

# OVERTURNING THE LAST STONE: THE FINAL STEP IN RETURNING PRECEDENTIAL STATUS TO ALL OPINIONS

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## I. BACKGROUND

“When over 500 of the best judges, lawyers, and law professors in America get into a fight over a proposed rule, no stone will be left unturned, and no argument will be left unmade.”<sup>1</sup> Yet in the adoption of the new Federal Rule of Appellate Procedure 32.1, permitting citation of unpublished decisions issued after January 1, 2007, the most significant stone remains unturned.<sup>2</sup> That stone bears the label “precedent.”

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1. Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 *Fordham L. Rev.* 23, 30 (2005) [hereinafter Schiltz, *Citation of Unpublished Opinions*]. Professor Schiltz was the Reporter for the Advisory Committee on the Federal Rules of Appellate Procedure during the drafting, comment, and recommendation period of new Fed. R. App. P. 32.1. His article is an excellent discussion of that Rule, the arguments presented for and against it, and the process by which it gained approval. Professor Schiltz is exactly correct in the quoted text that the argument about the precedential value of unpublished opinions was not left unmade; however, this critical underlying issue was left unaddressed, and explicitly so, by the Committee, the Supreme Court, and Congress.

At roughly the same time, Professor Schiltz—again benefiting from his wealth of experience with the process—wrote an interesting article outlining the arguments for and against Fed. R. App. P. 32.1 and suggesting that the rule regarding citation was a tempest in a teapot with little practical effect to recommend (or disparage) it, though he ultimately came to support it. The gem of Professor Schiltz’s article, though, is his careful distinction between citation, as an issue of sound and fury signifying very little, and precedent, which he acknowledges as “extremely important.” Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang Over the Citation of Unpublished Opinions*, 62 *Wash. & Lee L. Rev.* 1429, 1463 (2005) [hereinafter Schiltz, *Much Ado About Little*].

2. This issue is not truly fresh, as much has been written on it already. See n. 5, *infra*. Still, the issue of precedential status for “unpublished” opinions remains unresolved.

Despite the Rule's adoption, the most critical questions regarding precedent remain: Do American courts have the authority to render decisions not binding on future courts, and, even if they do, should they issue such decisions? These questions were expressly avoided by the Committee and the Supreme Court in approving the new federal rule,<sup>3</sup> as well as the first committee to propose a limited publication plan in 1973.<sup>4</sup> Nonetheless, they merit further consideration by everyone who practices before, sits on, or is concerned with our nation's courts.<sup>5</sup>

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3. Fed. R. App. P. 32.1 advisory comm. n. (acknowledging that "Rule 32.1 is extremely limited. . . . It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court.")

4. Advisory Council on Appellate Justice, Committee on Use of Appellate Court Energies, *Standards for Publication of Judicial Opinions: A Report of the Committee on Use of Appellate Energies of the Advisory Council on Appellate Justice* 20 (Fed. Jud. Ctr. & Natl. Ctr. for St. Cts. 1973) [hereinafter *Standards for Publication*] (recommending adoption of a policy of non-citation and issuance of a statement in which "nothing is said about precedential value").

5. This is not to say that there hasn't been much written and published over the years on the issue of unpublished cases, much of it addressed to the specific topic of precedent. See e.g. Jessie Allen, *Just Words? The Effects of No-Citation Rules in Federal Courts of Appeals*, 29 Vt. L. Rev. 555 (2005); J. Lyn Entrikin Goering, *Legal Fiction of the "Unpublished" Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor*, 1 Seton Hall Cir. Rev. 27 (2005); Lawrence J. Fox, *Those Unpublished Opinions: An Appropriate Expedience or an Abdication of Responsibility?* 32 Hofstra L. Rev. 1215 (2004); Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 Hastings L.J. 1235 (2004); Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 Stan. L. Rev. 1435 (2004); Amy E. Sloan, *A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule*, 79 Ind. L.J. 711 (2004); Norman R. Williams, *The Failings of Originalism: The Federal Courts and the Power of Precedent*, 37 U.C. Davis L. Rev. 761 (2004); Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. Cal. L. Rev. 755 (2003); Michael B.W. Sinclair, *Anastasoff Versus Hart: The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions*, 64 U. Pitt. L. Rev. 695 (2003); Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 Ind. L. Rev. 399 (2002) [hereinafter Robel, *Practice of Precedent*]; Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 Mich. L. Rev. 940 (1989) [hereinafter Robel, *Myth*]; William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. Chi. L. Rev. 573 (1981) [hereinafter Reynolds & Richman, *The Price of Reform*]; William L. Reynolds & William M. Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 Duke L.J. 807 (1979) [hereinafter Reynolds & Richman, *Limited Publication*]; William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167 (1978) [hereinafter Reynolds & Richman, *No-Citation Rules*].

## II. INTRODUCTION

In the mid-1970s, the members of the judiciary fundamentally changed the nature of precedent in the federal courts. They did so relatively quickly and quietly: first, by issuing decisions not designated for publication and not citeable, and then, by denying these decisions precedential status. The number of these unpublished decisions had risen to over eighty-four percent of all circuit decisions in 2006.<sup>6</sup> While Rule 32.1 restores citeability to these decisions, it does nothing to address the more critical issue of whether these decisions can be denied precedential weight, and even if so, whether they ought to be denied such value.<sup>7</sup>

The history of this process reveals that removing the precedential status of some federal decisions was not, at least initially, an explicit part of the plan for limited publication or citation. While concern over the increasing volume of federal case decisions was expressed as early as 1915, a mere twenty-one years after the Federal Reporter began publishing cases from the Courts of Appeals, it was not until 1964 that the current publication/citation/precedent landscape began to take shape.<sup>8</sup> In 1964, the Federal Judicial Conference recommended that the Courts of Appeals should report only those decisions that would be of “general precedential value” in order to deal with “the ever increasing practical difficulty and economic cost of establishing and maintaining accessible private and public law library facilities.”<sup>9</sup> Little action was taken on this suggestion until the 1973 Committee on the Use of Appellate Court Energies of the Federal Judicial Center’s Advisory Council on Appellate

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6. Administrative Office of the United States Courts, *Judicial Business* 52 (Table S-3), <http://www.uscourts.gov/judbus2006/tables/s3.pdf> (2006) [hereinafter *Judicial Business Table S-3*] (showing percent unpublished in the twelve-month period ending Sept. 20, 2006, to be 84.1%) (accessed Oct. 20, 2008; copy on file with Journal of Appellate Practice and Process).

7. Fed R. App. P. 32.1 advisory comm. n.

8. Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 Ohio St. L.J. 177, 184 (1999); Donna Stienstra, *Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals* 5 (Fed. Jud. Ctr. 1985).

9. Judicial Conference of the United States, *Report of the Proceedings of the Judicial Conference of the United States: March 16-17, 1964* at 11 (U.S. Govt. Printing Off. 1964) [hereinafter *1964 Judicial Conference Report*].

Justice<sup>10</sup> issued a report, *Standards for Publication of Judicial Opinions*, recommending limited publication and citation that included a draft plan for the courts of appeals to adopt.<sup>11</sup> In that report, non-publication and non-citation seemed to go hand in hand because permitting citation would create a market for these decisions. With this model in hand, the courts began to adopt rules limiting publication and citation.<sup>12</sup>

By 1974, each circuit had submitted plans to the Judicial Conference for how it would limit publication and citation.<sup>13</sup> Despite their lack of uniformity, or perhaps because of it, the federal Judicial Conference was pleased with the state of affairs, viewing each of the circuits as a legal laboratory that would accumulate experience and refine the rules accordingly.<sup>14</sup> However, the Conference's statements reveal that while it thought, "the possible rewards of such experimentation are so rich," the plan was not necessarily a permanent solution.<sup>15</sup>

Neither the 1964 Conference nor the 1973 Committee was inclined to deny precedential status to these new unpublished opinions.<sup>16</sup> Publication plans would limit publication to those cases of greatest, broadest precedential value, but that did not inherently diminish the precedential value of other cases.<sup>17</sup> In fact, the Advisory Council expressly considered a provision assigning unpublished opinions no precedential value, but it

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10. This committee will be referred to hereinafter as "The 1973 Committee."

11. *Standards for Publication*, *supra* n. 4.

12. *Id.* at app. I (setting out proposed text for model rule); *see also* Williams, *supra* n. 5, at 770 n. 29 (quoting text of rule).

13. David Greenwald & Frederick A. O. Schwarz, Jr., *The Censorial Judiciary*, 35 U.C. Davis L. Rev. 1133, 1142 (2002); Stienstra, *supra* n. 8, at 8.

14. Judicial Conference of the United States, *Report of the Proceedings of the Judicial Conference of the United States: March 7-8, 1974* at 12 (1974) [hereinafter *1974 Judicial Conference Report*]; *see also* Stienstra, *supra* n. 8, at 9, 13 (noting that it was the initial hope that several years of experience would allow the development of a single model for use across the federal circuits, and also noting the 1978 Judicial Conference stance to continue experimentation under a variety of plans).

15. *1974 Judicial Conference Report*, *supra* n. 14, at 12 (indicating that "the Conference agreed that it should not be discontinued until there is considerably more experience under the diverse circuit plans").

16. Williams, *supra* n. 5, at 770-71 n. 29.

17. *1964 Judicial Conference Report*, *supra* n. 9, at 11 (setting out text of resolution approved at those proceedings: "That the judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value and that opinions authorized to be published be succinct").

purposely avoided making such a suggestion to avoid the “morass of jurisprudence” such a debate would entail.<sup>18</sup> Initially, most federal courts of appeals took a similar approach by adopting publication plans that did not mandate a lesser or different precedential status for unpublished decisions but merely avoided their precedential effect by making them non-citeable.<sup>19</sup> However, within a few years, the federal court rules made these unpublished cases non-precedential.<sup>20</sup>

While this may seem a small and innocuous step to some, particularly those who have studied and practiced law solely in the period when unciteable and non-precedential unpublished opinions were the norm, a decision to remove precedential value from some decisions was a radical paradigm shift. For the first time in the history of Anglo-American common law, courts were free to render opinions that played no part in prescribing the law in similar future cases. Future factually similar cases would find no refuge, by precedent or reason, in these prior “unpublished” decisions. These unpublished cases were now neither evidence of the law nor the law itself. As Judge Richard Arnold explained:

If we mark an opinion as unpublished, it is not precedent. We are free to disregard it without even saying so. Even more striking, if we decided a case directly on point yesterday, lawyers may not even remind us of this fact. The bar is gagged. We are perfectly free to depart from past opinions if they are unpublished, and whether to publish them is entirely our own choice.<sup>21</sup>

That this fundamental shift in jurisprudence has caused significant debate is not surprising. What is surprising however, is that even though the debate has addressed the propriety of both non-citation and non-precedent, the rulemaking has focused on the procedural half of the matter (citation) and not the substantive half (precedent). With the adoption of Rule 32.1, lawyers are no longer “gagged,” at least as to unpublished decisions rendered after January 1, 2007; however, the

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18. *Standards for Publication*, *supra* n. 4, at 20.

19. Williams, *supra* n. 5, at 771.

20. *Id.* at 772-73.

21. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. App. Prac. & Process 219, 221 (1999).

unpublished cases they cite are still of less than full precedential value.<sup>22</sup>

The issue of citation was the subject of a lengthy debate and rulemaking process under the Rules Enabling Act.<sup>23</sup> The result was Rule 32.1, which permits citation to unpublished opinions rendered after January 1, 2007.<sup>24</sup> This Rule followed several years of contentious debate.<sup>25</sup> The “unpublished-opinions issue has been the subject of prolonged and, at times, even bitter controversy.”<sup>26</sup> As noted at the beginning of this paper, Professor Schiltz commented in describing the breadth of this debate that “[w]hen over 500 of the best judges, lawyers, and law professors in America get into a fight over a proposed rule, no stone will be left unturned, and no argument will be left unmade.”<sup>27</sup> Unfortunately, while the citation issue was resolved by new Rule 32.1,<sup>28</sup> one stone in this discussion remained

22. See Fed. R. App. P. 32.1 advisory comm. n. (pointing out that the rule “says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court,” and noting as well that it “addresses only the citation of federal judicial dispositions that have been *designated* as ‘unpublished’ or ‘non-precedential’—whether or not those dispositions have been published in some way or are precedential in some sense” (emphasis in original)).

23. See 28 U.S.C. §§ 2071-77 (2008) (available at <http://uscode.house.gov>).

24. The rule provides:

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

(i) designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like; and (ii) issued on or after January 1, 2007.

Fed. R. App. P. 32.1.

25. Schlitz, *Much Ado About Little*, *supra* n. 1, at 1429-30 (“On the day that I became Reporter, the issue of unpublished opinions was the most controversial issue on the Advisory Committee’s agenda. Eight years later, the issue of unpublished opinions continues to be the most controversial issue on the Advisory Committee’s agenda. I have devoted more attention to the unpublished-opinions issue than to all of the other issues the Advisory Committee has faced—combined.”); Schiltz, *Citation of Unpublished Opinions*, *supra* n. 1, at 23 (“This seemingly modest proposal—in essence, a proposal that someone appearing before a federal court may remind the court of its own words—is extraordinarily controversial. . . . Only once before in the history of federal rulemaking has a proposal attracted more comments.”). See also Adam Liptak, *Federal Appeals Court Decisions May Go Public*, 151 N.Y. Times A21 (Dec. 25, 2002) (summarizing then-current situation in various federal and state appellate courts).

26. Schiltz, *Much Ado About Little*, *supra* n. 1, at 1458 (referring to Fed. R. App. P. 32.1).

27. Schiltz, *Citation of Unpublished Opinions*, *supra* n. 1, at 30.

28. State courts continue to be divided on the issue. See e.g. Melissa M. Serfass & Jessie Wallace Cranford, *Federal and State Court Rules Governing Publication and*

unturned: the precedential status of these unpublished opinions. This fundamental question is explicitly avoided by Rule 32.1:

Rule 32.1 is extremely limited. . . . It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court. Rule 32.1 addresses only the *citation* of federal judicial dispositions that have been *designated* as “unpublished” or “non-precedential”—whether or not those dispositions have been published in some way or are precedential in some sense.<sup>29</sup>

However, while the Committee took no explicit position on what precedential weight is to be accorded these “unpublished” decisions, the Committee has implicitly created a regime in which such decisions are accorded persuasive, but not binding, precedential weight. So at best, the Rule itself takes no position. More practically and realistically, the Rule creates a scheme that accords such decisions only a lesser, persuasive authority—an authority on par with a treatise, law review article, or extra-jurisdictional decision, and a far cry from the binding precedential authority given to a similar case fortunate enough to be designated for publication.

While all parties are likely weary from the recent struggle over citation of unpublished opinions, all interested parties ought to return “once more unto the breach”<sup>30</sup> to examine, discuss, debate, and resolve the issue of the precedential status of these unpublished decisions. This article is intended to stimulate and reinvigorate that debate by refocusing the discussion on precedent now that the issue of citation has been determined. Part III of this article will briefly outline the history of publication and precedent in ancient, early English, and founding-era common law in the United States. Part IV will similarly examine the modern United States publication practice. Part V will canvass the debate over the precedential status of

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*Citation of Opinions: An Update*, 6 J. App. Prac. & Process 349 (2004). Although this comprehensive survey remains a useful source of historical information, the reader should note that, because there has been much activity in the field since 2004, much of the information in it is outdated.

29. Fed R. App. P. 32.1 advisory comm. n. (emphasis in original).

30. William Shakespeare, *Henry V*, act 3, sc. 1 (available at [http://www.shakespeare-literature.com/Henry\\_V/10.html](http://www.shakespeare-literature.com/Henry_V/10.html)) (accessed Nov. 3, 2008; copy of relevant page on file with Journal of Appellate Practice and Process).

unpublished opinions focusing on the period of limited publication. Denying the precedential status of decisions of the federal courts suffers potential Constitutional infirmities, fundamentally alters the common law method of jurisprudence, and offends our community understanding of the common law legal system. After reviewing the arguments over whether courts may continue the practice of declaring some opinions non-precedential, Part VI will then discuss whether courts ought to continue denying precedential status to some opinions and touch briefly on proposed solutions that address the practical needs of the federal judiciary.

One cannot deny the pragmatic difficulties that the federal court system faces in adjudicating the ever-increasing number of cases. In 1970, the Courts of Appeals disposed of 10,699 cases,<sup>31</sup> while in 2005, the Courts disposed of 67,582 cases.<sup>32</sup> During that same period the number of active circuit judges increased much more modestly, from ninety-seven to 167.<sup>33</sup> Clearly, the primary hurdle in returning all cases to full precedential value is their sheer volume.<sup>34</sup> Without minimizing this difficulty, answers must be found to address this issue that properly respect the fundamental aspect of the common law system—that “judges must respect what they have done in the past, whether or not it is printed in a book.”<sup>35</sup>

### III. HISTORY OF PUBLICATION AND PRECEDENT

There is an inherent human desire for stability and continuity in decisionmaking. Looking to the past for guidance

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31. Administrative Office of the United States Courts, *United States Courts of Appeals Workload Statistics for the Decade of the 1970's* at 2 (1980) (tbl. B1).

32. U.S. Courts, *Federal Court Management Statistics, U.S. Courts of Appeals—Judicial Caseload Profile*, <http://www.uscourts.gov/courtsofappeals.html> [hereinafter *2006 Caseload Profile*] (click “Federal Court Management Statistics,” then click “Courts of Appeals” under “Federal Court Management Statistics—2006,” then select “National Totals,” and click “Generate” to view two-page chart) (accessed Nov. 6, 2008; copy on file with *Journal of Appellate Practice and Process*).

33. *Id.* See also James C. Duff, *Annual Report of the Director, 2006* (Admin. Off. of the U.S. Cts. 2007); Admin. Off. of the U.S. Cts., *Judicial Facts and Figures 1* (2006), <http://www.uscourts.gov/judicialfactsfigures/2006/alljudicialfactsfigures.pdf> (accessed Oct. 8, 2008; copy on file with *Journal of Appellate Practice and Process*).

34. Arnold, *supra* n. 21, at 221-22.

35. *Id.* at 225.



and direction is thus inherent in an institutionalized justice system.<sup>36</sup> Whether explicitly binding or not, decisions of the past have a powerful impact on judges' decisions, for "out of self-doubt, humility, or respect for prior generations, judges throughout history have often sought guidance from those who came before them."<sup>37</sup> Ancient civilizations had some signs of this respect for what had come before, but it is in twelfth-century England that the roots of our modern conception of precedent, publication, and common law can be found. This tradition of common law, though not identical to that which we use today, was understood by the founding generation to include unfettered citation and precedent.

### *A. Ancient Publication and Precedent*

Ancient civilizations in Greece, Rome, and Egypt all relied upon past decisions to guide them in resolving disputes, and the Egyptians had even prepared a system of law reports to remind them of past rulings.<sup>38</sup> However, a reverence for prior rulings is not the same as a duty to follow precedent. *Stare decisis*, the obligation to follow prior decisions—even those the judge disagrees with—is a function of the common law.<sup>39</sup> Courts of ancient Greece, Egypt, or Rome may have followed prior decisions, but they do not seem to have viewed themselves as "'bound' by them."<sup>40</sup> For example, early Roman praetors published edicts, which were principles derived from actual

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36. Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. Va. L. Rev. 43 (2001).

37. *Id.* at 54.

38. See Carleton Kemp Allen, *Law in the Making 171-76* (7th ed., Clarendon Press 1964).

39. William Blackstone, *Commentaries on the Laws of England* \*70 (stating that "precedents and rules must be followed, unless flatly absurd or unjust"). See also James Kent, *Commentaries on American Law*, vol. I, \*473-76 (Oliver Wendell Holmes, Jr., ed., 12th ed. Little, Brown & Co. 1873) (stating that the best evidence of the common law is found in the decisions of the courts, that those decisions are precedents for future cases resting on analogous facts, which judges are bound to follow unless it can be shown that the law was misunderstood, and that this is just, because when a rule has been deliberately adopted and declared, members of the community ought to be able to rely upon it to govern their contracts and affairs).

40. Allen, *supra* n. 38, at 170.

controversies brought before them.<sup>41</sup> These edicts were then republished at the outset of a new praetor's term of service and each remained in effect throughout his terms as a "perpetual edict."<sup>42</sup> While not limiting on the authority of the praetors, these edicts served to establish and demonstrate to the public the judicial customs that would be followed and the principles applied to a given dispute.<sup>43</sup>

During the sixth century, Roman emperor Justinian would consolidate the judicial, legislative, and executive power in his own hands and prohibit the publication of interpretations of the law, believing that use of past decisions as a guideline for resolving present disputes led to inconsistencies in the law.<sup>44</sup> Out of Justinian's model, European civil law was developed.<sup>45</sup> But the use of prior decisions to aid in resolving current disputes would be seen again, in even stronger form, in English common law. Modern English courts (that is, courts of England since the reign of Henry II), and by extension American ones, developed into common law systems giving a special authority to prior decisions.<sup>46</sup>

### *B. Early English Publication and Precedent*

The law of England preceding the reign of Henry II in the mid-twelfth century was exceedingly local and relied heavily on local customs.<sup>47</sup> Indeed, there were three separate systems of law in England following the Norman Conquest: the laws of Wessex, the laws of Mercia, and the Danelaw.<sup>48</sup> In application, the law fractured even further:

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41. Anika C. Stucky, Student Author, *Building Law, Not Libraries: The Value of Unpublished Opinions and Their Effects on Precedent*, 59 Okla. L. Rev. 403, 409 (2006) (citing Henry Campbell Black, *Handbook on the Law of Judicial Precedents, or The Science of Case Law* (West Pub. Co. 1912)).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. Mortimer N.S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 Am. J. Comp. L. 67, 67-68 (2006).

47. J.H. Baker, *An Introduction to English Legal History* 14-15 (3d ed. Butterworths 1990).

48. *Id.* at 15.

[T]here were differences of detail, particularly in procedure, in each of the thirty-two counties. There were the courts of shires, hundreds and boroughs, the courts of lords, and the courts of the king. Trial by oath, ordeal or battle was universal; but the details varied from place to place and according to the status of the parties. Proceedings were oral, and therefore legal tradition was unstable.<sup>49</sup>

Litigation was reportedly as uncertain as a game of dice.<sup>50</sup> Such was the state of the law in the first half-century or so following the Norman Conquest, but Henry II eventually united England under a common system of laws against which local custom could not stand.<sup>51</sup> A treatise of the law under Henry II, traditionally attributed to Sir Ranulf de Glanvill (and often called simply *Glanvill*), indicates a coherent system of law involving both a central court and itinerant (circuit) court judges.<sup>52</sup> What followed was a professional bar and a business of law so important that the arguments of members of the bar and the court itself were being recorded in books.<sup>53</sup> These arguments and the decisions of the court, once recorded, served as tools for the learning of the law, navigation of the court system by practitioners, and an aid to consistency in decisionmaking by courts.

In the 1250s, Henry de Bracton, who was an accomplished circuit and assize judge as well as a member of the nascent court of the King's Bench,<sup>54</sup> attempted to explain the principles and procedures of English law through a collection of cases (the *Note Book*) and an accompanying treatise (*Treatise on the Laws of England*) commonly referred to simply as *Bracton*.<sup>55</sup> These

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49. *Id.*

50. *Id.* (citing *Leges Henrici Primi* (c. 1118)).

51. *Id.* at 16. Baker's delightful turn of phrase is that, "[a]gainst that uniform system, local custom would thereafter be seen at best as exceptional and at worst as exceptionable." *Id.*

52. *Id.* at 15-16, 22.

53. *Id.* at 23.

54. Bryce Lyon, *A Constitutional and Legal History of Medieval England* 334 (2d ed. W.W. Norton & Co. 1980).

55. Henry de Bracton, *De legibus et consuetudinibus Angliae* [*On the Laws and Customs of England*] (1569) (George E. Woodbine ed., & Samuel E. Thorne trans., Belknap Press 1968) (searchable Latin and English text also available at <http://hls15.law.harvard.edu/bracton>) (accessed Nov. 12, 2008; copy of title page on file with Journal of Appellate Practice and Process). See also J. W. Tubbs, *The Common Law Mind: Medieval*

works collected and discussed in detail five hundred cases, which Bracton believed were illustrative of English law.<sup>56</sup> He collected and made notes regarding over two thousand cases, whether for his use on the bench or specifically for his writing is unknown.<sup>57</sup> His collection and reliance upon cases demonstrates a strong belief in the value of precedents, and he stated that “if like matters arise let them be decided by like (*si tamen similia erinerint per simile iudicentur*), since the occasion is a good one for proceeding *a similibus ad similia*.”<sup>58</sup>

Bracton’s selection of cases, choosing older decisions of respected judges, such as Martin Pateshull and William Raleigh, over those of his contemporaries, indicates a disdain for his contemporaries’ departure from past decisions, and the work was written, according to its preface, to prevent the newer generation of judges from unwittingly leaving the proper course settled by their wise predecessors in past cases.<sup>59</sup> Bracton’s treatise was an important development in the history of both publication and precedent because it both indicated existing reliance upon precedent and facilitated future reliance upon and use of prior cases:

The influence of Bracton on the common law in succeeding centuries, though variable, has been significant. Bracton summed up the law as it had developed by the middle of the thirteenth century and passed it on to future generations of lawyers. He accomplished for the law in the thirteenth century what Blackstone accomplished for it in the eighteenth. For a century after its appearance, Bracton’s great book dominated English legal thought and study.<sup>60</sup>

Famed English legal historian Frederick William Maitland labeled the era “the age of Bracton” and called the work “crown

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*and Early Modern Conceptions 7-20* (Johns Hopkins U. Press 2000); Baker, *supra* n. 48, at 201-02.

56. See T. Ellis Lewis, *The History of Judicial Precedent I*, 46 L.Q. Rev. 207, 209-212 (1930). Some evidence suggests that this collection of cases from the plea rolls was started much earlier (c. 1220-30) and that Bracton was merely the final editor and publisher. See Baker, *supra* n. 47, at 201-02.

57. See Lyon, *supra* n. 54, at 334; Lewis, *supra* n. 56, at 209-12; Tubbs, *supra* n. 55, at 18.

58. Tubbs, *supra* n. 55, at 18-19. See also Lyon, *supra* n. 54, at 334.

59. Baker, *supra* n. 47, at 225.

60. Lyon, *supra* n. 54, at 435-36.

and flower of English medieval jurisprudence.”<sup>61</sup> Whether taken as evidence of extant practice or noted for its influence on the generations of lawyers to follow, Bracton’s treatise is important for its use of cases to support arguments about the law.<sup>62</sup>

Soon after Bracton’s efforts, and certainly by 1260, the practice of recording the arguments and decisions, in “the very words of judges and pleaders” was being followed.<sup>63</sup> Indeed, the Year Books reveal that both counsel and the court in these arguments were themselves citing to prior decisions and openly admitting that their decisions would be viewed as precedent in later cases.<sup>64</sup> One such case reveals a judge, perhaps speaking directly to a case reporter, saying, “one may safely put that in his book for law.”<sup>65</sup> However, it is important to note that these case reports were not crafted by the courts in the manner of modern American decisions. They were taken down by private reporters who often made errors, but these errors were thought to be avoided in the long term by reference not merely to a single precedential case, but to long and frequent repetition of a given type of common usage (“common learning”) among the bar.<sup>66</sup> This type of learning was brought to a court’s attention in the form of reference to prior cases, each of which brought something to the perception of common learning being upon the side of the advocate.

The Year Books certainly reveal both the use and importance of precedent in the common law system as early as the mid-thirteenth century. But they also reveal that precedent is not tied inextricably to publication and certainly not to formal, lengthy, dissertational written opinions so common in American courts today.<sup>67</sup>

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61. *Id.* at 333-34. Maitland himself quoted Edmund Burke expressing this concern about the end of Year Books and published reports: “To put an end to reports is to put an end to the law of England.” Frederick William Maitland, *Frederick William Maitland, Historian* 112-13 (Robert Livingston Schuyler ed., U. of Cal. Press 1960).

62. Tubbs, *supra* n. 55, at 20.

63. Baker, *supra* n. 47, at 225.

64. *Id.*

65. *Id.* (citing *Midhope v. Prior of Kirkham* (1313) 36 SS 178, per Stanton, J.).

66. *Id.* at 226.

67. *Id.* at 204 (explaining that even when the only record of decision was the courts’ rolls, lawyers and judges would rely upon their own memories and understanding of the cases’ decisions, “vouch[ing] the record” as needed). The lengthy dissertational model has been dubbed the “Friendly treatment” or “the Learned Hand model” after judges who were

The next major step in the history of case reporting and precedent was the publication by Sir Edward Coke of a thirteen-volume treatise of past cases, typically referred to as “The Reports.”<sup>68</sup> This is not to say that Coke’s works were the only systematic case reports of the era. Others include Plowden’s *Commentaries* and Bulstrode’s careful reporting of decisions of King’s Bench under James I and Charles I, as well as many less complete reports.<sup>69</sup> Sir Coke’s volumes were the most well known, likely due to his comprehensiveness, style, and personal accomplishments.<sup>70</sup> Both Coke’s *Reports* and his personal attempts to claim more of the King’s power over the law for the courts themselves served to increase the power of precedent.<sup>71</sup> For example, Coke cited to both ancient and recent precedent in his attempts to limit the jurisdiction of the ecclesiastical and chancery courts, to deny the King’s power to make arrests or alter the common law, and to argue that acts of Parliament contrary to common law (“common right and reason”) were void.<sup>72</sup>

Coke put common law and precedent at the center of the judicial exercise. While still not as strict as the concept of binding precedent would become in later years, the idea of a body of precedent, which would become increasingly binding through long use and experience, was viewed as a strength of the common law system.<sup>73</sup> Indeed, this refinement through repeated application was viewed as an important element of the common law, which Coke perceived as having been “refined” by “long

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known for such writings. Schiltz, *Citation of Unpublished Opinions*, *supra* n. 1, at 1485-88 (noting a nostalgic reverence for the type of careful deliberation and lengthy opinions rendered by preeminent Judge Henry J. Friendly of the Second Circuit). See also William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273, 278 (1996) (discussing “the Learned Hand model,” consisting of oral argument in most cases, discussions among the members of the bench, and judges writing their own opinions instead of relying on drafts composed by clerks or staff attorneys).

