

# UNPUBLISHED JUDICIAL OPINIONS

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HEARING  
BEFORE THE  
SUBCOMMITTEE ON COURTS, THE INTERNET,  
AND INTELLECTUAL PROPERTY  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED SEVENTH CONGRESS  
SECOND SESSION

—————  
JUNE 27, 2002  
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**Serial No. 82**  
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Printed for the use of the Committee on the Judiciary



Available via the World Wide Web: <http://www.house.gov/judiciary>

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U.S. GOVERNMENT PRINTING OFFICE

80-454 PDF

WASHINGTON : 2002

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# CONTENTS

JUNE 27, 2002

## OPENING STATEMENT

	Page
The Honorable Howard Coble, a Representative in Congress From the State of North Carolina, and Chairman, Subcommittee on Courts, the Internet, and Intellectual Property .....	1
The Honorable Howard L. Berman, a Representative in Congress From the State of California, and Ranking Member, Subcommittee on Courts, the Internet, and Intellectual Property .....	2

## WITNESSES

Honorable Samuel A. Alito, Jr., Judge, United States Court of Appeals for the Third Circuit, and Chair, Advisory Committee on the Federal Rules of Appellate Procedure	
Oral Testimony .....	5
Prepared Statement .....	6
Honorable Alex Kozinski, Judge, United States Court of Appeals for the Ninth Circuit	
Oral Testimony .....	9
Prepared Statement .....	11
Mr. Kenneth Schmier, Chairman, Committee for the Rule of Law	
Oral Testimony .....	20
Prepared Statement .....	21
Mr. Arthur Hellman, Professor of Law, University of Pittsburgh School of Law	
Oral Testimony .....	42
Prepared Statement .....	43

## LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Prepared Statement of the Honorable Howard Coble, a Representative in Congress From the State of North Carolina, and Chairman, Subcommittee on Courts, the Internet, and Intellectual Property .....	2
Prepared Statement of the Honorable Howard L. Berman, a Representative in Congress From the State of California, and Ranking Member, Subcommittee on Courts, the Internet, and Intellectual Property .....	3

## APPENDIX

### MATERIAL SUBMITTED FOR THE HEARING RECORD

Letter and Attachments from Lawrence A. Salibra, II, Senior Counsel and Elisa P. Pizzino, Counsel, Alcan Aluminum Corporation .....	67
Attachments from Alex Kozinski and Stephen Reinhardt .....	91
Article from David Greenwald and Frederick A. O. Schwarz, Jr. ....	237
Article from Stephen R. Barnett .....	279
Letter from Jonathan Lewin .....	305

## UNPUBLISHED JUDICIAL OPINIONS

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THURSDAY, JUNE 27, 2002

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON COURTS, THE INTERNET,  
AND INTELLECTUAL PROPERTY,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Subcommittee met, pursuant to call, at 2:20 p.m., in Room 2141, Rayburn House Office Building, Hon. Howard Coble [Chairman of the Subcommittee] presiding.

Mr. COBLE. The Subcommittee will come to order.

Ladies and gentlemen, pardon my immodesty, but this Subcommittee has an enviable record for punctuality, today notwithstanding. We had votes on the floor. In fact, one vote is just now being finalized, and that is why we are belated. My good friend, the Ranking Member, Mr. Berman, just joined us, so we will get underway. I thank you all for your patience in waiting for us to return.

Today we will examine an issue which has long been the subject of debate; that is, unpublished judicial opinions. Permit me, if you will, to begin by echoing my sentiments from a previous hearing on the operations of the Federal judicial misconduct statutes.

Overall, I believe that the Federal judiciary functions very well. At the same time, however, no branch of the government, including the third branch, is immune from evaluation. So that is one reason why we are assembled here today, to determine if there is in fact a problem with regard to the administration of justice in our country and, if so, to explore how we should fix or repair the problem.

More specifically, we are trying to determine if the administrative practices of limited publication and noncitation of opinions among the circuits are fair, both to litigants who want to know what a court was thinking when it rendered a decision, as well as to attorneys attempting to scour the law for precedential authority when advising their clients.

In conclusion, I want to extend my gratitude to everyone on the panel for your patience in working around the evolving Subcommittee schedule in preparation for this hearing. You will recall it was previously scheduled, and we had to reschedule for today. I hope that did not unduly inconvenience you. You have been very tolerant in this regard, and I appreciate your flexibility.

I am now pleased to recognize my good friend, the distinguished gentleman from California and Ranking Member of this Subcommittee, Mr. Berman, for his opening statement.

[The prepared statement of Mr. Coble follows:]

PREPARED STATEMENT OF THE HONORABLE HOWARD COBLE, A REPRESENTATIVE IN  
CONGRESS FROM THE STATE OF NORTH CAROLINA

Good morning. The Subcommittee will come to order.

Today we will examine an issue which has long been the subject of debate: unpublished judicial opinions. Allow me to begin by echoing my sentiments from a previous hearing on the operations of the federal judicial misconduct statutes: Overall, I believe that the federal judiciary functions very well. At the same time, however, no branch of the government (including the Third Branch) is immune from evaluation. So that is why we are assembled today—to determine if there is a problem with regard to the administration of justice in our country; and if so, to explore how we should fix the problem.

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In conclusion, I want to extend my gratitude to everyone on the panel for his patience in working around the evolving Subcommittee schedule in preparation for this hearing. You have all been very tolerant in this regard, and I very much appreciate your flexibility.

I now recognize my good friend, the Ranking Member from California, Mr. Berman, for an opening statement.

Mr. BERMAN. Thank you very much, Mr. Chairman. Thank you for calling the hearing. This is obviously an issue, the issue of unpublished judicial decisions, which has many in the judicial-legal communities quite exercised, and I think you are to be commended for your diligent efforts throughout this Congress to conduct oversight of those matters that fall into this Committee's jurisdiction.

I couldn't help but notice your comment about it is appropriate to evaluate the role of the third branch. I think probably as we talk, the House of Representatives, on the floor, is evaluating the role of the third branch, or at least a decision of the third branch; but then the third branch constantly evaluates our work as well, and they actually might be able to do it with more effectiveness than we can evaluate theirs.

But the issue before us today, that is, unpublished judicial decisions, poses important questions relating to the U.S. Constitution, the framers' intent, judicial efficiency, and the fairness of our judicial system. While we certainly will not resolve these questions here now, I expect our learned witnesses will provide us with strong insights on these issues.

I particularly want to thank Judge Kozinski from the Ninth Circuit for shuffling his schedule and traveling across the country to be with us today. I have long respected his thinking on many issues and know that his presence here indicates the importance he attaches to the issues before us.

I am interested in the ancillary issue that is raised by Judge Kozinski in his testimony. Specifically, without regard to what we might think about the pros and cons of unpublished judicial decisions, what is there that we can really do beyond being providing a forum for discussion?

The independence of the judiciary is an integral aspect of our form of Government. Having sat on the Subcommittee for nearly 20 years, I have developed a healthy respect for the need to ensure that the legislative branch not interfere with the independence of the judiciary. Even where I have strongly disagreed with the direction of the judiciary, and in the administrative as opposed to the court decision context, for instance, on the judicial privacy issue, I

still try to pursue solutions that leave it up to the judiciary to manage itself.

It appears that the issue of unpublished judicial decisions is one that naturally lends itself to resolution by judges themselves. Whether the judicial resolution comes through court decisions interpreting the U.S. Constitution or new administrative rules, the judiciary is capable of grappling with this issue itself. In fact, it may be an issue that under the U.S. Constitution only the courts can resolve.

Anyway, Mr. Chairman, I look forward to hearing our witnesses, and I yield back the balance of my time.

Mr. COBLE. I thank the gentleman from California. Thank you. [The prepared statement of Mr. Berman follows:]

PREPARED STATEMENT OF THE HONORABLE HOWARD L. BERMAN, A REPRESENTATIVE  
IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman,

I am pleased to join you today for this oversight hearing on "Unpublished Judicial Decisions." This is obviously an issue that has many in the judicial and legal communities quite exercised. You have shown significant foresight in bringing the issue to the attention of myself and other Subcommittee Members. In fact, you are to be commended for your diligent efforts throughout this Congress to conduct oversight of those matters that fall into our Courts jurisdiction.

The issue before us today—unpublished judicial decisions—poses important questions related to the U.S. Constitution, the Framers' intent, judicial efficiency, and the fairness of our judicial system. While we certainly won't resolve these questions here and now, I expect that our learned witnesses will provide us with strong insights on these issues.

I particularly want to thank Judge Kozinski from the Ninth Circuit for shuffling his schedule and traveling across the country to be with us today. I have long respected his thinking on many issues, and know that his presence here indicates the importance he attaches to the issues before us.

While I am certainly interested in our witnesses' analyses of the pros and cons of unpublished judicial decisions, I am also interested in an ancillary issue that was raised by Judge Kozinski in his testimony. Specifically, what, if anything, can or should Congress do—besides providing a forum for discussion?

The independence of the Judiciary is an integral aspect of our form of government. Having sat on this Subcommittee for nearly twenty years, I have developed a healthy respect for the need to ensure that the Legislative Branch not interfere with the independence of the Judiciary. Even where I have strongly disagreed with the direction of the Judiciary, as with the judicial privacy issue, I still pursue solutions that leave it up to the Judiciary to manage itself.

It appears that the issue of unpublished judicial decisions is one that naturally lends itself to resolution by judges themselves. Whether the judicial resolution comes through court decisions interpreting the U.S. Constitution or new administrative rules, the Judiciary is capable of grappling with this issue itself. In fact, it may be an issue that, under the U.S. Constitution, only the courts can resolve.

Anyway, Mr. Chairman, I look forward to hearing our witnesses go at it. I yield back the balance of my time.

Mr. COBLE. Again I say to the panelists, good to have you all with us. Not necessarily in order of appearance, but I will introduce our first witness, an old friend and frequent visitor, whom I have not seen in a good while. Professor Arthur Hellman is Professor of Law at the University of Pittsburgh, where he teaches courses in Federal court, civil procedure and constitutional law. Earlier this year, Professor Hellman received the Chancellor's Distinguished Research Award as a faculty member who has an outstanding and continuing record of research and scholarly activity. Professor Hellman received his B.A. Magna cum laude from Harvard University and his J.D. From the Yale Law School, and has

been a member of the faculty at the Pittsburgh School of Law since 1975.

Our next witness is Judge Alex Kozinski, who was appointed United States Circuit Judge for the Ninth Circuit about 15, 16, 17 years ago, I guess, Your Honor; 1985, I think. Prior to his appointment to the appellate bench, Judge Kozinski served as the Chief Judge of the United States Claims Court, worked in the Reagan administration, practiced law, and was a clerk to former Chief Justice Warren Burger. The judge received his B.A. And his J.D. Degree from UCLA.

Our next witness is Mr. Kenneth Schmier. Although she is not a Member of our Committee, Congresswoman Lee, the gentlewoman from California, has requested permission to introduce Mr. Schmier.

Ms. LEE. Thank you very much, Mr. Chairman. Let me just thank you for this privilege to be able to be with you today to make this introduction of my constituent, Mr. Kenneth Schmier. Let me just mention a couple of things about his background so you really can get a sense, the body, of who he is.

He is Chairman of the Board and Founder of NextBus Information Systems, Inc. This information system actually operates in over 20 cities nationwide, including here in Washington, D.C., back in Oakland, California, San Francisco, and many other parts of the Bay area.

Mr. Schmier is here today to testify on an issue to which he has really devoted considerable time and energy: the publication of appellate court decisions. He is chairman of the Committee of the Rule of Law, an ad hoc group which includes on its advisory board the district attorney of the City and County of San Francisco, the Dean of the Golden Gate School of Law, and the former D.A. Of San Francisco, and many other distinguished attorneys and Government leaders.

So it is my pleasure to welcome Mr. Schmier to Washington, D.C., to introduce him to the distinguished Members of this Subcommittee. I would like to say in closing that Mr. Schmier has a J.D. Degree from Hastings Law School.

Thank you, Mr. Chairman.

Mr. COBLE. Thank you. Mr. Schmier, my able counsel advises me that I badly butchered the pronunciation of your name, so I will correct it now. Mr. Schmier.

Our final witness is the Honorable Samuel Alito, who is a judge for the U.S. Court of Appeals for the Third Circuit. Judge Alito was nominated by President Bush and confirmed by the Senate on June 15, 1990. He was awarded his B.A. From Princeton and his J.D. From Yale. Judge Alito was admitted to the New Jersey Bar and the U.S. District Court of New Jersey.

Good to have all of you with us. We have written statements from each of you. I ask unanimous consent that these statements be submitted into the record in their entirety.

Gentleman, as you will recall, we have previously requested that you limit your oral testimony to 5 minutes. I don't like to muzzle witnesses, but in the interest of time, we have votes that are ongoing on the floor, your statements have been read and will be reread, so don't think that we are hustling you in and hustling you

out. But when you see the red light appear in your face at the panel on the desk, that will be your signal that you have exhausted your time limit. You won't be keelhauled if you take another second or two, but try to wrap up at that point.

Mr. COBLE. Judge Alito, why don't we start off with you, Sir?

**STATEMENT OF HONORABLE SAMUEL A. ALITO, JR.,  
JUDGE, UNITED STATES COURT OF APPEALS FOR THE  
THIRD CIRCUIT, AND CHAIR, ADVISORY COMMITTEE ON THE  
FEDERAL RULES OF APPELLATE PROCEDURE**

Judge ALITO. Thank you very much, Mr. Chairman. It is a pleasure for me to be here this afternoon to try to explain the ways in which—

Mr. COBLE. I am not sure you have that mike activated.

Judge ALITO. There it is. I apologize. It is a pleasure for me to be here this afternoon to explain the ways in which the Federal judiciary is attempting to address this important subject through the rules process.

The term that is used customarily in this area—unpublished opinions—is, of course, familiar to all of us, and I think the people who are familiar with the area know what it means. But I believe it is worth a minute at the outset to make sure that nobody is misled, because as a result of some recent developments and, in particular, technological changes, the term can be very misleading.

The fact of the matter is that today the vast majority of opinions, even if they are not printed in the traditional source, the Federal Reporter, are published in any sense of the word. They are available to subscribers to services such as LEXIS and WESLAW. They are now printed in a separate series of case reports called the Federal Appendix, which is available in most law libraries. All of the courts of appeals now have web sites, and most of them now post all of their opinions on those web sites so that anybody with access to the Internet can have easy and cheap access to all of those opinions.

So the term “unpublished opinion” has really become somewhat misleading. But whatever we call these opinions, they are vitally important to the work of the courts of appeals. The courts of appeals issue thousands of them each year, and I don't think it is an exaggeration to say that if the courts of appeals were required tomorrow to decide every case with the kind of opinion that is published in the Federal Reporter, either the courts would shut down or their work would be radically transformed in undesirable ways.

The issue of these unpublished or “non-precedential” opinions, as some of us now call them, seems to raise three major questions. They are related, but I think it is worth trying to keep them separate.

The first is the question of public access. Are these opinions readily available to members of the public and to the bar?

The second is the question of citation. Should lawyers be restricted in their ability to cite those opinions in their briefs?

The third is the question of precedential value. Should these opinions, should the decisions that are memorialized in these opinions, be binding in future cases?

The first issue, the issue of public access, has, I believe, been solved to a large degree by the advances that I mentioned first. As I said, I think these opinions are now, in the main, very broadly available to the public at little cost.

The third issue, the question of precedential value, of course, implicates the doctrine of stare decisis, which has traditionally been developed by the courts in the course of deciding cases. This is an area in which there have been some very interesting developments in recent years. There has been a renewal of academic interest in the area, there have been some very interesting and provocative judicial decisions in the area, and I think it is the overwhelming sentiment of the judiciary that this development should continue in this manner in the common law tradition and should not be regulated by the national rules process.

That leaves the second question, the question of citation, and that is the one with which I am most directly concerned. At this time, the issue is left to each court of appeals and the courts of appeals have different approaches. Some allow free citation of all opinions. The rest restrict citation to various degrees.

The Justice Department has recommended that the Federal Rules of Appellate Procedure be amended so that there would be a national uniform rule on this question that would allow the citation of all opinions for certain purposes, including, most importantly in this connection, in an instance in which an opinion that is not printed in the Federal Reporter has persuasive value that is greater than any other opinion that is available in a traditional printed form.

This proposal has been debated and discussed by the committee that I chair, the Advisory Committee on Appellate Rules, at several meetings. We surveyed the chief judges of the circuits on the proposal and, not surprisingly, they were sharply divided. Some were in favor, others were opposed. Others had mixed views on the question.

We are scheduled to take this question up again at our next meeting in November, and I expect that at that time we will vote either in favor of recommending the adoption of the Department of Justice proposal or some alternative, or perhaps the vote will be against any change in the current practice.

But the point I want to make is that we are very actively engaged in the process of considering and debating this issue, and we welcome your oversight on the question and the new information that this will bring to light.

Thank you.

Mr. COBLE. Thank you, Your Honor.

[The prepared statement of Judge Alito follows:]

PREPARED STATEMENT OF SAMUEL A. ALITO, JR.

Mr. Chairman and members of the subcommittee, I am Samuel A. Alito, Jr., judge of the United States Court of Appeals for the Third Circuit. I appear today on behalf of the Judicial Conference of the United States, which is the policy-making arm of the federal courts. I chair the Advisory Committee on the Federal Rules of Appellate Procedure. Thank you for the opportunity to share the views of the federal judiciary on "unpublished" courts of appeals opinions.

Court of appeals decisions are and always have been public. But not all opinions have been reported and included in printed volumes issued by the major legal publishers. Traditionally, major legal printers published only opinions that were sub-

mitted for that purpose by the judges authoring them. About forty years ago, the federal judiciary instituted a policy discouraging the publication of all “non-precedential” opinions in order to cope with the exponentially expanding volume of litigation. This policy was adopted for a variety of reasons, including to conserve opinion-writing time for precedent-setting decisions, to preserve the consistency and quality of precedential opinions, and to save time and money for attorneys, who would otherwise find it necessary to research a hugely increased body of case law and to pay for a great many additional volumes of case reports. Presently, most final decisions of the courts of appeals are “unpublished”—that is, they are not printed in the *Federal Reporter*.

Soon after the “unpublished-opinions” policy took effect, courts of appeals developed local procedural rules to restrict the citation of “unpublished” opinions. This was done in large part for the purpose of dispelling any suspicion that institutional litigants and others who might have ready access to collections of unpublished opinions had an advantage over other litigants without such access. Thus, lawyers were prevented from citing “unpublished” opinions in their briefs primarily as a matter of fairness. With the advent of computer assisted legal research, however, the reference to “unpublished” opinions is now something of a misnomer since the overwhelming majority of opinions are now readily available to the public, often at minimal or no cost because they are posted on court web sites and are now printed in a new series of casebooks called the *Federal Appendix* that is available in most law libraries.

Although the justification for prohibiting citation to “unpublished” opinions as a matter of fairness may no longer be viable because most opinions are available electronically, several courts of appeals continue for other reasons to prohibit or otherwise limit citation to “unpublished” opinions. They remain concerned that the problems that prompted the adoption of the Judicial Conference’s “unpublished-opinions” policy may be exacerbated by a policy permitting universal citation. The debate engendered over the appropriate use and precedential value of “unpublished” opinions implicates important competing interests, and the federal judiciary continues to study this subject carefully and to confer with the bar. The effort has now focused on a draft rule amendment governing “unpublished” opinions that has been proposed by the Department of Justice and will be considered by the Advisory Committee on the Federal Rules of Appellate Procedure at its November 2002 meeting.

#### HISTORY OF JUDICIARY ACTIONS REGARDING “UNPUBLISHED” OPINIONS

The federal courts of appeals have a longstanding practice of designating certain decisions as “unpublished opinions.” Faced with an overwhelming and growing volume of reported court decisions, the Judicial Conference in 1964 began to encourage judges to report only opinions that were of general precedential value. In 1972, the Conference asked each court to develop a formal publication plan restricting the number of opinions being reported. The Federal Judicial Center surveyed the courts and recommended criteria to help them designate which opinions should be forwarded to be published. By 1974, each court of appeals had a plan in operation.

By the 1980’s and 1990’s, one of the justifications for limited publication no longer applied, because new technologies facilitated electronic storage and easy retrieval of immense quantities of data. In 1990, the Federal Courts Study Committee recommended that the Judicial Conference establish an ad hoc committee to study whether technological advances gave reason to reexamine the policy on “unpublished” opinions. The committee did not endorse a universal publication policy, but it noted that “non-publication policies and non-citation rules present many problems.” The Conference did not act on that recommendation.

During the past decade, amendments to the rules have been periodically proposed to the Advisory Committee on the Federal Rules of Appellate Procedure to establish uniform procedures governing “unpublished” opinions. In 1998, the former chair of the advisory committee surveyed the chief circuit judges and received a virtually unanimous response that uniform rules were unnecessary. In January 2001, the Solicitor General, on behalf of the Department of Justice, proposed specific language amending the Federal Rules of Appellate Procedure to provide for uniform procedures governing the citation of unpublished opinions. The committee is now studying the Justice Department proposal.

## LIMITING PUBLICATION OF OPINIONS

“(A)ppellate opinions serve essentially two functions: to resolve particular disputes between litigants and to clarify or redefine the law in some manner.”<sup>1</sup> Up until the 1960’s, the volume of appellate opinions was sufficiently manageable to allow careful writing for virtually all decisions. The well-documented explosion in the appellate workload since then has been thought by the judiciary to present compelling doctrinal and practical reasons to limit the “publication”—that is, the public dissemination—of opinions.

First, the judiciary has been concerned that important precedential opinions will be obscured by the thousands of opinions that are issued each year by the courts of appeals to decide cases that do not present any questions of significant precedential value. Opinions dealing with the easy application of established law to specific facts have little use as precedent for other litigants or posterity. A brief written opinion is all that is necessary to inform the litigants of the outcome and the reasons for it.

Second, the judiciary has been concerned that the universal publication of opinions would either produce a deterioration in the quality of opinions or impose intolerable burdens on judges in researching and drafting opinions. Drafting an opinion that is to be applied as a precedent in future cases is a time-consuming task. All of the relevant facts and all of the relevant aspects of the procedural history of the case must be set out. In addition, the discussion of all pertinent legal authorities and the holding must be phrased so that the opinion will not be misunderstood. The opinion must be crafted with the recognition that some future litigants may seize on any ambiguity in order to achieve an unwarranted benefit or escape the opinion’s force. It would be virtually impossible for the courts of appeals to keep current with their case loads if they attempted to produce such an opinion in every case. Responsible appellate judges must devote more time to an opinion that changes the law or clarifies it in an important way (and may thus affect many litigants in future cases) than to an opinion that simply applies well-established law to specific facts (and thus affects solely the litigants at hand). This is not to say, of course, that the decision in the latter type of case is unimportant or that *the decision* may be made with less care. But because the primary function of *the opinion* in such a case is to inform the parties of the basis for decision, not to serve as a guide for future litigation, the opinion need not be as detailed or formal.

Most of the courts of appeals have a local rule governing the citation of “unpublished” or “non-precedential” opinions. Many of the courts initially prohibited citation of such opinions because, as mentioned, they were largely unavailable to the public. Although technology has mooted the “fairness” justification for prohibiting citation to “unpublished” opinions, some courts believe that limiting citation is useful for other reasons. Three of the circuits generally forbid citation, except under very limited circumstances (First, Seventh, and Ninth circuits). Others either generally permit citation or allow citation for limited purposes, such as to establish *res judicata* or collateral estoppel (D.C., Third, Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits). Although permitting citation, some of these local rules explicitly state that “unpublished” opinions lack precedential value. Still others recognize that unpublished opinions may have persuasive value (Fifth, Eighth, Tenth, and Eleventh Circuits). All courts of appeals agree that unpublished opinions are not binding precedent. A few courts of appeals have rules permitting counsel to recommend to the court that it “publish” a particular opinion.

A variety of recent developments have led courts of appeals to reexamine and in some instances alter their rules and practices regarding “unpublished” or non-precedential opinions. As noted, the vast majority of non-precedential opinions issued by the courts of appeals are now readily available to attorneys and the public. In the past few years, judicial decisions and scholarly articles have begun to explore the question whether the Constitution limits the authority of the federal courts to issue non-precedential opinions.<sup>2</sup> The judiciary is also acutely aware that past practices regarding non-precedential opinions have led to misperceptions and that some schol-

<sup>1</sup> Federal Courts Study Committee, *Working Papers and Subcommittee Reports*, Volume 1, p. 82 (July 1, 1990).

<sup>2</sup> See *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000) (holding local rule unconstitutional), *vacated en banc*, 235 F.3d 1054 (8th Cir. 2000). A subsequent Ninth Circuit opinion found that a local rule prohibiting citation of an unpublished opinion was not unconstitutional. *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001). See also, e.g., Thomas R. Lee and Lance S. Lehnhof, *The Anastasoff Case and the Judicial Power to “Unpublish” Opinions*, 77 Notre Dame L. Rev. 135 (2001); John Harrison, *The Power of Congress over the Rules of Precedent*, 50 Duke L. J. 503 (2000).

ars, practitioners, and others have voiced strong arguments against the continuation of some of those practices.

#### PRESENT WORK OF THE APPELLATE RULES COMMITTEE

The Department of Justice proposal to which I referred emerged from this backdrop. As noted, the Department of Justice has proposed an amendment to the Federal Rules of Appellate Procedure governing unpublished opinions. It is deliberately narrow and permits citation to an “unpublished” opinion only if: (1) it directly affects a related case, e.g., by supporting a claim of *res judicata* or collateral estoppel, or (2) “a party believes that it persuasively addresses a material issue in the appeal, and that no published opinion of the forum court adequately addresses the issue.” The proposal also requires that a copy of the “unpublished” opinion be attached to any document in which it is cited. The proposal takes no position on the precedential value of an “unpublished” opinion and does not dictate whether or to what extent a court should designate opinions as “unpublished.” The Department of Justice continues to endorse the proposal. As a litigant in all the circuits, it believes that a uniform national rule would be beneficial.

In response to the Justice Department proposal, the advisory committee undertook a review of the extensive number of articles and surveys on the subject and found that these express conflicting views. In accordance with its past practices, the committee surveyed the various courts of appeals. The responses from the courts of appeals manifested no consensus on the proposal advocated by the Justice Department. Unlike earlier surveys, however, several courts expressed no objection to implementing a rule on the citation of unpublished opinions. Others continued to express strong reservations. The complexity and competing interests were summed up in one response, which concluded that “the difficulty is that the decisions as to whether and when to publish, what kind of explanation to give, and what force should be given to a limited or no citation opinion are bound up together and are substantially affected by conditions that may vary from one circuit to another.” The concern is shared by others who fear that permitting citation to “unpublished” or “non-precedential” opinions will inexorably cause judges to try to draft those opinions in the same manner as precedential opinions and that this will substantially disrupt the efficient functioning of the courts.

The Advisory Committee on Appellate Rules discussed the Justice Department proposal at its last meeting in April 2002 and will again consider the Department of Justice proposal at its November 2002 meeting.

#### CONCLUSIONS

The subject of unpublished opinions raises many difficult issues that must be addressed on several different levels. At the same time, the practices governing “unpublished” opinions continue to evolve in the respective courts of appeals, with a majority permitting citation under certain circumstances. For example, the D.C. Circuit very recently amended its local rules to eliminate a former prohibition against citing unpublished opinions. It now permits citation “as precedent” of any decision issued by the court after January 1, 2002.

The doctrine of precedent (*stare decisis*) was established as part of the common law, and the development of this doctrine has long been committed primarily to the stewardship of the Third Branch. As part of its “unpublished-opinions” policy, the Judicial Conference has deliberately promoted experimentation by giving the respective courts of appeals local discretion in this area. Whether the benefits of uniform procedures governing citation of opinions outweigh the flexibility of local procedures is subject to no easy answer. The federal judiciary is actively engaged in studying the experiences of the courts and all the implications regarding the appropriate use of “unpublished” opinions.

We welcome the oversight of Congress and look forward to any new information that it may gather on this important issue. Thank you again for the opportunity to express the judiciary’s views.

Mr. COBLE. Judge Kozinski.

#### **STATEMENT OF HONORABLE ALEX KOZINSKI, JUDGE, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

Judge KOZINSKI. Good afternoon, Mr. Chairman. Thank you so much for inviting me. I feel privileged to be able to speak on the topic.

I do want to say a word on behalf of the Committee staff that was so helpful to me: Melissa McDonald, Eunice Goldring, Alec French. I came all the way from California and had logistical problems. They couldn't have been more helpful or courteous. I really appreciate it.

Mr. COBLE. Is that the way they told you to tell us that, Judge?

Judge KOZINSKI. Their mother called me.

Mr. COBLE. Judge, we are very high on the staff on both sides. Thank you for mentioning that.

Judge KOZINSKI. We deal with the public as well, of course, and we believe that how staff deals with members of the public reflects on us, and I think it really reflects well with the Committee how well your staff did. I don't want to belabor the point.

May I also introduce two gentlemen in the audience, Judge William Bryson from the Court of Appeals of the Federal Circuit, who spent many years in the Justice Department, including 8 years in the Solicitor General's Office. The Federal Circuit is another large circuit and has problems maybe somewhat different from ours. I asked Judge Bryson to be here, and conceivably with the permission of the Committee, if I get a question that bears on something, I may consult with him.

I also want to acknowledge Thomas Healy, a lawyer in town, a former law clerk of the Ninth Circuit, who wrote I think—and I have made copies of this as an exhibit—a Law Review article that goes into the very question of precedent, which is at the very heart of what these hearings are about. And it is such a scholarly piece that I believe the subject should be started by reading and understanding what Mr. Healy has said. Again, I may call on him if I get in too deeply.

I want to echo what Judge Alito said. Unpublished dispositions don't mean secret law. They never have meant secret law. Published has a specific meaning in the Federal courts, and what it means is it is those opinions through which the courts of appeals speak to the other judges of our circuit—of the circuit, by which we give guidance as to what the law is.

We decide many cases. In our circuit, we decide 4,500 cases or more a year, and we have a complement of about two dozen judges, with some help from senior judges, and we have to decide those cases, and we look at all of them very closely in deciding them. But some cases are such that they require an elucidation of the law and require guidance to other judges, to the judges of the district courts, the judges of bankruptcy courts, magistrate judges, and also notice to the public of how the law is developed. Those are the published opinions.

Quite simply, deciding some cases by unpublished disposition, which is simply a letter to the parties telling them who won and who lost, and why, frees us up to spend the time that needs to be spent on published opinions, the ones that actually shape the law.

Those are very difficult indeed. If one has not worked on a judicial opinion, one might think you write it down and it all comes out of the pen, but in fact it is a very time-consuming process, because you are thinking not only about the case before you, but you are thinking of all the cases in the future that will be governed by this principle. You have to put in not too much, not too little. You have

to put in a principle that will apply to this case, but also correctly predict the result in other cases.

I have been doing it for 20 years. I clerked on the Ninth Circuit, as the Chairman pointed out. I have been 17 years on the Ninth Circuit. I was a judge before that on the Court of Federal Claims. And there is an incredibly difficult and time-consuming task involved in writing opinions. We all do these things. We write in our chambers; 30, 40, 50, 60, 80 drafts of an opinion are not at all unusual.

Now, that kind of effort simply cannot be spent on 150 cases that each judge has to dispose of a year, and an additional 300 cases that each judge has to—on a panel with two other judges and has to review and approve.

In my view, requiring that all of those dispositions be published would result in simply chaos in the law. It would not allow us to spend the time needed to write opinions of that matter whereby we speak to our lower court judges and explain what the law is, and it would become a hunting ground for lawyers to find spurious distinctions, small changes in wording, that make no difference at all to the outcome, but give them a chance to try to say a case that otherwise is clear winds up being unclear, leading to more litigation, more expense, more delay for the litigants.

This is not a new process. As Mr. Healy points out in his article, this has been going on since the early days of the common law. Lord Coke complained there were too many cases cluttering up the law, making it difficult to figure out what the law is, not easier. In fact, appended to my statement are the practices in the State courts. As you will see, 38 States have some form of strict noncitation, nonpublication rule. There is much wisdom in the States. They decide far more cases than the Federal courts. They believe this is a tool that is necessary for the management of the case law. I believe this is something that speaks to the legitimacy of the practice.

Thank you very much.

Mr. COBLE. Thank you, Your Honor. The Subcommittee will welcome your companions as well, and your former law clerk. Good to have you all with us as well.

[The prepared statement of Judge Kozinski follows:]

#### PREPARED STATEMENT OF ALEX KOZINSKI

Mr. Chairman and Members of the Subcommittee. My name is Alex Kozinski and I am a judge of the Court of Appeals for the Ninth Circuit, where I have served since 1985. Prior to that time I served for three years as Chief Judge of the United States Claims Court, now called the United States Court of Federal Claims. Immediately after law school, I clerked for then-Judge (now Justice) Anthony M. Kennedy on the Ninth Circuit. I have thus spent over two decades working for courts that issue both published and unpublished rulings, which are the subject of these oversight hearings.

I thank the subcommittee for giving me the opportunity to state my views. I was invited to speak as an individual and not on behalf of my court or the federal judiciary. The views I express are therefore my own, although I believe that they reflect the views of a substantial majority of my Ninth Circuit colleagues and many other federal appellate judges as well.

#### WHAT ARE UNPUBLISHED DISPOSITIONS?

As Judge Alito points out in his testimony, the term “unpublished” is an anachronism, dating back to the days when failing to designate a disposition for inclusion

in a national reporter meant that it would not be published at all, and therefore unavailable to most members of the bar. Even at that time, unpublished did not mean secret. Like all court records, unpublished dispositions are available to the parties and the public from the clerk of the court. Today, of course, all dispositive rulings, whether designated for inclusion in an official reporter or not, are widely available online through Westlaw and Lexis, as well as in hard copy in West's Federal Appendix.

Unpublished dispositions differ from published ones in only one respect—albeit an important one: They may not be cited by or to the courts of our circuit. Ninth Circuit R. 36–3. (As Judge Alito explains, the rule operates somewhat differently in other circuits.) With minor exceptions dealing with subjects like *res judicata* and double jeopardy, none of the judges of our circuit—district judges, magistrate judges, bankruptcy judges, even circuit judges—may rely on these unpublished dispositions in making their decisions. And, in order to help them avoid the temptation to do so, we prohibit the lawyers from citing them in their briefs. The rule only applies to practice in the courts of our circuit; lawyers are free to cite our unpublished dispositions to other courts, who may give them whatever weight they deem appropriate; they may write about them in law review articles or post them on websites. There is no general prohibition against citing, discussing, criticizing or deconstructing unpublished dispositions. The prohibition is narrow: It prohibits citation to or reliance on unpublished dispositions where this would influence the decision-making process of a judge of one of the courts of our circuit. In that context, and that context alone, the unpublished disposition may not be considered.

