and decide the case and produce an opinion joined by a majority of the court. The court is thus enabled to provide the lower courts with more "guidance for the development of the law"²¹ than it could if limited to the traditional choice of either hearing and deciding the case or denying review and letting it

16. *Id.* at 522. Chief Justice Wright discounted the "wrong result" cases further as "few exceptions." See *supra* note 13. Chief Justice Bird was more ambiguous, speaking of depublishation generally as involving cases in which the supreme court "does not agree" with the depublished opinion or "erroneous ruling[s]." Bird, *supra* note 14, at 8.

17. See, e.g., *People v. McClanahan*, 7 Cal. App. 4th 1712, 1719 & n.3, 281 Cal. Rptr. 2d 847, 851 & n.3 (1991), *aff'd*, 3 Cal. 4th 860, 838 P.2d 241, 12 Cal. Rptr. 2d 719 (1992); *People v. Dee*, 222 Cal. App. 3d 760, 762, 272 Cal. Rptr. 208, 209 (1990); Robert S. Gerstein, "Law by Elimination: Depublishation in the California Supreme Court," 67 JUDICATURE 293, 297 (1984); Grodin, *supra* note 7, at 521; see also Philip L. Dubois, *The Negative Side of Judicial Decision Making: Depublishation As a Tool of Judicial Power and Administration on State Courts of Last Resort*, 33 VILL. L. REV. 469, 501 (1988) (finding depublished opinions similar to published ones by tests that might indicate misstatements of law, but nearly four times more likely than published opinions to have dissents).

18. Gerstein, *supra* note 17, at 297; see also Jerome B. Falk, Jr., *Summary Disposition: An Alternative to Supreme Court Depublishation*, 5 CAL. LITIG. 35, 38 (1992) (referring to "a judgment . . . discredited by depublishation").

19. CAL. R. CT. 979(e).

20. See *infra* notes 59-104 and accompanying text.

21. Grodin, *supra* note 7, at 522.

stand. Judged by the test of efficiency, depublishing may seem a marvelous judicial innovation, an answered prayer for the supreme courts of California and other states.

One therefore must wonder, inasmuch as the California Supreme Court has been depublishing cases for more than twenty years, why no other state supreme court appears to have adopted the practice.²² In other fields, the California court has been a leader for the nation, and one can think of few examples that other state supreme courts would like more to follow than one enabling them to amplify their judicial efficiency. Why have other courts not followed California's breakthrough? There are, I submit, good reasons, rooted in the difficulty of reconciling depublishing with some of the basic principles governing the role of the courts.²³

A. *Depublishing and Dispute Resolution*

1. Depublishing as an overstepping of judicial power

The deepest objection to depublishing is that it exceeds the judicial power, specifically "[t]he judicial power of this State" vested in California's courts by Article VI, Section 1, of the California Constitution.²⁴ The judicial process, and appellate adjudication in particular, have two basic functions: (1) resolving disputes between litigants; and (2) establishing legal rules to guide society as a whole and future judicial decisions.²⁵ Dispute resolution is the more distinctive function of courts—distinguishing them from legislatures, for example—and a defining function. *Courts decide cases*. For the federal courts, this limit on judicial power is embodied in the "case or controversy" requirement of Article III of the

22. See, e.g., Dubois, *supra* note 17, at 472 (stating that California Supreme Court is only court with discretionary jurisdiction that has power to depublish opinions of courts of appeal); Philip Carrizosa, *Making the Law Disappear*, CAL. LAW., Sept. 1989, at 65, 66 (same).

23. Cf. Dubois, *supra* note 17, at 479 (California experience with depublishing, on one view, "should be of broad interest to states considering methods to relieve their overburdened state supreme courts by raising 'the question of whether proposals intended to make the courts work more efficiently are not in effect creating a new form of "Lawmaking"'" (quoting Gerstein, *supra* note 17, at 298).

24. "The judicial power of this State is vested in the Supreme Court, courts of appeal, superior courts, municipal courts, and justice courts." CAL. CONST. art. VI, § 1.

25. See, e.g., PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 3 (1976) ("On the one hand, appellate justice is preoccupied with the impact of decisions on particular litigants, but on the other it is concerned with the general principles which govern the affairs of persons other than those who are party to the cases decided."); MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW 7 (1988) ("The function of resolving disputes faces toward the parties and the past. The function of enriching the supply of legal rules faces toward the general society and the future.").

Federal Constitution.²⁶ The California courts likewise recognize and apply the "case or controversy" requirement as a condition of the judicial power conferred on them by Article VI of the California Constitution.²⁷

26. U.S. CONST. art. III; see *Muskraat v. United States*, 219 U.S. 346, 356 (1911); see also GERALD GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 1590 (12th ed. 1991) (United States Supreme Court, "after all, only acts as an organ of constitutional elaboration because it is a *court*, a judicial body deciding cases").

27. See, e.g., *Arrieta v. Mahon*, 31 Cal. 3d 381, 386, 644 P.2d 1249, 1252, 182 Cal. Rptr. 770, 773 (1982) (discussing "[t]he question whether this case satisfies the 'case or controversy' requirement" and citing both Article VI and Article III, § 1, of the California Constitution; Article III, § 1 provides that "[t]he State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land"); *Neary v. Regents of the Univ. of Cal.*, 3 Cal. 4th 273, 282, 834 P.2d 119, 124, 10 Cal. Rptr. 2d 859, 864 (1992), *quoted infra* note 30. In terms of constitutional text, the "case or controversy" requirement of the Federal Constitution's Article III has sometimes been equated with the jurisdiction over "causes" conferred on the California Supreme Court by Article VI of the California Constitution. See CAL. CONST. art. VI, § 12(b) (supreme court "may review the decision of a court of appeal in any cause"); *id.* § 12(a) (authorizing supreme court to transfer "a cause" either to itself or to another court). Thus, "[t]he jurisdiction of United States courts is restricted to 'cases' and 'controversies.' The California courts are given jurisdiction over 'causes.'" *City of Carmel-by-the-Sea v. Young*, 2 Cal. 3d 259, 275, 466 P.2d 225, 237, 85 Cal. Rptr. 1, 13 (1970) (Mosk, J., dissenting) (citations omitted), *quoted in* BERNARD E. WITKIN, *MANUAL ON APPELLATE COURT OPINIONS* 165 (1977). But the California Supreme Court also has applied the "case or controversy" requirement—as a matter of California law, not as a federal question—directly, as in *Arrieta*. In doing so, moreover, the court relied in part on Article III, § 1 of the California Constitution, thus reinforcing the concept that the "case or controversy" requirement of the United States Constitution applies to the California courts. *Arrieta*, 31 Cal. 3d at 386, 644 P.2d at 1252, 182 Cal. Rptr. at 773; see also *People ex. rel. Lynch v. Superior Court*, 1 Cal. 3d 910, 912, 464 P.2d 126, 127, 83 Cal. Rptr. 670, 671 (1970) (citing Article III, § 1, as well as Article VI, for holding that "[t]he rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court").

In addition to conferring jurisdiction only over "causes," earlier versions of the California Constitution—whose substance recent amendments have evinced no intention to change—specified that the supreme court's power was to "hear and determine" those causes. Article VI, § 2 of the 1849 constitution gave each department of the supreme court "the power to hear and determine causes" (and indicated that the court's power when sitting en banc was the same). CAL. CONST. art. VI, § 2, *repealed by* CAL. CONST. art. VI, §§ 1, 12. The repealing amendment of 1966 was part of an extensive, noncontroversial revision based on recommendations of the California Constitution Revision Commission. See CAL. CONSTITUTION REVISION COMM'N, *PROPOSED REVISION OF THE CALIFORNIA CONSTITUTION* 84 (1966) [hereinafter *COMMISSION REPORT*]; *PROPOSED AMENDMENTS TO THE CONSTITUTION* 1-2 (George H. Murphy comp., 1966) [hereinafter *BALLOT PAMPHLET*]. Nothing in the legislative counsel's ballot analysis, the ballot arguments, or the commission's report suggested any intent at that time to alter the scope of the supreme court's jurisdiction. To the contrary, the commission stated with regard to the proposed provision that is now Article VI, § 12(a), authorizing the supreme court to transfer causes: "Portions of the existing Constitution allow the Supreme Court to transfer causes to or from itself for 'hearing or decision' and the Commission language preserves this power." *COMMISSION REPORT, supra*, at 92. Hence it is arguable that the California Supreme Court has power only to "hear and determine" causes (or to transfer them for that purpose)—not to make law without affecting the "determin[ation]" of a "cause."

Although California's "case or controversy" jurisprudence on the issue of standing may not coincide fully with decisions of the United States Supreme Court,²⁸ the judicial power of the California courts appears wholly congruent with that of the federal courts in being limited to the adjudication of "actual controversies," as opposed to the rendering of advisory opinions or other rulings that have no effect in deciding a dispute between litigants.²⁹ Thus, the California Supreme Court has held it "settled" that

[T]he duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.³⁰

Depublication, while it serves the courts' function of making law for the future, cannot be squared with dispute resolution as a defining attribute of judicial power. When the supreme court depublishes a court of appeal opinion, it resolves no dispute, since the appellate court's decision

28. A difference may lie in the "taxpayer suits" authorized by California Code of Civil Procedure § 526a. *See Blair v. Pitchess*, 5 Cal. 3d 258, 269, 486 P.2d 1242, 1250, 96 Cal. Rptr. 42, 50 (1971) ("[W]e conclude that if an action meets the requirements of section 526a, it presents a true case or controversy."); *see also Arrieta*, 31 Cal. 3d at 387, 644 P.2d at 1253, 182 Cal. Rptr. at 773 (adhering to rule announced in *Blair*); *Van Atta v. Scott*, 27 Cal. 3d 424, 447, 613 P.2d 210, 222, 166 Cal. Rptr. 149, 161 (1980) (stating that § 526a provides citizen's remedy for controlling illegal activity by government).

29. *Cf. In re Stewart*, 10 Cal. 3d 902, 908, 519 P.2d 568, 571, 112 Cal. Rptr. 520, 523 (1974) (Mosk, J., concurring), *cert. denied*, 419 U.S. 1111 (1975). Justice Mosk stated:

[Prospective overruling] results in rendering a mere advisory opinion, a procedure foreclosed to this court. . . . We may act only if there is . . . a justiciable issue involving rights or duties of the parties to the litigation. Where we purport to vindicate the position of the litigant, and then arbitrarily refuse to apply the rule of law to the very litigant involved, a mere advisory opinion emerges; it *decides* nothing.

Id.

30. *Paul v. Milk Depots, Inc.*, 62 Cal. 2d 129, 132, 396 P.2d 924, 926, 41 Cal. Rptr. 468, 470 (1964) (quoting *Consolidated Vultee Aircraft Corp. v. UAW*, 27 Cal. 2d 859, 863, 167 P.2d 725, 727 (1946), which in turn quoted a United States Supreme Court decision, *Mills v. Green*, 159 U.S. 651, 653 (1895)). The court also has recently declared, quoting a United States Supreme Court decision: "[T]he real value of the judicial pronouncement—what makes it a proper judicial resolution of a "case or controversy" rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*" *Neary v. Regents of the Univ. of Cal.*, 3 Cal. 4th 273, 282, 834 P.2d 119, 124, 10 Cal. Rptr. 2d 859, 864 (1992) (quoting *Hewitt v. Helms*, 482 U.S. 755, 761 (1987)); *see also Coleman v. Department of Personnel Admin.*, 52 Cal. 3d 1102, 1126, 805 P.2d 310, 314, 278 Cal. Rptr. 346, 360 (1991) (court lacks power to render advisory opinions); WITKIN, *supra* note 27, at 165 ("It is a basic assumption of our adversary system that neither a trial nor an appellate court will consider or decide questions of law, no matter how important, unless they arise in the course of a justiciable controversy calling for determination of rights of particular adversary parties.").

stands. The same is true, to be sure, when the supreme court simply denies review of a court of appeal decision. The additional act of depublishation, however, makes law—if only by eliminating the appellate opinion as a citable precedent—and the law thus made is not supported by the decision of any case. It shares no ground with the appellate decision left standing; rather, it impeaches that decision. For a California court thus to make law without deciding a case seems beyond the “judicial power” conferred by Section 1 of Article VI of the state constitution.³¹

The supreme court finds its authority for depublishation in the “publication clause” of Section 14 of Article VI. That clause requires the legislature to

provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate.³²

31. It may be argued that the supreme court's depublishation of a court of appeal opinion is no different, as a matter of judicial power, from a decision by the court of appeal under Rule 976 not to publish one of its opinions in the first place (or from the supreme court's depublishing of a court of appeal opinion for failure to meet the Rule 976 standards, if that ever happens). See *supra* notes 6-7, 12 and accompanying text. The key difference lies in the court's intent. When a court decides not to publish an opinion (or to depublish one) because it fails to meet the standards of Rule 976, the court (if applying those standards in good faith) is deciding only how “important” the opinion is, and decides nothing about the substantive merits of the opinion or about what the law is or should be. The court is making a managerial or housekeeping decision, not a law-making one. The existing depublishation decisions of the supreme court, in contrast, are based on disagreement with some aspect of the selected opinion and are designed to make law, at least by purging that opinion from the body of precedent. It is only the courts' power to make law—not their managerial or housekeeping power—that depends on their function of deciding cases. There is an additional difference in law-making impact. An opinion that is not published (or that hypothetically is depublished) for failure to meet the Rule 976 standards is less important, by definition, than an opinion certified by the court of appeal as meeting those standards and depublished by the supreme court for reasons of substance. Depublishation, as practiced by the court, thus has a greater impact on the law than does Rule 976 nonpublication, besides having a different intent—an intent to make law.

32. CAL. CONST. art. VI, § 14. Each depublishation order cites Article VI, § 14. See, e.g., *John S. v. Mark K. (In re Adoption of Michael H.)*, No. SO28855, California Supreme Court Minutes 17 (Dec. 31, 1992), in 6 California Official Reports (Mar. 4, 1993 Advance Sheets); Biggs, *supra* note 8, at 1184. See also Grodin, *supra* note 7, at 514 n.1 (“Depublishation is authorized by the California Constitution, article VI, § 14 . . .”). Depublishation orders also cite Rule 976, which states that an opinion certified for publication by a court of appeal “shall not be published . . . on an order of the Supreme Court to that effect.” CAL. R. CT. 976(c)(2); see, e.g., *John S.*, California Supreme Court Minutes at 17. Of course, a rule cannot expand the constitutional power of the court.

Section 68902 of the Government Code also is sometimes cited as authority for depublishation; it provides that such appellate opinions “as the Supreme Court may deem expedient shall be published in the official reports.” CAL. GOV'T. CODE § 68902 (West 1976). This language was added in 1963, at the request of the Judicial Council, in order to limit the publication of appellate opinions; Rule 976, setting forth standards for identifying opinions worthy of publication, also was adopted in 1963. See 38 CAL. STATE B.J. 706 (1963); Gerstein, *supra* note 17,

Read literally, this language is ambiguous. It tells the legislature and the supreme court to provide for the "publication" of opinions; arguably it does not authorize the subsequent and selective *depublication*, on substantive grounds, of opinions otherwise "deem[ed] appropriate" for publication. The term "appropriate," moreover, may or may not encompass law-making as well as housekeeping determinations.³³ Given the ambiguity, one looks to the context and history of the clause, and the supreme court's reading then seems doubtful. The court is claiming that Section 14 of Article VI expands the "judicial power" conferred by Section 1 of Article VI—that it severs the bond between judicial law making and the decision of cases. Section 14 would appear, however, to be a housekeeping measure in support of the traditional judicial power—a way to get the opinions of the appellate courts published—rather than a warrant for a new form of judicial law making. Nothing in the structure or history of Article VI supports such a bootstrap view of the publication clause. The clause has been in the California Constitution since 1904,³⁴ while *depublication* did not begin until 1971. It would seem strange if, after sixty-four years, the meaning of this mundane language had suddenly expanded to confer on the supreme court a new kind of law-making power, a power exceeding the "judicial power" granted by the rest of Article VI.³⁵ The constitutionality of *depublication* under Article

at 295; Robert A. Seligson & John S. Warnlof, *The Use of Unreported Cases in California*, 24 HASTINGS L.J. 37, 45-46 (1972). Standards such as those embodied in Rule 976 had been "approved by the Supreme Court and submitted to legislative committees considering the amendment" to the Government Code as "the elements of an understanding with the Legislature as to opinions to be published." CAL. STATE B.J., *supra*, at 706-07. Thus, while a statute in any event cannot expand the judicial power granted by the constitution, Government Code § 68902 not only was intended to establish general standards for publication—and not any practice of selective, substantive *depublication*—but apparently represented "an understanding" to that effect between the supreme court and the legislature.

33. See Winslow Christian & Molly T. Tami, 'Law By Elimination', CAL. LAW., Oct. 1984, at 25 ("[I]t can reasonably be argued that the constitution contemplated some regular provision for publication, not the existing case-by-case review of an issuing court's decision to publish.").

34. See Seligson & Warnlof, *supra* note 32, at 37, 44.

35. The 1966 constitutional amendment moved the publication clause to the present § 14 from the prior § 16. See BALLOT PAMPHLET, *supra* note 27, at 21, 24. Nothing in the legislative counsel's analysis, the ballot arguments or the proposal of the California Constitution Revision Commission on which the amendment was based indicates any intent at that time to broaden the clause's meaning. See COMMISSION REPORT, *supra* note 27, at 92; BALLOT PAMPHLET, *supra* note 27, at 1-2. The Commission stated: "The purpose of the paragraph is to require the Legislature to make available those court opinions certified by the Supreme Court for publication," COMMISSION REPORT, *supra* note 27, at 92—hardly a suggestion that the paragraph harbored a warrant for a new practice of *depublication*.

