Closing the Gap: Post-Decision, Pre-Mandate Mootness

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I. INTRODUCTION

There is a fissure in the federal judicial system—between decision and mandate—through which authority and resources are allowed to slip. Through this crack in federal procedure, decisions of federal appellate courts—duly deliberated and justly rendered—are surrendered forever to the ether of vacatur. Due to the needless separation of the issuance of a decision from the issuance of the corresponding mandate, federal courts have created a type of limbo in which decisions may exist for a period of time before being given full effect and precedential value through mandate. In this period between decision and mandate, decisions have been shown to be vulnerable to mootness. That is, decisions are susceptible to the circumstance of post-decision, pre-mandate mootness that may ultimately prove fatal to the value of the decision.

To clarify, the term "decision" refers to an appellate court's opinion that sets out the legal reasoning for its chosen outcome.[1] The term "mandate," however, refers to a formal order from an appellate court to a lower court that constitutes the actual final judgment on the case.[2] Both the decision and the mandate must be issued—*id est*, filed—before either takes official effect.[3] The subject of this Article is the gap of time after the issuance of a decision but before the issuance of a mandate—and what happens when a case is rendered moot during that time.

While federal appellate courts have had rare opportunity to address the obvious incongruity of such a situation, the Ninth Circuit, in *In re Pattullo*,[4] attempted to address the issue directly. In *Pattullo*, the Ninth Circuit's response to the post-decision, pre-mandate mootness of an appeal was to vacate its own decision rendered on the appeal, eviscerating its own authority and surrendering the value of significant resources expended in the rendering of that decision.[5]

The *Pattullo* result has significant implications for the effective and efficient rendering of appellate decisions. In Part II of this Article, we examine the specifics and circumstances of the *Pattullo* decision. In Part III, we articulate the significant problems the *Pattullo* rule poses for the federal courts system. And in Part IV, we examine alternative conclusions to *Pattullo*-type circumstances, ultimately concluding that the most effective approach to post-decision, pre-mandate mootness is to

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[1] *Cf.* BLACK'S LAW DICTIONARY 436, 1125 (8th ed. 2004) (defining "decision" and "opinion").

[2] *Cf. id.* at 980 (defining "mandate").

[3] *Cf. id.* at 850 (defining "issue").

[4] 271 F.3d 898 (9th Cir. 2001).

[5] *See infra* notes 15–29 and accompanying text.

eliminate the interim between decision and mandate—thereby eliminating the possibility for such a conflict to arise.

II. THE *PATTULLO* RESULT

In *In re Pattullo*,[6] the Ninth Circuit was presented with what appeared to be a bankruptcy case typical in both procedure and fact.[7] The particular issue presented concerned whether John and Susan Pattullo, individual debtors, were eligible for Chapter 13 bankruptcy relief.[8] The IRS asserted that because the Pattullos owed more than $250,000 of unsecured debt, the couple was statutorily precluded from seeking Chapter 13 protection.[9] The Pattullos countered that the IRS was barred from invoking the statutorily prescribed monetary limits due to the existence of a prior settlement agreement between the IRS and the Pattullos, which stipulated that the Pattullos did *not* possess more than $250,000 in unsecured debt.[10] Ultimately, the Pattullos' eligibility for Chapter 13 bankruptcy protection hinged on whether the IRS's prior stipulation had preclusive effect in the couple's later bankruptcy proceeding.[11] The bankruptcy court ruled that it did, and granted the Pattullos' motion for Chapter 13 protection.[12] The federal district court affirmed,[13] and the IRS appealed to the Ninth Circuit.[14]

While the appeal was pending before the Ninth Circuit, the bankruptcy court dismissed the Pattullos' underlying Chapter 13 proceeding "because the Pattullos had failed to comply with the requirements of their Chapter 13 plan."[15] The Ninth Circuit panel that was considering the IRS's appeal was not notified of the bankruptcy court's dismissal of the Pattullos' proceeding, and two weeks later it

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[6] 271 F.3d at 898.

[7] *See id.* at 900 (involving an appeal to the Ninth Circuit of a bankruptcy court's decision regarding Chapter 13 relief that had first been appealed to a federal district court).

[8] *Id.*

[9] *See id.* (noting that the IRS filed a motion to dismiss the Chapter 13 proceeding on the grounds that the Pattullos had over $250,000 in unsecured debt, and that 11 U.S.C. § 109(e) (1997) provides Chapter 13 relief only to those with less than $250,000 in unsecured debts).

