

Is Illinois Supreme Court Rule 23(e)'s Denial of Precedential Effect to Appellate Court "Orders" Constitutional?

Under Supreme Court Rule 23, the Appellate Court may express decision in one of three ways: a "full opinion" or "a concise written order," or a "summary order."¹ Under subpart (e) of the rule, appellate court "orders" are denied precedential effect and may not be cited "except to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case." Rule 23(e), a "non-citation rule," is at odds with the doctrine of precedent; impinges on the constitutional guarantees of free speech and freedom to petition for the redress of grievances; and implicates due process, equal protection, and separation of powers concerns. Additionally, the grounds underlying non-citation rules no longer exist.

1. Rule 23(e) Purports to Empower Judges to Disregard The Doctrine of Precedent.

Article VI of the Illinois Constitution provides that, "The judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts." Ill.Const.1970, art. VI, ' 1. The "judicial power" is the power to construe and apply the law to the case before the court. *People v. Miller*, 314 Ill. 474, 145 N.E.2d 685 (1925); *People v. Gersch*, 135 Ill.2d 384, 553 N.E.2d 281, 287 (1990) ("Judicial decisions ... are declarations of what the law already was ..."). The doctrine of precedent is inherent in, and limits, the "judicial power." *State Farm Fire and Cas. Co. v. Yapejian*, 152 Ill.2d 533, 605 N.E.2d 539, 542 (1992) ("Because of our system of precedent, [a judge] may not ... disregard binding authority."); *Hoffman v. Lehnhausen*, 48 Ill.2d 323, 269 N.E.2d 465, 469 (1971) (precedent and *stare decisis* remain basic tenets of our legal system and under these doctrines a legal principle established in a case applies to and benefits similarly situated litigants in subsequent cases). In *Chicago Bar Ass'n v. Illinois State Bd. of Elections*, 161 Ill.2d 502, 641 N.E.2d 525, 529 (1994), the Supreme Court explained the doctrine's role in the judicial decision-making process:

... The doctrine of *stare decisis* is the means by which the *courts* ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. *Stare decisis permits society to*

¹ Illinois Supreme Court Rule 23 provides in relevant part:

The decision of the Appellate Court may be expressed in one of the following forms: a full opinion, a concise written order, or a summary order. . . Only opinions of the court will be published.

(a) **Opinions.** A case may be disposed of by an opinion only when a majority of the panel deciding the case determines that at least one of the following criteria is satisfied . . . : (1) the decision establishes a new rule of law or modifies, explains or criticizes an existing rule of law, or (2) the decision resolves, creates, or avoids an apparent conflict of authority within the Appellate Court.

* * *

(e) **Effect of Orders.** An unpublished order of the court is not precedential and may not be cited by any party except to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case. . .

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presume that fundamental principles are established in the law rather than in the proclivities of individuals. The doctrine thereby contributes to the integrity of our constitutional system of government both in appearance and in fact. Stare decisis is not an inexorable command. However, a court will detour from the straight path of stare decisis only for articulable reasons, and only when the court must bring its decisions into agreement with experience and newly ascertained facts.

Id. 641 N.E.2d at 529 (emphasis added), *citing Vasquez v. Hillery*, 474 U.S. 254, 265-66, 106 S.Ct. 617, 624-25, 88 L.Ed.2d 598, 610 (1986); see also *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854, 112 S.Ct. 2791, 2808, 120 L.Ed.2d 674 (1992) (“Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”); Story, *Commentaries on the Constitution of the United States* " 377-78 (1833) (AA more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.@) Illinois’ view of the doctrine of precedent mirrors the view articulated in *Casey* and, more recently, in *Anastasoff v. United States*, 223 F.3d 898 (“*Anastasoff I*”), *vacated as moot* 2000 WL 1863092 (2000) (“*Anastasoff II*”), in which the Eighth Circuit found its non-citation rule unconstitutional.

In *Anastasoff I*, the Internal Revenue Service rejected the plaintiff’s claim for a refund under the applicable limitations statute. *Id.* 223 F.3d at 899. On appeal, the plaintiff argued that a different statute should be applied. *Id.* Plaintiff further argued that the court was not bound to follow an adverse unpublished decision under the Eighth Circuit’s non-citation rule, Rule 28A(i).² *Id.* The court found Rule 28A(i) unconstitutional under Article III³ because it “purports to confer on the federal courts a power that goes beyond the ‘judicial.’” *Anastasoff*, 223 F.3d at 899.