VI will be considered further after examining other aspects of the practice.³⁶

2. Depublication as denial of a reasoned decision

Although a depublication order does not affect the result of the case in which it is issued, in one respect it does affect the parties to that case. By discrediting the court of appeal's opinion, the order arguably deprives the parties of a reasoned decision, which is another defining attribute of the judicial process.³⁷ The California Constitution requires that appel-

36. See *infra* notes 105-15 and accompanying text. A defense of the constitutionality of depublication might point to the practice, engaged in sporadically by the California Supreme Court from 1905 to the mid-1940s, of accompanying an order denying a petition for review with a memorandum opinion "commenting" on the opinion of the court of appeal. See Grodin, *supra* note 7, at 525; Leonard D. Dungan, Comment, *Courts: Significance of the Practice of the California Supreme Court of Commenting on the Opinion of the District Court of Appeal When Denying a Hearing After Judgment*, 28 CAL. L. REV. 81 (1939); see also REPORT OF THE CHIEF JUSTICE'S ADVISORY COMMITTEE FOR AN EFFECTIVE PUBLICATION RULE 24-26 (1979) (condemning depublication and recommending revival of this practice). Justice Grodin has described the verbal formulae used by the court under the "commenting" practice as including statements that the court "withheld its approval" of all or part of the opinion." Grodin, *supra* note 7, at 525. If the practice did encompass disapproval of "all" of the court of appeal's opinion, it would to that extent seem subject to the same objection—against law making divorced from the decision of any case—that I have leveled against depublication. In that event, the endurance of the "commenting" practice for some 40 years—albeit over the repeated constitutional objection of one justice, see, e.g., *Wires v. Litle*, 27 Cal. App. 2d 240, 245, 82 P.2d 388, 389 (1938) (Houser, J., concurring)—might be cited to support the legitimacy of depublication.

In fact, however, the "commenting" practice did not include the court's withholding its approval of, or otherwise casting doubt on, all of the opinion below. All the verbal formulae used by the court, as catalogued in Dungan, *supra*, at 88-91, targeted only a portion of the court of appeal's opinion. See also Roger J. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 216 (1957) (stating that commenting practice involved "withholding approval of erroneous dicta or erroneous alternative grounds of decision"). As thus limited, the commenting practice avoids the charge of overstepping judicial power. The portion of the court of appeal opinion exempted from the supreme court's negative comment stands as law—and as citable precedent—and supports the court of appeal's decision that the supreme court declines to review. The court of appeal and the supreme court can be viewed as deciding the case in tandem—the court of appeal on the merits, the supreme court by denying review—and writing a joint opinion, with the supreme court pruning some of the lower court's language but leaving enough to support that court's decision. In contrast to depublication, no law is made apart from, or contrary to, the decision of a case. Thus, the court's "commenting" practice, whatever its desirability, lacked the constitutional flaw that attaches to depublication.

37. "We demand of an adjudicative decision a kind of rationality we do not expect of the results of contract or of voting." Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 367 (1978). "[A]djudication is institutionally committed to a 'reasoned' decision, to a decision based on 'principle.'" *Id.* at 372.

late decisions be "in writing with reasons stated."³⁸ A judicial decision without reasons, one authority has said, would be "an imperious ukase without a nod to law or a need to justify."³⁹

When the California Supreme Court issues a depublication order—perhaps the very model of "an imperious ukase without a nod to law or a need to justify"—the constitutional requirement of a written opinion is not *literally* violated. The opinion of the court of appeal is still in writing, still states reasons and still decides the case between the parties. But the supreme court's order—subject to what one makes of Rule 979(e)⁴⁰—announces the court's disapproval of a significant aspect of that opinion, a disapproval strong enough, in the eyes of the court, to banish the opinion from the ranks of citable precedent. With the opinion thus discredited, and no other opinion supplied to replace it, it is hard to see how that opinion can still provide a reasoned or principled justification for the appellate court's decision.⁴¹ The letter of the constitutional rule may remain intact, but the rule's purpose and spirit have been dishonored.

3. Depublication as denial of equal treatment to similarly situated litigants

Another purpose of written opinions, and of the doctrine of precedent and of law generally, is to promote equal treatment of persons whose cases are alike. In Cardozo's words, "It will not do to decide the same question one way between one set of litigants and the opposite way between another."⁴² Further, "one of the most fundamental social inter-

38. CAL. CONST. art. VI, § 14. This provision was adopted by the Constitutional Convention of 1878 without debate, except for a supporting speech by Samuel M. Wilson, who said in part:

Undoubtedly it will insure a careful examination of the cases, and result in well considered opinions, because they must come before the jurists of the country and be subjected to the severest criticism. I think every lawyer will agree with me, that in every case there should be an opinion in writing. It tends to purity and honesty in the administration of justice.

Samuel Wilson, Speech at Constitutional Convention of the State of California (Jan. 8, 1879) in Max Radin, *The Requirement of Written Opinions*, 18 CAL. L. REV. 486, 489 (1930); see also KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 26 (1960) (stating that court's written opinion "is addressed also to the losing party and counsel in an effort to make them feel at least that they have had a fair break").

39. CARRINGTON ET AL., *supra* note 25, at 31.

40. See *supra* note 19 and accompanying text; *infra* notes 59-104 and accompanying text.

41. See Gerstein, *supra* note 17, at 297.

42. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 33 (paperback ed. 1978); see also EISENBERG, *supra* note 25, at 9 ("[A] court should reason by articulating and applying rules that it is ready to apply in the future to all persons who are situated like the disputants.").

ests is that law shall be uniform and impartial. . . . Therefore in the main there shall be adherence to precedent."⁴³ Depublication, unlike any other legal procedure that comes to mind, has the purpose and effect—at least in the cases where the supreme court disagrees with the court of appeal's result, not just with its opinion⁴⁴—of promoting *unequal* treatment between litigants whose cases are alike. The losing party in the depublished case still loses. But because the supreme court's order removes that case as a precedent—and because the order may further be perceived, subject to Rule 979(e), as indicating the supreme court's disapproval of the opinion or result—the next litigant in a like situation is more likely to win. When the supreme court depublishes an opinion because it disagrees with the result, the unequal treatment of the litigants in the next case is precisely the court's objective. When the court disagrees only with something about the opinion, the same unequal treatment may in fact follow, because lower courts cannot know the reason for the supreme court's displeasure and may think it encompasses the result. Either way, the depublication order thwarts the normal adherence to precedent.

To be sure, inequality between successive litigants occurs in other situations. A court with discretionary power of review, like the California Supreme Court, may decline to review one case without giving a reason, and then grant review of a subsequent, similar case and reverse it. The supreme court normally seeks to avoid close-in-time inequality of this kind, however, by granting review and "holding" a case until another case presenting a similar issue has been decided.⁴⁵ Again, when a court overrules one of its decisions, the like-situated litigants in the successive cases of course are treated differently. This is a major reason, though, why overruling is the exception, and *stare decisis* the rule.⁴⁶ And when a case is overruled, the litigants get a written opinion giving reasons for it.⁴⁷ Most important, in the case of both the decision denied

43. CARDOZO, *supra* note 42, at 112.

44. See Grodin, *supra* note 7, at 522; *supra* note 17 and accompanying text.

45. See SUPREME COURT OF CALIFORNIA, SUPREME COURT OF CALIFORNIA PRACTICES AND PROCEDURES 14 (1990); Grodin, *supra* note 7, at 519.

46. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2803-16 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.); CARDOZO, *supra* note 42, at 34 ("Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts.").

47. The concern for equal treatment is also a major reason why judicial decisions, even ones overruling prior decisions, normally are made "retroactive" to all cases pending on the date of decision. To apply the decision only to the case in which it is announced, and not to similar pending cases, "breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally." *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2444 (1991).

review and the decision subsequently overruled, the court at the time of its first action did not indicate—and even with hindsight there is no reason to think—that it considered that decision to be wrong. A court must be free to change its mind, and some inequality between successive litigants is an inevitable consequence.

Depublication is different. When the court issues a depublication order, it affirmatively indicates that *at that time* it finds something wrong with the court of appeal opinion and hence does not want it to stand as precedent. The resulting inequality between successive litigants, in a case in which the court disagrees with the court of appeal's result, is not a necessary artifact of the passage of time; it could be avoided by granting review of the case. When the court does not do that, and instead depublishes the opinion, the very purpose of the depublication order, like its effect, is to prevent the treatment of the litigants in this case from becoming a precedent for the treatment of the next litigants in a similar case.⁴⁸ The affront to the principle of equal treatment of like-situated litigants is deliberate.

*B. Depublication and the Law-Making Function of the Courts:
Making Law Without Giving Reasons*

The second major function of adjudication is to make law for future conduct, future cases and society in general.⁴⁹ Depublication serves this function of shaping the law; indeed, since depublication resolves no dispute, this is the only major function it serves. Depublication shapes the law in one and possibly two ways. It clearly does so by eliminating the depublished opinion from the body of precedent on which the law builds. It may further do so by the message it conveys concerning the supreme court's view of the law. If the supreme court usually orders depublication, as Justice Grodin stated, because a majority of the justices "consider the opinion to be wrong in some significant way,"⁵⁰ then the court's

48. See Bird, *supra* note 14, at 8 ("[I]t must be difficult indeed for attorneys to explain to those whom they represent that the state's highest court may well have agreed that an injustice occurred but chose to afford them no remedy.").

49. See *supra* note 25 and accompanying text; see also CARDOZO, *supra* note 42, at 35 ("[A]s a system of case law develops, the sordid controversies of litigants are the stuff out of which great and shining truths will ultimately be shaped."); EISENBERG, *supra* note 25, at 6 ("[T]he establishment of legal rules to govern social conduct is treated as desirable in itself . . . so that the courts consciously take on the function of developing certain bodies of law, albeit on a case-by-case basis."); Robert A. Leflar, *Sources of Judge-Made Law*, 24 OKLA. L. REV. 319, 319 (1971) ("The other principal function of appellate decisions under our system is to establish the law itself, to determine what the content of the law shall be. This is the function of common law precedent, and of the rule of *stare decisis*.").

50. Grodin, *supra* note 7, at 514-15.

action may naturally be read as signaling that the opinion, in Grodin's words, "stands for what the court considers the law is *not*."⁵¹ On this view depublication not only eliminates a precedent, it creates a kind of *opposing precedent*. The validity of this view depends, however—as we shall shortly see—on what one makes of Rule 979(e)'s mandate that a depublication order "shall not be deemed an expression of opinion" by the court.⁵²

Depublication performs its law-making function, in any case, without providing a written opinion or other statement of reasons. The court has decreed something about how cases are to be decided in the future—at the least, that they are not to be decided by using a certain case as precedent—but has not offered any reason to justify its decision or any language to define it. Again there is no *literal* violation of the state constitution's requirement of a written opinion; the reason this time, presumably, is that a depublication order is not among "[d]ecisions . . . that determine causes."⁵³ But again the spirit of the requirement has been violated.⁵⁴ Depublication is a law-making act by a court, an act that shapes the law for the future. Assuming *arguendo* that the court has power to make law this way,⁵⁵ the policy underlying the constitution's requirement of a written opinion seems applicable. Such an opinion is required not only to justify the court's resolution of the dispute between the parties, but also to define and justify the law that is made for the future.⁵⁶ Just as the notion of judicial law making without stated reasons offended the framers of California's Constitution of 1879,⁵⁷ it offends concepts of the judicial function today. "[O]ur contemporary understanding is such that a decision without principled justification would be no judicial act at all."⁵⁸

51. *Id.* at 522; see *People v. Dee*, 222 Cal. App. 3d 760, 764-65, 272 Cal. Rptr. 208, 210-11 (1990); Uelmen, *Disappearing Dissenters*, *supra* note 10, at 39 ("[K]nowledgeable courts regard the [depublishing] orders as clear indicators of the thinking of the Supreme Court's majority.").

52. CAL. R. CT. 979(e); see *infra* notes 68-104 and accompanying text.

53. See CAL. CONST. art. VI, § 14 ("Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated.").

54. Indeed, it smacks of *chutzpah* to rely on the fact that depublishing does not "determine [a] cause[.]" itself a constitutional overreaching, see *supra* notes 24-35 and accompanying text, to justify failing to meet the constitution's requirement of a written opinion.

55. *But see supra* notes 34-35 and accompanying text.

56. See, e.g., LLEWELLYN, *supra* note 38, at 26 ("In our law the opinion has in addition a central forward-looking function which reaches far beyond the cause in hand: the opinion has as one if not its major office to show how like cases are properly to be decided in the future.").

57. See *supra* note 38 and accompanying text.

58. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2814 (1992) (opinion of O'Connor, Kennedy and Souter, JJ.).

C. Depublication and Rule 979

1. Rule 979 and the "secrecy" of the depublication process

At least until July 1, 1990, when the California Supreme Court adopted California Rule of Court 979, another objection to depublication was the secrecy surrounding it. Although the supreme court was depublishing more cases than it was deciding by opinion,⁵⁹ it had no rules stating who could apply to have an opinion depublished, or how or when to apply, or even acknowledging the procedure's existence. Repeat litigants, such as insurance companies, appeared to have an unfair advantage over others who might be affected by the elimination or survival of appellate precedents, but who were less clued-in to the process.⁶⁰ Justice Grodin, writing in 1984, conceded that it would help to "legitimize and demystify" depublication if the procedure were "supported by an express rule of court that acknowledges the existence of the option and states in general terms the occasions for its exercise."⁶¹

Six years later, the court moved in that direction by adopting rule 979.⁶² The rule owns up to depublication and lays out the procedures for

59. See Gerald F. Uelman, *Losing Steam*, CAL. LAW., June 1990, at 33, 43-44.

60. See *id.* at 44; Biggs, *supra* note 8, at 1190; Gerald F. Uelman, *Depublication*, L.A. LAW., Aug.-Sept. 1990, at 49, 49 ("The most insidious effect . . . is the subtle creation of a cognoscenti among the appellate bar.")

61. Grodin, *supra* note 7, at 523.

62. Rule 979 states:

(a) [Request procedure] A request by any person for the depublication of an opinion certified for publication shall be made by letter to the Supreme Court within 30 days after the decision becomes final as to the Court of Appeal. . . . The request shall state concisely reasons why the opinion should not remain published and shall not exceed 10 pages.

(b) [Response] The Court of Appeal or any person may, within 10 days after receipt by the Supreme Court of a request for depublication, submit a response, either joining in the request or stating concisely reasons why the opinion should remain published. Any response shall not exceed 10 pages and shall be accompanied by proof of mailing to the Court of Appeal, and proof of service to each party to the action or proceeding, and person requesting depublication.

(c) [Action by Supreme Court] When a request for depublication is received by the Supreme Court pursuant to subdivision (a), the court shall either order the opinion depublished or deny the request. The court shall send notice of its action to the Court of Appeal, each party, and any person who has requested depublication.

(d) [Limitation] Nothing in this rule limits the court's power, on its own motion, to order an opinion depublished.

(e) [Effect of Supreme Court order for depublication] An order of the Supreme Court directing depublication of an opinion in the Official Reports shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion.

requesting it, though rebuffing Grodin's proposal to say something about "the occasions for its exercise."⁶³

Rule 979 still leaves patches of secrecy and potential unfairness in the depublication procedures. While the rule imposes a time limit on requests for depublication (thirty days after the court of appeal decision becomes final),⁶⁴ it expressly does not limit the supreme court's power to order an opinion depublished on its own motion at any time—something the court has done more than a year after the court of appeal's decision.⁶⁵ Moreover, when the court acts on its own, with no one requesting depublication, there will have been no opportunity, such as the rule otherwise provides, for "[t]he Court of Appeal or any person" to oppose the request.⁶⁶ In addition, while the rule requires that notice of a depublication request be served on the court of appeal and each party to the case, those are not the only parties who may have an interest in seeing the court of appeal's decision remain on the books.⁶⁷ The court's rule provides no way for other parties to get notice that a request for depublication is pending.

2. Rule 979(e) and the meaning and impact of depublication

a. two reactions to the rule

Fundamental questions about the meaning and impact of depublication are raised by Rule 979(e). That remarkable provision reads:

An order of the Supreme Court directing depublication of an opinion in the Official Reports shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion.⁶⁸

63. Grodin, *supra* note 7, at 523. I like to think I had a role in extracting the rule from the court. See Stephen R. Barnett, *The Death of Oral Argument*, CAL. LAW., June 1990, at 45, 116 (criticizing court, one month earlier, for maintaining secrecy about depublication). The court's method of adopting the rule did full honor to the tradition of secrecy. The rule was not submitted to the Judicial Council, put out for public comment or otherwise made known until one day after it went into effect. See *Hearsay*, CAL. LAW., Aug. 1990, at 18, 18; Philip Carriosa, *Depublish Time Limit Is Adopted*, S.F. DAILY J., July 3, 1990, at 7.