[10] *See id.* (noting that the Pattullos sought summary judgment on the IRS's motion to dismiss based on the fact that "[t]he IRS had stipulated to the amount of the Pattullos' unsecured debts as part of a prior settlement between the Pattullos and the IRS").

[11] *See id.* (citing 11 U.S.C. § 109(e) (1997)).

[12] *In re* Pattullo, 271 F.3d 898, 900 (9th Cir. 2001) ("The bankruptcy court granted the Pattullos' motion, concluding that the prior stipulation had preclusive effect.").

[13] *See id.* (citing 11 U.S.C. § 109(e) (1997)).

[14] *Id.* ("The IRS appealed [the lower courts'] orders to this court.").

[15] *Id.*

issued a decision affirming the district court's holding.[16] However, the Ninth Circuit did not immediately issue a mandate accompanying this decision.[17] Shortly thereafter, the IRS filed a motion to vacate the Ninth Circuit's decision and to dismiss the appeal on the grounds that the bankruptcy court's prior dismissal made the Ninth Circuit appeal moot.[18] Upon this motion, the Ninth Circuit found itself in the awkward position of having learned of the prior dismissal only after having issued a decision but prior to issuing a mandate.[19]

The Ninth Circuit correctly observed that, to have jurisdiction over a case, a court must be able to grant effective relief between parties.[20] An appeal to a court lacking such ability is moot.[21] The Ninth Circuit agreed with the IRS that any future mandate it could issue in the case would fail to grant relief because the underlying Chapter 13 proceeding had been dismissed—any formal order as to the validity of that proceeding would be moot.[22] Thus, the mandateless Ninth Circuit appeal was moot.[23]

In *Pattullo*, it is clear that mootness stripped the Ninth Circuit of its jurisdiction to issue a mandate. But the case raises the perplexing question of how to handle decisions in cases that later become moot before a mandate is issued. With little precedential support and no explication, the Ninth Circuit offered this conclusory view: "Even after an appellate court has issued its decision, if it has not yet issued its mandate and the case becomes moot, the court will vacate its decision and dismiss the appeal as moot."[24]

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[16] *See id.* (explaining that the bankruptcy court dismissed the proceeding on June 27, 2001, and that the Ninth Circuit issued its disposition on July 11, 2001).

[17] *See id.* at 901 (noting that the *Pattullo* court had "yet to issue [its] mandate" by the time the IRS informed it about the dismissal of the Chapter 13 proceeding).

[18] *In re* Pattullo, 271 F.3d 898, 900 (9th Cir. 2001) (describing the IRS's motion to vacate and dismiss, which was filed two weeks after the Ninth Circuit issued its decision).

[19] *See id.* at 901 ("[W]hile we issued our memorandum disposition prior to the IRS bringing to our attention the dismissal of the Pattullos' Chapter 13 proceeding, we have yet to issue our mandate.").

[20] *See id.* ("[W]hile we issued our memorandum disposition prior to the IRS bringing to our attention the dismissal of the Pattullos' Chapter 13 proceeding, we have yet to issue our mandate.").

[21] *See id.* ("Our mootness inquiry focuses upon whether we can still grant relief between the parties.").

[22] *See id.* at 902 ("Because the Chapter 13 proceeding has been dismissed, any ruling as to its validity would be moot.").

[23] *See id.* (dismissing the case as moot in light of the bankruptcy court's dismissal).

[24] *In re* Pattullo, 271 F.3d 898, 901–02 (9th Cir. 2001) (citing United States v. Miller, 685 F.2d 123, 124 (5th Cir. Unit B 1982)). The *Pattullo* court's support for this proposition is discussed in great depth in Part III. A., *infra*.

Accordingly, the Ninth Circuit's decision on the merits of the Pattullos' case was vacated, and the IRS's appeal was dismissed.[25] By vacating its own decision, the Ninth Circuit avoided the thorny issues inherent in post-decision, pre-mandate mootness by creating a superficially sound rule.

III. THE PROBLEM WITH *PATTULLO*

By addressing the post-decision, pre-mandate mootness issue in such a manner, the *Pattullo* court set a clear and strict rule: When a case becomes moot after a decision is issued but before a mandate is issued, the decision shall be vacated.[26] While the *Pattullo* court's vacatur of its own decision seems to have been a reasonable method by which to resolve the problems posed by post-judgment, pre-mandate mootness, the likelihood for appropriate application of such a method across any spectrum of similar cases is slim.