#### WHY THE PROHIBITION AGAINST CITATION?

The answer to this question is fairly straightforward: Prohibiting citation to, and reliance on, unpublished dispositions helps our court to maintain consistency and clarity in the law of the circuit—the law applied by lower-court judges in their courtrooms, by our panels in later cases, and by lawyers advising clients about the likely consequences of various courses of action. Maintaining a consistent, internally coherent and predictable body of circuit law is a significant challenge for a collegial court consisting of a dozen or more judges (more than two dozen in our case) who sit in ever-changing panels of three. Appellate courts nevertheless have to speak with a consistent voice. If they fail to do so—if they leave the law uncertain or in disarray—they will make it very difficult for lawyers to advise their clients and for lower-court judges to decide cases correctly. The ripple effect of uncertain or unclear caselaw is felt acutely by those caught up in legal disputes, who must litigate their case all the way to the court of appeals if they want to know how the dispute would be decided.

In order to maintain a clear and consistent body of caselaw, appellate judges spend much of their time working on published opinions—those that announce and calibrate the circuit's decisional law. To someone not accustomed to writing opinions, the process may seem simple or easy. But those of us who have actually done it know that it's very difficult and delicate business indeed.

A published opinion must set forth the facts in sufficient detail so lawyers and judges unfamiliar with the case can understand the question presented. At the same time, it must omit irrelevant facts that could form a spurious ground for distinguishing the opinion. The legal discussion must be focused enough to dispose of the case at hand, yet broad enough to provide useful guidance in future cases. Because we normally write opinions where the law is unclear, we must explain why we are adopting one rule while rejecting others. We must also make sure that the new rule does not conflict with precedent, or sweep beyond the questions fairly presented.

While an unpublished disposition can often be prepared in only a few hours, an opinion generally takes many days (often weeks, sometimes months) of drafting, editing, polishing and revising. Frequently, this process brings to light new issues, calling for further research, which may sometimes send the author all the way back to square one. In short, writing an opinion is a tough, delicate, exacting, time-consuming process. Circuit judges devote something like half their time, and half the time of their clerks, to cases in which they write opinions, dissents or concurrences. (Attached as an exhibit is an article titled *How To Write It Right* by Fred Bernstein, one of my former law clerks. Fred discusses how it's not unusual to go through 70–80 drafts of an opinion over a span of several months.)

Once an opinion is circulated, the other judges on the panel and their clerks scrutinize it very closely. Often they suggest modifications, deletions or additions. Judges frequently exchange lengthy inter-chambers memoranda about a proposed opinion. Sometimes, differences can't be ironed out, precipitating a concurrence or dissent. By contrast, the phrasing (as opposed to the result) of an unpublished dis-

position is given relatively little scrutiny by the other chambers; dissents and concurrences are rare.

Opinions take up a disproportionate share of the court's time even after they are filed. Slip opinions are circulated to all chambers and many judges and law clerks review them for conflicts and errors. Petitions for rehearing en banc are filed in about half the published cases. Off-panel judges frequently point out problems with opinions, such as conflicts with circuit or Supreme Court authority. A panel may modify its opinion; if it does not, the objecting judge may call for a vote to take the case en banc. In 1999, there were 44 en banc calls in our court, 21 of which were successful.

Successful or not, an en banc call consumes substantial court resources. The judge making the call circulates one or more memos criticizing the opinion, and the panel must respond. Frequently, other judges circulate memoranda in support or opposition. Many of these memos are as complex and extensive as the opinion itself. Before the vote, every active judge must consider all of these memos, along with the panel's opinion, any separate opinions, the petition for rehearing and the response. The process can take months to complete.

If the case does go en banc, eleven judges must make their way to San Francisco or Pasadena to hear oral argument and confer. Because the deliberative process is much more complicated for a panel of eleven than for a panel of three, hammering out an en banc opinion is even more difficult and time-consuming than writing an ordinary panel opinion.

Now consider the numbers. During calendar year 1999, the Ninth Circuit decided some 4500 cases on the merits, approximately 700 by opinion and 3800 by unpublished disposition. Each active judge heard 450 cases as part of a three-judge panel and had writing responsibility in a third of those cases. That works out to an average of 150 dispositions—20 opinions and 130 unpublished dispositions—per judge. In addition, each of us was required to review, comment on, and eventually join or dissent from 40 opinions and 260 unpublished dispositions circulated by other judges with whom we sat.

Writing twenty opinions a year is like writing a law review article every two and a half weeks; joining forty opinions is like commenting on an article written by someone else nearly once every week. It's obvious just from the numbers that unpublished dispositions get written a lot faster—about one every other day. It's also obvious that explaining to the parties who wins, who loses and why takes far less time than preparing an opinion that will serve as precedent throughout the circuit and beyond. We seldom review unpublished dispositions of other panels or take them en banc. Not worrying about making law in 3800 unpublished dispositions frees us to concentrate on those decisions that will affect others besides the parties to the appeal.

If unpublished dispositions could be cited as precedent, conscientious judges would have to pay much closer attention to their precise wording. Language that might be adequate when applied to a particular case might well be unacceptable if applied to future cases raising different fact patterns. And while three judges might all agree on the outcome of the case before them, they might not agree on the precise reasoning or the rule that would be binding in future cases if the decision were published. Unpublished concurrences and dissents would become much more common, as individual judges would feel obligated to clarify their differences with the majority, even where those differences had no bearing on the case before them. In short, we would have to start treating the 130 unpublished dispositions for which we are each responsible and the 260 unpublished dispositions we receive from other judges as mini-opinions. We would also have to pay much closer attention to the unpublished dispositions written by judges on other panels—at the rate of ten per day.

Obviously, it would be impossible to do this without neglecting our other responsibilities. We write opinions in only 15% of the cases already and may well have to reduce that number. Or, we could write opinions that are less carefully reasoned. Or, spend less time keeping the law of the circuit consistent throughout the en banc process. Or, reduce our unpublished dispositions to one-word judgment orders, as have other circuits. None of these is a palatable alternative, yet something would have to give.

#### DO WE GIVE SHORT SHRIFT TO CASES DECIDED BY UNPUBLISHED DISPOSITIONS?

The answer to this question is no. Much of the time spent in deciding a case is not reflected in the length or complexity of the disposition: we read briefs, review the record, read the applicable authorities. All this behind-the-scenes work goes into every case and necessarily takes a substantial amount of time. How much? There is no set amount. Some cases have a large record, yet have a dispositive issue—such

as a jurisdictional defect—right near the surface. Others require a deeper examination before a dispositive issue is identified, although in the end, the resolution may be quite straightforward. The written dispositions in both cases may be short, they may look quite similar in structure and detail, yet they reflect very different time commitments.

Writing up an unpublished disposition is infinitely easier than writing a published opinion. To begin with, the facts need not be recited in detail because the parties to the dispute—the only ones for whom the disposition is intended—already know them. Nor is it important to be terribly precise in phrasing the legal standard announced, or providing the rationale for the decision. Most importantly, the judge drafting the disposition need not ponder how the disposition will be applied and interpreted in future cases presenting slightly different facts and considerations. The time—often a huge amount of time—that judges spend calibrating and polishing opinions need not be spent in cases decided by an unpublished disposition that is intended for the parties alone. Is this time taken away from the case? Is this an illegitimate shortcut? Not at all, because when judges do write opinions, much of the time they spend in the drafting process doesn't go toward actually deciding the case, but rather to making the reasoning consistent with the existing body of circuit caselaw and useful for other decisions in the future.

Lawyers sometimes darkly suggest that unpublished dispositions make up a secret body of law wholly at odds with our published decisions—that unpublished dispositions mark out a zone where no law prevails, but only the predilections and preferences of the judges. We have discussed this among the judges of my court and are, frankly, baffled by the claim because none of us perceives that this is what we are doing. These claims are always made with reference to some unnamed earlier case; lawyers seldom, if ever, present concrete evidence of lawlessness in unpublished dispositions to back up their claims. This is surprising because if the practice were happening with any frequency, the losing lawyers would have every incentive to make a fuss about it.

Nevertheless, we have worried about claims like these, and so in recent years we have taken two initiatives to help discover whether unpublished dispositions are, in fact, in wholesale, lawless conflict with published precedents. First, in February and March 2000 we distributed a memorandum to all district judges, bankruptcy judges, magistrate judges, lawyer representatives, senior advisory board members, and law school deans within the Ninth Circuit, as well as other members of the academic community, seeking information on unpublished dispositions that conflicted with other published or unpublished decisions. The memorandum was also posted on the court's website. Responses were collected by e-mail, fax, and a response form at the website. Only six responses were received. Of these, we found two to be meritorious and, despite our instructions, both responses identified conflicts between two *published* Ninth Circuit decisions—conflicts of which we were already aware. No one identified an unpublished disposition that conflicted with a published opinion or with another unpublished disposition.

Second, for a 30-month period beginning July 2000, we relaxed the court's rules barring citation of unpublished dispositions to allow their citation in requests for publication and in petitions for rehearing. For the first nine months, court staff examined all requests for publication filed. Only fifteen requests for publication were received, and none of these identified a legitimate conflict among unpublished dispositions or published opinions.

We are certainly not infallible, and I will not try to persuade this subcommittee that we never make a mistake when we decide 4500 cases a year. But I can state with some confidence that the sinister suggestion that our unpublished dispositions conceal a multitude of injustices and inconsistencies is simply not borne out by the evidence. I feel so confident of this point, having participated in rendering thousands of these dispositions myself, that I would welcome an audit or evaluation by an independent source.

How About That Claim of Unconstitutionality?

Two years ago, in *Anastasoff v. United States*, 223 F.3d 898 (8th Cir.), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000), Judge Richard Arnold of the Eighth Circuit set this area of law ablaze by holding that stare decisis in the strict form—an obligation to follow earlier opinions of the court, published or not—was part and parcel of the Article III judge's obligation to apply the law. If Judge Arnold were correct, this would mean that every one of our 3800 yearly unpublished dispositions is binding on every federal judge in our circuit. Lawyers would have a field day digging for superficial inconsistencies or imprecisions in wording, and we'd do little but hear cases en banc to settle claimed conflicts of authority.

Fortunately, *Anastasoff* turned out to be a false alarm. Judge Arnold is one of the ornaments of the federal judiciary, a judge widely respected for his erudition and

wisdom. But even Homer nods, and Judge Arnold took a big nod on this one. While his argument in *Anastasoff* has superficial appeal, closer examination exposes its flaws. I reached the opposite conclusion in an opinion I wrote by the name of *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001), a copy of which is attached as an exhibit. More recently, attorney Thomas Healy thoroughly examined Judge Arnold's constitutional claim in an article titled *Stare Decisis as a Constitutional Requirement*, 104 W. Va. L. Rev. 43 (2001). Mr. Healy concluded, as I had, that the historical record comes nowhere near supporting Judge Arnold's thesis, and in fact refutes it. Mr. Healy's article is also attached as an exhibit.

Finally, some legal scholars have suggested that there may be First Amendment problems with a citation ban. No case of which I am aware has addressed this claim, but it seems implausible on its face. As noted, our rule doesn't prevent people from talking about unpublished cases. Its prohibition is limited to what lawyers may say in their briefs and arguments in court. There are a multitude of restrictions on what lawyers may say in court, none of which raises First Amendment concerns. Lawyers may not, for example, knowingly leave the "nos" and "nots" out of the quotations in their briefs, or cite to evidence that's not in the record, or fail to cite applicable binding authority of which they are aware. A knowing violation of any of these rules may result in sanctions. Attempting to defraud the court in one's pleadings is the kind of conduct that may be punished, even if similar out-of-court conduct may not be. The prohibition against citation of unpublished dispositions addresses a specific kind of fraud on the deciding court—the illusion that the unpublished disposition has sufficient facts and law to give the deciding court useful guidance. As the Massachusetts Appeals Court noted in *Lyons v. Labor Relations Commission*, 476 N.E.2d 243 (Mass. App. 1985), unpublished dispositions can be quite misleading to those other than the parties to the case: "[T]he so called summary decisions, while binding on the parties, may not disclose fully the facts of the case or the rationale of the panel's decisions. . . . Summary decisions, although open to public examination, are directed to the parties and to the tribunal which decided the case, that is, only to persons who are cognizant of the entire record." *Id.* at 246 n.7.

#### ARE FEDERAL COURTS UNIQUE IN PROHIBITING CITATION TO UNPUBLISHED DECISIONS?

The answer is emphatically no. The vast majority of state court systems restrict citation to unpublished decisions. Last year, an article in the *Journal of Appellate Practice and Process* provided a thorough catalogue of these rules at both the federal and state levels. Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 *J. App. Prac. & Process* 251 (2001). (A copy of this article is attached as an exhibit, and a summary of its findings appears at the end of my statement.)

Their findings are very revealing. Thirty-eight states (plus the District of Columbia) restrict citation to unpublished opinions to some degree; by far the largest number (35) have a mandatory prohibition that is phrased much like the Ninth Circuit's rule. (Like the Ninth Circuit, some of these states permit citation for purposes of establishing *res judicata* or law of the case.) A typical rule, that of Alaska, reads as follows: "Summary decisions under this rule are without precedential effect and may not be cited in the courts of this state." Alaska R. App. P. 214(d). Only nine states have rules explicitly authorizing citation of unpublished cases as precedent, and only five have no rules at all on the matter. (The total comes out to fifty-two, plus the District of Columbia, because two states explicitly authorize citation of unpublished opinions as to some courts and explicitly deny it as to unpublished opinions of others.) Two states, California and Tennessee, have provisions that authorize the state's highest court to "de-publish" opinions of the lower courts, thereby depriving them of precedential authority and making them non-citeable.

The state courts, of course, hear vastly more cases in the aggregate than do the federal courts. That the overwhelming majority of states have adopted a prohibition against citation of, or reliance on, a large number of appellate decisions is significant in two respects. First, it shows that this is a legitimate and widely accepted practice in the legal community nationwide. Second, it discloses that many court systems in addition to the federal courts have found the non-publication/non-citation practice to be an important tool in managing the development of a coherent body of caselaw.

#### Are There Separation of Powers Concerns?

While I welcome this subcommittee's interest in the matter and the opportunity to address the issue, I do want to raise a red flag about the appropriateness and wisdom of congressional intervention. What lies at the heart of this controversy is the ability of appellate courts to perform one of their core functions, namely, over-

seeing the development of the law within their jurisdiction. The fact that so many state and federal courts have nonpublication rules and related prohibitions against citation suggests that this is an area of uniquely judicial concern.

There is not much recent authority on point, but almost 140 years ago the new state of California tried to impose, by statute, a requirement that “all decisions given upon an appeal in any Appellate Court of this State, shall be given in writing, with the reason therefor, and filed with the Clerk of the Court.” California Supreme Court Justice Stephen Field—the very same Justice Field who later sat on the United States Supreme Court and wrote that case we all remember so well from law school, *Pennoyer v. Neff*, 95 U.S. 714 (1877)—would have none of it. Speaking for a unanimous court, he held the law unconstitutional:

[The statute] is but one of many provisions embodied in different statutes by which control over the Judiciary Department of the government has been attempted by legislation. To accede to it any obligatory force would be to sanction a most palpable encroachment upon the independence of this department. If the power of the Legislature to prescribe the mode and manner in which the Judiciary shall discharge their official duties be once recognized, there will be no limit to the dependence of the latter. If the Legislature can require the reasons of our decisions to be stated in writing, it can forbid their statement in writing, and enforce their oral announcement, or prescribe the paper upon which they shall be written, and the ink which shall be used. And yet no sane man will justify any such absurd pretension, but where is the limit to this power if its exercise in any particular be admitted?

The truth is, no such power can exist in the Legislative Department, or be sanctioned by any Court which has the least respect for its own dignity and independence. In its own sphere of duties, this Court cannot be trammelled by any legislative restrictions. Its constitutional duty is discharged by the rendition of decisions. The Legislature can no more require this Court to state the reasons of its decisions, than this Court can require, for the validity of the statutes, that the Legislature shall accompany them with the reasons for their enactment. The principles of law settled are to be extracted from the records of the cases in which the decisions are rendered. The reports are full of adjudged cases, in which opinions were never delivered. The facts are stated by the Reporter, with the points arising thereon, and are followed by the judgments rendered, and yet no one ever doubted that the Courts, in the instances mentioned, were discharging their entire constitutional obligations.

The practice of giving the reasons in writing for judgments, has grown into use in modern times. Formerly, the reasons, if any were given, were generally stated orally by the Judges, and taken down by the Reporters in short hand.

In the judicial records of the King’s Courts, “the reasons or causes of the judgment,” says Lord Coke, “are not expressed, for wise and learned men do, before they judge, labor to reach to the depth of all the reasons of the case in question, but in their judgments express not any; and, in truth, if Judges should set down the reasons and causes of their judgments within every record, that immense labor should withdraw them from the necessary services of the commonwealth, and their records should grow to be like *Elephantini Libri, of infinite length, and, in mine opinion, lose somewhat of their present authority and reverence*,” and this is also worthy for learned and grave men to imitate.”

The opinions of the Judges, setting forth their reasons for their judgments, are, of course, of great importance in the information they impart as to the principles of law which govern the Court, and should guide litigants; and right-minded Judges, in important cases—when the pressure of other business will permit—will give such opinions. It is not every case, however, which will justify the expenditure of time necessary to write an opinion. Many cases involve no new principles, and are appealed only for delay. It can serve no purpose of public good to repeat elementary principles of law which have never been questioned for centuries. The Court must therefore exercise its own discretion as to the necessity of giving an opinion upon pronouncing judgment, and if one is given, whether it shall be orally or in writing. In the exercise of that discretion the authority of the Court is absolute. The legislative department is incompetent to touch it.

*Houston v. Williams*, 13 Cal. 24, 25–26 (1859) (citations omitted). Does this state the law today? I can offer no advisory opinion, but I do believe that Justice Field’s observations are worthy of careful consideration. Perhaps the best approach is not to test the issue by staying far clear of a confrontation between the judicial and legislative branches.

## WHAT ABOUT THE LAW OF UNINTENDED CONSEQUENCES?

It is the sad experience of mankind that often, in trying to make things better, we do something that has exactly the opposite effect. Unpublished, unciteable appellate decisions play an important role in the management of our dual responsibilities of deciding a multitude of cases, while keeping the law clear and consistent. Would it make things better if this tool were removed from the judicial arsenal?

To answer this question, I ask you to imagine a different kind of rule Congress might pass. Let's say Congress decided that we simply didn't have enough uniformity in the application of the law, and the reason was that the United States Supreme Court wasn't issuing enough opinions. So, in order to improve things, Congress passed a law that required the Supreme Court to grant review to, and decide, 1600 cases a year, rather than the 80 or so it decided this past Term. This would be only 178 case dispositions per Justice per year, less than half the number of the average Court of Appeals judge.

Assuming the Justices disagreed with Justice Field and did not see the law as an unconstitutional encroachment on their authority, what would be the consequences? It's unlikely that this enactment would cause the Justices to work twenty times harder to come up with twenty times the number of published opinions equal in caliber to their current opinions. My guess is that they'd write something in 1600 cases, but in the vast majority, it would not be something that was very good or very useful. In order to avoid having an avalanche of insignificant cases creating unintended conflicts and uncertainties, they would write "published" opinions that have very little useful content—akin to very abbreviated dispositions or judgment orders—that contain little more than the word "Affirmed."

Something like this will, I suspect, happen if courts of appeals are forced to accord precedential value to their unpublished dispositions: We would have a tendency to say much less in our unpublished dispositions, in order to avoid having them interfere with our principal mechanism for setting circuit law, namely, the published opinions.

And this would be too bad for the parties to those appeals. Under the current system, they at least get a reasoned disposition of some sort, a statement of their facts, however brief, and a genuine effort at explaining to them why they won or lost. If those words, now directed to the parties who know a lot about the case, must also be made usable by the multitudes who do not, we will simply say less, in order to protect the integrity and stability of our circuit law from those who would misconstrue or twist it.

## CONCLUSION

The topic the subcommittee has chosen for its oversight hearings is certainly a timely one. As Judge Alito has suggested, we in the judiciary are in the process of reevaluating our rules. I hope, in the end, we will leave well enough alone, and allow each court to decide this issue according to its own customs and needs. However, whatever happens will be the action of the judiciary, taken after careful reflection and with full knowledge of the institutional constraints under which we operate. I hope that whatever rule we adopt—whether to stay with the current local option or to adopt a national rule—the political branches of government will accept and respect it. Citation Rules in State Courts

**Citation Rules in State Courts**

	Unpublished Opinions <i>Shall Not Be Cited</i>		Unpublished Opinions <i>Should Not Be Cited</i>		Unpublished Opinions <i>May Be Cited</i>	
	Supreme Court*	Intermediate App. Court**	Supreme Court	Intermediate App. Court	Supreme Court	Intermediate App. Court
Alabama	X+	X+				
Alaska	X	X				
Arizona	X 1%	X 1%				
Arkansas		X 1				
California		X 1				
Colorado	X					
Connecticut						XS
Delaware					X	
District of Columbia	X 1					
Florida				X		
Georgia	X					
Hawaii		X+				
Idaho	X					
Illinois	X+					
Indiana		X 1				
Iowa	X	X				
Kansas	X+	X+				
Kentucky		X				
Louisiana		X+				
Maine	X					
Maryland	X 1	X 1				
Massachusetts		X 1				
Michigan						X
Minnesota						X
Mississippi	X+	X+				
Missouri	X					

Montana	X					
Nebraska	X	X <sup>1</sup>				
Nevada	X <sup>1</sup>					
New Hampshire	X					
New Jersey	X <sup>1</sup>	X <sup>1</sup>				
New Mexico	X	X				
New York						
North Carolina				X <sup>1</sup>		
North Dakota					X	
Ohio						X
Oklahoma	X <sup>1</sup>	X <sup>1</sup> #				X#
Oregon				X	X	
Pennsylvania						
Rhode Island	X					
South Carolina			X <sup>1</sup>	X <sup>1</sup>		
South Dakota	X <sup>1</sup>					
Tennessee	X <sup>1</sup>					
Texas		X				
Utah	X <sup>1</sup>	X <sup>1</sup>				
Vermont					X	
Virginia						
Washington		X				
West Virginia						
Wisconsin	X+	X+				
Wyoming						
TOTAL	26	22	1	4	4	5
TOTAL (EITHER)	35		4		9	
TOTAL (EITHER)	39			9		

Source: Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. App. Prac. & Process 251 (2001).

*Notes:*

\* No entry may indicate that state requires its Supreme Court to publish all opinions and/or orders

\*\* No entry may indicate that state has no intermediate appellate court

+ Exceptions for res judicata, collateral estoppel, law of the case, etc.

% Exceptions for publication requests and petitions for rehearing.

\$ All appellate opinions are published. Citation of unpublished out-of-state opinions is allowed.

# Court of Criminal Appeals is citeable; Court of Civil Appeals is not.

*Sample Language:*

*Shall Not Be Cited:*

“Summary decisions under this rule are without precedential effect and may not be cited in the courts of this state.”

Alaska R. App. P. 214(d).

*Should Not Be Cited:*

“Cases affirmed without opinion by the Court of Appeals should not be cited as authority.”

Or. R. App. P. 5.20(5).

*May Be Cited:*

“Unreported opinions or orders may be cited, but a copy must be provided.”

Del. Sup. Ct. R. 14(b)(vi)(4).

Mr. COBLE. Mr. Schmier.

**STATEMENT OF KENNETH SCHMIER, CHAIRMAN,  
COMMITTEE FOR THE RULE OF LAW**

Mr. SCHMIER. Thank you, Mr. Chairman. Approximately 4 months ago we received a decision in Schmier versus the United States Court of Appeals for the Ninth District that found us without standing to ask constitutional questions of the Ninth Circuit in the district courts of that district. We thought that surprising, because it seemed that a lawyer should be able to inquire of the courts their rationale for rules that make it impossible for lawyers to know the law.

The appellate court told us we would have to press our matter before Congress, and we are here. I suppose that shows that disgruntled litigants can get here.

I think I can be most useful in pointing out to the courts what it feels like to be a litigant who receives one of these unpublished appellate opinions. As Judge Kozinski points out, there is much wisdom in looking to the States, and my experience has been primarily in California, but there are witnesses here in the room who would be happy to share experiences with the Federal courts.

Our family appealed a contractual dispute where the trial court had determined the matter by a rule of law clearly contrary to that of the civil code. There were a lot of shenanigans during the process of the appeal, like the appellate record was missing for a long time. But 2 days before the oral argument, the presiding judge took the case off calendar and the case disappeared for 5 months.

One month later when the opinion was issued, its result was based upon 10 principles of law that were unrecognizable and they were unsupported by sites of authority. So we petitioned the court for rehearing, asking the court to correct those errors of law, any one of which would require a different result.

At the same time, we petitioned the court to publish the opinion and make it the law for everyone, feeling that the court would have to choose between correcting its errors or publishing the case, making it the law for everyone, and turning the contract law of California absolutely upside down.

The court refused to do either. So the question we raise to you is, are we simply disgruntled litigants, or do we have a legitimate beef? If the court is unwilling to make its rules of novel statements of law, law for everyone, why should we be subject to it? It seems to us that the failure to make law the law for everyone denies us the basic warranty of justice; that is, that every case is decided according to principles of law that are applicable to everyone.

I can tell you that my experience in traveling around the State of California, speaking to community groups, is that the public is uniformly unaware that there is such a thing as a “no citation” rule operating in our courts. I can also tell you that they are horrified

to hear that such a thing could exist. After all, how is it possible that a criminal defendant in America can be deprived of the right to tell a trial court that there exists an appellate court decision that would exonerate?

And we asked other questions. We want to know how it is possible to carry out the promise of equal protection of the law. "equal justice under the law" is carved over our Supreme Court. How can we carry that out, even in theory, if we don't maintain a citable body of knowledge of what has been decided in other cases? How can anybody insist on equal protection of the law if they can't bring to a court's attention that which the courts have already decided?

Finally, we ask this question: How is it possible, in a country that values free speech and where content restrictions on free speech are presumptively invalid, that a court can prohibit the discussion of what is our law in our courts of law?

We think that all of these things create a prima facie case that these rules are unconstitutional. The courts have been unwilling to act, and we ask now for checks and balances.

Mr. COBLE. Thank you, Mr. Schmier.

[The prepared statement of Mr. Schmier follows:]

PREPARED STATEMENT OF KENNETH J. SCHMIER

Mr. Chairman:

Thank you for the opportunity to draw to the attention of this Subcommittee that the law of precedents, referred to as *stare decisis*, a fundamental element of the rule of law, has been rendered ineffective.

This is so because the vast majority of our appellate court determinations are now made in unpublished, unciteable, nonprecedential, decisions, but would be equally true if only a fraction of one percent of decisions were allowed to be so made. The choice to make decisions in this manner rests entirely with the panels that make them. There now exist vast expanses in which lawless decisions may rest without notice. This has led to inconsistent resolution of cases in many instances and renders our "System," once at least theoretically perfect, unreliable. We ask that this committee restore the law of precedents to its proper operation for the protection of all.

We maintain a Website, <http://www.nonpublication.com/>, which is a compendium of information on this subject.

One can only wonder why our free press has not brought this troubling change of judicial accountability to the attention of the American people.

From school children to Congress, to former Attorneys General, our citizenry are under the impression that all decisions of the appellate court become citeable precedents in other cases, and that the future effect of bad precedent is a strict control upon the discretion of judges. Our citizens are uniformly unaware of unpublished, unciteable opinions and the consequences to our democracy of allowing such practices to continue.

These citizens are incredulous that a "no citation rule" could possibly exist in America, or even that an appellate court of any kind could make a decision that is removed from the chain of precedents. That some of our appellate courts decide over 90% of their cases in this manner seems to them outrageous, as it should. Legal scholars, judges, lawyers, and citizens echo their outrage. How, after all, can it possibly be that a criminal defendant could be forbidden to cite an appellate decision that would exonerate?

Civics classes across the country teach our precedential system of common law, and the importance of the test case for the redress of grievances. The test case is a method of forcing a resolution of an issue for all see, be bound, and therefore concerned. But how does this mechanism work when appellate courts are free to decide test cases in unciteable and unpublished decisions applicable to no one but the parties?

When opinions are citeable we must all be concerned about their effect upon the status of our law, not because of its justice to others, but because any change potentially affects us as well.

Due Process and Freedom of Speech allow us to insist upon equal treatment. No-citation rules and unpublished opinions gut the salutary power of these doctrines and make it impossible for individuals to argue past judicial resolutions to gain equal treatment in our courts, and sedate similarly situated political constituencies to be unconcerned about injustices or error.

Moreover, these same rules make it impossible for our people to govern themselves. Our government must have a self-regulating cycle. The cycle is this: We elect representatives who make our laws, the laws are applied to us individually by our courts, through the mechanism of published opinions we are able to see how our laws are actually being applied, and because we are concerned for the establishment of precedent, various groups of citizens study our court decisions. These groups of citizens foment for change where required and cause us to demand of our representatives certain actions. If our representatives refuse to accommodate us, we may then replace them. That process is severed when the application of law is not reported back to the citizens as legal precedent. In short, unless all cases are precedent, each of us stands alone, without recourse, before the enormous and unaccountable power of the judiciary, with no real mechanism for correcting our law.

My family's experience in the courts of California, which have no-citation and non-publication rules exactly analogous to that of the 9th Circuit is exemplary of the kind of harm now experienced by litigants all over our country.

We appealed a contractual matter determined pursuant to obvious misstatements of contract law. The presiding judge of the appellate court took the case off calendar two days before oral argument and kept it off calendar for five months. That judge then wrote the decision for the court, and marked it "Not to Be Published in the Official Reports," meaning under California Rule 977 that the decision is not to be cited or relied upon in any other case. The decision rested upon many errors including numerous unrecognizable principles of law unsupported by any cites of authority, the correction of any one of which would force a different result. We petitioned the court for rehearing to correct error, or in the alternative, for the publication of the case to make it law for all, reasoning that the rules of law it contained would turn the contract law of California upside down and require the California Supreme Court to act.

The appellate court refused to correct the errors, and also refused to make its decision law for all, leaving us losing \$700,000 according to statements of law unique for us and forbidden to be used to resolve any other case. Our petitions to the California and U.S. Supreme courts asking how we could be the subjects of law uniquely made for us were denied.

We believe the result determined by the California Court of Appeal in our case could not possibly have been the same were that decision written with knowledge that it would be citeable in other cases. We believe we were deprived of justice *under law* because the non-publication and no-citation rules combined to allow the judges to free themselves of the rule of law, and make rules that cannot possibly affect the public generally.

Despite the vast departures from law, our attempts to interest the press were futile. Had the decision been published as law for all, we would have been able to cry "look what they did to contract law" and enlist the support of all concerned about contract law. But because the decision was not law for all, we could say only, "look what they did to us." That cry went unheard.

The entire record of this case is available at [www.nonpublication.com](http://www.nonpublication.com) for those wishing to confirm our allegations.

A close friend was involved in another litigation matter in which three parties spent over \$3,000,000 in attorneys' fees attempting to get an answer to a simple, but unprecedented, issue of landlord tenant law. In the end, an appellate court opinion resolved the issue, but its twenty five-page opinion is unpublished and unciteable, assuring that similarly situated parties will have to undergo the same expense and frustration attempting to get the same answer.

Six years of litigation and a year's effort of the appellate court will bring no enlightenment whatsoever to future litigants. Instead of citizens being able to peacefully resolve such a dispute by known principles developed by common law processes and recorded in official reports of the courts, citizens facing the same issues will have to repeat the same wasteful process and friends will be turned to bitter foes. It is hard for us to see the efficiency the court claims in such a process.

Perhaps the plight of E.J. Ekdahl, a prisoner at San Quentin, California is more pathetic.

According to his letter, Mr. Ekdahl obtained a writ of habeas corpus from a Superior Court ordering the California Board of Prison Terms to set a parole hearing for him in 90 days or for the prison system to release him. The appellate court reversed in an unciteable unpublished opinion ignoring the valid statutory principles relied

upon by the Superior Court. Query: where an appellate court reverses a trial court can it be said the case is routine? If the appellate court's decision is not published and cannot be cited, what chance does Mr. Ekdahl stand of attracting attention to his case, even if it embodies the grossest of injustices? Can he ever hope for a time when some other appellate court would be forced to overrule his case, forcing reconsideration of his rights? He cannot. His case is outside the system of precedents, and there is no systemic method of ever discovering any injustice to him.

In *Sorchini v. City of Covina, USCA 9th*, Judge Kozinski established the law of the 9th Circuit as "binding precedent" finding a violation of court rules by counsel's cite of an unpublished opinion directly relieving her client of liability:

*"The only way Kish could help counsel's argument is prohibited by Ninth Circuit Rule 36-3—by persuading us to rule in the City's favor because an earlier panel of our court had ruled the same way."*

There is more in this opinion to concern us than the end of the doctrine of *stare decisis* and freedom of speech to argue law in a court of law. Kozinski excuses counsel's conduct because the Kish court violated the 9th Circuit's General Order 4.3.a. prohibiting panels from discussing the facts of the case being decided in unpublished opinions, an order that also makes it impossible for court watchers to determine whether the circuit is consistent in its application of law.

Worse still, Kozinski finds this excuse valid only in this case, citing *Bush v. Gore* as authority to make rules of ephemeral application. The humor of this may be lost on future generations, but what is certain to survive is a combination of authority that judges are absolutely free to make decisions that do not create precedent, that they are required to ignore all cases marked unpublished no matter how relevant, and that they are free to make law of ephemeral application. It seems to us that such a combination of authority establishes the end of the rule of law in the 9th Circuit.

The *Sorchini* Court resolved whether the police could be liable for dog bite injury to an escaping arrestee where the police did not announce release of the dog. But the court withheld its resolution of this issue from its published decision regarding violation of no citation rules, and decided that portion in an unpublished decision. Therefore, notwithstanding that the 9th Circuit has now resolved that issue twice, in *Kish* and again in *Sorchini*, there exists no citeable authority from which the police may determine a legal course of conduct, nor any precedent to deter litigation by others. We cannot see any efficiency gained by this process.

In *Symbol Technologies v. Lemelson Medical, USCA Fed 00-1583 (2002)* the Federal Circuit "decline(d) to consider the nonprecedential cases cited by Lemelson," considering only the published authorities despite the argument that unpublished decisions compelled a different result. Query: In face of such a divergence in the law between unpublished and published opinions, how are lawyers to advise clients regarding law? Shall lawyers' advice reflect what our courts publicly state is the law, or the law they actually apply in the vast majority of cases that go unpublished? Without a universal process of reconciliation how can we have one law for all? In circuits that do not provide unpublished cases to legal research services, how is anyone to even know how that court is actually resolving a given issue?

Judges tell us that the increase in the number of opinions would impose a burden upon attorneys researching a point of law. But how can a rule, which deprives a criminal or civil defendant of the right to cite a known appellate decision that would exonerate him be said to benefit that defendant?