64. CAL. R. CT. 979(a).

65. *Id.* § 979(d); see, e.g., *People v. Laury*, 209 Cal. App. 3d 713, 257 Cal. Rptr. 480 (Apr. 12, 1989) (depublished, 790 P.2d 237, 269 Cal. Rptr. 73 (Apr. 26, 1990)); see also Philip Carriosa, *California Supreme Court*, S.F. DAILY J., July 10, 1990, at 4 (commenting on 14 months for one depublication order).

66. CAL. R. CT. 979(b).

67. See Biggs, *supra* note 8, at 1190.

68. CAL. R. CT. 979(e).

One can react to this declaration in two ways. First, one can view it as a brazen denial of what everyone knows, and hence disregard or deride it. Since "everyone is aware"⁶⁹ that the supreme court normally orders depublication—as former Justice Grodin, former Chief Justice Bird and the late Chief Justice Wright have said—because it "consider[s] the opinion to be wrong in some significant way,"⁷⁰ Rule 979(e), on this view, must be either a thoughtless mistake by the court⁷¹ or an act of disingenuousness, an attempt to deny what the court is in fact doing. A cynic might add that, inasmuch as depublication incontestably eliminates the targeted case as a citable precedent, if the supreme court does this without having any opinion about the correctness of the case, the court literally does not know what it is doing.

The other possible reaction takes Rule 979(e) at face value. The supreme court may well *have* an opinion about the correctness of the depublished case, but the rule means what it says in declaring that depublication "shall not be *deemed*" an expression of opinion by the court. Depublication eliminates the court of appeal opinion as a citable precedent, but nothing further is to be inferred from the court's action. It is not to be interpreted as an expression of the supreme court's opinion, as a "signal" or "guidance" for the lower courts, or as any other form of *opposing precedent*. Lower courts should proceed to develop the law exactly as they would have if the depublished case had never been decided (or had never been published). Thus, where there is no conflicting appellate opinion that the supreme court has left published, both the courts of appeal and trial courts should feel free to replicate the depublished opinion, both in result and reasoning, as long as they do so on independent grounds, without giving that opinion any precedential weight. And even where there is a conflicting appellate opinion that the court has left published, the courts of appeal should feel no less free to reject that precedent, and to follow their own lights to the result or reasoning of the depublished opinion, than they would have felt if the depublished case had not been decided. On this view, Rule 979(e) means that depublication has only the negative, operative effect of removing the

69. Gerstein, *supra* note 17, at 297.

70. Grodin, *supra* note 7, at 514-15; see Biggs, *supra* note 8, at 1185 n.20 (quoting late Chief Justice Wright's views on court's reasons for ordering depublication); Bird, *supra* note 14, at 8.

71. Rule 979(e) essentially repeats Rule 978(c), which provides that a supreme court order directing *publication* of a court of appeal opinion shall not be deemed an expression of opinion of the court. CAL. R. CT. 978(c). Conceivably the supreme court, in its hasty and secret process of adopting Rule 979, see *supra* note 63 and accompanying text, picked up this disclaimer from Rule 978 without focusing on the difference between publication and depublication.

opinion as a precedent, and shall not be given any affirmative effect as an expression of the supreme court's view of the law.

b. Rule 979(e) in the courts of appeal

Since Rule 979(e) was adopted, the courts of appeal in fact have been splitting into these two camps of reaction to the rule. In the first camp, Division Five of the First Appellate District, in *People v. Dee*,⁷² found in depublishation orders a "message" from the supreme court and effectively rejected Rule 979(e).⁷³ A similar view was taken by Presiding Justice David G. Sills of Division Three of the Fourth Appellate District, dissenting in *In re Anita G.*⁷⁴ Noting that the supreme court had declined to depublish a case going one way on the issue presented and that the court had pending a request for depublishation of a case going the other way, Presiding Justice Sills wanted to wait to see whether the court would grant the pending request. If the court did so, he said, "the signal will be unmistakable"; and as for Rule 979(e), it "cannot be taken in isolation when the Supreme Court allows contrary opinions to remain officially published."⁷⁵

In the second camp, the majority in *Anita G.* took Rule 979(e) at face value. Depublishation of the case targeted by the pending request would make no difference, the court said, because "we are expressly di-

72. 222 Cal. App. 3d 760, 272 Cal. Rptr. 208 (1990).

73. *Id.* at 765, 272 Cal. Rptr. at 211. Writing shortly after the adoption of Rule 979(e), Justice Donald King traced two conflicting lines of court of appeal decisions, one resulting in depublishation, and found "[t]he message from the Supreme Court . . . obvious": The depublishation decisions were wrong and the others correct. *Id.* at 763, 272 Cal. Rptr. at 209-10. Declaring it to be "generally accepted that most depublishation occurs because the court considers the opinion to be wrong in some significant way," *id.* at 764, 272 Cal. Rptr. at 210, and common practice for the courts of appeal to seek "implicit guidance" from depublishation, the court, calling for "a bit more candor," expressly relied on the supreme court's depublishation orders "as indicating the Supreme Court's views." *Id.* Confronted with Rule 979(e), the court responded, first, that the depublishation orders in question predated the rule, which did not apply retroactively. *Id.* at 764-65, 272 Cal. Rptr. at 211. Second, the court rejected the rule: "to insist that those depublishation orders are without significance would be to perpetuate a myth." *Id.* at 765, 272 Cal. Rptr. at 211.

74. *Orange County Social Servs. Agency v. Ana G. (In re Anita G.)*, 9 Cal. App. 4th 1543, 1555-58, 12 Cal. Rptr. 2d 265, 272-75 (Sills, P.J., dissenting), *review granted*, California Supreme Court Minutes 11 (Dec. 17, 1992), in 5 California Official Reports (Feb. 23, 1993 Advance Sheets), 842 P.2d 99, 14 Cal. Rptr. 2d 800 (1992).

75. *Id.* at 1556-57, 12 Cal. Rptr. 2d at 274-75 (Sills, P.J., dissenting). Presiding Justice Sills added: "A decent respect for the orders of the Supreme Court under such circumstances requires, at the very least, that the disagreeing appellate court bears a heavier-than-usual burden of showing why it should depart from surviving precedent." *Id.* at 1558, 12 Cal. Rptr. 2d at 275 (Sills, P.J., dissenting).

rected by the court rules not to draw the inference the dissent suggests."⁷⁶

Similarly, in *People v. McClanahan*,⁷⁷ a panel of the Fifth District relied on the language of Rule 979(e) to refuse to give "signaling" effect to an actual depublication order. The supreme court, faced with a split among courts of appeal, had depublished "at least two" cases going one way and had left on the books two cases going the other way.⁷⁸ This panel, although "acutely aware" of the depublication orders,⁷⁹ refused to follow the published decisions and agreed with the depublished ones.⁸⁰ The panel explained: "Following the command of . . . Rule 979(e), we cannot consider the depublication orders as 'an expression of opinion of the Supreme Court.'"⁸¹

When the supreme court granted review of *McClanahan*, one might have expected an opinion chastising the court of appeal for refusing to follow the supreme court's "guidance." Instead, saying nothing about Rule 979 or depublication, the court affirmed the court of appeal's decision.⁸² *McClanahan* thus can be read as putting the supreme court in the second camp.⁸³

c. *the practical impact of Rule 979(e)*

What is going on here is not purely a disagreement among courts of appeal about the proper reaction to Rule 979(e). The courts are enlisting that rule in support of whatever view they take of the case before them. The majority in *People v. Dee*,⁸⁴ which relied on the supreme court's

76. *Id.* at 1552 n.10, 12 Cal. Rptr. 2d at 274 n.10.

77. 7 Cal. App. 4th 1712, 281 Cal. Rptr. 847 (1991), *aff'd*, 3 Cal. 4th 860, 838 P.2d 241, 12 Cal. Rptr. 2d 719 (1992).

78. *See id.* at 1719 & n.3, 281 Cal. Rptr. at 851 & n.3.

79. *Id.*

80. *Id.* at 1724, 281 Cal. Rptr. at 855.

81. *Id.* at 1719 n.3, 281 Cal. Rptr. at 851 n.3; *accord* *People v. Davis*, 9 Cal. App. 4th 1765, 12 Cal. Rptr. 2d 496 (1992) (depublished, California Supreme Court Minutes 16 (Dec. 31, 1992), in 6 California Official Reports (Mar. 4, 1993 Advance Sheets)) (another panel of Fifth District deciding same issue with identical opinion).

82. *People v. McClanahan*, 3 Cal. 4th 860, 838 P.2d 241, 12 Cal. Rptr. 2d 719 (1992).

83. However, the court's subsequent depublication of the identical court of appeal opinion in *Davis*, *supra* note 81, may have constituted chastisement after all—a purging from the Official Reports of the declarations of independence by the courts of appeal in both *Davis* and *McClanahan*. On the other hand, since the court of appeal opinion in *McClanahan* was automatically "depublished" upon the supreme court's grant of review in that case, *see* CAL. R. Cr. 976(d), the court may have wanted to relegate the *Davis* opinion to the same oblivion simply as a matter of symmetry. Ironically, the vice of depublication as law making "without giving reasons," *see supra* notes 49-58 and accompanying text, throws confusion here on the meaning of depublication itself.

84. 222 Cal. App. 3d 760, 272 Cal. Rptr. 208 (1990).

depublication orders and rejected Rule 979(e), happened to disagree with the depublished decisions.⁸⁵ The dissenter in *Anita G.*, who wanted to wait to see whether the supreme court depublished a case, happened to think the decision in that case wrong.⁸⁶ The majority in *Anita G.*, which refused to wait and pooh-pooed depublishment, happened to think the decision in that case right.⁸⁷ The court of appeal in *McClanahan*, which took Rule 979(e) at face value in refusing to follow published opinions and replicating depublished ones, disagreed with the published opinions.⁸⁸

The choice that courts have in reacting to Rule 979(e) thus appears to be diluting the impact of depublishment. A court that disagrees with a depublished opinion will stress the "obvious message" and "implicit guidance" to be drawn from depublishment, Rule 979(e) notwithstanding. A court that agrees with a depublished opinion will stress the rule's statement that depublishment shall not be deemed an expression of opinion by the court. Apart from its effect in eliminating a precedent, depublishment becomes a makeweight argument for whatever result the appellate court wants to reach.⁸⁹

This equilibrium, however, should not last indefinitely. The courts of appeal gradually will become committed to one or the other view of the rule. As they do, they will progressively lose their ability to vary the weight they give to depublishment with the result they want to reach in the case before them.

And as the courts join one camp or the other, the second camp can be expected to prevail. This view appears to have the implicit support of the supreme court in *McClanahan*.⁹⁰ More important, the language of Rule 979(e) is clear and should be read to mean what it says. Depublishment eliminates the targeted opinion as a citable precedent, but it "shall not be deemed" an expression of opinion by the supreme court.⁹¹ That is, it creates no form of opposing precedent. Lower courts should proceed to decide cases in all respects as if the depublished case had never been decided.⁹²

85. *Id.* at 765, 272 Cal. Rptr. at 211.

86. 9 Cal. App. 4th at 1558, 12 Cal. Rptr. 2d at 275 (Sills, P.J., dissenting).

87. *Id.* at 1551-52 n.10, 12 Cal. Rptr. 2d at 270-71 n.10.

88. *McClanahan*, 7 Cal. App. 4th at 1724, 281 Cal. Rptr. at 855.

89. Depublishment has always spoken with an "uncertain voice." Gerstein, *supra* note 17, at 297. The ambiguity is underscored by Rule 979(e).

90. See *supra* note 82 and accompanying text. *But cf. supra* note 83.

91. CAL. R. CT. 979(e).

92. There is an apparent paradox here, but on examination it largely dissolves. Lawyers and judges, it seems, will have different obligations in reacting to the rule. Lawyers must do their best to anticipate the decisions of the courts. So when Rule 979(e) tells lawyers not to

d. *the efficiency of depublication in light of Rule 979(e)*

The case for depublication presumably rests, as noted earlier, on its claimed value as an efficiency measure for the supreme court. The judicial resources required to issue a depublication order are considerably less than those required to hear and decide a case and produce an opinion. So the supreme court is able to eliminate more appellate law that it thinks erroneous, and the court thus can be more effective in steering the lower courts away from "what the court considers the law is *not*."⁹³

The question arises, however, especially in the light of Rule 979(e), whether the need to eliminate "erroneous" decisions is as compelling as the court appears to think. First, it must be noted that the United States Supreme Court, and apparently the supreme courts of all other states, are able to handle their own much-increased case loads, and to tend their own proliferating case law, without exceeding the traditional judicial function of deciding cases.⁹⁴ Second, at least two of the court's spokes-

"deem" a depublication order an expression of the supreme court's opinion concerning the correctness of the depublished case, although in fact the order probably expresses such an opinion, the rule is telling lawyers not to do their job—not a laudable edict from a court, and not one likely to be obeyed. Lower-court judges, on the other hand, are not in business to anticipate decisions of the supreme court on grounds that the court tells them to ignore. True, court of appeal justices might minimize their reversal rate (or depublication rate) by doing so. But that is not a legitimate endeavor for judges when it flouts the supreme court's own instructions. Thus lower-court judges, unlike lawyers, violate no professional duty by taking Rule 979(e) at face value and refusing to consider a depublication order an expression of the court's opinion; to the contrary, they discharge the duty that lies on judges to obey a rule of court. But then, the reason for the lawyers to do otherwise crumbles. If the lower courts obey the rule and decline to read into depublication orders any expression of opinion by the court—any "opposing precedent" to the depublished opinion—then *this* becomes the judicial behavior that lawyers should anticipate (since, as a general rule, cases must be decided by the lower courts before reaching the supreme court). Thus, until a case clears the court of appeal, the opinion actually held by the supreme court about a depublished case may in fact be irrelevant, so that lawyers as well as judges not only can, but should, treat Rule 979(e) as meaning what it says.

93. Grodin, *supra* note 7, at 521-22; see Kent L. Richland, *Depublication*, L.A. LAW., Aug.-Sept. 1990, at 48, 53 ("Given the current demands upon the court, depublication acts as a sensible escape valve by which the court can keep the system operating relatively smoothly while conserving its limited resources.").

94. See Dubois, *supra* note 17, at 472. It has been argued that the California Supreme Court faces a greater need to remove a "bad" appellate precedent than does the United States Supreme Court. Falk, *supra* note 18, at 36. The argument points out that a decision of any California court of appeal is binding (absent a conflicting decision) on all California trial courts. *Auto Equity Sales v. Superior Court*, 57 Cal. 2d 450, 455, 369 P.2d 937, 939, 20 Cal. Rptr. 321, 323-24 (1960). In contrast, it is said, a decision of a federal circuit court of appeals binds trial courts only in that circuit, leaving other circuits free to develop alternative views for eventual consideration by the Supreme Court. See, e.g., *Ruppert v. Bowen*, 871 F.2d 1172, 1177 (2d Cir. 1989); *Castillo-Felix v. INS*, 601 F.2d 459, 467 (9th Cir. 1979); Falk, *supra* note 18, at 36. While the claim has some force, it overlooks two opposing considerations, both based on the different situation prevailing at the appellate level. First, the California courts of appeal feel free to reject California court of appeal decisions with which they disagree. See,

persons for depublication, the late Chief Justice Wright and former Justice Grodin, have claimed that the supreme court usually agrees with the result of a depublished case and disagrees only with something about the opinion.⁹⁵ If that is true, the "error" consists only of dictum. Because "[n]o court is required to follow another court's dicta,"⁹⁶ not even trial courts are bound by the erroneous language.⁹⁷

Then there is Rule 979(e). If the second camp prevails and the rule is taken as meaning what it says, the difference between depublishing an "erroneous" decision and simply denying review of it, a difference already of questionable significance,⁹⁸ has been narrowed. What now will be the effect of depublication? Depublishing the opinion will, indeed, prevent courts from following it as a precedent. This effect has two components. First, the state's *trial* courts will not be bound by the decision, as they would have been if it had stood as the only appellate precedent (and if the "error" was in the holding, not just in dictum).⁹⁹ This problem of compelled error, however, would have borne the seeds of its own prompt correction. For as soon as a trial court bound by the decision rendered its ruling, that ruling could be appealed, and the court of appeal, unlike the trial court, would not be bound by the first court of appeal's decision.¹⁰⁰

e.g., *People v. McClanahan*, 3 Cal. 4th 860, 871, 838 P.2d 241, 249, 12 Cal. Rptr. 2d 719, 727 (1992); *McCallum v. McCallum*, 190 Cal. App. 3d 308, 315 n.4, 235 Cal. Rptr. 396, 400 n.4 (1987). In contrast, in the federal courts of appeal, or at least in the Ninth Circuit, the decision of one panel is binding on all other panels, unless overturned by the court en banc. *See, e.g.*, *Lomas Mortgage USA v. Wiese*, 980 F.2d 1279, 1282 (9th Cir. 1992); *United States v. Washington*, 872 F.2d 874, 880 (9th Cir. 1989); Arthur D. Hellman, *Breaking the Banc: The Common-Law Process in the Large Appellate Court*, 23 ARIZ. ST. L.J. 915, 935-36 (1991). Thus a "bad" decision of the Ninth Circuit, left standing by the U.S. Supreme Court, binds the entire Ninth Circuit, while a "bad" decision of a California court of appeal, left standing by the California Supreme Court, may be rejected by any other California court of appeal. The second point is that, as a result, the asserted binding effect that a "bad" appellate decision has on California's trial courts lasts only until one of those trial court decisions is appealed. *See McCallum*, 190 Cal. App. 3d at 315, 235 Cal. Rptr. at 400.