The *Anastasoff* court first observed that the principles that comprise the doctrine of precedent—every judicial decision is a declaration and interpretation of a general principle or rule of law; and court’s declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties—“were well established and well regarded at the time this nation was founded.” *Id.* at 899-900. The court determined that the drafters of Article III “considered these principles to derive from the nature of judicial power, and *intended that they would limit the judicial power delegated to the courts.*” *Id.* 223 F.3d at 899-900 (emphasis added; footnote omitted). The court next explored the role precedent plays in regulating the proper exercise of that power:

² Rule 28A(i) provides, in relevant part:

Unpublished opinions are not precedent ... When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite an unpublished opinion. Parties may also cite an unpublished opinion ... if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well ...

³ Article III provides: “The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain.” U.S.Const., art. III, ' 1.

... In determining the law in one case, judges bind those in subsequent cases because, although the judicial power requires judges to determine the law in each case, a judge is sworn to determine, not according to his own judgments, but according to the known laws. Judges are not delegated to pronounce a new law, but to maintain and expound the old. The judicial power to determine law is a power only to determine what the law is, not to invent it. Because precedents are the best and most authoritative guide of what the law is, the judicial power is limited by them.

Anastasoff I, 223 F.3d at 901 (emphasis added; citations, footnotes, and internal punctuation omitted). The court then explains that, “[t]he duty of courts to follow their prior decisions was understood [by the Framers] to derive from the nature of judicial power itself and to separate it from a dangerous union with the legislative power.” *Id.* at 903. Legislatures, unlike courts, are free to depart from established legal principles. If judges are free to disregard precedent, their exercise of judicial power is left virtually unregulated. *Id.* at 901-02. The court concludes stating that, “Rule 28A(i) expands the judicial power beyond the limits set by Article III by allowing us complete discretion to determine which judicial decisions will bind us and which will not. Insofar as it limits the precedential effect of our prior decisions, the Rule is therefore unconstitutional.” *Id.* at 905.⁴

Illinois Supreme Court Rule 23(e) and Eighth Circuit Rule 28A(i) are the same in all material respects. Both establish the same criteria for publication; allow for disposition in an unpublished opinion; grant the panel deciding the case discretion whether to publish; deny unpublished decisions precedential effect; define the circumstances when unpublished decisions may be cited; and prohibit, or strongly discourage, citation to unpublished decisions in other circumstances. Accordingly, Rule 23(e), like the Eighth Circuit rule, purports to give the courts power beyond the judicial.

Rule 23(e), moreover, is more restrictive, and, therefore, more constitutionally offensive than Rule 28A(i). While Rule 28A(i) allows litigants to “cite an unpublished opinion ... if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well,” under Rule 23(e) an unpublished order may be cited only “to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case.” *People v. Petty*, ___ Ill.App.3d ___, 724 N.E.2d 1059, 1061 (2nd Dist.2000). Thus, even where an unpublished order addresses material issues not addressed in any published opinion, under Rule 23 it still may not be considered by a court deciding a subsequent case. *Id.*

In *Petty*, a criminal case, trial court, relying on an unpublished order, suppressed the arresting officer’s testimony. *Id.* The appellate court, after indicating that Rule 23(e) prohibited it from considering the unpublished decision, conducted its own “independent

⁴ In *Anastasoff II*, the government informed the court that it paid the plaintiff the full amount of her claim and adopted a position consistent with the plaintiff’s on the proper reading of the statute involved. *Id.* 2000 WL 1863092 *1. The court found that as a result of the government’s actions the case had become moot. *Id.* *2. Although vacated, *Anastasoff I* is still a viable precedent. *Smith v. Barber*, 964 F.2d 636, 638 (7th Cir.1992) (“... vacating a decision because of supervening mootness does not destroy its precedential effect.” (Citation omitted.))

analysis” and found that the trial court abused its discretion in suppressing the testimony and reversed. *Id.* Rule 23(e) forced the *Petty* court to violate basic tenets of judicial decision making embodied in the doctrines of precedent and *stare decisis*. See *Chicago Bar Ass’n*, 161 Ill.2d at ____, 641 N.E.2d at 529 (“[A] court will detour from the straight path of *stare decisis* only for articulable reasons, and only when the court must bring its decisions into agreement with experience and newly ascertained facts.”) *Petty* reached a result contrary to the result reached in the unpublished decision without distinguishing, or even discussing, that decision, as would have been required of it in the absence of Rule 23(e)’s restrictions. *Petty* clearly demonstrates that Rule 23’s denial of precedential effect to unpublished orders offends constitutional limits on judicial decision-making.