In *Re Machiko Kamiyama, Cal.App.4th, Div. 3, G022140 (1998)* a California appellate court resolved a habeas corpus petition. A woman had spent three months in prison because she left her eight-year-old child at home, in a gated community, without a sitter, while she went to work. The court expressly recognized that there was no California case on point, and despite a dissenting opinion, resolved the case in an unpublished, unciteable opinion. We ask, what institution is to resolve the law for us if it is not the appellate court? How can we reference this case if it is not published and indexed? It happens the court determined that whether good parenting or bad, having latch key children is not criminal, for to make that the law would make millions of parents criminals. Yet despite this resolution, neither police, nor social workers nor parents can have any idea what the law is, because a trial judge convicted, and the reversal is unpublished and unciteable. Are we citizens to live forever under the tyranny of doubt as to what of our actions may result in criminal liability? Absent a published opinion, what systemic mechanism of our democracy brings the need for debate of a narrow legal issue to the body politic? How will legal thought, experience, outcome, and knowledge be preserved and brought to wisdom without some method of preserving our past attempts at justice?

More importantly, consider the loss of protection to Ms. Kamiyama had her conviction been sustained in an unpublished opinion. The public would not have cared

because it was not law for all. But had the same decision become law for all, government would have received millions of calls from similarly situated parents wondering what to do.

Even ignoring computerized research techniques and their astounding ability to isolate relevant precedents, limiting the number of cases a litigant or his attorney can sift through can only have the effect of denying that litigant the opportunity to argue for some measure of equal protection of the law. Moreover, can it possibly be argued that preventing the mention of 90% or so of our body of common law, while permitting mention of virtually every other repository of knowledge in our courts of law, does not constitute a presumptively unconstitutional content based restriction on the right of free speech where it matters most—in the forums where our law is considered and applied to us as individuals?

In respect of our memory of our father, who was a prosecutor and later a professor of law, and all of those who have sacrificed for the American concept of Equal Justice under Law, we have endeavored to force the judiciary to face the many unanswerable questions raised by no-citation, non-publication rules. We have litigated the issue in *Schmier v. Jennings*, *Schmier v. Supreme Court of California*, *Schmier v. United States Court of Appeals for the 9th Circuit*, and *Schmier v. United States Court of Appeals for the 11th Circuit* (Records available at [www.nonpublication.com](http://www.nonpublication.com)). In all of this litigation, and at all levels of the judicial system, we have never been able to obtain answers to the issues raised. Rather, the matters have always been dismissed for want of standing.

This has left us wondering if as attorneys and citizens, we have a duty, if not standing, to challenge a systemic constitutional violation broadly implemented by the judiciary itself, that deprives the people of fundamental constitutional protections, or whether the law requires us to remain silent until such time as that rule creates an obviously unjust result to ourselves rather than others. We think history teaches us that ignoring systemic injustice in the bud is foolish.

Moreover, we believe that because the courts are entrusted with the duty to protect the constitutional rights of the people, the judiciary has the duty of a trustee to candidly answer questions regarding the propriety of rules like Court Rule 36–3 forthrightly and without evasion. Yet *Schmier v. USCA 9th* and *Schmier v. USCA 11th* refused to do so. The USCA 11th even refused to publish its decision or provide it to WestLaw, assuring, as best it was able, that court watchers would not even know that its practices have been questioned.

On April 2, of 2001 I sent a letter to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. That letter is attached hereto. I raised twenty questions regarding no-citation rules and unpublished opinions. The judges of that committee have never answered those questions.

The Subcommittee should be aware that files of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States contain many letters from chief circuit judges weighing in on this issue: Federal Circuit Chief Judge Haldane Robert Mayer wrote “Each court should be allowed to decide for itself the circumstances under which nonprecedential opinions may be cited.” Similarly, 3rd Circuit Chief Judge Edward R. Becker wrote “the criteria for determining when an opinion should be legended ‘not precedential’ should be a matter for the respective Courts of Appeals” and that what opinions should be citeable “should be a matter for the Courts of Appeals IOP’s, if at all.” Circuit Judge Wilfred Feinberg of the 2nd Circuit wrote “I also feel that any attempt to specify uniform, national criteria for ‘unpublished’ opinions—would be unwise.” 2nd Circuit Chief Judge Ralph K. Winter wrote “the FRAP should not attempt to specify uniform standards regarding unpublished opinions. There is no correct set of standards writ in stone, and the present diversity of practice allows each court to choose those standards it deems most appropriate.” 7th Circuit Chief Judge Richard A. Posner wrote—I do think it is useful “very useful—to have a category of unpublished opinions, provided it is understood that such opinions cannot be cited. . . . I do not think written criteria for when to publish an opinion are useful or even feasible. I think it should be left to the judgment of the panel.”

Perhaps 4th Circuit Chief Judge J. Harvie Wilkinson III summed up the judges position best, “there might be some advantage simply in leaving the subject alone.”

We think demand for unlimited access to a mechanism allowing the trumping of the rule of law is inconsistent with American notions of limits on the exercise of power by any government official. To us, admissions that the use of unpublished unciteable opinions cannot be subjected to articulable legal principles constitute an admission that the activity itself is lawless.

In *Schmier v. USCA 9th*, the USCA 9th stated that “Schmier will have to press his concerns about unpublished opinions—to the Congress,” perhaps anticipating that the difficulty of doing so would daunt us. We are here to do just that.

We ask you to recognize this as a point in history where the Congress must exercise its power of checks and balances or, as representatives of the people, knowingly yield the manifest protections of the law of precedents held by the people as protection from otherwise unfettered power of the judiciary. We ask you to consider as a warning Barbara Tuchman's book, *The March of Folly*, which carefully recounts how numerous civilizations have destroyed themselves by doing things *they knew were wrong at the time*, justifying their actions by an anticipated, if unproven, expediency.

Our hope is that as part of the consideration of this matter the Subcommittee on the Courts can obtain the answers to the questions we could not obtain in our litigations with the judicial system or our inquiry of the Committee on Rules of Practice and Procedure.

Before I close, let me be clear on what we think should be the rule. Precedent means simply, "that which was allowed before." Therefore, all decisions of cases are precedent as a matter of historical fact. That does not mean precedents must be followed. It means that relevant precedents must be considered, then followed, distinguished or overruled.

All cases should be decided by written decisions carefully written to explain who won and why, considering facts and the weight of all conflicting legal principles no matter how complex. Opinions should teach the parties and the public the appropriate law to be used in all factually similar cases, and explain why conflicting arguments and precedents are rejected. No working hypothesis of result should harden into a final result until it has survived thorough scrutiny by at least three well-trained and experienced minds considering legal argument and precedents that bring to bear the benefit of historical experience. All decisions must carry the warranty that they are decided by legal principles, right or wrong, that have been equally applicable to all similarly situated in the past, or will be for the foreseeable future. That warranty only becomes implicit when each decision becomes a part of the law itself.

This substantial effort is required so that all who submit their conflicts to the peaceful judicial processes may be assured of the utmost judicial care, infinitely respectful of each individual, which is the essential promise of our democracy. This methodology implements G-d's law, assuring all that we will not do unto anyone that which we would not do to ourselves if similarly situated.

In every case, courts should consider all relevant precedents brought to their attention or known to them, and should accord them weight according to the stature of the issuing court and respectful of the doctrine of *stare decisis*, yet free to follow, distinguish or overrule the dictates of any case as articulable reason supports as proper for that instant case, and all future cases of similar nature. In this way our system of citation indexes our legal knowledge so that, like the scientific method it inculcates, our legal knowledge tends always toward predictability, reconciliation, and improvement.

The concept of binding precedent, offered by Judge Kozinski as a reason all cases may not be precedent, must be ended because the institutional resistance the requisite of *en banc* hearing places upon the correction of error and improvement in our law is too extreme. As was written by Judge Kozinski in *Hart v. Massanari*, "Because they are so cumbersome, *en banc* procedures are seldom used merely to correct the errors of individual panels." Error should never be perpetuated simply for the convenience of the court. Democracy places no faith in univocalism as a device for finding or asserting truth. Rather, democracy expects to find ever-improving truth in a consensus of free speaking individuals.

The concept of binding precedent or law of the circuit must be ended in favor of the independence of panels, each subject to the flexible doctrine of *stare decisis*, so that controversy and inconsistency can draw enlightenment and recognition of noble truths. Moreover, our legal system should encourage citizens to find safe harbor in conduct that can be viewed as right from all perspectives, rather than encourage the nefarious to seek safe harbor in the precise language of one panel's "binding precedent."

Our *Official Reports*, which may be online and not in books, should include all appellate decisions. Each of these decisions should be indexed and made available for study by our entire community, and particularly its law schools and representatives, so that our judges are encouraged by the possibility of public and peer review, immediately or years in the future, to strive for that decision that stands as right from all perspectives. Also in this way our laws may be improved by criticism, reconciliation, and change, and our entire society can be involved in both learning and perfecting out law, and keeping our judges and our judicial system on track. All relevant decisions should be citeable to, and may be relied upon by any court, so that our law can, at least theoretically, be said to be equally applied to all.

Americans are the most productive people in the world. We are justice-loving people. We wage war only to protect our ideas of justice. Our government has no higher duty than to provide us equal justice under law, nor do we deserve any lesser standard in our own courts than careful decisions respectful of each individual citizen and the law, no matter what the cost.

President Kennedy pledged for us: "*we shall pay any price, bear any burden, meet any hardship, support any friend, oppose any foe, to assure the survival and the success of liberty.*" These noble words pledge us to meet the cost—if there actually is proof that a cost will be required.

The job of the judiciary is to provide the discipline of ideals to our system. They must tell us what is needed to do the job right, and if they cannot get our attention, then they must refuse to do the job wrong, at least until we affirmatively order a new method.

What the judiciary may not do, and must not be allowed to do, is to remove from us the protection of the rule of law without engaging our attention and careful consideration of the protections we surrender, and the existence and extent of the expediency promised to us in exchange.

Moreover, we should be allowed to offer alternative methods for correcting the real logistical problems facing the courts. For example, careful consideration might reveal that the flood criminal appeals swamping our appellate courts might be triaged more effectively for all concerned if court appointed attorneys were paid substantial success fees for successful appeals, rather than minimal retainers to mass file appeals.

We ask the Congress to draw wide attention to this matter, so that the public may fully appreciate the protections of liberty it has already lost, to recognize how easily it could lose its liberty entirely through laxness, and may insist upon restoration of *stare decisis* to its proper function in the processes of our judiciary.

**Publish or Perish***Perspective From a Client***A response to Please Don't Cite This! By Judges Alex Kozinski and Stephen Reinhardt**

By Kenneth J. Schmier

Chairman, Committee for the Rule of Law

**Publish or Perish**

Not as an attorney, but as a client and businessman, I'd like to offer a response to *Please Don't Cite This!* June '00. Judges Alex Kozinski and Stephen Reinhardt have written the first honest, if unsatisfying, defense of non-publication - no citation rules. These rules, unthinkable only a couple of decades ago, are presently rendering some 90% of the work product of the California Courts of Appeal and the Ninth Circuit official "nullities". What happened to *stare decisis*?

When I went to law school (Hastings '74) we occasionally ran into an opinion "limited to its facts". But such cases were unusual, and were the object of suspicion because they stretched the law. Now, in direct conflict with numerous constitutional principles, law, common sense, and *James B. Beam Distilling Co. v. Georgia* (1991) 501 U.S. 529, appellate court determinations, both criminal and civil, are only selectively prospective, and it is illegal to mention most of them in any court in the jurisdiction! Our justices have created justifications for no citation rules from emperor's magic cloth only court sycophants can see.

American courts were once renowned for their principled legal doctrine equally applicable to all - "Equal Justice Under Law" is carved over the entrance of our Supreme Court. This is no longer true, not even in theory. Cries of foul are heard regularly, and litigants are turning to private judges. Why? Because not only is the public court system unbearably cost and time inefficient, but the results it produces have become well-nigh random, and worse.

Commerce has changed greatly in the past twenty years, but there is no knowable record of how most of the commercial law issues presented to our courts during that time have been resolved. In the absence of such a record, how can the judiciary possibly deliver equal protection? Or sound judgments? Or even stay abreast of business realities?

The judges tell us that by using unciteable opinions, cases can be disposed of without stating their facts, nor need they "announce a rule general enough to apply to future cases" in their resolution. But this deprives business people of any real opportunity to chart safe conduct. Subtle rules often dictate the results of cases that preserve or destroy our lives and fortunes. We cannot plan for the consequences of rules that we don't know, and which are not citeable when discovered. Vague? It's crazy-making! The resulting fear and uncertainty greatly limit our productivity. We cannot nip errant rules in the bud when we don't know about them. And we cannot properly govern ourselves because we do not get reliable feedback as to how our law is being applied.

Can the result and the articulation of the principles upon which a case was determined be disconnected? The phrasing of legal principles determining a result *is the law*. A "result" cannot be right unless it flows logically from legal doctrine applied to a given fact situation. Moreover, three judges are supposed to work up appellate cases. By most accounts that is no longer the practice. Instead, much of the courts' output qualifies as "one-judge" or "no-judge" opinions, to borrow the words of retired Justice Robert S. Thompson.

We used to solicit observations from the multitude of perspectives that make up our community by publishing every decision. Legal scholars and representatives of constituencies threatened by any rule being applied by the judiciary could be counted upon to join the call for review or legislative correction. No more. Issuing decisions as “nullities” sedates public concern and keeps would-be commentators ignorant of development of the law.

But the harm is surfacing nonetheless. Chief Justice Ron George has said, “You’d have a difficult time separating the wheat from the chaff if you published [all appellate court opinions].” Kozinski and Reinhardt tell us, “Using the language of the memdispo to predict how the court would decide a different case would be highly misleading”.

Deputy Attorney General Tom Blake, who defends the California Supreme Court in a challenge to its rules 976-979 said, “We’d need a hundred Supreme Court judges to correct all of the error coming out of the appellate courts.” That’s an argument that proves too much. Who is correcting all that error now?

What it all means is that appellate assembly lines have serious quality control problems.

According to Kozinski and Reinhardt these quality control problems are solved by the no citation rule because the court need not worry about propagation of error. Not so. It is scrutiny for potential propagation of error that protects each one of us individually as we stand one at a time before the awesome power and often-uncontrolled egos of our judges. Shall we tolerate injustice to others because no harm threatens us personally today? We know better.

The Judges tell us that the process of writing published opinions, “*Frequently brings to light new issues, calling for further research, which in turn, may send the author back to square one.*” But this only demonstrates that square one must be a “working hypothesis” rather than a “result”.

No working hypothesis should harden into a result until it has survived thorough scrutiny by at least three well-trained and experienced minds applying legal principles that bring to bear the benefit of historical experience. The process allows us litigants to hold the law hostage for a right result. As the judges admit, frequently working hypotheses fail because of conflicts. Aren’t those of us shunted to the “memdispo” track entitled to a change of result if law will not justify the working hypothesis? Given the treatment of petitions for rehearing, even those coupled with an alternative demand that the “new law” of the unpublished opinion be published, the answer is currently no. The judiciary regularly refuses both review and publication, effectively shooting the hostage.

What meaning is there in equal protection, if principles unknown to existing law can be used to resolve our cases yet be sheltered from public scrutiny by laws insuring that these novelties will never be cited again? How do we invoke the Rule of Law to correct obstinate rule of men, if the judiciary can refuse to make its pronouncements law for all? How do we bring a test case? We can’t.

Ideas have consequences, and the consequence of the notion that a solemn judicial declaration of “the law” that dictates the resolution of a dispute, is not law at all when the next such dispute comes along, is simply a call for legal anarchy.

To bring this matter to the attention of the people and our lawmakers, we have formed the Committee for the Rule of Law. [www.Nonpublication.com](http://www.Nonpublication.com) is our meeting place and our library. We encourage reports of abuse of unpublished opinions through the website.

We are speaking to every group that will listen. The public and its representatives are shocked to learn of no citation rules and the extent of their operation. They should be because these rules gut the promises of

equal treatment and freedom of speech that form the core of our democracy.

*Please Don't Cite This!* answered nothing; it only confirmed prevailing suspicions by conceding that most appellate decisions are the product of expediency, not principle, and that many of them are made not by judges, but by their clerks. As businesses often learn the hard way, the public is rarely fooled with inferior quality for long. The same is true of the courts. Polls consistently show that the stature of the Courts is declining. Sophisticated litigants are abandoning the public courts in droves. Respect for law may follow, for obedience to law can not be taught while judges ignore it.

Publication and citation of appellate decisions lead to knowledge of the laws and the reasons for the laws in the general populace, the perfection of the law itself, and voluntary obedience to the law. No citation rules ultimately must lead to lawlessness and chaos. Publish or perish.

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Peter G. McCabe, Secretary  
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Thurgood Marshall Federal Judiciary Building  
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John K. Rabiej, Chief  
Rules Committee Support Office  
Administrative Office of U. S. Courts  
Thurgood Marshall Federal Judiciary Building  
Washington, D.C. 20544

April 2, 2001

To the Committee:

As a citizen and not as a lawyer, I protest that your rules revision does not address the serious issue of non-publication/no-citation rules applied in varying ways among the circuits. The people depend upon you as its representatives to safeguard our concepts of liberty, which will only exist so long as we have equal justice under law.

I have learned from Mr. Rabiej that the committee understands the tremendous significance of this issue but has determined to ignore it because the chief judges of several appellate circuits complain of workload problems. Balderdash.

The committee needs to carefully rethink this issue for it has the last clear chance to save the rule of law, and all that it offers humankind, from those who would destruct it in the name of unproved expediency. Be warned: Do not confuse the lack of knowledge of no-citation rules and the concomitant decline in quality of appellate work among the general public for approval. The public understands the doctrine of precedent and has been taught the appropriate manner by which appellate courts operate in required civics classes.

No one, it seems, and certainly not the judiciary, has taken on the responsibility of engaging the public to either educate them about, or debate the wisdom of, these rules.

So unknown are these rules that five out of five former United States Attorneys General attending a recent event at Hastings Law School were unaware of their existence. Senators Rockefeller, Wyden,

Boxer and Feinstein were not aware. Nor were any of the entire congressional delegation coming from northern California. Even the general counsel of the House Judiciary Sub Committee on Courts and Intellectual Property was not aware of no-citation rules. Graduating Harvard, Boalt, Hastings, and Chicago Law School students had never been taught about these rules! This is not to say others are aware of these rules, only that they have not been asked.

But it will become known, because our committee, among other dedicated citizens, will make it known. Already we have succeeded in getting bills before legislatures, and we are informed that the Congress will look into the matter this term.

As one who has spoken to hundreds of community groups regarding these rules, I can tell you that members of the public, from immigrant cab drivers to brain surgeons are uniformly horrified upon learning of no-citation rules, as they should be. Apparently only judges and a few lawyers so concerned with easing the burdens of judges, or just agreeing with them, or lessening a perceived malpractice liability, are comfortable overlooking the manifest protection of the public afforded by publication and citation.

Preliminarily let me observe that the opposite of justice is not injustice, it is expediency. No one intends injustice. Persons, whose actions seem unjust from a neutral perspective, only intend to expediently advance their own agenda over the rights of others, which they weigh to be less important. At bottom, this is the argument with which the judges have prevailed upon the committee, thereby earning the committee's complacency in the destruction of *stare decisis*, and with it, equal protection and the rule of law.

Committee members would do well to recall *Queens Bench v. Dudley and Stevens*. Necessity created by 28 days without food in a life boat did not warrant the taking of human life, for, even though the judges themselves doubted being able to withstand such compelling circumstances, the law must stand to encourage lawful conduct. So it should be reckoned with publication and citation. The law must stand to encourage judges to anticipate every circumstance, every perspective, every criticism, to solicit other observations of the same, and to criticize each other, all in order to assure each individual the height of justice humanly possible. We simply cannot ever attain the forward promise of *Justice for All* -- liberty as we know it -- unless we have justice for each. The judges of your committee would have us aim below this mark, making its achievement not only unlikely, but impossible.

Economic feasibility is not for your committee to debate. President Kennedy pledged for us: "*we shall pay any price, bear any burden, meet any hardship, support any friend, oppose any foe, to assure the survival and the success of liberty*". The job of the judiciary is to provide the discipline of ideals to our system. They must tell us what is needed to do the job right, and if they cannot get our attention, then they must refuse to do the job wrong, at least until we affirmatively order a new method. What the judiciary may not, and must not, do is to sell out our values without engaging our attention.

As a nation, we go to war for justice, at the expense of human life. Therefore justice is more important to us than human life itself. That being so, the "necessity" defended by the workload of the appellate judiciary cannot support the renunciation of *stare decisis* and the rule of law.

Here are twenty questions the Committee for the Rule of Law has endeavored to have answered by the judiciary. But Court actions asking these questions have been dismissed to avoid them, not in the interests of the people, but rather in the interest of "collegiality", whatever that may be.

But perhaps there are persons among your committee who would candidly and publicly address them. To find out, I formally request, from the committee itself, a response to each of the following:

- How can equal protection of law exist where courts have no institutional memory of the manner in which the law is applied in similar cases?
- How can our courts learn from the mistakes of others, or keep abreast of changing conditions in the community generally, absent publication of decisions?
- How can the public be certain that its judges correctly and honestly state the law when rulings and opinions are not made public for review and criticism?
- To what effect is the doctrine of equal protection of the law if law can be applied to an individual without immediately causing others that would be affected to complain on that individual's behalf when the rule is unconstitutional, illegal or unjust?
- Does the doctrine of *stare decisis* become totally inoperative only when our courts refuse to allow citation of 100% of appellate opinions, or is it made inoperative when any decision is removed from the control of the law of precedents?
- Are no-citation rules consistent with freedom of speech and the right to petition government?
- Are unpublished decisions selectively prospective?
- By what mechanism is the rule of law to be invoked to control the caprice of judges if judges can make decisions of limited prospectivity?
- How can the people govern themselves if the manner in which its laws are applied is not reported back to them for correction?
- Is it just that a criminal defendant be prevented from informing a court that an appellate court decision exists that would – or even might- exonerate?
- How can individuals be presumed to know the law if court decisions are not published?
- Who corrects error of the appellate court contained in unpublished opinions?
- How does one bring a test case if the judiciary retains the option to defeat its use as precedent?
- If judges cannot do their jobs properly should they not object publicly, but rather engage in wanton negligence? Will the judiciary approve other workers, trades and professionals operating to this standard?
- Whose word is acceptable to determine the extent of deviance from existing law in unpublished opinions?
- 1. Where a litigant has been denied a request for rehearing for error in the law, and where rules of law are announced without citation of existing authority and/or deviate from the common understanding of the law, and where a request for publication of the decision is also denied, should the resolution of his cause in an unpublished opinion be suspect of denial of equal protection, error, corruption, or tyranny?

2. How are the various organizations of the public – i.e. Law Schools, Community Organizations, Industry Organizations, Academics, Politicians, Journalists and Commentators, etc, motivated to review unpublished opinions or join in a call for review when the questioned opinion is unciteable and not law for the general community?
3. What warranty of correctness inheres in the unpublished unciteable decision for the benefit of the litigant burdened by an appellate court decision?
4. How shall members of the public learn law and justice if they are not involved in the process?
5. How will we ever simultaneously have *Liberty* and *Justice for All*, if there exists no mechanism for the learning, perfecting and embracing of an infinitely granular and just law among our people?

Each of the members of your committee has sworn an oath to protect and defend the Constitution of the United States. Non-publication and no-citation rules hold grave constitutional implications under *James B. Beam Distilling v. Georgia* (selective prospectivity), *Legal Services Corporation v. Valenzuela* (freedom of speech), and *Anastasoff v. United States of America* (Article Three and the essence of the rule of law). Given the oaths freely taken by yourselves, none of you have the luxury of ignoring the issues presented here, but have the affirmative duty to rectify them or publicly explain the basis for your refusal to do so. To do other wise is not only obliquity but should be carefully considered for its implication of treason.

We have been given a great doctrine, given to us for safe keeping at the expense of much life, limb, and property. It provides for the common welfare while simultaneously protecting and preserving respect for the individual. The control of its implementing system is that government should never act against an individual except where reason capable of articulate written statement, openly put to, and applicable to, all similarly situated, exists. For this reason government may never act against an individual without the imprimatur of a court. Any person affected by a court used to have the right to insist that the action taken by the government become part of our common law so as to warrant that the government would treat all others similarly. To be blunt, your committee is now complacent in the destruction of that control mechanism.

There is enormous protection for the individual in that control mechanism, for it raises anything that government may do to one individual to a potential threat against the entire community of persons that might, now or at some time in the future, be treated in the same way. It is the threat of propagation of error that causes each of us to look out for the other.

Because of this, we Americans have resolutely protected each other, insuring that our house may not be divided. The care and concern for others, or in other words, the respect for the humanity of others is regenerated and amplified by *stare decisis*, equal protection and the rule of law. Why is it so important? Because it is the direct implementation of the essence of G-d's law - Do not do unto others that which you would not have them do unto you. Our obedience to that doctrine is not because we are threatened by a greater force, but rather because we understand that *Justice for All* best protects us from whatever may be brought upon us.

The absence of the certain opportunity for every person to obtain a fully explicated opinion, warranted to be the law for all by its publication and the effect of *stare decisis*, threatens destruction of our nation. A powerful statement, but not alarmist, for to say otherwise is to negate the benefit of the rule of just law.

The judges of your committee must observe their courts from the perspective of the people they serve. Courts do not serve lawyers – they are part of that institution-and are not appropriate oversight. Courts serve people. Courts are the embodiment of government as it relates to individuals. Each wrong decision does at least quadruple damage. It rewards and encourages the scofflaw and harms and makes cynics of the law abiding. And the talk of the people quickly spreads the harm.

The problem is not the citation of erroneous decisions. The problem is the creation of erroneous decisions. The purpose of publication and citation is to discourage error, and also to enlist the whole community in identifying error and perfecting the law itself. Sedating public concern for error in individual cases improperly serves only to protect the courts and individual judges from public criticism, or having to criticize fellow judges for unwise decisions in the process of correcting the law, and has the negative effect of taking the public's eye off of the otherwise unrestricted power of the judiciary, and the need for constant governance of government by the people themselves.

Justice Anthony Kennedy told me that "It would take a thousand judges to do it right". Perhaps. But that figures to only twenty per state. It is a small enough cost for the many benefits of the rule of law, the *sine qua non* of civilization.

Sincerely

Kenneth J. Schmier  
Chairman  
Committee for the Rule of Law

Cc: Blaine Merrit  
Counsel House Subcommittee for the Courts  
William Glaberson, New York Times  
Kim Curtis, Associated Press  
Bridgid McMenamin, Forbes Magazine

Letter of Prisoner EJ Ekdahl (Retyped)

E.J. EKDAHL. #2N30L  
P.O. Box C- 79199. CSP.  
San Quentin, CA. 94694.

MICHEAL KALIK SCHMIER  
1475 POWELL ST. #201.  
EMERYVILLE, CA. 94608-2026

Dear Sir:

I am a prisoner serving a 15 years to life indeterminate sentence. After several parole hearings before the Board of Prison terms (B.P.T.) where the process was an illegal pro-forma type of hearing, I filed a writ of habeas corpus pro per. Marin County Superior Court granted the writ in Oct. 31, 1996. The court's order told the B.P.T. to set a parole date in 90 days or released me on parole. Of course the Attorney General asked for a stay and appealed the decision as he is his job.

What happened next is why I write to you in response to your paid political advertisement. By the way I told my family members who do vote about your campaign.

On Nov. 13, 1997., the Court of Appeal, First District, Division One, Case Number: A076671 Emil J. Ekdahl (Marin – County Super. Ct. No. SC088084. ) issued its opinion. This order was marked **NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.**

I am not making this up the opinion was so far out of what prior case law read. The court misquoted its own case law to the point of only an idiot would believe that is what those cases stood for.

So I believe this is a form a political repression on a class of politically unpopular prisoners. That the courts in California use unpublished opinions and summary denials to carry out this oppression. That through the use of unpublished decisions coupled with the use of summary denials of prisoners habeas petitions the rule of law is crippled to the point of anarchy.

While much could be said about poetic justice for a class of people who are convicted law breakers. It is the system which must uphold the higher standard, especially if it wishes to stand in judgment and impart morality to those they judge.

The law in question is Calif. Penal Code statute § 3041. The language of the law

is clear: “ the Board shall normally set a parole date ...” There are currently 24,500 inmates eligible for parole with 1200 of them over their prescribed matrix of suggested time to be served.

Sen. Polanco (D) currently has a bill pending that may fix the situation. See [HTTP://www.sacbee.com/state-wire/v-prinst/story/2208210p-2601878c.html](http://www.sacbee.com/state-wire/v-prinst/story/2208210p-2601878c.html).

Well good luck with your campaign and I know there must be thousands of ordinary Californian citizens who have also been politically repressed via the courts unpublished decisions practice and I hope you'll be able to bring in an end to this.

Sincerely

/s/ E.J. Ekdahl pro per...



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## Justice in The Dark

Brigid McMnamin, 10.30.00

THREE YEARS AGO A FEDERAL jury acquitted Vicki Lopez-Lukis, a former commissioner in Lee County, Fla., of bribery for letting her lover, a Goldman Sachs lobbyist, reimburse her for their personal phone calls. But, bizarrely, the jury convicted her of one count of using the mails to deprive her constituents of "honest services" in connection with the same alleged bribery. This didn't make any sense, so she appealed to the 11th Circuit Court of Appeals. But in a one-word decision--"affirmed"--the appeals court rejected her argument.

Blind justice? For Lopez-Lukis, more like justice in the dark. She has no idea what the appellate judges were thinking when they brushed aside the obvious inconsistency in the verdict. Forget further appeals. The Supreme Court rarely accepts cases for review--only 124 of 8,445 sent to it in the 1999-2000 season--and almost never accepts one if there is no published opinion to look at. Lopez-Lukis is serving a 27-month term in Coleman federal prison near Orlando.

Last year federal appeals judges disposed of 79% of the 26,819 cases they decided by issuing so-called unpublished decisions, up from 37% in 1977. Over 7% of the unpublished decisions consisted of a single word. Whether curt or long-winded, an unpublished decision isn't precedent. That means the judges can be sloppy. They are not accountable for illogic or inconsistency in the rulings.

"This is judges disobeying the law," says William Richman, a University of Toledo law professor who has studied the problem.

At last, one federal appeals court has declared war on the practice. In August, in a case involving a late-filed tax refund claim, a three-judge panel in St. Louis, Mo. branded unpublished decisions unconstitutional. Despite the ruling, the taxpayer lost her refund.

The reasoning behind this momentous decision was that judicial decisions are intended not just to resolve particular disputes but also to tell Americans what the law is. So every decision must be a precedent. Though that decision is itself a precedent only in the 8th Circuit (Arkansas, Iowa, Minnesota, Missouri, Nebraska and the Dakotas), litigants in other federal courts are starting to cite it. The Supreme Court will likely end up ruling on the matter.

The shortcut system began in the late 1960s when judges were

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struggling to deal with an avalanche of social-justice litigation as well as a parade of *pro se* litigants from the jailhouse. True, the appellate backlog does get scary at times. But does this justify lazy law? "[Unpublished decisions] are not prepared with the same kind of exactness," admits Procter R. Hug Jr., chief judge of the 9th Circuit on the West Coast, though he contends that they are still sound.

Judges insist that they issue unpublished decisions only in simple, noncontroversial cases, where the answer is clear cut. The statistics say otherwise. Appeals courts issue unpublished decisions in 24% of the cases where various judges disagree so much that one writes a dissenting opinion, and in 37% of the cases where they're reversing the trial court.

The 9th Circuit Appeals Court recently saw proof that unpublished decisions mask plenty of inconsistency. The court had affirmed the conviction of Pablo Rivera-Sanchez, an illegal alien who sneaked back into the U.S. after being deported. His lawyer found, though, that the court had in the past issued 27 separate unpublished decisions applying three different rules to the same immigration issue.

Consider how unpublished decisions have nearly driven out of business Beehive Telephone, a Wendover, Utah-based rural phone company. Last year the Federal Communications Commission cut Beehive's rates by 66%. An appeals court, swayed by the FCC's claim that Beehive had made a procedural error that barred appellate review, refused to hear the case.



#### Table

By the Numbers

#### Chart

Looking for Justice

1 of 2

[Next page](#)

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Home > Magazines > Forbes Magazine

Page 2 of 2 from Justice in The Dark  
Brigid McMenemy, 10.30.00

Beehive lawyer Russell Lukas dug up an earlier decision by the same court that said even if a company makes that error—which he insists Beehive did not—it doesn't disqualify an appeal. But Lukas couldn't cite one of the key cases—it was deemed unpublished. Completing the insult, the appeals court ruled against Beehive in another unpublished decision only one word long. "They can't justify what they're going to do, so they don't publish it," says Lukas, who works out of Washington, D.C. He asked the Supreme Court for review, but naturally, was denied.

Alcan Aluminum, the Ohio subsidiary of the Canadian-based giant Alcan Aluminium Ltd., was the victim of a court's unpublished opinion that directly contradicted its earlier decision in the same case. A federal court in Philadelphia held Alcan liable in 1991 for part of the cost of cleaning up Pennsylvania's Susquehanna River after a spill. An appeals court kicked the case back to the lower court, saying in a published decision that Alcan would be off the hook if it could show that its emulsion hadn't caused the pollution. Though Alcan proved that its waste hadn't caused the harm, the lower court still found it liable, applying a new and impossibly high standard. The company appealed again, to the same appellate court, but this time the judges baited it down with one of those one-word grunts. Penalty, \$500,000.

There are better ways to deal with backlogs. Congress might appropriate the money to pay for more judges. Or perhaps shrink the overpowering role of federal law in our lives.

#### Table

By the Numbers

-

#### Chart

Looking for Justice

-

Previous page

2 of 2

E-mail story

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Home > Magazines > Forbes Magazine

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19.30.00

from Justice in The Dark

**Secret Justice**

Appeals courts are giving short shrift to cases-and not just frivolous ones.

<b>79%</b> of almost 27,000 federal appeals decided on merits last year;
<b>24%</b> of the 1998 cases close enough that a judge wrote a dissenting opinion;
<b>37%</b> of cases that reversed the trial court, a sign the law wasn't clear.
<b>43%</b> of cases in the New England circuit, and Puerto Rico.
<b>90%</b> of cases in the circuit including maryland, virginia, the carolinas.

**Back to Justice in The Dark**

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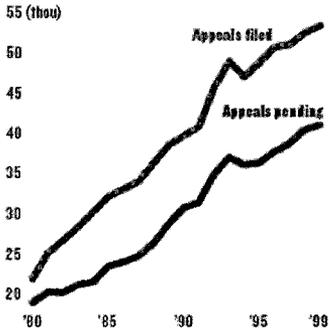
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 from Justice in The Dark

Unpublished decisions haven't reduced the backlog, and the number of appeals continues to rise.



Back to Justice in The Dark

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6/28/2002

Mr. COBLE. Professor Hellman.