95. *See Grodin, supra* note 7, at 522; *Biggs, supra* note 8, at 1185 n.20. Chief Justice Bird's statement was more ambiguous. *See Bird, supra* note 14, at 8.

96. *Indiana Harbor Belt R.R. v. American Cyanamid Co.*, 916 F.2d 1174, 1176 (7th Cir. 1990).

97. *Cf. WITKIN, supra* note 27, at 36 ("The reports are crammed with opinions stating unsound propositions as well as settled propositions facing imminent repudiation by creative courts.").

98. *See Carrizosa, supra* note 22, at 66 (quoting Bernard Witkin for proposition that "[t]he courts of appeal have the right to disagree and that is not an evil because disagreement causes serious thinking. It would probably not be any worse just to leave the opinion stand if the Supreme Court does not wish to review it.").

99. *Auto-Equity Sales v. Superior Court*, 57 Cal. 2d 450, 369 P.2d 937, 20 Cal. Rptr. 321 (1960).

100. *See cases cited supra* note 94.

Second, if the “erroneous” decision had not been depublished, the courts of appeal, though not bound by the decision, might still have followed it—either because it *was* a precedent, albeit not binding, or because they found its reasoning persuasive. With the decision depublished, courts of appeal are less likely to “follow” it (that is, reach the same result or employ the same reasoning)—both because it is *not* a precedent and, since the opinion may not be cited,¹⁰¹ because it is less likely to come to the court’s attention. Under the “face value” reading of Rule 979(e), however, courts of appeal have the supreme court’s blessing to reach the same result and employ the same reasoning, as long as they do so without giving the depublished opinion any precedential weight. Furthermore, while California Rule of Court 977(a) states that a depublished “opinion” may not be cited,¹⁰² it would appear to violate no rule to cite a depublication *order*—which is the antithesis of the depublished opinion, although it also points the way to that opinion. At least one court of appeal has effectively cited such orders.¹⁰³ In any event the depublished opinions are likely to be known to lawyers, and their substance consequently presented to the court.¹⁰⁴ Thus, while some steering effect remains, Rule 979(e) lessens the extent to which depublication steers the courts of appeal—and hence trial courts—away from the result and reasoning of the depublished opinion.

In sum, Rule 979(e) reduces the value of depublication as a managerial tool for the court. No longer does the court’s order send a “signal” or “message” to lower courts (except to ones inclined to agree anyway). The game of depublication, especially in view of its problematic legitimacy, may not be worth the candle of the “guidance” it provides.

3. The constitutionality of depublication

Whatever the ameliorating impact of Rule 979(e), the fundamental legal objections to depublication remain. Most serious, even if depublication does no more than eliminate a precedent, this act of making law without deciding a case would seem to exceed the “judicial power” conferred on the supreme court by Article VI of the California Constitu-

101. CAL. R. CT. 977(a).

102. “An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action or proceeding” CAL. R. CT. 977(a).

103. *People v. Dee*, 222 Cal. App. 3d 760, 763-64, 272 Cal. Rptr. 208, 209-10 (1990) (naming depublished cases, giving court of appeal docket numbers and dates of depublication by supreme court, and expressly relying on supreme court depublication orders).

104. See *Richland*, *supra* note 93, at 52 (“[N]o appellate lawyer worthy of the name would think of submitting a brief on an issue of any significance without reviewing the depublished cases as well as the published ones . . .”).

tion.¹⁰⁵ The court's workload admittedly is onerous, but the constitution imposes limits on what the judicial branch can do.

A suggestive analogy is found in *INS v. Chadha*,¹⁰⁶ where the United States Supreme Court struck down the legislative-veto practice of the United States Congress. Just as the California Supreme Court justifies depublication on the ground of efficiency and uses the practice extensively, Congress had inserted legislative-veto provisions—allowing veto of an administrative agency's action by a resolution passed by one or both houses of Congress—in “literally hundreds of statutes, dating back to the 1930s.”¹⁰⁷ The Supreme Court conceded that the device might well be “efficient, convenient, and useful.”¹⁰⁸ Nonetheless, the Court held the legislative veto unconstitutional, finding that it failed to comply with the Constitution's requirements for legislative action. “The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted,” the Court said.¹⁰⁹

The legislative power conferred by the United States Constitution differs, of course, from the judicial power conferred by the California Constitution. But similar principles of limited and separate powers apply.¹¹⁰ Just as the legislative veto did not comply with the Federal Constitution's requirements for legislative action, depublication appears not to comply with the California Constitution's limitations on judicial power.¹¹¹

A splash of reality may seem called for. Inasmuch as the last word on the meaning of the California Constitution belongs to the California Supreme Court, discussion of the legitimacy of depublication under the California Constitution may seem pointless. But the court, while it has depublished a great many cases, has never considered and decided, in an actual case, whether depublication is constitutional. It might reach a surprising result—as it did in 1988 when it was sued for allegedly violating the California Constitution's rule requiring that cases be decided

105. See *supra* notes 24-35 and accompanying text.

106. 462 U.S. 919 (1983).

107. *Id.* at 959-60 (Powell, J., concurring).

108. *Id.* at 944.

109. *Id.* at 951.

110. Without the legislative veto, Congress would have been faced, as stated by Justice Byron White, with a “Hobson's choice” of either refraining from delegating authority to an agency or ceding its power to the agency. *Id.* at 968 (White, J., dissenting). Similarly, as stated by Justice Grodin, the California Supreme Court, without depublication, would face a Hobson's choice of either expending the resources needed to review an “erroneous” court of appeal decision or letting the decision stand. See Grodin, *supra* note 7, at 519-20.

111. See *supra* text accompanying notes 24-35.

within ninety days after being "submitted."¹¹² It is also possible, in a case challenging depublication, that the supreme court justices would disqualify themselves—as they did in the ninety-day-rule case before it was settled.¹¹³ In that event a panel of court of appeal justices would be chosen by lot to hear the case.¹¹⁴ In any event, the legitimacy of depublication under Article VI of the California Constitution presents a real question.¹¹⁵

III. STIPULATED REVERSAL

If depublication is one uniquely Californian way of nullifying a lower court's action without the usual niceties of appellate review, it is no longer the only one. We now have "stipulated reversal," embraced by the California Supreme Court in *Neary v. Regents of the University of California*.¹¹⁶ Before comparing these two distinctive approaches of the California Supreme Court to the judicial processes of lower courts, there is much to say about *Neary* as an example—a disquieting one—of the judicial process as it proceeds these days in the California Supreme Court itself.

112. See CAL. CONST. art. VI, § 19; *Stevens v. Broussard*, No. 875390 (S.F. Super. Ct., filed May 11, 1987). The supreme court justices settled the case by effectively conceding the plaintiffs' claim and agreeing to decide cases within 90 days of oral argument. See Philip Carrizosa, *Supreme Court Members Say 90-Day Deadline Will Work*, S.F. BANNER DAILY J., Sept. 27, 1988, at 8. Previously all the justices had disqualified themselves from hearing the case, and a substitute court comprised of court of appeal justices had been selected by lot. Telephone interview with Stanley Sapiro, Esq., plaintiff and counsel in *Stevens v. Broussard* (Feb. 1, 1993). California law requires disqualification of a judge who is a party to the case. CAL. CIV. PROC. CODE § 170.1(a)(4) (West Supp. 1993). A cynic might note that this suit demanded repayment of the justices' salaries for periods when cases went undecided for more than 90 days, see CAL. CONST. art. VI, § 19, and that no such weapon would be available in a suit challenging depublication. I am not a cynic.

113. See *supra* note 112 and accompanying text. Similarly, all but one of the justices disqualified themselves, and the remaining one was ruled disqualified, in the suit brought in 1979 to stop public hearings in the investigation of the supreme court by the Commission on Judicial Performance. *Mosk v. Superior Court*, 25 Cal. 3d 474, 480 & n.2, 601 P.2d 1030, 1034 & n.2, 159 Cal. Rptr. 494, 498 & n.2 (1979); see *Olson v. Cory*, 27 Cal. 3d 532, 597-603, 636 P.2d 532, 569-71, 178 Cal. Rptr. 568, 605-07 (1980) (Newman, J., dissenting). In that case the justices were not named as defendants (although one was the plaintiff). See PREBLE STOLZ, *JUDGING JUDGES* 361-99 (1981).

114. See *Mosk*, 25 Cal. 3d at 483, 601 P.2d at 1035-36, 159 Cal. Rptr. at 499-500; *supra* note 112.

115. Procedurally, a challenge to depublication might be brought by a petition for rehearing of a supreme court order denying review of a case and ordering depublication. The party who had lost in the court of appeal would argue that the supreme court lacked constitutional power under Article VI to order depublication without granting review—to make law unsupported by decision of a case. It is also possible that the challenge could be brought, like the 90-day-rule case, as an action against the justices. See *supra* notes 112-13 and accompanying text.

116. 3 Cal. 4th 273, 834 P.2d 119, 10 Cal. Rptr. 2d 859 (1992).

Neary was a libel suit. Federal and state agricultural agencies had sprayed George Neary's herd of pregnant heifers with a pesticide, toxaphene, to ward off an infestation of the scabies mite.¹¹⁷ When ninety-five cows and 400 calves died, Neary blamed the pesticide treatment.¹¹⁸ He and state officials eventually agreed to have the incident investigated by veterinarians from the University of California at Davis.¹¹⁹ Three veterinarians from the School of Veterinary Medicine at Davis conducted the inquiry and concluded that the cattle deaths were due not to the pesticide but to mismanagement at Neary's ranch.¹²⁰ The University published the veterinarians' report,¹²¹ having concluded that it was required to do so under the California Public Records Act.¹²² Neary sued the University and the veterinarians for libel.¹²³ After a four-month jury trial, he won a verdict and judgment against all the defendants for \$7 million.¹²⁴

While appeals by both sides were pending, the parties agreed to settle.¹²⁵ Neary would be paid \$3 million.¹²⁶ In return he would join with the defendants in requesting of the court of appeal that (1) the appeals be dismissed with prejudice; (2) the trial court's judgment be "vacated;" and (3) the action in the trial court be dismissed with prejudice.¹²⁷ Pursuant to this agreement, the parties asked the court of appeal to "reverse the trial court's judgment and remand the case to the Superior Court for dismissal with prejudice."¹²⁸

117. *Id.* at 275-76, 834 P.2d at 120, 10 Cal. Rptr. 2d at 860.

118. *Id.* at 276, 834 P.2d at 120, 10 Cal. Rptr. 2d at 860.

119. *Id.* at 292, 834 P.2d at 131, 10 Cal. Rptr. 2d at 870 (Kennard, J., dissenting).

120. *Id.*, 834 P.2d at 131, 10 Cal. Rptr. 2d at 871 (Kennard, J., dissenting).

121. *Id.* at 276, 834 P.2d at 120, 10 Cal. Rptr. 2d at 860.

122. CAL. GOV'T CODE §§ 6250-6265 (West 1980).

123. *Neary*, 3 Cal. 4th at 276, 834 P.2d at 120, 10 Cal. Rptr. 2d at 860.

124. *Id.* at 275, 834 P.2d at 120, 10 Cal. Rptr. 2d at 860.

125. *Id.* at 276, 834 P.2d at 120, 10 Cal. Rptr. 2d at 860.

126. *Id.*

127. Petitioners' Brief at 5.

128. *Id.* at 6; see *Neary v. Regents of the Univ. of Cal.*, 7 Cal. App. 4th 73, 75 (Advance Sheets), 278 Cal. Rptr. 773, 774 (1991), *rev'd*, 3 Cal. 4th 273, 834 P.2d 119, 10 Cal. Rptr. 2d 859 (1992). In their Petition for Review in the supreme court, the defendants-appellants (defendants) explained that they had asked the court of appeal to "reverse" the trial court's judgment, rather than to "vacate[]" it as provided in the settlement agreement, "only because vacating a judgment may not be a permissible remedy under California law." Petition for Review at 1 n.1. The defendants added: "Because Appellants are indifferent as to whether the Superior Court's judgment is vacated or reversed, we shall use the terms 'vacatur' and 'reversal' interchangeably throughout this Petition." *Id.* In their subsequent Brief on the Merits, the defendants told the court: "Additional research, however, has uncovered numerous cases where this Court and the Courts of Appeal have vacated lower court judgments, rather than reversed . . ." Petitioners' Brief at 1 n.1. Accordingly, the defendants said, "we shall use 'vacatur,' rather than 'reversal,' throughout this brief." *Id.* On the implications of the differ-

The court of appeal refused. Presiding Justice J. Anthony Kline wrote for the court: “[R]eversal of a judgment not thought to be legally erroneous simply to effectuate settlement would trivialize the work of the trial courts and undermine the integrity of the entire judicial process.”¹²⁹

The California Supreme Court, six-to-one, reversed.¹³⁰ The court of appeal was ordered to “grant[] the parties’ request for a stipulated reversal of the trial court judgment.”¹³¹

The court’s opinion, by Justice Marvin Baxter, relied on the policy favoring settlement and the principle that “[t]he courts exist for litigants.”¹³² When the parties have agreed to settle, Justice Baxter wrote, “the court should respect the parties’ choice and assist them in settlement.”¹³³ The court thus created a “strong presumption” favoring stipulated reversal; “as a general rule,” it held, “parties are entitled to a stipulated reversal by the Court of Appeal absent a showing of extraordinary circumstances that warrant an exception.”¹³⁴ The “public interest” might provide such a circumstance, the court said, but only if that interest was “specific, demonstrable, well established, and compelling.”¹³⁵ “[T]he policies favoring settlement are strong and . . . the extraordinary-circumstance exception is narrow,” the court stressed.¹³⁶

The court declined to decide whether the potential effect of a trial court judgment as collateral estoppel in other actions “should be a factor in deciding whether to depart from the strong presumption” in favor of stipulated reversal.¹³⁷ There was no potential collateral-estoppel effect in *Neary*, the court said, and no other circumstance warranting an exception from the presumption. To the contrary, the facts presented would support stipulated reversal “[e]ven in the absence of the general presumption favoring this procedure.”¹³⁸

Justice Stanley Mosk concurred separately “under the facts of this case.”¹³⁹ He rejected the court’s “gratuitous creation of some type of

ence in terminology and the change in the defendants’ position, see *infra* notes 179-94 and accompanying text.

129. *Neary*, 7 Cal. App. 4th at 80 (Advance Sheets), 278 Cal. Rptr. at 778.

130. *Neary*, 3 Cal. 4th at 285-86, 834 P.2d at 126, 10 Cal. Rptr. 2d at 866.

131. *Id.*

132. *Id.* at 280, 834 P.2d at 123, 10 Cal. Rptr. 2d at 862.

133. *Id.*

134. *Id.* at 275, 834 P.2d at 120, 10 Cal. Rptr. 2d at 859-60. The court three times used the term “strong presumption.” *Id.* at 283, 284, 834 P.2d at 124, 125, 10 Cal. Rptr. 2d at 864, 865.

135. *Id.* at 283, 834 P.2d at 125, 10 Cal. Rptr. 2d at 865.

136. *Id.* at 284, 834 P.2d at 125, 10 Cal. Rptr. 2d at 865.

137. *Id.*

138. *Id.* at 285, 834 P.2d at 126, 10 Cal. Rptr. 2d at 866.

139. *Id.* at 286, 834 P.2d at 126-27, 10 Cal. Rptr. 2d at 866 (Mosk, J., concurring).

'presumption.'¹⁴⁰ In his view the appellate court asked to approve a stipulated reversal should have discretion to consider the facts of each case—for example, the attempt of a manufacturer whose product had been held defective to wipe out that judgment by means of stipulated reversal in order to deter suits by other victims.¹⁴¹ Justice Mosk called the majority's presumption "mere dictum" in view of its "apparently conflicting" case-by-case approach, which he endorsed.¹⁴²

Justice Joyce Kennard dissented. "Because a judgment embodies an act of government, its annulment must be reconciled with public as well as private interests," she said.¹⁴³ In her view stipulated reversals erode public confidence in the judiciary, discourage pretrial settlements, and annul judgments that may have value for third parties or society at large.¹⁴⁴ The majority's principle that "[t]he courts exist for litigants" would support stipulated reversals not only of trial court decisions but of appellate and supreme court decisions, Justice Kennard argued.¹⁴⁵ She wondered how the majority would respond if "the parties conditioned settlement on the appellate justices wearing green robes on Saint Patrick's Day, or singing 'California Here I Come' before court proceedings."¹⁴⁶

The court's adoption of a presumption in favor of stipulated reversal, Justice Kennard continued, "will reinforce an already too common perception that the quality of justice a litigant can expect is proportional to the financial means at the litigant's disposal."¹⁴⁷ The presumption should be the other way, she said,¹⁴⁸ and she saw no legitimate reason for the granting of a stipulated reversal in *Neary*.¹⁴⁹ Justice Kennard, while acknowledging that settlements on appeal should be encouraged, concluded:

What they [the parties] should not be free to do is to include within those terms of settlement the destruction of a judgment, a public product fashioned at the cost of public resources, and to require an appellate court to accomplish that destruction merely to facilitate resolution of their private dispute.¹⁵⁰

140. *Id.*, 834 P.2d at 127, 10 Cal. Rptr. 2d at 866 (Mosk, J., concurring).

141. *Id.* (Mosk, J., concurring).

142. *Id.*, 834 P.2d at 126-27, 10 Cal. Rptr. 2d at 866-67 (Mosk, J., concurring).