The effects of such a decision are apparent: A vacated decision has no precedential effect,[27] is in essence reversed,[28] and is effectively stripped of all persuasive authority.[29] For any decision that may become moot before an accompanying mandate is issued, the *Pattullo* treatment is utterly fatal. However, such treatment is potentially problematic for various legal and policy reasons, and is not the most desirable in light of our modern court structure or any number of traditional judicial ambitions.

A. The Pattullo *Decision Lacks Precedential Support*

The rule suggested by *Pattullo* is unsupported in case law. A close study of the authority offered by the Ninth Circuit in support of the *Pattullo* rule indicates that there is, in fact, no precedent requiring

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[25] *See id.* at 902 ("We lack jurisdiction over this case and must accordingly vacate our memorandum disposition and dismiss this appeal.").

[26] *See id.* at 901–02.

[27] Durning v. Citibank, N.A., 950 F.2d 1419, 1424 n.2 (9th Cir. 1991) ("[A] decision that has been vacated has no precedential authority whatsoever.").

[28] *See, e.g.*, DOROTHY W. NELSON, ET AL., FEDERAL NINTH CIRCUIT CIVIL APPELLATE PRACTICE 10:262 ("[T]he effect of reversal and vacatur is essentially the same and the court occasionally uses the terms interchangeably."). *Compare* Cal. Dept. of Soc. Servs. v. Thompson, 321 F.3d 835, 847 (9th Cir. 2003) (using reversal to nullify the lower court's decision), *with* Orff v. United States, 358 F.3d 1137, 1149 (9th Cir. 2004) (using vacatur to render the district court's ruling null).

[29] *See, e.g.*, Russman v. Bd. of Educ., 260 F.3d 114, 122 n.2 (2d Cir. 2001) (stating that the persuasive authority of a federal court's order is lost if that order is vacated); Jo Ann J. Brighton, et al., Yellowstone: *New Standards for Lender Ability in Today's Economic Climate*, 28–7 AM. BANKR. INST. J. 28, 84 (2009) (noting that a landmark bankruptcy case was no longer persuasive authority after being vacated).

vacatur of a decision unaccompanied by a mandate in the event that the underlying case becomes moot.[30]

The *Pattullo* court's grand claim that post-decision, pre-mandate mootness requires vacatur of a decision is supported by a single citation referencing *United States v. Miller*[31]—a tax fraud case arising from the Former Fifth Circuit.[32] However, the laconic *Miller* opinion does little to shed light on what should be done with decisions unaccompanied by mandate that later become moot. In *Miller*, as in *Pattullo*, the underlying case became moot after the federal circuit court issued its opinion on the presented appeal, but before it issued an accompanying mandate.[33] After simply stating that "the instant case has . . . become moot," the *Miller* court held that the "previous opinion of this court . . . is vacated."[34] However, like the *Pattullo* court, the *Miller* court offers little basis for why such an opinion must be vacated. The *Miller* court cites as its sole guidance *United States v. Munsingwear, Inc.*,[35] a 1950 Supreme Court case.[36]

While the authoritative trail in support of the *Pattullo* rule ends with the sexagenarian *Munsingwear*, the *Munsingwear* opinion does not actually support a rule requiring vacatur of mandateless decisions in cases that become moot, as provided in *Pattullo* and *Miller.* The relevant portion of *Munsingwear* merely states,

> The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.[37]

Aside from the fact that *Munsingwear*'s language can be strictly interpreted to apply only to *civil* cases before *the Supreme Court*, even a broad reading of *Munsingwear* does not buttress the *Pattullo* and *Miller* rules regarding post-decision, pre-mandate mootness.

At most, *Munsingwear* establishes merely that a federal appellate court will vacate (or reverse) a *lower* court decision and remand to dismiss if a federal appeal becomes moot while *pending a decision*

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[30] *See infra* notes 34 to 40.

[31] 685 F.2d 123 (5th Cir. Unit B 1982).

[32] *See In re* Pattullo, 271 F.3d 898, 900–01 (9th Cir. 2001) (citing *Miller*, 685 F.2d at 124).

[33] *See Miller*, 685 F.2d at 124 (noting that the appeal was rendered moot "[b]efore issuance of the mandate in the instant case," but after a previous opinion was published at 660 F.2d 563 (5th Cir. Unit B 1981)).