**STATEMENT OF ARTHUR HELLMAN, PROFESSOR OF LAW,  
UNIVERSITY OF PITTSBURGH SCHOOL OF LAW**

Mr. HELLMAN. Thank you, Mr. Chairman, and thank you for the opportunity to express my views today.

The problem of unpublished opinions actually encompasses three related but distinct issues. The first question is whether a court of appeals should provide some kind of explanation in every case that it decides on the merits. My answer is that it should, and the reason goes back to something basic that in fact is cited, I think, in the Massachusetts Constitution of 1780: We have a Government of laws and not of men.

When an appellate court decides a case, the court's explanation provides the tangible evidence that the decision is the product of the law and not simply the personal preferences of the judges who happen to sit on that panel. Deciding cases by judgment orders or their equivalent is an unacceptable practice that should not be considered among the options available to the courts of appeals as they consider the other issues.

Now, a related point involves the dissemination of opinions that Judge Alito has alluded to. Today, 11 of the 13 circuits make their unpublished decisions available to WESTLAW and LEXIS and other electronic publishers, and that includes the circuits that prohibit the citation of opinions as precedent. The courts do this, I think, at least in part, because they recognize that ready access to unpublished opinions is an important mechanism for accountability, whether or not those decisions are binding or even citable.

My own view is that the courts should make all of their unpublished opinions available to the electronic publishers, and if they are not willing to do it on their own, I would like to see the judicial conference take some steps.

That brings me to the second step of the major issues, the precedential status of unpublished opinions. I think this is a very difficult question. I had hoped to find some middle ground, but I have concluded that given the realities of the process by which cases with unpublished opinions are decided, there really is not a middle ground and the courts should not feel bound by any of those decisions.

Now, that does mean we are going to be compromising with the principle of treating like cases alike, and we should not do that easily or lightly. But I think it is going to happen here.

Fortunately, as a practical matter, not many cases will be affected. In any event, what is important is not the formal legal status of unpublished opinions, but their role in the adjudicative process.

That brings me to the issue that Judge Alito's committee is addressing: whether litigants should be permitted to cite unpublished opinions for their persuasive value when arguing later cases in the court of appeals.

Now, I think that the permissive citation rule that was endorsed provisionally by Judge Alito's committee just a few months ago, I think that is a good rule and I hope it will survive the long and arduous process of rulemaking under the enabling act.

I say that for a couple of reasons. Several of the circuits have been operating under variations of that rule for several years now,

and the problems that Judge Kozinski fears do not seem to have materialized. But it is not just the absence of negative effects that lead me to endorse the rule. There are positive reasons, and one is suggested in Judge Boudin's letter to Judge Alito. Litigants can provide information to the court that the court should have, but is not likely to get through other means.

More broadly, I believe that the task of creating a coherent and sensible body of law is not one that the judges carry out alone. On the contrary, under the adversary system, the judges work, or should work, in partnership with the lawyers. When a litigant, through counsel, informs the court that a prior panel has improvidently made new law in an unpublished opinion, the court should welcome that information and either assimilate the holding into the body of law, or forthrightly repudiate it.

Having said all that, I recognize the legitimacy of the concerns that have been articulated by Judge Kozinski and Judge Boudin, concerns that involve the effect of a permissive citation rule on the internal practices of the courts.

Now, I am not fully convinced by those arguments, but I do appreciate the value of the system of regional decentralization that our court of appeals system represents. So if the judges of a court of appeals, after formally and publicly consulting the bar of the circuit and other interested citizens, if they adhere to their view that a permissive citation rule would undermine circuit operations, the court should be allowed to opt out. I suggest that opt-out proviso.

My hope, though, is that the circuits that opt out will ultimately come around, and I think they will, because I think they will ultimately recognize that judges and lawyers together can do a better job than judges alone in realizing the ideals that underlie our system of precedent.

Thank you. And thank you again for holding the hearing on this important subject.

Mr. COBLE. Thank you, Professor.

[The prepared statement of Mr. Hellman follows:]

PREPARED STATEMENT OF ARTHUR D. HELLMAN

Mr. Chairman and Members of the Subcommittee:

I appreciate your invitation to express my views at this oversight hearing on unpublished judicial opinions. By way of personal background, I am a professor of law and Distinguished Faculty Scholar at the University of Pittsburgh School of Law. I have been studying the operation of the federal appellate courts for more than 25 years, starting in the mid-1970s, when I served as Deputy Executive Director of the Commission on Revision of the Federal Court Appellate System (Hruska Commission).

Since my days at the Hruska Commission, I have organized and participated in many other studies of the federal appellate courts. In the late 1980s I supervised a distinguished group of scholars in analyzing the innovations of the Ninth Circuit and its court of appeals. Not long after that, I was selected by the Federal Judicial Center to carry out a study of unresolved intercircuit conflicts requested by Congress in the Judicial Improvements Act of 1990. More recently, I served on the Ninth Circuit Court of Appeals Evaluation Committee appointed by Chief Judge Procter Hug, Jr. Of course, in my testimony today I speak only for myself; I do not speak for any court or other institution.

This statement is in six parts. After sketching the background (Part I) and outlining the issues (Part II), the statement deals with the obligation to explain (Part III), the precedential status of unpublished opinions (Part IV), and rules governing citation (Part V). The statement concludes with recommendations and reflections.

## I. BACKGROUND

In the Anglo-American legal system, the decisions of appellate courts not only resolve the disputes between the parties immediately before them; they also establish precedents to guide courts and citizens in the resolution of future disputes. That, at least, is the tradition. In the 1970s, the federal courts of appeals, responding to unparalleled increases in the volume of cases, began to break from traditional practice. The courts designated some of their dispositions as “not for publication,” and they prohibited lawyers from citing those dispositions. Court rules explicitly or implicitly announced that unpublished opinions “are not binding precedent.” Today, “unpublished” opinions account for about 80% of the cases decided by the federal courts of appeals.

Non-publication and non-citation rules aroused controversy from the start, and several recent developments have added fuel to the debate. Among them:

- In an ironic counterpoint to court rules that draw a sharp distinction between published and unpublished opinions, the spread of computerized legal research has meant that “unpublished” opinions generally are as readily available as those designated as “published.”
- Six of the 13 circuits now allow citation of unpublished opinions for persuasive value while retaining the rule that such decisions are not binding.
- Effective January 1, 2002, the District of Columbia Circuit has abandoned its restrictive rule on citation of unpublished decisions. The court now allows unpublished orders and explanatory memoranda to be “cited as precedent.”
- West Group, publisher of the Federal Reporter System, has begun publication of the “Federal Appendix,” a hard-cover series of reports of cases designated by the courts as “not for publication.” In little more than a year, the series reached its 30th volume.
- The Third Circuit Court of Appeals, long a holdout against on-line publication of its “unpublished” opinions, began posting not-for-publication dispositions on its web site. Those opinions, complete with West headnotes, now appear in the Federal Appendix along with those of 10 other circuits.
- In *Anastoff v. United States*, the Eighth Circuit Court of Appeals held that the circuit rule denying precedential status to unpublished opinions is unconstitutional under Article III. Although that decision was subsequently vacated by the en banc court, it has generated widespread commentary about the constitutionality—and the wisdom—of nonpublication rules.
- In April 2002, the Advisory Committee on Appellate Rules tentatively approved a proposal for an amendment to the Federal Rules of Appellate Procedure that would allow litigants to cite “non-precedential” decisions for their persuasive value.

In light of these developments, the time is ripe for a re-examination of the practice of designating opinions as “not for publication” and excluding them from the corpus of binding precedent. I applaud the Subcommittee for taking the initiative and holding an oversight hearing on these important questions.

## II. SORTING OUT THE ISSUES

The problem of “unpublished opinions” actually encompasses three related but distinct issues. First, must a court of appeals provide some kind of explanation in every case that it decides on the merits? Second, may a court designate some of its opinions as “not for publication” and refuse to treat those opinions as binding precedent? Third, when a court designates an opinion as “not for publication,” may the court forbid lawyers from citing that opinion when arguing future cases?

Before turning to these questions, three preliminary matters require attention. The first involves terminology. It is convenient to use the term “unpublished opinions,” and I shall do so here. But as I have already indicated, “unpublished” does not mean unpublished in a literal sense. Today the term is no more than a shorthand for opinions that are designated by the court as “not for publication.” That is the sense in which I use the term in my testimony today.

Second, there is the question of constitutionality. As already noted, the Eighth Circuit held, in the *Anastoff* case,<sup>1</sup> that denying precedential status to unpublished opinions violates Article III of the Constitution. If *Anastoff* is correct, the issues I have identified are not simply issues of policy; they also have a constitu-

<sup>1</sup>*Anastoff v. United States*, 223 F.3d 898 (8th Cir.), vacated as moot, 235 F.3d 1054 (8th Cir. 2000) (en banc).

tional dimension. This in turn means that the courts—and of course Congress—are constrained in the solutions they can adopt.

I agree with Judge Kozinski (and other commentators) that the constitutional analysis in *Anastasioff* is flawed and the conclusion unpersuasive.<sup>2</sup> It is most implausible to suppose that the sparse language of Article III encompasses a command (or more accurately a set of commands) governing the precedential effect of intermediate appellate court decisions. Judge Arnold's analysis does not dispel the skepticism that his thesis engenders.

The final preliminary matter involves the allocation of responsibility between the courts and Congress. Without exploring the question in depth, I offer two observations. First, nothing in the existing statutory scheme limits the courts' freedom to determine the precedential status of their decisions or to regulate citation practices by counsel. Second, there is no need for Congress to take any action at this time. I have real doubts as to whether these matters are an appropriate subject for legislation; in any event, as already noted, the issues are being considered by the Advisory Committee on Appellate Rules. At least until that process has run its course, it is appropriate for Congress to stay its hand. (The question whether the rules should be determined by each court individually or should be uniform throughout the nation will be addressed in the final sections of this statement.)

### III. THE OBLIGATION TO EXPLAIN

#### A. "Some record of the reasoning"

It might appear that the issue of whether courts must provide explanations for their decisions is entirely distinct from the policy issues raised by non-citation and non-publication rules. In theory, it is. But I have heard the suggestion that allowing citation of unpublished opinions is so undesirable that if non-citation rules are abandoned, courts should respond by disposing of cases with judgment orders or their equivalent—dispositions that announce a result but do not provide any kind of explanation.

I believe that deciding cases by judgment orders is an unacceptable practice that should not be considered among the alternatives available to the courts of appeals. More than a quarter of a century ago, the Hruska Commission endorsed the "basic proposition" that in every appellate case the court should provide "some record, however brief, and whatever the form, of the reasoning which impelled the decision."<sup>3</sup> Although time has outdistanced some of the Hruska Commission's recommendations, this one remains as cogent and compelling as it was in 1975. The reason is simple. We pride ourselves in having a government of laws, not of men. When an appellate court decides a case, the court's explanation—a "record [of the court's] reasoning"—provides tangible evidence that the decision is the product of the law, not simply the preferences of the judges who happened to sit on the panel.

The need for an explanation is particularly great when the case is decided—as most court of appeals cases are—without oral argument. An oral argument of even a few minutes assures the litigants that the case has been considered by the judges themselves and that the contentions of the losing party, although not persuasive, were at least heard. Without oral argument, that assurance disappears. An explanatory memorandum is not a substitute for oral argument, but it provides some evidence that the judges have confronted the issues presented by the appeal.

Although the Federal Rules of Appellate Procedure have not been amended to require the courts of appeals to provide "some record—of the reasoning which impelled the decision," as the Hruska Commission recommended, the practice in the circuits generally conforms to this precept.<sup>4</sup> For the reasons given, I believe that it should be taken as the starting-point in any discussion of rules governing the citation and publication of court of appeals decisions.

#### B. Availability in electronic form

When the Hruska Commission was writing its report, it could assume that if a court of appeals decided a case without a precedential opinion, the only reason for

<sup>2</sup> See *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) (Kozinski, J.).

<sup>3</sup> Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 258 (1975).

<sup>4</sup> According to Administrative Office data, only two circuits—the Eighth and the Eleventh—dispose of a substantial number of appeals "without comment." In the other circuits, all but a handful of cases receive "opinions or orders that expound on the law as applied to the facts of each case and that detail the judicial reasons upon which the judgment is based." See Table S-3 in the Annual Reports of the Director of the Administrative Office. Perusal of the Federal Appendix does not suggest a different conclusion; however, I do not know if the Federal Appendix includes all unpublished decisions.

providing “a record—of the reasoning underlying the decision” would be to satisfy the needs of the parties to the litigation. As a practical matter at that time, if an appellate disposition was not furnished to West Publishing Co. and other legal publishers, it would not be readily available to anyone other than the parties. Only those who took the trouble to visit or write to the Clerk’s Office to obtain a copy of the document could find out what the court had said.

Today, of course, the situation is very different. Opinions—whether or not designated for publication—are produced electronically. And 11 of the 13 circuits make their “unpublished” opinions available to West, Lexis, and other electronic publishers.<sup>5</sup> This group includes the circuits that prohibit the citation of unpublished opinions as precedent. The courts thus recognize that ready access to “unpublished” opinions is an important mechanism for accountability irrespective of the decisions’ binding effect.

Two circuits continue to withhold their “unpublished” opinions from electronic services. Ironically, both circuits—the Fifth and the Eleventh—allow citation of unpublished opinions as “persuasive” authority. But for most lawyers the authorization is hollow, because opinions that cannot be found on line are essentially unavailable.

I believe that all of the courts of appeals should make their unpublished dispositions available in electronic form to publishers and other information providers. Whether or not the decisions can be cited as precedent, members of the legal community and other citizens have a strong interest in knowing how the courts are carrying out their work of resolving disputes and applying the law. In all of the circuits, unpublished dispositions constitute a majority—generally a substantial majority—of the appeals decided on the merits. Thanks to modern technology, the practical obstacles that once stood in the way of allowing citizens to monitor this part of the courts’ work no longer exist. Only by making all of their decisions available to publishers can the courts satisfy their obligations of accountability. There is no good reason why they should not do so.

#### IV. THE PRECEDENTIAL STATUS OF UNPUBLISHED OPINIONS

Although it might seem logical to consider the options available to lawyers at the argument stage before turning to the options available to the judges in deciding cases, I will reverse that sequence for what I hope will be an obvious reason. If judges must treat unpublished opinions as binding precedents, it would make no sense not to allow the lawyers to cite these decisions. On the other hand, if unpublished opinions are not binding, the desirability of a non-citation rule remains an open question. So I turn first to the precedential status of unpublished opinions.

To set the stage, it is necessary to outline the existing practices in the federal appellate system. Cases in the federal courts of appeals ordinarily are heard by panels of three judges selected at random from among a much larger number of judges (active, senior, and visiting). All of the circuits follow a rule under which published panel opinions are binding on subsequent panels of that court, unless overruled by the Supreme Court or by the court of appeals en banc.<sup>6</sup> The question is whether unpublished opinions should also be treated as binding.

Two prominent federal judges have addressed this question and have reached contrary conclusions. In an article that preceded the *Anastoff* decision, Judge Richard Arnold took the position that unless “the parties concede that a prior panel opinion governs the issue” presented by a new case, “all decisions have precedential significance” and must be followed by subsequent panels.<sup>7</sup> Judge Alex Kozinski, writing in response, defended his circuit’s rule that unpublished dispositions “are not binding precedent.”<sup>8</sup>

I believe that both judges make two errors. First, they do not adequately address the antecedent question: binding as to what? What is it that a later panel would be obliged to follow if unpublished opinions were treated as binding precedent? Second, both judges assume that the precedential status of unpublished opinions is an all-or-nothing issue: either unpublished opinions must be treated in the same way

<sup>5</sup> The Third Circuit joined this group only recently. The court announced that “beginning January 2, 2002, all opinions of the Court in counseled cases will be posted on the court’s web site—and will be available for dissemination by legal publishers.” From my own research, it appears that five other circuits—the First, Second, Fourth, Eighth, and Tenth—also post unpublished opinions on the courts’ web sites.

<sup>6</sup> Not surprisingly, judges sometimes disagree over the effect of Supreme Court decisions on circuit precedent. See, e.g., *South Camden Citizens in Action v. New Jersey Dept of Env’t Protection*, 274 F.3d 771 (3d Cir. 2001); *Johnson v. K Mart Corp.*, 273 F.3d 1035 (11th Cir. 2001); *Shain v. Ellison*, 273 F.3d 56 (2d Cir. 2001).

<sup>7</sup> Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. App. Prac. & Process 219, 222 (2000).

<sup>8</sup> *Hart v. Massanari*, 266 F.3d 1155, 1159 (9th Cir. 2001) (quoting 9th Cir. R. 36–3).

as published opinions, or the courts should be free to disregard them. I believe that if we look more closely at what might be binding in an unpublished decision, we may find a middle ground on the question of what the rule should be. At least we will better understand what is at stake in the debate.

#### A. *Binding as to What?*

To think sensibly about the question whether unpublished opinions should be treated as binding precedent, we must ask: “binding as to what?” What is it that the later panel would be bound to if unpublished opinions were put on the same plane as published opinions of the same court?

There are, at bottom, two possible answers to this question. An unpublished opinion may announce a proposition of law that addresses one of the issues presented by the case now before the panel. Or, the unpublished decision may apply established law to a record which, in its relevant facts, cannot be distinguished from that of the new case.

##### 1. *Unpublished opinions as a source of legal rules*

In Judge Kozinski’s view, “the most serious implication” of a rule requiring later panels to follow unpublished opinions is that it “would preclude courts from developing a coherent and internally consistent body of caselaw to serve as binding authority for themselves and the courts below them.” The reason, Judge Kozinski explains, is that writing a “precedential opinion” is “an exacting and extremely time-consuming task.” The volume of appeals in the federal appellate courts makes it impossible for judges “to write precedential opinions in every case that comes before them.”<sup>9</sup>

The linchpin of this argument is the proposition that writing “precedential opinion” is “an exacting and extremely time-consuming task.” Judge Kozinski elaborates on this point as follows:

The rule of decision cannot simply be announced; it must be selected after due consideration of the relevant legal and policy considerations. Where more than one rule could be followed—which is often the case—the court must explain why it is selecting one rule and rejecting the others. Moreover, the rule must be phrased with precision and with due regard to how it will be applied in future cases.—[When a case is decided without precedential opinion,] the rule of law is not announced in a way that makes it suitable for governing future cases.<sup>10</sup>

The problem with this argument is that if courts are using unpublished opinions to announce new rules of decision, while self-consciously rejecting others that might plausibly be followed, they are violating their own standards for deciding cases without published opinions. The Ninth Circuit’s rule, for example, provides that an opinion should be published if it “[e]stablishes, alters, modifies or clarifies a rule of law.” Any opinion that fits Judge Kozinski’s description will also fall with the category of opinions that warrant publication.

The courts of appeals do, on occasion, use unpublished opinions to announce new legal rules. One such case was *Christie*,<sup>11</sup> the unpublished Eighth Circuit decision that the *Anastoff* panel relied on.<sup>12</sup> But Judge Kozinski does not suggest that this happens often, and my impression is that it does not (although this is a subject on which additional empirical research would be welcome). Under what circumstances, then, might a panel find that an unpublished opinion has announced a proposition of law that is not supported by binding published authority? I think there are two.

First, there is what might be called the “implicit holding.” The implicit holding is a proposition of law that logically underlies a court’s decision but is not stated. A common example involves the standard of appellate review. The court of appeals will summarize the appellant’s challenge to a ruling by the trial court and then say, “We find no abuse of discretion. We therefore affirm.”

As a matter of logic, this manner of approaching the issue certainly suggests that the particular trial court ruling is reviewed for abuse of discretion rather than de novo or by some other standard. And in the Ninth Circuit, at least, statements of

<sup>9</sup>Hart, 266 F.3d at 1176–77.

<sup>10</sup>*Id.* at 1176.

<sup>11</sup>*Christie v. United States*, 1992 U.S.App. LEXIS 38446 (8th Cir. 1992). I believe that at the time of the *Anastoff* decision, *Christie* was not available on line on either Westlaw or Lexis. It is now available on Lexis.

<sup>12</sup>The *Christie* disposition, in rejecting the taxpayers’ statutory arguments, cited no precedents at all. Judge Jerry E. Smith has described *Christie* as “a textbook example of an unpublished opinion that in fact does announce a new rule of law.” *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, 262 (5th Cir 2001) (dissent from denial of rehearing en banc).

that kind have been treated as holdings.<sup>13</sup> But in my view, whatever the label, such statements should not be treated as binding authority for the underlying proposition. And that is so whether or not the opinion is published.

The Ninth Circuit has actually addressed a very similar situation in an en banc opinion. In *Beisler v. Commissioner*,<sup>14</sup> the taxpayer asserted that certain payments were excluded from income under section 105(c) of the Internal Revenue Code. To qualify for the exclusion under the statute, the payments had to satisfy two conditions; for present purposes these may be referred to as (1) and (2). A prior decision, *Wood v. United States*,<sup>15</sup> held that the payments there were excluded. The taxpayer in *Beisler* argued that the court in *Wood*, in allowing the exclusion, necessarily found that condition (2) was satisfied.

The Ninth Circuit rejected that argument. The court acknowledged that the *Wood* opinion “recited” condition (2), but found that this was not the equivalent of a holding. All that could be said was that the *Wood* court “evidently assumed, without explanation, that [the requirements of condition (2)] were met.” The en banc opinion continued: “Such *unstated assumptions on non-litigated issues* are not precedential holdings binding future decisions.”<sup>16</sup>

The *Beisler* principle will cover many of the situations in which Judge Kozinski fears that unpublished opinions will make bad (or at least thoughtless) law. For example, in a recent panel discussion, Judge Kozinski described a Title VII retaliation case in which he was responsible for preparing an unpublished opinion. The opinion failed to make clear whether a particular employee was or was not a supervisor. Judge Kozinski correctly pointed out that in a Title VII case the nature and extent of the employer’s liability may well depend on the supervisory status of the harassing employee. But under the *Beisler* principle, the Kozinski opinion (whether or not published) could not have been authority for any proposition relating to supervisory status. At most, references to supervisory status constituted “unstated assumptions on [a] non-litigated issue[.]”

The *Beisler* principle may also apply to what I will call the “inadvertent” holding. Suppose that, in the example given above, the court, instead of saying, “Finding no abuse of discretion, we affirm,” had said: “We review for abuse of discretion. Finding none, we affirm.” Here the court is stating the standard of review rather than assuming it. But if the standard of review was not disputed by the parties, and there is nothing in the opinion to suggest that the court viewed the issue as open or contestable, is that sufficiently different from the implicit holding to warrant different treatment? I have real doubts that it is.

Even if inadvertent holdings are treated as precedential when found in published opinions, courts need not accord similar treatment to unpublished opinions. When a panel elects to publish an opinion, that determination triggers the elaborate process that Judge Kozinski describes. It is reasonable to assume that every proposition of law relied on in the opinion received some attention from the members of the panel. But when the opinion is unpublished, we have no such confidence. We can probably say that the judges believed that the result was not in conflict with any law cited by the lawyers or known to the members of the panel. But we cannot assume that the various intermediate steps received the kind of scrutiny that would warrant giving them binding effect in later cases.

## 2. Unpublished opinions and “case-matching”

As Judge Kozinski appears to recognize, most unpublished opinions do not involve law declaration at all; they apply accepted rules to new facts that in their broad outlines are very similar to those of one or more published decisions.<sup>17</sup> Yet this is where Judge Arnold takes his stand. He argues:

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 is itself a conclusion of law with precedential significance.<sup>18</sup>

<sup>13</sup> See, e.g., *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*,—F.3d—(9th Cir. 2002) (citing *Tagaropoulos, S.A. v. S.S. Santa Paula*, 502 F.2d 1171, 1171 (9th Cir. 1974)).

<sup>14</sup> 814 F.2d 1304 (9th Cir. 1987) (en banc).

<sup>15</sup> 590 F.2d 321 (9th Cir. 1979).

<sup>16</sup> *Beisler*, 814 F.2d at 1308 (emphasis added; internal quotation marks deleted).

<sup>17</sup> *Hart*, 266 F.3d at 1179.

<sup>18</sup> Arnold, *supra* note 7, at 222–23.

If the courts were still following the classic model of common law adjudication delineated in the writings of Karl Llewellyn, I might agree with Judge Arnold that each new decision has at least minimal precedential significance. And because the number of cases is so large, I might then have to agree with Judge Kozinski that requiring later panels to follow unpublished opinions “would preclude courts from developing a coherent and internally consistent body of caselaw.” But much of the work of the federal courts today—and particularly that part of it that tends to generate unpublished dispositions—departs significantly from the Llewellyn model. These changes have important consequences for the prospect of treating unpublished opinions as binding precedent.

The classic model of adjudication involves a process of matching cases, memorably described by Llewellyn in his book *The Bramble Bush*. The process was neatly summarized by one of the judges who personified Llewellyn’s “Grand Tradition:” the law “works itself pure from case to case.”<sup>19</sup> But today on many recurring issues the law never works itself pure; rather, the law retains an element of indeterminacy, and the “rules of decision” are not rules but (in the Hart and Sacks classification system) standards. Many of the illustrations are familiar: Did border patrol agents have reasonable suspicion to stop a vehicle? Did an alien challenging deportation show a well-founded fear of persecution? Did a trademark holder show that the competitor’s mark created a likelihood of confusion?

I believe that in these settings the legal regime creates what I will call a *zone of discretion* for appellate panels. By this I mean that there are numerous cases in which a panel can decide a fact-based issue either way without changing the law of the circuit or creating an intracircuit conflict. The “zone” is not itself a legal rule, nor is it part of the system of rules. Rather, it is a consequence of the rules that do exist.

The zone of discretion is not limited to situations in which the court of appeals reviews deferentially. Indeed, the Supreme Court decision that provides the strongest support for the concept is one that involves non-deferential review. In *United States v. Arvizu*,<sup>20</sup> the Court considered whether a border patrol agent had “reasonable suspicion” for stopping a vehicle. The Court reaffirmed its holding that “the standard for appellate review of reasonable-suspicion determinations should be *de novo*, rather than for ‘abuse of discretion.’” The Court explained that one reason for this approach is to “prevent the affirmance of opposite decisions on identical facts from different judicial districts in the same circuit.” But the Court also reiterated that “the existence *vel non* of ‘reasonable suspicion’ is governed by a ‘totality of the circumstances’ test. The Court acknowledged that “a totality of the circumstances approach may render appellate review less circumscribed by precedent than otherwise,” but said “it is the nature of the totality rule.”

I believe that “the nature of the totality rule”—and of other indeterminate or multi-factor “rules”—also allows for leeway among the panels hearing cases on appeal. One consequence is that it becomes almost irrelevant whether unpublished opinions are binding or not. Even if they are binding, it is highly unlikely that an unpublished opinion—one among the many that apply the “rule” to an infinite variety of factual circumstances—could compel a decision one way rather than the other in a new case.

### 3. Conclusion

If the preceding analysis is correct, there will be relatively few occasions when a litigant will be able to make even a colorable argument that an unpublished opinion *compels* a decision one way rather than another in a new appeal. And if the unpublished opinion is not even an arguably compelling precedent, the question whether such opinions are binding becomes one of more theoretical than practical interest. In some cases, however, the panel will find that the unpublished opinion is squarely on point: if it is binding, it will determine the outcome. Is the panel obliged to follow the unpublished opinion? To that question I now turn.

#### B. To Bind or Not to Bind?

What is most remarkable about the current regime is not that unpublished opinions are not treated as binding precedent, but that later panels can treat them as though they never existed. Although Judge Kozinski and Judge Arnold disagree on almost everything else, they both appear to assume that the only choice is between perpetuating this regime and giving unpublished opinions the same precedential

<sup>19</sup> See Arthur D. Hellman, *Breaking the Banc: The Common-Law Process in the Large Appellate Court*, 23 *Ariz. St. L.J.* 915, 917 & n.13 (1991) (quoting Lord Mansfield).

<sup>20</sup> 122 S. Ct. 744 (2002).

status as published opinions. I believe that a more nuanced approach may be possible.

As Judge Kozinski points out, the current understanding of precedent in the federal courts of appeals is of relatively recent origin. Indeed, as late as 1960, at least one eminent circuit judge took the position that “in a proper case a panel—may frankly state its disagreement with a decision of another panel and refuse to be bound thereby.”<sup>21</sup> No one takes that position today, for good reason.<sup>22</sup> At the same time, no one argues that federal courts should adopt the practice formerly followed by the House of Lords, under which the overruling of a prior decision was absolutely forbidden. In every court of appeals there are one or more procedures for overruling circuit precedent. The question, then, is whether it is possible to find a middle ground—an approach that would give limited precedential weight to unpublished opinions, but allow such opinions to be overruled more easily than published decisions.<sup>23</sup>

### 1. *Stare decisis and the unpublished opinion*

In considering the precedential status of unpublished opinions, it is useful to begin by asking why, in our system, courts ordinarily feel obliged to treat their own prior decisions as binding. In *Moragne v. States Marine Lines*,<sup>24</sup> Justice Harlan, writing for a unanimous Supreme Court, summarized the “[v]ery weighty considerations” that underlie the principle of stare decisis: “the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.”<sup>25</sup> How much weight do these considerations carry when the prior decision is “unpublished”?

Justice Harlan’s first consideration invokes what we might call reliance interests; it emphasizes the role of precedent in guiding primary conduct. But when a court designates an opinion as “not for publication,” it is signaling that, in the court’s view, the opinion adds nothing to the guidance found in existing decisions. In the words of the Tenth Circuit rule, an unpublished decision “does not require application of new points of law;”<sup>26</sup> in the Fourth Circuit’s language, the decision does not “establish, alter, modify, clarify or explain a rule of law within [the] Circuit.”<sup>27</sup> Even if the court’s perception is clouded, the designation itself puts citizens on notice that they should not rely on the opinion for legal rules not previously established.

Next, Justice Harlan invokes concerns of efficiency. He echoes Justice Cardozo’s oft-quoted observation that “the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case.”<sup>28</sup> But as Judge Kozinski and others have made clear, the “labor” involved in preparing an unpublished opinion is modest indeed. From the standpoint of efficiency, little would be lost if judges were to “reopen” the determinations made in unpublished opinions.

This brings us to Justice Harlan’s final consideration. In emphasizing the role of the judiciary as a source of *impersonal* judgments, Justice Harlan calls attention to a principle deeply embedded in the idea of justice: the principle of even-handedness, or treating like cases alike. To allow courts to decide new cases without regard to how they have treated similar cases in the past violates basic norms of equality and indeed the rule of law.

The fact that the earlier decision was unpublished does not diminish the force of these imperatives. On the contrary, if the court today rejects the same claim that it accepted last week in a decision withheld from the Federal Reporter, that is even more likely to shake “public faith in the judiciary as a source of impersonal and reasoned judgments.” And that is not all. The “court” that rejects the claim today will probably be a different “court”—i.e. a different panel of judges—than the one that endorsed the identical claim last week.

<sup>21</sup> *Dunbar v. Henry du Bois’ Sons Co.*, 275 F.2d 304, 306 (2d Cir. 1960). The judge was Judge Charles E. Clark, the principal drafter of the original Federal Rules of Civil Procedure.

<sup>22</sup> See Hellman, *supra* note 19, at 922–23.

<sup>23</sup> There is a parallel in the Supreme Court’s treatment of its summary affirmances. The Court has said that summary affirmances “are of precedential value,” but “not of the same precedential value as would be an opinion of this Court treating the question on the merits.” *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).

<sup>24</sup> 398 U.S. 375 (1969).

<sup>25</sup> *Id.* at 403.

<sup>26</sup> 10th Cir. R. 36.1.

<sup>27</sup> 4th Cir. R. 36(a) (tenses altered).

<sup>28</sup> Benjamin N. Cardozo, *The Nature of the Judicial Process* 149 (1921).

Thus, of the three considerations that underlie the practice of *stare decisis*, one applies fully to unpublished decisions, while the other two apply only in an attenuated way. I believe that this analysis points to the desirability of a middle ground: (a) requiring panels to treat unpublished decisions as binding precedent in limited circumstances but (b) allowing unpublished decisions to be repudiated without en banc rehearing.

### 2. Giving unpublished opinions their due

What sort of rule would give unpublished opinions their due—but no more? Before answering that question, it is necessary to address a point that is easily overlooked. Often—probably more often than not—the panel that is confronted with an unpublished decision that is squarely on point will reach a conclusion that is consistent with the earlier decision. Under those circumstances, the question whether the unpublished decision is a binding precedent is of little more than academic interest. All the panel need do is to publish its opinion with a footnote flagging the unpublished decision and announcing that there is now no reason to cite it.

But suppose the panel concludes that the unpublished decision, if binding, compels a result in the new case that is contrary to the outcome the panel would reach on the basis of its independent analysis. A simple approach to this situation is suggested by the Seventh Circuit's rule on published decisions. In the Seventh Circuit, a panel may overrule a prior published decision if the panel's proposed opinion "is first circulated among the active members of [the] court and a majority of them do not vote to rehear en banc the issue of whether the [new] position should be adopted."<sup>29</sup> The courts of appeals might consider this approach as a means of dealing with unpublished opinions.

A rule of this kind is responsive to the different processes that attend the issuance of published and unpublished opinions. In most if not all circuits, opinions designated as "for publication" receive scrutiny by off-panel judges, either before or after filing.<sup>30</sup> Decisions that appear out of line with circuit authority, Supreme Court precedent, or sound policy will generally be flagged, and if the initial misgivings prove well-founded, the error will be corrected by the court en banc or by the panel itself. By the same token, if a panel decision has survived this scrutiny, it should be treated as authoritative, and nothing short of reconsideration by an en banc court should suffice to repudiate it.

In contrast, when a decision is designated as "not for publication," it will receive little if any attention from off-panel judges. If a later panel concludes that the unpublished decision "got it wrong," that judgment is entitled to great weight, particularly in comparison to the judgment of the earlier panel, which by hypothesis did not believe that its decision was making new law. At the same time, by requiring the later panel to circulate a proposed opinion to all active judges, the Seventh Circuit approach assures that the panel will not act casually in repudiating the earlier decision.

### C. Drawbacks of this approach

Many judges will be uneasy at the prospect of giving even limited binding effect to unpublished dispositions. I therefore emphasize once again that the approach suggested here would affect only a small number of cases. Fact-based holdings in unpublished opinions would almost never qualify. Propositions of law would be treated as presumptively binding only if (a) the earlier panel announced a rule of law not supported by existing Supreme Court or circuit precedent; (b) the proposition was indisputably essential to the outcome of the earlier case; and (c) adhering to the proposition in the new case would *compel* a holding contrary to the holding that the panel would otherwise reach. When all of those circumstances obtain, it would be but a modest step to say that the obligation to treat like cases alike requires the later panel to accord the earlier disposition a formal burial before deciding the new case differently.