2. Rule 23 Violates Constitutional Guarantees of Free Speech and the Right to Petition for the Redress of Grievances.

The Illinois and Federal Constitutions prohibit laws abridging freedom of speech and the ability of citizens to petition the government, including the courts, for the redress of grievances. Ill.Const.1970, art. I, §§ 4, 12; U.S.Const. Amd. I. The Bill of Rights to the Illinois Constitution provides that “[a]ll persons may speak, write and publish freely,” Ill.Const.1970, art. I, § 4, and that [e]very person shall find a certain remedy in the laws for all injuries and wrongs which he receives ... He shall obtain justice by law, freely, completely, and promptly,” *Id.* § 12. The First Amendment, applicable to the States under the Fourteenth Amendment, states that Congress shall make no law abridging freedom of speech and “the right of the people peaceably ... to petition the Government for a redress of grievances.” U.S.Const. Amd. I. “It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, ... and are therefore united in the First Article’s assurance.” *Arlington Hts. Nat’l Bank v. Arlington Hts. Fed. Sav. & Loan Assn.*, 37 Ill.2d 546, 550, 229 N.E.2d 514 517 (1967), quoting *Thomas v. Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 323, 89 L.Ed. 430, 440. The same constitutional analysis is applicable to free speech and freedom to petition claims. *Wayte v. United States*, 472 U.S. 479, 482 (1985). Rule 23(e)’s prohibition against citing unpublished appellate court orders infringes on the constitutionally guaranteed rights of free speech and petition and lacks a sufficient basis to pass constitutional muster.

Rule 23(e) is a pure content-based restriction on speech. It does not regulate conduct or a combination of speech and non-speech elements that may, in certain circumstances be regulated by the state under appropriate time, place, and manner restrictions. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495, 95 S.Ct. 1029, 1046, 43 L.Ed.2d 328 (1975). The government’s ability to regulate speech based solely on content is extremely limited. It may only prohibit categories of expression, such as “fighting words,” which “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *Id.*, quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942). Unpublished court decisions are not the equivalent of “fighting words,” and it cannot be said that they play no essential part in the exposition of ideas and no value in the search for truth. Banning citation to unpublished appellate court orders, moreover, does

nothing to advance societal morality interests, while any benefits in terms of promoting order are minimal, and pale in comparison to the interests of litigants and society in general in having all court decisions available for consideration and scrutiny. Legal proceedings are public events; “what transpires in the court room is public property ... There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.” *Craig v. Harney*, 331 U.S. 367, 374, 67 S.Ct. 1249, 1254, 91 L.Ed. 1546 (1947). Rule 23(e), is nothing more than a type of censorship, incompatible with First Amendment and Illinois Bill of Rights guarantees. Rule 23(e) prohibits a litigant from placing before the court its prior decision favorable to the litigant’s position. It thus restricts the litigant’s right to free speech and restricts his ability to present his case in the manner he sees fit. Rule 23(e) undermines rights guaranteed under the Illinois and Federal Constitutions in, of all places, a court of law.

3. Rule 23(e) Violates Equal Protection, Due Process, and Separation of Powers.

Rule 23's treatment of unpublished decisions raises state and federal equal protection and due process concerns, particularly in criminal cases. As *Petty, supra*, demonstrates, unpublished decisions often times do possess significant precedential value. It is fundamentally unfair to deny a litigant—especially a criminal defendant—the right to rely on favorable decisions based solely on considerations of administrative convenience. See Statements of the Justices in Support and in Opposition to Administrative Order MR. No. 10343; see also *In re Rules of U.S. Court of Appeals for Tenth Circuit*, 955 F.2d 36, 37 (1992) (Holloway, C.J., dissenting) (“[A]ll rulings . . . are precedents, like it or not, and we cannot consign any of them to oblivion merely by banning their citation. See *Jones v. Supt.t, Virginia State Farm*, 465 F.2d 1091, 1094 (4th Cir.1972) (“... any decision is by definition a precedent ...”). No matter how insignificant a prior ruling might appear to us, *any litigant who can point to a prior decision of the court and demonstrate that he is entitled to prevail under it should be able to do so as a matter of essential justice and fundamental fairness. To deny a litigant this right may well have overtones of a constitutional infringement because of the arbitrariness, irrationality, and unequal treatment of the rule.*@ (emphasis added)).