[34] *Id.*

[35] 340 U.S. 36 (1950).

[36] *See Miller*, 685 F.2d at 124 (citing *Munsingwear*, 340 U.S. at 36).

[37] *Munsingwear*, 340 U.S. at 39.

before the appellate court. Contrary to what the *Miller* and *Pattullo* courts assert, *Munsingwear* contemplates neither mootness arising *after* a federal appellate court has issued its decision, nor the proper role of the mandate.[38] Furthermore, *Munsingwear* does not discuss the circumstance of a federal court vacating *its own* decision in the face of mootness—its consideration is limited to the vacatur of a prior lower court decision. Consequently, even the most generous reading of *Munsingwear* fails to provide precedential support for *Pattullo*'s harshly strict result requiring vacatur of mandateless decisions once their cases have become moot. And because the precedent asserted as support for the *Pattullo* and *Miller* holdings is flimsy at best (and completely lacking at worst), the validity of the conclusions reached by these two courts regarding post-decision, pre-mandate mootness must be seriously questioned.

B. The Pattullo *Result Allows Parties to Negate the Exercise of Judicial Authority*

Pattullo's conclusion that issued decisions must be vacated in the event the underlying case becomes moot presents another significant issue for the federal judicial system. It could allow parties to short-circuit the decision-making process, thereby permitting *parties*—and not federal judges—to shape law. Such a result is offensive to traditionally-held values relating to the law generally and the form and function of the judiciary specifically.

Federal courts are endowed with a certain power to say what the law is.[39] Federal courts are comprised of federal judges who rise to their office only through the successful navigation of an oftentimes rigorous, constitutionally-mandated nomination and confirmation process.[40] This appointment process, which is at the same time both a pillar and reflection of certain constitutionally-valued principles, has endured little deviation since our country's inception. This is a carefully crafted process which aspires to do no less than to safeguard justice by reserving the powers of judicial review, statutory interpretation, and the like, to a

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[38] *See id.* (including no mention of mandates or post-decision mootness).

[39] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[40] *See, e.g.*, U.S. CONST. art. II, § 2 (detailing the nomination and approval process of Supreme Court judges); Judiciary Act of 1891 (Evarts Act), ch. 517, 26 Stat. 826 (codified as amended at 28 U.S.C. § 43 (2006)), extended by the Act of Sept. 6, 1916, ch. 448, 39 Stat. 726 (creating the circuit courts of appeals and detailing the method of appointing circuit judges).

select few anointed by elected federal representatives.[41] However, the *Pattullo* result permits the usurpation of those powers by parties who find the result of an appropriately undertaken federal judicial proceeding to be potentially adverse.

Consider the following hypothetical: Alpha Co. sues Beta Co. in federal court. Alpha wins. Beta appeals a determination of law made by the district court. The federal circuit court executes a diligent review—it receives briefs, hears oral argument, and undertakes all reasonable and regular deliberation of the issues. The circuit court ultimately issues a decision affirming the lower court's determination of law, but does not immediately issue an accompanying mandate that formally orders the result stated in the decision. Importantly, the circuit court's decision interprets the applicable law in a manner that both Alpha and Beta feel to be potentially adverse to the parties' long-term interests. Alpha and Beta are both repeat players in federal courts, and because both parties are likely to litigate similar issues in the future, it is in neither party's long-term interest to see the circuit court's disfavored interpretation of law become binding precedent. For that reason, Alpha and Beta execute a settlement intended to render—and effectively rendering—the underlying case moot.[42] Before the circuit can issue a mandate in the case, it notices that Alpha and Beta no longer have a case or controversy for which the circuit can grant effective relief. Per *Pattullo*, the circuit court dismisses *Beta v. Alpha* as moot and vacates its own decision regarding the applicable law.

The result of this hypothetical is unfortunate. Alpha and Beta have effectively usurped the authority of the circuit court by deciding whether or not the circuit's interpretation of applicable law will stand as valid precedent or be erased from case law by vacatur. The parties received a preview of the precedent that will ultimately bind them, and then seized upon an opportunity to eliminate the precedential threat. In effect, the parties have exercised a veto of forthcoming federal case law. Parties—not judges—have determined legal precedent.

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[41] *See, e.g.*, U.S. CONST. art. II, § 2 (noting that federal judges are confirmed by elected federal representatives).