Yet even if I am right that panels would seldom find that an unpublished disposition constitutes a compelling precedent for a wrong decision in the case before them, that does not fully answer the judges' concerns. The problem, they will argue, is that panels would be required to examine numerous unpublished opinions in order to ascertain whether those opinions can conscientiously be distinguished. That in itself would be a substantial burden.

At least a partial answer lies in the adversary system. If one litigant argues that an unpublished disposition constitutes a compelling precedent for a particular out-

<sup>29</sup> 7th Cir. R. 40(e).

<sup>30</sup> See, e.g., Edward R. Becker, *Contemplating the Future of the Federal Courts of Appeals*, 34 U.C. Davis L. Rev. 343, 344 (2000) (Third Circuit).

come, the lawyer on the other side can be expected to point out why the case cannot be read so broadly. Given that most unpublished opinions are brief, the judges should not have to spend a great deal of time analyzing these arguments.

There is, however, a further difficulty with the approach suggested. Even if it would make sense for the courts of appeals, how would it work in the lower courts of the circuit? Suppose that a litigant were to point to an unpublished decision which, under the criteria set forth above, constituted a compelling precedent in a new case. Would we say that the lower court must treat the decision as binding law, even though the opinion received minimal scrutiny within the three-judge panel and, in all likelihood, none from off-panel judges? I do not think we would. But if the lower court has the discretion to reject the unpublished opinion, we would be giving the lower courts greater freedom to depart from appellate teachings than three-judge panels of the court of appeals.<sup>31</sup> That cannot be right either.

#### D. Conclusion

Reluctantly, I conclude that the Seventh Circuit approach is not an acceptable middle ground. If unpublished opinions are to be given even limited binding effect in the courts of appeals, they would have to be given some precedential status in the lower courts, and that would raise grave problems. Fortunately, what is important is not the formal legal status of unpublished opinions but their role in the adjudicative process. I now address that subject.

### V. THE CITEABILITY OF UNPUBLISHED DECISIONS

#### A. Options for litigants

Perhaps some courts will be persuaded by Judge Arnold's argument that judges do not have the power "to choose for themselves, from all the cases they decide, those that they will follow in the future, and those that they need not."<sup>32</sup> If so, it would follow that lawyers should be permitted to cite unpublished dispositions. The adversary system requires no less.

The converse is not true, however. Even if later panels have no obligation to follow unpublished opinions, I would still argue that lawyers should be permitted to cite them.<sup>33</sup> There are at least three reasons for this.

First, citation of unpublished opinions provides information to the courts of appeals that the courts should have, but are unlikely to receive from other sources. Has an unpublished opinion relied on a proposition of law that is not supported by binding published authority?<sup>34</sup> Has a panel applied established law to reach a result that could not readily be deduced from published opinions applying the rule? How have prior panels dealt with recurring but low-visibility issues of procedure or remedies?<sup>35</sup> Are there patterns of apparently novel holdings in unpublished opinions that point to systematic malfunctions in the court's use of nonpublication rules?

This is information that a court should have, not only for the purpose of monitoring its publication practices, but also from a jurisprudential perspective. Indeed, from a jurisprudential standpoint I fear that there may be an element of wishful thinking in judges' resistance to allowing citation of unpublished opinions. For example, Chief Judge Boyce Martin of the Sixth Circuit has emphasized the value of keeping the body of circuit law "cohesive and understandable, and not muddying the water with a needless torrent of published [and therefore citable] opinions."<sup>36</sup> But as Professor Loren Robel has pointed out, the "cohesiveness" that is achieved by excluding unpublished opinions from the corpus of citable precedent "is a false cohesiveness, achieved only by ignoring decisions that create the mud."<sup>37</sup> Courts do themselves no favors by forbidding litigants from telling later panels about unpublished decisions when awareness of those decisions could help the court to bring

<sup>31</sup>The problem, of course, stems from the fact that the lower court would have no authority to overrule the unpublished decision.

<sup>32</sup>*Anastasoff*, supra note 1, 223 F.3d at 904.

<sup>33</sup>The discussion here is limited to citation rules in the courts of appeals. Different considerations come into play at the trial-court level.

<sup>34</sup>As Chief Judge Boudin of the First Circuit said in his letter to Judge Alito, "it is quite convenient for us to know that the court has said one thing in an unpublished opinion and is proposing to say something else in a published one; we may well find this out ourselves but [a rule allowing citation] would make counsel help."

<sup>35</sup>*See, e.g., United States v. Rivera-Sanchez*, 222 F.3d 1057, 1062–63 (9th Cir. 2000). In that case, at the request of the court, counsel "produced a list of twenty separate unpublished dispositions instructing district courts to take a total of three different approaches to correct [a recurring] problem [involving resentencing]."

<sup>36</sup>Boyce Martin, In Defense of Unpublished Opinions, 60 Ohio St. L. J. 177, 192 (1999).

<sup>37</sup>Lauren Robel, The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community, 35 Ind. L. Rev. 399, 416 (2002).

greater coherence to the law or simply to improve the operation of nonpublication plans.

Second, there is something unseemly about a court's laying down a rule that lawyers may not call the court's attention to decisions of that court that bear on the issues in a new appeal. As members of the Advisory Committee on Appellate Rules pointed out at the April meeting, lawyers generally can cite just about everything else to a court of appeals—anything from decisions of foreign tribunals to op-ed pieces and news stories. It is at least anomalous that the one body of material lawyers cannot cite is composed of decisions of that very court.

Although I would not argue that non-citation rules violate the First Amendment, they do implicate First Amendment concerns. Recently, in *Legal Services Corp. v. Velasquez*,<sup>38</sup> the Supreme Court emphasized the importance of allowing attorneys to “present all the reasonable and well-grounded arguments necessary for proper resolution of the case.”<sup>39</sup> The Court struck down a law that sought “to prohibit the analysis of certain legal issues and to truncate presentation to the courts.”<sup>40</sup> While this holding would not apply to restrictions imposed by the courts themselves, it does raise doubts about the soundness of rules that “truncate presentation” of the law—here, the court's own decisions.

Finally, the experience of those courts that have allowed citation of unpublished opinions does not bear out the fears of Judge Kozinski, Judge Martin, and other proponents of non-citation rules. The Tenth Circuit suspended its non-citation rule on a trial basis 8 years ago. Before long, the court made its permissive rule permanent. Presumably the judges found that they were not being inundated with citations to unpublished dispositions, and that allowing lawyers to cite unpublished opinions for their persuasive value did not interfere with the court's ability to establish a coherent body of law within the circuit.

Upon reflection, it is not surprising that courts have been able to live in peace with permissive citation rules. As a member of the Advisory Committee pointed out at the April 2002 meeting, a lawyer who relies on an unpublished opinion in a brief or oral argument is in effect acknowledging that no published opinion supports the lawyer's position. That is a substantial disincentive to promiscuous citation of unpublished rulings.

There may be a second reason why lawyers have been restrained in their use of unpublished dispositions. Most appellate decisions ratify the status quo by affirming criminal convictions, administrative agency determinations, or district court rulings denying relief in civil cases.<sup>41</sup> Unpublished dispositions are skewed even more strongly in the same direction.<sup>42</sup> This means that the typical appellant is far more likely to find support in published decisions than in those that are unpublished. The typical appellee will find more ore in unpublished dispositions, but because the corpus of published decisions is so favorable, there will usually be little incentive to go beyond them. Thus, for somewhat different reasons, both classes of litigants will generally be content to make their arguments on the basis of published opinions alone.

### *B. Options for the court*

When the Advisory Committee on Appellate Rules discussed this issue in April, members who supported the proposed national rule emphasized that allowing citation by litigants would in no way limit the power of the courts of appeals to designate some opinions as “non-precedential.” That is certainly true. But it does not follow that because unpublished opinions are not binding precedent, the courts of appeals should feel free to ignore such opinions when they are on point. After all, it is commonplace for these courts to discuss opinions of other circuits, opinions of district courts, state-court decisions, and other non-binding authority. Why should unpublished decisions of the same court not receive at least as much consideration?

In fact, I would go further. Even if no change is made in the precedential status of unpublished opinions as a matter of law, I believe that the courts of appeals should feel obliged to at least acknowledge on-point dispositions cited by a party, if only to make explicit that the disposition has been superseded by the published disposition. This belief rests on the premise that the task of creating a coherent and sensible body of law is not one that the judges carry out alone; on the contrary,

<sup>38</sup> 531 U.S. 533 (2001).

<sup>39</sup> *Id.* at 545.

<sup>40</sup> *Id.*

<sup>41</sup> See Michael Hannon, A Closer Look at Unpublished Opinions in the United States Courts of Appeals, 3 J. App. Prac. & Process 199, 218–19 (2001); Ruth Colker, Winning and Losing under the Americans with Disabilities Act, 62 Ohio St. L. J. 239, 254 (2001).

<sup>42</sup> See Hannon, *supra* note 41, at 220–21; Ruth Colker, The Americans with Disabilities Act: A Windfall for Defendants, 34 Harv. C.R.-C.L. L. Rev. 99, 104–05 (1999).

under the adversary system the judges work (or should work) in partnership with the lawyers. When a litigant, through counsel, informs the court that a prior panel has improvidently made new law in an unpublished opinion, the court should acknowledge the error and either assimilate the holding into the body of circuit law or forthrightly repudiate it.<sup>43</sup>

### *C. Options for the Advisory Committees*

In January 2001, Solicitor General Seth Waxman wrote to Judge Will Garwood, chair of the Advisory Committee on Appellate Rules, proposing the adoption of a new rule that would allow litigants to cite unpublished opinions for their persuasive value. In April 2002 the Advisory Committee endorsed the proposal with some modifications. I support the Advisory Committee's decision and hope that when the process has run its course the proposed rule will be adopted.

This is not the place for a detailed discussion of the particulars of the rule. However, two points deserve mention. First, at the Advisory Committee meeting in April, members debated whether the proposed rule should include a cautionary note, similar to the one included in most of the circuits' current rules, stating that unpublished opinions should be cited only if no published opinion of the forum court adequately addresses the issue. I believe that a hortatory note of this kind is desirable. While the courts of appeals sometimes err in choosing not to publish, unpublished dispositions generally deserve their second-class status. Litigants should be encouraged to research published opinions carefully before citing one that is unpublished.

Second, Chief Judge Boudin of the First Circuit has suggested that adopting a permissive citation rule on a national basis would "undermine[] the ability of different circuits to maintain or adopt procedures [for unpublished dispositions] that work best in their local circumstances." The reason, he explains, is that these procedures "are sensitive to the volume of cases, the expectations of lawyers, the size of the circuit and the use of different methods of screening cases and drafting short-form dispositions."<sup>44</sup>

Although I do not find this argument totally convincing, I cannot say that Judge Boudin is wrong. I therefore believe that the rule should include a provision that would allow individual courts of appeals to opt out if a majority of the active judges vote to do so after giving notice and an opportunity for comment in accordance with the procedure specified in 28 USC §2071(b).<sup>45</sup>

In saying this, I do not retreat from my view that litigants should be permitted to cite unpublished opinions in arguing later cases. However, I also appreciate the value of the system of regional decentralization embodied in the organization of the federal appellate courts. If the judges of a court of appeals, after formally and publicly consulting the bar of the circuit and other interested citizens, adhere to their view that a permissive citation rule would undermine circuit operations, it is appropriate to respect that judgment.

## VI. CONCLUSION

### *A. Recommendations*

In my testimony today I have suggested that judges should not treat unpublished opinions as though they did not exist. At the very least, courts should allow lawyers to cite unpublished dispositions. When an unpublished disposition is closely on point, I believe that the later panel should acknowledge it and publish an opinion that clarifies the law on that issue. A further question is whether these matters should be addressed on a circuit-by-circuit basis, or whether there should be national rules.

On three issues, policy and experience point to the desirability of a national rule, at least as the default:

1. The Federal Rules of Appellate Procedure should be amended, as the Hruska Commission recommended, to require that in every appellate case the court should provide "some record, however brief, and whatever the form, of the reasoning which impelled the decision."

<sup>43</sup>This approach can be seen as a particularized application of the insights associated with the economist F.A. Hayek. Hayek's theories would suggest that the collective perceptions of lawyers acting on behalf of clients with diverse interests will provide better information about the precedential value of opinions than the small groups of judges who decide the cases.

<sup>44</sup>Letter of Chief Judge Boudin to Judge Alito, Feb. 26, 2002, at 2-3 (on file with author).

<sup>45</sup>When a duty of initial disclosure was first made part of the Federal Rules of Civil Procedure, individual judicial districts were permitted to opt out by local rule. Seven years later, the rules were amended to eliminate the opt-out provision.

2. The Judicial Conference of the United States should require all of the courts of appeals to make their decisions (including unpublished dispositions) available in electronic form to legal publishers.
3. The Advisory Committee on Appellate Rules should proceed with its drafting work on the proposed rule that would allow litigants to cite unpublished dispositions for their persuasive value. However, the rule should include a provision allowing individual circuits to opt out in accordance with the notice-and-comment procedure specified in 28 USC § 2071(b).

On the other hand, our system of precedent is characterized by flexibility. Further, reasonable people can disagree as to how much weight an unpublished opinion should carry, and how panels should treat such dispositions when they are on point. Thus, I would not favor a national rule on the precedential status of unpublished opinions.

### *B. Implications*

Judge Kozinski has argued that, given the volume of appeals, it is simply not possible for the judges to write citeworthy opinions in all cases while still giving truly precedential opinions the care and consideration they deserve. There are two responses to this point.

The first has already been given: several of the circuits have for some years allowed litigants to cite unpublished opinions, and the disastrous consequences Judge Kozinski predicts have not materialized.

Second, if judges do not have sufficient time to provide “some record—of the reasoning” in every case, without creating problems for the adjudication of future cases or stinting on the attention they give to precedential opinions, then there are not enough judges to do the job that we as citizens want them to do. Indeed, there probably are not. The Judicial Conference of the United States recently requested 10 new judgeships for the courts of appeals—and that number may well understate the need.

I recognize that Congress is not likely to act on this judgeship request, or any other, in the immediate future. In the meantime, the courts must do the best they can with the judges they have. Nevertheless, an oversight hearing provides a good opportunity to look to the long term. From that perspective it is appropriate to suggest that Congress should create new appellate judgeships not only to meet expanding caseloads but to handle existing caseloads with a minimum of compromise to the quality of the process.

### *C. A larger perspective*

Half a century ago, Professor Henry Hart reminded us that the judges who sit for the time being on our courts “are only the custodians of the law and not the owners of it.”<sup>46</sup> I sometimes think that the judges of the courts of appeals, in prohibiting lawyers from citing the courts’ own decisions, have lost sight of the great truth found in Hart’s words.

I have no quarrel with the basic idea underlying nonpublication rules. Vast numbers of appeals today involve no more than the routine application of established law. When the judges correctly identify these cases and relegate them to a subordinate position in the decisional array, everyone benefits.<sup>47</sup> But some unpublished decisions go beyond established law or the zone of discretion. When this occurs, the judges should welcome the assistance of litigants in assimilating or repudiating the nonconforming dispositions.

The rule now under consideration by the Advisory Committee would go a long way in the right direction. How much beyond that the courts should go is a question on which reasonable people can differ. I thank the Subcommittee for holding this hearing and providing the opportunity for a thoughtful exploration of these difficult issues.

Mr. COBLE. Thanks to each of you. Mr. Berman and I imposed the 5-minute rule against us as well, so the red light will appear in our eyes as well. Let me get moving here.

Judge Alito, in your written testimony you articulate a defense of unpublished cases that lack precedential value. You state that

<sup>46</sup>Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 *Harv. L. Rev.* 1362, 1396 (1953).

<sup>47</sup>It is instructive to browse through a volume of the Federal Appendix. The vast majority of the opinions have nothing in them that anyone would want to cite.

a brief written response is all that is necessary to inform the litigants of the outcome and the reasons for it.

Is this in fact being done, A; and, in other words, do all litigants throughout the circuits receive some response, however brief, which explains the reasoning behind an opinion, even though it is unpublished?

Judge ALITO. That is true in my court, and I am, of course, most familiar with the practices of my court. We now issue an explanation in every case.

Whether it is true now in every circuit, I am afraid I can't answer. I believe it is now the predominant practice nationwide.

Mr. COBLE. Mr. Schmier, do you and Mr. Hellman want to weigh in on this?

Mr. HELLMAN. It is the practice in most circuits. The best evidence we have is the annual report of the Administrative Office of U.S. courts. According to that, of the 28,000 decisions on the merits in the most recent fiscal year, there are only about 1,300 classified as without comment. That is about less than, I think, one half of 1 percent; 647 of those are from the Eighth Circuit, and that does not accord with what I have seen of the Eighth Circuit practice.

So it may be that there is some difficulty there in classifying cases in accordance with the AO's labels for these things, but my strong sense is that what Judge Alito describes for the Third Circuit is the practice pretty much throughout the country.

Mr. COBLE. Mr. Schmier?

Mr. SCHMIER. The question is really whether or not the appellate decision is respectful of the humanity of the people who come before the court. If the appellate decision does not carefully address and explain the law used to resolve the issue, or does not address the arguments that have been posed by the losing party to explain why they are not relevant, then that decision leaves the parties unsatisfied that their arguments have been heard, and that is the constant practice in unpublished opinions. The real reason why we are here is the unpublished opinions are simply not made to a quality level that satisfies people.

Mr. COBLE. Judge Kozinski, do you want to weigh in on this?

Judge KOZINSKI. In our circuit, in our court of appeals, you always get an explanation in writing. One of the points I want to make is if you make all of those things citable, we are simply going to say less. We are simply going to say less, because everything that you say and you put in an opinion, anything that is precedential, lawyers will look at, lawyers will try to twist and find a way of using to their advantage, and we will simply say less.

So I think in a way, acquiring the ability to cite and making them precedential would in fact go counter to what Mr. Schmier was worried about.

Mr. COBLE. I think you touched on this, Judge Alito, but let me ask you, Professor Hellman, comment on the difference between unpublished and uncitable and why is the distinction significant? I am going to start with you, Professor Hellman.

Mr. HELLMAN. Yes.

Mr. COBLE. I think you touched on it, Judge Alito, in your statement. You go first, Mr. Hellman. I will then come to Judge Alito.

Mr. HELLMAN. Judge Alito is absolutely right in saying the term “unpublished opinion” is a misnomer, and maybe the time has come to get rid of it, because it is so misleading.

It seems to me that we have two phenomena here, and it is so easy to get them confused or to assume that they are the same thing. Judge Alito’s committee, I think, in the rule it is considering refers to non-precedential opinions. That is, the court designates a certain class of opinions and says these opinions are nonbinding. That is the relevant, the first relevant classification; is or is not the opinion in a class that the court calls binding.

The second question is are nonbinding opinions citable for their persuasive value, even though they are not binding? That it seems to me is the central issue and the one that is toughest and the one that I would like to see the most attention paid to.

Mr. COBLE. Do you want to add anything to that, Judge Alito? Judge ALITO. No, I think that explains it.

Mr. COBLE. The gentleman from California.

Mr. BERMAN. Mr. Chairman, I sort of wish this hearing were an unpublished hearing, because I have not done all the background work I had hoped to do before it.

My first question is really just out of curiosity, and perhaps silly, but in an uncitable opinion, an opinion that has been ruled to be uncitable, when one of the parties to that ruling wants to assert that the issue is *res judicata*, can he cite the earlier opinion?

Judge KOZINSKI. That is a very good question.

Mr. BERMAN. A good question. All right.

Judge KOZINSKI. All of the noncitation rules that I am aware of, certainly ours does, have an exception for *res judicata*, collateral estoppel, and double jeopardy, all things that go not to the precedential effect of the opinion; and precedential effect means the effect of this ruling on other unrelated cases; but where the rule goes to the relationship of the parties to this case, there is always an exception for those.

Mr. BERMAN. Why should—this may have been touched upon, but I missed it. Why not have a universal rule that binds all circuits, whatever that rule is, rather than having different rules for different circuits? Is there a case for the regionalization, the decentralization of practices in this area?

Judge ALITO. Well, we are, of course, considering whether a national rule on citation should be adopted. There are certainly those on our committee and those people in the bar who argue very strongly in favor of a national rule. Some of them are institutional litigants who appear in many different circuits, and they find it difficult to operate under all of these conflicting regimes.

Some argue that there simply is not any justification for regional differences.

On the other side, there is the argument that the caseloads of the courts of appeals do differ quite significantly. The number of cases per judge in some of the courts of appeals—and Judge Kozinski’s court is one of them—the caseloads in some courts are considerably higher than in other courts.

Courts have different internal practices about circulating opinions before publication and things of that nature.

So to the extent there are differences in caseloads and internal operating procedures, the argument is made there is a justification for a different treatment on a circuit-by-circuit basis.

Judge KOZINSKI. We believe—or I believe very strongly there is a justification for having different rules for different circuits. As I said, what opinions are are those communications that the court of appeals judges make to instruct those who apply the law, like district judges and magistrate judges, U.S. Attorneys and the like, as to how to apply the law. We don't want a lot of clutter. We don't want a lot of static. We want to speak clearly through those published opinions. And given that we have over two dozen judges doing the speaking, plus 10 senior judges, plus visiting judges, you can actually get quite a cacophony going; and then we speak to a very large group as well, more district judges than any other circuit.

The Federal Circuit probably has an even more serious problem than we do, because as members may recall, they not only review the Court of International Trade, but every single district in the country in patent cases. Every single district court in the country. So when they speak, they speak to the 800 district judges in the country, some of them as remote as Hawaii and Alaska and so on. For them to speak clearly, for us to speak clearly, is much more difficult with so many people speaking and so many people listening, than perhaps a smaller circuit, a smaller court like the First or Third Circuit. It is much larger than any of us would like to have courts of appeals be, but it is a very difficult problem.

Mr. BERMAN. Are you calling for more circuits?

Judge KOZINSKI. Certainly not. I think we can do the job quite well.

Mr. BERMAN. I was curious, you made a comment in response to Mr. Schmier that if you had—I guess the word is “nonpublished”—but if you had to have precedent decisions on every single case you ruled on, on many of those cases you might write shorter, less clearly, your thought processes because of the danger of a lawyer twisting something you said in a situation where you wouldn't have had the time to make all the distinctions you might have liked to have made, because you are now having to deal with all of those issues.

My guess is also that another judge—it is not just lawyers sometimes twist these things, but other judges could also look at it. Did you want to respond to that?

Mr. SCHMIER. Yes, I would, because I think that is really at the crux of the problem. The question is what do we mean by the word “precedent”? What we mean by the word “precedent” is only that which was allowed before. All we ask of the judges is that when they hear a case, when they hear an argument, that they either abide by precedent, they distinguish it, or they overrule it, but they don't ever ignore it. And that is why the citation is so important. The citation is so important because every judge, when he or she writes an opinion, has to know that that opinion is going to be looked at either now or 5 years from now or 10 years from now, and that makes that judge walk around their opinion and look at it from every possible perspective.

That is what guarantees the people who stand alone before judges that their decisions are going to be accurate, and it is the removal of that citation that then says to the judges, hey, I don't have to be careful, I don't have to think about how this is going to play out in the future. And that frees them from the rule of law.

I ask you this question: What mechanism—what mechanism controls the caprice of judges? What controls their discretion if they are free to make rules of ephemeral application? Judge Kozinski in *Sorchini versus the City of Covina* has insisted that judges have the clear ability to, one, ignore precedent; two, to make decisions that don't make precedent; and, three, to make decisions of ephemeral application.

Mr. BERMAN. Was that a decision that can be cited?

Mr. SCHMIER. That is a decision that can be cited. I believe that what will remain from *Sorchini versus the City of Covina* is that it is authority for someone that the rule of law has ended. So concerned was the City of Covina that despite the fact they won that case, they brought that to your Committee's attention.

Mr. BERMAN. I am just curious, was there a petition for a writ on that case? The Supreme Court could also look at an uncited opinion, right? All the appellate rights continue?

Judge KOZINSKI. There was no petition for rehearing.

Mr. SCHMIER. Because they won. The important point for this Committee's attention in *Sorchini* is that Judge Kozinski's court took the basic issue, which was that the police released the dog which bit someone without announcing—that bit a potential arrestee—without announcing it. And despite the fact that the appellate court dealt with that in a case called *Kish*, and dealt with it again in an unpublished portion of the decision, not the published part I was talking about, so now the appellate court has decided that issue twice, and it still doesn't stand as any kind of law that could deter litigation. The question we have is how come they don't have the time to do it right, but they seem to have the right to do these cases over and over?

Mr. BERMAN. I am sorry. My time has expired.

Mr. COBLE. We will go for a second round. Mr. Berman and I are here by ourselves. There are no votes being sounded as yet.

Judge ALITO, practically everything we do in this town—strike that—practically everything we do, period, has a cost factor. Having said that, let me ask you this: Let's assume that the Congress were to mandate the publication of all decisions. Could you estimate the burden this would place upon the judiciary's budget and how much would it cost to implement it? A ball yard figure. If you don't know, give it to us subsequently.

Judge ALITO. I don't know the answer off the top of my head. I would have to calculate it. But I can say this, and I am reiterating something I think I mentioned briefly in my initial statement. If the courts of appeals were required to prepare in every case the kind of opinion that is prepared for what we used to call publication, printing in the most common reporter of our decisions—each court of appeals judge now prepares between, I would say, 20 to 40 of those a year depending on the judge and the circuit and factors of that nature—that number would have to go up. On my court it would be about 100 instead of 30. Let's say it would be 100. On

Judge Kozinski's court, I think it would be 150. So it might be necessary just to produce the opinions, it might be necessary to double the size of the judiciary or perhaps increase it by even a greater factor.

There would be the additional complication of trying to maintain consistency among all those opinions. We try very hard to make sure that our opinions are consistent with each other. We circulate them to all the members of the court before they are ever sent to the printer. So we have an opportunity to point out inconsistencies between the opinion that is being proposed and opinions that exist with which we are familiar.

Trying to maintain consistency for this greatly increased body of cases would be an additional burden. So I couldn't quantify what increase in membership of the judiciary would be necessary, but I have no doubt that it would be very substantial.

Mr. COBLE. I am sure that issue has been considered. I see Mike from AOC is in the audience; May have an opinion on that subsequently. We can talk about that. I guess probably 25 years ago—perhaps shelf space, for example, it may require more filing space. But that probably is not a pertinent deal now since we are in the disk age. But anyway, those two issues probably are of some concern. We can kick that around.

Mr. COBLE. Mr. Schmier, an argument against mandatory citation is that prudent judicial administration requires adherence to noncitation rules. How do you respond to that, or what is your opinion of that?

Mr. SCHMIER. I think it is malarkey. I don't understand really any of these points. The citation is the way we reconcile our law. What seems to be suggested here is that we will have this body of published law that clearly States what courts are supposed to do. And the concept of binding precedent which says that courts, even panels of the same level, must do the same thing. But if they want to violate the law or do something different they just do it in an unpublished opinion that doesn't surface.

So what has happened is that by taking this rigid control of the system, they have actually destabilized the system. What they have done is they forced all of the minute changes and rules that have to be made in order to accommodate the varying circumstances of human beings to go underground. And that is the problem. It is much better if every panel looks at each case. They abide by stare decisis, which gives them respect for stability, but they are free to do what is required.

I say this, look, precedent should be strong enough to stand against every force except reason and mercy. That is what the rule should be. This binding precedent is wrong because it makes it impossible for judges to correct error without this en banc proceeding. If they get rid of that, then there is no problem with panels looking at each other's decisions and talking about them. Inconsistency is where we learn both in the scientific community and in the legal community. It is what draws our attention to problems and it is what invokes the whole democracy, the law schools, the legislatures, the community groups and the industry groups, all these people to weigh in on what our law should be. And when they make all our cases uncitable, they get rid of the sweet flower that

attracts our attention to these cases and they make it impossible, truly impossible on a systemic basis for the democracy to operate.

Judge KOZINSKI. Mr. Schmier has put his finger on an important point. What he says is the reason we can go with his system where we publish everything is we should not have a rule that panels of the Ninth Circuit or panels of the Third Circuit are bound by earlier rulings of the same circuit. We can look at the published opinion of another panel and say gee, we don't agree. Goodness or mercy tells us we shouldn't go the same way.

That is not how the Federal courts operate, and in fact, there is no State court system that operates in that way. When you have a court of 28 judges or 24 judges or 22 judges who sit on panels of three, the only sensible rule, the only workable rule, is that when a panel of three judges decides an issue, that is binding, that is binding on every district judge, every bankruptcy judge, every magistrate judge and every circuit judge in the circuit unless you go to the burden of going en banc, which is a huge expensive difficult process.

And if Mr. Schmier is suggesting we just jettison the en banc process and let every panel of every circuit say we looked at this and we choose to ignore it, we are talking about revamping how the Federal courts do business in a way again that will lead to chaos.

To answer the Chairman's question I think you would have to multiply by 20 times the size of the Federal Judiciary to get published opinions—

Mr. COBLE. If you would, give us some estimated figures on that, if you will.

Judge KOZINSKI. My estimation would be on the neighborhood of 20 times. The example I give in my testimony is imagine we asked—the Supreme Court just handed down 80 opinions, complex, difficult, often contested issues. Imagine if we asked the Supreme Court to publish 1,600 cases a year because there is not enough consistent law there. You can't—there is no way they could do it. There is no way they could do it. You would have to increase the number of justices, which then would mean you would have a different institution, a different court and a very different way of making decisions. These are very fundamental things we are purporting to change and when Mr. Schmier says get rid of the en banc process I am sure he is talking more.

Mr. COBLE. I am sure my 5 minutes have expired. Let me recognize Mr. Berman.

Mr. BERMAN. Well, the Supreme Court would then have to resolve not conflicts between circuits, but conflicts between panels within a circuit.

Judge KOZINSKI. Exactly right.

Mr. BERMAN. But your experience—your very bad experience, I take it, was with the California and the California State court system am I right about that? When you first started to testify, you spoke of—

Mr. SCHMIER. That's correct, but there are others here who can could say the exact same circumstance.

Mr. BERMAN. But I am trying—I have a memory not that long ago of a huge hullabaloo in California. Was it about the California

Supreme Court certifying for nonpublication a decision of a Court of Appeals? In other words, the Court of Appeals didn't want to keep it from having precedential value, but the Supreme Court, rather than taking the case and reversing the case, instead came in and depublished it.

Judge KOZINSKI. That is the term of art.

Mr. SCHMIER. The fundamental flaw I see in California's unique depublishment practice—the word itself doesn't show up in the law dictionaries, and that is that they simply erase it as precedent is that it allows the Supreme Court to change the law for the State without changing the result for the parties. It disconnects the ability of a party to hold the law hostage, that is, the law for everybody hostage in order to insist on the right result for the one person.

It is this—in this context that one begins to see how all of our rights vis-a-vis our Government are violated by the no citation rule. You see, they can't—the way our system works is that Government cannot act against an individual without—without the imprimatur of the court. And every person in our country has the right to elevate that decision of the court to an appellate court where, through the process, they can insist that that decision of what the Government is doing to that person becomes law for everyone.

And it is the fact that it is law for everyone that concerns everyone and rallies people to the defense of the individual. That process has been disconnected and severed so that it no longer protects us. That is why this is a fundamental issue.

Mr. BERMAN. I mean, I am not sure that that is why people go to court to make law for everybody as opposed to try to get justice for themselves.

Mr. SCHMIER. How about a test case. How do you bring a test case in Judge Kozinski's court?

Mr. BERMAN. They are not pursuing test cases, but pursuing cases. There are certainly other situations, I agree.

Judge KOZINSKI. May I comment on Mr. Schmier? Whether or not something is published is not up to the whim of the judges. We have legal standards for when we publish. One very simple way of testing it, if I have to write a disposition and I can't cite a Ninth Circuit case on point I publish, and I think that is a rule of most of my colleagues. It has to be a Ninth Circuit case directly controlling.

Now there is always this undercurrent, as Mr. Schmier points to, that lawyers always say, oh, there is all this law being made. It is unaccountable. It is underground and all these unpublished things go contrary to the law, and basically judges are free to do anything they want. So we actually looked into it. We sent out letters and memoranda and requests to lawyers. We put it on our web site and we asked for comments and asked anybody to send us—we put out thousands of these a year—to send us two unpublished dispositions that were in conflict, either with another disposition or with a published one.

We got six answers, two of them had merit and they both dealt with conflicts in published opinions. And they were conflicts of which we were already aware and we are in the process of fixing. We have another initiative which is still in progress where we allow the citation of unpublished dispositions in requests for publi-

cation. The idea would be look, you need to publish this because you don't really have any published law on point. The experiment has been going on for 15 months. We have been monitoring it very closely and nothing has come in that—and the Committee, if it wishes, can have these materials open to the public—but there is nothing that has come in that supports the view that there is lawlessness out there or renegade panels or unpublished dispositions that are being used to sweep unacceptable results under the rug.

Unpublished dispositions are cases that are squarely controlled by existing precedent, squarely controlled by existing Ninth Circuit opinion, that and nothing more.

Mr. BERMAN. I have one more question, Mr. Chairman. My time has run out.

Mr. COBLE. Ms. Waters, do you have any questions?

Ms. WATERS. I have no questions.

Mr. COBLE. Go ahead and ask your question, Howard.

Mr. BERMAN. My last question, assuming that we agree—we decide we don't like this system, we want everything citable, published, have precedential value, do we have the authority to legislate in this area?

Professor Hellman.

Mr. HELLMAN. I think it is very doubtful. I think it would raise some very grave separation of powers issues. And it seems to me that on the immediate issues we are talking about today, citation rules, precedential status, it is really very hard for me to see a role for Congress on that. But let me just add something else to that, because one of the things that strikes me a little bit listening to Judge Kozinski and Judge Alito, you don't have to dig very far into this subject before you start asking a question, that is, I guess one step from a question that has already been asked, are there enough appellate judges today to do the job.

Put aside what additional requirements you might add or asking the judges to do more, are there enough judges to do the job today in the way we would like them to do their job. And if there are not enough, then there is only one branch of Government that can create new judgeships and that is Congress.

Now I recognize the political realities and they seem to get worse everyday on the other side of the Hill. But one of the great virtues of an oversight hearing is that you can look to the long-term. And one of the things I would hope this Subcommittee would do from this perspective is to ask the question taking into account all the things that we would like the judges to do, to write for the parties, to be accountable, to come up with a coherent and sensible body of law, are there enough judges today and if there are not, maybe Congress should be thinking about creating some new judgeships as the Administrative Office and the Judicial conference have asked for. So, in terms of a constructive response—

Mr. BERMAN. And a couple Senate judiciary Committees to confirm that.

Mr. HELLMAN. That would be wonderful and something that folks over here I know have no control over at all and indeed lawyers.

Mr. COBLE. Professor Hellman you are reading my mind because I was going to tack on what Mr. Berman said earlier and I believe

in your statement you made reference to the argument posed by Judge Kozinski that not having sufficient time or not being able to write more complete opinions because of the lack of time, but I was going to say one of the problems might be an insufficient number of sitting judges. There may be enough—spots for judges, but an inadequate number of sitting judges. I assume you concur with that.