143. *Id.*, 834 P.2d at 127, 10 Cal. Rptr. 2d at 867 (Kennard, J., dissenting).

144. *Id.* at 286-95, 834 P.2d at 127-33, 10 Cal. Rptr. 2d at 867-72 (Kennard, J., dissenting).

145. *Id.* at 293-94, 834 P.2d at 131-32, 10 Cal. Rptr. 2d at 871 (Kennard, J., dissenting).

146. *Id.* at 293, 834 P.2d at 131, 10 Cal. Rptr. 2d at 871 (Kennard, J., dissenting).

147. *Id.* at 287, 834 P.2d at 127-28, 10 Cal. Rptr. 2d at 867 (Kennard, J., dissenting).

148. *Id.*, 834 P.2d at 127, 10 Cal. Rptr. 2d at 867 (Kennard, J., dissenting).

149. *Id.* at 294-95, 834 P.2d at 132-33, 10 Cal. Rptr. 2d at 871-72 (Kennard, J., dissenting).

150. *Id.* at 295, 834 P.2d at 132-33, 10 Cal. Rptr. 2d at 872 (Kennard, J., dissenting).

Neary says something not only about the California Supreme Court's view of trial court decisions, but about the way the court reaches and explains its own decisions. The court's opinion in *Neary* is a robust argument, written smoothly and pungently, for the position that "courts exist for litigants."¹⁵¹ The opinion, however, is one-sided and poorly reasoned. It is more partisan and less candid than the briefs of the parties. The court ignores the dissenting and concurring opinions, stretches facts, gives the parties more than they asked for, and systematically exaggerates the benefits of stipulated reversal while belittling the costs. The opinion and the rule laid down in *Neary* are likely to waste judicial resources and erode respect for the courts.

A. Stonewalling Colleagues

The court's opinion in *Neary* does not mention either Justice Mosk's concurrence or Justice Kennard's dissent. Nor can it be said that the court, though not referring to these opinions, addresses the major points they make.¹⁵² The failure of a court's majority to acknowledge and reply to dissenting and concurring opinions not only marks a lack of collegial respect, it also casts doubt on the open and rational nature of the court's decision making. Dissents and concurrences serve the purposes, among others, of compelling the majority to justify its result, sharpening the majority's reasoning and improving its opinion.¹⁵³ A majority's explicit reply to dissenting and concurring opinions testifies that this healthy interchange has taken place.¹⁵⁴ Conversely, the absence of any such reply may help to explain why a majority opinion is one-sided and poorly rea-

151. *Id.* at 280, 834 P.2d at 123, 10 Cal. Rptr. 2d at 862.

152. The court offers no reply, for example, to Justice Mosk's proposed case-by-case approach or his hypothetical case involving the manufacturer who wants to wipe out a judgment of product liability. *See id.* at 286, 834 P.2d at 126-27, 10 Cal. Rptr. 2d at 866-67 (Mosk, J., concurring). The court does address some points made by Justice Kennard, but ignores other major ones. The points ignored include the applicability of the majority's arguments to appellate judgments, *id.* at 287-88, 834 P.2d at 127-28, 10 Cal. Rptr. 2d at 867 (Kennard, J., dissenting); the contrary authority in the courts of appeal, *id.* at 291, 834 P.2d at 130, 10 Cal. Rptr. 2d at 870 (Kennard, J., dissenting), *see infra* notes 162-72 and accompanying text; and the inconsistency between claiming that stipulated reversal carries no inference that the trial court erred and claiming that the veterinarians insisted on the reversal in order to restore their reputations and would not settle without it, *id.* at 294, 834 P.2d at 132, 10 Cal. Rptr. 2d at 872 (Kennard, J., dissenting).

153. *See* Robert W. Bennett, *A Dissent on Dissent*, 74 JUDICATURE 255, 259 (1991).

154. Professor Eisenberg has argued that courts "are obliged to be responsive to what the profession has to say," a discourse that occurs first in "the arena of the particular case" through briefs, arguments and lawyers' decisions framing the issues. EISENBERG, *supra* note 25, at 12. Interchange between the court's majority and its dissenting and concurring judges represents, one would think, a keystone of this discourse. *See* Edward C. Voss, *Dissent: Sign of a Healthy Court*, 24 ARIZ. ST. L.J. 643, 655 (1992).

soned, like the opinion in *Neary*. When a court stonewalls its dissenting and concurring justices, it forfeits both some credibility for its own position and some respect for the decision-making process of the court.

B. *Stretching Facts*

Attempting to conscript every possible argument in support of its result, the court in *Neary* takes liberties, in two respects, with the facts before it.

1. "California taxpayers"

In arguing that "the public interest" supports granting the stipulated reversal on the facts of *Neary*, the court claims that because the defendant University of California is a public entity, the taxpayers of California stand to lose millions of dollars if the settlement does not go through. "The trial court judgment requires the University—a public entity—and its employees to pay \$7 million to plaintiff," whereas "[u]nder the proposed settlement, defendants would pay only \$3 million," the court says.¹⁵⁵ Accordingly:

If the settlement in this case was not effectuated, and the judgment were affirmed on appeal, both California taxpayers and public revenue recipients would ultimately lose \$4 million for no apparent reason. This stands the public interest on its head and would surely seem unfair to those citizens denied essential services as a result.¹⁵⁶

The court repeats the \$4 million figure five times as the measure of what the California public stands to lose.¹⁵⁷

The court's compassion for California's taxpayers and welfare recipients conceals the fact, clear from the briefs, that the University—and its employees, the veterinarians—had insurance. Hence it was not the case that under the proposed settlement "defendants would pay" \$3 million; an insurer would pay that sum.¹⁵⁸ Whether the University's insurance also would cover the additional \$4 million, if the case was not settled and

155. *Neary*, 3 Cal. 4th at 283, 834 P.2d at 124, 10 Cal. Rptr. 2d at 864.

156. *Id.*, 834 P.2d at 125, 10 Cal. Rptr. 2d at 864; *see also id.* at 285, 834 P.2d at 126, 10 Cal. Rptr. 2d at 866 ("The average taxpayer wants and deserves more for his or her money.").

157. *Id.* at 283, 285, 834 P.2d at 125-26, 10 Cal. Rptr. 2d at 864, 866.

158. The defendants' brief stated that the settlement had been negotiated by attorneys for Neary, the University, and "one of the insurance carriers that had provided coverage to the University and its employees when the events giving rise to this case arose." Petitioners' Brief at 6. It further spoke of "[t]he insurance carrier that negotiated the settlement with Neary, and which will be responsible for making the payments thereunder." *Id.* Neary's brief confirmed the existence of insurance, stating: "The settlement agreements required the Regents or their insurers to make payments to Neary . . ." Respondent's Brief at 1.

the defendants lost their appeal, was not made explicit in the papers before the court. It was stated, however, that more than one insurance carrier provided coverage to the University and that one carrier would pay the settlement¹⁵⁹—implying that insurance would cover some or all of the additional amount, as was in fact the case (the University was fully covered).¹⁶⁰ In view of the stated presence of insurance, the court's emphatic claim that the \$4 million would come out of the public's hide lacks support in the facts. The parties themselves made no such claim; the court was more partisan than they were.¹⁶¹

2. Stipulated reversals granted "routinely" before *Neary*

Another assertion outrunning both the facts and the claims of the parties is the statement, made three times by the court in *Neary*, that the California courts of appeal have "routinely" granted stipulated reversals and similar settlement procedures.¹⁶² The statement is based on twelve stipulated reversals or vacatur found by the defendants in the records of the courts of appeal over a five-year period.¹⁶³ Whatever one thinks of this number (a question considered shortly),¹⁶⁴ the court's claim of "routine[]" approval suppresses both a conspicuous case in the court of appeal denying stipulated reversal and the announced policy of one court of appeal—besides the one that decided *Neary*—of refusing to grant such relief.

159. Petitioners' Brief at 6, *quoted supra* note 158.

160. Counsel for the *Neary* defendants states that, although nothing more was before the court, the University's insurance would have covered the entire judgment. Telephone Interview with Jerome B. Falk, Jr., Attorney for Petitioners, Regents of the University of California (Jan. 7, 1993).

161. Of course, it may be said—and Professor Gideon Kanner has said, in discussing this point with me—that when an insurance company pays, the public pays. On that basis, however, the "public interest" cited by the court as supporting the stipulated reversal on the facts of *Neary* would exist in the case of any defendant covered by insurance. This evidently is not what the court means when it points out that the University of California is "a public entity," *Neary*, 3 Cal. 4th at 283, 834 P.2d at 124, 10 Cal. Rptr. 2d at 864, or when it speaks of a "direct interest in saving \$4 million," *id.* at 285, 834 P.2d at 126, 10 Cal. Rptr. 2d at 866, on the part of "California taxpayers and public revenue recipients," *id.* at 283, 834 P.2d at 125, 10 Cal. Rptr. 2d at 864.

162. *See id.* at 278, 834 P.2d at 121, 10 Cal. Rptr. 2d at 861 ("Courts of Appeal throughout the state have routinely granted the parties' requests for stipulated reversals and similar procedures to effectuate settlement agreements."); *id.* at 279, 834 P.2d at 122, 10 Cal. Rptr. 2d at 862 ("[T]he record in this case . . . demonstrates that Courts of Appeal have heretofore routinely granted stipulated reversals and similar procedural methods."); *id.* at 285, 834 P.2d at 126, 10 Cal. Rptr. 2d at 866 ("[T]he Courts of Appeal had routinely been allowing . . . stipulated reversals and the like.")

163. *See* Petition for Review at 7-9; *Neary*, 3 Cal. 4th at 279, 834 P.2d at 122, 10 Cal. Rptr. 2d at 862; *id.* at 289, 834 P.2d at 129, 10 Cal. Rptr. 2d at 868 (Kennard, J., dissenting).

164. *See infra* notes 202-05 and accompanying text.

The conspicuous case was *In re Marriage of Shapiro*,¹⁶⁵ a published opinion by Presiding Justice Otto Kaus in which the court refused to grant a stipulated reversal because of the effect it would have on third parties.¹⁶⁶ Although *Shapiro* was discussed and relied on in *Neary* by both the court of appeal¹⁶⁷ and Justice Kennard,¹⁶⁸ the court ignored it.

The court's "routine" assertion also conceals the fact, candidly reported by the defendants, that "at least one Court of Appeal refused such stipulations as a matter of policy."¹⁶⁹ This was Division One of the Fourth Appellate District, which so ruled in an unpublished opinion on November 13, 1990.¹⁷⁰ The *Neary* defendants, in their petition for review to the supreme court, reported this case and described as follows the situation that would prevail in the courts of appeal if the supreme court did not grant review:

Some courts of appeal—probably the majority—would continue to grant stipulated reversal or vacatur. Other appellate courts—most probably, the court of appeal that decided *Neary* and Division One of the Fourth Appellate District—would decline to accept such stipulations.¹⁷¹

165. 39 Cal. App. 3d 460, 114 Cal. Rptr. 277 (1974).

166. *Id.* at 464, 114 Cal. Rptr. at 279. *Shapiro* was a divorce case in which, after an interlocutory judgment dissolving the marriage and dividing the community property, the husband died. *Id.* at 462, 114 Cal. Rptr. at 278. The executor and the widow reached a settlement conditioned on reversing the judgment, so that the property could be distributed through probate and the widow could avoid the "substantial and unnecessary tax burdens" of the community property division. *Id.* (quoting reasons for requested reversal). The court refused to grant the parties' request, pointing out that the reversal would have "consequences affecting interests not directly involved in this proceeding, that is, those of the taxing authorities." *Id.* at 464, 114 Cal. Rptr. at 279.

167. *Neary*, 7 Cal. App. 4th 73, 77 (Advance Sheets), 278 Cal. Rptr. 773, 776-77 (1991).

168. *Neary*, 3 Cal. 4th at 291, 834 P.2d at 130, 10 Cal. Rptr. 2d at 870 (Kennard, J., dissenting).

169. Petition for Review at 3.

170. Order on Motions at 2-3, *Continental Casualty Co. v. Jones* (Nov. 13, 1990) (No. D010086). Refusing to grant a request for stipulated reversal, the court stated:

[T]he stipulation we have before us goes beyond simply dismissal. It would require this court to issue an order modifying the terms of a superior court judgment, in a manner which this court would not necessarily elect to do on its own. We will not permit counsel to govern this court's decisions in such manner.

Id. In reporting this decision, the *Neary* defendants noted that the *Continental Casualty* court subsequently did grant the parties' request to modify one aspect of the trial court's judgment. Petition for Review at 24 n.40. The court granted this modification, however, not simply because the parties had agreed on it, but upon "finding the same to be a reasonable and just resolution of the issues on appeal." Order at 1, *Continental Casualty Co. v. Jones* (Dec. 24, 1990) (No. D010086).

171. Petition for Review at 24.

Thus, where the parties claim "probably the majority," the court asserts "routinely."¹⁷² Again one has to look to the briefs, not to the opinion of the supreme court, for an objective presentation of the facts.

C. *Giving the Parties More Than They Asked For: The Court's "Presumption" and Its Insistence on "Reversing" the Judgment Instead of "Vacating" It*

In another problematic feature of the opinion in *Neary*, the court went further, in two key holdings, than the parties asked it to go. This is not always inappropriate. With respect to at least one of the holdings in *Neary*, however, it appears to be.

The first holding is the "presumption" that the court created in favor of stipulated reversal.¹⁷³ The parties did not ask for any "presumption." They asked for what Justice Mosk would have given them: a "case-by-case approach"¹⁷⁴ in which the appellate court would "balance competing interests"¹⁷⁵ in its "informed discretion."¹⁷⁶ The parties conceded, moreover, that stipulated reversal "should not be available where the public interest would be adversely affected."¹⁷⁷ The court, in contrast, created a "strong presumption" in favor of stipulated reversal and left only the grudging possibility that a "specific, demonstrable, well established, and compelling" public interest, amounting to "extraordinary circumstances," might warrant an exception.¹⁷⁸

The court also gave the parties more than they sought by ordering the court of appeal to grant "reversal" of the trial court's judgment

172. See *supra* note 162.

173. *Neary*, 3 Cal. 4th at 284, 834 P.2d at 121, 10 Cal. Rptr. 2d at 860; see *supra* notes 134-38 and accompanying text.

174. Petitioners' Answer to the Amici Curiae Briefs at 12; see *Neary*, 3 Cal. 4th at 286, 834 P.2d at 126-27, 10 Cal. Rptr. 2d at 866-67 (Mosk, J., concurring).

175. Petitioners' Answer to the Amici Curiae Briefs at 5.

176. *Id.* at 1.

177. *Id.* at 13. The court noted that "[s]ome of the amici curiae in this case contend a stipulated reversal should be denied when it would adversely affect the public interest," *Neary*, 3 Cal. 4th at 283, 834 P.2d at 125, 10 Cal. Rptr. 2d at 865—omitting to note that the parties themselves took that position.

178. *Neary*, 3 Cal. 4th at 283-84, 834 P.2d at 125, 10 Cal. Rptr. 2d at 865; see *supra* text accompanying notes 134-36. The court excused itself from being more specific with the oleaginous explanation that "[b]ecause we can only speculate as to the facts of future cases, we cannot enumerate with any specificity what facts may or may not constitute an extraordinary circumstance that would warrant denying the parties' request." *Neary*, 3 Cal. 4th at 284, 834 P.2d at 125, 10 Cal. Rptr. 2d at 865. The court did not have to limit itself, however, to future cases. It could have taken note of *In re Marriage of Shapiro*, 39 Cal. App. 3d 460, 114 Cal. Rptr. 227 (1974), see *supra* notes 165-68 and accompanying text, and given the courts of appeal some guidance by indicating whether the facts of that case warranted the court's denial of the parties' request.

rather than to “vacate” it, and by embracing stipulated “reversal” as the remedy that courts presumptively should grant. The settlement in *Neary* provided for the trial court’s judgment to be “vacated.”¹⁷⁹ The defendants first explained to the supreme court that they had asked the court of appeal instead to “reverse” the judgment only because they thought vacatur might not be a permissible remedy, and that they were “indifferent” as to whether the judgment was vacated or reversed.¹⁸⁰ After “[a]dditional research” disclosed that vacatur was permissible, the defendants asked the supreme court only for vacatur,¹⁸¹ stating that they “do not seek . . . a reversal of the trial court’s judgment (as opposed to its vacatur).”¹⁸² The court, however, throughout its opinion speaks resolutely of “reversal” and goes to some lengths to avoid the terms “vacate” and “vacatur.”¹⁸³

It is not always inappropriate for a court to adopt a rule that goes beyond what the parties have asked for. The court may conclude, for example, that a narrow approach proposed by the parties—typically in an effort to maximize their chance of winning by minimizing the required change in the law—would be too costly to administer as compared with a broader, bright-line rule. The court in *Neary* suggests such a justification for its “presumption.”¹⁸⁴ While this explanation has its flaws,¹⁸⁵ the court offers no explanation for embracing stipulated “reversal” when the parties asked, and the settlement provided, only that the judgment be “vacated.” This part of the court’s ruling seems even more “gratuitous”¹⁸⁶ than the presumption the court created.