[42] There may be some cases that fall into exceptions of the mootness doctrine, but there will be some that do not. *See* 15 MOORE'S FEDERAL PRACTICE § 101.99 (3d ed.2009) (detailing the exceptions to mootness and characterizing them as narrow). Moreover, crafty parties acting in consort may be able to conceal that the case is not properly characterized as moot. As an aside, note that the amount of the settlement will depend on the value assigned by Alpha and Beta, respectively, to avoiding precedent at issue. And although Alpha will win the immediate case by not settling, it will nevertheless settle when the long-term cost of the disfavored precedent exceeds the short-term gain from the immediate verdict.

A thorough discussion of why such a rule is constitutionally questionable or consequentially dangerous is grist for a different mill. It is sufficient to note the apparent disharmony of this outcome with existing notions of federal judicial power. Litigating parties, unlike federal judges, have not been subjected to selective nomination, confirmation, and appointment processes designed to reserve judicial authority to a narrow class. They were not chosen by elected representatives to interpret the law of the land with the advisement and consent of other similarly selected individuals. Thus, endowing parties with what amounts to a veto power over forthcoming precedent runs contrary to the constitutionally mandated structure of our federal judiciary. The *Pattullo* rule, in some sense, could at times elevate parties to a position where they enjoy co-equal power with the federal appellate bench. Consequently, the *Pattullo* rule is constitutionally questionable because it allows federal law to be vetoed by persons and corporations who are not appropriately vested—constitutionally or statutorily—with the power to determine federal law.

The negative consequences of *Pattullo*-enabled party vetoes of federal law are easily foreseeable. Private individuals and corporations, under the *Pattullo* rule, could essentially ratify or veto precedent to avoid judicial outcomes against their self-interest. This has several adverse results. For instance, it stunts the growth of federal legal precedent, the law will take a shape that best accommodates the desires of savvy repeat litigants without regard for judicial intent or non-repeat players, and the strength of statutory law will atrophy as such laws are shaped by strategic precedent derailment. This last point is particularly troubling for those concerned about popular expression given the fact that, in our democratic system, popular expression is entrusted to elected representatives, whose subsequent expression is partially manifested in statutory law. However, as noted, the problems with allowing non-judges to determine federal law are too obvious and too abundant to fully address in this limited space.

Finally, it is important to recognize that a post-decision, pre-mandate settlement is but one of many ways in which federal judicial impotence might occur given the *Pattullo* rule. For example—local rules permitting—Alpha might withdraw its original complaint,[43] or Beta might withdraw its appeal.[44] Any such scenario could result in the

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[43] *See*, *e.g.*, Deakins v. Monaghan, 484 U.S. 193, 200–01 (1988) (holding that respondents' withdrawal of their complaints rendered the appeal moot).

[44] *See*, *e.g.*, United States v. Radin, 865 F.2d 266, 266 (9th Cir. 1988) ("Because [defendant] has withdrawn his appeal, this issue is now moot as to him.").

usurpation of federal judicial power by savvy parties with a view towards the long term.

C. The Pattullo *Result Precipitates a Waste of Judicial Resources*

Judicial resources are scarce.[45] Accordingly, wasting judicial resources is discouraged.[46] Academic proposals to conserve judicial resources abound,[47] and numerous legal standards recognize the value of limited judicial assets.[48] *Pattullo*'s result dictating that post-decision, pre-mandate mootness requires vacatur of the decision results in a massive waste of judicial resources by inappropriately erasing a decision reached through the significant expenditure of judicial resources. Thus, even as a policy matter, the *Pattullo* rule is vulnerable to meaningful criticism.

Any time an appeal is dismissed as moot after a decision has been issued—without regard to whether or not the mootness results from the intentional derailment of disfavored precedent—a significant amount of judicial resources is spent.[49] The entire value of the time, work, and expense consumed in considering the appeal and reaching a decision is lost. This is an unfortunate but unavoidable feature of our federal courts system and the mootness doctrine. However, what is not necessary—and what is certainly not unavoidable—is the vacatur of a mandateless decision in a case that later becomes moot.

The establishment of precedent is the value received in exchange for the expenditure of scarce judicial resources. Having received that precedent, our legal landscape is endowed with some measure of clarity

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[45] *See, e.g.*, Holland v. Florida, 130 S. Ct. 2549, 2567–68 (2010) (describing "judicial resources" as "scarce"); Kenyeres v. Ashcroft, 538 U.S. 1301, 1388 (2003) (noting the scarcity of judicial resources).