Mr. HELLMAN. Yes. And I think it is something that warrants a very close look because if you look at what has happened, and again, this gets beyond the subject of today's hearing, but not much because to the extent that judges are doing less than they think the case really calls for because there are too many cases then Congress does have a role and that is to provide adequate judicial power.

Mr. COBLE. I hope you will hold us harmless because, Ms. Waters and Mr. Berman, and I don't have the authority to appoint judges. Did you want to say something, Ms. Waters?

Mr. BERMAN. I do have one thing I want to say, and that is all right, you are throwing out a proposition here, more judges, fewer reasons to go noncitable because—but I am wondering to what extent in the judicial process—I am sure it is not a written standard, this case is simple, it is boring, it is easy to decide and it is so clear cut, so covered by existing law, so straightforward and so uninteresting that I rather take the additional time to deal with the more interesting, more complicated cases, and I am going to go uncitable.

Mr. HELLMAN. If I might respond to that. Yes, and I don't want to give a wrong impression that there are lots of cases that deserve no more than they get. They would not get any more. They should not get any more judges' time even if there were 10 or 20 times as many judges. But I have here—this is the Federal appendix we have heard so much about. These are the unpublished opinions—not hard-covered version but the soft-covered version. If you were to browse through that, you would say that most of those cases got just about the treatment they deserve, a written opinion, but not precedential.

Mr. COBLE. Gentlemen let me conclude by thinking aloud. The Advisory Committee on Appellate Rules tentatively approved a proposal for an amendment that would allow litigants to cite nonprecedential decisions for persuasive value. If this change is subsequently adopted by the Congress and applied uniformly throughout the circuits, are the problems we have discussed today solved, A; and B, if not, what should Congress do? Does anybody want to weigh in on that before we drop the hook on this meeting? Mr. Schmier?

Mr. SCHMIER. I think in large measure—

Mr. COBLE. As briefly as you can.

Mr. SCHMIER. That would address the freedom of speech issue and it would address, in many ways, the stare decisis issue, only because stare decisis is a natural motivation. But I think really they must be accorded the status of precedent. That doesn't mean it is binding on anybody. It means only that they must be considered. And if that were the rule, I would find that acceptable.

Mr. COBLE. Anyone else want to be heard?

Judge KOZINSKI. I think it would exacerbate the problem. I think that so long as the unpublished dis lets us write to the parties who know everything about the case, who know the intricacies, we can be very brief. As soon as these things are going to be used by other people who don't know the intricacies, then you have to be sure that what you put in there is enough to make it useful and not misleading.

Judge ALITO. Well, because my committee is going to be voting finally on this in November, I don't think should say whether I think it is a good idea. I think it would resolve one of the three questions that I mentioned at the outset, and the only one I believe that is properly—that needs to be addressed that may properly be addressed through the rules process at this time.

Mr. HELLMAN. I agree with Judge Alito on that last point.

Mr. COBLE. Gentlemen, we thank you for your attendance today and we very much appreciate your contribution. This concludes the oversight hearing of unpublished judicial opinions. The record will remain open for 1 week, so if anything crosses your train of thought, feel free to submit it to us. And thank you again for your attendance and the Subcommittee stands adjourned.

[Whereupon, at 3:30 p.m., the Subcommittee was adjourned.]



# A P P E N D I X

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## MATERIAL SUBMITTED FOR THE HEARING RECORD

**Alcan Aluminum Corporation**

Via UPS overnight

July 5, 2002

Hon. Howard Coble, Chairman  
Subcommittee on Courts, the Internet,  
and Intellectual Property  
2468 Rayburn House Office Building  
Washington, D.C. 20515-3306

**Re: Comments On The Testimony Before The House Judiciary  
Subcommittee On Courts, the Internet, and Intellectual Property  
Concerning Unpublished Judicial Opinions.**

Dear Chairman Coble:

I wish to share with the Subcommittee for inclusion into the record with respect to the above-captioned hearing certain views and experiences from the practical perspective of someone who must (1) advise a large corporation on its legal obligation, (2) evaluate the potential for success in litigation and (3) actually try cases.

Under the present system created by the courts of unpublished-non-precedential opinions ("UPNP"), predictability of our legal system, its fairness and ultimately its legitimacy is seriously impaired since precedent, which Professor Arthur Hellman<sup>1</sup> stated in his testimony, is the cornerstone our system, in reality does not exist.

Precedent simply stated is a requirement that a party will be treated by the law like all other similarly situated parties where there is no distinction of legal significance. A court must consider itself bound by precedent, except when it openly and explicitly discloses a compelling reason to deviate from established precedent for valid policy reasons<sup>2</sup>, otherwise precedent simply does not exist. Contrary to Professor Hellman's claim, precedent can not be the cornerstone of our legal system by simply requiring courts to write opinions which he then argues they may disregard at their discretion.

The common law develops when courts decide the application of a legal principle in the context of certain factual situations. It presumes that unless there are compelling reasons to

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<sup>1</sup> Arthur Hellman, Professor, University of Pittsburgh School of Law.

<sup>2</sup> These deviations from established precedent must be reduced to writing and published thereby becoming precedent in those exceptional circumstances as well.

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- 2 -

change the legal principle, the principle requires the court to apply it uniformly to similarly situated parties. The court is bound by that precedent only to the extent that that legally significant factual context makes a subsequent case indistinguishable.

In subsequent cases with legally significant distinguishable facts, a case with superficially similar facts has never been precedential. What makes it non-precedential is not the declaration of a judge, but the fact that the legal principle in the original case is either inapplicable or applicable in a different manner because of the facts. An important element of common law is the explicit declaration by a court of how the legal principle applies in different situations and those declarations then become precedential but only to comparable factual situations.

The problem with the present practice is that the courts are treating cases (which appear on all relevant legal parameters to be the same and therefore entitled to comparable treatment), differently and are not offering legitimate explanations, or offering no explanation, to justify that different treatment. This is what legitimately troubled Judge Arnold in *Anastasoff v. United States*.<sup>3</sup> Judge Arnold was being asked to treat *Anastasoff* differently simply because a prior panel declared, without explanation, that the legal benefit it was willing to give a particular litigant it was unwilling to extend to all similarly situated litigants. This conduct is the antithesis of a legal system based on laws and not men.

Two witnesses from the federal judiciary offered explanations for the practice that were seriously flawed. Judge Alex Kozinski suggested that treating certain decisions as unprecedential was necessary because otherwise the bar could misuse statements by distorting their original intent. Under his theory, this requires the selection of the appropriate case to articulate new common law to minimize the potential for such "misuse". There are a number of problems with this argument.

First, if the case is legally indistinguishable from a prior case that is explicit precedent it is hard to imagine how (a) treating the case the same and (b) describing similarities could be subject to much devious manipulation.

Second, research has demonstrated that judges are simply incapable of determining which case is likely to have significant impact or precedential value. See, Pamela Foa, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*. 39 U. PITT. L. REV. 309 (1977-78).

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<sup>3</sup> *Anastasoff v. United States*, 223 F.3d 898 (8<sup>th</sup> Cir 2000)

**Alcan Aluminum Corporation**

- 3 -

Third, there is likely to be significant costs with leaving an area of the law unclear for years waiting for the perfect case to arise, presuming judges can really recognize it.<sup>4</sup>

Fourth, it is hard to believe a reasonably competent judge who believes he has fairly determined a case can not explain the extent to which the decision complies or differs from prior precedent.

Fifth, I would suggest that the difficulty which Judge Kozinski attributes to a devious bar that attempts to distort his words is, instead, a symptom of the problem which Judge Richard A. Posner identified in his book Overcoming Law:

[M]ost lawyers, judges, and law professors still believe that demonstrably correct rather than merely plausible or reasonable answers to most legal questions, even very difficult and contentious ones, can be found—and it is imperative that they be found—by reasoning from authoritative tests, either legislative enactments (including constitutions) or judicial decisions, and therefore without recourse to the theories, data, insights, or empirical methods of the social sciences, or to personal or political values: without, in other words, an encounter, necessarily messy, with the worlds of fact and feeling.

*Id.* at p. 20. Those of course who must reconcile law and the practical on a daily basis readily recognized the validity of Posner's criticism of the traditional presumption in the profession that still dominates views as to how legal decisions are made.

Faced with the reality that the development of law cannot be as abstract as judges would like, and perhaps unskilled in effectively dealing with the complexities of the empirical world, judges instead find that decisions made in the formalistic manner can prove to be embarrassing, since it exposes its inherent weakness to assimilate and analyze complex facts in a practical manner. For example, a judge early in the case titled *United States v. Alcan Aluminum Corp.*<sup>5</sup> attempted to define hazardous substances by reference exclusively to the statutory text of CERCLA. The text, he reasoned, contained no specific limitations either as to form, effect or quantity which permitted him to conclude that the tiny amount of below background metal compounds in the Alcan waste emulsion were encompassed in the CERCLA definition.

Alcan pointed out to the court using empirical examples that such a conclusion would necessarily be unworkable since the CERCLA definition would render everything in the

<sup>4</sup> Promotes excessive unnecessary litigation.

<sup>5</sup> *United States v. Alcan Aluminum Corp.*, 755 F. Supp. 531 (N.D.N.Y. 1991); aff'd in part and remanded, 990 F.2d 711 (2<sup>nd</sup> Cir. 1993).

**Alcan Aluminum Corporation**

- 4 -

universe hazardous, and no meaningful distinctions could be made between harmful and harmless materials. The judge insisted that reference to the law made that distinction possible. Alcan then tested his opinion (actually tested the paper and ink which was used to announce his decision imposing liability) which turned out to be hundreds of times more hazardous under his abstractly reasoned conclusion than the rolling emulsion at issue in the case.

What Judge Kozinski attributes to the devious nature of the bar in twisting what he or other judges have said in their opinions is, I suggest, nothing more than becoming victimized by the failure of the traditional legal "totem" which Posner describes. If Judge Kozinski candidly described the totality of the reasoning behind his opinion with the comprehensiveness that Judge Posner suggests he will more likely than not find his opinions far less susceptible to the multitude of interpretations which he attributes to devious motives of the bar.

Judge Samuel A. Alito, Jr. described discussions of the federal bench in permitting unpublished opinions to be argued for their persuasive value but not become precedential. He also testified that significant increases in judicial resources would be required if all opinions were written to be precedential.

Judge Alito's comment concerning the notion of allowing UPNP opinions to be relied upon for their persuasiveness misses the point. Common law develops by applying principles which make sense in similar situations. If a case is persuasive it must have consistent facts and the outcome makes sense. Therefore, it has all the required characteristics of precedent. If the UPNP opinion is not persuasive it is because the facts do not match then the pending case is not precedential because it is distinguishable, not because some judge said it is not precedential. If the facts do match but the case is not persuasive, then the only other explanation is that the case was poorly decided in the first instance. Requiring cases to be used as precedent is a control on the quality of judicial decision making; it forces courts to explicitly confront and acknowledge errors and hopefully discourage their creation. Unfortunately, the practice of using UPNP opinions can and is likely often used to bury poorly reasoned opinions because it does not appear that one can offer an otherwise legitimate explanation for the practice.

The fact that there appears to be no legitimate explanations for the practice is further illustrated when one examines Judge Alito's suggestion that time and cost are limiting factors to the creation of precedential cases. First, it is difficult to understand how resolving a case so that it can be declared to have precedential impact can take more time than properly resolving the cases in the first instance, since the precedential value of any case is by definition limited to cases of comparable facts. If the court has determined and correctly applied the principles of law to the facts before it what is the problem with being

## Alcan Aluminum Corporation

- 5 -

bound to apply the principle in the same way to comparable cases? Quite frankly, the clear implication is that there appears to be a two tiered justice system, one that has reliable results and a far larger one with less reliable results.

Second, Judge Alito does not explain the role of UPNP opinions in situations where there is clear precedent and the case before it has comparable facts. Are not both the litigants and the public entitled to a cogent explanation as to why apparently comparable cases are not being treated the same. This quite frankly is a more serious problem than the rule being considered by the federal courts addresses. In Judge Alito's own Circuit one need look at *United States v. Alcan Aluminum Corp.*, ("Butler I") where the Court stated: "...if Alcan proves that the emulsion did not or could not, *when mixed with other hazardous wastes*, contributes to the release and the resultant response costs, then Alcan should not be responsible for *any* response costs."<sup>6</sup>

After remand, it was undisputed that Alcan made the proof and the trial court opinion even confirms the total absence of hazardous substances in the Alcan waste similar to those requiring remediation. It has now even been explicitly admitted by the United States and its experts that the impact of the emulsion was comparable to homogenized milk, nonetheless, the second panel in *Butler II* suggested that the legal standard articulated by the first panel was a "slip-up". However, no clear statement by the Third Circuit exists acknowledging any error in the first opinion. What appears to have taken place is that a panel who disagreed with the first panel's precedential decision used the UPNP opinion process to avoid the precedent and the "en banc" procedure that is supposed to be used to change the law of the Circuit. This case is widely cited by the media as a source of judicial abuse of UPNP. (See attached exhibits, Corporate Legal Times and Forbes).

Further, Judge Alito fails to acknowledge that the vagueness and uncertainty created by UPNP opinions itself creates additional appeals. One is compelled to appeal, even with clear precedent against the position, since there are 8 in 10 chances that your case will fall into the category where precedent is irrelevant.

Finally, with all due respect, one has to be skeptical of Judge Alito's characterization of the time and resources which he claims would be required to issue precedential opinions. As indicated the necessary research and thinking should have been completed to properly resolve the cases in the first instance. There are many who persuasively argue that a thoughtful analysis of the decision by putting pen to paper is necessary to test the validity of the decision.<sup>7</sup> Most notably, a State Appellate Judge, Judge Mark Fain, wrote to me in response to

<sup>6</sup> *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 270 (3<sup>rd</sup> Cir. 1992).

<sup>7</sup> "... This is not to suggest that a court would consciously decide to decide a case arbitrarily, but most who have done legal writing would agree that the process of committing words to paper often tests the structure of the argument and perhaps even the result." Reynolds & Richman, The Non-Precedential Precedent.

Alcan Aluminum Corporation

- 6 -

a letter of mine published in Judicature on the topic stating his view that not requiring the judiciary to be accountable for their opinions by mandating the precedential application of opinions lends itself to judicial "sloppiness." Judge Fain agreed to allow me to include his letter (see attached exhibit, Judge Fain Letter) and further informed me that the rules in Ohio in response to concerns such as his now requires that all cases are to be comparably treated.

The fact that Ohio is functioning perfectly well with this new rule (that applies retroactively) and without burgeoning in the judicial corps further suggests that Judge Alito's claims concerning the required judicial resources that would be required to make opinions precedential is highly suspect. Consider further that general jurisdiction judges in large metropolitan areas carry cases loads (especially when federal cases loads are adjusted for administrative cases) that are many times that carried by federal judges. Judge Alito's claim suggests cultural limitations rather than "real" limitations limit production of precedential opinions. The dramatic impact on cultural limitations on judicial efficiency has been noted as explaining large variations in judicial efficiency in the federal system that appear to have nothing to do with the size of the case loads. *See, Dungworth and Pace, Statistical Overview of Civil Litigation in the Federal Courts, Rand Institute For Civil Justice, 1990.*

It is worth addressing the argument that slowness of the federal courts can be attributed to the greater complexity of the cases in the federal courts when compared to those of the state courts with much larger case loads. I spend a lot of time in both systems and have not seen any evidence that such a distinction exists. In fact, statutes like the Tax Injunction Act which forces complex federal constitutional tax issues, often of global proportions, into the state court system plus the greater variety of the areas of expertise inherent in general jurisdictional tribunals argues that state systems should be much slower given the complexity and extent of the issues before them.

Thus, neither considered analysis, existing studies, nor actual practice in many state tribunals support Judge Alito's testimony.

Professor Hellman's testimony deserves comment - Professor Hellman argued that a legal system of laws not men requires precedent and written opinions justifying outcomes, but it is okay to ignore them most of the time. However, Professor Hellman's attempt to buttress his position by suggesting that he has reviewed UPNP opinions and that most received the extent of consideration they deserved is suspect. Professor Hellman appears to be relying on the reported cases themselves. Experienced practitioners realize that often courts write

**Alcan Aluminum Corporation**

- 7 -

opinions to justify outcomes and not develop the law and that those opinions can unintentionally and many times intentionally leave out or distort both the facts and the law. Absent a comprehensive review of the entire court record, one cannot make the claim of Professor Hellman with confidence.

The following example illustrates how courts can misinterpret facts in published opinions. In *United States v. Alcan Aluminum Corp.*, 97 F. Supp. 2d 248 (NDNY 2000) (*PAS II*) the trial court, which had been reversed once by the Second Circuit, was intent on finding the type of hazardous substance in the Alcan waste that had been deemed by the government to be a problem at the site. After hearing the expert for the United States, the court concluded that the emulsion contained nickel because no test showed otherwise: "...Alcan had the opportunity to test its emulsion for nickel, yet offered no evidence other than the absence of testing by the government to contradict testimony suggesting that the emulsion contained nickel...the court finds that it is more likely than not that Alcan's waste emulsion contained nickel." *Id.* at 261.

If one relies on the opinion alone, which is published, one would never know that the United States conducted 19 tests on the emulsion and was unable to find nickel<sup>8</sup>. **Knowing this fact would dramatically change one's view of the case.**

The Petition for Certiorari in *Alcan v. Prudential*, already part of the record, further demonstrates that this practice of being less than accurate and candid is both common and extensive. Inconsistent cases are simply ignored and sections of legislation are overlooked. Consequently, beyond requiring cases to be published and precedential, electronic access to the briefs should also be required as another check on judicial accountability

Finally, there was discussion in the hearing of whether it was constitutional for the Congress to compel courts to publish opinions and make them precedential. It should be noted that Congress routinely mandates rules for judicial conduct in the context of the rulemaking mechanism that created the Federal Rules. However, Congressional action, even if it were to be held unconstitutional, can have an important role in compelling judicial accountability by exposing improper judicial conduct to widespread public scrutiny.

In my experience with this topic, I have been amazed both at the lack of awareness by the public of the practice of issuing UPNP opinions and the ire it raises once people are informed of the practice. Notwithstanding the attempts of the witnesses to attempt to intellectualize an explanation for the conduct, it is conduct that is instinctively offensive to

<sup>8</sup> This opinion exemplifies the judicial "sloppiness" and concern voiced by Posner that the real problem is the judge's inability to analyze empirical data.

**Alcan Aluminum Corporation**

- 8 -

those concerned about predictability, equal protection and accountability as important elements of our legal system. In his book, Muted Fury, William Ross studied the strong calls for judicial reform when the judiciary was routinely declaring progressive legislation passed by Congress unconstitutional in the later part of the 19<sup>th</sup> and the early 20<sup>th</sup> centuries. Ross described how the federal judiciary is responsive to public opinion: "public support for the judicial power has remained strong because "the Court has generally told the country what it wanted to hear, and provided the constitutional case for what the dominant in the nation wanted to do." The Congress can act to mobilize that public sentiment. The dominant interests in this country will insist that no two-tier justice system exist no matter how much work federal judges are required to do and that similarly situated parties get equal treatment under the law. No level of administrative inconvenience can justify departure from these principles.

Respectfully submitted,

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Attachments

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Corporate Legal Times

November, 1999

SECTION: Pg. 1

LENGTH: 6090 words

HEADLINE: 75 Percent of Federal Appeals Result in Uncitable Decisions

BYLINE: BRUCE RUBENSTEIN

HIGHLIGHT:

"A kind of siege mentality developed in the late 1960s in the biggest circuits with the biggest caseloads," says Thomas E. Baker, professor at Drake University Law School. "That was when these so-called 'differentiated decisional procedures' were instituted."

BODY:

Controversial Cases Disappear

THE PROBLEM seems prehistoric now, but it was only 1973 when an advisory council to the federal courts-citing the cost to lawyers of purchasing many volumes of legal decisions annually-urged judges to reduce the number of published opinions they issued.

There were other reasons asserted in the report and further arguments have been raised since, but the cost of buying all those books and the space required to store them created substantial momentum for rules allowing limited publication.

Shelves full of law books are now an interior decorator's tool, and there is little written by any judge anywhere that isn't available online, if you can afford the search.

Meanwhile, the concept of unpublished decisions has evolved.

"We don't call them 'unpublished' any longer," says Chief Judge Edward R. Becker of the 3rd Circuit Court of Appeals. "That's a misnomer in this electronic age. We call them 'unpublished-not precedential'-the key language being 'not precedential,'" he says.

Defenders of this system claim unpublished decisions serve an important function. They dispense with questions of fact that need to be settled but do not pose new or significant legal issues. Dealing with such cases while creating neither precedent nor official record, they argue, frees judges to devote more time to matters that require the full exercise of their judicial skills.

But critics call what has become an epidemic of unpublished decisions a black mark against the legal system. At best, they say, it elevates expediency over consistency in order to save time, and in doing so, shields the law from public scrutiny.

Some, including Lawrence A. Salibra, senior counsel at Alcan Aluminum Corp., Mayfield Heights, Ohio, go further. They claim that unpublished opinions and their evil twin, the one-word ("affirmed" or "denied") judgment order, are often nothing more than a dodge that allows judges to pursue their own agendas without fear of reversal.

#### UNPRECEDENTIAL PRECEDENTS

If unpublished decisions are a problem, it's a big one. In 1998, 75 percent of all decisions by federal appeals courts-17,210 decisions-were not published. More than 1,500 cases were finalized with one-word judgment orders. Both practices have spread to lower courts, state and federal.

The circuit courts each have their own rules regarding publication, which range from specific to vague. The 1st, 5th, 6th and D.C. Circuits have a presumption in favor of publication. The 8th has no presumption. The rest have a presumption against publication. In some circuits, one member of a panel can decide that an opinion should be published. In others, a majority is required.

Critics, whose numbers are growing, claim "the non-precedential precedent" often masks injustice, especially in routine matters such as Social Security and prisoners' rights appeals, which rarely seem to merit a published decision.

Recently the uproar over a one-word decision forced the Atlanta-based 11th Circuit to backtrack and issue a nine-page (published) opinion defending the perfunctory "affirmed," with which it had dismissed the appeal of a controversial criminal conviction.

Corporate litigants have not been as critical as practitioners in other areas.

"There are two reasons for that," says Salibra. "First and foremost, not many litigators realize how prevalent unpublished opinions have become. The fact that three-quarters of all federal appeals court opinions are unpublished is a scandal in my opinion.

"Secondly, corporate disputes are usually about money, and there is a strong bias toward settlement. Some in-house attorneys believe that, if a dispute is over money and settlement is the preferred outcome, then the legal principle at stake doesn't matter."

But according to Salibra, it does matter. He argues that a consistently applied body of law that conforms to precedent and can withstand review is the only real protection litigants have. Without it, even settlement becomes difficult.

"Judges who know they are deviating from circuit precedent and want to avoid review are able to hide behind opinions that are not for publication," he says.

"It's a problem I believe reflects the general inadequacy of the judiciary today. I know many corporate lawyers agree with me, privately."

Some judges have reservations as well.

"The unpublished opinion constitutes a great temptation to be less than fully accountable," says Burley B. Mitchell Jr., chief justice of the North Carolina Supreme Court. "It allows a judge to resolve an important case by making it disappear, rather than going on record on a matter that may be controversial.

"I'd like to think that rarely happens, and only with a small number of judges," he adds. "but where it does happen, it is a very serious problem. It is an injustice and it has the cumulative effect of eroding confidence in the

judicial system."

#### APPELLATE COURTS SWAMPED

Unpublished opinions and one-word judgment orders are among several expedients the U.S. Courts of Appeals have devised to manage the explosive growth of their dockets. The statistical trends are daunting.

"They're Malthusian," says Thomas E. Baker, professor at Drake University Law School, Des Moines, Iowa. Baker has written extensively on the problem of limited review on the appeals level. In 1998, he was invited to participate in a research conference with the Commission on Structural Alternatives for the Federal Court of Appeals.

Baker offers the following figures for consideration:

In 1950 there were 65 circuit judgeships. Today there are 167. In 1960, the annual number of appeals was 4,000. By 1990 it had grown to 40,000, and in 1997, the number was 53,777. Thus, 2.5 times the number of judges are dealing with more than 13 times the number of appeals, and the trend is sharply up.

He also notes that, in 1950, there were 36 filings per judgeship. In 1997 the figure was 300-plus. And in 1950 the entire federal appeals system decided 2,355 cases. In 1997 the 9th Circuit alone decided 8,515 cases.

Baker believes major changes have been necessary for a long time, but nothing significant has happened.

"Congress has taken a laid-back approach to the problem," says Baker. "It has slowly added judges. And when the caseload got too big in the 5th Circuit, the 11th was carved out of it. That happened in 1981, and no additional circuits have been formed since."

The problem has been exacerbated in recent years by partisan bickering in Congress, with a resulting failure to affirm judicial appointments. When the Democrats controlled the Senate, they routinely held up nominees by Presidents Reagan and Bush. Republicans did the same after the election of President Clinton. As of August, there were 68 vacancies in the federal courts: 25 at the appeals level and 43 in the district courts.

Additionally, funding for the federal judiciary has remained at \$ 4 billion for several years. Chief Justice William Rehnquist asked Congress for \$ 300 million more in 1999. Instead, cuts of between \$ 180 million and \$ 280 million are in the works. If the budget is cut, Rehnquist warns, the judiciary will be forced to furlough up to 10 percent of its nearly 21,000 employees, further hobbling the disposition of cases.

Two things have happened in response to the increase in the federal docket: Judges have hired more staff, and the courts have devised procedural shortcuts.

One clerk per judge was the norm until the late 1960s. Now, judges on the appellate level routinely have three clerks. Along with the staff increase in chambers, circuit courts employ central staff attorneys in a proportion of roughly one per judge. The staff attorneys function as an in-house law department, working on appeals and sometimes, in effect, dispensing with them.

Critics claim staff attorneys practice a form of triage, scheduling a few appeals for serious consideration and a precedential opinion, many more for a quick look and an unpublished decision and others for a simple confirmed or denied, with no appended discussion.

Procedural shortcuts first emerged as solutions to a crisis situation in a few circuits.

"A kind of siege mentality developed in the late 1960s in the biggest circuits with the biggest caseloads," says Baker. "That was when these so-called 'differentiated decisional procedures' were instituted.

"Now," he notes, "they are the norm in every circuit, and judges and lawyers take them for granted."

As things stand, the U.S. Supreme Court is almost irrelevant to the problem of overloaded circuits. It hears fewer than 80 cases per year. In theory, the Supreme Court could review a judgment order or an unprecedented decision, but the chances of that happening are almost zero.

According to a 1997 study, in 1995 the Supreme Court issued opinions in 64 cases arising from the circuits, only two of which were unpublished dispositions.

"Unpublished decisions are the kiss of death when it comes to a Supreme Court hearing," says Salibra.

#### A CASE IN POINT

Salibra's company, Alcan Aluminum, is a potentially responsible party in a Superfund action regarding a site known as the Butler Tunnels. The suit was filed in 1989. Ten years earlier, a waste recycler had illegally dumped 2 million gallons of oily waste collected from a number of sources down the air shaft of the old Butler coal mine, near Pittston, Pa. In September 1985, heavy rains washed about 100,000 gallons of the waste into the nearby Susquehanna River.

The EPA spent \$ 1.3 million remediating the damage, and in 1989, the government sued 20 defendants that were known to have generated the waste. Nineteen settled. Only Alcan chose to litigate. The case is being heard in U.S. District Court for the Middle District of Pennsylvania. Appeals would go to the 3rd Circuit Court of Appeals.

Several government agencies, including the U.S. Army, sent oily waste to the culpable recycler, and the United States was once a PRP, but no longer. It entered into a consent decree with itself for \$ 29,000, then succeeded in pinning joint-and-several liability on Alcan to the tune of \$ 250,000.

The fact that Richard B. Stewart, a Justice Department attorney, represented the United States on both sides of the decree, first as plaintiffs' attorney who filed the suit and then as the defense attorney who settled it, is one of several peculiar features of this litigation. The others are a pair of one-word decisions, the first by a panel of the 3rd Circuit contravening an earlier decision by the same court, the second by a district court judge.

"There was a clear judicial agenda at work in that matter, and if they'd written an opinion in either case, they could not have accomplished it," claims Salibra.

"How would I define the agenda? Sort of pro-environment, combined with an irrational definition of who is environmentally culpable that has no scientific basis. They decided in advance to impose liability. I believe Judge Timothy K. Lewis orchestrated the decisions in the Butler case. Judge Lewis has a kind of obsession with disregarding precedent and ignoring evidence in order to send cases back to the district courts so they can assess liability."

Lewis, who recently resigned from the 3rd Circuit to become a partner at Buchanan Ingersoll, Pittsburgh, firmly denies having an agenda. "That is utterly ridiculous and misinformed about how judges work," he says.

## MILK PRODUCERS BEWARE

The first Alcan v. United States case concerning the Butler Tunnels site (Butler I) is recognized as one of the most important Superfund cases to date. It has been the subject of scholarly articles in law journals and various forums for environmental commentary. Butler I was the first CERCLA case in which the concept of joint-and-several liability was breached, a decision that resolved Alcan's first appeal to the 3rd Circuit, in 1992.

Alcan argued its contribution to the Butler Tunnels waste was a benign emulsion that was 95 percent water and 5 percent mineral oil that contained minute amounts of metal. It was deemed a hazardous substance under the Comprehensive Environmental Response, Compensation and Liability Act because of the metal. But Alcan was able to demonstrate that those same metals occurred naturally and in higher concentrations in air, dirt and food.

"If our emulsion was hazardous, then so are Corn Flakes," Salibra says. "So is Similac."

District Court Judge Edwin M. Kosik conceded that the hazardous substance in Alcan's waste was present at below ambient levels. Nevertheless, he ruled Alcan was jointly and severally liable because the waste that washed out of the Butler mine was harmful. "The environmental harm caused by the mingled wastes is indivisible," he ruled.

"We took that to the 3rd Circuit on appeal, and a three-judge panel reversed it," says Salibra. "They told us that if we could prove our waste was not causing the problem at the site, we were not liable, and they sent it back to District Court on remand."

The panel made several rulings concerning Alcan's emulsion. It ruled the mere presence of Alcan's waste in the mingled waste exposed it to liability, because there is no threshold quantitative requirement before waste material can be defined as hazardous.

But it accepted Alcan's contention that holding it liable for hazardous substances at below background levels was contrary to the divisibility of harm rule (Section 433 in the Second Restatement of Torts). It said Alcan could "avoid or limit liability by showing that its material could not cause any harm."

The case was remanded to District Court with instructions to hold a factual hearing on the issue of divisibility of harm. The panel ruled that if Alcan could establish that the hazardous substances in its emulsion could not, when added to other hazardous substances, have caused the response costs, then it couldn't be held liable. The vote was 2-1, with the dissenting vote cast by Judge Lewis.

In District Court for the second time, Alcan relied on arguments that the response actions at the Butler site related solely to remediation of an oil spill.

"It is a matter of undisputed fact that there is no metals problem at the Butler site," says Salibra. "The government's remedial investigation established that. Nor are the chemicals described in that study as causing the environmental problem present in our waste. That isn't disputed."

Nevertheless, the District Court reimposed liability for the site on Alcan. Judge Kosik ruled that, because metals in Alcan's emulsion became part of the overall spill, Alcan was liable.

The crux of his decision can be found in a hypothetical he posed as part of his opinion: If thousands of gallons of a non-hazardous substance such as milk were spilled in a stream, and if that spill harmed the environment, then the presence of hazardous compounds such as trace metals in the milk would bring it under CERCLA and make the generator of the milk liable.

"In other words," counters Salibra, "everything in the universe is a hazardous substance under CERCLA."

Alcan appealed again (Butler II), this time arguing it had proven its emulsion was not causing the problem at the Butler site, the only standard set when the 3rd Circuit remanded the case. Another three-judge panel heard Alcan's second appeal, which included amicus briefs from non-hazardous waste generators such as school districts and an elaborately reasoned scientific argument.

In 1996 the panel entered a one-word order affirming the District Court. Salibra calls the ruling a classic example of a court hiding behind the non-precedential precedent to achieve an agenda. This time, Judge Lewis voted with the 2-1 majority.

"Obviously the gentleman is aggrieved," says Chief Judge Becker of the 3rd Circuit. "I'm not going to enter into a debate in the legal press about the specifics of that case. The panel apparently thought the District Court had it right, and there was nothing to be gained by writing an extensive opinion. That means they did not think that either the public importance or the precedential value of the case was great. Therefore, they disposed of it summarily."

Judge Becker argues forcefully in favor of unpublished opinions but concedes that one-word judgment orders such as the one issued by the Alcan panel are a mistake.

"We owe the bar more than that," he says. "At the beginning of the year we committed to virtually eliminating judgment orders as a case-management tool, and we've done quite well. For example, we haven't issued one in the last four months." (The interview took place in August.)

#### NEW RULE OF LAW?

After the panel's affirmation, Alcan petitioned for a rehearing en banc.

"We included briefs from various amici showing why the scientific standard they were affirming simply would not work," says Salibra. "What it boils down to is this: It is a mathematical impossibility to take our waste, add it to waste in the Susquehanna River, and thereby raise the level of hazardous metals in the river. It will either have no effect, if the metals in the river are at ambient levels, or the opposite effect if the metals are there in greater than background levels. There is no factual question about that. As we pointed out, and as our many amici pointed out, it is a simple mathematical fact."

The legal team Alcan retained for the rehearing petition included the late A. Leon Higginbotham, former chief judge of the 3rd Circuit and, at the time, a lecturer at Harvard Law School, and William Sessions, former FBI director.

"Instead of following the mandate of Butler I," they wrote, "the District Court articulated for the first time a new rule of law under CERCLA: That Alcan was required to show that the unregulated, non-hazardous substances in its emulsion could not have contributed to the condition requiring response. This standard is in direct conflict with every other court that has applied divisibility and apportionment standards. It is clearly erroneous and a repudiation of this Court's holding in Butler I. The affirmation of the District Court's opinion was therefore an error of the clearest sort. Moreover, the

affirmance without explanation leaves the law in this Circuit relating to an important issue under CERCLA in a state of confusion and uncertainty."

Nevertheless, the petition was denied.

The judgment order aggrieved Salibra on two counts. The lack of explanation leaves the Court open to criticism that it is surreptitiously pursuing an agenda. Meanwhile, the federal circuits are at odds about what triggers liability under CERCLA, and the panel's decision does nothing to resolve that conflict by issuing a citable decision with a chance for Supreme Court review.

"As things stand, you can ship ice cream and be jointly and severally liable in the 3rd Circuit," says Salibra. "But in the 5th Circuit, for example, you can dispose of lead and not be liable if the plaintiff can't demonstrate that lead is a problem requiring remediation at the site in question."