179. Petitioners’ Brief at 5; see *supra* text accompanying note 127.

180. Petition for Review at 1 n.1; see *supra* note 128.

181. Petitioners’ Brief at 1 n.1; see *supra* note 128.

182. Petitioners’ Answer to the Amici Curiae Briefs at 1.

183. See, e.g., *Neary*, 3 Cal. 4th at 278, 834 P.2d at 121, 10 Cal. Rptr. 2d at 861 (“stipulated reversals and similar procedures”); *id.* at 279, 834 P.2d at 122, 10 Cal. Rptr. 2d at 862 (“stipulated reversals and similar procedural methods”); *id.* at 285, 834 P.2d at 126, 10 Cal. Rptr. 2d at 866 (“stipulated reversals and the like”). The court’s only uses of “vacate” or “vacatur” were in stating the facts, *id.* at 276, 834 P.2d at 120, 10 Cal. Rptr. 2d at 860, and in its holding that the appellate courts have legal authority “to reverse (or otherwise vacate)” a judgment when the parties so stipulate, *id.* at 277, 834 P.2d at 120, 10 Cal. Rptr. 2d at 860.

184. *Id.* at 284, 834 P.2d at 125-26, 10 Cal. Rptr. 2d at 865 (stating that under presumption, court need not “expend significant resources” unless someone objects to settlement or some problem appears in record).

185. The court’s chosen target is only a “negative presumption,” *id.*, and not the case-by-case approach proposed by both Justice Mosk and the parties. See *supra* notes 139-41, 174-77 and accompanying text. Moreover, the court is less than constant in its solicitude for the resources of the courts of appeal; it takes no account of the burden its opinion imposes on those courts by leaving open the issues involving potential collateral estoppel. See *supra* note 137 and accompanying text; *infra* notes 225-34 and accompanying text.

186. See *Neary*, 3 Cal. 4th at 286, 834 P.2d at 127, 10 Cal. Rptr. 2d at 866-67 (Mosk, J., concurring); *supra* notes 173-78 and accompanying text.

The difference between “reversing” and “vacating” a judgment would seem significant. Courts and commentators have debated stipulated “vacatur,” with the majority apparently in opposition,¹⁸⁷ but stipulated “reversal” is a stronger and more questionable measure. To “reverse” a judgment means to reject it, undo it, turn it around. “To reverse a judgment, according to Webster’s dictionary, means to overthrow it by a contrary decision, to make it void, to undo or annul it for error.”¹⁸⁸ A national legal newspaper has described the procedure approved in *Neary* as “agreeing that a four-month trial came out the opposite of how it did.”¹⁸⁹

There are several reasons why the court’s embrace of stipulated “reversal” not only exceeds the parties’ request but worsens the resulting law. First, the charge of “rewriting history,” of attempting “to erase or rewrite the record of a trial”¹⁹⁰—a charge the court in *Neary* is at pains to deny¹⁹¹—is harder to disclaim when the judgment is not just erased

187. The federal circuits are split, and the Supreme Court has granted certiorari on the question. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 61 U.S.L.W. 3557 (U.S. Feb. 22, 1993), *granting cert. to U.S. Philips Corp. v. Windmere Corp.*, 971 F.2d 728 (Fed. Cir. 1992). The Federal Circuit and Second Circuit apparently grant stipulated vacatur as a matter of course. *See U.S. Philips Corp. v. Windmere Corp.*, 971 F.2d 728 (Fed. Cir. 1992); *Federal Data Corp. v. SMS Data Prods. Group*, 819 F.2d 277 (Fed. Cir. 1987); *Nestle Co. v. Chester’s Market*, 756 F.2d 280 (2d Cir. 1985). The Seventh Circuit has adhered to its policy of refusing such requests, *In re Memorial Hospital*, 862 F.2d 1299 (7th Cir. 1988), and this decision has been followed—and Judge Easterbrook’s reasoning explicitly endorsed—by the District of Columbia and Third Circuits. *Clarendon Ltd. v. Nu-West Indus.*, 936 F.2d 127, 129 (3d Cir. 1991); *In re United States*, 927 F.2d 626, 628 (D.C. Cir. 1991). The Ninth Circuit applies a case-by-case approach. *See National Union Fire Ins. Co. v. Seafirst Corp.*, 891 F.2d 762 (9th Cir. 1989); *Ringsby Truck Lines v. Western Conference of Teamsters*, 686 F.2d 720 (9th Cir. 1982). (Characteristically, the *Neary* court cites only the Second and Federal Circuit cases. *See* 3 Cal. 4th at 277-78, 834 P.2d at 121, 10 Cal. Rptr. 2d at 861.) For commentary, see Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589 (1991) (contra); Henry E. Klingeman, Note, *Settlement Pending Appeal: An Argument for Vacatur*, 58 FORDHAM L. REV. 233 (1989) (pro); William D. Zeller, Note, *Avoiding Issue Preclusion by Settlement Conditioned Upon the Vacatur of Entered Judgments*, 96 YALE L.J. 860 (1987) (contra).

188. *Atlantic Coast Line R.R. v. St. Joe Paper Co.*, 216 F.2d 832, 833 (5th Cir. 1954), *cert. denied*, 348 U.S. 963 (1955); *see also* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1544 (3d ed. 1992) (definition of “reverse”: “1. To turn around to the opposite direction. 2. To turn inside out or upside down. 3. To exchange the positions of; transpose. 4. *Law*. To revoke or annul (a decision or decree, for example). 5. a. To cause to adopt a contrary viewpoint. b. To change to the opposite . . .”).

189. Gail D. Cox, *Innovation—Or Just Court Triage?*, NAT’L L. J., Oct. 5, 1992, at 1, 1-10; *see also id.* at 11 (reporting interview with Professor Fisch: “Although one can come down on either side on vacatur, . . . stipulated reversals are something else. ‘A reversal is an affirmative finding of fact and law,’ she notes, adding that it is ‘incredible’ the California Supreme Court took that extra step.”).

190. *Neary*, 3 Cal. 4th at 282, 834 P.2d at 124, 10 Cal. Rptr. 2d at 864.

191. *Id.* at 282-83, 834 P.2d at 124, 10 Cal. Rptr. 2d at 864.

but turned around. Second, the objection based on the message conveyed about the judicial system—that well-heeled litigants can buy judgments—is stronger when what the litigant can buy appears to be not just an erasure but an opposite result. Third, “reversal” of the judgment more strongly belies the *Neary* court’s assertion that “[t]here will be no inference that the jury or trial court erred.”¹⁹² Fourth, the court’s approval of stipulated “reversal” undermines the factual premise of *Neary*, the claim that granting the parties’ request was necessary to effectuate their settlement. Since the settlement provided that the judgment be “vacated,” and the parties told the supreme court they wanted nothing more, giving them “reversal” plainly was not necessary to let the settlement go through.¹⁹³

Finally, in giving the parties more than they asked for, the *Neary* court was untrue to its own philosophical premise. If “[t]he courts exist for litigants,”¹⁹⁴ why give the litigants more than they seek? If they ask only for “vacatur,” why give them “reversal”? The rule adopted in *Neary* impeaches the rhetoric of *Neary*.

D. Weighing the Costs and Benefits of Stipulated Reversal

1. Stipulated reversal and the policy favoring settlement

The central question in *Neary* is whether the benefits of stipulated reversal outweigh the costs. A major sub-question is whether stipulated reversals, on balance, promote the policy favoring settlement. This depends on whether they save more resources by encouraging settlements on appeal than they lose by discouraging settlements before trial.¹⁹⁵ The

192. *Id.* at 283, 834 P.2d at 124, 10 Cal. Rptr. 2d at 864. The court does add that the appellate court can explicitly state “that the reversal is pursuant to settlement and does not constitute either approval or rejection of the trial court’s judgment.” *Id.* at 282-83, 834 P.2d at 124, 10 Cal. Rptr. 2d at 864. Then why call it “reversal”?

193. It is possible that the entire litigation over the settlement in *Neary* would have been avoided if the defendants had done their “[a]dditional research” at the outset and hence had asked the court of appeal only to “vacate” the judgment, in accord with the terms of the settlement agreement. See *supra* note 128 and accompanying text. The court of appeal’s opinion discusses “reversal” throughout and arguably turns on that concept. *Neary*, 7 Cal. App. 4th 73 (Advance Sheets) *passim*, 278 Cal. Rptr. 773 *passim*. If the parties had asked the court of appeal only to “vacate” the judgment, as they had agreed to do, the court might simply have signed their proposed order. In that case the whole litigation in the court of appeal and the supreme court would have been avoided, with substantial savings to the defendant University—or, more likely, its insurers. See *supra* notes 158-61 and accompanying text.

194. *Neary*, 3 Cal. 4th at 280, 834 P.2d at 123, 10 Cal. Rptr. 2d at 862.

195. While both the majority and the dissenter in *Neary* take for granted that it is better to settle a case than to let a court decide it, this can be questioned. See Stephen M. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1 (1992); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). See, in particular, *id.* at 1078 (“There is . . . a critical difference between a process like settlement, which is based on bargaining and

court in *Neary* assesses this question, and the costs and benefits of stipulated reversals generally, with a heavy thumb on the scale.

Looking first at the possible benefits, and at the *Neary* case itself, the court assumes without discussion that *Neary* would not settle unless the stipulated reversal were granted.¹⁹⁶ Perched on this assumption, the court warbles of the resources that will be saved by avoiding the appeal: "The trial lasted four *months*. The record consists of 63 volumes of reporter's transcript containing nearly 13,000 pages . . ." ¹⁹⁷ The assumption, however, is unknowable. That *Neary* settled with a stipulated reversal—in fact a stipulated vacatur—does not prove, and there is no way the court or the defendants' counsel can know, that the defendant veterinarians would not settle without such a provision if they were told it could not be obtained.¹⁹⁸

Looking beyond *Neary*, the court repeatedly asserts, as noted earlier, that the court of appeal "routinely" has been granting stipulated reversals or vacaturs as part of settlements on appeal.¹⁹⁹ Those settlements would not take place, the court implies, if the reversals or vacaturs were not granted.²⁰⁰ As in the case of *Neary* itself, however, there is no way of knowing whether the cases would have settled anyhow. Moreover, the settlements in question not only were not "routine" in the sense of uniformity (as noted earlier, some courts refused them),²⁰¹ they were not numerous, either. The court's assertion was based on a filing by the defendants, evidently the result of an exhaustive search of court of appeal minutes, which found a total of twelve stipulated reversals (or vacaturs)

accepts inequalities of wealth as an integral and legitimate component of the process, and a process like judgment, which knowingly struggles against those inequalities.").

196. See *Neary*, 3 Cal. 4th at 278-79, 280-81, 285, 834 P.2d at 122, 123, 126, 10 Cal. Rptr. 2d at 862, 863, 866.

197. *Id.* at 278, 834 P.2d at 121-22, 10 Cal. Rptr. 2d at 861.

198. See *id.* at 289, 834 P.2d at 129, 10 Cal. Rptr. 2d at 869 (Kennard, J., dissenting). In fact the defendants, again more restrained than the court, did not make the flat claim that *Neary* would not settle unless the existing settlement agreement was upheld. Asked by the court of appeal whether reversal or vacatur was a condition of settlement, the defendants answered carefully that it was "a condition precedent to the settlement of this case," Letter from Steven L. Mayer, counsel for Defendants and Appellants, to the Honorable J. Anthony Kline et al. (Jan. 30, 1991) (on file with *Loyola of Los Angeles Law Review*)—as indeed it was, to "the" (existing) settlement agreement. The defendants did not assert that the case would not settle otherwise. They said only that if reversal or vacatur could not be achieved, "additional—and wholly unnecessary—litigation is likely." *Id.* at 5.

199. *Neary*, 3 Cal. 4th at 278, 279, 285, 834 P.2d at 121, 122, 126, 10 Cal. Rptr. 2d at 861, 862, 866; see *supra* note 162 and accompanying text.

200. See *Neary*, 3 Cal. 4th at 278, 834 P.2d at 121, 10 Cal. Rptr. 2d at 861.

201. See *supra* notes 165-72 and accompanying text.

approved by the courts of appeal "[i]n the past five years."²⁰² That is not many; it shows stipulated reversal to have been, as Justice Kennard said, "a rare occurrence."²⁰³ My research indicates that during this period the total number of cases that settled in the courts of appeal was about 237 per year, or 1185 for the five years.²⁰⁴ The twelve cases that the defendants found settling with stipulated reversal or vacatur thus constituted about one percent of the cases that settled—not a ratio suggesting that the device was an important factor in making settlements possible.²⁰⁵

Turning to the possible costs of stipulated reversal, the court in *Neary* rejects the argument, endorsed by an influential federal court of appeals opinion²⁰⁶ and a law review article,²⁰⁷ that the availability of stip-

202. Petition for Review at 7; see *id.* at 7-10; *Neary*, 3 Cal. 4th at 278, 834 P.2d at 122, 10 Cal. Rptr. 2d at 861; *id.* at 289, 834 P.2d at 129, 10 Cal. Rptr. 2d at 868 (Kennard, J., dissenting).

203. *Neary*, 3 Cal. 4th at 289, 834 P.2d at 129, 10 Cal. Rptr. 2d at 868 (Kennard, J., dissenting).

204. My research assistant and I sampled one-fifth of the court of appeal minutes—those appearing in one out of every five consecutive volumes of the California Appellate advance sheets—for the five-year period, from March 15, 1986, to March 15, 1991, counting the cases identified as settling on appeal. (Typical language in the minutes was: "Pursuant to stipulation of counsel, the request by appellant to dismiss the appeal is granted." *E.g.*, *Lakes Joint Venture v. Western State Bldg.*, G007843, Court of Appeal Minutes 43 (Jan. 15, 1991), in 11 California Official Reports (Advance Sheets).) Two hundred thirty-seven such settlements were found. Multiplying this figure by five produces 1185 for the five years, or an average of 237 per year.

205. After *Neary*, one might expect stipulated reversals (or vacaturs) to become markedly more common; as of March 1993, however, the evidence is ambiguous. *Neary* was decided August 13, 1992. The court of appeal minutes reflecting case dispositions since *Neary* are found in 16 volumes of the Official Reports advance sheets, running from 1992 volume 27 (dated October 8, 1992) to 1993 volume 7 (dated March 16, 1993). These minutes show one stipulated reversal and one stipulated vacatur. *Richardson v. Lange*, No. F017811, Court of Appeal Minutes 36-37 (5th App. Dist., Oct. 23, 1992), in 32 California Official Reports (Dec. 1, 1992 Advance Sheets) (reversal); *Lanouette v. Ciba-Geigy Corp.*, No. F008571, Court of Appeal Minutes 110 (5th App. Dist., Sept. 10, 1992), in 27 California Official Reports (Oct. 8, 1992 Advance Sheets) (vacatur, citing *Neary*). Since the 16 volumes represent almost half of the yearly 35 volumes, continuation at this rate would produce roughly four stipulated reversals or vacaturs per year—well above the pre-*Neary* rate of 12 over five years, or 2.5 per year. See *supra* note 163 and accompanying text. It must be noted, however, that the two post-*Neary* stipulations occurred in September and October of 1992, shortly after *Neary* was decided, and there have been none since. The evidence thus seems not to confirm a post-*Neary* surge in stipulated reversals. Compare Stephen R. Barnett, *Judgments for Sale*, S.F. DAILY J., Aug. 27, 1992, at 4 (predicting that "[r]uling will spur 'stipulated reversals'"). By the same token, however, if stipulated reversals remain so rare even after *Neary* trumpeted their availability, the importance of the device in facilitating settlements may seem more doubtful than ever.

206. *In re Memorial Hosp.*, 862 F.2d 1299, 1302 (7th Cir. 1988), followed in *Clarendon Ltd. v. Nu-West Indus.*, 936 F.2d 127, 129 (3d Cir. 1991); *In re United States*, 927 F.2d 626, 628 (D.C. Cir. 1991).

207. Fisch, *supra* note 187, at 589, 596.

ulated reversal, because it assures litigants that an adverse trial court judgment can be bought off, discourages pretrial settlements. The court makes four points in response. First, going to trial still involves litigation costs, an "enormous burden."²⁰⁸ Second, trials have significant non-monetary costs, such as "negative publicity."²⁰⁹ Third, the argument "too easily surmises that a losing defendant can simply 'buy its way out' from an unfavorable judgment by paying the amount of the judgment";²¹⁰ it thus "assumes a case can be settled after trial for the same amount as it could have been settled before trial [sic]," whereas "practitioners know" the price goes up after losing at trial.²¹¹ Fourth, the argument lacks support in "empirical data," since the courts of appeal have been "routinely" granting stipulated reversals and "[n]othing suggests" that this has "even slightly decreased the number of pretrial settlements."²¹²

None of these responses bears weight. Of course going to trial still may involve major costs, including both litigation expenses²¹³ and non-monetary costs such as negative publicity. The fact remains that the availability of stipulated reversal removes one major additional cost of going to trial—the risk of incurring an adverse judgment that cannot be bought off. Such a judgment, if left to stand, would have its own negative publicity, lasting permanently along with the judgment. Even more costly to a losing defendant, as Justice Mosk pointed out, may be the collateral estoppel effects of the unreversed judgment. There may be precedential effects as well.²¹⁴ For some litigants, who are on the margin between going to trial and settling, the removal of these downside risks

208. *Neary*, 3 Cal. 4th at 279, 834 P.2d at 122, 10 Cal. Rptr. 2d at 862.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 279-80, 834 P.2d at 122, 10 Cal. Rptr. 2d at 862.