[46] *See, e.g.*, San Remo Hotel, L.P. v. City & Cnty. of S.F., 545 U.S. 323, 337 n.24 (2005) (expressing the "desire to conserve judicial resources."); Festo Corp. v. Shoketsu Kinzoku Kabushiki Co., 535 U.S. 722, 731–32 (2002) (noting, in passing, that conservation of judicial resources is desirable).

[47] *See, e.g.*, Bruce Zucker & Michelle Carey, *Capturing the Harm: Defining "Tax Loss" for Use in Federal Sentencing*, 15 AKRON TAX J. 1, 15 (2000) (advocating for a federal sentencing policy that will conserve judicial resources); Elizabeth Fella, Note, *Playing Catch Up: Changing the Bankruptcy Code to Accommodate America's Growing Number of Non-Traditional Couples*, 37 ARIZ. ST. L.J. 681, 704 (2005) (proposing a change to the bankruptcy code because, in part, it "will conserve judicial resources").

[48] *See, e.g.*, Pearson v. Callahan, 129 S. Ct. 808, 818 (2009) (limiting the applicability of precedent regarding qualified immunity because, in part, it "sometimes results in a substantial expenditure of scarce judicial resources"); Massaro v. United States, 538 U.S. 500, 504 (2003) (noting federal courts' implementation of a procedural rule intended to conserve judicial resources).

[49] *See* Daniel A. Zariski, et al., *Mootness in the Class-Action Context*, 26 REV. LITIG. 77, 112 (2007) (discussing how allowing a party to moot a named plaintiff's claim, and thereby avoid class certification, at the last moment wastes judicial and party resources).

and guidance for the resolution of future disputes.[50] When a court vacates a decision, it completely strips that decision of precedential effect.[51] It is unable to provide clarity or guidance to any legal actor,[52] and the accompanying loss of judicial resources is a sunk cost. Vacatur prevents the precedents that (in part) validate the use of judicial resources.

Accordingly, it is clear that a desire to prevent the injudicious consumption of judicial resources is further ground to harshly consider the *Pattullo* result. An avoidance of vacatur would therefore serve policy interests as well as the legal interests previously discussed.[53]

IV. ALTERNATIVES TO THE *PATTULLO* RULE

As discussed above, the *Pattullo* rule regarding post-decision, pre-mandate mootness is unsupported by case law and unsupportable in the face of certain legal and policy arguments. Fortunately, there are a number of alternative ways in which courts may address post-decision, pre-mandate mootness without vacating the decision and running contrary to the previously articulated interests. The approaches described herein certainly do not represent the entire universe of available alternatives to the *Pattullo* rule, but they are surely among the most intuitive. Furthermore, having surveyed many of the alternatives

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[50] *In re* Memorial Hosp. of Iowa County, Inc., 862 F.2d 1299, 1302 (7th Cir. 1988) ("When a clash between genuine adversaries produces a precedent, however, the judicial system ought not allow the social value of that precedent, created at cost to the public and other litigants, to be a bargaining chip in the process of settlement. The precedent, a public act of a public official, is not the parties' property."). *See also* Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 790 (2003) ("In the common law system, past precedents—albeit interpreted in light of changing current social and economic conditions—should guide courts as they undertake to bring clarity to . . . the law."); *see also* Darlene C. Goring, *Private Problem, Public Solution: Affirmative Action in the 21st Century*, 33 AKRON L. REV. 209, 286–87 (2000) (noting that "Supreme Court precedent . . . offer[s] guidance" on race-based remedial affirmative action programs); Jeffrey M. Olson, Note, *Gauging an Adequate Probable Cause Standard for Provisional Arrest in Light of* Parretti v. United States, 48 CATH. U. L. REV. 161, 202 (1998) (noting that legal precedent provides great clarity on the topic of the Constitution's applicability in certain international law enforcement scenarios).

[51] Durning v. Citibank, N.A., 950 F.2d 1419, 1424 n.2 (9th Cir. 1991) ("[A] decision that has been vacated has no precedential authority whatsoever.").

[52] *See supra* notes 30–32 and accompanying text.

[53] This position also finds support in *Humphreys v. DEA*, where the Third Circuit chose not to vacate a decision given the existing absence of case law on the topic at issue. 105 F.3d 112, 116 (3d Cir. 1996) ("In light of the complete absence of case law interpreting the relevant statute, we believe it would not be prudent to withdraw our opinion."). *See also* Part III. A.–B., *supra*.

and explored the contours of our federal courts system, it appears that these are also among the most viable.