On Sept. 22, 1999, the 1st Circuit affirmed a lower court decision, *Aucshnet v. Coaters Inc.*, that hazardous substances at background levels or less, and/or hazardous substances that do not drive response costs, do not generate liability.

"That completely contradicts *Butler II*," says Salibra. "It's just another demonstration that what the 3rd Circuit did is inconsistent with where the law is going."

Salibra observes that even the staunchest defenders of unprecedented opinions argue they are appropriate only when they simply settle questions of fact without making new law. "But here," he says, "we have a situation in which numerous amici and two of the most highly respected scholars in the legal profession agree that a brand new standard that is totally different than the one being applied in other circuits is articulated, and the Court persists in claiming it doesn't merit an explanation."

Chief Judge Becker declined to discuss *Butler II* or any conflicts it poses with other circuit's law.

"The Supreme Court will deal with that if they need to," he says. "Or if one of these cases comes back to us, we'll deal with it. Meanwhile, I just can't debate an issue like that in the press."

Queried why he believes Judge Lewis has an agenda, Salibra pointed to a 1997 3rd Circuit case, *Public Interest Research Group v. Magnesium Elektron Inc.*

In that case, there was a summary holding in District Court that environmental damage had occurred. That was affirmed without opinion by a 3rd Circuit panel. After the penalty phase there was another appeal, in which the 3rd Circuit reversed and held there was no environmental damage.

"The single dissent on the second panel was from Judge Lewis," says Salibra. "The analytical framework of that case was the same as our *Butler Tunnels* litigation. The fundamental question in both was, can the constituents of the waste cause environmental damage? And the answer in both was no. In *Butler II*, they held us liable, even though there was no causal connection between what we did and the problems. In the other case, MBI was not held liable. So you have this notion that causation is a malleable concept that keeps changing. But it doesn't. What changes is the makeup of the three-judge panel."

Lewis calls Salibra's allegation unfounded. "I cannot comment substantively on judicial decision-making on a matter that could still be pending," he says. "I can tell you that this case doesn't ring a bell, which isn't surprising in view of the number of cases we hear. They're all extremely important to the lawyers, of course. If a judgment order was issued, it was issued by three

judges, not just me."

Lewis supports Judge Becker's decision to eliminate judgment orders.

"I agree that the lawyers should be able to look at a written opinion in order to get a better idea of the rationale behind a decision," he says. "It does increase the workload somewhat, but it was the right thing to do, and I'm glad he did it."

#### UNCONSTITUTIONAL PRECEDENT?

While Alcan's second appeal was pending, the company decided to sue the Butler site's other PRPs, including the U.S government, for a portion of the liability. "Our theory was, we didn't put the hazardous stuff in there, so they must have," Salibra says.

The government moved for summary judgment, removing itself from the suit on grounds it had already settled with itself.

"We didn't know they'd settled until they filed that motion," says Salibra. "What makes it particularly bad is the fact that the waste they contributed was really hazardous stuff. They settled what should have been a huge liability for \$ 29,000, then stuck us with nearly 10 times that for an emulsion that played no part in the problem."

The case was heard in U.S. District Court for Massachusetts. Chief Judge William G. Young listened to the arguments on the government's motion. Alcan opposed it on grounds that Congress did not intend to permit such a settlement- and even if it did, the Court could not allow it, since Article III of the Constitution requires a case or a controversy as a prerequisite to a court-sanctioned settlement.

"We cited occasions when the government had stated that it is a single juridical body as a matter of law," says Salibra.

So again, Salibra alleges, a judge with an agenda was faced with a situation in which an opinion which furthered that agenda would be unable to withstand scrutiny. At the end of oral arguments, Judge Young ruled in favor of the government by simply saying, "motion granted."

Alcan's attorneys prepared a memorandum in support of a motion for entry of judgment pursuant to Rule 54(b), in which its arguments and supporting citations appeared. "We called the judge while we were preparing it and asked if he intended to write a formal opinion, which would have been useful in the preparation of our motion. He said no, we'd just have to construct the Court's reasoning from the transcript of the arguments."

The memorandum was presented the Judge Young in March 1999.

"The intent was to confront the Court with the logic of what it had done," says Salibra. "Our theory was that the judge will either have confidence in what he did and respond with a reasoned explanation, or he will do whatever he can to get out of responding because he has no reasonable explanation."

On April 5, Judge Young wrote the following note across the cover page of Alcan's motion: "Treated as a motion for reconsideration, motion denied."

"This goes straight to the viability of Superfund," Salibra maintains. "If it's true the government can settle with itself, and, therefore, when it is a PRP it will never have joint-and-several liability, that takes away about 90 percent of all joint-and-several liability Superfund actions. The government is almost always a PRP. In many cases they are the biggest PRP. It virtually renders Superfund ineffective if it stands."

Salibra says that Alcan intends to appeal, and a reconstruction of the judge's reasoning and Alcan's rebuttal will become part of the appeal.

"These judges hope you will never appeal," he says, "and in well over 90 percent of cases, according to studies, people don't appeal. So by ruling against you, changing the economics of the game and dragging it out, they can usually bully you into submitting to the solution they want to impose."

#### BIONIC JUDICIARY

According to the critics, putting pen to paper is an integral part of the judicial function. Many judges, they claim, have changed their minds when they found themselves unable to articulate a sound rationale for a ruling. Others have had their minds changed for them by higher courts. Therefore, failing to write an opinion or writing one that is immune from review isolates rulings from the checks and balances that are normally part of the system.

But again, the idealized process runs into the realities of judicial resources and workload.

"To give each case that comes through our Court that kind of attention is simply not possible. You'd have to find a way to extend our day, or maybe our lives," says Judge Becker. "If you had any idea of the work involved in writing a published opinion, you would sympathize. I go through anywhere from 10 to 17 drafts of an opinion that creates precedent. I work seven days a week, morning, noon and night. I worked most of last night on a motion, for example. I don't mean to sound dramatic, but it's true. You don't simply write an opinion. You go back through the record, you check and recheck it."

The 3rd Circuit's workload has quadrupled in the past three decades, according to Judge Becker. In 1969, the 3rd dealt with 90 fully briefed cases. Now the figure is 400-plus a year.

"I repeat, unless you make us bionic, there is no way we can write published opinions on every case," he reiterates. "We write them on the ones that deserve them because of precedential value, which, I ought to point out, is a lot of cases. Should three-quarters of appeals court decisions be unpublished? Yes, they probably should, because there are that many cases that turn on their facts and don't involve a new legal precept.

"Remember, they are accessible online and through other sources, so they aren't exactly hidden. The key thing is, they are not precedential, meaning we are not bound to follow them in subsequent cases," he says.

A 1998 study of unpublished decisions, "Quiet Justice: Unreported Decisions of the United States Courts of Appeals," concludes they result in significant time savings for the judiciary and for the litigants.

"With each variable examined, unpublished cases were concluded quicker than published cases, in some cases several months sooner," writes Robert J. Van Der Velde, assistant professor of justice at Auburn University.

"If justice delayed is justice denied, then limited publication rules do reduce the delay and denial of justice," he says.

Few dispute the practical value of unpublished opinions that simply resolve disputes, and nobody argues against publishing precedential opinion. But critics profess considerable skepticism about judges' ability to distinguish between fact-finding and lawmaking.

In 1978, when the percentage of unpublished opinions was far lower than it is now, a congressional commission heard detailed testimony about "suppressed

precedent"-lawmaking opinions that were going unpublished. Among the cases cited was a 7th Circuit decision reversing a District Court's refusal to order a mass-transit company to accept a citizens' group's advertising. It was a fundamental free speech issue that turned on constitutional interpretation. The decision was unpublished, even though it sparked a 17-page dissent. That was one of dozens of examples that, even at that early date, were considered egregious examples of judicial abuse of the concept.

For corporate litigants, the most telling criticism concerns consistent interpretation and application of the law. Law professors William L. Reynolds and William M. Richman, writing for the Columbia Law Review, observe that limited publication rules interfere with responsible decision-making. It isolates a portion of the judiciary's product from the demands of stare decisis, to stand by things decided.

"Common law courts have an obligation to avoid inconsistency by deciding like cases in a like manner," Reynolds and Richman argue. "A judge who decides early in the process that a decision will be unpublished might not expend sufficient energy to track down all 'like' cases. Some of those cases may be unpublished and not citable. A judge therefore may not even know of their existence; or if he does, may feel no obligation to explain his departure from their holdings. . . Finally, a court may use non-publication to deliberately suppress a lawmaking opinion."

#### FORMULA FOR IRRESPONSIBILITY

Jerrold J. Ganzfried, chair of the Supreme Court and appellate litigation practice at Howrey & Simon, Washington, D.C., has argued or briefed a dozen appellate cases that were decided by unpublished opinions. Most of those cases he won. All of them involved corporate parties and commercial law issues. Consistency, he says, is his major concern.

An example is a case he argued before the 9th Circuit. It was a breach of contract case litigated in U.S. District Court for Central California, even though it was a matter of California law. Diversity of citizenship rules mandate federal jurisdiction when citizens of different states litigate.

Ganzfried's client lost, and the 9th Circuit affirmed the District Court in an unpublished opinion. In a 1993 petition for cert to the U.S. Supreme Court, which failed, he argued that the Circuit Court's interpretation of state court precedents conflicted with decisions of the California courts and other federal courts of appeal.

"The Supreme Court has ruled in a number of cases that, when issues of state law provide the basis for decisions, the results should be the same whether you're in state court or in federal court under diversity of citizenship jurisdiction," says Ganzfried. "In this case, I pointed out that the 9th Circuit standard put it in conflict with the 3rd and 7th Circuits."

He also argued that clear guidance from the Supreme Court on the issues he raised was necessary, because so many circuit court opinions, including the one he was contesting, go unpublished. He claimed unpublished opinions that expand or contract state law have a doubly negative effect. They intrude on the state court's authority to interpret state law, and they forestall corrective decisions of the state supreme court.

"The effect on litigants is resounding," he wrote. "Not only are certainty and fairness diminished if forum selection is outcome determinative, but parties litigating state law in federal court lack the opportunity to seek review in state supreme court on incorrect rulings."

Ganzfried concedes that, given the number of case decided by the circuits, there is no way all of them can get extended written decisions.

"Many don't merit a published opinion," he says. "But inconsistent interpretation of the law shouldn't go unresolved. Of course, law changes and develops over time, but there are mechanisms in place to accommodate that. Circuits sitting en banc can overturn a previous decision, and the Supreme Court is a forum in which the law can be clarified.

If a second system develops in which there are decisions that don't seem to square with precedent, and because there is no explanation you don't have any effective mechanism to get them heard en banc or take them to the Supreme Court, that poses big problems for commercial litigants."

The result will be forum shopping, and, taken to an extreme, a system in which geographical happenstance is more important than the law.

Ganzfried points to a comment from Judge Richard A. Posner, chief judge of the 7th Circuit.

In a New York Times article, Judge Posner calls unpublished opinions "a formula for irresponsibility" and acknowledges that most judges, himself included, are not nearly as careful in their handling of unpublished decisions.

"When one of the top judges in the country is expressing a view like that about the system, then there is clearly an institutional issue to be addressed," Ganzfried says.

#### SOLUTIONS

A laundry list of proposed remedies exists, and a growing number of lawyers and many legal scholars believe every major pressure group in the profession, in-house attorneys included, should get behind at least some of them.

The Commission on Structural Alternatives for the Federal Courts of Appeals was created out of a compromise between members of Congress who wanted to divide the 9th Circuit for ideological reasons and those who did not. It issued a final report in December 1998. Among its recommendations were:

- \* Legislation authorizing the 9th Circuit to reorganize itself into three regional divisions;
- \* Legislation authorizing any circuit with more than 15 judgeships to reorganize into divisions (this would apply immediately to the 4th, 5th and 6th Circuits); and
- \* A recommendation that two-judge panels hear some appeals.

The Commission's most controversial suggestion was for the creation of District Court Appellate Panels consisting of two District Court judges and a Circuit Court judge. These panels would hear appeals in designated categories. The Commission suggested diversity of citizenship and sentencing appeals. The panel could transfer an appeal to the Circuit Court if it was deemed to concern a significant legal issue. Appeals from its decisions would be by leave of the court only.

Baker of Drake University, who has studied the problems facing the circuit courts, has compiled some further proposals, among them:

- \* Bi-level courts of appeals: The first level would provide review for error as a matter of right in every appeal. The second level would provide discretionary review of the first level to preform the lawmaking function;
- \* National subject matter courts along the lines of the Court of Appeals for the Federal Circuit, which hears intellectual property appeals; and
- \* Subdividing or unifying the circuits in order to use existing manpower more effectively.

All of these suggestions represent tinkering with a system that effectively makes the federal circuits the courts of last resort. Queried whether the U.S. Supreme Court carried its weight in an overloaded system, Chief Judge Becker, replies: "I won't touch that one. They select very important cases. They have a choice about what they hear. We don't."

Which is why the circuits hear about 25,000 cases per year, and the Supreme Court hears 80. At least one critic of unpublished decisions thinks that disproportion should be addressed before any more fixes are applied at the appellate level.

"The U.S. Supreme Court has defined itself as that great body that resolves great intellectual issues," says Salibra. "It will redesign a faucet but it won't come in and replace a washer. There have been suggestions that some kind of super-appellate court be formed somewhere between the circuits and Supreme Court, but I think that's silly.

"The Supreme Court should do what it's supposed to do, much of which consists of settling conflicts between the circuits. As it stands, they wait until the conflicts percolate around for a long time. They have to play a much more realistic and pragmatic role in a system that is now totally out of whack."

GRAPHIC: Photo, "The fact that three-quarters of all federal appeals court opinions are unpublished is a scandal," Lawrence A. Salibra, senior counsel at Alcan Aluminum Corp.; Photo, "Many [cases] don't merit a published opinion" says Jerrold J. Ganzfried, chair of the Supreme Court and appellate litigation practice at Howrey & Simon. "But inconsistent interpretation of the law shouldn't go unresolved."

LOAD-DATE: February 7, 2000



## Justice in The Dark

THREE YEARS AGO A FEDERAL jury acquitted Vicki Lopez-Lukis, a former commissioner in Lee County, Fla., of bribery for letting her lover, a Goldman Sachs lobbyist, reimburse her for their personal phone calls. But, bizarrely, the jury convicted her of one count of using the mails to deprive her constituents of "honest services" in connection with the same alleged bribery. This didn't make any sense, so she appealed to the 11th Circuit Court of Appeals. But in a one-word decision—"affirmed"—the appeals court rejected her argument.

Blind justice? For Lopez-Lukis, more like justice in the dark. She has no idea what the appellate judges were thinking when they brushed aside the obvious inconsistency in the verdict. Forget further appeals. The Supreme Court rarely accepts cases for review—only 124 of 8,445 sent to it in the 1999-2000 season—and almost never accepts one if there is no published opinion to look at. Lopez-Lukis is serving a 27-month term in Coleman federal prison near Orlando.

Last year federal appeals judges disposed of 79% of the 26,819 cases they decided by issuing so-called unpublished decisions, up from 37% in 1977. Over 7% of the unpublished decisions consisted of a single word. Whether curt or long-winded, an unpublished decision isn't precedent. That means the judges can be sloppy. They are not accountable for illogic or inconsistency in the rulings.

"This is judges disobeying the law," says William Richman, a University of Toledo law professor who has studied the problem.

At last, one federal appeals court has declared war on the practice. In August, in a case involving a late-filed tax refund claim, a three-judge panel in St. Louis, Mo. branded unpublished decisions unconstitutional. Despite the ruling, the taxpayer lost her refund.

The reasoning behind this momentous decision was that judicial decisions are intended not just to resolve particular disputes but also to tell Americans what the law is. So every decision must be a precedent. Though that decision is itself a precedent only in the 8th Circuit (Arkansas, Iowa, Minnesota, Missouri, Nebraska and the Dakotas), litigants in other federal courts are starting to cite it. The Supreme Court will likely end up ruling on the matter.

The shortcut system began in the late 1960s when judges were struggling to deal with an avalanche of social-justice litigation as well as a parade of *pro se* litigants from the jailhouse. True, the appellate backlog does get scary at times. But does this justify lazy law? "[Unpublished decisions] are not prepared with the same kind of exactness," admits Procter R. Hug Jr., chief judge of the 9th Circuit on the West Coast, though he contends that they are still sound.

Judges insist that they issue unpublished decisions only in simple, noncontroversial cases, where the answer is clear cut. The statistics say otherwise. Appeals courts issue unpublished decisions in 24% of the cases where various judges disagree so much that one writes a dissenting opinion, and in 37% of the cases where they're reversing the trial court.

The 9th Circuit Appeals Court recently saw proof that unpublished decisions mask plenty of inconsistency. The court had affirmed the conviction of Pablo Rivera-Sanchez, an illegal alien who sneaked back into the U.S. after being deported. His lawyer found, though, that the court had in the past issued 27 separate unpublished decisions applying three different rules to the same immigration issue.

Consider how unpublished decisions have nearly driven out of business Beehive Telephone, a Wendover, Utah-based rural phone company. Last year the Federal Communications Commission cut Beehive's rates by 66%. An appeals court, swayed by the FCC's claim that Beehive had made a

procedural error that barred appellate review, refused to hear the case.

Beehive lawyer Russell Lukas dug up an earlier decision by the same court that said even if a company makes that error—which he insists Beehive did not—it doesn't disqualify an appeal. But Lukas couldn't cite one of the key cases—it was deemed unpublished. Completing the insult, the appeals court ruled against Beehive in another unpublished decision only one word long. "They can't justify what they're going to do, so they don't publish it," says Lukas, who works out of Washington, D.C. He asked the Supreme Court for review, but naturally, was denied.

Alcan Aluminum, the Ohio subsidiary of the Canadian-based giant Alcan Aluminium Ltd., was the victim of a court's unpublished opinion that directly contradicted its earlier decision in the same case. A federal court in Philadelphia held Alcan liable in 1991 for part of the cost of cleaning up Pennsylvania's Susquehanna River after a spill. An appeals court kicked the case back to the lower court, saying in a published decision that Alcan would be off the hook if it could show that its emulsion hadn't caused the pollution. Though Alcan proved that its waste hadn't caused the harm, the lower court still found it liable, applying a new and impossibly high standard. The company appealed again, to the same appellate court, but this time the judges batted it down with one of those one-word grunts. Penalty, \$500,000.

There are better ways to deal with backlogs. Congress might appropriate the money to pay for more judges. Or perhaps shrink the overpowering role of federal law in our lives.

#### Tables

By the Numbers

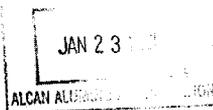
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#### Charts

Looking for Justice

-

## Court of Appeals of Ohio



## JUDGES

JAMES A. BROGAN, DAYTON  
 WILLIAM H. WOLFF, JR., DAYTON  
 MIKE FAIN, DAYTON  
 THOMAS J. GRADY, SPRINGFIELD  
 FREDERICK N. YOUNG, DAYTON

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 GREENE  
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 MONTGOMERY

RONALD E. MOUNT, Esq.  
 COURT ADMINISTRATOR

January 18, 2001

Lawrence A. Salibra, II, Esq.  
 Senior Counsel  
 Alcan Aluminum Corp.  
 3690 Orange Place  
 Beachwood, OH 44122

Dear Mr. Salibra:

I note with interest your letter in the November/December issue of *Judicature*. I share your concern that the dichotomy between published and unpublished opinions lends itself to a judicial "sloppiness" concerning those opinions that have been identified, before being written, as unpublished opinions.

You may or may not be aware of a proposed amendment to the Ohio Supreme Court Rules for the Reporting of Opinions. This proposal, which I enclose, would eliminate the publication of opinions by the courts of appeals in the printed media. Ultimately, all opinions would be published in the electronic medium, only. I understand that the movement to the electronic medium is inevitable. What I do not understand is why there is a perceived need to maintain the distinction between published and unpublished opinions, an unnecessary distinction now that all opinions are going to be published in one, electronic medium. I gather from your comments in *Judicature* that you might have a similar point of view.

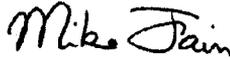
I also enclose a copy of a memorandum that I was authorized by my colleagues on the Second District Court of Appeals to present to the Ohio Court of Appeals Judges Association, in which we expressed our opposition to continuing the distinction between published and unpublished opinions after the conversion to the electronic medium. Although I was not present at this meeting, my understanding is that a narrow majority of those judges present and voting opposed continuing the distinction. I am uncertain

Lawrence A. Salibra, II, Esq.  
January 18, 2001

of the present status of the proposed amendments to the Supreme Court Rules for the Reporting of Opinions.

Please do not consider yourself obligated to respond. I merely thought, based upon your letter in *Judicature*, that you might find this matter of interest.

Very truly yours,

A handwritten signature in black ink that reads "Mike Fain". The signature is written in a cursive, slightly slanted style.

Mike Fain

MF/pjt

Enclosures

# WEST VIRGINIA LAW REVIEW



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STARE DECISIS AS A CONSTITUTIONAL REQUIREMENT

Thomas Healy

## STARE DECISIS AS A CONSTITUTIONAL REQUIREMENT

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Thomas Healy\*

*Is the rule of stare decisis a constitutional requirement, or is it merely a judicial policy that can be abandoned at the will of the courts? This question, which goes to the heart of the federal judicial power, has been largely overlooked for the past two centuries. However, a recent ruling that federal courts are constitutionally required to follow their prior decisions has given the question new significance. The ruling, issued by a panel of the United States Court of Appeals for the Eighth Circuit, argues that stare decisis was such an established and integral feature of the common law that the founding generation regarded it as an inherent and essential limit on judicial power. Therefore, when the Constitution vested the "judicial Power of the United States" in the federal courts, it necessarily limited them to a decision-making process in which precedent is presumptively binding.*

*This Article challenges that claim. By tracing the history of precedent in the common law, it demonstrates that stare decisis was not an established doctrine by 1789, nor was it viewed as necessary to check the potential abuse of judicial power. The Article also demonstrates that even if stare decisis is constitutionally required, the courts are not obligated to give prospective precedential effect to every one of their decisions. Stare decisis is not an end in itself, but a means to serve important values in a legal system. And those values can be equally well served by a system in which only some of today's decisions will be binding tomorrow.*

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\* Associate, Sidley Austin Brown & Wood, Washington D.C.; J.D., Columbia, 1999; Law Clerk to Judge Michael Hawkins on the United States Court of Appeals for the Ninth Circuit, 1999-2000. I am grateful for the helpful comments of Vincent Blasi, Michael Dorf, Mark Feldman, Banu Ramachandran, Seetha Ramachandran, Lara Shalov, and Peter Strauss and for the fine editorial work of Rob Alsop. I owe special thanks to Arlene Chow for extensive help in formulating and articulating the arguments that follow.

	INTRODUCTION.....	44
I.	STARE DECISIS AND THE COMMON LAW TRADITION .....	54
	A. <i>Case Law in Medieval England</i> .....	56
	B. <i>The Growing Role of Precedent and the Influence         of Sir Edward Coke</i> .....	62
	C. <i>Blackstonian Conservatism v. Mansfield's Reformism</i> .....	66
	D. <i>Precedent in Colonial America: A New Land         and New Values</i> .....	73
	E. <i>The Post-Revolutionary Attitude Toward Precedent</i> .....	78
	F. <i>The Historical Evidence Summarized</i> .....	88
II.	STARE DECISIS AS A STRUCTURAL CHECK .....	91
	A. <i>The Least Dangerous Branch</i> .....	93
	B. <i>"All the Usual and Most Effectual Precautions"</i> .....	97
	C. <i>The Wrong Kind of Check</i> .....	101
III.	NON-PRECEDENTIAL DECISIONS AND THE VALUES OF STARE DECISIS .....	106
	A. <i>The Values Served by Adherence to Precedent</i> .....	108
	B. <i>Non-Precedential Opinions and the Rule of Disposition</i> .....	111
	CONCLUSION .....	120

### INTRODUCTION

When a court is faced with a legal question, one of the first points it considers is whether it has addressed a similar issue in the past. If so, the court will usually follow one of two paths: It will either adhere to the prior decision and apply it to the current dispute or distinguish the two cases and adopt a new rule. The court will rarely overrule the earlier decision, and then only if there are exceptional reasons for doing so.<sup>1</sup> This practice of deciding cases by reference and adherence to the past is one of the defining characteristics of Anglo-American jurisprudence and distinguishes our system from the civil law, where judges reason from general principles, not from precedents.<sup>2</sup> It is a practice so fixed in our legal institutions that most of us cannot envision the courts deciding cases in any other way. But are the courts required to follow this practice? Does the Constitution mandate a rule of stare decisis, or is it simply a judicial policy that can be altered or discarded when the need arises?

This question, which seems so obvious and fundamental, has largely gone unaddressed for the past 212 years. The Supreme Court has occasionally debated the workings of stare decisis, such as under what conditions a past deci-

<sup>1</sup> See *infra* notes 41-42 and accompanying text.

<sup>2</sup> See JAMES W. TUBBS, *THE COMMON LAW MIND: MEDIEVAL AND EARLY MODERN CONCEPTIONS*, 17, 179 (2000).

sion can be overruled.<sup>3</sup> However, these debates have concerned the strength of the presumption that precedent is binding, not whether the presumption itself is a constitutional requirement.<sup>4</sup> The academic literature has been similarly silent. Although a few scholars have touched on the issue casually, no one has seriously examined whether stare decisis is dictated by the Constitution.<sup>5</sup>

In the wake of a recent court decision, however, this question has become vitally important. In *Anastasoff v. United States*,<sup>6</sup> a panel of the United States Court of Appeals for the Eighth Circuit ruled that the court's practice of issuing unpublished opinions that cannot be cited as precedent violates Article III of the United States Constitution.<sup>7</sup> The decision, written by Judge Richard S. Arnold, argues that stare decisis was such an established and integral feature of the common law that it was implicit in the founding generation's understanding of what it meant to exercise judicial power.<sup>8</sup> Therefore, Judge Arnold argues, when the Constitution vested "the judicial Power of the United States"<sup>9</sup> in the federal courts, it necessarily limited them to a decision-making process in which precedent is binding.<sup>10</sup> Judge Arnold does not claim that courts can never overrule past cases,<sup>11</sup> but when they do, he asserts, they must justify their actions

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<sup>3</sup> See *infra* notes 56-59 and accompanying text.

<sup>4</sup> For instance, the Court has stated on several occasions that stare decisis is not "an inexorable command." *E.g.*, *Agostini v. Felton*, 521 U.S. 203, 235-36 (1997). However, this does not necessarily imply that courts are free to abandon the presumption that precedent is binding. It could mean only that the presumption itself is not inexorable. In other words, although the Court has concluded that stare decisis does not require absolute adherence to precedent, it has left open the question of whether this less-than-absolute doctrine of stare decisis is nonetheless constitutionally required.

<sup>5</sup> One of the first scholars to broach the issue was Henry Monaghan, who speculated in 1988 that perhaps "the principle of stare decisis inheres in the 'judicial power' of article III." Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 754-55 (1988). Six years later, another professor argued that stare decisis is in fact unconstitutional, at least in cases raising constitutional issues. See Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994). Most recently, a third writer asserted that stare decisis is a "judicial policy" that is "not grounded in the Constitution." Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1548 (2000). This conclusion was based on the Court's statements that "stare decisis is not an inexorable command." *Id.* However, as I have explained, these statements leave open the possibility that a less-than-absolute doctrine of stare decisis is constitutionally required. See *supra* note 4.

<sup>6</sup> 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, *Anastasoff v. United States*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

<sup>7</sup> See *id.* at 905.

<sup>8</sup> See *id.* at 900-904.

<sup>9</sup> U.S. CONST. art. III., § 1, cl. 1.

<sup>10</sup> See *Anastasoff*, 223 F.3d at 904-05.

<sup>11</sup> See *id.*

through reasons that are “convincingly clear.”<sup>12</sup> And because the Eighth Circuit’s practice stripped unpublished opinions of even presumptive authority, the court had exceeded the judicial power delegated to it by Article III.<sup>13</sup>

Judge Arnold’s argument is quite original.<sup>14</sup> Although many lawyers have expressed concerns about the circuit courts’ practice of issuing non-precedential decisions,<sup>15</sup> no one has ever claimed that it is unconstitutional.<sup>16</sup> The argument also has profound theoretical and practical implications. For the past half-century, scholarship and litigation concerning Article III has focused primarily on jurisdictional issues, such as what types of disputes the judicial power extends to and what control Congress has over that question.<sup>17</sup> Judge Arnold’s analysis shifts attention away from the issue of *what* the courts can hear and asserts that Article III is also relevant to the issue of *how* the courts must decide the cases they do hear. Although a few scholars have anticipated this move,<sup>18</sup> the Eighth Circuit panel is the first court to explicitly locate jurispuden-

<sup>12</sup> *Id.* at 905.

<sup>13</sup> *See id.*

<sup>14</sup> *See* Jerome I. Braun, *Eighth Circuit Decision Intensifies Debate Over Publication and Citation of Appellate Opinions*, 84 JUDICATURE 90, 92 (2000) (describing the opinion as “a wholly original pronouncement . . . quite unexampled in the law of any other circuit”). I refer to the argument as “Judge Arnold’s” because he was clearly the dominant force behind it. A year earlier, he had written a journal article that strongly criticized non-precedential opinions and questioned whether they were constitutional. At the time, however, he did not answer his own question. *See* Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 226 (1999).

<sup>15</sup> *See, e.g.*, Charles E. Carpenter, Jr., *The No-Citation Rule For Unpublished Opinions: Do the Ends of Expediency For Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C. L. REV. 235, 247-256 (1998) (arguing that no-citation rules lower the quality of appellate opinions, create a body of shadow law, and foster mistrust of the courts); 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) (arguing that non-precedential opinions generate a secret body of law, undermine certainty and stability, and fail to offer guidance for future judges).

<sup>16</sup> Indeed, not even the parties in *Anastasoff* challenged the practice as unconstitutional. The case involved a dispute over a tax refund and the plaintiff argued merely that the court was not bound by an unpublished decision unfavorable to her. *See Anastasoff*, 223 F.3d at 899. Judge Arnold raised the constitutional issue on his own. *See id.*

<sup>17</sup> *See* Evan Caminker, *Allocating the Judicial Power in a “Unified Judiciary,”* 78 TEX. L. REV. 1513, 1513 (2000); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 1998 (1994).

<sup>18</sup> *See* Caminker, *supra* note 17, at 1514 (noting that congressional actions have invited a shift from the question of “when and where” judicial power must be exercised to the question of “how” it must be exercised); James S. Liebman & William F. Ryan, *“Some Effectual Power”: The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696 (1998) (arguing that Article III is relevant to the quality of judicial power, not just the quantity); Dorf, *supra* note 17, at 1998 (stating that Article III raises jurisprudential issues).

tial norms in Article III. And if other courts follow the panel's lead, a vast new area of federal courts litigation could open up.

The panel's conclusion could also disrupt the operation of the federal courts. Three-quarters of the opinions issued by the courts of appeals are unpublished,<sup>19</sup> and nearly all the circuits deny precedential effect to these opinions.<sup>20</sup> This practice, which has been in place for roughly thirty years,<sup>21</sup> has enabled the courts to keep pace with a caseload that has increased by four-hundred percent over the same period.<sup>22</sup> By issuing non-precedential opinions, judges save time both in the writing process (because non-precedential decisions are short and not intended for future reference) and in the researching process (because the body of case law is substantially reduced).<sup>23</sup> If the practice was struck down nationwide, the smooth functioning of the appellate courts would be in serious jeopardy.

Moreover, because Judge Arnold's analysis is based on an interpretation of the judicial power vested by Article III, it would presumably apply to the federal district courts as well.<sup>24</sup> Most of these courts currently have no rules governing the precedential status of their opinions, but it is generally understood that district court judges are not bound by their own decisions or those of other

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<sup>19</sup> See Administrative Office of the United States Courts, *1999 Judicial Business of the United States Courts* 49, Table S-3 (2000), available at <http://www.uscourts.gov/judbus1999/s03sep99.pdf> (reporting that seventy-eight percent of opinions or orders in the courts of appeals were unpublished in the twelve-month period ending in September 1999). By unpublished, I mean they do not appear in the federal reporters, though they usually appear in Lexis and Westlaw and are available on the circuit court web pages.

<sup>20</sup> The First, Second, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits explicitly deny precedential effect to unpublished decisions. See 1st Cir. R. 36(b)(2)(F); 2d Cir. R. 0.23; 5th Cir. R. 47.5.4; 7th Cir. R. 53(b)(2)(iv); 8th Cir. R. 28A(i); 9th Cir. R. 36-3; 10th Cir. R. 36.3(A); 11th Cir. R. 36-2; D.C. Cir. R. 28(c). The Fourth and Sixth Circuits disfavor the citation of unpublished opinions, but allow it when the opinion has precedential value and there is no published opinion that would serve as well. See 4th Cir. R. 36(c); 6th Cir. R. 28(g). The Third Circuit rules make no mention of unpublished opinions, but imply that only published opinions are binding. See 3d Cir. R. 28.3(b).

<sup>21</sup> See The Honorable Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO S. L.J. 177, 184-86 (1999).

<sup>22</sup> The number of cases disposed of by the courts of appeals rose from 10,669 in 1970 to 51,194 in 1997. See Dragich, *supra* note 15, at 758 n.48; Administrative Office of the United States Courts, *1997 Judicial Business of the United States Courts*, Report of the Director, at Table B-1 (1997), available at [http://www.uscourts.gov/judicial\\_business/b01sep97.pdf](http://www.uscourts.gov/judicial_business/b01sep97.pdf). This increase has been offset somewhat by an increase in judgeships from 97 to 167 over the same period. See Arnold, *supra* note 14, at 222. However, the number of cases per judge has still increased two-hundred percent. For anecdotal evidence of the increasing workload of circuit court judges, see Martin, *supra* note 21, at 181-83.

<sup>23</sup> See Martin, *supra* note 21, at 190.

<sup>24</sup> See Braun, *supra* note 14, at 92 (noting that the Eighth Circuit's opinion "arguably extends to all Article III courts, making every district court order binding precedent within the district").

judges in their district.<sup>25</sup> Thus, if the panel's opinion was taken to its logical conclusion, it would require an overhaul of district court practice.<sup>26</sup>

These potential consequences may be reason enough for other courts to reject Judge Arnold's analysis. Indeed, the Eighth Circuit itself has already stripped the opinion of legal effect.<sup>27</sup> On en banc review, the court vacated the decision because subsequent actions of the parties had rendered the case moot.<sup>28</sup> Judge Arnold also authored the en banc opinion and explained that as a result of the court's action, the constitutionality of non-precedential opinions is once again an open question in the Eighth Circuit.<sup>29</sup> He did not retreat from his analysis in the panel opinion, however, and given his adamant opposition to non-precedential opinions, it seems likely that he would reach the same conclusion if faced with the question again.<sup>30</sup> More importantly, his analysis has generated considerable debate in other circuits and is sure to be seized on by litigants and judges who share his views.<sup>31</sup> For these reasons, and because there is so little

<sup>25</sup> See, e.g., *United States v. Cerceda*, 172 F.3d 806, 812 n.6 (11th Cir. 1999) ("The opinion of a district court carries no precedential weight, even within the same district."); *Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995) ("District court decisions have no weight as precedents, no authority.").