68. Healy, *supra* n. 36, at 62.

69. Baker, *supra* n. 47, at 209-10.

70. Stucky, *supra* n. 41, at 413.

71. Healy, *supra* n. 36, at 63.

72. *Id.*

73. *Id.* For an example of the inexorable command of vertical binding precedent in modern American courts, see *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (noting that “a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be”).

and continual experience” of judges seeking to ever refine the law further by “declaring its principles with even greater precision and renewing it by application to the matter at hand.”<sup>74</sup>

Coke’s idealistic vision of improving the law itself through accumulation of applications of the law should be realized in modern common law systems. We possess the ability to record both argument and decisions with greater certainty, to retain those records more permanently, and to disseminate the decisions to a wider audience. More applications of the principles of law to facts, such that the principles are tested and refined, improves our understanding of the principles and gives greater certainty to those seeking to conform their conduct to them.

In the wake of increasing interest in precedents, and their greater availability in the form of written reports, the bar was faced with two critical problems in ascribing the decisions of courts the kind of binding authority that they now possess in modern American courts. The first problem facing the courts in Coke’s era was the still-prevalent belief in natural law. The belief in universal, unchanging principles of justice and right unavoidably raised the question of how the decisions of prior cases could be “the law” when “the law” was derived from a higher authority.<sup>75</sup> This was not an insurmountable challenge to the development of binding precedent, given that the source of natural law was itself in the process of being wrested away from the crown and into the hands of the judiciary. Both Coke and later English jurists subscribed to a declaratory theory of law that served as a compromise between natural law and the rising importance of precedent.<sup>76</sup> The declaratory theory states that while not, strictly speaking, law themselves, decisions were “the best proof of what the law is.”<sup>77</sup> Indeed, while they were less willing to ascribe binding precedential authority to any single

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74. Healy, *supra* n. 36, at 66 (citing John Greville Agard Pocock, *The Ancient Constitution and the Feudal Law* 35 (Cambridge U. Press 1987) and H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. Chi. L. Rev. 1513, 1537, & 1537 n. 91 (1987)).

75. Healy, *supra* n. 36, at 67.

76. *Id.* at 67-68.

77. *Id.* at 62 (quoting Coke); Blackstone, *supra* n. 39, at \*69 (stating that cases, “are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law”).

decision, its adherents were keenly attuned to finding the “current of authorities” or a “strong and uniform . . . train of decisions.”<sup>78</sup> The second issue impeding the increased reliance on precedent as binding authority was the poor quality of the reports throughout the seventeenth and eighteenth centuries.<sup>79</sup> Judges of the era were unable to rely with much certainty on the accuracy of a report unless they had confidence in the competence and credibility of the reporter himself.<sup>80</sup> This too was not too much of a challenge for the common law. By the mid-eighteenth century, reports of greater accuracy and reliability were made, which increased the ability of judges to more faithfully adhere to precedent.<sup>81</sup>

### C. *Modern English Publication and Precedent*

With the rise of better publication standards came greater adherence to the dictates of precedent. Throughout the latter half of the eighteenth century, a major proponent of this view was Sir William Blackstone.<sup>82</sup> Blackstone perceived the adherence to precedent as not just a worthy idea, but as part of a judge’s duty under the declaratory theory.<sup>83</sup> That is, it was the duty of judges to state and apply the law rather than to make and remake it:

For it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge’s opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which is not in the breast of any subsequent judge to alter or vary from according to his private sentiments: he being sworn to determine, not

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78. Healy, *supra* n. 36, at 68 (quoting in part James Ram, *The Science of Legal Judgments*, 9 Law Libr. 76 (John S. Littell 1835)).

79. *Id.* See also T. Ellis Holdsworth, *History of Judicial Precedent IV*, 48 L.Q. Rev. 230-31 (1932).

80. See Allen, *supra* n. 38, at 219 (noting that “the doctrine of precedent had reached an advanced stage of development in the eighteenth century,” but that “the process which was to establish the theory, in its full modern acceptance, was not yet complete”).

81. Allen, *supra* n. 38, at 209; Tubbs, *supra* n. 55, at 181.

82. Healy, *supra* n. 36, at 70.

83. Blackstone, *supra* n. 39, at \*69.



according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.<sup>84</sup>

Blackstone viewed adherence to precedent as the generally applicable rule and judicial discretion to ignore precedent as the exception—an exception that was limited to instances in which the precedent was “manifestly absurd or unjust” or “contradictory to reason.”<sup>85</sup> Especially telling about the rise of the power of precedent in this period is that Blackstone’s jurisprudential opposite, Lord Mansfield, also perceived an increased adherence to precedent, even as he questioned Blackstone’s assertion that it was the judge’s duty.<sup>86</sup> While contemporaries Blackstone and Mansfield disagreed about the power of the courts and the extent to which precedent bound courts, the matter was decided in dramatic fashion in the case of *Perrin v. Blake*,<sup>87</sup> in which Blackstone’s adherence to prior decisions won out over Mansfield’s attempt to cast aside the old decisions as feudal in origin and outdated.<sup>88</sup> Following this major step in the rise of binding precedent, the effect of precedent became well enmeshed in English jurisprudence:

By the beginning of the nineteenth century, courts began to regard a line of decisions as absolutely binding, though they could still depart from a single decision, or even two decisions, for sufficient reasons. Gradually that exception also disappeared and by the latter half of the nineteenth century, courts asserted an obligation to follow all prior cases, no matter how incorrect. Even the House of Lords, which had never regarded its own precedents as binding, declared in 1861 that it was absolutely bound by its past decisions.<sup>89</sup>

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84. *Id.*

85. *Id.* at \*70.

86. Allen, *supra* n. 38, at 211 (stating that Mansfield “had a deep impatience of the unintelligent and mechanical use of precedent merely for its own sake and without any true relevance to the underlying principles involved in a legal issue”); David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* 126 (Cambridge U. Press 1989) (noting that Mansfield “never entirely ignored precedents”).

87. 96 Eng. Rep. 392 (K.B.), 10 Eng. R. C. 689, 4 Bur. (Eng.) 2579 (1772).

88. Healy, *supra* n. 36, at 72.

89. *Id.* (footnotes omitted).

Blackstone's ideas of precedent, and of common law, are well-documented in his *Commentaries on the Laws of England*, which have been called "the magnum opus of the eighteenth century" and "perhaps the most stylish and readable contribution ever made to English legal literature."<sup>90</sup> More important, Blackstone's *Commentaries*, as they became known, were extremely influential in both England and America in the late eighteenth and early nineteenth centuries.<sup>91</sup> As the eighteenth century gave way to the nineteenth century, both a philosophical shift and increasingly accurate case reports ushered in an era in which decisions were both published and precedential in much the way they are today.

#### D. Early American Publication and Precedent

"American courts have always adhered to a common law system that is dependent upon precedent."<sup>92</sup> Though the exact contours of the common law system varied among the colonies and changed over time, the implicit reliance on inherited ideas about the law is difficult to deny. As Justice Story explained,

The case is not alone considered as decided and settled, but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them when they first emigrated to this country; and it is, and always has been, considered as the great security of our rights, our

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90. Baker, *supra* n. 47, at 219.

91. William S. Brewbaker III, *Found Law, Made Law and Creation: Reconsidering Blackstone's Declaratory Theory*, 22 J. L. & Religion 255, 255 (2007) (asserting that "Sir William Blackstone's Commentaries on the Laws of England is arguably the single most influential work of jurisprudence in American history") (footnote omitted). See also Herbert J. Storing, *William Blackstone 1723-1780*, in *History of Political Philosophy* 622-34 (Leo Strauss & Joseph Cropsey eds., 3d ed., U. Chi. Press 1987) (outlining Blackstone's essential ideas and method); Wilfrid Prest, *Blackstone as Architect: Constructing the Commentaries*, 15 Yale J.L. & Human. 103 (2003); Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. Pa. L. Rev. 1 (1996); Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 Emory L.J. 437, 489-96 (1996); S.F.C. Milsom, *The Nature of Blackstone's Achievement*, 1 Oxford J. Leg. Stud. 1 (1981); Rupert Cross, *Blackstone v. Bentham*, 92 L.Q. Rev. 516 (1976).

92. Suzanne O. Snowden, Student Author, "*That's My Holding and I'm Not Sticking To It!*" *Court Rules That Deprive Unpublished Opinions of Precedential Authority Distort the Common Law*, 79 Wash. U. L.Q. 1253, 1256 (2001) (footnote omitted).

liberties, and our property. It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice or will of particular judges.<sup>93</sup>

However, American courts from their earliest days faced the same barriers to the use of precedent as English courts: belief in natural law and lack of quality reports.<sup>94</sup> As in England, these impediments were overcome. Blackstone's *Commentaries* and his ideas were as resonant with American lawyers as they were with English lawyers. Edmund Burke noted, "I hear that they have sold nearly as many of Blackstone's *Commentaries* in America as in England."<sup>95</sup> A later writer's study of Blackstone revealed that "[t]he *Commentaries* became the chief if not the only law books in every [colonial] lawyer's office, and the most important if not the only textbooks for [colonial] law students."<sup>96</sup> Numerous scholars have noted the profound effect of Blackstone's common law scholarship on the thinking of both the Revolutionary and Founding generations of America.<sup>97</sup> Blackstone's *Commentaries* have been described as the "principal source" of legal education for Alexander Hamilton<sup>98</sup> and an awe-inducing inspiration to the young James Kent.<sup>99</sup> In the late eighteenth and early nineteenth century, Blackstone's philosophy was married with increasing reporting of case decisions.<sup>100</sup> Some judges actively collected, reported, and digested the laws of their states themselves; others, like Chancellor James Kent of New York, worked closely with a reporter.<sup>101</sup> Much as it had in England, the law had become less

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93. Joseph Story, *Commentaries on the Constitution of the United States* § 377 (Hilliard, Gray & Co. 1833) (quoted in *Anastasoff v. U.S.*, 223 F.3d 898, 904 (8th Cir. 2000), vacated as moot on other grounds en banc, 235 F.3d 1054 (8th Cir. 2000)).

94. Healy, *supra* n. 36, at 73-74.

95. Edmund Burke, speech, *On Conciliation with America* (Mar. 22, 1775), in Edmund Burke, *Pre-Revolutionary Writings* 206, 225 (Ian Harris ed., Cambridge U. Press 1993).

96. David A. Lockmiller, *Sir William Blackstone* 170 (U.N.C. Press 1938).

97. See e.g. William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 Vt. L. Rev. 5, 6 (1994).

98. Jacob Ernest Cooke, *Alexander Hamilton* 29 (Charles Scribner's Sons 1982).

99. Bader, *supra* n. 97, at 11 (citing William Kent, *Memoirs and Letters of James Kent LL.D.* 18 (Little, Brown & Co. 1898)).

100. Lawrence M. Friedman, *A History of American Law*, 88-91 (Touchstone 3d ed. 2005).

101. *Id.* at 89.

dependent upon natural or divine law and more a law of artificial reason.<sup>102</sup> It also became more the function of a professional, well-trained legal profession with an interest in increasing the power of the court system.<sup>103</sup> Toward that end, lawyers worked for the establishment of more common law rules and practices.<sup>104</sup>

This move was quite successful though early America had two additional problems to overcome before Blackstonian adherence to precedent could flourish. First, it had to receive the common law from England, develop its own common law, or both. While Maryland had declared itself to be governed by the common law in 1642, other colonies did not follow suit until the early eighteenth century; by the time of the revolution, however, most had formally or informally adopted the common law.<sup>105</sup> Second, the post-Revolutionary legal system<sup>106</sup> had to weather the growing pains of a system of law both sprung from and estranged from English common law and principles. Viewing themselves as distinctly separated from the common law of England and in the process of developing a common law of their own, judges of the era seemed to discard precedents on a variety of grounds.<sup>107</sup> One such ground was to simply take the exception Blackstone had given and declare the precedents illogical, unreasonable, or contrary to public policy.<sup>108</sup> Others viewed English precedents as conflicting with a more important source of authority, state law.<sup>109</sup> At the core of these decisions was the

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102. Compare Mark L. Jones, *Fundamental Dimensions of Law and Legal Education: An Historical Framework*, 39 *John Marshall L. Rev.* 1041, 1099-1102 (2006) (recounting at length the circumstances of Lord Coke's explanation of artificial reason in the law) and Bernadette Meyler, *Towards a Common Law Originalism*, 59 *Stan. L. Rev.* 551, 585 (2006) (discussing Coke's description of artificial reason) with Carl F. Stychin, *The Commentaries of Chancellor Kent and the Development of an American Common Law*, 37 *Am. J. Legal Hist.* 440, 451-52 (1993) (discussing Kent's similar view of American law as founded upon such "cultivated and artificial reasoning").

103. Healy, *supra* n. 36, at 76; Stychin, *supra* n. 102 at 451-52.

104. Healy, *supra* n. 36, at 74-75.

105. *Id.*

106. To call it a "system" using the singular is a generalization made in attempt to take a broad view. It was, of course, several colony or state systems, although they shared this problem sufficiently to make this generalization reasonable.

107. Healy, *supra* n. 36, at 79-80.

108. *Id.* at 79.

109. *Id.*

idea that English rules were inapplicable to American circumstances.<sup>110</sup> As Lawrence Friedman put it, “[t]hey chiseled law out of the hard rock of basic principle.”<sup>111</sup> However, as states resolved these issues by receiving the parts of English common law that their lawyers believed were applicable and by developing their own common law precedents, precedent took—and has maintained—a prominent position in American jurisprudence.<sup>112</sup>

Throughout the nineteenth century, *stare decisis* strengthened in the United States as the above impediments were overcome.<sup>113</sup> The landmark case of *Marbury v. Madison* emphasizes the importance of each judicial decision as an element of the developing case law, for “[i]nherent in every judicial decision is a declaration and interpretation of a general principle of law.”<sup>114</sup> The centrality of adherence to precedent in American law is also illustrated by Justice Story’s well-known comment, which is of particular interest in the present context of courts issuing non-precedential decisions: “A 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.”<sup>115</sup> From Justice Story’s time to today, adherence to precedent and the application of *stare decisis* have been a prominent, if not the most prominent, feature of American law. Indeed, “[o]ld common-law attitudes toward precedent are so deeply ingrained in the behavior of American lawyers and judges that they hardly rise to the conscious level,”<sup>116</sup> and “American attitudes toward precedent are the attitudes of Coke, Blackstone, Marshall, and Kent, although

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110. *Id.* at 79-80.

111. Friedman, *supra* n. 100, at 88.

112. Sellers, *supra* n. 46, at 67.

113. Healy, *supra* n. 36, at 87.

114. *Anastasoff v. U.S.*, 223 F.3d 898, 899 (citing *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803)). Justice Marshall’s famous declaration that “[i]t is emphatically the province and duty of the judicial department to say what the law is,” and his somewhat less famous, but no less important, statement that “[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule” both appear in *Marbury* at 5 U.S. 177.

115. Story, *supra* n. 93, at § 377.

116. Sellers, *supra* n. 46, at 67.

courts no longer feel the need to cite to these authors, or the decisions on which they relied.”<sup>117</sup> Yet, the “alarming doctrine” perceived by Justice Story arguably exists today, when over eighty percent of all decisions of the United States federal courts are unpublished and essentially non-precedential, leaving courts unbound today by what they did yesterday. That the concepts of precedent and stare decisis are inherent in our legal system is easy to see, but how we have reached a point when they are avoidable in the vast majority of federal cases is more difficult to understand.

#### IV. MODERN AMERICAN PUBLICATION AND PRECEDENT

The late nineteenth and early twentieth centuries saw the rise of comprehensive case reports, and with that development came a renewed concern that this body of case law would prove too much for the legal system to deal with. This concern ultimately led to rules limiting publication of opinions, and, for the first time in common law history, rules limiting the citation of opinions. Whether implicitly or explicitly, the rules then came to deny precedential status to these opinions. However, the twentieth century also brought with it technological innovation that allows for better management of and access to the ever-increasing body of law. Moreover, lawyers’ and judges’ attitudes towards these allegedly unimportant opinions suggests that they are anything but unimportant.

##### *A. Comprehensive Publication and the Concerns It Engenders*

As noted above, while precedent and case publication are not preconditions for each other,<sup>118</sup> the existence of reliable case reports does strengthen the use of precedent.<sup>119</sup> The desire for an American common law led to the creation of various state reporters, starting with Ephraim Kirby’s 1789 Connecticut Reports and Francis Hopkinson’s Judgments in Admiralty in

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117. *Id.* at 73.

118. Baker, *supra* n. 47, at 204 (explaining that even when the only record of decision was the courts’ rolls, lawyers and judges would rely upon their own memories and understanding of the cases’ decisions, “vouch[ing] the record” as needed).

119. Allen, *supra* n. 38, at 223-30 (discussing early English reports and reporters).

Pennsylvania (also published that year).<sup>120</sup> By 1803, states had begun designating official state reporters to increase the reliability of reports and create more systematic coverage.<sup>121</sup> What had once been the province of enthusiastic practitioners became a government function, and while the government production of an official reporter did give lawyers and judges a common reference, it was often slow and not as useful as the former reporters.<sup>122</sup> Rather than being produced by an interested practitioner or an efficient publisher, official reports of the era were left in the hands of political appointees.<sup>123</sup> But that condition would not last forever. John B. West and the West Publishing Company would change the face of legal publishing by producing more efficient, complete, and systematic reports.

West's goal was interesting in two respects. First, he sought, "to collect, arrange in an orderly manner, and put into convenient and inexpensive form in the shortest possible time, the material which every judge and lawyer must use."<sup>124</sup> This statement reveals the importance, visible even to a non-lawyer, that the legal system placed on its decisions. Second, West chose to publish all judicial decisions, rather than choosing to publish only a selected subset of them. This move was a departure from past practice and had its critics, but West's perception of the market was right—"[]awyers chose the comprehensive style of reporting, preferring that all precedent be available."<sup>125</sup>

Lawyers would want to read, and want to be able to rely upon, all previous decisions in which a court applied the law in a similar case. This desire has been repeatedly expressed by lawyers. It can be seen in both the advocating for greater

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120. Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 Cal. L. Rev. 15, 19, & 19 n. 20 (1987).

121. *Id.* at 19.

122. *Id.* at 20.

123. Thomas A. Woxland, "Forever Associated With the Practice of Law": *The Early Years of the West Publishing Company*, 5 Leg. Ref. Serv. Q. 115, 119, 120 (Spring 1985) (noting that in the early years "[t]he office of the state reporter was usually a patronage position, occupied by a political crony rather than an efficient publisher," and that court reporters were "given the exclusive right to record, print, and publish the decisions" of particular courts).

124. *Id.* at 118-19 (citing *A Symposium of Law Publishers*, 23 Am. L. Rev. 396, 406 (1889)).

125. Berring, *supra* n. 120, at 21.

acceptance of the common law and the striving for greater, and better, publication of court decisions.

This preference for access to the courts' actual opinions was poignantly shown by the rejection of the American Law Institute's attempt to replace case law with a Restatement that extracted the "best" principles of law.<sup>126</sup> Faced with a greatly expanding number of decisions and a popular universal reporting system, the American Law Institute perceived a mass of case law in need of reduction and distillation.<sup>127</sup> Its goal was to craft a restatement of the law that would obviate the need for citation to cases by extracting the best principles and ignoring the rest.<sup>128</sup> But lawyers proved unwilling to rely on a secondary source when the words of the courts themselves were before them, and they continued to cite cases and to rely upon the Restatement as a useful, but secondary, source.<sup>129</sup>

While supplanting case decisions with summaries was ineffective in reducing the increasing number of opinions to be written, researched, and relied upon, simply choosing to return to an era of limited publication was effective. In fact, it has been so successful that over eighty percent of all federal decisions are now unpublished.

### *B. The Birth of Limited Publication Plans*

While increases in cases and reported opinions were noted throughout the late nineteenth and early twentieth centuries, the first rumblings about limiting citation began in the Third and Fifth Circuits in the 1940s.<sup>130</sup> Very little consensus was achieved, however, until 1964, when the Federal Judicial Conference recommended that the Courts of Appeals should report only those decisions that would be of "general precedential value" in order to deal with "the ever increasing practical difficulty and economic cost of establishing and

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126. *Id.* at 23.

127. *Id.*

128. *Id.*

129. *Id.*

130. Reynolds & Richman, *No-Citation Rules*, *supra* n. 5, at 1169 & 1169 n. 17.



maintaining private and public law library facilities.”<sup>131</sup> Little action was taken on this suggestion until in 1973 the Council on Appellate Justice issued *Standards for Publication of Judicial Opinions*, recommending limited publication and citation and including a draft plan for the courts of appeals to adopt.<sup>132</sup> In that report, non-publication and non-citation seemed to go hand in hand because permitting citation would create a market for these decisions. With a model in hand, the courts began to adopt rules limiting publication and citation.<sup>133</sup> By 1974, each circuit had submitted plans to the Judicial Conference for how it would limit publication and citation.<sup>134</sup> Prior to these plans, the federal courts of appeals had essentially all their opinions published.<sup>135</sup>

Neither the 1964 Conference nor the 1973 Advisory Council was inclined to deny precedential status to these new unpublished opinions.<sup>136</sup> Publication plans would limit publication to those cases of greatest, broadest precedential value, but did not inherently diminish the precedential value of other cases.<sup>137</sup> In fact, the Advisory Council expressly considered a provision assigning unpublished opinions no precedential value, but it purposely avoided making such a suggestion to avoid the “morass of jurisprudence” such a debate would entail.<sup>138</sup> Instead, it recommended merely denying citation of the unpublished opinions as precedent and saying nothing about their actual precedential value.<sup>139</sup> Initially, the courts of appeals took a similar approach by adopting publication plans that did not mandate a lesser or different

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131. *1964 Judicial Conference Report*, *supra* n. 9, at 11 (quoted in Arnold, *supra* n. 21, at 219).

132. *Standards for Publication*, *supra* n. 4.

133. *Id.* at app. I; see also Williams, *supra* n. 5, at 770-71 n. 29.

134. Greenwald & Schwarz, *supra* n. 13, at 1142; see also Reynolds & Richman, *No-Citation Rules*, *supra* n. 5, at 1170-71.

135. Berring, *supra* n. 120, at 15-20. (noting West Publishing Company’s policy of publishing all case opinions rather than some subset of them in a movement toward complete publication); Jon A. Strongman, Student Author, *Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value is Unconstitutional*, 50 U. Kan. L. Rev. 195 (2001) (noting that the 1970s proved a breaking point for the practice of uniform publication of federal circuit opinions).

136. Williams, *supra* n. 5, at 770-71 n. 29 (quoting 1973 report).

137. *1964 Judicial Conference Report*, *supra* n. 9, at 11.

138. *Standards for Publication*, *supra* n. 4, at 20.

139. *Id.*

precedential status for unpublished decisions; they simply restricted citation to unpublished opinions.<sup>140</sup> However, within a few years, most federal court rules made these unpublished cases non-precedential.<sup>141</sup>

Such a progression, from non-published to non-citeable to non-precedential, seems logical and in its own way almost necessary.<sup>142</sup> Limited publication is not a new idea; it dates back to the earliest reporters, who were selective in what they published.<sup>143</sup> But declaring decisions to be unciteable, and moreover, not precedent, was contrary to the entire history of the common law system. This removal of decisions from the body of common law was a fundamental shift in the common law system that was truly unprecedented.<sup>144</sup> Even in the early days of Yearbooks or the unsettled post-Revolution days of early American courts, no matter how sparse the record, cases could always be cited to the court as evidence of its past rulings. Now, however, federal courts were unwilling to be bound by what they had done in similar cases in the past; in fact, they were

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140. Williams, *supra* n. 5, at 771.

141. *Id.* at 771-73.

142. “Unpublished” cases that remained citeable and precedential would be sought out despite their formal publication status, but creating a rule that a decision is both non-citeable and non-precedential effectively removes that decision from the body of common law. Only by restricting opinions on all three grounds (publication, citation, and precedent) could one hope to make some opinions truly “disposable.” This, of course, was unsuccessful because practitioners placed value on these opinions despite their diminished status. *See generally e.g.* Robel, *Practice of Precedent*, *supra* n. 5 (examining recent surveys of federal judges and lawyers); Robel, *Myth*, *supra* n. 5.

143. Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. Mich. J.L. Reform 119, 121 (1994).

144. Please forgive the pun, but synonyms did not adequately capture the concept quite as well, because the shift plainly is without precedent. English and early American practice uniformly allowed citation to and reliance upon prior decisions regardless of their publication status. Modern English practice is similar to the historical practice in England: Unreported cases are unlikely to be cited but may be cited, if appropriate. *See* Robert J. Martineau, *Appellate Justice in England and the United States: A Comparative Analysis* 104 (William S. Hein & Co. 1990). *But see* F. Allan Hanson, *From Key Numbers to Keywords: How Automation Has Transformed the Law*, 94 L. Libr. J. 563, 565-66 (2002) (quoting Roderick Munday, *The Limits of Citation Determined*, 80 L. Socy. Gaz. 1337 (1983) (claiming that the British courts are “restricting the use of unreported materials which the computer revolution has made available to the profession,” and noting that, “[i]n particular, the House of Lords . . . has effectively outlawed the citation of unreported cases in argument before it’’)).

unwilling to even be told about it,<sup>145</sup> not because they had decided it inapplicable, but because another panel of the court had decided at the time of the decision that it would not aid future decision-makers.

This shift was born not out of a philosophic or jurisprudential need to prune the law; rather, it was created because of a need to reduce the expense of publishing, collecting, and maintaining law libraries as well as reducing the workload of the federal judiciary and lawyers.<sup>146</sup> From that perspective of pragmatic concerns, the early 1970s proved to be a turning point.<sup>147</sup> Between 1950 and 1970, federal case filings rose from 2678 to 11,440, while federal judgeships rose from sixty-four to ninety.<sup>148</sup> Simply on a case-per-judge basis, judges' workloads more than tripled over a twenty-year period. In response, the 1973 Committee sought a pragmatic solution,<sup>149</sup> which was adopted and eventually extended by the federal courts. Yet many of the Committee's pragmatic concerns are no longer valid in light of the present state of legal information technology and practices. And those that remain must be weighed against the inherent value of precedent to our legal system, either as an intrinsic limit imposed by our Constitution or as a proper practice for the good of our legal system. These issues are discussed further in Part IV.

### C. Recent Technological Developments in Publication

Technological advances have drastically altered the landscape of legal publishing and legal research over the last

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145. Arnold, *supra* n. 21, at 221 (pointing out that “[t]he bar is gagged,” but that “[w]e are perfectly free to depart from past opinions if they are unpublished, and whether to publish them is entirely our own choice”).

146. See *Standards for Publication*, *supra* n. 4, at 6-8. The reader will note that, aside from a general comment that “[u]nlimited proliferation of published opinions constitutes a burden and a threat to a cohesive body of law,” *id.* at 6, the balance of the Committee's seven factors indicating that publication should be limited is made up of pragmatic concerns about workload and logistics—many of which are wholly inapplicable in today's legal information setting.

147. Richard A. Posner, *The Federal Courts: Challenge and Reform*, 391-93 (tbl. A.2) (Harvard U. Press 1996).

148. *Id.* at 392, 397, 398.

149. *Standards for Publication*, *supra* n. 4, at 21 (stating that the recommendation to address only citation and not precedent “deals with use rather than philosophical effect”).

thirty to forty years. These changes alone cry out for a reevaluation of the concept of limited publication and precedent.<sup>150</sup> At the time of the 1964 conference first formally proposing limited publication of federal opinions, computer-assisted legal research was, at best, a theory.<sup>151</sup> By 1973, when the Federal Judicial Center's Advisory Council released its suggested standards for limited publication of judicial opinions, computer-assisted research was in its earliest stages.<sup>152</sup> The first LEXIS system was released in April 1973, and by the fall of 1973, a small number of firms began using it.<sup>153</sup> By the time the first Westlaw system was in place in April 1975,<sup>154</sup> the federal Courts of Appeals had already created rules regarding limited publication and the precedential value of unpublished opinions. Since then, computer-assisted legal research systems have been refined and improved dramatically.<sup>155</sup> Indeed, advances in information communication have revolutionized legal research and access to legal information: "Legal information is no longer available exclusively in print, and the researcher is now no longer constrained by the limitations of the printed page," so this information can be stored, indexed, and retrieved digitally with just a few keystrokes.<sup>156</sup> Moreover, such access through commercial databases is increasingly available online without the need for dedicated in-office hardware or CDs full of cases. This includes "unpublished" decisions, which are widely available both through West's and LEXIS's online services, but also in West's *Federal Appendix*, which has been publishing "unpublished" cases since 2001.<sup>157</sup>

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150. Kirt Shuldberg, Student Author, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 Cal. L. Rev. 541, 551 (1997) (asserting that "[t]hese historic rationales for the limited publication/no-citation plans warrant re-examination in light of current technology").

151. *Id.* at 556.

152. *Id.*

153. William G. Harrington, *A Brief History of Computer-Assisted Legal Research*, 77 L. Libr. J. 543, 553 (1985).

154. *Id.*

155. *Id.* at 554; Shuldberg, *supra* n. 150, at 558.

156. Shuldberg, *supra* n. 150, at 556.

157. Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. Rev. 705, 709-10 (2006).

This electronic and internet revolution is not solely the province of private reporters, however. In 2002, Congress enacted the E-Government Act, a law aimed at promoting greater communication between the government and the citizenry via electronic means.<sup>158</sup> In accordance with that law, the federal courts are in the process of making all civil court records (save those that are sealed) available online.<sup>159</sup>

The system of limited publication, non-citation, and non-precedent was created in a legal setting limited to print resources and without the indexed and non-indexed searching capabilities of any computer-assisted legal research systems. In their current formats, however, those systems make it possible to search cases (and other sources) through both traditional indexed methods and via full-text searching. These advances in legal information technology should themselves justify a complete re-examination of the need for a limited publication and precedent regime.

#### *D. Citation and Precedent in the Federal Courts of Appeals Prior to Rule 32.1.*

The 1973 Advisory Committee's report avoided the "morass of jurisprudence" inherent in directly tackling the issue of precedential status of unpublished decisions.<sup>160</sup> The Committee shrewdly decided to refrain from declaring that unpublished opinions were not precedent. It instead took a position that "relies on the correspondence of publication and precedential value on the one hand, and of non-publication and non-precedential value on the other."<sup>161</sup> Such a position "deals

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158. See 44 U.S.C. § 3501, n. (2007) (referring to Pub. L. 104-13, which requires the Chief Justice of the United States and all chief judges of federal courts to "cause to be established and maintained . . . a website that contains the following information or links to websites with the following information: . . . [a]ccess to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format") (available at <http://uscode.house.gov>).