A. Permit the Decision to Stand as Valid Precedent

Perhaps the most obvious alternative to the *Pattullo* result is to permit a federal court's decision to stand as valid precedent even though the underlying case became moot prior to the issue of an accompanying mandate. This would endow the decision with full precedential force despite the dismissal of the underlying case as moot and no issue of a subsequent mandate. This alternative would necessarily view the decision as having significance independent from the mandate. That is, the decision is not dependent upon the issuance of an accompanying mandate for precedential value. This is precisely what the Third Circuit did in *Humphreys v. DEA*, an appeal involving the post-decision, pre-mandate death of the appellant[54]

This alternative proposal has potential pitfalls. Most notably, it is of questionable constitutionality, in part because federal courts are barred from issuing advisory opinions and other such decisions where a genuine dispute is absent.[55] Of course, this alternative would not permit the issuance of advisory opinions *per se* because the decisions in question would have been issued at times when true cases or controversies were before the deciding federal courts. However, these decisions nevertheless apply to ultimately moot cases, and it is not clear if the fact of their premature issuance should save them from vacatur or some like fate.

Contrariwise, if the jurisdictional minefield could be successfully navigated and this alternative was considered constitutional, then a decent argument could be made in support of this alternative. Specifically, an objector to this alternative would be hard-pressed to offer meaningful reasons *against* permitting the decision to stand as precedent. The decision, despite mootness, is the product of the same rigor, deliberation, and litigation as any other precedential decision. Consequently, it is reasonable to assert that such a decision merits as

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[54] 105 F.3d 112 (3d Cir. 1996).

[55] "[C]ourts should not render decisions absent a genuine need to resolve a real dispute." 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3532.1, at 114 (2d ed. 1984). This principle is an invocation of the doctrine of ripeness, and regarding ripeness the Supreme Court has said that the ripeness doctrine is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." Nat'l Park Hospitality Ass'n v. Dep't of The Interior, 538 U.S. 803, 807 (2003) (citing Reno v. Catholic Soc. Servs., Inc. 509 U.S. 43, 57 n.18 (1993) (internal quotations omitted)).

much authority as any other case decided by the same court at the same time in the same way.

Ultimately, in light of itsquestionable constitutionality, permitting mandateless decisions in cases that later become moot to enjoy full precedential authority is perhaps not the best alternative to the *Pattullo* rule. More conservative and less problematic alternatives exist.

B. Deem the Decision Non-Precedential Without Vacatur

A second alternative to the *Pattullo* rule requiring vacatur of a decision lacking an accompanying mandate in instances where the underlying case has become moot is to deem the decision non-precedential without requiring vacatur. That is, federal appellate courts could issue an order stating that the previously issued decision "lacks precedential value" and "cannot be cited as authority."[56] By such an order, the opinion would not stand as binding precedent. Accordingly, the constitutional concerns raised by advisory opinions and the like may be further lessened, though perhaps not completely silenced.[57]

The difference between this alternative and the *Pattullo* rule may not be readily apparent, but it is critical nonetheless: A non-precedential decision—known in some jurisdictions as a memorandum opinion[58]—may provide valuable guidance to future parties and judicial actors despite its character as non-binding precedent.[59] Parties may look to non-precedential decisions to better understand the factual circumstances that have historically led a particular court to particular outcomes. Put simply, decisions have value though they may be non-binding. Courts can avoid a needless waste of judicial resources by giving mandateless decision in cases later rendered moot a status akin to that held by memorandum opinions. Because such decisions have value even though

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[56] *See, e.g.*, MJG Enters. v. Cloyd, 2010 U.S. Dist. LEXIS 102579, at *21 n.1 (D. Ariz. Sept. 27, 2010) (explaining that "a de-published opinion has no precedential effect and cannot be cited as authority in any court"); *see also, e.g.*, Payne v. Peninsula Sch. Dist., 621 F.3d 1001, 1001 (9th Cir. 2010) (ordering that *Payne* be taken en banc, and that the three-judge panel decision "shall not be cited as precedent by or to any court of the Ninth Circuit").