213. These are not always an "enormous burden." See *supra* text accompanying note 208. Two pages further on, in rejecting the court of appeal's argument regarding the substantial public resources already devoted to the trial of *Neary*, the court notes that judgment in a civil case "may be entered before trial, for example, on a defendant's successful demurrer or motion for summary judgment. . . . The reality in those cases is that judgment is not the result of substantial court resources. The amount of court time does not even compare to that of a trial." *Neary*, 3 Cal. 4th at 281, 834 P.2d at 123, 10 Cal. Rptr. 2d at 863. By the same token, the litigation cost to the parties in those cases "does not even compare to that of a trial." The litigant thus might well decide to bear this cost in the hope of winning, given the fallback of stipulated reversal in the case of losing. When the court looks at one side of the issue, trials are assumed and litigation costs an "enormous burden"; when it looks at the other side, there need not be a trial.

214. See *infra* note 236 and accompanying text.

will make it worthwhile to reject settlement and take the chance of winning at trial.²¹⁵

Likewise, naturally the cost of settlement will be higher after losing at trial. No one "assumes a case can be settled after trial for the same amount as it could have been settled before trial."²¹⁶ The point remains that the assurance of being able to buy off an adverse judgment after trial, albeit at a higher price than would have been paid for a settlement before trial, removes a major cost of going to trial: the risk of incurring an adverse judgment that *cannot* be bought off. Especially for deep-pocketed litigants such as product manufacturers—who may also be the litigants with the most to gain by winning at trial, and the most to lose through the collateral estoppel effects of an adverse judgment—the availability of stipulated reversal may tilt the balance against pretrial settlement. It lacks economic sense to argue that because some costs remain or even increase, the removal of other very substantial costs may not tip the litigant's decision in favor of going ahead.

The court's fourth point, that there are no "empirical data" showing that stipulated reversals have a negative impact on pretrial settlements, rests on the claim that the courts of appeal have "routinely" granted stipulated reversals and that "[n]othing suggests" a resulting decrease in pretrial settlements.²¹⁷ As I have noted, the "routinely" routine falters; the asserted practice in the courts of appeal before *Neary* was neither consistent nor quantitatively significant.²¹⁸ And if there are no "empirical data" showing a negative impact of stipulated reversals on pretrial settlements, neither does the court have any empirical data for its claim that stipulated reversals encourage settlements on appeal. The fact that some cases settle with stipulated reversal (or vacatur) does not establish that they would not settle if such procedures were not available.

215. See Fisch, *supra* note 187, at 635-37.

216. *Neary*, 3 Cal. 4th at 279, 834 P.2d at 122, 10 Cal. Rptr. 2d at 862. It would be a rare case, though, in which a losing defendant could not "'buy its way out' from an unfavorable judgment by paying the amount of the judgment." *Id.*; see *supra* note 210 and accompanying text. Since all that the winning plaintiff can get by refusing to settle and prevailing on appeal is "the amount of the judgment" (and possibly attorneys' fees), and since the appeal involves the risk of getting less or nothing, the judgment's collateral costs to the defendant would have to be both very substantial and very likely for the defendant to be willing to pay the plaintiff in settlement more than the plaintiff could obtain by refusing to settle. Cf. Fisch, *supra* note 187, at 639 (suggesting that defendant's interest in avoiding collateral consequences might enable winning plaintiff to negotiate settlement price higher than "expected outcome"—which includes, however, discount for chance of losing, see *id.* at 634).

217. *Neary*, 3 Cal. 4th at 279-80, 834 P.2d at 122, 10 Cal. Rptr. 2d at 862.

218. See *supra* notes 165-72, 201-05 and accompanying text.

When one looks at empirical data, moreover, the one percent of pre-*Neary* appellate settlements that employed such procedures²¹⁹—while most courts of appeal apparently were willing to grant them²²⁰—suggests that stipulated reversals or vacatur were not an important factor in making settlements possible. Additional empirical evidence comes from examining the settlement rate in one division of the court of appeal that refused to grant stipulated reversals or vacatur. The rate there was twice the average settlement rate of all the divisions of the court of appeal.²²¹

Actually, both effects on settlement should exist. Stipulated reversals increase what the losing litigant can gain by settling on appeal, and hence may induce some such litigant to settle who otherwise would not. Stipulated reversals reduce a litigant's costs of going to trial, and hence may induce some litigant to go to trial who otherwise would not. The weights of the two effects, however, may differ. We have no empirical data that directly show the effect either way—that show cases which were settled, or not settled, *because* of stipulated reversal. The one percent of appellate settlements that involved stipulated reversals prior to *Neary* suggests that the procedure's effect in producing settlements on appeal was not substantial, as does the settlement rate in one court that refused to approve the procedure.²²² One important thing we know, moreover, is that pretrial settlements, as the *Neary* court acknowledged, save substantially more resources than do settlements on appeal.²²³ In the absence of further evidence pointing the other way, this fact should tip the burden of proof against the proponents of stipulated reversal, as

219. See *supra* notes 202-05 and accompanying text.

220. See Petition for Review at 23-24; *supra* note 171 and accompanying text.

221. As noted earlier, Division One of the Fourth Appellate District, on November 13, 1990, refused a stipulated reversal and announced that “[w]e will not permit counsel to govern this court's decisions in such manner.” Order on Motions at 2-3, *Continental Casualty Co. v. Jones* (Nov. 13, 1990) (No. D010086); see Petition for Review in *Neary* at 23-24 & 24 n.40; see *supra* notes 169-70 and accompanying text. Examination of that court's minutes for the following calendar year, 1991, confirms that no stipulated reversals or vacatur were granted. If stipulated reversal promotes settlement, the settlement rate in that division should have been lower, other things being equal, than the rate in other courts of appeal. The average number of cases settling annually in all the courts of appeal was 237, see *supra* note 204, and Division One of the Fourth District at that time had nine percent of the state's appellate justices (8 of 87). See *Courts of Appeal*, 53 Cal. 3d iv-viii, 279 Cal. Rptr. x-xi (1991). Hence the expected number of cases settling annually in Division One of the Fourth District would have been 21 (9% of 237). The minutes show that the actual number of cases settling in Division One of the Fourth District during 1991 was 41—about double the expected number. Of course, other things may not have been equal; many factors may affect an appellate court's settlement rate. These data suggest, however, that stipulated reversal is not an important factor.

222. See *supra* notes 219-21 and accompanying text.

223. See *Neary*, 3 Cal. 4th at 277, 834 P.2d at 121, 10 Cal. Rptr. 2d at 861 (“a postjudgment settlement is perhaps less efficient than a pretrial one”).

far as the effect on settlement is concerned.²²⁴ It remains to consider other costs of stipulated reversal and to place them in the balance as well.

2. Other costs of stipulated reversal

Stipulated reversals have other costs, also slighted by the court in *Neary*. These range from burdens on the very resources that apparently most concerned the court to loss of benefits produced for the public by the judicial system.

Costs to both courts and litigants are likely to flow from the *Neary* court's treatment—or nontreatment—of the potential collateral-estoppel effects of the trial court judgment that the parties want to have reversed. Stating that no third party would be affected by the judgment in *Neary* and that “we should avoid advisory opinions,” the court left open “whether potential collateral estoppel should be a factor in deciding whether to depart from the strong presumption” favoring stipulated reversal.²²⁵ The question of collateral estoppel is no rare, technical offshoot of stipulated reversal. It lies at the heart of the matter and will demand the court's attention in most cases where stipulated reversal is sought.²²⁶

The first “collateral-estoppel cost” imposed on the courts of appeal by *Neary* will involve determining whether the trial court's judgment potentially affects a third party. The *Neary* court claimed that its “presumption” would make things easy for the courts of appeal: “[T]he court need not expend significant resources unless a nonparty comes for-

224. There may be a countervailing effect by which the availability of stipulated reversal encourages pretrial settlement. Economic analysts of litigation have said that the chance of settlement increases as the parties' estimates of the expected outcome move closer together. See Stephen M. Bundy & Einer R. Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice And Its Regulation*, 79 CAL. L. REV. 313, 365 (1991); Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITIG. 1067, 1076 (1989). The prospect of stipulated reversal may bring those estimates closer together and thus increase the chance of pretrial settlement. (I am indebted for this point to Einer Elhauge.) It would seem that this rather abstract effect would need to be set off, however, against the more concrete effect of lowering for one party the risks of going to trial. In any event, the same abstract effect would mean that the impact of stipulated reversal in eliminating the collateral estoppel effect of a trial court judgment would reduce the chance of settlement in collateral cases, since it would increase the parties' uncertainty in estimating the outcome of those cases.

225. *Neary*, 3 Cal. 4th at 284, 834 P.2d at 125, 10 Cal. Rptr. 2d at 865.

226. The *Neary* defendants described the question as “sure to arise in subsequent cases.” Petitioners' Brief at 25. Professor Fisch states, “Destruction of an adverse judgment's collateral estoppel effect is the most common reason for a party to seek vacatur.” Fisch, *supra* note 187, at 616; see also *Neary*, 3 Cal. 4th at 286, 834 P.2d at 126, 10 Cal. Rptr. 2d at 866 (Mosk, J., concurring) (arguing that some defendants might be eager to erase judgments and deter other suits).

ward and objects to the settlement for some reason or unless some other problem is apparent in the record."²²⁷ This blithe assurance overlooks the fact that requests for stipulated reversal do not arise in adversary proceedings such as American courts take for granted. They are by nature collusive. Hence the court cannot rely on the assumption that a problem will be "apparent in the record," or that an affected nonparty will get notice of the proceeding and thus be able to "come[] forward and object[]."²²⁸ Rather the court of appeal will have to consider *sua sponte*, in inquisitorial fashion, the possible existence and interests of third parties who might be affected by the settlement. American courts may not excel at this unfamiliar task. Hence there will be a continuing risk of cutting off the rights of unconsidered third parties, with resulting problems of due process, as well as a continuing potential for compromise to the neutrality and reputation of the courts.²²⁹

If there is a potential effect on a third party, the court of appeal will have to wrestle with the question of law that the supreme court ducked: what effect, if any, to give to potential collateral estoppel in deciding whether to "depart from the strong presumption" in favor of stipulated reversal.²³⁰ And if it is decided, as *Neary* perhaps suggests, that the "strong presumption" prevails, further costs will follow for other litigants and other courts. Litigants will lose the preclusive effect of the trial court's judgment and will have to relitigate the issue in question, with added costs and uncertain prospects.²³¹ The courts, likewise, will bear

227. *Neary*, 3 Cal. 4th at 284, 834 P.2d at 126, 10 Cal. Rptr. 2d at 865.

228. *Id.* "[I]t is rare that third parties who might benefit from the preclusive effect of a judgment will learn of the threat to the judgment in time to make their presence known to the court." Fisch, *supra* note 187, at 621 n.165.

229. In *Neary* itself, the court's assurance that "[c]ollateral estoppel is not an issue in this case," 3 Cal. 4th at 284, 834 P.2d at 125, 10 Cal. Rptr. 2d at 865, may be questioned. The court explains that "[t]he parties in this case agree that no nonparty is or will be affected by the trial court judgment, and nothing in the record suggests otherwise." *Id.* This "trust me" approach seems inadequate. As a general rule the parties of course will so agree, and will put nothing in the record that suggests otherwise. As one amicus put it, the defendants' position "requires the court to accept on faith the representations of parties which have an incentive to color or narrowly interpret the facts and the interests of the public or nonparties." Brief of Amicus Curiae Plant Insulation Company in Support of the Opinion of the Court of Appeal at 24. In fact, one could question the assertion of the parties in *Neary* that no third parties would be affected by the preclusive effect of the trial court's judgment. The defendants told the court that "[a]s far as we know, only three lawsuits other than this case have been filed arising out of the toxaphene spraying on Neary's ranch." Petitioners' Brief at 21. Despite these three suits, there was "literally no risk" that any third party could be affected by the stipulated reversal, the defendants vouched, because all three were "in the process of being settled," Petitioners' Answer to Amici Curiae Briefs at 23—as if settlements never fall through.

230. *Neary*, 3 Cal. 4th at 284, 834 P.2d at 125, 10 Cal. Rptr. 2d at 865.

231. See Fisch, *supra* note 187, at 610, 620-21. "[T]he most significant cost associated with vacatur is the destruction of the judgment's preclusive effect." *Id.* at 610.

“the cost of consuming scarce judicial resources to litigate an issue a second time.”²³² The California Supreme Court previously has embraced issue preclusion as a way of promoting judicial economy by preventing needless litigation and inconsistent results.²³³ The court in *Neary*, while apparently preoccupied with judicial economy, focused too closely on the *Neary* case itself, failing to consider the costs that a legal rule designed to settle that case might impose on courts and parties in other cases.²³⁴

A further cost will lie, at least in some cases, in destruction of the precedential effect of the trial court judgment. The court in *Neary* emphatically denies that trial court judgments have any such effect: “[T]he Court of Appeal decision incorrectly suggests that a trial court judgment provides guidance to other courts and litigants. Not so. ‘[T]rial courts make no binding precedents.’”²³⁵ Apart from the manifest nonsequitur—decisions can “provide[] guidance” though they are not “binding precedents”—the court’s assertion appears to be incorrect. In at least one context, review of administrative agency decisions, trial courts not only “provide[] guidance” for the agencies but, in the case of at least one agency, appear to make “binding precedents.”²³⁶ Beyond that, the

232. *Id.* at 620-21.

233. *Clemmer v. Hartford Ins. Co.*, 22 Cal. 3d 865, 875, 587 P.2d 1098, 1102-03, 151 Cal. Rptr. 285, 289 (1978); see *Bernhard v. Bank of Am.*, 19 Cal. 2d 807, 811, 122 P.2d 892, 892-94 (1942); see also *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) (stating that collateral estoppel promotes judicial economy by preventing needless litigation).

234. See *In re Memorial Hosp.*, 862 F.2d 1299, 1303 (7th Cir. 1988) (“Judges must have at heart the interests of other litigants in future cases, and hold them equal in weight with the interests of today’s.”).

235. *Neary*, 3 Cal. 4th at 282, 834 P.2d at 124, 10 Cal. Rptr. 2d at 864 (quoting *Fenske v. Board of Admin.*, 103 Cal. App. 3d 590, 596, 163 Cal. Rptr. 182, 186 (1980)). The quoted statement was dictum in that case. *Fenske v. Board of Administration* affirmed a superior court order, on review of an administrative agency’s decision, holding a statute unconstitutional as applied to the person involved in the agency proceeding. *Fenske v. Board of Admin.*, 103 Cal. App. 3d 590, 594, 598, 163 Cal. Rptr. 182, 184, 187 (1980). The court added, unnecessarily, that the agency could not apply the order to other persons in other cases because a constitutional provision, CAL. CONST. art. III, § 315, barred administrative agencies from declaring statutes unconstitutional, and because “the doctrine of stare decisis applies only to decisions of appellate courts and trial courts make no binding precedents.” *Fenske*, 103 Cal. App. 3d at 596, 163 Cal. Rptr. at 186.

236. Jurisdiction to review decisions of administrative agencies often lies in the superior courts. See CAL. CIV. PROC. CODE § 1085 (West 1980) (stating that writ may be issued by any court to any inferior board to compel performance of an act). Decisions of these courts that reverse agency actions may well be followed by the agencies in other cases. For at least one agency, a binding precedential effect is mandated by statute. Under the Unemployment Insurance Code, the Unemployment Insurance Appeals Board designates certain of its decisions as “precedent decisions.” CAL. UNEMP. INS. CODE § 409 (West 1986). These decisions are published, *id.*, and actions may be brought in superior court for review of any of them. *Id.* § 409.2; see *Pacific Legal Found. v. Unemployment Ins. Appeals Bd.*, 29 Cal. 3d 101, 109-11,

court's enthusiastic belittling of the role of the trial courts has its own costs. As Justice Kennard observed: "If this court by its actions shows little regard for the work of the trial courts, we can hardly expect the public to hold them in high esteem."²³⁷

Another cost of stipulated reversal involves the loss of benefits that flow to the public from the judicial system. The courts are not, as the majority in *Neary* asserts, little more than a dispute-resolution service. If parties want an essentially private resolution of their dispute, they can go to arbitration or other forms of alternative dispute resolution, and pay for it themselves. Court judgments, produced with a substantial expenditure of public resources, are designed to benefit the public as well as litigants.

Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.²³⁸

The court in *Neary*, in contrast, attributes a court's judgment to the parties, calling it "the ultimate product of their sustained effort and ex-

624 P.2d at 244, 242-48, 172 Cal. Rptr. 194, 197-99 (1981). Section 409.1 of the Unemployment Insurance Code provides:

If a final judgment of a court of competent jurisdiction reverses or declares invalid a precedent decision of the appeals board . . . , the appeals board . . . shall promptly modify the precedent decision to conform in all respects to the judgment of the court. The modified precedent decision shall supersede the prior precedent decision for all purposes.

CAL. UNEMP. INS. CODE § 409.1 (West 1986); *see, e.g.*, California Unemployment Ins. Appeals Bd., Notice by R.E. Petersen, Chief Counsel (Oct. 2, 1992) (stating that Superior Court of Sacramento County has invalidated Precedent Benefit Decision P-B-467 and "[a]ccordingly, pursuant to . . . section 409.1 the Board has overruled and set aside" that decision, which "is no longer of any force or effect").