159. See Judicial Conference of the United States, *Report of the Judicial Conference Committee on Court Administration and Case Management on Privacy and Public Access to Electronic Case Files* (Sept. 2001) (available at <http://www.privacy.uscourts.gov/Policy.htm>) (accessed Dec. 2, 2008; copy on file with Journal of Appellate Practice and Process).

160. See *Standards for Publication*, *supra* n. 4, at 20.

161. *Id.* at 21.

with use rather than philosophical effect,”<sup>162</sup> and leaves the declaration that otherwise precedential opinions are no longer part of the common law to the individual circuits. The Committee’s reliance on practice was effective, as the federal circuits adopted non-publication rules and eventually augmented them with non-precedent rules.<sup>163</sup> So, with little consideration of what the 1973 Committee had written off as “philosophical effect,” the rules of the federal courts of appeals quietly removed many of their decisions from the body of precedent. The number of decisions rendered as “unpublished” has risen to just over eighty-four percent.<sup>164</sup> The correspondence between non-publication and non-precedential value anticipated by the Committee has come to pass.

Immediately prior to the adoption of the new Rule 32.1, all thirteen circuits had a limited publication rule in place that allowed for designation of some opinions as unpublished.<sup>165</sup> In their criteria for deciding which cases were published and which were not, all thirteen circuits’ rules contained criteria that generally touched upon the issue of precedent.<sup>166</sup> In addition, all thirteen circuits had some rule in place that governed the citation of unpublished opinions.<sup>167</sup> However, only two circuits accorded any of their unpublished opinions the same status as published decisions.<sup>168</sup>

### *1. Publication*

All thirteen circuits had rules allowing for limited publication of judicial opinions.<sup>169</sup> There was little uniformity

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162. *Id.*

163. Williams, *supra* n. 5, at 772.

164. *Judicial Business Table S-3*, *supra* n. 6 (showing percent unpublished in the twelve-month period ending Sept. 30, 2006 to be 84.1%).

165. Serfass & Cranford, *supra* n. 28, at 351-57 (tbl. 1). *See also* Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. App. Prac. & Process 251, 253-57 (tbl. 1) (2001). The reader should note that virtually all of the rules cited in these articles have since been updated. However, the Serfass and Cranford articles provide accurate information about the rules as they existed when each was published.

166. Serfass & Cranford, *supra* n. 28, at 351-57.

167. *Id.*

168. *See id.*

169. *Id.*

among the rules regarding publication,<sup>170</sup> and only two points regarding these rules are of interest here. First, the rules varied from those that presumed opinions would be published to those that stated a policy against publication.<sup>171</sup> Second, several circuits' rules epitomized the 1973 Committee's belief that by designating certain opinions unpublished, the issue of precedent would be answered inherently. Four circuits (the Third, Tenth, Eleventh, and Federal Circuits) explicitly stated that the decision to publish depended, at least in part, upon whether the deciding court viewed the opinion as precedential.<sup>172</sup> These circuits outright conflated the concepts of unpublished and unprecedential, deciding as a single issue whether opinions would be published and precedential.<sup>173</sup> For example, the Third Circuit rule referred to its unpublished decisions as its "not precedential opinions."<sup>174</sup> Such a statement suggests that the "correspondence" foreseen by the 1973 Committee was accepted and applied by courts. Without the appellate system's ever considering the jurisprudential underpinnings or having a national debate on the issue, unpublished came to mean both "unciteable" and "non-precedential" in most circuits.<sup>175</sup> Of course, when we speak of "publication" in the context of the rules, we mean only that the court has designated the opinions as "published" or "unpublished." As noted above, nearly all federal appellate decisions are now—and for several years have been—published in both commercial online databases and the *Federal*

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170. *Id.*

171. *Id.* The reader might compare, for example, Serfass and Cranford's summary of First Circuit Rule 36(b), which pointed out that "[i]n general, the court thinks it desirable that opinions be published and thus be available for citation" and Fifth Circuit Rule 47.5.1, which provided that "opinions that may in any way interest persons other than the parties to a case should be published" with, for example, their summary of Federal Circuit Internal Operating Procedure 10, which reminded practitioners that "[t]he workload of the appellate courts precludes preparation of precedential opinions in all cases," and pointed out that "[u]nnecessary precedential dispositions, with concomitant full opinions, only impede the rendering of decisions and the preparation of precedential opinions in cases which merit that effort."

172. *Id.* at 351-57.

173. *Id.*

174. *Id.* at 352 (quoting 3d Cir. I.O.P 5.7).

175. *Id.* at 351-57.

*Appendix*, as well as, increasingly, on the courts' own websites under the E-Government Act.<sup>176</sup>

## 2. Citation

The 1973 Committee recognized that limiting publication would be of no avail if citation to unpublished opinions remained unrestricted.<sup>177</sup> Since the mid-1970s, all federal courts of appeals have had some form of limited-citation rule, though the rules varied widely in the extent of their restrictions. At the time of the adoption of Rule 32.1, four circuits had rules forbidding citation to unpublished opinions entirely.<sup>178</sup> The remaining nine circuits allowed citation to some degree when the litigant believed no published opinion would serve as well.<sup>179</sup> Of those nine, three circuits (the First, Eighth, and Eleventh), specifically recognized that unpublished opinions might be cited for their persuasive authority.<sup>180</sup> Even among the nine circuits that allowed citation under certain circumstances, most expressed some disapproval of the practice either by saying that citation was “disfavored”<sup>181</sup> or by using phrases like “should not normally be cited.”<sup>182</sup> Only the D.C. Circuit explicitly approved citation as precedent without language of reservation.<sup>183</sup> It is these limited-citation rules, rather than rules about limited publication or precedential effect, that are replaced by Rule 32.1.<sup>184</sup>

Declaring unpublished opinions to be non-citeable had the direct effect of denying their precedential effects in almost every

176. *Gant*, *supra* n. 157, at 709-10.

177. *Standards for Publication*, *supra* n. 4, at 18-19.

178. *See Serfass & Cranford*, *supra* n. 28, at 351-57.

179. *Id.*

180. *Id.*

181. This was the language used by the First, Fourth, Sixth, Tenth, and Eleventh Circuits. *Id.* at 351-56. Note that Eleventh Circuit Rule 36-2 was citation-friendly, but that its I.O.P. 5 stated that “[t]he court does not favor reliance on unpublished opinions.” *Id.* at 356.

182. *Id.* at 353.

183. *Id.* at 356. (quoting D.C. Cir. R. 36(c)(2), which indicated that while the decision to issue an unpublished decision meant that the deciding panel saw “no precedential value” in the opinion, the rules plainly allowed citation as precedent, which left the determination of precedential effect up to the court to which the opinion was cited).

184. *See Fed. R. App. 32.1 & advisory comm. nn.*



circuit.<sup>185</sup> The extent to which these decisions might be treated as precedent varied widely across the circuits from those that accorded them no value to those that accorded at least some of them full precedential value.<sup>186</sup>

### 3. Precedent

The 1973 Committee's proposal to remove unpublished opinions from the body of citeable law effectively answered the question of whether those decisions are precedential. In a modern jurisprudential version of "out of sight—out of mind," unpublished decisions continued, from a rules perspective, to be unciteable until the advent of Rule 32.1, and by extension, they were usually unprecedential.

Of the thirteen circuits, only two, the Fifth and D.C. Circuits, retained any precedential status to their unpublished opinions. The Fifth Circuit gave precedential value to decisions prior to January 1, 1996, while the D.C. Circuit gave precedential value to decisions after January 1, 2002.<sup>187</sup> Neither of these rules made it clear that they meant binding precedential effect, but that seems to be the implication.<sup>188</sup> Four other circuits' rules suggested that their unpublished decisions might have some persuasive value.<sup>189</sup> The remaining six circuits denied unpublished opinions any precedential effect, either explicitly or by completely forbidding citation.<sup>190</sup> The denial of binding precedential status expressly or by implication was nearly ubiquitous in the federal courts of appeals, though a few of them left some room open for a litigant to argue that a decision had persuasive value.<sup>191</sup> Although all circuits have now brought their citation rules into congruence with Rule 32.1, the

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185. Serfass & Cranford, *supra* n. 28, at 351-57.

186. Compare *e.g.* Serfass & Cranford, *supra* n. 28, at 354 (summarizing 7th Cir. R. 53(b)(2)(iv), which stated that unpublished orders should not be cited or used as precedent), with *e.g. id.* at 353 (quoting from 5th Cir. R. 47.5.3, which stated that "[u]npublished opinions issued before January 1, 1996, are precedent," but cautioned that they should not normally be cited).

187. *See id.* at 353, 356.

188. *Id.*

189. *See generally id.*

190. *See generally id.*

191. It appears that persuasive value would be the same value given to decisions of courts in other jurisdictions, law review articles, secondary sources, and the like.

new federal rule has not altered the state of affairs with respect to precedent.

### *E. Rule 32.1*

It was a long road from the creation of limited publication and citation plans in 1973 to the 2006 enactment of Rule 32.1, which restored citeability to unpublished decisions (at least those issued after January 1, 2007).

#### *1. History of the Rule*

Upon enactment of the limited publication and citation plans by all the circuits in 1973, the Federal Judicial Conference was satisfied, viewing each of the circuits as a legal laboratory that would accumulate experience and refine the rules accordingly.<sup>192</sup> It did seem to acknowledge, however, that the plan was not necessarily a permanent solution.<sup>193</sup> Still, the relevant report indicates that “the possible rewards of such experimentation are so rich, the Conference agreed that it should not be discontinued until there is considerably more experience under diverse circuit plans.”<sup>194</sup> It was apparently the hope of the Conference that a common plan might develop.<sup>195</sup> It did not. Nor was the issue revisited formally by the federal government until the Federal Courts Study Committee was created in 1988 by Congress.

The FCSC published a report in 1990 finding that “non-publication and non-citation rules present many problems.”<sup>196</sup> Recognizing that the decision to limit publication and citation was always one of pragmatism and never one of principle, the Committee explained that “[t]he policy in courts of appeals of not publishing certain opinions, and concomitantly restricting

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192. 1974 *Judicial Conference Report*, *supra* n. 14, at 12.

193. *Id.* (stating that “[t]he Conference noted the view of its Committee and its Subcommittee that further experimentation may well lead to the amendment of the diverse circuit plans”)

194. *Id.*

195. *Id.* (expressing the expectation “that eventually a somewhat more or less common plan might evolve”).

196. Federal Courts Study Committee, *Report*, 22 Conn. L. Rev. 733, 871 (1990).

their citation, has always been a concession to perceived necessity.”<sup>197</sup> In addition, the FCSC noted that both doctrinal issues and application issues supported questioning of the non-publication/non-citation rules.<sup>198</sup> While it was essentially a call for the Judicial Conference to “review policy” on the matter, and not a policy suggestion or analysis in and of itself, the FCSC report seemed to suggest that a return to universal publication might very well have been called for:

Universal publication has enough problems of its own that we cannot recommend it now; but inexpensive database access and computerized search technologies may justify revisiting the issue, because these developments may now or soon will provide wide and inexpensive access to all opinions.<sup>199</sup>

Though the 1990 Judicial Conference did not agree and refused to study the matter, the FCSC’s forecast has undeniably come to pass; today, unpublished courts of appeals decisions are routinely published in the *Federal Appendix* and online in both commercial and government-operated databases.<sup>200</sup> And despite the Judicial Conference’s rejection of the FCSC’s 1990 recommendation for revisiting the issue,<sup>201</sup> the same recommendation for further study was made two months later by a long-term project within the Judicial Conference itself.<sup>202</sup> The Local Rules Project, which had been created by the Judicial Conference in 1984, was in the midst of a review of all of the federal courts’ local rules to determine which rules were most in conflict.<sup>203</sup> One such area of conflict and concern was the multiplicity of local rules governing publication and citation.<sup>204</sup>

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197. *Id.*

198. *Id.* (noting that “[s]heer bulk prohibits universal publication in traditional hard-copy volumes” and also acknowledging the “easy applications of established law to fact” in many routine cases).

199. *Id.* at 871-72.

200. Gant, *supra* n. 157, at 709-10.

201. *Report of the Judicial Conference of the United States: September 12, 1990* at 88 (noting Judicial Conference opposition to FCSC recommendation that “[a] representative ad hoc committee under the auspices of the Judicial Conference should review policy on unpublished court opinions in light of increasing ease and decreasing cost of database access”).

202. Schiltz, *Much Ado About Little*, *supra* n. 1, at 1437.

203. *Id.*

204. *Id.*

The Local Rules Project specifically recommended that the issue was appropriate for resolution by a national rule and that the Advisory Committee should consider amending the Federal Rules of Appellate Procedure to implement such a rule.<sup>205</sup>

The Judicial Conference Committee took the recommendation and asked the Advisory Committee to consider the issue.<sup>206</sup> While the recommendation was placed on the Advisory Committee's agenda, it languished in what a later Advisory Committee Reporter would characterize as "rulemaking hell."<sup>207</sup> Between a reluctance to address an issue that the Judicial Conference had recently declined to study and the Advisory Committee's more substantial task in "restyling" all of the Federal Rules of Appellate Procedure into plain language with a consistent style, no action was taken on the issue throughout the mid-1990s.<sup>208</sup> In 1997, the Advisory Committee completed the restyling project and, under the direction of a new chair and a new reporter, it turned its attention to the unpublished-opinions issue.<sup>209</sup> The Advisory Committee's initial poll of the Circuits' chief judges indicated that they were "virtually unanimous in their opposition to *any* rulemaking on the topic,"<sup>210</sup> and the Committee somewhat reluctantly decided to "bow to the political reality"<sup>211</sup> that "rules regarding unpublished decisions have no chance of clearing the Judicial Conference in the foreseeable future."<sup>212</sup> Still, the Advisory Committee had questions about the issue, including a concern that some circuits were refusing to make their

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205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 1437-38.

209. *Id.* at 1438-39. See also Judicial Conference of the United States, Advisory Committee on Appellate Rules, *Minutes—September 1997 Meeting* pt. VII(C)(3), <http://www.uscourts.gov/rules/Minutes/ap9-97.htm> (Sept. 12, 1997) [hereinafter *Fall 1997 Minutes*] (accessed Dec. 12, 2008; copy on file with Journal of Appellate Practice and Process).

210. Judicial Conference of the United States, Advisory Committee on Appellate Rules, *Minutes—Spring 1998 Meeting*, pt. (V)(C), <http://www.uscourts.gov/rules/Minutes/0498appellateminutes.htm> (Apr. 16, 1998) [hereinafter *Spring 1998 Minutes*] (emphasis in original) (accessed Dec. 12, 2008; copy on file with Journal of Appellate Practice and Process).

211. Schiltz, *Much Ado About Little*, *supra* n. 1, at 1440.

212. *Spring 1998 Minutes*, *supra* n. 210.

unpublished decisions available, in any manner, to commercial publishers like West and LEXIS.<sup>213</sup> Also, the Solicitor General believed that a rule should be proposed notwithstanding the judges' objections.<sup>214</sup> The Committee had spoken, however, and the issue would remain dormant until January 2001, when the Solicitor General would again urge the Advisory Committee to adopt a national standard governing the citation of unpublished opinions.<sup>215</sup>

Though both the Chair and the Reporter of the Committee were uninterested in taking up the issue, the Solicitor General and several Committee members believed that judicial sentiment on the issue might have changed since 1997.<sup>216</sup> This was a well-founded belief given the selection of several new chief judges and the then-recent decision of the Eighth Circuit in *Anastasoff v. United States*,<sup>217</sup> which held that a federal court is constitutionally required to treat all its decisions as precedent.<sup>218</sup> Nonetheless, for scheduling reasons, the Advisory Committee tabled the discussion until the next meeting, which did not occur until April 2002.<sup>219</sup> In preparation for this meeting, the new chair, then-Judge Samuel A. Alito of the Third Circuit, now a Justice of the United States Supreme Court, polled the chief judges once again on both the issue itself and the Solicitor General's proposal for a uniform rule.<sup>220</sup>

The uniform rule proposed by the Solicitor General at that time was not the Rule 32.1 that would later be enacted; it was a

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213. See Schiltz, *Much Ado About Little*, *supra* n. 1, at 1441.

214. *Spring 1998 Minutes*, *supra* n. 210. It is interesting to note that during the discussion of this agenda item, one committee member "wondered whether the Committee might propose a rule addressing only the question of whether unpublished decisions should be treated as precedential," while another asked if it might "be worthwhile to pursue rulemaking on the isolated question of the citation of unpublished opinions." Neither narrow question was taken up, however, as the perception was that the judges were against "any rulemaking on the topic." *Id.* (emphasis in original).

215. Schiltz, *Much Ado About Little*, *supra* n. 1, at 1441 (citing Letter from Seth P. Waxman, Solicitor Gen. of the U.S., to Will Garwood, Chair, Advisory Comm. on App. R. 1 (Jan. 16, 2001) (on file with Wash. & Lee L. Rev.) [hereinafter *Waxman Letter*]).

216. Schiltz, *Much Ado About Little*, *supra* n. 1, at 1443.

217. 223 F.3d 898 (8th Cir.), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (*en banc*).

218. Schiltz, *Much Ado About Little*, *supra* n. 1, at 1443.

219. *Id.* at 1444.

220. *Id.* (citing Ltr. from Samuel A. Alito, Jr., J., U.S. Ct. of App. for the 3d Cir., Chair, Advisory Comm. on App. Rules, to R. Lanier Anderson, III, C. J., U.S. Ct. of App. for the 11th Cir. (Feb. 22, 2002) (on file with Wash. & Lee L. Rev.) [hereinafter *Alito Letter*]).

rule focused on uniformity across the circuits that had three main features: First, citation of unpublished opinions would continue to be disfavored; second, citation would be expressly allowed on issues of res judicata, law of the case, collateral estoppel, double jeopardy, sanctionable conduct, abuse of writ, fact or adequacy of notice, and the like; and third, citation would also be allowed when a party reasonably believed that the unpublished opinion persuasively addressed a material issue that was unaddressed by any published opinion.<sup>221</sup> The chief judges' response to this proposal was far different from the one in 1997. Instead of being unanimous, the judges' individual responses were quite varied. The chief judges of three circuits, the Second, Seventh, and D.C., did not respond.<sup>222</sup> The chief judges of three circuits, the Third, Tenth, and Eleventh, expressed support.<sup>223</sup> The chief judges of five circuits, the First, Fourth, Eighth, Ninth, and Federal, expressed opposition.<sup>224</sup> And the chief judges of the remaining circuits, the Fifth and Sixth, expressed division among their judges and a disinclination to alter standard procedure, respectively.<sup>225</sup>

It was this great variation in opinion, the *Anastasoff* decision, and the then-recent liberalization of some circuits' rules on citation that signaled a sea change in opinion on the issue. For example, the D.C. Circuit had recently altered its rule to permit citation of opinions after January 1, 2002, "as precedent,"<sup>226</sup> and the internal operating procedures then in force in the Third Circuit indicated that the court itself did not cite unpublished opinions, but they did not restrict litigants from doing so.<sup>227</sup> In addition, the First Circuit had embarked on the comment process to enact its own rule permitting citation in

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221. Schiltz, *Much Ado About Little*, *supra* n. 1, at 1441-42 (citing *Waxman Letter*, *supra* n. 215).

222. *Id.* at 1444 (citing *Alito Letter*, *supra* n. 220).

223. *Id.*

224. *Id.* at 1444-45.

225. *Id.*

226. Serfass & Cranford, *supra* n. 28, at 356 (describing D.C. Cir. R. 28(c)(1)(b), now no longer in force). The provisions of former Rule 28(c)(1)(b) are now incorporated into D.C. Cir. R. 32.1(b)(1)(B).

227. *Id.* at 352 (describing former 3d Cir. I.O.P. 5.7, now no longer in force). *See also* Serfass & Cranford, *supra* n. 165, at 253 (describing former 3d Cir. I.O.P. 5.8, apparently in force before former 3d Cir. I.O.P. 5.7 became effective, and which contained virtually the same language).

some circumstances, which later became First Circuit R. 32.3.<sup>228</sup> This change of perception about the importance of the issue was reflected in the Advisory Committee's vote to propose an amendment to the Federal Rules that would include a national rule on the citation of unpublished opinions.<sup>229</sup>

After finally taking up the issue, the Advisory Committee turned its attention to the content of the proposed rule. The possibilities ran the gamut from opposing all national rulemaking to requiring all opinions to be written, published, and precedential, but the likely range of rules fell within a much narrower field.<sup>230</sup> Professor Schiltz played a pivotal role in framing the debate and the actual rule by drafting three alternative proposed rules.<sup>231</sup> Alternative A specifically authorized courts to issue opinions that were non-precedential and permitted the citation of such opinions without restriction. Alternative B addressed only the issue of citation, permitting it without restriction, but made no mention of precedential status for such opinions. Alternative C hewed most closely to the Solicitor General's position, permitting citation in a limited set of circumstances and making no mention of precedential status.<sup>232</sup> Alternative A was quickly rejected, as the Advisory Committee, like the 1973 Committee before it, did not want to get involved in the messy issue of precedential status.<sup>233</sup> Between the other two, the Committee quickly rejected Alternative C in favor of Alternative B.<sup>234</sup> Alternative B, which

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228. Serfass & Cranford, *supra* n. 28, at 351 (describing former 1st Cir. R. 32.3, since rescinded).

229. Judicial Conference of the United States, Advisory Committee on Appellate Rules, *Minutes—Spring 2002 Meeting*, <http://www.uscourts.gov/rules/Minutes/app0402.pdf> pt. (V)(H) (Apr. 22, 2002), [hereinafter *Spring 2002 Minutes*] (accessed Dec. 12, 2008; copy on file with *Journal of Appellate Practice and Process*).

230. See e.g. *Spring 1998 Minutes*, *supra* n. 210, at pt. (V)(C) (summarizing committee members' discussion of various alternatives). See also *Spring 2002 Minutes*, *supra* n. 229 (setting out committee members' suggestions and concerns).

231. Schiltz, *Much Ado About Little*, *supra* n. 1, at 1447-49.

232. *Id.* at 1448.

233. Judicial Conference of the United States, Advisory Committee on Appellate Rules, *Minutes—Fall 2002 Meeting* 35 (pt. (V)(F)), <http://www.uscourts.gov/rules/Minutes/app1102.pdf> (Nov. 18, 2002) (noting that committee members "were unanimous in wanting to limit the involvement of the Committee to the issue of citation") (accessed Dec. 12, 2008; copy on file with *Journal of Appellate Practice and Process*).

234. Schiltz, *Much Ado About Little*, *supra* n. 1, at 1448.

removed all restrictions on the citation of unpublished opinions while not addressing their precedential force, was broader, but also more controversial, than Alternative C.<sup>235</sup> But as Professor Schiltz reports, there was a feeling that “if the Advisory Committee was going to pick a fight, it should at least pick one worth fighting,” and that Alternative C would remain a fallback position.<sup>236</sup>

In November 2002, the newly minted Rule 32.1 was approved by the Advisory Committee with only stylistic changes,<sup>237</sup> and in June 2003, it was approved for publication by the Standing Committee with no changes and very little conversation.<sup>238</sup> The subsequent publication and proffered proposed amendments drew numerous comments by letter and several requests to testify before the Advisory Committee.<sup>239</sup> Most of the comments opposed the rule; however, the vast majority of those came from a single circuit—the Ninth—and were “extremely repetitive,” which suggested to Professor Schiltz that

[o]bviously, there had been an organized campaign to generate comments opposing Rule 32.1, as many of those comments repeated—sometimes word-for-word—the same basic “talking points” that had been distributed by opponents of the rule.<sup>240</sup>

Even after acknowledging these comments, the Advisory Committee was firm in its support of the rule. At the Committee’s April 2004 meeting, every member, save one, spoke in favor of the rule, and most did so in very serious terms, arguing that “an Article III court should not be able to forbid parties from citing back to it the public actions that the court

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235. *Id.*

236. *Id.* at 1447-48.

237. For example, the admonition, “[a] court must not impose” was shifted from active to passive voice to read, “[N]o restriction may be imposed,” so as not to unnecessarily antagonize the judges inclined to oppose the rule. *See* Schiltz, *Much Ado About Little*, *supra* n. 1, at 1449.

238. Judicial Conference of the United States, Committee on Rules of Practice and Procedure, *Minutes—Meeting of June 9-10, 2003* 8-9 (June 9-10, 2003), <http://www.uscourts.gov/rules/Minutes/ST06-2003-min.pdf> (noting then-Judge Alito’s presentation of the new rule and Judge Sirica’s single comment about it) (accessed Dec. 12, 2008; copy on file with *Journal of Appellate Practice and Process*).

239. Schiltz, *Much Ado About Little*, *supra* n. 1, at 1450-51.

240. *Id.* at 1451.



itself has taken” and pointing out that

[i]t is antithetical to American values and to the common law system for a court to forbid a party or an attorney from calling the court’s attention to its own prior decisions, from arguing to the court that its prior decisions were or were not correct, and from arguing that the court should or should not act consistently with those prior decisions in the present case.<sup>241</sup>

Committee members called no-citation rules “extreme” and “ludicrous,” and one member-judge noted that limited citation rules made federal circuit judges the only government officials who can shield themselves from being confronted with their past actions.<sup>242</sup> Members likewise dismissed concerns that permitting citation would slow the wheels of justice by increasing disposition times or make for rougher justice by encouraging shorter opinions.<sup>243</sup> Committee members, including three circuit judges from circuits that had already liberalized citation to unpublished opinions, noted that no such delays or other problems were occurring in their circuits.<sup>244</sup> Only a single Committee member spoke out against the citation of unpublished opinions.<sup>245</sup> This member also opined that the differing caseloads throughout the circuits justified different approaches.<sup>246</sup>

Although the Advisory Committee was clearly in support of the proposed rule, it was difficult to determine whether the judiciary on balance was for it or against it. To address this issue, the Standing Committee returned the proposal to the Advisory Committee to have the issue studied further by the Federal Judicial Center and the Administrative Office of the

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241. Judicial Conference of the United States, Advisory Committee on Appellate Rules and Procedure, *Minutes—Spring 2004 Meeting* 8 (Apr. 13-14 2004), <http://www.uscourts.gov/rules/Minutes/app0404.pdf> (accessed Dec. 12, 2008; copy on file with Journal of Appellate Practice and Process).

242. *Id.*

243. *Id.* (referring generically to “parade of horrors” forecast by commentators opposing new rule).

244. *Id.*

245. *Id.* The member called the unpublished opinions “junk law” and stated that the rulemaking body ought to wait for consensus on the issue.

246. *Id.*

United States Courts.<sup>247</sup> Both the FJC and AO did study the issue, and both studies refuted the claims made by opponents of proposed Rule 32.1.<sup>248</sup> First, the AO study found that a permissive citation policy had no appreciable impact on either median disposition times or the number of summary dispositions.<sup>249</sup> Second, the FJC's survey of circuit judges revealed that those judges believed, by a wide margin, that permitting citation of unpublished opinions would not increase the courts' workload either in checking citations or in preparing unpublished opinions with greater care.<sup>250</sup> Third, the FJC's survey of judges in the two circuits that had recently liberalized their rules on citation (the First and D.C. Circuits) revealed that judges in those circuits had experienced no appreciable change in their workload and that their method of dealing with unpublished decisions had remained unchanged.<sup>251</sup> Fourth, the FJC's survey of attorneys found that attorneys also predicted or reported no appreciable change in their workloads as a result of more permissive citation practices.<sup>252</sup> Many attorneys reported that they already researched unpublished opinions, and most predicted that the rule would be a positive change in their practices.<sup>253</sup>

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247. Judicial Conference of the United States, Committee on Rules of Practice and Procedure, *Minutes—Meeting of June 17-18, 2004* 11 (June 17-18, 2004), <http://www.uscourts.gov/rules/Minutes/ST06-2004-min.pdf> (accessed Dec. 12, 2008; copy on file with Journal of Appellate Practice and Process); Schiltz, *Much Ado About Little*, *supra* n. 1, at 1453.

248. Schiltz, *Much Ado About Little*, *supra* n. 1, at 1454-57.

249. *Id.* at 1454-55 (citing Memorandum from John K. Rabiej, Chief, Rules Comm. Support Off., Admin. Off. of the U.S. Courts, to Advisory Comm. on App. Rules 1 (Feb. 24, 2005)).

250. Tim Reagan et al., *Citations to Unpublished Opinions in the Federal Courts of Appeals* 10, [http://www.fjc.gov/public/pdf.nsf/lookup/citatio2.pdf/\\$file/citatio2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/citatio2.pdf/$file/citatio2.pdf) (Fed. Jud. Ctr. 2005) & *id.* at 38 (tbl. J, entitled "Unpublished Citation's Additional Work") (accessed Jan. 5, 2009; copy on file with Journal of Appellate Practice and Process); Schiltz, *Much Ado About Little*, *supra* n. 1, at 1454-55.

251. Reagan et al., *supra* n. 250, at 12-13 & *id.* at 43 (tbl. O, entitled "Work after Local Rule Change"); Schiltz, *Much Ado about Little*, *supra* n. 1, at 1455-56.

252. Reagan et al., *supra* n. 250, at 17 & *id.* at 49 (tbl. U, entitled "Impact on Work of New Rule"); Schiltz, *Much Ado about Little*, *supra* n. 1, at 1456.

253. Reagan et al., *supra* n. 250, at 15-17 & *id.* at 45-48 (tbls. Q-T, entitled, respectively, "Wanted to Cite This Court's Unpublished Opinion," "Wanted to Cite Another Court's Unpublished Opinion," "Would Have Cited This Court's Unpublished Opinion," & "Would Have Cited Another Court's Unpublished Opinion"); Schiltz, *Much Ado About Little*, *supra* n. 1, at 1456.