[57] *See supra* notes 55 and 56 and accompanying text. The concerns are lessened because the resulting opinion would have been issued when there was a live case or controversy, it would not bind the parties as their case is already moot, and it would not have precedential effect. That being said, the concerns may not be wholly eliminated. If a case becomes mooted before the decision is issued, courts cannot then release a memorandum opinion; that would still be an advisory opinion. Therefore, one may object that the memorandum opinion here applies to an ultimately moot case and therefore, like the "binding opinion" alternative discussed in Part IV.A. *supra*, it is also of questionable constitutionality.

[58] *See* RUGGERO J. ALDISERT, OPINION WRITING § 2.4.2.

[59] *Id.*

they are non-binding, this alternative is preferable to erasing such decisions from judicial history via vacatur. It also aids in ensuring that judge-written law remains a resource for legal actors—and mutes the power of parties to dictate or veto federal law. Though this seems like a viable solution, in light of the lingering constitutional concerns, we think a better solution remains.

C. Require Simultaneous Issuance of Decisions and Mandates

The best alternative to the *Pattullo* rule is simply to require federal appellate courts to issue decisions simultaneously with accompanying mandates. This would altogether eliminate the lag between the issuance of the decision and the issuance of the mandate. Accordingly, it would be impossible for a case to become moot in the interim between the issuance of the decision and the issuance of the mandate. The *Pattullo* problem could be avoided entirely, rather than ham-handedly remedied. Presently, the main reason for the failure to issue decisions simultaneously with accompanying mandates is to allow for a petition for rehearing.[60] Beyond that, sheer bureaucratic inefficiency is a likely contributor to the problem. Neither provides a compelling rationale for needlessly exposing the decision-making process to the type of awkwardness and confusion illustrated by *Pattullo* and *Miller*. Regarding the allowance for rehearing, courts could issue the mandate simultaneously with the decision, and simply recall the mandate if rehearing is required.[61] Thus, any interim between decision and mandate is without justifiable motivation.

Because the requirement that courts issue decisions simultaneously with accompanying mandates is novel, it is unclear what undesirable effect might result from such a rule, if any. Perhaps such a requirement would have the unintended consequence of slowing the federal appellate process. Perhaps such a requirement would increase the already substantial costs of justice-seeking by creating additional administrative burdens for the justice system to bear. However, these hypothetical concerns seem nominal and, particularly in light of the structural and policy concerns articulated above,[62] well worth the anticipated benefits.

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[60] FED. R. APP. P. 41 ("The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.").

[61] Federal Rule of Appellate Procedure 41 expressly allows the court to shorten the time period between decision and mandate. FED. R. APP. P. 41. Moreover, courts commonly recall their mandates for a variety of reasons.

[62] *See* Part III, *supra*.

In sum, the best way of handling post-decision, pre-mandate mootness is to prevent it from happening altogether. The creation of federal statutory or court rules requiring that federal appellate courts issue mandates simultaneously with decisions could avoid potential *Pattullo*- and *Miller*-like situations. This would accordingly eliminate the power of litigating parties to usurp judicial authority by manufacturing mootness in the face of disfavored precedent. It would also eliminate the obvious waste resulting from the vacatur of already-rendered decisions. Therefore, by following this path, our federal courts could avoid the adverse consequences resulting from *Pattullo*.

V. CONCLUSION

In *Pattullo*, the Ninth Circuit held that "[e]ven after an appellate court has issued its decision, if it has not yet issued its mandate and the case becomes moot, the court will vacate its decision and dismiss the appeal as moot."[63] This unsupported assertion appears to have ignored any reasonable calculation of the potential effects such a result might have in the aggregate and in different situations. The *Pattullo* rule allows the evisceration of circuit authority in favor of the precedential preference of the litigating parties and precipitates a gross waste of judicial resources. In short, this rule exacerbates a procedural wrinkle in our federal courts system, and it ought to be replaced.

The most effective and intuitive alternative to the *Pattullo* rule would be a federal statutory or court rule requiring that accompanying mandates be issued simultaneously with their decisions. Such a rule would avoid the negative consequence of a *Pattullo*- or *Miller*-type situation by eliminating the foolish inconsistency of separating decision from mandate. And in doing so, such a rule would create a more complete relationship between mandate and decision that even the most cunning of litigants would be hard-pressed to tear asunder.

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[63] *Id.* at 901–02 (citing United States v. Miller, 685 F.2d 123, 124 (5th Cir. Unit B 1982). The *Pattullo* court's support for this proposition is discussed in great depth in Part III. A., *supra*.