Stipulated reversal as approved in *Neary* might be useful to the Board. When a superior court decision invalidates a Board precedent, the Board can appeal the decision and settle with a stipulated reversal, thus preserving its precedent. *Cf. In re Memorial Hosp.*, 862 F.2d 1299, 1301 (7th Cir. 1988) (U.S. Department of Health and Human Services joined motion for stipulated vacatur). Such action would deny to other litigants before the Board, and to the public at large, the benefits of the precedential effect that the superior court's decision otherwise would have.

237. *Neary*, 3 Cal. 4th at 288, 834 P.2d at 128, 10 Cal. Rptr. 2d at 868 (Kennard, J., dissenting).

238. Fiss, *supra* note 195, at 1085.

pense.”²³⁹ In the court’s view the parties have produced the judgment and therefore apparently own it, to buy and sell as their wealth allows them to.

The judgments of California’s courts, however, are designed to benefit the people of California, not just the few persons who are before the court. These judgments interpret the laws of the state, explicate the values embodied in those laws, establish rights and liabilities between parties engaged in activities that affect the public, decide questions of public justice (such as libel actions against a public university), and otherwise declare law and do justice in ways of deep interest to the public. Part of the reason for public financing of the judicial system lies in the public value of judicial decisions. All these benefits are to some extent denied to the public when a court’s judgment is “reversed” by a higher court simply because one party has paid the other’s price.

A final cost of stipulated reversal lies in the harm the practice inflicts on public respect for the judicial system. When wealthy parties can use their money to turn court judgments around, while parties lacking the cash cannot, the courts may no longer be viewed as neutral public arbiters of justice and law, but as one more institution where the dollar calls the tune.²⁴⁰ A goddess of justice who wears a blindfold, an aspiration that the law treat rich and poor alike, these ideals are subverted by a rule of law that frankly allows private parties to buy off the judgments of the public courts.²⁴¹

239. *Neary*, 3 Cal. 4th at 280, 834 P.2d at 123, 10 Cal. Rptr. 2d at 862.

240. *See id.* at 287, 834 P.2d at 127, 10 Cal. Rptr. 2d at 867 (Kennard, J., dissenting). The trial judge who sentenced Bill Honig, California’s then-Superintendent of Public Instruction, on conflict-of-interest charges stated: “There cannot be two standards of justice—a standard for the powerful and affluent and another for those who are not.” Nanette Asimov, *Honig Gets Probation*, S.F. CHRON., Feb. 25, 1993, at A1, A8. *Neary* may seem hard to square with this proposition—unless the proposition is discounted as coming from a trial judge, *see supra* note 235 and accompanying text.

241. A recent survey provides some evidence concerning the public’s impression of California’s courts. In 1992 the Judicial Council of California, as part of a project called “2020 Vision: A Plan for the Future of California’s Courts,” commissioned a survey of the perceptions of the California courts held by members of the public and by lawyers. A majority (52%) of the public respondents rated the state’s court system “only fair” or “poor.” YANKELOVICH, SKELLY & WHITE/CLANCY SHULMAN, 2020 VISION: THE COMMISSION ON THE FUTURE OF THE COURTS, SURVEYING THE FUTURE: CALIFORNIANS’ ATTITUDES ON THE COURT SYSTEM 5 (1992) [hereinafter SURVEY]. Asked to evaluate the California court system by comparing “desirable” attributes with attributes delivered now, the public respondents listed five “key gaps”; all five concerned equal justice, and two asserted that the system failed to “[t]reat poor people as well as . . . wealthy people” and to avoid giving “rich people better access to court than poor people.” *Id.* at 14; *see id.* at 10 (“Essentially, Californians believe that some people get treated better than others.”). The lawyer respondents also saw a “key gap” in failure by the courts to treat the poor as well as the wealthy; indeed, they listed this failing higher than the public respondents did. *Id.* at 17; *cf. id.* at 14. California Chief Justice Malcolm Lucas,

In sum, when one adds up the costs of stipulated reversals and weighs them against the sole asserted benefit of promoting settlements on appeal, it is hard to share the *Neary* court's assessment that the benefits outweigh the costs.

IV. DEPUBLICATION AND STIPULATED REVERSAL

While each is problematic in its own right, depublication and stipulated reversal, considered together, display similarities and differences. This mingled pattern invites inquiry about the governing rationale for these two distinctly Californian judicial innovations and about the California Supreme Court's underlying conception of the judicial process.

A basic similarity is that both procedures involve, in a rough but essential sense, making judicial decisions disappear. To this end, they both entail setting aside a judicial act of a lower court without the judicial act that such a result normally requires of an appellate court—deciding a case and giving a reason for the decision. Depublication is accomplished by the supreme court without either deciding a case or issuing an opinion. Stipulated reversal does “decide” a case, but the only “reason” given is that the parties have agreed to it—that one party has paid the other's price. The two practices thus have in common an easy undoing of the work of a lower court, and hence a disparagement of that court's role. The supreme court in *Neary* makes its deprecation explicit by denouncing the notion that trial court judgments “provide[] guidance to other courts and litigants”²⁴² and by crediting those judgments to the “sustained effort and expense” of the parties²⁴³—as if the court, the judge and public moneys played no part in the trial court's ruling. And while the supreme court has made nothing explicit in defense of depublication, the practice of extinguishing the hard-wrought opinions of appellate judges without a word of explanation speaks for itself as a deprecation of their work, if not an insult as well. In embracing each practice, the California Supreme Court gives the back of its hand to the work of a lower court.

who chairs the Judicial Council, called the survey “worrisome.” Marty Graham, *Lawyers and Public Differ on 'Justice'*, S.F. DAILY J., Dec. 11, 1992, at 1. “‘The efficacy of the courts is inseparably tied to the public confidence,’ [Chief Justice] Lucas said, ‘It is not enough that we be scrupulously fair; we must also appear to be so.’” *Id.*

The interviews for this survey were conducted from mid-September to mid-October 1992, SURVEY, *supra*, at 1—a period beginning one month after *Neary* was decided on August 13, 1992, to some attention in the press. See Richard C. Paddock, *Settlement that Voids Jury Verdict OK'd*, L.A. TIMES, Aug. 14, 1992, at A3; *Unusual Settlement OK'd in UC Libel Suit*, S.F. CHRON., Aug. 14, 1992, at A28. Chief Justice Lucas was in the majority in *Neary*.

242. *Neary*, 3 Cal. 4th at 282, 834 P.2d at 124, 10 Cal. Rptr. 2d at 864.

243. *Id.* at 280, 834 P.2d at 123, 10 Cal. Rptr. 2d at 862.

This similarity masks, however, a deep difference in the conceptions of the judicial process that underlie depublication on the one hand and stipulated reversal on the other. Stipulated reversal apotheosizes the view, trumpeted in *Neary*, that “[t]he courts exist for litigants,”²⁴⁴ that “the paramount purpose of litigation is to resolve disputes.”²⁴⁵ From this perspective, it is harder than ever to see how the court can justify depublication. The court’s order depublishing a court of appeal opinion has no effect on the result of the case, no substantive impact on the litigants or the dispute between them. If “[t]he courts exist for litigants,” what business does a court have performing a judicial act that has no effect on the litigants? Quoting a United States Supreme Court opinion, the court declares in *Neary*: “The real value of the judicial pronouncement—what makes it a proper resolution of a “case or controversy” rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*”²⁴⁶ Since depublication settles no dispute, one wonders how it is a proper resolution of a “case or controversy” rather than an advisory opinion.

If depublication cannot be reconciled with the view of the judicial process that animates *Neary*, the reason is that it reflects the *other* major purpose of courts, a purpose denied in *Neary*: “making law” for future cases and for society as a whole.²⁴⁷ Depublication, however, carries this role too far—beyond the limits of the judicial function—by divorcing it from the resolution of any dispute before the court.²⁴⁸ *Neary* throws a spotlight on this fatal vice of depublication. Everything the court says about the judicial process in *Neary* confirms the illegitimacy of depublication.

At the same time, *Neary* exceeds the limits of the judicial function in the opposite direction. By allowing (and inviting) litigants to treat court judgments as bargaining chips, *Neary* sacrifices the public functions of litigation on the altar of dispute resolution. It thus deprives the public of many of the benefits of the judicial system and undermines respect for the courts as public arbiters of law and justice.

Another apparent difference between the two practices involves their treatment of the public record. The court in *Neary* denies that stip-

244. *Id.*

245. *Id.* at 282, 834 P.2d at 123, 10 Cal. Rptr. 2d at 864.

246. *Id.* at 282, 834 P.2d at 124, 10 Cal. Rptr. 2d at 864 (quoting *Hewitt v. Helms*, 482 U.S. 755, 761 (1987)).

247. See *supra* notes 25, 49 and accompanying text.

248. See *Bird*, *supra* note 14, at 9 (“Reliance on this technique [depublishing] ironically may result in neither of the two functions of the appellate process, justice and predictability, being fulfilled.”).

ulated reversal constitutes “an attempt to erase or rewrite the record of the trial.”²⁴⁹ Everything that has happened in the case “will remain a matter of public record,”²⁵⁰ the court says, and “[t]here will be no inference that the jury or trial court erred.”²⁵¹ This “no inference” claim echoes the “no opinion” claim of Rule 979(e) concerning depublication—that it “shall not be deemed an expression of opinion” by the supreme court.²⁵² Both claims may well seem implausible. Depublication, however, tampers with the public record more frankly than stipulated reversal does. The acknowledged purpose and effect of a depublication order are precisely to remove the depublished opinion from the public record of citable precedents.

The difference, however, may be more apparent than real. Despite the *Neary* court’s denial, stipulated reversal, too, inherently involves the rewriting of history. That is what “reversal” means. If the stipulated reversal did not in some sense “erase or rewrite the record of a trial,” the losing party would not pay for it, much less insist on it as a condition of settlement. Depublication and stipulated reversal thus both have at their heart a tampering with the public judicial record.

In attempting to deny this, the *Neary* court calls attention to another trait the two practices share: a certain duplicity, an attempt to have things both ways. This is clear in *Neary* from the contrast between the court’s denial that “reversal” connotes error and its reliance on the defendants’ claim that the veterinarians insist on such a provision in order to cleanse their reputations of the jury’s verdict.²⁵³ (If the reversal is only a “reminder” that the trial court’s judgment “did not face appellate review,” as the court claims,²⁵⁴ the parties should be satisfied with an order dismissing the appeal, which they could routinely have.)²⁵⁵ With regard to depublication, while I have argued that Rule 979(e) can and should be taken at face value in declaring that depublication “shall not be deemed” an expression of opinion by the court,²⁵⁶ there remains a sense in which the rule denies reality, since the supreme court plainly is expressing its (negative) opinion about some aspect of the court of appeal’s opinion. The court is exercising a form of substantive review while seem-

249. *Neary*, 3 Cal. 4th at 282, 834 P.2d at 124, 10 Cal. Rptr. 2d at 864.

250. *Id.*

251. *Id.* at 282-83, 834 P.2d at 124, 10 Cal. Rptr. 2d at 864.

252. CAL. R. CT. 979(e); see *supra* note 68 and accompanying text.

253. See *Neary*, 3 Cal. 4th at 281, 282-83, 834 P.2d at 123, 124, 10 Cal. Rptr. 2d at 863, 864; *id.* at 294, 834 P.2d at 132, 10 Cal. Rptr. 2d at 872 (Kennard, J., dissenting).

254. *Id.* at 285, 834 P.2d at 126, 10 Cal. Rptr. 2d at 866.

255. See *id.* at 294, 834 P.2d at 132, 10 Cal. Rptr. 2d at 872 (Kennard, J., dissenting).

256. See *supra* notes 90-92 and accompanying text.

ing to deny, in Rule 979(e), that it is doing so. The two practices thus share a calculated ambiguity.

This ambiguity might be defended as a useful device to ease the workload of the judicial system and increase its capability. The court is enabled to expand the judicial function in both directions—making law without deciding cases, reversing judgments to soothe losing litigants—while denying that it is doing so. The veterinarians in *Neary* can tell their professional colleagues that the judgment against them was “reversed,” and have the word understood in its normal meaning, while the supreme court tells *its* professional colleagues that the word means something else. The supreme court depublishes opinions because it thinks they are wrong, but asserts in Rule 979(e) that it shall not be taken to be expressing any such opinion. The result, it can be argued, is some useful play in the joints, some oil for the gears. The court gets the expanded power it wants in depublication; the parties get the expanded power they want in stipulated reversal; and “deniability” is preserved.

But ambiguity has its harms. Courts, as institutions of public record, should not, and ultimately cannot, conceal from the profession and the public what they are doing. If they adopt procedures that test the limits of the judicial function, these procedures sooner or later will be out on the table for all to see and appraise. The court itself should place them there. Apart from what it conceals, ambiguity can be damaging in its own right. When a court tries to have things both ways, either in a single opinion or in simultaneous practices, it impeaches itself, losing credibility and compromising its integrity.

There remains one possible basis for reconciling depublication and stipulated reversal, quite possibly the one that does justify each practice in the eyes of the court. This, of course, is judicial efficiency—the court’s apparent craving for almost any help it can get in lessening input and increasing output.²⁵⁷ The *Neary* opinion exudes a hunger for settlements.²⁵⁸ And depublication, though it has received from the court no extended defense like that offered for stipulated reversals in *Neary*—indeed, no defense at all—apparently also reflects the consuming quest for judicial economy.²⁵⁹

257. The court, however, unaccountably has not sought the major relief that it should obtain—a constitutional amendment relieving the court of its exclusive jurisdiction over death penalty appeals. CAL. CONST. art. VI, § 11.

258. See *Neary*, 3 Cal. 4th at 277, 283, 834 P.2d at 121, 125, 10 Cal. Rptr. 2d at 860-61, 864-65 (“The need for settlements is greater than ever before.”).

259. See Grodin, *supra* note 7, at 516; Bird, *supra* note 14 (“In an attempt to deal with this situation [where the court of appeal “has erred”] quickly and still fulfill its oversight function, the court has come to rely increasingly on [depublishing] . . .”). At least one other recent

It is fair to ask whether depublication and stipulated reversal in fact promote this end. Stipulated reversal, as I have argued, appears to flunk the cost-benefit test, *Neary* notwithstanding. The efficiency advantages of depublication, on the other hand, may seem hard to deny. Although Rule 979(e) narrows the practical difference between depublishing an opinion and simply denying review of it, the court still gets more law-making bang for its buck by eliminating the opinion as precedent at the rather tiny cost in direct resources that depublication exacts. Depublication, however, has other, less tangible costs, which include diminished respect for the state's supreme court and its judicial system. Efficiency, in any event, does not make a process legitimate. (Legislative vetoes were efficient.)²⁶⁰ Whether depublication exceeds the judicial power conferred by Article VI of the California Constitution remains an open question.

V. CONCLUSION

Depublication and stipulated reversal are two distinctive techniques embraced by the California Supreme Court for annulling actions of lower courts without the usual requirements of appellate review. The impact of depublication is being diluted by California Rule of Court 979(e), but the practice still offends basic principles governing the exercise of judicial power, in particular the principle that courts make law only by deciding cases. There is thus a real question whether depublication exceeds the "judicial power" conferred by Article VI of the California Constitution.

Stipulated reversal was approved by the court in *Neary v. Regents of the University of California*, but not persuasively. The court's opinion is one-sided and poorly reasoned; it ignores the dissenting and concurring opinions, takes liberties with the facts, and gives the parties more than they asked for. Most important, the opinion systematically exaggerates the benefits of stipulated reversal and belittles the costs. In fact, the possible benefits of the procedure in promoting settlements on appeal seem outweighed by the costs it imposes in discouraging pretrial settlements, burdening the court of appeal with issues concerning collateral estoppel (and possibly the court system generally with relitigation of issues), cutting off other public benefits of trial court judgments, and undermining respect for the judicial system.

decision of the California Supreme Court appears to reflect the court's compulsion to fend cases off its docket. See *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1, 832 P.2d 899, 10 Cal. Rptr. 2d 183 (1992) (holding that courts may not review arbitration awards even for errors of law that are apparent on face of award and cause substantial injustice).

260. See *INS v. Chadha*, 462 U.S. 919 (1983) (holding legislative vetoes unconstitutional); *supra* notes 106-09 and accompanying text.

Considered together, depublication and stipulated reversal, despite their procedural similarity, reflect deeply opposed views of the purpose of courts. Stipulated reversal apotheosizes the view, embraced by the court in *Neary*, that courts exist to resolve disputes. That view condemns depublication, which resolves no dispute. Depublication in fact reflects the other major purpose of courts, "law making," a purpose the court in *Neary* denies.

Recognition that courts serve both purposes does not legitimize either depublication or stipulated reversal. Each practice exceeds the limits of the judicial function, in opposite directions. Depublication is an *ultra vires* exercise of judicial power because it makes law unsupported by the decision of any case. Stipulated reversal, though not beyond the court's power, sacrifices the law-making function of courts, and their character as public institutions, on the altar of dispute resolution.

A final possible basis for reconciling the two practices, and the one that may in fact explain the existence of both, lies in their perceived contribution to judicial efficiency. Stipulated reversal appears on balance to make no such contribution. Depublication, even as diluted by Rule 979(e), undoubtedly does enlarge the court's law-making power. But depublication also imposes major costs, which include diminished respect for the judicial system. The question remains, moreover, whether this extension of law-making power lies within the court's authority under the California Constitution.

Depublication and stipulated reversal, two distinctive devices adopted by the California Supreme Court for making judicial decisions disappear, both ultimately raise the question whether any gains they produce in judicial efficiency are worth the harm they may inflict on the integrity and reputation of California's courts.