By mid-2005, a national rule on the citation of unpublished opinions seemed virtually assured. Members of the two key committees were persuaded by the FJC and AO studies that a national rule on the issue was appropriate. Two members of the Advisory Committee still held out for a more limited rule akin to what the Solicitor General had initially proposed, but that Committee approved Rule 32.1, as written, in April 2005.<sup>254</sup> The Standing Committee unanimously approved the rule at its June 2005 meeting.<sup>255</sup> While the issue was much closer in the Judicial Conference, that body resolved the impasse with an amendment that limited the freedom of citation to decisions issued after January 1, 2007.<sup>256</sup> The Supreme Court approved the new rule without comment, and Congress did not act to block the rule.<sup>257</sup> On December 1, 2006, Rule 32.1 took effect, but due to the post-January 1, 2007, limitation it affected no decisions for one full month.<sup>258</sup>

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254. Judicial Conference of the United States, Advisory Committee on Appellate Rules and Procedure, *Minutes—Meeting of April 14-15, 2005* at 16 (Apr. 14-15 2005), <http://www.uscourts.gov/rules/Minutes/app0405.pdf> (accessed Jan. 5, 2009; copy on file with *Journal of Appellate Practice and Process*). Readers interested in the committee discussion preceding the vote of approval might wish to review the rest of the material in Section IV(A) of these minutes.

255. Judicial Conference of the United States, Committee on Rules of Practice and Procedure, *Minutes—Meeting of June 15-16, 2005* 10-11, <http://www.uscourts.gov/rules/Minutes/ST06-2005-min.pdf> (June 15-16, 2005) (accessed Jan. 5, 2008; copy on file with *Journal of Appellate Practice and Process*). Although the text of the rule itself was unaltered at this meeting, the Advisory Committee did vote to release with the rule only a shortened version of the Committee Note. *Id.* at 11.

256. Judicial Conference of the United States *Report of the Proceedings of the Judicial Conference of the United States* 36-37, [http://www.uscourts.gov/judconf/sept05proc\\_final.pdf](http://www.uscourts.gov/judconf/sept05proc_final.pdf) (Sept. 20, 2005) (accessed Jan. 5, 2009; copy on file with *Journal of Appellate Practice and Process*).

257. See Ltr. from John G. Roberts, Jr., C.J. of the U.S., to J. Dennis Hastert, Speaker, U.S. House of Rep. 1, [http://www.uscourts.gov/rules/Letters\\_Orders.pdf](http://www.uscourts.gov/rules/Letters_Orders.pdf) (Apr. 12, 2006) (transmitting attached order that amends then-existing rules to include new F.R.A.P. 32.1) (accessed Jan. 5, 2009; copy on file with *Journal of Appellate Practice and Process*). See also *Rules Enabling Act*, 28 U.S.C. §§ 2071, 2074(a) (2008) (permitting the federal courts generally to make rules in the absence of Congressional objection and permitting a rule published before May 1 of a given year to take effect after December 1 of that year if Congress takes no action to prevent its doing so) (available at <http://uscode.house.gov>).

258. Fed. R. App. P. 32.1 (providing, in subsection (a)(ii) that it applies only to opinions issued on or after January 1, 2007).

## 2. *The Text of Rule 32.1*

The new rule, by its terms, addresses only the issue of citation:

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

(i) designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like; and

(ii) issued on or after January 1, 2007.

(b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited,<sup>259</sup>

and the comment explicitly states:

Rule 32.1 is extremely limited. It does not require any court to issue an unpublished opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as “unpublished” or specify the procedure that a court must follow in making that determination. It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court. Rule 32.1 addresses only the *citation* of federal judicial dispositions that have been *designated* as “unpublished” or “non-precedential”—whether or not those dispositions have been published in some way or are precedential in some sense.<sup>260</sup>

This rule, which takes no position on the precedential status of these unpublished—though now citeable—opinions, has addressed, to borrow the phrasing of the 1973 Committee, only

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259. Fed. R. App. P. 32.1

260. Fed. R. App. P. 32.1, advisory comm. n. on 2006 amendments (emphasis in original).

the “use” issue and not the greater issue of its “philosophical effect.”<sup>261</sup>

Once again, the policy and rulemaking authority has avoided the “morass of jurisprudence”<sup>262</sup> involved in discussing, debating, and deciding on the more critical issue of what precedential effect these unpublished decisions should have. Instead, the system’s development is left once again to follow the supposedly natural “correspondence” between publication and precedential value.<sup>263</sup> Relying upon that correspondence—the natural trend of treating citeable things as precedent and unciteable things as non-precedent—has led to the patchwork rules that have governed since the mid-1970s. If part of the goal of Rule 32.1 was to bring uniformity to the issue, it has mostly failed.<sup>264</sup> But more importantly, it has not only failed to resolve the critical issue of whether these decisions are precedent, it has chosen not even to address that issue.<sup>265</sup> Instead, the policy of the 1973 Committee, to allow the pragmatic tail to wag the jurisprudential dog, has been repeated. The policy that initially led to the uneven rules regarding publication, citation, and precedent, which in turn led to the Rule 32.1 debate and proposal, is now being repeated.

What remains to be done, in the wake of Rule 32.1, is to wade into the “morass of jurisprudence” and confront the issue of precedential status. It is an issue of both principle and pragmatism, of what we must do and what we ought to do. To continue to pass on the important question in favor of the more approachable question is to perpetuate a jurisprudence of doubt.

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261. *Standards for Publication*, *supra* n. 4, at 21 (stating of the recommendation to address only citation and not precedent that “[i]t deals with use rather than philosophical effect”).

262. *Id.* at 20.

263. *Id.* at 21 (stating that the recommendation “relies on the correspondence of publication and precedential value on the one hand, and of non-publication and non-precedential value on the other.”).

264. It has not even brought uniformity on the citation issue, as it is limited in application to decisions issued after January 1, 2007. *See* Fed. R. App. P. 32.1(a)(ii). This is, at most, a partial partial solution.

265. Schiltz, *Much Ado about Little*, *supra* n. 1, at 1448 (“[M]embers concluded that the Advisory Committee should not embrace one side or the other of the debate over the constitutionality of issuing nonprecedential opinions. Rather, the Advisory Committee decided to limit its involvement to the issue of citation. To date, the Advisory Committee has not wavered from this position.”). *See also* Fed. R. App. P. 32.1 advisory comm. n.

What follows is an examination of the various doubts expressed over the denial of the precedential status of some decisions under the misnomer “unpublished opinions.” These doubts are both principled and pragmatic; that is, they address both potential constitutional infirmities and perceived practical problems with the practice of declaring some decisions *ex ante* to be non-precedential.

#### V. THE DEBATE OVER PRECEDENTIAL STATUS OF UNPUBLISHED DECISIONS

For the vast majority of the history of common law courts in America and England, the publication status of an opinion was not directly determinative of its precedential value. That is, while it may have been difficult for litigants to find a court’s past decisions, nothing prevented a litigant from bringing such a decision to the court’s attention or suggested that the court need not follow it.<sup>266</sup> While the 1973 Committee’s recommendation, on its face, claims only to deal with whether an unpublished case can be cited as precedent and not whether it is precedent, for all practical purposes, this is a distinction without a difference. The 1973 Committee knew full well that the inability to cite a case effectively removed it from the body of precedent as well as from view; moreover, the Committee was aware that the trend would be to treat non-citable items as non-precedents owing to the “correspondence of publication and precedential value on the one hand, and of non-publication and non-precedential value on the other.”<sup>267</sup>

From the beginning, limited publication and citation rules in the federal courts of appeals were heavily criticized.<sup>268</sup> As a 1985 FJC Staff Report explains, “[o]f the recent innovations, none has been more controversial than the practice of disposing of some cases without a published decision.”<sup>269</sup> And a note

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266. See Baker, *supra* n. 47, at 204 (pointing out that, even in the earliest days of reporting cases, “[t]he rolls continued to be the most authoritative source of precedents into later times, and it was common for counsel to ‘vouch the record’ when citing a previous case.”)

267. *Standards for Publication*, *supra* n. 4, at 21.

268. Stienstra, *supra* n. 8, at 2.

269. *Id.* See also *id.* at 13-14 (discussing commentators’ concerns about unfairness).

critical of non-citation rules and the non-precedent effect that followed them, for example, examines the limited publication and citation rules existing in the federal courts of appeals in the late 1970s, then proceeds to examine the rules' effect on the precedential status of unpublished cases.<sup>270</sup> Stating that "[t]hese practices raise several problems,"<sup>271</sup> the author considers the importance of all cases in clarifying the law, the difficulty unpublished opinions cause in the appeals process, and several potential Constitutional infirmities in the practice.<sup>272</sup> Similarly, an authoritative article published in the late 1970s examines the arguments in favor of limited publication and citation and finds them both fundamentally flawed and vulnerable to considerable counterattack.<sup>273</sup> In fact, its authors note at the start of their description of the arguments in favor of the then-existing rules that

[t]he argument in favor of the limited publication and no-citation rule has not been carefully and completely delineated. Commentators have been content to characterize it as an argument based on judicial economy, although some of its other aspects have also been noted.<sup>274</sup>

The article then proceeds to lay bare the unstated premises of the limited-citation argument, refuting them at every turn and

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270. David Dunn, Student Author, *Unreported Decisions in the United States Courts of Appeals*, 63 Cornell L. Rev. 148 (1977).

271. *Id.* at 135.

272. *Id.* at 135-45.

273. See generally Reynolds & Richman, *No-Citation Rules*, *supra* n. 5. In addition to this seminal article on the issue, Reynolds and Richman have been prolific in their further examination of this and related issues, and in publishing their scholarship in this area. See e.g. William M. Richman, *Much Ado About the Tip of an Iceberg*, 62 Wash. & Lee L. Rev. 1723 (2005); William L. Reynolds & William M. Richman, *Justice and More Judges*, 15 J.L. & Pol. 559 (1999); William M. Richman, *An Argument on the Record for More Federal Judgeships*, 1 J. App. Prac. & Process 37 (1999); William M. Richman, *Rationing Judgeships Has Lost Its Appeal*, 24 Pepp. L. Rev. 911 (1997); William L. Reynolds & William M. Richman, *The New Certiorari Courts: Congress Must Expand the Number of Judges on the U.S. Courts of Appeals to Restore Their Traditional Role*, 80 Judicature 206 (Mar.-Apr. 1997); William L. Reynolds & William M. Richman, *Studying Deck Chairs on the Titanic*, 81 Cornell L. Rev. 1290 (1996); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273 (1996); Reynolds & Richman, *Limited Publication*, *supra* n. 5.

274. Reynolds & Richman, *No-Citation Rules*, *supra* n. 5, at 1181 (footnotes omitted).

ultimately adding significant counterarguments based on judicial responsibility and accountability.<sup>275</sup>

From the outset, considerable doubt about the wisdom of limited publication, citation, and precedent has existed:

The case against the limited publication/no-citation rules is a strong one. The premises upon which the rules are based are subject to serious question, and powerful arguments can be advanced against the entire concept. It is not surprising, therefore, that a significant number of critics have spoken against the system—critics from the bench, the bar, and the schools.

Furthermore, the widespread adoption of the limited publication/no-citation rules—a major change in the operation of the circuit courts—has been accomplished with relatively little public debate or legislative participation.<sup>276</sup>

Still, such critics and their strong criticisms were unable to alter the system, which was by then firmly fixed on limited publication and citation as the pragmatic solution to the ever-increasing federal caseload. Though both the 1973 Committee and every official rulemaking body since has avoided the underlying jurisprudential issues, both the issues and the accompanying criticisms of the scheme remain.

*A. Criticisms of the Premises of Limited Publication, Citation, and Precedent*

The justificatory arguments in favor of limited publication and limited citation have already been aptly outlined elsewhere.<sup>277</sup> It will nonetheless be helpful to take a similar approach here, re-framing those arguments and revisiting them in light of the courts' additional experience, the expanded scholarship on the issue, and the opinion-publication realities that presently exist.

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275. *Id.* at 1167-1205.

276. *Id.* at 1205 (footnotes omitted).

277. The analysis in this section owes much to that undertaken by Professors Reynolds and Richman in *No Citation Rules*, *supra* n. 5. *See generally id.*



The premises<sup>278</sup> for preventing publication are essentially three-fold: (1) appellate opinions can be divided into those that make law and those that apply law, only the former of which need to be published; (2) publication of all opinions imposes costs on both the opinion creators (courts) and opinion consumers (the public); and (3) judges can determine before drafting an opinion whether a case is one that will make law or one that merely applies law.<sup>279</sup>

The premises for preventing citation were essentially two-fold: (1) the costs savings envisioned by limiting publication would be lost if citation were allowed; and (2) allowing citation of unpublished opinions would result in unfairness between litigants.<sup>280</sup> These premises have now been largely rejected as inaccurate and also as having been overcome by more important concerns.<sup>281</sup> Given that Rule 32.1 has resolved this issue in favor of citation, there is no need to explicate this argument at great length.<sup>282</sup> But because the reasons for denying citation are often imported into discussions of denying precedential status, it will be touched on briefly.

Finally, the premises for preventing opinions from being precedential are almost entirely implied, following without separate principled consideration from the first two issues.<sup>283</sup> Essentially, those premises are also two-fold and mirror the

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278. The use of the word “premises” is intended only to suggest underlying reasons that have been specified for examination; it is not intended to suggest that this discussion purports to be a formal logical proof. Like the surveys of the relevant arguments in favor of no-citation rules in the articles that preceded this one, this is simply an effort to state clearly, and to address directly, the reasons for limiting publication, citation, and precedent.

279. Reynolds & Richman, *No-Citation Rules*, *supra* n. 5, at 1188-89; *Standards for Publication*, *supra* n. 4, at 6-8.

280. Reynolds & Richman, *No-Citation Rules*, *supra* n. 5, at 1188-89; *Standards for Publication*, *supra* n. 4, at 19.

281. Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 *Arizona St. L.J.* 1, 7 (2007) (noting the adoption of Fed. R. App. P. 32.1 permitting citation, and characterizing the “charges leveled at institutionalized unpublication” as “multiplicitous and damning”). *See also* Stephen R. Barnett, *No-Citation Rules under Siege: A Battlefield Report and Analysis*, 5 *J. App. Prac. & Process* 473, 497 (2003) (noting that the citadel of non-citation was then falling).

282. *See* Fed. R. App. P. 32.1.

283. *See Standards for Publication*, *supra* n. 4, at 20-21 (relying entirely on the correspondence between functional publication and precedent rather than addressing the issue directly); Fed. R. App. P. 32.1 advisory comm. n. (taking no position on the issue of precedent).

reasons for preventing citation: (1) the costs savings envisioned by limiting publication and citation would be lost if decisions were truly precedential; and (2) allowing unpublished cases to have precedential value would result in unfairness between litigants. In light of the developments in legal research technology and the recent decision to allow all unpublished cases to be cited, the foundation for denying certain decisions precedential status is terribly weak—even before one addresses the potential Constitutional infirmities and pragmatic objections.

*B. Premises Supporting the Prevention of Comprehensive Publication*

The argument in favor of limiting publication of court decisions is essentially a practical argument of judicial and litigant economy.<sup>284</sup> It relies on three premises: (1) appellate opinions can be divided into those that make law and those that apply law, only the former of which need to be published; (2) publication of all opinions imposed costs on both the opinion creators (courts) and opinion consumers (the public); and (3) judges can determine before drafting an opinion whether a case is one that will make law or one that merely applies law. Each of these premises is significantly flawed.

*1. The Law-Making/Law-Applying Distinction*

The most general and theoretical premise is that court decisions serve one of two purposes. A given decision either makes law (law-making) or merely applies the law (dispute-resolving).<sup>285</sup> According to this model, a given decision either makes new law by expanding the scope of existing law or writing a new principle into the body of law, or simply applies

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284. Reynolds & Richman, *No-Citation Rules*, *supra* n. 5 at 1188-89 (noting the argument that “[p]ublication of all appellate opinions is excessively costly” with respect to both judges’ time devoted to writing additional opinions and lawyers’ time expended on researching an expanded group of opinions).

285. *Standards for Publication*, *supra* n. 4, at 2-3.

the law without altering it.<sup>286</sup> If this dichotomy is meaningful, then one would need only to look at the law-making decisions to know the law and could safely ignore the dispute-resolving cases, which merely apply the law to other circumstances.

This distinction itself is flawed in several respects. First, it is false; it is a distinction without a meaningful difference. Any decision, even one that merely applies the law to facts identical to a prior case, makes law. The existence of multiple cases on a given point adds to the predictive power of precedent. Because the court has decided similar cases repeatedly, frequently, or recently a lawyer may reasonably assume that it is more likely to do so in the present case. The strength of the precedent, that is how likely a court will be to justify departure from it, can be determined from these qualities. In plain terms, an advocate would rather argue from a line of cases showing repeated and frequent application of law to similar facts that have been re-affirmed recently, than merely rely on a single case. Repeated applications demonstrate acceptance of a principle of law by multiple courts and multiple panels, with each additional case adding to the “well-established” line of authority advocates so love to reference. Frequent application indicates a robust principle in active use, which makes it harder for a court to depart from that rule than would a single holding, which could be viewed as idiosyncratic or aberrational. Recent applications of the principle allow for an argument that the principle has not faded over time in its applicability to modern societal and legal circumstances. All of these benefits presume identical factual settings, a true rarity,<sup>287</sup> but even in those cases, significant predictive benefit can be garnered by later litigants.

Second, very few cases are identical in all respects to other decided cases, and in this respect even minor variations matter.

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286. *Id.* (contrasting opinions that “permit the parties and their attorneys to see that the judges have considered their positions and arguments and to see the reasoning on which the court reached its conclusion” with opinions that “provide the stuff of the law,” which are described as those that “permit an understanding of legal doctrine, and . . . accommodate legal doctrine to changing conditions”).

287. See Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571, 577 (1987) (pointing out that “[n]o two events are exactly alike,” and that “[f]or a decision to be precedent for another decision does not require that the facts of the earlier and the later cases be absolutely identical,” for “[w]ere that required, nothing would be precedent for anything else”).

When a court decides that a case is factually similar enough to come within the ambit of a given precedent, or when it decides that it is factually dissimilar enough to fall outside the rule articulated in a particular precedent, that adds something to the law, even if the distinction is minor. The typical common law action, after all, does not present binary questions about the applicability or non-applicability of a general legal rule, such as whether the tort of negligence requires causation. “Instead, the determination of liability or no liability typically involves subtle, circumstance-based questions like whether the defendant’s particular conduct, considered in light of decided cases, itself amounts to a breach of duty.”<sup>288</sup> Thus, each new, slightly different, case represents an expansion, retraction, or clarification of the law’s reach, however, slight. Each case adds something to the contours of the law.

Third, the publication of so-called dispute-resolving opinions serves an important institutional goal in allowing for proper review. Where decisions are not published, they are set outside the courts’ normal range of vision, which reduces the likelihood of en banc or Supreme Court review. Take, for example, the Ninth Circuit’s decision in *United States v. Rivera-Sanchez*,<sup>289</sup> in which the court acknowledged that no less than twenty unpublished circuit opinions had been rendered on an unresolved issue, and that those decisions had obviously divided three ways on the proper rule to be applied.<sup>290</sup> Not only would

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288. Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 Green Bag 2d 17, 23 (2000). See also Healy, *supra* n. 36, at 66 (remarking on Lord Coke’s belief that judges should “refine” the law by “declaring its principles with even greater precision and renewing it by application to the matter at hand,” and citing John Greville Agard Pocock, *The Ancient Constitution and the Feudal Law* (Cambridge U. Press 1987) and H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. Chi. L. Rev. 1513 (1987)).

289. 222 F.3d 1057, 1063 (9th Cir. 2000) (noting that twenty cases over a two-year period had been resolved by unpublished opinion, yielding inconsistent outcomes until the Ninth Circuit requested, in contravention of its own restrictive rules on citation, a list of these opinions from counsel).

290. *Id.* Of the twenty decisions identified in *Rivera-Sanchez*, eleven decisions ruled in favor of one procedure, six in favor of another, and three remanded to force the district courts to take a position on the proper process. See also *St. Louis Southwestern Ry. Co. v. Brotherhood of Ry., Airline and S.S. Clerks, Freight Handlers, Express and Station Employees*, 484 U.S. 907 (1987) (*Mem.*) (Brennan, J. and White, J., dissenting from denial of certiorari) (pointing out that Fifth Circuit’s unpublished opinion created a split between the circuits on an “important question of federal law” that “could easily result in the same

publication of these decisions have established a clear rule for the circuit and avoided needless litigation, if the disparity persisted due to an actual split between panels, it would have allowed for an en banc resolution.

Similarly, lack of published opinions shields decisions from Supreme Court review. Since the limited publication rules went into effect in the mid-1970s, the Supreme Court has granted certiorari on very few unpublished appellate decisions, though that number is rising.<sup>291</sup> This occurs because a circuit's decision not to publish a given case signals that the case is routine, even when it is not. For example in *Edge Broadcasting Company v. United States*,<sup>292</sup> the Fourth Circuit declared a federal statute limiting lottery advertising unconstitutional in an unpublished opinion. In its reversal of that decision, the Supreme Court expressed surprise and dismay that a Court of Appeals could perceive such a ruling as unworthy of publication.<sup>293</sup> The hiding of cases from Supreme Court review also occurs because lack of detailed published opinions creates a less thorough record, which itself discourages Supreme Court review. For example, in *County of Los Angeles v. Kling*,<sup>294</sup> the Supreme Court granted certiorari and issued a summary reversal in a case that the Ninth Circuit had decided in a brief, unpublished, non-citeable opinion, but Justice Stevens dissented, calling the Ninth Circuit's practice "plainly wrong" and noting:

As this Court's summary disposition today demonstrates, the Court of Appeals would have been well advised to

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collective-bargaining contract, or identical ones, being interpreted in different ways in different circuits").

291. David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate Over Unpublished Opinions*, 62 Wash. & Lee L. Rev. 1667, 1684 & 1684 n. 61 (2005) (noting that the court took only twelve such cases in the 1974 to 2000 terms and another twelve in the 2001 to 2004 terms). See also David R. Cleveland, *Draining the Morass: Ending the Jurisprudential Unpublication System*, 92 Marq. L. Rev. 685 (2009). Of course, if unpublished decisions were easy applications of settled law to obvious facts, the Supreme Court should be granting certiorari in zero cases with unpublished decisions.

292. 956 F.2d 263 (tbl.) (per curiam), 1992 WL 35795 (4th Cir. 1992). Note that this opinion appears to have been released for publication only on August 31, 1993. See *Edge Broad. Co. v. U.S.*, 5 F.3d 59 (4th Cir. 1992).

293. *U.S. v. Edge Broad. Co.*, 509 U.S. 418, 425 n. 3 (1993) ("We deem it remarkable and unusual that although the Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished *per curiam* opinion.").

294. 474 U.S. 936 (1985).

discuss the record in greater depth. One reason it failed to do so is that the members of the panel decided that the issues presented by this case did not warrant discussion in a published opinion that could be “cited to or by the courts of this circuit, save as provided by Rule 21(c).” . . . That decision not to publish the opinion or permit it to be cited—like the decision to promulgate a rule spawning a body of secret law—was plainly wrong.

The brevity of analysis in the Court of Appeals’ unpublished, non-citable opinion, however, does not justify the Court’s summary reversal.

. . .

For, like a court of appeals that issues an opinion that may not be printed or cited, this Court then engages in decision-making without the discipline and accountability that the preparation of opinions requires.<sup>295</sup>

Finally, by not publishing opinions, the courts of appeals avoid creating clear circuit rules, thus obfuscating circuit splits. This is not to say, however, that the Supreme Court never takes notice of unpublished opinions—it does<sup>296</sup>—or that the Court has accepted the appeals courts’ claims that these decisions are non-precedential.<sup>297</sup> Neither is true. Nevertheless, it seems clear that non-publication interferes with the proper review process in federal cases. Indeed, the concern that this is occurring has been noted by individual Justices of the Supreme Court. For example, though the Court denied certiorari in *Smith v. United States*,<sup>298</sup> Justice Blackmun noted that “[b]ecause the Court of Appeals’ unpublished opinion cannot be squared with our harmless-error precedents, I would vacate the judgment and direct the Court of Appeals to review the sentence under the proper standard,”

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295. *Id.* at 938, 940 (Stevens, J., dissenting) (footnotes and internal citations omitted).

296. See e.g. Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. App. Prac. & Process 199, 241-50 (2001) (collecting Supreme Court decisions and denials of writs involving unpublished decisions in an appendix).

297. See e.g. *C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987) (“The Court of Appeals exceeded its jurisdiction regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished.”).

298. 502 U.S. 1017 (1991) (Blackmun, O’Connor, & Souter, JJ., dissenting from denial of writ of certiorari).

stating in addition that

[t]he fact that the Court of Appeals' opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the circuit and surely is as important to the parties concerned as is a published opinion.<sup>299</sup>

Similarly, in *Waller v. United States*,<sup>300</sup> two justices dissented from a denial of certiorari on the ground that a recent unpublished decision of the Ninth Circuit put it at odds with the First Circuit.<sup>301</sup>

In addition to promoting proper review, publication of dispute-resolving opinions serves another important function: preserving judicial accountability and the perception of judicial accountability. What was once perceived as the “weakest” branch<sup>302</sup> is now perceived as increasingly powerful, and by some, as too powerful.<sup>303</sup> Calls for greater judicial accountability and transparency are likewise on the rise. The idea that an appellate court can make law that is good in only a single instance and not to be relied upon by later litigants is contrary to the public's sense of how a court ought to proceed. We have long viewed courts as our guardians of fairness and protection against all others—individuals, organizations, and even the other two branches of government.

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299. *Id.* at 1019-20 & 1020 n.\*.

300. 504 U.S. 962 (1992) (White & O'Connor, JJ., dissenting from denial of writ of certiorari).

301. *Id.* at 964-65 (White & O'Connor JJ., dissenting); see also *Hyman v. Rickman*, 446 U.S. 989, 990-92 (1980) (Blackmun, Brennan, & Marshall, JJ., dissenting from denial of writ of certiorari on the ground that the unpublished opinion at issue was in conflict with opinions of other circuits on the issue of right to appointed counsel).

302. See *The Federalist* No. 78 at 465 (Alexander Hamilton) (reprinted in *The Federalist Papers* (New Am. Lib./Mentor Books 1961)).

303. See e.g. Kathleen Hall Jamieson & Michael Hennessy, *Public Understanding of and Support for the Courts: Survey Results*, 95 Geo. L.J. 899, 901 (2007) (citing data from two national surveys indicating that twenty-eight percent of Americans polled believed that the Supreme Court “has too much power”); Jonah Goldberg, *Senate “Show Trial” is Product of a Too-Powerful Court*, USA Today 11A (Jan. 11, 2006) (taking position that Senate's rigorous examination of nominees for Supreme Court is justified by significant power invested in Justices, here likened to “unelected monarchs”); Lance Eric Neff, *Keys to the Kingdom: Interpretive Power and Societal Influence During Two Ages*, 7 Fla. Coastal L. Rev. 697, 700-01 & 701 n. 19 (2006) (noting that the judiciary is commonly perceived as being “too powerful” and relatively unaccountable).

## 2. *Costs to the Courts and the Public*

Assuming that decisions can be meaningfully divided into those that need publishing and those that can safely remain unpublished, the second premise then states that the publication of all opinions imposes undue costs on both the courts and the public. These costs can be divided, for the sake of analysis, into four parts: the costs of creating decisions, the costs of publication, the costs of consumption, and the costs to the system.

The costs of creating these decisions include the use of judicial resources sufficient to produce what might be called a publication-worthy opinion.<sup>304</sup> In 1978, the perception was that greater study was needed to determine if there were any cost-savings associated with the widespread use of unpublished opinions.<sup>305</sup> Given the current state of affairs, where all decisions, including those designated as “unpublished,” are published by commercial legal publishers, the courts’ own websites, or both, it seems untrue that the costs of publication are deleterious to the courts.<sup>306</sup> The costs of publication, which are essentially the costs of publishing and disseminating the decisions, were once claimed to be too great for publishers to bear: “The burden on the publishing industry to continue to supply a complete reporting services [sic] at prices that are reasonably tolerable appears to be beyond their capacity.”<sup>307</sup> It is unclear what support ever existed for this proposition, but any concerns about the cost of publication being too great for the publishers seems thoroughly undercut by the increasing use of computer-assisted legal research, online access to legal databases, and the courts’ own provision of full-text searchable opinions pursuant to the E-Government Act.<sup>308</sup>

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304. See *Hart v. Massanari*, 266 F.3d 1155, 1176-77 (9th Cir. 2001) (characterizing the “solemn judicial act” of opinion writing as “an exacting and extremely time-consuming task”).

305. Reynolds & Richman, *No-Citation Rules*, *supra* n. 5, at 1191.

306. Shuldberg, *supra* n. 150, at 558 (forecasting, more than a decade ago, that the library of the future might be designed for readers who “sit at computer terminals searching through compact discs or on-line information rather than browsing through bookshelves”).

307. *Standards for Publication*, *supra* n. 4, at 8.

308. Shuldberg, *supra* n. 150, at 558.



Another cost often claimed to justify limited publication is the cost of consumption. This includes the costs of maintaining libraries as well as the costs of searching the opinions once published.<sup>309</sup> The former cost, while real, is adequately addressed by technology, government provision of opinions, and so forth. The latter is unavoidable unless literal publication can be prevented. While the courts can designate certain opinions as unpublished, it cannot prevent litigants from taking the time to review them—a practice that litigants seem eager to engage in.<sup>310</sup> Litigants will continue to do so now that such decisions are citeable. This cost, like the cost of actual publication, seems to be willingly borne by litigants who want to know what the court has done in the past. This impulse reflects a strong intuitive sense of how the courts work (and should work), which no amount of limiting publication can rebut.<sup>311</sup>

Finally, a perceived cost that is occasionally mentioned, and has been since the advent of universal publication of court decisions, is that the system itself may be crushed under the avalanche of new opinions. There is simply, the argument goes, too much case law for the legal system to work with, which will lead to unspecified ills.<sup>312</sup> This argument is difficult to counter because of its lack of specificity. Some have suggested that it reflects nothing more than “a longing for an earlier, simpler day when an attorney supposedly could practice out of Blackstone and a few volumes of state reports.”<sup>313</sup> In addition, it is a difficult sentiment to credit when some judges suggest that the problem is that there are too few precedents rather than too

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309. *Standards for Publication*, *supra* n. 4, at 7-8.