Rule 23(e) also encroaches Articles II and IV of the Illinois Constitution. Article II provides that, “The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.” Ill.Const.1970, art. II, ' 1; *Best v. Taylor Machine Works*, 179 Ill.2d 367, 228 Ill.Dec. 636, 689 N.E.2d 1057, 1078 (1997). Under Article IV, “The legislative power is vested in a General Assembly ...” Ill.Const.1970, art. IV, ' 1. “Legislative power” is the power to enact laws or declare what laws shall be. *People v. Hawkinson*, 324 Ill. 285, 155 N.E.2d 318 (1927). The separation of powers doctrine prevents courts from exercising the power to say what the law will be. *People ex rel. Devine v. Murphy*, 181 Ill.2d 522, 230 Ill.Dec. 220, 223-24, 693 N.E.2d 349, 352-53 (1998). The power to make law is vested in the General Assembly. *People v. Miller*, 314 Ill. 474, 145 N.E.2d 685 (1925); *People v. Gersch*, 135 Ill.2d 384, 553 N.E.2d 281, 287 (1990) (“Judicial decisions . . . are declarations of what the law already was . . .”). Under Rule 23, the court is allowed to determine which of its decisions shall be precedent and which shall not. Accordingly, the court is granted the

power to state what the law shall be, rather than declaring what the law is. Rule 23 effectively, and improperly, grants law-making power to the courts.

4. Non-Citation Rules Have Been Criticized Since Inception and The Considerations For Them No Longer Exist.

Since shortly after going into effect, non-citation rules have come under criticism from the bench and bar. One of the most widespread criticisms is that non-precedential opinions have “pernicious effects” on judicial responsibility. See e.g. *Nat. Classification Comm. v. United States*, 765 F.2d 164, 173, n. 2 (D.C.Cir.1985) (Wald, J., Separate Statement) citing Reynolds & Richmond, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U.Chi.L.Rev. 573 (1981). In Judge Wald’s view, non-citation rules result in less carefully prepared or soundly reasoned opinions; reduce judicial accountability; increase the risk of non-uniformity; allow difficult issues to be swept under the carpet; and result in a body of “secret law.” Wald, *The Problem with Courts: Black-Robed Bureaucracy or Collegiality Under Challenge?*, 42 Md.L.Rev. 766, 781-84 (1983). See also Braun, *Eighth Circuit Decision Intensifies Debate over Publication and Citation of Appellate Opinions*, 84 *Judicature* 90, ___ (2000) (As a consequence of non-citation rules, “useful precedents are being withheld from use by lawyers, and by courts ...; and a whole class of decisions remains immune from the penetrating scrutiny to which every judicial decision should be subject.”) Prior to authoring *Anastasoff*, Judge Arnold criticized his circuit’s rule as an affront to the judicial decision-making process, and an invitation for judges to engage in improper behavior. Arnold, *Unpublished Opinions: A Comment*, 1 *J.App.Prac. & Process* 219, 221-23 (1999).

In *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260 (5th Cir.2001), Judge Jerry E. Smith dissented from the denial of a petition for rehearing *en banc* in a case that “would have given [the] court an opportunity to examine the question of unpublished opinions generally, an issue that is important to the fair administration of justice ...” He observes that the conflicting decisions resulting from his circuit’s non-citation rule creates a situation unfair to litigants, their attorneys, and the courts, because it is difficult, if not impossible, to know what the law is on a given point; and that the justifications for the adopting non-citation rules, namely efficiency, the relative unavailability of unpublished decisions, and the assumptions that unpublished decisions do not establish a new rule of law, modify an existing rule, apply an existing rule to distinct facts, or concern any issue of public importance, are no longer valid. *Id.* at 261-62. In terms of efficiency, the judge sees no harm in viewing an opinion that restates well-settled legal principles as precedent. *Id.* at 263. With the advent of the Internet and computer-based research providers, he finds the proposition that unpublished opinions are not generally available untenable. *Id.* at 261. The judge also cites empirical studies that show that a substantial number of unpublished opinions involve significant issues about which reasonable minds may disagree. *Id.* at 261-62.

Conclusion

While the Supreme Court has constitutional authority to promulgate rules regulating appellate process, Ill.Const.1970, art. VI, ' 16, its exercise of that authority must be consistent the judicial power conferred on the courts by ' 1 of Article VI, as well as the

other provisions of the Illinois Constitution. The administrative concerns underlying Rule 23, however weighty, must give way to constitutional mandate. Rule 23(e) is not consistent with the State and Federal constitutions.

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