310. Robel, *Practice of Precedent*, *supra* n. 5, at 405-06 (examining then-recent surveys of federal judges and lawyers); *see also* Robel, *Myth*, *supra* n. 5, at 949 (noting in a discussion of lawyers' interest in unpublished opinions that it would, for example, be difficult to “discern” a “pattern” of the court's favoring or disfavoring certain arguments or types of cases “if one were limited to the court's published expressions”).

311. Robel, *Practice of Precedent*, *supra* n. 5, at 406 (pointing out that “unpublished opinions are routinely (indeed, promiscuously) cited by the federal courts of appeals and relied upon by the federal district courts”).

312. *Standards for Publication*, *supra* n. 4, at 6 (asserting that “[t]he limits on the capacity of judges and lawyers to produce, research and assimilate the substance of judicial opinions are dangerously near”).

313. Reynolds & Richman, *No-Citation Rules*, *supra* n. 5, at 1191.

many.<sup>314</sup> Moreover, the fear of a crush of case law is countered by both present practice and the desire of modern practicing lawyers to embrace more, not less, case law. For example, the number of federal appellate court dispositions either published (5506) or total (34,580) in the twelve-month period ending September 30, 2006, would no doubt have seemed outrageously high to a practitioner in 1915, but the number has not proven crushing to the system.<sup>315</sup> Indeed, those whom this alleged cost would potentially crush have shown both a willingness to research additional (that is, unpublished) decisions, even when they were unciteable and treated as non-precedents.<sup>316</sup> Moreover, the practitioners and judges in circuits that allow the citation of such opinions have reported little or no additional cost in doing so.<sup>317</sup> At bottom, the limitation of precedents based on the premise that it would be too much law for lawyers to work with must be rejected because it makes no sense and leads to a perverse conclusion:

Surely proponents of this “fairness” rationale cannot mean that the courts ought to adopt Harrison Bergeron-like rules that level the playing field by imposing artificial impediments on lawyers smart enough to follow developments in their field of specialty. Yet that is their inescapable implication.<sup>318</sup>

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314. Posner, *supra* n. 147, at 166. *See also* Commission on Structural Alternatives for the Federal Courts of Appeals, *Working Papers* at 48 (1998) (Thirty-seven percent of federal district judges surveyed indicated some area of circuit law as “inconsistent or difficult to know” and twenty-nine percent identified the problem as a lack of circuit decisions on point).

315. *Judicial Business Table S-3*, *supra* n. 6, at 52 (showing data on published, unpublished, and total dispositions in period surveyed).

316. Reagan et al., *supra* n. 250, at 15-17 (indicating that survey data shows attorneys’ strong desire to use unpublished opinions); *see also* Robel, *Practice of Precedent*, *supra* n. 5, at 401 (noting that “lawyers and judges value these opinions despite the rules limiting citation”). *See also* Robel, *Myth*, *supra* n. 5, at 957-58 (indicating that government-agency lawyers consult and use unpublished opinions); Schiltz, *Much Ado about Little*, *supra* n. 1, at 43-45 (collecting arguments in favor of Fed. R. App. P. 32.1).

317. Reagan et al., *supra* n. 250, at 17 (49 tbl. U) (indicating that judges in circuits allowing citation have reported, on average, no appreciable impact in their work caused by allowing citation to the now published, unpublished decisions). *See also* Schiltz, *Citation of Unpublished Opinions*, *supra* n. 1, at 43-45 (collecting arguments in favor of Fed. R. App. P. 32.1).

318. Boggs & Brooks, *supra* n. 288, at 21-22 (footnote omitted).

Finally, no one has yet fully tallied the cost of “running the unpublication machine,” but “[s]uch partial accounts of these processes as they exist suggest that they are an enormous drain on court resources.”<sup>319</sup> Moreover, it is quite possible that the current practice of preventing many cases from being published and precedential adds to the courts’ workload:

The current appellate practice of hiding precedents may have an adverse effect on the courts’ workload. The greater the number of precedents, the greater the volume of law, the greater the number of solutions to legal issues, and the easier it would be to determine whether an authoritative answer to a legal issue has been judicially sanctioned. Assuming that most lawyers would not raise issues on appeal that an appellate court would consider already decided, an increased volume of law would serve to lower the number of appeals and the number of issues raised in those cases that are appealed far more effectively than sanctions for frivolity.<sup>320</sup>

Whatever the support for limited publication on cost grounds initially, changes in technology and the undoing of citation limitations seem to indicate that little support for limited publication remains.

### *3. Judicial Ability to Distinguish Law-Making from Law-Applying Ex Ante*

The final premise, that judges can determine, before drafting an opinion, whether a case is of the law-making variety or merely dispute resolving, is both critical to the idea of limited publication and at the same time wholly without merit. This premise would suggest that it is critical to the idea of limited publication because it is the court’s ability to designate some

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319. Pether, *supra* n. 5, at 1522 (footnote omitted). The evocative phrase “unpublication machine” refers to the entire process of producing unpublished decisions and then dealing with them after they are, perhaps ironically, published. Maintaining a two-track system and dealing with two tiers of cases carries unstudied costs.

320. Cappalli, *supra* n. 5, at 769 (footnotes omitted) (citing, among other sources, Posner, *supra* n. 147 at 166 (suggesting that “the aggregate value of unpublished opinions as sources of guidance to the bar and to lower-court judges . . . might well outweigh the costs . . . of publishing”)).

cases as law-making (to be published) and dispute-resolving (not to be published) that allows for the judicial time-savings of writing a less thorough, detailed, and polished opinion. Without the ability to determine in advance whether a case will lead to a published decision, the court would gain very little in the way of cost savings.<sup>321</sup> At the same time, the premise that judges can make this determination *ex ante* is inherently flawed.

First, the concept that any case can be said to be purely dispute-resolving with no lawmaking value is itself in error.<sup>322</sup> Because there is a value in even the slightest change in the law as well as repetitions of the law's application, "[t]he legal system needs not merely the leading case but also the expansions and contractions of old, verbally stable rules that are found in humdrum applications, or what we might call the 'rules in operation.'"<sup>323</sup>

Second, we are all poorly suited to predict the future. As Justice Stevens succinctly states:

A rule which authorizes any court to censor the future citation of its own opinions rests on a false premise. Such a rule assumes that an author is a reliable judge of the quality and importance of his own work product. If I need authority to demonstrate the invalidity of that assumption, I refer you to a citizen of Illinois who gave a brief talk in Gettysburg, Pennsylvania that he did not expect to be long remembered. Judges are the last persons who should be authorized to determine which of their decisions should be long remembered.<sup>324</sup>

Third, judges are poorly situated at the time they write an opinion to know what value that opinion may have to future litigants. The value of a decision as a precedent lies in its factual similarity to a case that follows it. The present system of allowing judges to decide prospectively which of their decisions are law and which are not "starkly reverses centuries of common

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321. Reynolds & Richman, *No-Citation Rules*, *supra* n. 5, at 1191-93.

322. See Section V.B.1, *supra*.

323. Cappalli, *supra* n. 5, at 769.

324. John Paul Stevens, J., S. Ct. of the U.S., *Remarks* (Ill. St. B. Assn. Centennial Dinner, Springfield, Ill. Jan. 22, 1977), *quoted in* Reynolds & Richman, *No-Citation Rules*, *supra* n. 5, at 1192 (quoting Brief for Amicus Curiae Chi. Council of Law. at 37, *Browder v. Dept. of Corrections*, 434 U.S. 257 (1978) (available at 1977 WL 189280)).

law tradition.”<sup>325</sup> The power and the duty to determine the precedential effect of a decision has traditionally rested not with the precedent-making court but with the precedent-applying court.<sup>326</sup> It is only with a set of new facts in hand, to which the rule is to be applied, that a court can determine whether a prior case is or is not a valid precedent.<sup>327</sup>

Fourth, evidence suggests that many cases that are plainly law-making are being designated unpublished.<sup>328</sup> These include novel interpretations of the law, reversals of what the district court believed to be the law, split decisions, decisions at variance with other panels of the same appellate courts, and decisions that evidence circuit splits, to name a few.<sup>329</sup> In fact, choosing incorrectly imposes additional costs on the system by hiding cases from review, preventing exposure of splits within and between circuits, depriving litigants of precedents from which to determine behavior and outcomes, encouraging identical cases to be brought when they could be avoided, disparate treatment of litigants, and erosion of respect for the courts.<sup>330</sup>

In addition, those arguing from the premise that judges can distinguish readily between cases that make law and those that apply it presume that judges are making determinations about what will and will not be published based only on whether the case adds something new to the law. If judges are making publication decisions based on other facts, and both first-hand accounts and objective research indicate that this is so, then the system is even more flawed. Judge Richard Arnold of the Eighth Circuit expressed uneasiness at the system, which encourages strategic thinking among judges wishing to establish certain

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325. Cappalli, *supra* n. 5, at 772.

326. *Id.* at 773.

327. *Id.* Accord K.N. Llewellyn, *The Bramble Bush* 53 (Oceana Pub., Inc. 1973) (pointing out that “the true rule of the case [is] what it will be made to stand for by another later court” (emphasis in original)). See also *id.* at 62-66.

328. Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 Vand. L. Rev. 71, 120 (2001). See also e.g. *U.S. v. Edge Broad. Co.*, 509 U.S. at 425 n. 3 (expressing surprise and dismay at one circuit’s decision to render an unpublished decision charting new Constitutional ground).

329. Merritt & Brudney, *supra* n. 328, at 113-14.

330. See e.g. Section V.B.1, *supra*.

precedents or to avoid establishing others:

[I]f, after hearing argument, a judge in conference thinks that a certain decision should be reached, but also believes that the decision is hard to justify under the law, he or she can achieve the result, assuming agreement by the other members of the panel, by deciding the case in an unpublished opinion and sweeping the difficulties under the rug. Again, I'm not saying that this has ever occurred in any particular case, but a system that encourages this sort of behavior, or is at least open to it, has to be subject to question in any world in which judges are human beings.<sup>331</sup>

Judge Wald of the D.C. Circuit was even more concerned and even more candid, pointing out that

a double track system allows for deviousness and abuse. I have seen judges purposely compromise on an unpublished decision incorporating an agreed-upon result in order to avoid a time-consuming public debate about what law controls. I have even seen wily would-be dissenters go along with a result they do not like so long as it is not elevated to a precedent. We do occasionally sweep troublesome issues under the rug, though most will not stay put for long.<sup>332</sup>

The full scope and effect of incidents like those Judge Wald experienced are difficult to measure. One study of published and unpublished decisions on asylum cases in the Ninth Circuit<sup>333</sup> has indicated that judges engage in strategic decisionmaking about publication that is unrelated to the precedential value of a particular case:

[V]oting and publication are, for some judges, strategically intertwined: for example, judges may be prepared to acquiesce in decisions that run contrary to their own preferences, and to vote with the majority, as long as the

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331. Arnold, *supra* n. 21, at 223.

332. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1374 (1995) (discussing her own observations as a judge on the D.C. Circuit).

333. David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. Cinn. L. Rev. 817, 823 (2005) (observing that “[t]he empirical literature on publication is sparse”).

decision remains unpublished, but can be driven to dissent if the majority insists upon publication.<sup>334</sup>

Other studies have indicated that many unpublished opinions are lengthy, complex, or otherwise seemingly deserving of publication.<sup>335</sup> Finally, the prospect that some judges may be using unpublished opinions for reasons other than those envisioned by the limited publication rules has not gone unnoticed by the Supreme Court. In a recent interview, Justice Stevens expressed his concern with the use of unpublished opinions and his increased willingness to review them

Q: Is the decision to grant or deny cert. influenced by whether the opinion from the court below is a published or nonpublished opinion?

A: Well, I tend to vote to grant more on unpublished opinions, on the theory that occasionally judges will use the unpublished opinion as a device to reach a decision that might be a little hard to justify.<sup>336</sup>

While the number of federal cases filed continues to grow, there is little to suggest that limiting publication is an answer, much less a good answer, to reducing the stress on the courts. Whatever arguments once existed to recommend the practice of

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334. *Id.* at 820.

335. *See e.g. id.* at 820-29 (collecting prior research); Brian P. Brooks, *Publishing Unpublished Opinions: A Review of the Federal Appendix*, 5 *Green Bag* 2d 259, 260-63 (2002); Merritt & Brudney, *supra* n. 328, at 120 (finding that unpublished decisions have an effect on the substance of the law and that unpublished decisions are not simply routine applications of the law but contain “a noticeable number of reversals, dissents, or concurrences,” and remarking on “significant associations between case outcome and judicial characteristics”); Robert A. Mead, “Unpublished” Opinions as the Bulk of the Iceberg: *Publication Patterns in the Eighth and Tenth Circuits of the United States Courts of Appeals*, 93 *Law Libr. J.* 589, 601-03 (2001) (examining publication rates by subject matter in the Eighth and Tenth Circuits over a six-month period and finding great disparity in publication rates, especially in areas where the government is a litigant); Pamela Foa, Student Author, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 39 *U. Pitt. L. Rev.* 309, 315-40 (1977) (analyzing results of a six-month study of Seventh Circuit cases, which revealed that fifteen percent of unpublished cases were substantively significant and met the publication standards); Wald, *supra* n. 332, at 1374 (noting that a six-month study had found that forty percent of unpublished D. C. Circuit cases arguably met the publication standards, and noting in addition that the percentage might be much higher in 1995).

336. Jeffrey Cole & Elaine E. Bucklo, *A Life Well Lived: An Interview with Justice John Paul Stevens*, 32 *Litig.* 8, 67 (Spring 2006).

using unpublished opinions, they have been largely refuted and undercut by developments of the last thirty-five years.

*C. Premises Supporting a Bar on Citation to Unpublished Decisions*

The argument in favor of limiting citation is essentially one of a perceived necessity to support the practice of limited publication. Limiting citation to some portion of the courts' decisions serves no purpose of its own; there is no inherent value in preventing litigants from mentioning what the court has done in similar cases in the past. It is a practice undertaken to enable limited publication practices to exist. While the practice of limiting publication continues, the practice of limiting citation has come to an end with new Rule 32.1—at least in regard to decisions issued after January 1, 2007. However, because the premises underlying the limitation of citation of unpublished opinions so closely parallel those for denying unpublished opinions precedential status, and because the practice continues in some states, the citation issue will be examined briefly here.

*1. Cost Savings*

The core premise in favor of limiting citation of unpublished decisions is that such a limitation is necessary to prevent the decisions' use, which is in turn necessary because use would undermine the cost savings to judges, consumers, publishers, and the system itself. This premise is flawed. To the extent that the "sausage" of unpublished decisions is "not safe for human consumption" as Judge Kozinski has claimed,<sup>337</sup> the preferable remedy would be to stop making the sausage in the present manner and make a better product, not to continue making it and throwing it away.

Evidence suggests that both judges and attorneys bear little or no cost in citing these decisions because they are already researching them. In the modern legal publishing scenario,

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337. Alex Kozinski, *In Opposition to Proposed Federal Rule of Appellate Procedure 32.1*, 51 Fed. Law. 36, 37 (June 2004).



where unpublished decisions are nearly universally published in West's *Federal Appendix*, West's and LEXIS's online services, on the courts' own websites, and elsewhere, the costs of publication are already sunk—citation itself adds no additional costs to the equation. The heuristic lawyers use to find cases in online databases locates unpublished cases right along with published ones, and lawyers review them both.<sup>338</sup> In those circuits where citation has been recently allowed, very little additional costs in either researching or opinion writing have been noted.<sup>339</sup> To the extent that cost was an issue it has been overcome by technological advances and the competing value of allowing litigants to tell a court what it has done in the past.

## 2. Fairness to Litigants

Part of the justification for limiting citation rests on the premise that unfairness would result by allowing those with better access to decisions to cite them. This premise was flawed when limited citation rules were imposed in the early 1970s and continues to be flawed, although for a different reason, in the modern setting. During the early era of non-citation rules, “unpublished” cases were truly not published and access to them was available only by actually visiting the court clerk and copying the decisions.<sup>340</sup> The premise in favor of non-citation presumed that preventing citation of these decisions would prevent their use entirely and resolve the perceived unfairness

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338. See e.g. Stephen R. Barnett, *The Dog That Did Not Bark: No-Citation Rules, Judicial Conference Rulemaking, and Federal Public Defenders*, 62 Wash. & Lee L. Rev. 1491, 1535-36 (2005); Salem M. Katsh & Alex V. Chachkes, *The Constitutionality of No-Citation Rules*, 3 J. App. Prac. & Process 287, 301-02 (2001).

339. Reagan et al., *supra* n. 250, at 17 & *id.* at 49 (tbl. U, entitled “Impact on Work of New Rule”) (indicating that judges in circuits allowing citation have reported, on average, no appreciable impact in their work caused by allowing citation to what might now be termed published unpublished decisions). Note that “costs” in this context include time and effort as well as strictly monetary costs.

Although Reagan's survey is still useful, now that Rule 32.1 has created a uniform rule permitting citation of unpublished decisions in all federal courts of appeals, a more uniform national study can—and probably should—be done to assess the costs, if any, associated with permitting citation.

340. Goering, *supra* n. 5, at 38 (noting that when limited publication and citation rules were first adopted, research in unpublished opinions was available only to institutional litigants with the incentive and ability to collect and index them).

that disparity of access caused.<sup>341</sup> As the 1973 Committee explained, “[i]t is unfair to allow counsel, or others having special knowledge of an unpublished opinion, to use it if favorable and withhold it if unfavorable.”<sup>342</sup> This premise was flawed at the outset for two reasons.

First, large law firms, organizations, and other repeat players retained their advantage with respect to unpublished decisions and perhaps even gained additional advantage. These repeat players could still afford to cull the clerk’s records for similar cases and unpublished decisions and could pull from them the winning reasoning. While they were unable to cite the decisions as authority, they could have superior knowledge about the court’s recent rulings and access to the court’s own reasoning and language. This information could be used in crafting their arguments to the court, which, it should be immediately apparent, gave them an incredible advantage: They could repeat to the court its own reasoning, perhaps even in its own words.<sup>343</sup> Thus, the advantage was maintained even without citation because repeat players and large institutions could do all this without ever having to cite that authority to the opposing side.

Second, in this era in which so-called unpublished decisions are increasingly—and now nearly ubiquitously—published, there is no real disparity between the parties.<sup>344</sup> Any litigant with access to the *Federal Appendix*, online research systems, and, increasingly, the courts’ own websites, now has access to the unpublished decisions of the courts.<sup>345</sup> Moreover, researching those decisions does not appear to place a burden on the parties. Attorneys report that they already research such unpublished decisions. Also, to the extent the use of such opinions has recently increased, as in the D.C. Circuit after it

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341. *Standards for Publication*, *supra* n. 4, at 19-20.

342. *Id.* at 19.

343. Katsh & Chachkes, *supra* n. 338, at 301-02 (noting that unpublished opinions are searched because lawyers find value in repeating the court’s own reasoning and language back to it and noting cases in which courts have referred in later cases to language in unpublished opinions).

344. Shuldberg, *supra* n. 150, at 558.

345. *Id.*

liberalized its citation policy, attorneys have reported no significant increase in workload.<sup>346</sup>

Limitation of citation was a practice founded largely on a perceived need to protect the cost gains of the limited publication regime. Practice, both initial and present, suggests that the limitation of citation is both ineffective and unnecessary to cost containment in the limited publication regime. The recent adoption of Rule 32.1 suggests that litigants are unwilling to ignore unpublished decisions, primarily because they believe them to be of value and are willing to bear the costs of researching them. Additionally, the rule will equalize the playing field between institutional repeat players and other litigants.

*D. Premises Supporting the Denial of Precedential Status to Unpublished Decisions*

As noted above, neither the 1973 Committee nor the drafters of Rule 32.1 have directly confronted the precedential status of unpublished decisions. The creation of limited publication and limited citation rules was undertaken with an understanding that limiting publication and citation would have the effect of limiting the precedential status of decisions,<sup>347</sup> but whether such an effect was desirable or rested on sound jurisprudential premises seems not to have been an issue. Likewise, in crafting the new rule the Committee expressly avoided addressing the issue,<sup>348</sup> but the Advisory Committee's Reporter has acknowledged that the precedent question is an extremely important one—far more important than the issue of citation itself.<sup>349</sup>

Defense of the practice of limiting precedential status of unpublished opinions as a goal unto itself has often been

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346. Reagan et al., *supra* n. 250 at 17 & *id.* at 49 (tbl. U).

347. See *Standards for Publication*, *supra* n. 4, at 20-21.

348. See Fed. R. App. P. 32.1, advisory comm. nn.

349. Schiltz, *Much Ado About Little*, *supra* n. 1, at 1463 (stating that "Rule 32.1 is not, in fact, an important rule," but also acknowledging "that there are closely related issues—such as whether unpublished opinions should or must be treated as precedential—that are extremely important").

discussed as bound into the larger question of limiting publication, and it largely tracks the premises above. First, it is suggested that limiting precedential status is required to preserve the cost gains realized by limiting publication. Second, the premise holds that allowing unpublished cases to have precedential value would result in unfairness between litigants. The flaw in the first of these is apparent given the market for unpublished opinions and their common usage by both litigants and courts, even in the absence of full precedential status. The flaw in the second is much the same as in the citation discussion: To the extent that any disparity of access to unpublished opinions exists, limiting precedential status does not resolve that disparity, and to the extent that no meaningful disparity now exists, the rule serves no purpose.

The first premise states that if unpublished decisions are precedential, they will need to be prepared with greater care, a market will spring up for their use, and litigants will need to research them.<sup>350</sup> It is plain to see that the last two have occurred even in the absence of precedential status, perhaps because the sense within the system that a court is bound to take note of what it has done yesterday and act similarly today is extremely strong.<sup>351</sup> That belief has created a market for unpublished decisions and made the research of them standard practice among litigators.

The second premise, which is similar to the unfairness concern with citation, states that allowing unpublished cases to have precedential value would result in unfairness between litigants. As noted in regard to citation, the rule does nothing to prevent that advantage of those in the know and, in fact, tends to increase their advantage, at least while access disparity exists. When no access disparity exists, and litigants would research the cases anyway, then the playing field is already equal and the rule prohibiting precedent is unnecessary. This is increasingly the case. Unpublished decisions are widely available and studies have indicated that they are searched anyway.

How the courts decide to denominate their decisions (as published or unpublished) is itself relatively unimportant. The

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350. *Standards for Publication*, *supra* n. 4, at 20.

351. *See generally e.g. Robel, Practice of Precedent*, *supra* n. 5.

legal system has traditionally made whatever use of the decisions it finds appropriate and will continue to do so. Whether to allow citation of the decisions is a question answered, at least for the federal court system, by Rule 32.1, which prevents courts from restricting citation of decisions regardless of whether they are formally designated for publication or not. The real question, then, is whether decisions may be designated as non-precedential, and, even if so, whether they ought to be. Whether they can be is subject to several challenges on Constitutional grounds ranging from core questions of the courts' powers under Article III to implied rights such as substantive due process.

### *1. Judge Arnold's Originalist Argument*

The most well known, as well as the most fundamental, alleged constitutional infirmity with the process of denying the precedential status of unpublished cases is that Article III of the Constitution does not give federal courts the authority to decide which of their cases are precedential and which are good only for a single time and place. The crux of this argument is that all cases decided by the federal courts are precedent. The foremost proponent of this view, in both time and importance, was Judge Richard Arnold of the Eighth Circuit,<sup>352</sup> although some proposed a similar view of precedent prior to Judge Arnold's writings,<sup>353</sup> and many picked up the banner after Judge Arnold's provocative decision in *Anastasoff*.<sup>354</sup> Others, Ninth Circuit

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352. See Arnold, *supra* n. 21; *Anastasoff v. U.S.*, 223 F.3d 898 (8th Cir.), *vacated* 235 F.3d 1054 (8th Cir. 2000).

353. See e.g. Bader, *supra* n. 97, at 9-11 (emphasizing the importance of precedent to the lawyers and judges of the Revolutionary generation); *Re: Rules of U.S. Court of Appeals for Tenth Circuit; Adopted Nov. 18, 1986*, 955 F.2d 36, 37 (10th Cir. 1992) (Halloway, Barrett, and Baldock, JJ., dissenting) (recognizing that "[e]ach ruling, published or unpublished, involves the facts of a particular case and the application of law—to the case," and taking the position that "all rulings of this court are precedents, like it or not, and we cannot consign any of them to oblivion by merely banning their citation"); Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723 (1988).

354. See e.g. Penelope Pether, *Take a Letter, Your Honor: Outing the Judicial Epistemology of Hart v. Massanari*, 62 Wash. & Lee L. Rev. 1553 (2005); Cappalli, *supra* n. 5; Sinclair, *supra* n. 5; Steve Sheppard *The Unpublished Opinion: How Richard Arnold's Anastasoff Opinion is Saving America's Courts from Themselves*, 2002 Ark. L. Notes 85 (2002); Stephen R. Barnett, *From Anastasoff to Hart to West's Federal Appendix:*

Judge Alex Kozinski among them, have rejected Judge Arnold's Constitutional analysis.<sup>355</sup>

## 2. *The Eighth Circuit Speaks: Anastasoff v. United States*

The Eighth Circuit in *Anastasoff* declared the Circuit's rule denying precedential status to unpublished opinions in violation of Article III.<sup>356</sup> The opinion, authored by Judge Arnold, held that denying decisions precedential status exceeded the court's judicial power.<sup>357</sup>

The *Anastasoff* panel followed a prior unpublished opinion,<sup>358</sup> believing itself Constitutionally required to do so because the panel issuing the unpublished opinion had previously rejected "precisely the same legal argument"<sup>359</sup> made by the plaintiff before it. Citing to the text of then-current Local Rule 28A(i), which stated that "[u]npublished opinions are not

*The Ground Shifts Under No-Citation Rules*, 4 J. App. Prac. & Process 1 (2002); Kenneth Anthony Laretto, *Precedent, Judicial Power, and the Constitutionality of "No-Citation" Rules in the Federal Courts of Appeals*, 54 Stan. L. Rev. 1037 (2002); Charles R. Eloshway, Student Author, *Say It Ain't So: Non-Precedential Opinions Exceed the Limits of Article III Powers*, 70 Geo. Wash. L. Rev. 632 (2002); Johanna S. Schiavoni, Student Author, *Who's Afraid of Precedent?: The Debate Over the Precedential Value of Unpublished Opinions*, 49 UCLA Law. Rev. 1859 (2002); Merritt & Brudney, *supra* n. 328; Sheree L. K. Nitta, Student Author, *The Price of Precedent: Anastasoff v. United States*, 23 U. Haw. L. Rev. 795 (2001); Strongman, *supra* n. 135; Lance A. Wade, Student Author, *Honda Meets Anastasoff: The Procedural Due Process Argument Rules Prohibiting Unpublished Judicial Decisions*, 42 B.C. L. Rev. 695 (2001); William J. Miller, Student Author, *Chipping Away at the Dam: Anastasoff v. United States and the Future of Unpublished Decisions in the United States Court of Appeals and Beyond*, 50 Drake L. Rev. 181 (2001); Jennifer Adams, Student Author, *Law Today; Gone Tomorrow*, 53 Baylor L. Rev. 659 (2001).

355. *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) (Kozinski, J.). See also, e.g., R. Ben Brown, *Judging in the Days of the Early Republic: A Critique of Judge Richard Arnold's Use of History in Anastasoff v. United States*, 3 J. App. Prac. & Process 355 (2001); John Harrison, *The Power of Congress over the Rules of Precedent*, 50 Duke L.J. 503 (2000); Thomas R. Lee & Lance S. Lehnhof, Student Author, *The Anastasoff Case and the Judicial Power To "Unpublish" Opinions*, 77 Notre Dame L. Rev. 135 (2001).

356. *Anastasoff*, 223 F.3d 898.

357. *Id.* at 899 ("We hold that the portion of Rule 28A(i) that declares that unpublished opinions are not precedent is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the 'judicial.'").

358. *Christie v. U.S.*, No. 91-2375MN (8th Cir. Mar. 20, 1992) (per curiam) (unpublished).

359. *Anastasoff*, 223 F.3d at 899.

precedent,” Anastasoff argued that, as a non-precedent, the earlier case did not bind the panel by which her case was heard.<sup>360</sup> The court disagreed:

Although it is our only case directly in point, Ms. Anastasoff contends that we are not bound by *Christie* because it is an unpublished decision and thus not a precedent under 8th Circuit Rule 28A(i). We disagree. We hold that the portion of Rule 28A(i) that declares that unpublished opinions are not precedent is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the “judicial.”<sup>361</sup>

In holding the Eighth Circuit’s rule unconstitutional, the *Anastasoff* decision reinvigorated a national debate on the issues of limited publication and citation.<sup>362</sup> Though the *Anastasoff* case would eventually become moot, leading to the opinion’s being vacated,<sup>363</sup> Judge Arnold’s opinion resonated with many courts, lawyers, and commentators<sup>364</sup> and rankled others.<sup>365</sup>

Prior to deciding the *Anastasoff* case, Judge Arnold had expressed concern about the process of allowing unpublished decisions to be treated as non-precedential.<sup>366</sup> In both his article<sup>367</sup> and the original *Anastasoff* opinion,<sup>368</sup> he expressed a firm belief that “all decisions have precedential significance.”<sup>369</sup> His article closes by asking whether “the assertion that unpublished opinions are not precedent and cannot be cited” is a

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360. *Id.*

361. *Id.*

362. Leane C. Medford et al., *Anastasoff v. U.S.*, 20 Am. Bankr. Inst. J. 26 (Nov. 2001) (“Although vacated, *Anastasoff* breathed new life into a continuing controversy over the precedential effects of unpublished opinions, receiving national attention from the judiciary, legal commentators and practitioners.”).

363. *Anastasoff v. U.S.*, 235 F.3d 1054, 1056 (8th Cir. 2000) (*en banc*) (“The controversy over the status of unpublished opinions is, to be sure, of great interest and importance, but this sort of factor will not save a case from becoming moot. We sit to decide cases, not issues, and whether unpublished opinions have precedential effect no longer has any relevance for the decision of this tax-refund case.”)

364. *See* n. 354, *supra*.

365. *See* n. 355, *supra*.

366. Arnold, *supra* n. 21.

367. *Id.*

368. *Anastasoff*, 223 F.3d 898.

369. Arnold, *supra* n. 21, at 222. *See also Anastasoff*, 223 F.3d at 899-900 (discussing various earlier articulations of the “doctrine of precedent,” and noting that its components “were well established and well regarded at the time this nation was founded”).

violation of Article III, and the decision in *Anastasoff* provides the answer: “[T]he portion of Rule 28A(i) that declares that unpublished opinions are not precedent is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the ‘judicial.’”<sup>370</sup> In arriving at that conclusion, the court in *Anastasoff* considered

- the text of Article III,
- the meaning of the relevant clause and the doctrine of precedent at the time of its framing, and
- the message it sends to allow courts to decide cases and declare them *ex ante* to be non-precedential.<sup>371</sup>

Though the most that can be claimed is that Article III implies the limitation proposed because no explicit discussion of precedent is contained in its text, Judge Arnold makes a compelling case. Article III states that “[t]he 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 and establish.”<sup>372</sup> The critical phrase is “judicial power,” which is explained no further within the text. What is meant (or was meant or understood by the Framers, if that is the method of Constitutional interpretation to be employed) by “judicial power” requires additional examination. Judge Arnold’s thesis is that the phrase “judicial power” is a grant of limited power and that power does not extend to rendering non-precedential opinions.<sup>373</sup> *Anastasoff* sets forth an originalist argument supporting this conclusion.<sup>374</sup>

As a first principle, *Anastasoff* finds that every judicial decision is a declaration of law, which must be applied in subsequent similar cases:

Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. This

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370. *Anastasoff*, 223 F.3d at 899.

371. *Id.* at 899-904.

372. U.S. Const. art. III, § 1, cl. 1.

373. *Anastasoff*, 223 F.3d at 899.

374. *Id.* at 899-904.



declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties. These principles, which form the doctrine of precedent, were well established and well regarded at the time this nation was founded. The Framers of the Constitution considered these principles to derive from the nature of judicial power, and intended that they would limit the judicial power delegated to the courts by Article III of the Constitution.<sup>375</sup>

In support of this conclusion, the *Anastasoff* court cites *Marbury v. Madison*, which offers the perspective that “[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”<sup>376</sup>

In addition, the court examines the Framers’ understanding of the doctrine of precedent as part of their notion of judicial power, in part by looking to the sources that influenced the Framers, such as the writings of Coke, Hale, and Blackstone.<sup>377</sup>

In reviewing these sources, the court finds ample evidence that within the common law system, “the judge’s duty to follow precedent derives from the nature of the judicial power itself.”<sup>378</sup>

Judge Arnold, like Blackstone, views each decision of the court to add to the body of law, “the law in that case, being solemnly declared and determined, what was before uncertain, and perhaps indifferent, is now become a permanent rule.”<sup>379</sup> The *Anastasoff* court then turns its attention to the writings of the Framers themselves, including James Madison’s understanding of the courts as bounded by the “authoritative force” of “judicial precedents”<sup>380</sup> and as observing the “obligations arising from judicial expositions of the law on succeeding judges,”<sup>381</sup> and Alexander Hamilton’s emphatic statement:

375. *Id.* at 899-900 (footnotes omitted) (citing *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177-78 (1803); *James B. Beam Distilling Co. v. Ga.*, 501 U.S. 529, 544 (1991); *Cohens v. Va.*, 6 Wheat. 264, 399 (1821)).

376. *Marbury*, 5 U.S. at 177.

377. *Anastasoff*, 223 F.3d at 900-04.

378. *Id.* at 901 (footnote omitted).

379. *Id.* (quoting Blackstone, *Commentaries* at \*69).

380. *Id.* at 902 n. 10 (citing James Madison, Letter to Charles Jared Ingersoll (June 25, 1831), reprinted in *The Mind of the Founder: Sources of the Political Thought of James Madison* 390, 390-93 (Marvin Meyers ed., rev. ed., Brandeis U. Press 1981)).

381. *Id.* at 902.

[T]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.<sup>382</sup>

However, it was not only the Federalists whose writings reveal a well-established understanding of precedent as part of the judicial power in the new government, because “the Anti-Federalists also assumed that federal judicial decisions would become authorities in subsequent cases”<sup>383</sup> and were concerned that

one adjudication will form a precedent to the next, and this to a following one. These cases will immediately affect individuals only; so that a series of determinations will probably take place before even the people will be informed of them.<sup>384</sup>

Another Anti-Federalist, writing as “the Federal Farmer” expressed the concern that the federal courts to be established would have “no precedents in this country, as yet, to regulate the divisions in equity as in Great Britain; equity, therefore, in the supreme court for many years will be mere discretion.”<sup>385</sup> These contemporary writings reveal an understanding that the courts under the new Constitution would be of binding authority.<sup>386</sup>

While modern justifications of precedent tend toward the pragmatic,<sup>387</sup> for the Framers, the concept of precedent was part

382. *Id.* at 902 (citing *Federalist Papers* No. 78, at 510).

383. *Id.* at 902-03 (citing *Essays of Brutus*, XV (Mar. 20, 1788) in *The Complete Anti-Federalist* vol. 2, 441 (Herbert J. Storing ed., U. Chi. Press 1981); *Letters from The Federal Farmer* No. 3 (Oct. 10, 1787), in *id.* at 244).

384. *Id.* at 903 n. 13 (quoting *Essays of Brutus*, *supra* n. 383, at 441).

385. *Id.* (quoting *Letters from The Federal Farmer* No. 3, *supra* n. 383, at 244).

386. *Id.* at 901-02; see also Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 *Notre Dame L. Rev.* 1075, 1101 (2003) (pointing out that “remarks on the subject of precedent of these most prominent Federalists and Anti-Federalists show that they adhered to a theory of precedent basically consistent with the major common-law treatises of the day, and that they believed that the accumulating force of precedents would, over time, tend to authoritatively ‘fix’ the meaning of the Constitution,” and noting that “[o]ne theme to be found in their remarks is that adherence to precedent forestalls the accumulation of arbitrary power in the courts”).

387. See e.g. Schauer, *supra* n. 287, at 595-602 (noting that the authority of precedent is commonly supported by arguments (1) from fundamental fairness, i.e., that like cases should be treated alike; (2) from the need for predictability; and (3) from the recognition

and parcel of their understanding of judicial power, a power that was bounded by an obligation to find the law rather than make it.<sup>388</sup> That distinction meant much to the Framers, who were successors to and believers in a declaratory theory of adjudication.<sup>389</sup> Whether the courts make law or find law is a philosophic distinction with little meaningful difference presently, though it reveals much about the view of precedent that makes up the Framers' original understanding. What is apparent from the earliest days of English common law and throughout the framing of the Constitution is that each decision rendered by a common law court has traditionally been part of the common law, regardless of its publication status—at least until the change in the early 1970s, of course.<sup>390</sup> Though Constitutional interpretation is a process fraught with difficulties, it seems unlikely that the Framers would have intended a system (or understood one) that would allow federal courts to make decisions good in only single times and places and having no bearing on later decisions.

Finally, the *Anastasoff* court carefully discriminates between the practice of limited publication, which was the traditional common law practice, and the practice of deciding *ex ante* to deny the precedential status of some opinions, which was unknown in the common law.<sup>391</sup> Unpublished did not historically mean unprecedential, and to equate the two flies in the face of the expectations and experiences of English common law and those of the founding generation of this country.<sup>392</sup> As *Anastasoff* notes,

the Framers did not regard this absence of a reporting system as an impediment to the precedential authority of a judicial decision . . . [J]udges and lawyers of the day recognized the authority of unpublished decisions even

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that it is an aid to judicial decisionmaking, preventing unnecessary reconsideration of established matters).

388. *Anastasoff*, 223 F.3d at 901-02.

389. *Id.*

390. *Id.* at 903.

391. *Id.*

392. *Id.*

when they were established only by memory or by a lawyer's unpublished memorandum.<sup>393</sup>

This view of the Framers is consonant with that of earlier generations, who held both written reports and decisions in the rolls or manuscripts of the court to be valid authority.<sup>394</sup>

It would be difficult to summarize the *Anastasoff* court's position better than Judge Arnold himself did:

[I]n the late eighteenth century, the doctrine of precedent was well-established in legal practice (despite the absence of a reporting system), regarded as an immemorial custom, and valued for its role in past struggles for liberty. The duty of courts to follow their prior decisions was understood to derive from the nature of the judicial power itself and to separate it from a dangerous union with the legislative power. The statements of the Framers indicate an understanding and acceptance of these principles. We conclude therefore that, as the Framers intended, the doctrine of precedent limits the "judicial power" delegated to the courts in Article III.<sup>395</sup>

In support of this conclusion, he provides a powerful quote from Justice Story's *Commentaries on the Constitution of the United States*:

The case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them, when they first emigrated to this country; and it is, and always has been considered, as the great security of our rights, our liberties, and our property. It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice or will of judges. A 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

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393. *Id.* (citing Peter Karsten, *Heart Versus Head: Judge-Made Law in Nineteenth-Century America* 30 (U.N.C. Press 1997) and Jesse Root, *The Origin of Government and Laws in Connecticut* (1798), reprinted in *The Legal Mind in America* 38-39 (Perry Miller ed., Anchor Books 1962)).

394. *See id.* at 903 n. 14; *see also* Baker, *supra* n. 47, at 204.

395. *Anastasoff*, 223 F.3d at 903.

itself, without reference to the settled course of antecedent principles.<sup>396</sup>

Some have argued that the practice of declaring certain (now most) decisions of the federal courts to be non-precedential is not a cause for alarm.<sup>397</sup> The better perspective, however, is that the practice causes an even more insidious harm than cutting the courts free from precedent. Allowing courts to choose at the time of opinion writing what decisions are and are not precedent allows them to deprive the common law of valuable precedents, to make law good only for a single time and place, to treat similar cases dissimilarly, and to cause some issues to evade review.<sup>398</sup> Such a practice is less blatant, but no less offensive to the Constitution and common law history.

Though the government would eventually concede the point to the taxpayer, making the *Anastasoff* case moot, many seized upon the vacated *Anastasoff* opinion to challenge the policy of non-citation and non-precedent.<sup>399</sup> Indeed, the decision reinvigorated the federal rulemaking process that led to Rule 32.1.<sup>400</sup> But Rule 32.1 does not resolve the core issues of the precedential status of unpublished decisions and whether designating cases non-precedential falls within or without the Article III power of the court.

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396. *Id.* at 903-04 (quoting Story, *supra* n. 93, at §§ 377-78).

397. See e.g. *Hart v. Massanari*, 266 F.3d 1155, 1160 (9th Cir. 2001) (“We believe *Anastasoff* overstates the case. Rules that empower courts of appeals to issue nonprecedential decisions do not cut those courts free from all legal rules and precedents; if they did, we might find cause for alarm.”).

398. See e.g. Pether, *supra* n. 281, at 7-8 (2007) (“Given its origins, it is perhaps unsurprising that the charges leveled at institutionalized unpublication are multiplicitous and damning. They include the identifying of damaging ‘rule of law effects’ of the practice, such as enabling powerful and repeat player litigants to rig the system of precedent so it operates in their favor; unconstitutionality; lack of transparency and judicial accountability, the enabling of judicial corruption or the engendering of public suspicion that it is occurring, and the producing of public and practitioner disrespect for the judicial system.”); Patrick J. Schiltz, *Citation of Unpublished Opinions*, *supra* n. 1, at 43-58 (collecting arguments in favor of Fed. R. App. P. 32.1).

399. See note 354, *supra*.

400. Medford et al., *supra* n. 362, at 26 (pointing out that, “[a]lthough vacated, *Anastasoff* breathed new life into a continuing controversy over the precedential effects of unpublished opinions, receiving national attention from the judiciary, legal commentators and practitioners.”)

### 3. *The Ninth Circuit Replies: Hart v. Massanari*

The *Anastasoff* decision was widely praised.<sup>401</sup> However, the case did have its critics.<sup>402</sup> Perhaps the most vocal of those was Judge Kozinski of the Ninth Circuit, who responded to *Anastasoff* in *Hart v. Massanari*.<sup>403</sup> In *Hart*, Judge Kozinski attacked *Anastasoff*'s constitutional interpretations and advanced several countervailing pragmatic reasons for declaring some cases non-precedential.<sup>404</sup> In *Hart*, the court examined whether an attorney should be disciplined for citing to an unpublished decision in violation of then-current Ninth Circuit Rule 36-3, which stated: "Unpublished decisions of this court are not binding precedent. . . [and generally] may not be cited to or by the courts of this circuit."<sup>405</sup>

In the view of the *Hart* court, Article III provides no limitation on judicial power that would prevent a federal court of appeals from issuing non-precedential opinions:

Unlike the *Anastasoff* court, we are unable to find within Article III of the Constitution a requirement that all case dispositions and orders issued by appellate courts be binding authority. On the contrary, we believe that an inherent aspect of our function as Article III judges is managing precedent to develop a coherent body of circuit law to govern litigation in our court and the other courts of this circuit. We agree with *Anastasoff* that we—and all courts—must follow the law. But we do not think that this means we must also make binding law every time we issue a merits decision.<sup>406</sup>

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401. See n. 354, *supra*.

402. See n. 355, *supra*.

403. 266 F.3d 1155 (9th Cir. 2001).

404. *Id.*; see also Pether, *supra* n. 354, at 1556 (undertaking "a detailed critical discourse analysis of the construction of a revisionist history of the United States doctrine of precedent in *Hart*").

405. *Hart*, 266 F.3d at 1159 (9th Cir. 2001) (quoting 9th Cir. R. 36-3). Appellant's counsel had relied upon the constitutional argument outlined by *Anastasoff*, which the Ninth Circuit rejected. *Id.* at 1180 (holding former Rule 36-3 constitutional but declining to impose sanctions because counsel's conduct in testing the rule's constitutionality was not a "willful" violation).

406. *Id.* at 1180.

a. The *Hart* Analysis

1. *Anastasoff* Overstates the Case.

To support its conclusion, the *Hart* court first asserted that *Anastasoff* overstates the case:

We believe that *Anastasoff* overstates the case. Rules that empower courts of appeals to issue nonprecedential decisions do not cut those courts free from all legal rules and precedents; if they did, we might find cause for alarm.<sup>407</sup>

It viewed the declaration of some cases to be non-precedent as part of the courts' attempt to create a cohesive, pre-planned body of law.<sup>408</sup>

However, declaring decisions non-precedent at the time of opinion is not a cause for alarm because it is so drastic, but because it is so subtle. While allowing judges to ignore precedent would permit them to choose what they want the law to be in any given case, allowing them to decide what cases are precedent has the similar effect of allowing them to choose what they want the law to be (or not be) in all future cases. Moreover, focusing as it does on only the originalist Constitutional interpretation, *Anastasoff* actually understates the case against a non-precedent regime. Other modes of Constitutional interpretation exist and other arguments, Constitutional and otherwise, also exist.

2. Article III's Grant of "Judicial Power" is Not Limited.

Second, the court in *Hart* asserted that the "judicial power" language in Article III contains no limitations, but is merely descriptive.<sup>409</sup> In making that point, the opinion concedes that other sections of Article III, such as the references to "Cases" and "Controversies," have been held to be limitations, but

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407. *Id.* at 1160.

408. *Id.* at 1177 (noting that the federal courts of appeals "select a manageable number of cases in which to publish precedential opinions, and leave the rest to be decided by unpublished dispositions or judgment orders").

409. *Id.* at 1160.

suggests that the general reference to “judicial power” is unlikely to state a similar limitation.<sup>410</sup> The *Hart* court’s stated reasons for this conclusion are

- no other case has held the judicial power clause to state a limitation;
- there are many other practices of the federal courts that are not similarly challenged as beyond the limits of judicial power; and
- the Constitution would seem to provide that Congress could abolish the inferior federal courts altogether and therefore could modify the courts’ ambit to issue non-precedential opinions without offending the Constitution.<sup>411</sup>

The first two of these arguments do not touch the *Anastasoff* opinion in any meaningful way. First, that a provision has not been read in a particular fashion in the past does not preclude a present reading of it in that fashion. Second, that other established practices do not rise to the level of ultra vires extra-judicial acts does not speak one way or another about the constitutionality of the non-precedent rules then in force in most circuits. Finally, that the Constitution would seem to provide that Congress could abolish the inferior federal courts altogether and therefore could modify the courts’ ambit to issue non-precedential opinions without offending the Constitution is not a sound argument. As *Hart* acknowledged, the greater power does not by necessity include the lesser.<sup>412</sup> Moreover, the power to command the courts to act in some unconstitutional manner is not a lesser power than the power to abolish the inferior courts, merely a different one. That Congress could abolish the inferior federal courts does not automatically vest in it a right to require the courts to act in some particular fashion, let alone an unconstitutional one. Thus, this argument ultimately begs the question rather than resolving it. More important, it is not the

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410. *Id.*

411. *Id.* at 1160-61.

412. *Id.* at 1161.



power of Congress at issue in either *Hart* or *Anastasoff*; the heart of the matter here is whether the courts may, consistent with their judicial power, render decisions that are not precedent. Whether Congress could specifically order them to do so is neither relevant nor helpful to the analysis.

### 3. Judge Arnold Got the History Wrong.

Assuming for the sake of argument that the “judicial power” clause offers a limitation on judicial power and is implicated here, *Hart* next proceeds to attack the historical analysis in *Anastasoff*. Before doing so, however, it foists upon *Anastasoff* a false premise, one that *Anastasoff* does not require. That is, *Hart* suggests that to succeed in its constitutional analysis, *Anastasoff* must demonstrate that the Framers understood a rigidity of precedent similar to that present in the federal court system today.<sup>413</sup> The opinion then proceeds to demonstrate that the Framers’ understanding of precedent was not nearly as rigid.<sup>414</sup> However, the analysis in *Anastasoff* does not rely on a claim that the Framers held a view of precedent identical (in terms of rigidity or any other factor) to that followed in the courts today; it is focused on whether the act of the federal courts in issuing non-precedential opinions falls outside what the Framers would have considered “judicial power.”<sup>415</sup>

After all of that, the court in *Hart* conceded the point critical to *Anastasoff*’s analysis (that precedent was well-established at the time of the Constitution’s framing), while contesting a point that is immaterial (the precise strictness with which precedent was then applied):

While we agree with *Anastasoff* that the principle of precedent was well established in the common law courts by the time Article III of the Constitution was written, we do not agree that it was known and applied in the strict sense in which we apply binding authority today.<sup>416</sup>

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413. *Id.* at 1162-66.

414. *Id.*

415. *Anastasoff*, 223 F.3d at 903 (concluding that “as the Framers intended, the doctrine of precedent limits the ‘judicial power’ delegated to the courts in Article III”).

416. *Hart*, 266 F.3d at 1174.

The *Hart* analysis thus misses the larger point. The constitutional argument in *Anastasoff* is not that the Framers understood strict, binding, horizontal and vertical precedent between and among the Supreme Court, the Courts of Appeals, and the District Courts (only the first of which existed explicitly at the time);<sup>417</sup> rather, it argues that the Framers understood and intended that each decision rendered by the federal courts would make law and contribute to the body of common law on which later decisions rest.<sup>418</sup> That is enough. The Framers were familiar with both limited publication and a less stringent meaning of precedent than is now applied, but they did understand, and arguably intended, that the decisions of the courts, whatever their individual and cumulative worth, would be added to the common law and would then shape the law of this nation. Instead, by present practice in most circuits, an average of eighty percent of all decisions are removed from the body of common law.<sup>419</sup>

In addition, the court in *Hart* conflates the issues of publication and precedent throughout its discussion of the history.<sup>420</sup> For example, the court takes pains to describe the inadequacies of the early common law and founding-era case reports and notes that the increased quality of case reports led to an increasing rigidity of precedent.<sup>421</sup> From this, the court argues that the era before quality reports was one without an understanding of precedent.<sup>422</sup> This unnecessarily confuses the

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417. "Horizontal precedent" refers to the binding power of decisions of a coordinate-level court, and "vertical precedent" refers to the binding power of a superior-level court.

418. *Anastasoff*, 223 F.3d at 904-05. The relevant language bears quoting in full:

[W]e stress that we are not here creating some rigid doctrine of eternal adherence to precedents. Cases can be overruled. Sometimes they should be. On our Court, this function can be performed by the en banc Court, but not by a single panel. If the reasoning of a case is exposed as faulty, or if other exigent circumstances justify it, precedents can be changed. When this occurs, however, there is a burden of justification. The precedent from which we are departing should be stated, and our reasons for rejecting it should be made convincingly clear. In this way, the law grows and changes, but it does so incrementally, in response to the dictates of reason, and not because judges have simply changed their minds.

*Id.*

419. *Judicial Business Table S-3*, *supra* n. 6.

420. *Hart*, 266 F.3d at 1162-66.

421. *Id.* at 1166-69.

422. *Id.*

two issues of publication and precedent. While the improved accuracy and ubiquity of case reports can be credited as a factor in strengthening the concept of precedent within the common law,<sup>423</sup> it does not follow logically that precedent was unknown or impossible in the face of limited publication.<sup>424</sup>

The crux of the *Hart* decision reveals the most critical point of disagreement between the two cases. *Anastasoff* relies on the assumption that cases are decided on the law and left to future panels to apply to later cases, thus creating the law.<sup>425</sup> Conversely, the *Hart* opinion relies on the assumption that courts rule in order to develop a coherent and internally consistent body of case law.<sup>426</sup> If the *Hart* theory is correct, which would mean that judges are—and ought to be—deciding prospectively which of their decisions are law and which are not for the purpose of crafting a body of coherent case law, this “starkly reverses centuries of common law tradition.”<sup>427</sup>

#### 4. The System Advocated in *Anastasoff* is Unworkable.

Finally, the court in *Hart* makes its pragmatic argument that writing a precedential opinion is “an exacting and extremely time-consuming task.”<sup>428</sup> This overstates the importance of a lengthy, dissertational opinion, which is not the sine qua non for all precedential cases. Courts are bound by what earlier courts have done, not what they have said, and in many cases a short description of the decision, the authority relied upon, and the operative facts that bring this case within the ambit of the prior authority will be entirely sufficient.<sup>429</sup> In addition, while the pragmatic concern is undeniable, the rulemakers have avoided

423. Allen, *supra* n. 38, at 230 (pointing out the importance to an eighteenth-century judge of establishing a reporter’s reliability). See generally Berring, *supra* n. 120.

424. See Section III.D., *supra*.

425. *Anastasoff*, 223 F.3d at 905 (characterizing the creation of new decisional law as incremental); accord Cappalli, *supra* n. 5, at 773 (explaining that it is the precedent-applying court that determines a decision’s precedential effect); Llewellyn, *supra* n. 327, at 52, 63-66 (noting that it is the precedent-applying court that determines the scope of the precedent-writing court’s decision, the words used by the precedent-writing court notwithstanding).

426. *Hart*, 266 F.3d at 1176.

427. Cappalli, *supra* n. 5, at 772.

428. *Hart*, 266 F.3d at 1177.

429. See e.g. Cappalli, *supra* n. 5, at 771-72.

the jurisprudential in favor of the pragmatic for far too long. Judge Arnold states this view eloquently in *Anastasoff*:

It is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision. We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as a precedent. If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid. At bottom, rules like our Rule 28A(i) assert that courts have the following power: to choose for themselves, from among all the cases they decide, those that they will follow in the future, and those that they need not. Indeed, some forms of the non-publication rule even forbid citation. Those courts are saying to the bar: "We may have decided this question the opposite way yesterday, but this does not bind us today, and, what's more, you cannot even tell us what we did yesterday." As we have tried to explain in this opinion, such a statement exceeds the judicial power, which is based on reason, not *fiat*.<sup>430</sup>

The Eighth Circuit's then-current rule served to bar citation of unpublished opinions, thus hiding them, not in fact, but in legal effect, from the litigants' and courts' use. New Rule 32.1 allows the litigants to tell the court what it has done yesterday, but it does nothing to resolve the underlying question of how a court must treat its prior decisions.<sup>431</sup>

## VI. CURRENT STATUS OF THE ARTICLE III DEBATE

The final chapter on this constitutional debate has not yet been written, for *Anastasoff* was vacated as moot on other grounds,<sup>432</sup> and *Hart* answered the question only for the Ninth Circuit. Though Rule 32.1 addresses the citation issue, the

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430. *Anastasoff*, 223 F.3d at 904 (italics in original).

431. See Fed. R. App. P. 32.1.

432. *Anastasoff*, 235 F.3d 1054.

underlying issue of precedential status remains.<sup>433</sup> Many believe, as the dissenting judges of the Tenth Circuit did back in 1986 when they opposed the practice of issuing non-precedential opinions, that

[e]ach ruling, published or unpublished, involves the facts of a particular case and the application of law—to the case. Therefore all rulings of this court are precedents, like it or not, and we cannot consign any of them to oblivion. . . . 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.<sup>434</sup>

But the Supreme Court has not addressed the issue, though numerous petitions for certiorari have been filed on it,<sup>435</sup> and at least three Justices have expressed a view of the history of precedent similar to that described by Judge Arnold.<sup>436</sup>

433. Fed. R. App. P. 32.1, advisory comm. n.

434. Re: Rules of U.S. Court of Appeals for Tenth Circuit. Adopted Nov. 18, 1986, 955 F.2d 36, 36-38 (1992) (Halloway, Barrett, & Baldock, JJ. dissenting) (citation and footnote omitted).

435. Twice during the early stages of limited publication and citation, the Supreme Court chose not to address the issue. See *Do-Right Auto Sales v. U.S. Ct. of Appeals*, 429 U.S. 917 (1976) (denying writ of mandamus filed following Seventh Circuit's striking of citation to unpublished opinion from party's brief); *Browder v. Dir., Dept. of Correction*, 434 U.S. 257 (1978) (after granting certiorari on publication issue, Court did not address it). See also Dunn, *supra* n. 270, at 142-43 (discussing arguments and opinions in *Do-Right*); Br. of Petr. at 7, 50-56, *Browder v. Dir., Dept. of Correction*, 434 U.S. 257 (1978), 1977 WL 204850 (indicating that a court's "inherent power to withhold any of its opinions from publication and to a priori deprive such opinions of precedential value" was among the questions presented in *Browder*, and then raising arguments against the non-publication policies of the courts below). See also Cleveland, *supra* n. 291.

436. *Rogers v. Tenn.*, 532 U.S. 451, 472 n. 2 (2001) (Scalia, Stevens, & Thomas, JJ. dissenting) ("[t]he near-dispositive strength Blackstone accorded *stare decisis* was not some mere personal predilection. Chancellor Kent was of the same view: 'If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have a *right* to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it.' 1 J. Kent, Commentaries \*475-\*476 (emphasis added). See also Hamilton's statement in *The Federalist*: 'To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out

Moreover, the rule-making body for the federal courts has consistently avoided the issue.<sup>437</sup> This difference of opinion remains unresolved.

Other Constitutional interpretive doctrines exist, beyond the originalist battlefield on which both *Anastasoff* and *Hart* engaged this issue. Those modes of interpretation could be applied to the issue now that the related issue of citation of unpublished opinions has been resolved by Rule 32.1, and it is time for courts, rulemakers, and commentators to return their attention to the core of the matter: precedent. At least one aspect of that issue of precedent involves resolving the question of whether the issuance of non-precedential opinions lies within or without the “judicial power” granted to the federal courts. But consideration of that issue does not raise the only constitutional infirmity of the practice.

### *A. Equal Protection*

In addition to the Article III judicial power argument, it has been suggested that the scheme of declaring some decisions non-precedential violates the Equal Protection Clause.<sup>438</sup> The gist of this claim is that the practice treats similarly situated litigants in a disparate manner.<sup>439</sup>

The core guarantee of the Equal Protection clause is that similarly situated persons should be treated alike,<sup>440</sup> and the Court has repeatedly reaffirmed that Fifth and Fourteenth

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their duty in every particular case that comes before them.’ The Federalist No. 78, p. 471 (C. Rossiter ed. 1961)” (emphasis in original).

437. *Standards for Publication*, *supra* n. 4, at 20-21. See also Fed. R. App. P. 32.1 advisory comm. n.

438. See generally *e.g.* Strongman, *supra* n. 135; Wade, *supra* n. 354; Miller, *supra* n. 354.

439. Strongman, *supra* n. 135, at 220.

440. See *e.g. Plyler v Doe*, 457 U.S. 202, 216 (1982) (citing *F.S. Royster Guano Co. v. Va.*, 253 U.S. 412, 415 (1920)). Equal protection is guaranteed by the Fourteenth Amendment in regard to state action and the Fifth Amendment in regard to federal action. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (noting that “it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government” through the Fifth Amendment than on state governments through the Fourteenth).

Amendment equal protection are congruent.<sup>441</sup> From this it follows that the federal courts must treat similarly situated litigants alike unless an appropriate justification for disparate treatment exists.

Equal protection involves twin inquiries: (1) the standard of review applicable to the government's conduct, and (2) whether the challenged discrimination is sufficiently justified under that standard. The standard of review applicable to the issuance of non-precedential opinions is arguably strict scrutiny, because this is the standard applied to cases involving a suspect class or the inhibition of a fundamental right.<sup>442</sup> If so, the conduct at issue—the use of non-precedential opinions—is not sufficiently justified to meet that standard. The practice of designating opinions as unpublished and non-precedential certainly implicates a fundamental right, and it might also be regarded as involving a suspect class.<sup>443</sup>

### *1. Unequal treatment of similarly situated parties.*

The discrimination that occurs in a regime of non-precedential opinions is that similarly situated litigants, indeed even the same litigant in the same factual setting, may be treated differently by the courts. This is exemplified by a pair of cases in which the Dallas Area Rapid Transit authority received diametrically opposed decisions from the Fifth Circuit without explanation in a span of just three years. In 1999, a district court held that “DART is a political subdivision of the state of Texas, and is therefore immune from suit under the Eleventh

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441. See e.g. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n. 2 (1975) (pointing out that “[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment,” and citing *Schlesinger v. Ballard*, 419 U.S. 498 (1975), *Jimenez v. Weinberger*, 417 U.S. 628 (1974), and *Frontiero v. Richardson*, 411 U.S. 677 (1973)).

442. See e.g. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972) (applying strict scrutiny to a statute limiting free speech).

443. See e.g., Pether, *supra* n. 5, at 1444-1445 (citing M. Margaret McKeown, J., U.S. Ct. of App. for the 9th Cir., *What is “Authority”?* Panel Presentation, Assoc. of Am. Law Schools (Jan. 3-6, 2001) (suggesting a “private history” of the origins of the limited publication initiative rooted in screening out civil rights and prisoner appeals)).

Amendment,”<sup>444</sup> which holding the Fifth Circuit affirmed without comment in an unpublished opinion.<sup>445</sup> The Supreme Court denied certiorari, so the litigants in DART (and similarly situated litigants) must have felt about as secure as possible that the rule establishing their immunity was settled in the Fifth Circuit. So it seemed fitting that when the question of DART’s Eleventh Amendment immunity was again brought before the district court in 2000, the court held that “[i]t is firmly established that DART is governmental unit or instrumentality of the State of Texas” and therefore entitled to Eleventh Amendment immunity,<sup>446</sup> relying on the Fifth Circuit’s affirmance in *Anderson* just one year prior. However, this time the Fifth Circuit held that DART was not entitled to Eleventh Amendment immunity, despite Fifth Circuit case law that dated back to 1986.<sup>447</sup>

The Fifth Circuit was wholly dismissive of the prior result in *Anderson* (and two similar cases), stating that “[a]lthough all three cases upheld DART’s immunity from suit, they are neither binding nor persuasive in this context.”<sup>448</sup> So, because the prior case holding DART immune was unpublished, it was not accorded precedential weight under the relevant Fifth Circuit Rule,<sup>449</sup> and the court felt free to depart from the earlier case without distinguishing it in some fashion (which it could not because the legally relevant facts were identical) or overruling the law on which the case was based.<sup>450</sup> Though the Fifth Circuit denied an en banc hearing, several judges dissented:

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444. *Anderson v. Dallas Area Rapid Transit*, No. CA3:97-CV-1834-BC (N.D. Tex. Sept. 29, 1998), *aff’d without opinion* 180 F.3d 265 (5th Cir. 1999) (per curiam) (unpublished), *cert. denied* 529 U.S. 1062 (1999). Note that the district court’s unpublished opinion is available at 1998 U.S. Dist. LEXIS 15493; the material quoted from it in the text above appears at \*24.

445. *Anderson*, 180 F.3d 265.

446. *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, 260-61 (5th Cir. 2001) (Smith, Jones, & DeMoss, JJ., dissenting from denial of petition for rehearing en banc) [hereinafter *Williams II*].

447. *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315, 318-19 (5th Cir. 2001).

448. *Id.* at 319.

449. Fifth Circuit Rule 47.5.4, then in effect, provided that “[u]npublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of *res judicata*, collateral estoppel or law of the case.”

450. *Williams*, 242 F.3d at 322 (holding that “[t]he district court therefore erred in finding DART immune from suit”).



The refusal of the en banc court to rehear this case en banc is unfortunate, for this is an opportunity to revisit the questionable practice of denying precedential status to unpublished opinions. . . . I respectfully dissent from the denial of rehearing en banc, which would have given this court an opportunity to examine the question of unpublished opinions generally, an issue that is important to the fair administration of justice in this circuit.<sup>451</sup>

The dissenters recognized the fundamental unfairness that has occurred in treating DART differently in two identical cases decided within two years, based not on factually distinguishing factors or a change in the governing law, but merely the whim of one panel choosing not to publish. The fact that the party was DART in both cases makes it apparent that the defendant was not only similarly situated in each case, but as far as legally relevant facts go, it was identically situated. Yet, it was treated differently. The dissent in *Williams* explains the fundamental injustice aptly:

If the *Anderson* panel had published its opinion, it would have been binding on the panel in the instant case—*Williams*—and the result here would have been different. Based, however, on the mere fortuity that the *Anderson* panel decided not to publish, our panel in *Williams* was free to disagree with *Anderson* and to deny to DART the same immunity that *Anderson* had conferred on it less than two years earlier.

What is the hapless litigant or attorney, or for that matter a federal district judge or magistrate judge, to do? The reader should put himself or herself into the shoes of the attorney for DART. That client is told in May 1999, by a panel of this court in *Anderson*, that it is immune, on the basis of a “comprehensive and well-reasoned opinion.” Competent counsel reasonably would have concluded, and advised his or her client, that it could count on Eleventh Amendment immunity.

Then, in March 2000, in the instant case, a federal district judge, understandably citing and relying on the circuit’s decision in *Anderson*, holds that “[i]t is firmly established that DART is a governmental unit or instrumentality of the

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451. *Williams II*, 256 F.3d at 260 (Smith, Jones, & DeMoss, JJ., dissenting).

state of Texas.” In February 2001, however, a panel, containing one of the judges who was on the *Anderson* panel, reverses and tells DART that, on the basis of well-established Fifth Circuit law from 1986, it has no such immunity. One can only wonder what competent counsel will advise the client now.<sup>452</sup>

Indeed. How did the *Anderson* panel affirm such a plainly stated grant of immunity in 1999 in the face of case law dating back to 1986? How could the *Williams* panel, in fairness and accord with equal protection, treat DART differently without distinguishing or reconciling the decision in *Anderson*? These questions remain unanswered because the petition for rehearing en banc was denied,<sup>453</sup> as was the petition for certiorari.<sup>454</sup>

Perhaps one of the most telling tales of unequal treatment can be found in the Ninth Circuit’s decision in *United States v. Rivera-Sanchez*,<sup>455</sup> in which the Ninth Circuit examined an issue left unresolved following the Supreme Court’s decision in *Almendarez-Torres v. United States*.<sup>456</sup> The Ninth Circuit was forced to admit in *Rivera-Sanchez* that no less than twenty prior panels had issued unpublished decisions on the matter at issue, and those decisions split on the answer: Eleven cases were remanded for re-sentencing, six were remanded for correction of the judgment, and three were remanded for consideration of the proper standard under *Almendarez*.<sup>457</sup> For three years following *Almendarez*, these Ninth Circuit cases had escaped review while providing different answers to the same legal question. If not for the *Rivera-Sanchez* court’s request during oral argument that

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452. *Williams II*, 256 F.3d at 260-61 (Smith, Jones, & DeMoss, J., dissenting from denial of petition for rehearing en banc).

453. *Williams II*, 256 F.3d 260.

454. *Dallas Area Rapid Transit v. Williams*, 534 U.S. 1042 (2001). The reader will note that the Eighth Circuit’s decisions in *Anastasoff* and *Christie* present a similar issue, albeit one with a better outcome. The *Anastasoff* court held itself bound by the earlier unpublished decision in *Christie*, but it could easily have chosen otherwise even though the complaining taxpayers in the two cases were similarly situated. See §V.D.2, *supra*.

455. 222 F.3d 1057 (9th Cir. 2000).

456. *Almendarez-Torres v. U.S.*, 523 U.S. 224 (1998) (leaving unresolved whether a district court must re-sentence a defendant convicted of illegal re-entry following a deportation under 8 U.S.C. §1326(a) and §1326(b)(2), or can merely correct the judgment of conviction).

457. *Rivera-Sanchez*, 222 F.3d at 1062-63.

counsel prepare and provide a list of unpublished cases, this unequal disposition of cases would probably have continued.<sup>458</sup>

It is ironic that the Ninth Circuit panel's request for counsel's citation of those unpublished decisions and its own subsequent citation of them was in direct contravention of its then-current rule on unpublished cases, which provided that "[u]npublished dispositions and orders of this Court may not be cited to or by the courts of this circuit,"<sup>459</sup> except in several circumstances that did not apply to Rivera-Sanchez's situation. The confusion within the circuit was resolved only because the Ninth Circuit itself ignored its non-citation rule.

These are not isolated examples. In fact, "[e]mpirical evidence suggests that cases such as *Christie* and *Anderson* are more common than one might think."<sup>460</sup> For example, one study of unpublished opinions found that publication decisions, combined with limited citation/precedent rules, have an effect on the substance of the law, and that unpublished decisions are not simply routine applications of the law.<sup>461</sup> Instead, they contain "a noticeable number of reversals, dissents, or concurrences," and appear to suggest "significant associations between case outcome and judicial characteristics."<sup>462</sup>

The authors of this study continue by pointing out the dangers inherent in the practice:

Our findings thus yield troubling public policy implications that make the constitutional issue posed by the Eighth Circuit more stark. We know that at least some unpublished decisions reach results with which other judges would disagree, and that judges and courts also vary in their tendency to publish outcomes. It follows that denying precedential value to unpublished opinions gives judges discretion to decide which of their rulings will bind future

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458. *Id.*

459. For information about the former version of the Ninth Circuit rule, see Serfass & Cranford, *supra* n. 165, at 255 & 255 n. 6 (referring to text of interim rule and indicating that former version (in force when *Rivera-Sanchez* was decided) prohibited citation of unpublished decisions).

460. *Williams II*, 256 F.3d at 262 (Smith, Jones, and DeMoss, J., dissenting from denial of petition for rehearing en banc).

461. Merritt & Brudney, *supra* n. 328, at 120.

462. *Id.*

decision-makers—and sets the stage for inconsistent treatment of like cases.<sup>463</sup>

It is this inconsistent treatment of like cases that is the most troubling from an Equal Protection perspective, because “failing to give unpublished opinions precedential effect raises the very specter described by the Eighth Circuit: that like cases will be decided in unlike ways.”<sup>464</sup> Clearly, the idea that these unpublished opinions are issued in easy cases involving well-established legal principles that add nothing to the body of law and can safely be ignored rests on faulty empirical grounds.<sup>465</sup>

Given that unequal treatment exists, this government action should be subjected to the appropriate scrutiny and its justifications examined. The most appropriate standard is strict scrutiny, and the process of declaring certain decisions non-precedential cannot meet the justification standard required.

*2. Strict scrutiny is the appropriate standard, and it is not met here.*

The appropriate standard for such discrimination is strict scrutiny because the unequal treatment here inhibits a fundamental right. The right to a fair trial is certainly a fundamental right: “Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by ‘impartial’ jurors,”<sup>466</sup> and the Supreme Court has repeatedly held other concerns, such as the right to counsel, to be important in protecting the “fundamental right to a fair trial.”<sup>467</sup> Among the

463. *Id.* at 120-21.

464. *Id.* (citing *Anastasoff*).

465. Boggs & Brooks, *supra* n. 288, at 20-21 & 21 n. 17. See also Stienstra, *supra* n. 8, at 37 (noting that less than half the circuits routinely publish reversals); Hannon, *supra* n. 296, at 215-24 (noting the significant number of unpublished opinions involving reversals, dissents, or concurrences).

466. *Gentile v. St. Bar of Nev.*, 501 U.S. 1030, 1075 (Rehnquist, C.J., White, Scalia & Souter, JJ., dissenting).

467. See e.g. *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127 (1994) (indicating that peremptory challenges are a means to ensure fundamental right to fair trial); *Lockhart v. Fretwell*, 506 U.S. 364 (1993) (recognizing that right to counsel exists to protect fundamental right to fair trial); *Chandler v. Fla.*, 449 U.S. 560, 577 (1981) (holding that judicial control of media coverage of court proceedings is constitutional when exercised to “protect the fundamental right of the accused to a fair trial”).

various other protections in service of an overall fair trial, the court has expressed a concern for “equal justice.”<sup>468</sup> This equal justice is denied to parties before the court who, depending on the day they arrive in court, receive different justice.<sup>469</sup>

The government cannot meet the standard of demonstrating that this discrimination inhibiting a fundamental right is necessary to achieve a compelling government interest, and that it could not attain the goal through any means less restrictive of the right.<sup>470</sup> While the interest in dealing with the volume of cases filed in federal court is compelling in a lay sense, it does not meet the high standard the Supreme Court has required for a compelling government interest. For example, the Court has rejected claims that administrative efficiency was a compelling government interest sufficient to justify discrimination based on gender: “[O]ur prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, ‘the Constitution recognizes higher values than speed and efficiency.’”<sup>471</sup>

Likewise, the Court has struck down a statutory provision that inhibited the fundamental right to travel by imposing a one-year waiting period on welfare benefits.<sup>472</sup> The Court applied strict scrutiny, stating that “[s]ince the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest.”<sup>473</sup> The Court rejected arguments that administrative efficiency or the budgetary benefits of the waiting period were compelling state

468. Strongman, *supra* n. 135, at 220 (citing *Griffin v. Ill.*, 351 U.S. 12, 19 (1956) (noting that the United States seeks to afford equal justice to all and special privileges to none in administering its laws)).

469. Compare e.g. *Williams II*, 256 F.3d 260, with *Anderson*, No. CA3:97-CV-1834-BC (N.D. Tex. 1998).

470. In this analysis, the government bears the burden of demonstrating both the necessity of its action and the compelling governmental interest that action furthers. Erwin Chemerinsky, *Constitutional Law* 767 (3d ed. Aspen 2006) (pointing out that “[u]nder strict scrutiny it is not enough for the government to prove a compelling purpose behind the law; the government must also show that the law is *necessary* to achieve that objective” (emphasis in original)).

471. *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (quoting *Stanley v. Ill.*, 405 U.S. 645, 656 (1972)).

472. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

473. *Id.* at 638 (emphasis in original).

interests in the face of such a fundamental right.<sup>474</sup>

We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification.<sup>475</sup>

Moreover, even if a compelling state interest can be found here, the courts' non-precedent policies (which now apply to eighty percent of federal circuit decisions) were not narrowly tailored.<sup>476</sup> First, the claim that these cases are not lawmaking is belied by the high percentage of unpublished opinions that are or contain reversals, dissents, and concurrences.<sup>477</sup> Second, the courts could accomplish their goal of streamlined opinion writing by adopting a brief opinion format—one that sets forth the bare minimum necessary to explain the prior precedent under which a particular case falls, the relevant facts that bring it within that case's control, and the result.<sup>478</sup> Creating a two-tiered, two-track system of adjudicating cases and rendering opinions is not a good fit.

As with the core Article III issue, this potential constitutional infirmity in the federal courts of appeals' designation of the vast majority of their decisions as non-precedential should be further examined and pressed in court.

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474. *Id.* at 636-38.

475. *Id.* at 633 (footnote omitted).

476. The requirement that a government action is narrowly tailored means that the action fits the compelling interest with "greater precision than any alternative means." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n. 6 (1986) (citing John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 727 n. 26 (1974)).

477. See *Boggs & Brooks*, *supra* n. 288, at 20-21. See also *Stienstra*, *supra* n. 8, at 37 (noting that more than half the circuits did not automatically publish opinions reversing decisions below); *Hannon*, *supra* n. 296, at 215-24 (noting the significant number of unpublished opinions involving reversals, dissents, or concurrences).

478. *Cappalli*, *supra* n. 5, at 795.

Because of the importance of the right to a fair trial, this issue should be decided by the United States Supreme Court.

### *B. Due Process*

As with the Equal Protection claim, which has been raised by commentators but not advanced before a court, it has been suggested that the scheme of declaring some decisions non-precedential violates Due Process requirements.<sup>479</sup> This claim proceeds from the statement in the Due Process clause that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law,”<sup>480</sup> which has been held to contain both substantive and procedural requirements.<sup>481</sup>

The substantive due process objection is similar to the equal protection objection outlined above.<sup>482</sup> The right to a fair trial, as embodied in the requirement that courts should be bound to follow prior decisions (or distinguish them or change the law), is arguably a fundamental right and “implicit in the concept of ordered liberty” as set forth in the Constitution.<sup>483</sup> The concept that a common law court would both look to prior decisions and make decisions knowing that they would be treated as precedential by later courts is intrinsic to our judicial

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479. See generally Wade, *supra* n. 354. See also Miller, *supra* n. 354, at 204; Analisa Pratt, Student Author, *A Call for Uniformity in Appellate Courts’ Rules Regarding Citation of Unpublished Opinions*, 35 Golden Gate U.L. Rev. 195, 214-19 (2005).

480. U.S. Const. amend V.

481. See e.g. Wade, *supra* n. 354, at 717; Pratt, *supra* n. 479, at 214.

482. The Fifth and Fourteenth Amendments are the source of both substantive due process and equal protection rights, and the two types of protections are frequently found concurrently. Both involve assessing the fundamental nature of the right asserted, the justification of the government action, and the “fit” or burden of the government action. Often the Court applies both, and finds the requirements of both to be met, but sometimes the Court itself splits on which protection is a better analysis for a given problem. Compare e.g. *Zablocki v. Redhail*, 434 U.S. 374, 382 (1978) with *id.* at 392 (Stewart, J. concurring) (using an equal protection approach for the majority opinion, but having the concurrence apply a due process analysis). While the difference is essentially one of phrasing, the distinction is typically whether the inhibition of a right applies to everyone (due process) or only to some (equal protection). Under either approach, depending upon who is viewed as harmed by the non-precedential opinion regime, the core analysis and outcome are the same.

483. See e.g. *Griswold v. Conn.*, 381 U.S. 479, 500 (1965) (Harlan, J. concurring).

system.<sup>484</sup> The practice of the court, the argument proceeds, of issuing non-precedential opinions infringes upon that right both as to the party whose decision is made without that process and as to those who would seek to rely upon that decision in the future.<sup>485</sup> If, then, the right is fundamental and the government's action impinges on it, that action is subject to strict scrutiny and must be justified by showing that the action is the least burdensome means of achieving a compelling interest.<sup>486</sup> As discussed above in the equal protection analysis, the practice of declaring opinions in advance to hold no precedential weight is not a the least burdensome means of achieving any compelling state interest.

The procedural due process requirement guarantees that people deprived of life, liberty, or property are entitled to a reasonable level of judicial or administrative process.<sup>487</sup> This "duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions" serves "not only to ensure abstract fair play to the individual," but "[i]ts purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property."<sup>488</sup> In setting the standard for what process is required, the Supreme Court has relied upon traditional common law procedures, stating recently in *Honda Motor Co., Ltd. v. Oberg*:

As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis. . . . Because the basic procedural protections of

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484. See Section III, *supra*.

485. Cf. *Loritz v. U.S. Ct. of Appeals for the 9th Cir.*, 382 F.3d 990 (9th Cir. 2004) (finding that a litigant whose case was disposed of by unpublished opinion lacked Article III standing because he was asserting due process rights of later litigants). *But see id.* at 992-93 (Beam, J., concurring) (stating that the necessary standing is created by plaintiff's argument that prior unpublished case law, if it were precedential, would dictate a different outcome).

486. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (stating that classifications "affecting fundamental rights . . . are given the most exacting scrutiny" (citations omitted)); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 672 (1966) (pointing out that the Court has "long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined").

487. See e.g. *Wade*, *supra* n. 354, at 717; *Pratt*, *supra* n. 479, at 214.

488. *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972).



the common law have been regarded as so fundamental, very few cases have arisen in which a party has complained of their denial. In fact, most of our due process decisions involve arguments that traditional procedures provide too little protection and that additional safeguards are necessary to ensure compliance with the Constitution. . . .

Nevertheless, there are a handful of cases in which a party has been deprived of liberty or property without the safeguards of common-law procedure. . . . When the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process.<sup>489</sup>

In *Honda*, the Supreme Court invalidated, on due process grounds, Oregon's departure from the well-established common law procedure of judicial oversight of punitive damage awards.<sup>490</sup> In so doing, the Court examined this longstanding check on excessive awards, which has been the common law practice "for as long as punitive damages have been awarded,"<sup>491</sup> reviewed the history of judicial oversight of punitive damage verdicts,<sup>492</sup> and then placed its decision as soundly within a long line of cases finding the Fifth (and concomitant Fourteenth) Amendment due process guarantees violated by procedures removing this "well-established common-law protection."<sup>493</sup> The Court held that the protection was deeply entrenched despite minor variations in its form throughout common law history,<sup>494</sup> and that the nature of the

489. 512 U.S. 415, 430 (1994) (internal citations omitted). See also *Wade*, *supra* n. 354, at 717; *Pratt*, *supra* n. 479, at 214.

490. *Honda*, 512 U.S. at 434-35 (recognizing that "[a] decision to punish a tortfeasor by means of an exaction of exemplary damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment").

491. *Id.* at 421.

492. *Id.* at 421-29.

493. *Id.* at 430 (citing *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856); *Tumey v. Ohio*, 273 U.S. 510 (1927); *Brown v. Miss.*, 297 U.S. 278 (1936); *In re Winship*, 397 U.S. 358, 361 (1970); *Burnham v. Super. Ct.*, 495 U.S. 604 (1990); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991)).

494. *Id.* at 434-35 & 435 n. 12 (noting that the strength of judicial deference to jury verdicts and the extent to which judicial review of jury verdicts was contested varied in the eighteenth and nineteenth centuries, yet finding the practice well-established overall despite these differences). See also *id.* at 421-26 (detailing the established but not always precisely identical practice of judicial review of jury verdicts).

protection, as part of due process, created an “insurmountable presumption of unconstitutionality because there was no adequate replacement procedure and no societal transformation justifying the departure.”<sup>495</sup> The Court contrasted the setting of *Honda*, in which no societal transformation dictated the change, with the setting of *International Shoe Co. v. Washington*,<sup>496</sup> in which modern changes in communication, transportation, and business dealings made litigation in a distant forum less onerous and more necessary.<sup>497</sup> Similarly, the Court contrasted the setting in *Honda*, in which no adequate alternative protection was given, with that in *Hurtado v. California*,<sup>498</sup> in which a neutral magistrate was substituted in the criminal charging process for the common law grand jury.<sup>499</sup>

In regard to the issue of denying precedential status to unpublished decisions, *Honda* provides, by analogy, an argument that the practice violates procedural due process. Like the judicial oversight of punitive damage verdicts in *Honda*, the precedential status of all opinions:

(1) is deeply rooted in common law tradition; (2) creates a presumption of unconstitutionality if removed; (3) lacks an adequate replacement procedure; and (4) was not abrogated in response to constitutionally justifiable societal transformation.<sup>500</sup>

Thus, the practice of denying all decisions precedential status is as violative of due process as is the denial of judicial oversight of punitive damage verdicts. The practice of according all decisions precedential status is deeply rooted in the common law tradition.<sup>501</sup> Much like the practice of judicial oversight examined in *Honda*,<sup>502</sup> the exact contours of the common law practice in connection with unpublished opinions have not been rigid or unchanging, but the core of the protection has existed from early common law and has been adopted into modern

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495. Wade, *supra* n. 354, at 718 (citing *Honda*).

496. 326 U.S. 310 (1945).

497. *Honda*, 512 U.S. at 431.

498. 110 U.S. 516 (1884).

499. *Honda*, 512 U.S. at 431.

500. Wade, *supra* n. 354, at 722 (citing *Honda*).

501. See Section III, *supra*.

502. *Honda*, 512 U.S. at 434.

practice. Just as the Court in *Honda* rejected the claim that a lack of perfect uniformity in application of the rule undermines the rule itself, here the Court should reject the claim that the practice of adhering to precedent has changed over time.<sup>503</sup> In some form sufficient to establish the principle that all decisions of a common law court form precedent to which that court looks in making future cases, the practice of referring to past cases stretches back farther and is of more fundamental importance than is the judicial oversight of punitive damage awards.<sup>504</sup>

The removal of the practice of according precedential status to all decisions creates a presumption of unconstitutionality that cannot be overcome. For a reviewing court to find such an action constitutional, the government must show that societal transformation has necessitated such a change or that an adequate replacement process has been put in place,<sup>505</sup> neither of which applies here.

While the booming caseload of the federal courts presents an argument for societal transformation of a type, that argument is flawed in two respects. First, unlike the change identified in *International Shoe*, the change here is intrinsic to the court, rather than to the society it judges. If such an internal need could be considered a sufficient societal transformation, the court would always be able to offer such a justification by explaining, “we need the change.” Second, the practices within the legal system demonstrate a resilient insistence on the citation of and reliance on unpublished decisions as some form of precedent, even in the face of rules to the contrary. Studies have shown that both lawyers and courts have frequently relied upon and cited unpublished decisions, even when circuit rules restricted them.<sup>506</sup> This suggests that it is not that society has moved on,

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503. *Id.*

504. Wade, *supra* n. 354, at 723 (pointing out that “[t]he history of lawyers citing to all prior judicial decisions is much lengthier than the comprehensive punitive damage review considered ‘deeply rooted’ by the *Honda* Court” and that “[w]hereas the *Honda* Court traced the practice of punitive damage review to the mid-seventeenth century, the ability to cite prior decisions dates back four hundred years further—to the middle of the thirteenth century,” and then asserting that “[t]he long history of this citation procedure is sufficient to indicate a deeply-rooted common law practice in accord with *Honda*”).

505. *Honda*, 512 U.S. at 431-32.

506. See Reagan et al., *supra* n. 250, at 15-17 (reporting that a Federal Judicial Center survey of federal practitioners indicated widespread research of unpublished decisions and the perceived usefulness of those opinions). See also Robel, *Practice of Precedent*, *supra* n.

but that the courts themselves have abrogated this doctrine against societal interests. Finally, society has transformed in ways that cut against such a justification. The unpublished decisions of the federal courts of appeals are now uniformly citeable thanks to new Rule 32.1.<sup>507</sup> Such decisions are widely available in the *Federal Appendix*, on West's and LEXIS's online services, and on the courts' own websites.<sup>508</sup> Even with citation restrictions in place, past practice suggests that these opinions will be looked at and used.<sup>509</sup> If anything, society has pushed back against the encroachment on this traditional common law protection. Nor have any adequate alternate procedures been substituted. It is difficult to imagine what alternative procedure could be substituted to meaningfully replace the ability of litigants to rely upon a court's following its decisions from one case to the next absent some factual distinctions or changes in the law.

As with the other Constitutional questions surrounding the practice of issuing non-precedential opinions, this issue should be pressed by litigants and Supreme Court review sought (and granted). Even if none of these arguments is ultimately successful, and the Supreme Court decides that cases can be designated as non-precedential, the question remains as to whether they ought to be. That question embodies both pragmatic costs of denying some decisions precedential status and an inquiry into what we, as members of the legal community, perceive the purpose of courts and court decisions to be. While the issue of volume in the federal courts is apparent, declaration of some decisions as non-precedential is not a necessary response. Nor, in the minds of many, is it a desirable one.

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5, at 401 (indicating that "evidence suggests that lawyers and judges value these opinions despite the rules limiting citation," and that "[t]his valuation, in turn, suggests a cultural, rather than a rule-bound, conception of stare decisis"); *Working Papers*, supra n. 314, at 78 (revealing that nineteen percent of attorneys polled reviewed either "most or all" or "most or all in one or more areas of the law" and forty percent reported reviewing unpublished cases that come up during their research); Katsh & Chachkes, supra n. 338, at 301-02 (noting that a "prudent" lawyer researches unpublished opinions to mine the court's past practices, reasoning, and language regardless of publication or citation rules).

507. Fed. R. App. P. 32.1.

508. See generally Shuldberg, supra n. 150.

509. See Robel, *Practice of Precedent*, supra n. 5, at 404-09. See also Robel, *Myth*, supra n. 5, at 962 (noting that "some litigants can and do use these opinions").

*C. Pragmatic Objections to Precedential Status and Proposed Solutions*

Even if the Supreme Court were to resolve all of the above questions in favor of the practice of rendering non-precedential opinions, the answer of whether the courts may issue them does not resolve the question of whether they ought to issue them. The practice of issuing non-precedential opinions is a failed experiment in addressing the federal courts' volume issue. Litigants' and courts' continued use of unpublished opinions, even throughout a period of restricted citation, demonstrates that reliance upon prior decisions is deeply embedded in our legal culture and our rule-based legal system.<sup>510</sup> This legal culture is based on an expectation of consistency, development of the law through accretion of precedent, and analogical reasoning. With the enactment of Rule 32.1, which permits citation of unpublished decisions, the rules denying some decisions precedential status makes even less sense.<sup>511</sup> Permitting citation undercuts the presumption that less time can be spent on opinions merely because they are unpublished.<sup>512</sup> These decisions will be scrutinized, their reasoning adopted, and their authority urged upon the courts, whether as precedent or merely as past practice.<sup>513</sup>

Reasoning by analogy and appeal to precedent are part of life, both lay and legal.<sup>514</sup> Reliance upon past decisions is expected and practiced by lawyers, litigants, and judges alike.<sup>515</sup> Failure to respect these expectations about precedent, such as by declaring decisions not precedent *ex ante*, is harmful to the

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510. See generally *id.* & *id.*

511. Fed. R. App. P. 32.1.

512. See *Standards for Publication*, *supra* n. 4, at 18 (pointing out that “[a]n opinion that meets the needs of the parties . . . can be written with the assumption that the parties are familiar with the background of the case,” but that “[a]n opinion for the whole world cannot rest on such assumptions”).

513. See Robel, *Practice of Precedent*, *supra* n. 5, at 400. See also Robel, *Myth*, *supra* n. 5, at 962.

514. Schauer, *supra* n. 287, at 572.

515. See Robel, *Practice of Precedent*, *supra* n. 5, at 400. See also Robel, *Myth*, *supra* n. 5, at 962.

courts' public image and self-image alike.<sup>516</sup> While there are no easy solutions, there is merit in wading into the "morass of jurisprudence" surrounding the issue and taking a stand based on jurisprudential grounds:

It is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision. We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as a precedent. If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid.<sup>517</sup>

Solutions to this problem seem to fall into three categories. First, written opinions could be brief and limited to only the necessary information. Second, courts could take the time to write full discursive opinions and accept the backlogs. Third, Congress could act, on its own or in response to the above, to add federal judgeships or, more drastically, limit or alter the federal jurisdiction.

### *1. Legal Reasoning and Precedent*

Precedent is not merely a cornerstone of common law; it is inherent in the human experience. From the young child going off to first grade who proclaims that she ought to get a new backpack because her brother got a new backpack when he started first grade to the clerk who is unwilling to accept a filing by fax simply because he has never done so in the past, precedent is part of our sense of fairness and propriety. Even small children understand and naturally apply appeals to precedent as argument for what they want. This behavior continues into adulthood as we frequently justify our actions as in accordance with past practice or argue for others to alter their

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516. Pether, *supra* n. 5, at 1483-84; Reynolds & Richman, *No-Citation Rules*, *supra* n. 5, at 1199-1204.

517. *Anastasoff*, 223 F.3d at 904.

past practices in our favor. Indeed, the idea that someone is “setting a bad precedent” is part of the common vernacular.

In the American legal community, the importance of precedent is even greater.<sup>518</sup> At its core, the common law requires practitioners to analogize cases to determine applicable legal principles and whether they apply to given facts.<sup>519</sup> Llewellyn explains this well when he says:

We have discovered that rules *alone*, mere forms of words, are worthless. We have learned that the concrete instance, the heaping up of concrete instances, the present, vital memory of a multitude of concrete instances, is necessary in order to make any general proposition, be it rule of law or any other, *mean* anything at all.<sup>520</sup>

Declaring some decisions non-precedential merely because they apply the same rule of law applied in earlier cases deprives the law of these instances. It is from these instances that society can discern the strength and limits of the rule. It is exceedingly rare that a decision adds nothing to the law.<sup>521</sup> Each decision adds either a slight expansion of the rule to a certain set of facts, limitation of the law to a certain set of facts, or merely the weight of a newer and additional decision, which affirms the resilience of the rule. Each instance of applying law to facts, which the court has been charged with doing anyway, provides another example that can inform individuals in ordering their affairs as well as in evaluating whether to bring a similar challenge to court. This process of building and refining the common law comports with Lord Coke’s perception that the law would be “refined” by “long and continual experience,” with judges “declaring its principles with even greater precision and renewing it by application to the matter at hand.”<sup>522</sup> This process is being diminished by the growing body of non-precedential opinions.

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518. See generally e.g. Robel, *Practice of Precedent*, *supra* n. 5; Robel, *Myth*, *supra* n. 5.

519. Llewellyn, *supra* n. 327, at 66-69.

520. *Id.* at 12 (emphasis in original).

521. Arnold, *supra* n. 21, at 222-23.

522. Healy, *supra* n. 36, at 66 (citing John Greville Agard Pocock, *The Ancient Constitution and The Feudal Law* (Cambridge U. Press 1987)).

One commentator described the effect of this deprivation of precedent with a vivid metaphor, stating that “[t]he doctrine of precedent is like a pointillist painting with judicial opinions as the carefully placed points providing depth,”<sup>523</sup> and then noted that when some of the points are removed, the overall picture is made less distinct, its contours less clear.<sup>524</sup> The power of this metaphor is magnified by the extent to which non-publication has now expanded. Over eighty-four percent of all federal appellate decisions are now unpublished.<sup>525</sup> Imagine a pointillist painting missing eighty-four percent of its points! This principle is the same as Llewellyn’s “heaps”: The common law functions based on repeated applications of the rule of law, applications that provide fodder for inductive reasoning about what the rule is, and more critically, analogical reasoning about how the rule is (and will be) applied.<sup>526</sup> This is why scholarly writers talk of the common law being “deprived” of precedent,<sup>527</sup> and why Judge Arnold noted:

I would take the position that all decisions have precedential significance. To be sure, there are many cases that look like previous cases, and that are almost identical. In each instance, however, it is possible to think of conceivable reasons why the previous case can be distinguished, and when a court decides that it cannot be, it is necessarily holding that the proffered distinctions lack merit under the law. This holding itself is a conclusion of law with precedential significance. . . . Every case has some precedential value, maybe not much, but some.<sup>528</sup>

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523. Strongman, *supra* n. 135 at 195.

524. *Id.*

525. *Judicial Business, Table S-3, supra* n. 6, at 52 (showing the percent unpublished in the twelve-month period ending Sept. 30, 2006, to be 84.1).

526. Llewellyn, *supra* n. 327, at 12, 48-50.

527. Merritt & Brudney, *supra* n. 328, at 73 (noting that limited publication can “deprive litigants of useful precedent”). See also e.g. Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 Am. U. L. Rev. 757, 785-800 (1995) (describing consequences of limiting precedent); Foa, *supra* n. 335, at 338-40 (noting “loss” to bench and bar occasioned by Seventh Circuit rule).

528. Arnold, *supra* n. 21, at 222-23.



Whether it is exalted as by Blackstone<sup>529</sup> or feared as by Brutus,<sup>530</sup> the sense that what a court does sets a legal precedent that must then be followed or distinguished is fundamental to our legal system.<sup>531</sup> This fundamental nature is apparent in the actions of both lawyers and judges, who have continued to use all cases despite the last three decades' practice of limited publication, citation, and precedent.

## 2. *Judges and Lawyers Find Unpublished Cases Authoritative.*

Though some part of the case for limited citation has been made on freeing lawyers from the need to research the growing body of case law, the evidence suggests that lawyers are all too willing to undertake that search.<sup>532</sup> Likewise, limited publication rules were also supported by vague statements that too many precedents would overwhelm the law,<sup>533</sup> and this, too, has proven inaccurate.<sup>534</sup> Whether they were false premises or because modern information technology has outpaced and outmoded these ideas,<sup>535</sup> lawyers have continued to seek

529. See *Anastasoff*, 223 F.3d at 900 (citing Blackstone, *supra* n. 39, at \*69: "it is an established rule to abide by former precedents").

530. *Id.* at 903 n. 13 (citing *Essays of Brutus*, XV, *supra* n. 383: "[O]ne adjudication will form a precedent to the next, and this to a following one. These cases will immediately affect individuals only; so that a series of determinations will probably take place before even the people will be informed of them," and *Letters from The Federal Farmer* No. 3, *supra* n. 383: "no precedents in this country, as yet, to regulate the divisions in equity as in Great Britain; equity, therefore, in the supreme court for many years will be mere discretion").

531. Llewellyn, *supra* n. 327, at 61.

532. Compare *Standards for Publication*, *supra* n. 4, at 7 (pointing out that "[t]he endless search for factual analogy requires immense expenditures of time and funds"), with Robel, *Practice of Precedent*, *supra* n. 5, at 401 (stating that "evidence suggests that lawyers and judges value these opinions despite the rules limiting citation," and that "[t]his valuation, in turn, suggests a cultural, rather than rule-based conception of stare decisis").

533. *Standards for Publication*, *supra* n. 4, at 6 ("[c]ommon law in the United States could be crushed by its own weight if the rate of publication is not abated").

534. Shuldberg, *supra* n. 150, at 558-59.

535. See Hannon, *supra* n. 296, at 206, 209 n. 48. See also Boggs & Brooks, *supra* n. 288, at 18 (contending that "[t]he 'unpublished opinions' debate . . . is badly misnamed," because "[b]etween Lexis and Westlaw, Internet sites maintained by universities and some of the circuit courts of appeals, and networks of attorneys practicing in particular fields, it is the rare opinion that is not disseminated for mass consumption").

precedents in courts' prior decisions even in the face of publication and citation restrictions.<sup>536</sup>

Limiting publication of certain cases was intended in part as a cost-saving measure.<sup>537</sup> Limiting citation was seen as a necessary step in preserving the efficiency gained in limiting publication.<sup>538</sup> The issue of limiting (or denying) precedential status to these cases has been carefully avoided.<sup>539</sup> The hope was that courts could issue written opinions only for their law-making decisions and not for their law-applying decisions, which would result in a savings in terms of both opinion creation costs and opinion use costs. To prevent a market for arising for these unpublished opinions, however, a citation ban was needed. Finally, in order to justify a citation ban, many circuits declared these opinions as non-precedential.<sup>540</sup>

These ideas are, one by one, faltering. Whatever additional savings were envisioned by preventing unpublished opinions from being physically published has not come to pass given the ubiquity with which new unpublished cases are collected and published. Likewise, with the enactment of Rule 32.1, the citadel of non-citation has fallen, at least in the federal system.<sup>541</sup> That decisions of the courts, which were viewed by lawyers and judges as having some value, even throughout the

536. Robel, *Practice of Precedent*, *supra* n. 5, at 414 (noting "the depth of our historical cultural commitment to justification").

537. *Standards for Publication*, *supra* n. 4, at 6-8. *See also* Boggs & Brooks, *supra* n. 288, at 19 (counseling against defending "on high theory a practice that is in fact justified for simple efficiency reasons"); Robel, *Practice of Precedent*, *supra* n. 5, at 402 (tracing the shifting and highly pragmatic rationales for limited publication and citation).

538. *Standards for Publication*, *supra* n. 4, at 18-21; Reynolds & Richman, *No-Citation Rules*, *supra* n. 5, at 1185-86; Robel, *Practice of Precedent*, *supra* n. 5, at 404 (also noting unequal-access argument against allowing citation).

539. *Standards for Publication*, *supra* n. 4, at 20-21 (recommending denying citation to unpublished decisions and avoiding the "morass of jurisprudence" involved in directly declaring them non-precedential, thus leaving the development of the precedential value of unpublished decisions to the "correspondence of publication and precedential value on the one hand, and of non-publication and non-precedential value on the other"); Fed. R. App. P. 32.1 advisory comm. n. (stating that "Rule 32.1 is extremely limited. . . . It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court").

540. Reynolds & Richman, *No-Citation Rules*, *supra* n. 5, at 1179-81.

541. *See* Barnett, *supra* n. 281 (referencing, by the use of "siege" and "battlefield" in his title, Judge Cardozo's famous phrase in *Ultramares Corp. v. Touche*, 174 N.E. 441, 445 (N.Y. 1931), that the assault on the citadel of privity was proceeding apace to make a similar claim regarding no-citation rules).

non-citation era, should be properly viewed as precedential seems a logical final step.

Surveys of judges and lawyers in the federal system have indicated that the attempt to create a body of “disposable opinions” that could be produced more cheaply and ignored by later litigants and courts has failed.<sup>542</sup> Lawyers and judges already make use of unpublished, unciteable opinions. Surveys conducted in the 1990s by the Commission on Structural Alternatives for the Federal Courts (dubbed the “White Commission” in honor of its chair, Justice Byron White), queried federal trial and appellate judges as well as a random selection of attorneys with cases filed before the federal courts.<sup>543</sup> Although the White Commission’s primary area of interest was the desirability and feasibility of splitting the Ninth Circuit and similar structuring issues,<sup>544</sup> it did touch upon the issue of unpublished, non-citable, non-precedential opinions, as part of an overall practice of “differentiated decisional processes.”<sup>545</sup>

The White Commission surveys of lawyers and federal judges revealed that federal judges and lawyers alike looked to and cited unpublished opinions with a frequency that suggested that they found them to be of value.<sup>546</sup> For example, nearly one in five lawyers reported that they review most or all unpublished

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542. See generally Robel, *Practice of Precedent*, *supra* n. 5 (examining recent surveys of federal judges and lawyers). See also Robel, *Myth*, *supra* n. 5, at 1 (coining the term “disposable opinion” in reference to unpublished, unciteable opinions of the federal circuits).

543. See *Working Papers*, *supra* n. 314, at 3 (stating that the response rate was eighty-six percent among appellate judges, eighty-one percent among district judges, and fifty-one percent among attorneys queried).

544. Commission on Structural Alternatives for the Federal Courts of Appeals, *Final Report* at ix (1998) [hereinafter *White Commission Report*].

545. *Id.* at 21-22. The White Commission discussed the marking of certain types of appeals at or near the time of filing as in need of less attention, which might typically mean no oral argument, staff-drafted dispositions, and unpublished decisions. This process may have its own issues of constitutionality and propriety, but that issue is beyond the scope of this article. See e.g. Pether, *supra* n. 5, at 1438, 1491-92.

546. Robel, *Practice of Precedent*, *supra* n. 5, at 405-09 (summarizing the relevant data from the White Commission’s surveys of federal judges and lawyers, which were conducted in 1998, at a time when limited citation rules were still in effect in most circuits).

decisions in their circuit in at least one area of law.<sup>547</sup> Moreover, another forty-four percent of lawyers reported reading unpublished opinions that come up in the course of their research.<sup>548</sup> With nearly two-thirds of lawyers who responded reporting that they “do not feel free to ignore these opinions either generally or with respect to specific cases,” Dean Robel was right to note that lawyers read these cases, “because they provide useful information in support of their clients’ cases.”<sup>549</sup> Even when such rules are in place, preventing lawyers from citing (or from being obligated to cite) unpublished opinions, such opinions are still researched because it is “prudent” and because lawyers believe that they “indicate how the appellate court has ruled in the past and thus might rule in the future.”<sup>550</sup>

In addition to this cultural conception of precedent, which lawyers believe in despite non-precedent rules, lawyers are aware pragmatically that unpublished decisions continue to have some precedential effect despite the rules. Two attorneys from a prominent national law firm described the potential benefit this way: “[I]t behooves counsel to review unpublished opinions because they still may influence a court that reads (or remembers deciding) them itself.”<sup>551</sup> Evidence suggests that these lawyers are correct.<sup>552</sup> At least one study has found the citation of unpublished decisions to be common in the federal courts of appeals, often in support of the court’s legal analysis.<sup>553</sup> Such use is not surprising given that judges both read and consider unpublished opinions, according to the White

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547. *Working Papers*, *supra* n. 314, at 78 (showing that nineteen percent reported reviewing either “most or all” or “most or all in one or more areas of the law”).

548. *Id.* (indicating that forty percent reported reviewing unpublished cases that come up during their research and another four percent reported reading only that subset of those that arise out of the districts in which they practice).

549. Robel, *Practice of Precedent*, *supra* n. 5, at 406 (2002) (citing Katsh & Chachkes, *supra* n. 338).

550. *Id.*

551. Katsh & Chachkes, *supra* n. 338, at 302.

552. See Hannon, *supra* n. 296, at 235 (tbl. 6) (noting courts’ citations to their own unpublished opinions). See also *Johns v. State*, 35 P.3d 53, 65 (Alaska App. 2001) (Mannheimer, J., concurring) (noting the routine usage of unpublished opinions by Alaska’s lower courts).

553. See Hannon, *supra* n. 296, at 235 (tbl. 6).

Commission survey.<sup>554</sup> For instance, over one quarter of appellate judges responded that they review all unpublished decisions of their circuits either before or soon after they are issued, and that number is fifty percent or higher in four circuits.<sup>555</sup> Similarly, one fifth of district court judges reported reviewing all unpublished decisions in their circuits.<sup>556</sup> These numbers indicate that far from regarding them as easy and easily forgettable opinions, both appellate and district judges are taking time either crafting or reviewing the content of these opinions. This again makes sense, given that roughly a third of district court judges expressed concern that some area of the law in their circuits was inconsistent or difficult to know, a problem which over half ascribed, at least in part, to inconsistency between published and unpublished opinions or a lack of circuit decisions on point.<sup>557</sup>

Even prior to *Anastasoff*, federal courts and lawyers practicing before them found some value in unpublished opinions. Dean Robel summarizes this behavior aptly:

Large numbers of participants in the federal appellate system, including judges, use unpublished opinions in ways not contemplated by the publication plans, although completely consistent with common-law understandings of practice surrounding precedent.<sup>558</sup>

While the benefits and contours of the continued adherence to a common law understanding of precedent can be argued normatively, the fact that such adherence is firmly embedded, so firmly embedded that it overrides in many respects rule-based proscriptions against following it, seems beyond dispute.

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554. *Working Papers*, *supra* n. 314, at 15, 49 (including survey data for, respectively, appellate and trial judges).

555. *See id.* at 15 (indicating that twenty-seven percent so reported, and that the Fourth, Seventh, D.C., and Federal Circuits are at or over the fifty percent mark).

556. *See id.* at 49 (noting that twenty percent so reported).

557. *See id.* at 48 (indicating that thirty-seven percent indicated some area of circuit law as “inconsistent or difficult to know,” and that twenty-three percent identified the cause as inconsistency between published and unpublished opinions, while twenty-nine percent identified the cause as a lack of circuit decisions on point). The reader should note that these responses were not mutually exclusive, and that a respondent who was so inclined could choose several responses to this survey question.

558. Robel, *Practice of Precedent*, *supra* n. 5, at 414.

More recently, two important surveys were undertaken as part of the federal rulemaking process that eventually resulted in Rule 32.1. In 2004, the proposed rule was well on its way to being approved, but the Judicial Conference's Standing Committee (the last stop before submission to the Supreme Court for approval) decided to have the issue studied further by the Federal Judicial Center and the Administrative Office of the United States Courts.<sup>559</sup>

The FJC study surveyed all active and senior circuit judges and a random selection of attorneys who had appeared in recent federal cases,<sup>560</sup> and corroborated some of the White Commission's findings. For example, forty-four percent of judges in circuits that allowed citation said they found citations to unpublished decisions helpful "occasionally," "often," or "very often."<sup>561</sup> Moreover, thirty percent of those judges noted that unpublished opinions are "occasionally," "often," or "very often" inconsistent with published precedent.<sup>562</sup> These numbers support the contention that decisions rendered in unpublished opinions are neither routine nor easily discarded. They are, however, very much in use already in the federal courts of appeals. The FJC's survey of attorneys revealed that attorneys research unpublished opinions, even when they cannot cite them, and that attorneys frequently find unpublished decisions that would aid their cases.<sup>563</sup> In addition, the study found that attorneys reported, on average, that permitting citation would have "no appreciable impact" on their workload.<sup>564</sup>

The AO study examined the nine circuits that then permitted citation of unpublished opinions in some form and found that allowing citation to unpublished decisions did not increase the courts' workload or the disposition time of cases before the courts.<sup>565</sup> Like the FJC study, it confirmed that

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559. Schiltz, *Much Ado About Little*, *supra* n. 1, at 1453-55.

560. Reagan et al., *supra* n. 250, at 3, 15 (noting that response rate was 86% for both judges and attorneys surveyed).

561. *Id.* at 39 (tbl. K).

562. *Id.* at 40 (tbl. L).

563. *Id.* at 15-17.

564. *Id.* at 17. *See also id.* at 49 (tbl. U).

565. Schiltz, *Citation of Unpublished Opinions*, *supra* n. 1, at 65 (citing John K. Rabiej, Chief, R. Comm. Support Off., Admin. Off. of the U.S. Cts., *Memo. to Advisory Comm. on App. R.* at 1 (Feb. 24, 2005)).

unpublished opinions were being used and valued even before the institution of Rule 32.1.

The Advisory Committee itself heard similar comments regarding the use and importance of unpublished opinions.<sup>566</sup> As one scholar concluded after reviewing the comments, “[t]he evidence is overwhelming that unpublished opinions are indeed a valuable source of ‘insight and information.’”<sup>567</sup> He pointed out that

[f]irst, unpublished opinions are often read. . . . Second, unpublished opinions are often cited by attorneys. . . . Third, unpublished opinions are often cited by judges. . . . Fourth, there are some areas of the law in which unpublished opinions are particularly valuable. . . . Fifth, unpublished opinions can be particularly helpful to district judges, who so often must exercise discretion in applying relatively settled law to an infinite variety of facts. . . . Sixth, there is not already “too much law,” as some opponents of Rule 32.1 claim.<sup>568</sup>

Similar comments regarding not just use, but also legal significance, came to light during the Rule 32.1 adoption process.<sup>569</sup> First, many commentators rejected the idea that a court can predict which cases will have precedential value:

[o]nly when a case comes along with arguably comparable facts does the precedential relevance of an earlier decision-with-opinion arise. . . . Lacking omniscience, an appellate panel cannot predict what may come before its court in future days.<sup>570</sup>

Others pointed out that courts often struggle to predict the legal significance of cases and often designate as non-precedential cases that should be precedential—as evidenced by the many unpublished decisions that contain dissents, concurrences, and

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566. *Id.* at 44-49.

567. *Id.* at 44 (citing Comm. on Rules of Practice & Proc. of the Jud. Conf. of the U.S., *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure* 33-34 (2003)).

568. *Id.* at 443-46 (footnotes omitted).

569. *Id.* at 44-47.

570. Cappalli, *supra* n. 5, at 773 (quoted in Schiltz, *Citation of Unpublished Opinions*, *supra* n. 1, at 47 (noting that Professor Cappalli sent this article as an attachment to his comment to the Advisory Committee)).

reversals.<sup>571</sup> For example, one research study found that

publication decisions, when combined with limited-citation rules, do affect the substance of precedential law. Unpublished decisions do not reflect routine applications of existing law with which all judges would agree. If they did, these decisions would not include a noticeable number of reversals, dissents, or concurrences, nor would they show significant associations between case outcome and judicial characteristics.<sup>572</sup>

Other surveys show similar results. Professor Barnett, whose work in this area has been prolific,<sup>573</sup> conducted a survey of federal public defenders regarding their use of unpublished decisions in both permissive and restrictive citation circuits.<sup>574</sup> He found that sixty-seven percent of those polled favored the citation of unpublished opinion and found the use of such opinions a routine part of existing practice.<sup>575</sup> Many of those polled indicated that the additional research presented by unpublished opinions required no additional effort and that there was no disparity of access.<sup>576</sup> Indicative of the overall sentiment, Barnett noted these two comments from federal public defenders regarding the citation of unpublished opinions: “That doesn’t bother me at all. I always do the research; that’s part of my job,” and “as an advocate, I always use anything I can.”<sup>577</sup>

Both scholarly commentary dating back to the enactment of limited publication and citation rules and several recent surveys and studies indicate that the use of opinions as precedent is too fundamental and persistent to be set aside by rule. Three decades of circuit rules have been unable to overcome the strong cultural commitment to the idea of precedent as inherent in every

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571. Schiltz, *Citation of Unpublished Opinions*, *supra* n. 1, at 48.

572. Merritt & Brudney, *supra* n. 328, at 120.

573. See generally e.g. Barnett, *supra* n. 338; Stephen R. Barnett, *In Support of Proposed Federal Rule of Appellate Procedure 32.1: A Reply to Judge Alex Kozinski*, 51 Fed. Law. 32 (Dec. 2004) [hereinafter *Kozinski Reply*]; Barnett, *supra* n. 354.

574. Barnett, *supra* n. 338, at 1550-51 (analyzing responses of federal judges and federal public defenders to questions regarding unpublished opinion usage).

575. *Id.* at 1551.

576. *Id.* at 1514, 1518, 1519 (reporting that the cases frequently “come up” or “pop up” on Westlaw or other commercial services and, as one public defender explained, “[r]esearch isn’t what it used to be.”)

577. *Id.* at 1519.



decision courts make. The purposes for which the limitations on precedential effect were instituted—limiting publication and limiting citation—have fallen away, laying bare a practice which, even if it may exist consistent with our Constitution, ought not to exist in accordance with our sense of how the legal system works.

### 3. *Ideas for Addressing Volume*

There remains the problem of volume. It is easy to see that the increase in the number of filed cases has grossly outstripped the increase in the number of federal judgeships.<sup>578</sup> Some, such as Judge Arnold, have argued that the fundamental principle of precedent should not be trumped by pragmatic concerns: “The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to handle each case. If this means that backlogs will grow, the price must still be paid.”<sup>579</sup> Others have argued that the issue of volume alone is not persuasive.<sup>580</sup>

Nevertheless, at least three potential solutions take the volume-based arguments made by the opponents of full precedential status at face value. To fully explore the costs and benefits of each is beyond the scope of this article, and this list is by no means exhaustive.

#### a. Expand the Judiciary

First, the federal judiciary could be expanded. This expansion—an increase in federal judgeships—is not a novel suggestion. It is both the obvious response to the suggestion that there are too few judges to do the work of the courts and a

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578. See *White Commission Report*, *supra* n. 544, at 14 (tbl. 2-3, “Authorized District and Circuit Judgeships and Filings per Judgeship”) (showing increase in filings per appellate judge from forty-four to 300 between 1892 and 1997).

579. *Anastasoff*, 223 F.3d at 904.

580. Robel, *Practice of Precedent*, *supra* n. 5, at 415 (posing this thought experiment: “To see why the argument from caseload is unpersuasive, take it seriously. Imagine that courts continue deciding cases in exactly the same way they are deciding them now, giving to each case exactly the attention it now gets, and writing exactly what they now write, no more and no less. Next imagine that the only change is to the rules that govern what lawyers can do with those opinions. What would be lost in abandoning limitations on citation?” (footnote omitted)).

recommendation of the Hruska Commission in 1975:

[t]he creation of additional appellate judgeships is the only method of accommodating mounting caseloads without introducing undesirable structural change or impairing the appellate process. Accordingly, the Commission recommends that Congress create new appellate judgeships wherever caseloads require them.<sup>581</sup>

Such a response, however, is not without its costs, including, for example, added judicial pay, added administrative costs, and perhaps even court restructuring. Still, as the most straightforward method of dealing with the issue of volume, it should be considered further.

#### b. Encourage Streamlined Opinions

Second, opinion writing in cases designated as unpublished can remain streamlined. A short opinion format—more detailed than the simple “affirmed,” but far shorter than the typical multi-page unpublished opinion—is likely to supply sufficient critical information to satisfy both the parties in the case at bar and later litigants. Many presently unpublished opinions are written in this fashion and are workable.<sup>582</sup> Once judges know that these opinions will now be citeable in wake of Rule 32.1, it seems likely that some standardization or development of short opinions will occur regardless of the precedent issue. And it bears noting that the use of short opinions is not a novel proposal:

[S]hort opinions ought to be utilized for the eighty percent of appeals now being archived as non-precedential. Should a policy reversal occur and appellate judges begin to treat all appeals as precedential, no judicial retraining would be necessary. Nor would retraining be necessary under a system where brief, published explanations are required.<sup>583</sup>

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581. Commission on Revision of the Federal Court Appellate System Structure and Internal Procedures, *Recommendations for Change*, 67 F.R.D. 195, 201 (1975) (This Commission was dubbed the “Hruska Commission” after its chairman, Sen. Roman L. Hruska.)

582. Barnett, *Kozinski Reply*, *supra* n. 573, at 33 (pointing out that “[o]ne need only page through the *Federal Appendix*, that oxymoronic publisher of ‘unpublished’ opinions, to see that the opinions are serviceable and in no way beyond the realm of citability”).

583. Cappalli, *supra* n. 5, at 796.

Advocates of keeping unpublished decisions non-citeable and non-precedential suggest that unpublished decisions are the easy cases, which do nothing more than apply well-settled law to new facts in a manner that does not meaningfully expand the law.<sup>584</sup> If that is so, then it should be straightforward to dispose of such a case in a one-to-two paragraph opinion setting forth the governing authority, the facts of this case that bring it within that authority, and the result. What matters in such decisions is what the court does and not what the court says it is doing.<sup>585</sup>

[T]he true content of law is known not by the verbal rule formulations but by the application of those verbal formulations to specific settings. Astute lawyers look for cases analogous to theirs decided under abstract rule formulations; they search for on point precedents. In sum, the actual scope of a doctrinal formulation is learned through its applications and not through the words chosen to express the doctrine.<sup>586</sup>

A long and carefully crafted opinion seems unnecessary in this context.

### c. Restrict the Jurisdiction of the Federal Courts of Appeals

Third, the federal courts' jurisdiction could be restricted in some fashion. Congress could restrict the federal courts' jurisdiction either by making certain appeals discretionary or by limiting the courts' subject matter jurisdiction. These are extreme solutions, both, but either would serve to address the

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584. See Schiltz, *Citation of Unpublished Opinions*, *supra* n. 1, at 32 (citing Stephen S. Trott, J., U.S. Ct. of App. for the 9th Cir., *Letter to Peter G. McCabe, Secy., Comm. on R. of Prac. & Procedure 1* (Jan. 8, 2004)).

585. See e.g. Barnett, *Kozinski Reply*, *supra* n. 573, at 32 (pointing out that “law is not what judges say, but what they decide”); Cappalli, *supra* n. 5, at 772-79 (“It is sound practice for appellate courts to estimate the rules they craft to decide the case. . . . Still, it is only an estimate because the power to determine the holding of a judicial precedent resides in future judges applying it”); Boggs & Brooks, *supra* n. 288, at 17 (acknowledging that “[t]o the common lawyer, every decision of every court is a precedent; . . . [and] “it is the decision—not the opinion—that constitutes the law”).

586. Cappalli, *supra* n. 5, at 768-69; accord *Black v. Cutter Labs.*, 351 U.S. 292, 297-98 (1956) (noting that an appeal is a review of a judgment, not of an opinion, and that precedent-applying courts have not only the power but a duty “to look beyond the broad sweep of the language and determine for . . . [themselves] precisely the ground on which the judgment rests”).

volume issue. More creative and drastic solutions likely exist. For example, two appellate judges, in response to the White Commission survey, proposed the abolition of the existing federal courts of appeals in favor of a single national court of appeals. Such a system would help to equalize judicial caseloads between judges and promote uniform national appellate decisions.<sup>587</sup>

## VI. CONCLUSION

Whether by constitutional case decision or by the adoption of a new Federal Rule of Appellate Procedure, the practice of issuing non-precedential opinions should be ended. Failure to recognize every decision as precedential represents and perpetuates a serious problem in our judicial system because the practice conflicts with both our constitutional and community values.

Evidence suggests that unpublished opinions are already published. They have long been researched despite the rules against their citation, and they are now fully citeable under Rule 32.1. Unpublished decisions are already being published, researched, and cited because they are perceived to have precedential value within our legal system. This value should be recognized rather than denied.

The Supreme Court has aptly cautioned in another context that “[l]iberty finds no refuge in a jurisprudence of doubt.”<sup>588</sup> Yet for over three decades, the federal courts’ policy of creating “non-precedential precedents”<sup>589</sup> has increasingly fostered a jurisprudence of doubt. After three decades of limiting the publication, citation, and precedential effect of their opinions, federal courts are still carefully avoiding the “morass of jurisprudence”<sup>590</sup> involved in closely examining the precedential

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587. See *Working Papers*, supra n. 314, at 31, 34 (reporting an opinion expressed in some detail by a judge of the Third Circuit and echoed much more tersely by a judge of the Seventh Circuit). This potential solution is mentioned not to promote it, but only to suggest by example that other ideas for dealing with the issue of volume are out there.

588. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 843 (1992).

589. See Reynolds & Richman, *No-Citation Rules*, supra n. 5, at 1167 (quoting testimony of Seventh Circuit Judge Robert Sprecher before the Commission on Revision of the Federal Court Appellate System).

590. *Standards for Publication*, supra n. 4, at 20.

status of unpublished opinions. However, the winds have changed.

The limitation of publication now exists in name only. The limitation of citation has been removed by Rule 32.1. The limitation on full precedential status for all decisions of the federal courts of appeals, initially instituted to help realize the gains believed to flow from the other two limitations, is the last remaining vestige of a flawed and failed experiment. The practice of deciding *ex ante* which cases join the body of precedent and which do not should be abandoned. Both the dictates of American constitutional law and the traditions of the American legal community require it.