<sup>26</sup> Supreme Court practice might also be affected. Although the Court generally gives precedential effect to all its written opinions, the court has suggested that its summary dispositions are not entitled to full deference. See *Caban v. Mohammed*, 441 U.S. 380, 390 n.9 (1979).

<sup>27</sup> See *Anastasoff v. United States*, 235 F.3d 1054, 1055 (8th Cir. 2000).

<sup>28</sup> See *id.* at 1056.

<sup>29</sup> See *id.*

<sup>30</sup> In a recent journal article, Judge Arnold stated: "This practice disturbs me so much that it is hard to know where to begin in discussing it." Arnold, *supra* note 14, at 222. He described the practice as "startling" and argued that it "is creating a vast underground body of law." *Id.* at 221, 225. He also revealed that he has voted to change the circuit's rule on several occasions and that other members of the court have joined him. See *id.* at 225-26.

<sup>31</sup> The Ninth Circuit is already dealing with the issue. The circuit's Judicial Conference and Rules Advisory Committee recently recommended that the court allow citation to unpublished opinions. See Braun, *supra* note 14, at 94. The court rejected the recommendation, but the issue will remain on the table during a two-year public comment period. See *id.* In addition, a lawsuit was filed challenging the Ninth Circuit's prohibition against citing unpublished opinions. A district court dismissed the suit for lack of standing. See *Schmier v. United States Court of Appeals for the Ninth Circuit*, 136 F. Supp. 1048 (N.D. Cal. 2001). Several other courts have also responded to *Anastasoff*. See *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, 260-64 (5th Cir. 2001) (Smith J., dissenting) (recommending that en banc court address the constitutionality of non-precedential opinions); *McGuinness v. Pepe*, 150 F. Supp. 227, 234 (D. Mass. 2001) (citing *Anastasoff* for the propriety of discussing unpublished opinions); *Community Visual Communications, Inc. v. City of San Antonio*, 148 F. Supp. 2d 764, 774-75 (W.D. Tex. 2000) (discussing *Anastasoff* and requesting that the 5<sup>th</sup> Circuit reconsider its rule barring citation to unpublished opinions). For an analysis of Judge Arnold's argument by a sitting judge, see Danny J. Boggs & Brian Brooks, *Unpublished Opinions & The Nature of Precedent*, 4 GREEN BAG 2d 17 (2000). For a recently published "mini-symposium" on the issue, see *Anastasoff, Unpublished Opinions, and 'No-Citation' Rules*, 3 J. APP. PRAC. & PROCESS 169 (2001). For more general commentary on the practice of issuing non-precedential

scholarship on point, this Article examines the merits of Judge Arnold's claim that stare decisis is constitutionally required and that the practice of issuing non-precedential decisions violates this requirement.

Part I explores Judge Arnold's primary argument—that stare decisis is dictated by the founding generation's background assumptions about the authority of precedent and the nature of judicial power. According to Judge Arnold, the obligation to follow precedent was regarded in the late eighteenth century as "an immemorial custom, the way judging had always been carried out, part of the course of the law."<sup>32</sup> In addition, he claims, the "duty of the courts to follow their prior decisions was understood to derive from the nature of the judicial power itself"<sup>33</sup> and was viewed as essential to curtail the discretion of the judiciary and "to separate it from a dangerous union with the legislative power."<sup>34</sup> Judge Arnold concedes that opinions were seldom published in eighteenth-century America, but argues that this was no "impediment to the precedential authority of a judicial decision."<sup>35</sup> "Judges and lawyers of the day," he asserts, "recognized the authority of unpublished decisions even when they were established only by memory or by a lawyer's unpublished memorandum."<sup>36</sup>

Judge Arnold's reliance on the background assumptions of the founding generation is unobjectionable in itself. The Constitution is largely silent as to the "intrinsic nature and scope" of the judicial power,<sup>37</sup> and one way to establish the limits of that power is by reference to the common law tradition.<sup>38</sup> However, his

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opinions, see, e.g., *In re Rules of the United States Court of Appeals for the Tenth Circuit*, 955 F.2d 36, 38 (10th Cir. 1992) (Holloway, J., dissenting) (criticizing the practice); *National Classification Comm'n v. United States*, 765 F.2d 164, 173 n.2 (D.C. Cir. 1985) (Wald, J., concurring) (same); Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Decisions*, CALIFORNIA LAWYER, June 2000 (defending the practice); RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 170-71 (1996) (same); Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909 (1986) (same).

<sup>32</sup> *Anastasoff*, 223 F.3d at 900.

<sup>33</sup> *Id.* at 903.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See EDWARD S. CORBIN, *THE DOCTRINE OF JUDICIAL REVIEW* 16 (1914).

<sup>38</sup> See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia J., concurring) (stating that "the judicial Power of the United States . . . must be deemed to be the judicial power as understood by our common-law tradition"); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 150 (1951) (Frankfurter J., concurring) (noting that the judicial power was modeled on the "business of the Colonial courts and the courts of Westminster when the Constitution was framed"); David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU. L. REV. 75, 84 (asserting that constitutional terms such as "judicial" should be given the meaning associated with them "through centuries of Anglo-American practice"). By accepting this premise, I am not endorsing originalism as an exclusive approach to constitutional interpretation. I support a pluralistic method that looks not

claim about the substance of that tradition is overstated. By tracing the development of precedent from the middle ages to the early years of the Republic, Part I demonstrates that *stare decisis* is not an immemorial custom, but developed slowly over hundreds of years and was still unsettled even in eighteenth-century England. Moreover, the doctrine did not result from deeply held beliefs about the nature of judicial power, but emerged out of a practice of following the past for the sake of convenience and stability. Only later did judges develop a theory to justify that practice, and the theory they settled on – that past decisions were evidence of the law, but not the law itself – was rooted in a natural law perspective that is at odds with the concept of binding precedent. This theory also limited the practical significance of precedent. Because judges viewed decisions only as evidence of the law, they looked to a line of opinions for guidance rather than to a single case. Judges also felt free to ignore decisions not published in credible law reports because those decisions could not be considered reliable evidence of the law. Finally, American adherence to precedent in the seventeenth and eighteenth centuries was especially weak. Many colonial courts never recognized an obligation to follow past decisions, and in the decades after independence, state courts abandoned large numbers of English and domestic precedents. The early Supreme Court also paid little attention to case law.

This history casts considerable doubt on the claim that the founding generation viewed *stare decisis* as an inherent limit on the exercise of judicial power. Moreover, it demonstrates that even if courts were expected to follow precedents generally, they were not expected to give precedential effect to every one of their decisions. As Judge Arnold acknowledges, many decisions in the eighteenth century were not published. Contrary to his assertion, however, these decisions were not considered binding. A judge could rely on an unpublished decision to support his independent judgment, but he could also reject that decision as unreliable evidence of the law. In fact, the lack of reliable law reports was a major impediment to acceptance of the idea that precedent is binding. Thus, the founding generation would not have been surprised by a system in which only some decisions were given precedential effect; they were already familiar with just such a system.

In Part II, I examine a related argument that is suggested, though not stated explicitly, by Judge Arnold. Even if *stare decisis* is not dictated by the founding generation's background assumptions, did the Framers nonetheless intend for the courts to be bound by precedent as part of the separation of powers and checks and balances implicit in the Constitution's structure? The ques-

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only to original understanding and intent but also to structural, doctrinal, ethical, and prudential concerns. See, e.g., Philip Bobbitt, *Constitutional Fate*, 58 TEX. L. REV. 695, 700-751 (1980) (describing a pluralistic approach to interpretation that includes six forms of constitutional argument). Nevertheless, I recognize that originalist claims carry considerable weight with many judges and scholars, which is why I spend so much energy challenging Judge Arnold's historical assertions.

tion here is not whether the founding generation thought the mere exercise of “judicial power” implied an obligation to follow precedent, but whether the Framers viewed stare decisis as a necessary check on the power of the courts.

Apart from an isolated statement by Hamilton, there is little evidence to support this theory and several reasons to reject it. First, the Framers expressed few concerns about the potential abuse of judicial power. Indeed, they thought the judiciary was a weak and feeble branch and worried that it would be overpowered by the other branches. Second, the Framers addressed whatever concerns they had about the courts by instituting several checks apart from stare decisis, including congressional control over jurisdiction. The Framers thought these checks were sufficient to restrain the judiciary, especially in light of its limited power. Finally, stare decisis is not the kind of mechanism the Framers relied on to prevent overreaching. The Framers did not trust officials to limit their own authority, so they designed *inter*-branch checks that pitted the ambitions of each branch against the ambitions of the others. Stare decisis is an *intra*-branch check that relies on the self-restraint of the very officials it is meant to constrain. It was precisely such self-policing that the Framers regarded as inadequate to prevent abuses of power.

In Part III, I acknowledge that even if stare decisis is not dictated by the founding generation’s assumptions or by the system of checks and balances, it might nonetheless be essential to the legitimacy of the courts. By following the doctrine consistently for the better part of two centuries, the courts may have created an expectation that they will continue to do so. And to the extent that their legitimacy now rides on this expectation, they may no longer be free to abandon the doctrine. Even if this is true, however, it does not necessarily follow that non-precedential decisions threaten the courts’ legitimacy. Stare decisis is not an end in itself, but a means to promote certain values, such as certainty, equality, efficiency, and judicial integrity. Although a complete abandonment of stare decisis might undermine these values, the discrete practice of issuing non-precedential opinions does not. Because a court must still follow past decisions even when it issues a non-precedential opinion, problems arise only when the non-precedential opinion differs in a meaningful way from the precedents upon which it is based (or when it is based on no precedents at all, as in cases of first impression). Therefore, as long as courts adopt a narrow rule for determining when non-precedential opinions will be issued, along with mechanisms to ensure compliance with that rule, the underlying values of stare decisis will be preserved.

Before laying out these arguments in detail, I should make clear exactly what I mean when I refer to stare decisis or the doctrine of precedent, two terms I use interchangeably throughout this Article.<sup>39</sup> I am not referring to a doctrine under which courts can never overrule past decisions. English courts have fol-

<sup>39</sup> In doing so, I follow the example of Professor Wasserstrom. See RICHARD A. WASSERSTROM, *THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION* 39 (1961).

lowed such an absolute form of stare decisis for roughly the past century (with some recent exceptions), but American courts have never taken such a rigid view.<sup>40</sup> Instead, in this country stare decisis is generally understood to mean that precedent is presumptively binding. In other words, courts cannot depart from previous decisions simply because they disagree with them.<sup>41</sup> However, they can disregard precedent if they offer some special justification for doing so.<sup>42</sup>

One writer has argued that Judge Arnold did not have this formulation of stare decisis in mind when he wrote his opinion in *Anastasoff*. According to Professor Polly Price, Judge Arnold meant only that courts are required to begin their analysis with, and explain any departure from, past cases, not that they are bound by past decisions they disagree with.<sup>43</sup> Furthermore, Professor Price argues, because the evidence shows that most eighteenth-century courts at least used past cases as a starting point even if they did not always adhere to them, Judge Arnold's historical claim is defensible.<sup>44</sup>

Some of Judge Arnold's language supports Professor Price's interpretation. Near the end of the opinion, he writes that he "is not creating some rigid doctrine of eternal adherence to precedents"<sup>45</sup> and that "[i]f the reasoning of a case is exposed as faulty, or if other exigent circumstances justify it, precedents can be changed."<sup>46</sup> He also writes that when a court rejects a prior decision, it must make its reason "convincingly clear," yet does not state that a court must provide some reason other than its mere disagreement with the earlier decision.<sup>47</sup>

<sup>40</sup> See RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 5, 19, 135 (Clarendon Press 4th ed., 1991).

<sup>41</sup> See WASSERSTROM, *supra* note 39, at 52 (1961) ("For, if the doctrine of precedent has any significant meaning, it would seem necessary to imply that rules are to be followed because they are rules and not because they are 'correct' rules."); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 8 (2001) (noting that "[t]he doctrine of stare decisis would indeed be no doctrine at all if courts were free to overrule a past decision simply because they would have reached a different decision as an original matter").

<sup>42</sup> See, e.g., *Dickerson v. United States*, 530 U.S. 428, 443-44 (2000) (stating that stare decisis requires that a "departure from precedent . . . be supported by some special justification"); *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring) (stating that the decision to overrule must be supported by "reasons that go beyond mere demonstration that the overruled opinion was wrong"); *Planned Parenthood v. Casey*, 505 U.S. 833, 863 (1992) (O'Connor, Kennedy, and Souter, JJ., plurality opinion) (stating that "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided").

<sup>43</sup> See Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 84-85 (2000).

<sup>44</sup> See *id.*

<sup>45</sup> *Anastasoff v. United States*, 223 F.3d 898, 904-05 (8th Cir. 2000).

<sup>46</sup> *Id.*

<sup>47</sup> See *id.* at 905.

The majority of the language in *Anastasoff*, however, undermines Professor Price's reading. Judge Arnold writes that rules of law declared by courts "must be applied in subsequent cases to similarly situated parties,"<sup>48</sup> that it is the "judge's duty to follow precedent,"<sup>49</sup> that "in determining the law in one case, judges bind those in subsequent cases,"<sup>50</sup> and that "the Framers thought that, under the Constitution, judicial decisions would become binding precedents."<sup>51</sup> He also makes clear that he understands the difference between a requirement that courts begin their analysis with past decisions and a requirement that they adhere to those decisions, and that he believes Article III includes both.<sup>52</sup> For this reason, I will analyze his claim under the widely accepted definition of stare decisis articulated above.

I should also make clear that this Article does not address the important question of what circumstances justify the overruling of prior decisions.<sup>53</sup> As already stated, the essence of stare decisis is that courts cannot disregard precedents simply because they disagree with them.<sup>54</sup> For the doctrine to mean anything, decisions must be followed because they are precedent, not because they are correct. The latter is just a decision on the merits.<sup>55</sup> Beyond this baseline principle, however, there is much disagreement about precisely what qualifies as special justification. Some Supreme Court justices have suggested that a decision can be overruled if it is "egregiously incorrect"<sup>56</sup> or "inconsistent with the

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<sup>48</sup> *Id.* at 900.

<sup>49</sup> *Id.* at 901.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 900-02.

<sup>52</sup> In describing the practice of issuing non-precedential opinions, Judge Arnold writes that 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." *Id.* He then writes, "As we have tried to explain in this opinion, such a statement exceeds the judicial power, which is based on reason, not fiat." *Id.* at 904. If Judge Arnold believed that courts must only begin their analysis with past decisions, he would have found only the second part of his imagined statement problematic – the part where the courts tell the bar that it cannot remind them of past decisions. That he also objects to the courts' message that they are not bound by past decisions indicates that he thinks courts must not only start their analysis with precedent, but must adhere to it as well.

<sup>53</sup> The Article also does not address the obligation of lower courts to follow the decisions of higher courts, which is sometimes misleadingly referred to as vertical stare decisis. This obligation does not derive from the mere existence of the decisions, but from the hierarchical relationship of the courts and is therefore fundamentally different from horizontal stare decisis. For a complete discussion of the constitutional and pragmatic aspects of vertical stare decisis, see Evan H. Caminker, *Why Must Inferior Courts Obey Supreme Court Precedents?*, 46 STAN. L. REV. 817 (1994).

<sup>54</sup> See WASSERSTROM, *supra* note 39, at 52; Nelson, *supra* note 41, at 8.

<sup>55</sup> See WASSERSTROM, *supra* note 39, at 52.

<sup>56</sup> *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 304 (1985) (Stevens, J., dissenting).

sense of justice or with the social welfare"<sup>57</sup> or "insusceptible of principled application."<sup>58</sup> The Court has also indicated that other factors may be relevant, such as whether a decision has proved unworkable, has previously been questioned, has induced significant reliance, or rests on outdated facts.<sup>59</sup> At bottom, the answer a court gives to this problem depends upon how much it values the competing interests of finality and accuracy. This, in turn, is dictated largely by its views about the possibility of objectively right answers.<sup>60</sup> As two scholars have observed, "[T]he less we believe in legal truth, the more we will value legal finality."<sup>61</sup>

This Article does not attempt to resolve the problem. Instead, it considers whether the principle underlying this debate – that prior decisions cannot be overruled without special justification – is constitutionally mandated, and if so, whether the practice of issuing non-precedential decisions violates that principle. Though largely unexplored, this inquiry is central to our understanding of the federal courts and the power they possess, and it provides important context for the debate over just how far the courts should go in adhering to precedent.

#### I. STARE DECISIS AND THE COMMON LAW TRADITION

The impulse to look to the past when shaping the present has always been powerful. Whether out of self-doubt, humility, or respect for prior generations, judges throughout history have often sought guidance from those who came before them. In ancient Greece, judges relied on past cases to settle commercial disputes, while early Egyptian judges prepared a rudimentary system of law reports to help guide their decisions.<sup>62</sup> Roman judges also displayed a tendency to follow the example of their predecessors, especially in procedural matters.<sup>63</sup>

A willingness to consult past decisions for their wisdom or insight, however, is far different from an obligation to follow precedent simply because it exists.<sup>64</sup> And only common law judges have recognized an obligation to fol-

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<sup>57</sup> *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989); *Johnson v. Transp. Agency*, 480 U.S. 616, 644-45 & n.4 (1987) (Stevens, J., concurring).

<sup>58</sup> *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 599 (1996) (Scalia J., dissenting).

<sup>59</sup> *See Planned Parenthood v. Casey*, 505 U.S. 833, 854-64 (1992) (O'Connor, Kennedy, and Souter, JJ., plurality opinion).

<sup>60</sup> *See Nelson*, *supra* note 41, at 48-52.

<sup>61</sup> CROSS & HARRIS, *supra* note 40, at 221.

<sup>62</sup> *See* CARLETON KEMP ALLEN, *LAW IN THE MAKING* 170, 177 n.1 (Clarendon Press 7th ed., 1964).

<sup>63</sup> *See id.* at 171, 175-76.

<sup>64</sup> *See* Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 30, 41 (1959).

low even those decisions they disagree with.<sup>65</sup> Though courts in Greece, Egypt, or Rome may have consulted past decisions for guidance, they were never bound, even presumptively, by those decisions, and they did not view precedent as a restraint on their power.<sup>66</sup> In fact, Justinian believed that the judicial practice of consulting past decisions threatened *his* power because it established the courts as the final arbiter of the law, a role he wanted for himself.<sup>67</sup> "No judge or arbitrator," he declared, "is to deem himself bound by juristic opinions which he considers wrong: still less by the decisions of learned prefects or other judges. . . . Decisions should be based on laws, not on precedents."<sup>68</sup>

The history of stare decisis, then, begins in the common law.<sup>69</sup> In this Part, I trace that history in an effort to establish the assumptions of the founding generation concerning the authority of decided cases and the nature of judicial power. The discussion unfolds in six sections. The first three sections explore the development and growth of case law in England from the middle ages to the early nineteenth century. Although this story has been told by a number of English historians, from whom the bulk of my material comes, I construct a narrative that pays special attention to the slow, organic evolution of stare decisis and the forces that propelled and hindered its progress. In the next two sections, I follow the story to America, beginning with the status of case law in the early colonies and continuing on to the Revolution and the decades immediately afterward. This territory is less well-traveled, and my account seeks to illustrate how the needs of the colonies created a distinctly American approach to precedent. The final section synthesizes the historical evidence, identifies important themes, draws conclusions, and addresses potential counter-arguments.

The history that follows is long and detailed, but with good reason. The rule that courts are bound by past decisions did not emerge all at once as a result of explicit premises about the authority of case law.<sup>70</sup> It developed slowly, almost imperceptibly over several hundred years, assuming its modern form only in the late eighteenth and early nineteenth centuries.<sup>71</sup> Indeed, as this history

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<sup>65</sup> See Harold J. Berman & Charles J. Reid Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 444-45 (1996).

<sup>66</sup> See ALLEN, *supra* note 62, at 170.

<sup>67</sup> See *id.* at 172-73.

<sup>68</sup> *Id.*

<sup>69</sup> Berman & Reid, *supra* note 65, at 444-45.

<sup>70</sup> See Jim Evans, *Precedent in the Nineteenth Century*, in PRECEDENT IN LAW 35, 35-36 (Laurence Goldstein, ed., 1987); W. S. Holdsworth, *Case Law*, 50 L.Q. REV. 180, 190 (1934); Albert Kocourek & Harold Koven, *Renovation of the Common Law Through Stare Decisis*, 29 ILL. B.J. 971, 973-74 (1935).

<sup>71</sup> There is some dispute about precisely when the modern doctrine of precedent took shape. Carleton Kemp Allen argued that although the doctrine was well-advanced in the late eighteenth century, the final touches were not added until the nineteenth century. See ALLEN, *supra* note 62, at 219, 219 n.1. Other scholars agree. See THEODORE F.T. PLUCKNETT, A CONCISE

makes clear, for most of its life the common law operated without a doctrine of stare decisis.<sup>72</sup>

#### A. *Case Law in Medieval England*

The earliest records of English law reveal little about the role of decided cases. Although court judgments were occasionally recorded during the Anglo-Saxon and Norman periods, they throw little light on the attitude toward judicial precedent.<sup>73</sup> Early legal texts are also unhelpful. The first treatise on the common law, written in 1187, refers to only one case and offers no explanation of the way in which courts reached decisions.<sup>74</sup> It was not until the mid-thirteenth century that a legal writer showed a discernible interest in the work of the courts.<sup>75</sup> In a treatise written around 1256, a judge named Henry de Bracton attempted to explain the principles and procedures of English law.<sup>76</sup> To illustrate his points, he included discussions of some five hundred cases decided by the Court of Common Pleas, the general trial court of the day.<sup>77</sup> He also expressed a strong belief in the value of precedents, stating that "[i]f any new and unusual matters arise, which have not before been seen in the realm, if like matters arise let them be decided by like since the decision is a good one for proceeding a

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HISTORY OF THE COMMON LAW 308 (1929) (stating that "it is only in the nineteenth century that the present system of case law with its hierarchy of authorities was established"); CROSS & HARRIS, *supra* note 40, at 24 (noting that "the strict rules [of precedent] are the creature of the nineteenth and twentieth centuries"). William Holdsworth, however, maintained that the modern theory was substantially in place by the end of the eighteenth century. *See* Holdsworth, *supra* note 70, at 180. The dispute seems minor, given that Holdsworth did not rule out the possibility of additional refinements in the nineteenth century. *See* Kempin, *supra* note 64, at 30 n.4. In any case, these scholars all focused on the doctrine of precedent in English courts, and there is strong evidence that American courts did not accept the modern doctrine of precedent until the early nineteenth century. *See id.* at 36, 50-51 ("It can be established that American cases, up to the year 1800, had no firm doctrine of stare decisis."); *See also* Caminker, *supra* note 53, at 661 ("There is no consensus as to precisely when the notion of case law precedent gained currency in English common law. But most legal historians have agreed that the eighteenth and nineteenth centuries marked an important point of transition.").

<sup>72</sup> TUBBS, *supra* note 2, at 18.

<sup>73</sup> *See* T. Ellis Lewis, *The History of Judicial Precedent I*, 46 L.Q. REV. 207 (1930) [cited hereinafter as Lewis, *The History of Judicial Precedent I*]; PERCY H. WINFIELD, *THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY* 146 (1925) ("There is practically no trace of law reporting under the Norman kings.").

<sup>74</sup> *See* ALLEN, *supra* note 62, at 187; Lewis, *The History of Judicial Precedent I*, *supra* note 73, at 209.

<sup>75</sup> *See* Lewis, *The History of Judicial Precedent I*, *supra* note 73, at 212.

<sup>76</sup> *See* TUBBS, *supra* note 2, at 7-20.

<sup>77</sup> *See* Lewis, *The History of Judicial Precedent I*, *supra* note 73, at 209-212. Bracton also kept a private notebook that contained references to roughly 2,000 cases. *See id.* at 209.

similibus ad similia.”<sup>78</sup>

Despite his regard for precedent, however, Bracton did not view past decisions as a binding source of authority. He carefully selected the cases in his treatise to reflect what he thought the law was, not simply to show what the courts had done.<sup>79</sup> Indeed, most of the cases he cited were older and conflicted with more recent opinions he disliked.<sup>80</sup> Bracton conceded that these older cases were no longer followed, but he believed that his contemporaries had perverted the law and he wanted to restore the custom that had existed a generation before.<sup>81</sup> Thus, it is clear that Bracton did not cite cases because he thought they were authoritative sources of law, but rather because he respected the judges who had decided them and because they helped to illustrate his views.<sup>82</sup>

It is also clear that Bracton’s use of cases was unique in thirteenth-century England.<sup>83</sup> No other judge or lawyer collected court decisions for the simple reason that none of them had access to the Plea Rolls on which these judgments were recorded.<sup>84</sup> Bracton was well placed, however, and he used his influence to obtain access to the only set of Plea Rolls in existence, from which he copied selected decisions.<sup>85</sup> This was a difficult task. The rolls were immense and lacked any index to their contents; a lawyer interested in a given topic would have had to read straight through to locate a case on point.<sup>86</sup> So even if other lawyers had been granted access to the rolls, the difficulty of sorting through them would have made any use of cases by the profession at large “manifestly impossible.”<sup>87</sup>

Still, Bracton’s treatise was a significant step in the development of stare decisis because he familiarized lawyers with the use of cases to support

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<sup>78</sup> TUBBS, *supra* note 2, at 18-19.

<sup>79</sup> *See id.* at 19; Lewis, *The History of Judicial Precedent I*, *supra* note 73, at 209-212.

<sup>80</sup> *See* PLUCKNETT, *supra* note 71, at 304; TUBBS, *supra* note 2, at 19.

<sup>81</sup> *See* PLUCKNETT, *supra* note 71, at 304.

<sup>82</sup> *See id.* at 180 (stating that Bracton’s use of cases was “not based upon their authority as sources of law, but upon his personal respect for the judges who decided them, and his belief that they raise and discuss questions upon lines which he considers sound”); TUBBS, *supra* note 2, at 20 (declaring that “Bracton’s cases are carefully selected to show what the law ought to be, not because he thinks they have any binding authority”); Lewis, *The History of Judicial Precedent I*, *supra* note 73, at 210-12 (stating that Bracton’s “cases were not authorities in the modern sense, but merely apposite illustrations of the point at issue”).

<sup>83</sup> *See* PLUCKNETT, *supra* note 71, at 303 (noting that Bracton was “undertaking research into the present and former condition of the law by a novel method which he had devised”).

<sup>84</sup> *See id.*

<sup>85</sup> *See* HAROLD POTTER, POTTER’S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 282 (A.K.R. Kiralfy ed., 4th ed., 1958); PLUCKNETT, *supra* note 71, at 181.

<sup>86</sup> *See* PLUCKNETT, *supra* note 71, at 303.

<sup>87</sup> *Id.* at 303.

arguments about the law.<sup>88</sup> It is also possible that his example inspired the creation of the Year Books, a digest of court cases that first appeared around 1283 and ran until the mid-sixteenth century.<sup>89</sup> Much has been written about the Year Books and it is sometimes assumed that they mark the beginning of the English doctrine of precedent. Yet although the Year Books contributed to the influence of cases in the common law, their development and content make clear that they "were not intended to collect precedents whose authority should be binding in later cases"<sup>90</sup> and were ill-suited to this purpose.

The precise origin of the Year Books is not known.<sup>91</sup> Some historians initially claimed that they were produced by official reporters paid by the king.<sup>92</sup> Modern scholars, however, believe the Year Books were begun by students or young lawyers who took notes of court proceedings and then distributed them to the bar.<sup>93</sup> The basis for this conclusion is the content of the books themselves. Unlike modern law reports, which include only the opinion of the court, the Year Books included everything but the opinion. They recounted the arguments, the form of pleading, some commentary on the case, even remarks about the weather, all in the gossipy tone of a professional newspaper.<sup>94</sup> However, they rarely reported the decision or the reasons behind it.<sup>95</sup> "What the judgment was nobody knew and nobody cared."<sup>96</sup> Such a record would have been valuable to students and young lawyers navigating the courts for the first time because the world of pleading was complex and tangled.<sup>97</sup> But it would have had little value for someone who wanted to know the content of the law or the ways in which courts reached decisions. It is for this reason that students are credited with creation of the Year Books.<sup>98</sup> It is for this same reason that scholars agree the Year Books were neither the result of an emerging belief in the binding force of precedent, nor were they the catalyst for such a doctrine.<sup>99</sup> The Year Books

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<sup>88</sup> See *id.* at 181; TUBBS, *supra* note 2, at 20.

<sup>89</sup> See PLUCKNETT, *supra* note 71, at 182, 304.

<sup>90</sup> *Id.*

<sup>91</sup> See WINFIELD, *supra* note 73, at 158.

<sup>92</sup> See POTTER, *supra* note 85, at 270.

<sup>93</sup> See *id.* at 269; TUBBS, *supra* note 2, at 42.

<sup>94</sup> See WINFIELD, *supra* note 73, at 159.

<sup>95</sup> See ALLEN, *supra* note 62, at 200-01; POTTER, *supra* note 85, at 270; Lewis, *The History of Judicial Precedent I*, *supra* note 73, at 217-18.

<sup>96</sup> THEODORE F.T. PLUCKNETT, *EARLY ENGLISH LEGAL LITERATURE* 103-04 (Cambridge 1958).

<sup>97</sup> See POTTER, *supra* note 85, at 269-70; TUBBS, *supra* note 2, at 42.

<sup>98</sup> See TUBBS, *supra* note 2, at 42, 180.

<sup>99</sup> See *id.*

“were never adduced as actual authorities in court,”<sup>100</sup> and the absence of actual decisions made their use “as legal authority nearly impossible.”<sup>101</sup>

If the Year Books could not support a system of binding precedent, however, they do document the emerging role of cases in the courts. Even in the early Year Books, judges and lawyers occasionally discuss past decisions.<sup>102</sup> And though such discussions are relatively rare – precedent is cited in roughly one of every twenty cases<sup>103</sup> – their presence demonstrates that reference to the past was at least considered a relevant legal argument.<sup>104</sup> In a 1310 case, for example, Chief Justice Bereford referred to a case “in the time of the late King Edward”<sup>105</sup> in which a woman was summoned to Parliament and then arraigned on numerous charges when she arrived. Noting that the King had refused to hear the case because the woman had not been warned of the charges, Bereford concluded with the words, “So say I here.”<sup>106</sup> In other cases, Bereford used such phrases as “I have seen a case of”<sup>107</sup> or “Do you not remember the case of?”<sup>108</sup>

The Year Books also reveal other points about the use of precedent. Judges and lawyers who referred to past cases rarely cited them by name, relying instead on descriptions of the facts and general assertions about the year and court in which the case was decided.<sup>109</sup> This raised problems of credibility and accuracy.<sup>110</sup> Further complicating the picture, most lawyers and judges could not produce the records of past cases and were forced to recite the facts from memory or private notes.<sup>111</sup> Judges, of course, could get away with unsupported claims about past decisions, and many of them referred to cases ten, fifteen, and twenty years old without documentation.<sup>112</sup> On the other hand, if a lawyer cited

<sup>100</sup> ALLEN, *supra* note 62, at 202.

<sup>101</sup> TUBBS, *supra* note 2, at 42. See also ALLEN, *supra* note 62, at 201 (“To speak of a ‘system of precedents’ in connexion with the Year Books would be a complete anachronism.”); PLUCKNETT, *supra* note 71, at 306 (noting that “the Year Books themselves . . . were not regarded as collections of authoritative or binding decisions”).

<sup>102</sup> See TUBBS, *supra* note 2, at 42-43.

<sup>103</sup> See *id.* at 181.

<sup>104</sup> See ALLEN, *supra* note 62, at 190.

<sup>105</sup> *Id.* at 194.

<sup>106</sup> *Id.* 194-95.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 194.

<sup>109</sup> See *id.* at 191; TUBBS, *supra* note 2, at 43.

<sup>110</sup> See TUBBS, *supra* note 2, at 43-44.

<sup>111</sup> See T. Ellis Lewis, *The History of Judicial Precedent II*, 46 L.Q. REV. 341, 342 (1930) [cited hereinafter as Lewis, *The History of Judicial Precedent II*].

<sup>112</sup> See ALLEN, *supra* note 62, at 193-95. Often, it appears, they were remembering their own years as practitioners. See *id.* at 196.

a case and could not support his account of the decision, he was likely to be called on it.<sup>113</sup> In one early fourteenth century case, a lawyer named Miggeley was asked where he had seen a certain practice. "Sir, in Trinity term last past, and of that I vouch the record," replied the lawyer, to which the judge shot back, "If you find it, I will give you my hat."<sup>114</sup>

When written pleadings replaced oral pleadings in the mid-fifteenth century, the content of the Year Books changed slightly. Under the old system, case reports focused on tactical and procedural issues.<sup>115</sup> Now, however, attention shifted to the substantive issues in a case, and the Year Book writers began to provide fuller accounts of cases, often discussing decisions at length.<sup>116</sup> This, in turn, made the Year Books a more fertile source of case law, and judges and lawyers began to cite precedents more frequently.<sup>117</sup> Judges also became increasingly conscious of the way their decisions would shape the law. In 1469, a judge named Yelverton acknowledged the future implications of a decision by stating, "[F]or this case has never been seen before, and therefore our present judgement will be taken for a [precedent] hereafter."<sup>118</sup> Yelverton's statement is the first recorded use of the term precedent, and it was echoed over the next few decades by other judges.<sup>119</sup>

Despite the increasing role of precedents, however, at no point during the Year Book period did judges think they were bound, even presumptively, by prior decisions.<sup>120</sup> They looked to these cases because they respected the opinions of their predecessors, because it seemed prudent to maintain consistency, and because they wanted to "save trouble."<sup>121</sup> But they did not think their power as judges was restrained by precedent. When faced with a prior decision they disliked, most judges simply dismissed it without reasons or ignored it altogether.<sup>122</sup> "[I]t was not incumbent upon them to say how the cases differed, or

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<sup>113</sup> See TUBBS, *supra* note 2, at 44.

<sup>114</sup> See ALLEN, *supra* note 62, at 193.

<sup>115</sup> See Lewis, *The History of Judicial Precedent II*, *supra* note 111, at 357.

<sup>116</sup> See POTTER, *supra* note 85, at 271; TUBBS, *supra* note 2, at 181.

<sup>117</sup> See ALLEN, *supra* note 62, at 190 n.3; POTTER, *supra* note 85, at 277; TUBBS, *supra* note 2, at 64; T. Ellis Lewis, *The History of Judicial Precedent III*, 47 L.Q. REV. 411 (1931) [cited hereinafter as Lewis, *The History of Judicial Precedent III*].

<sup>118</sup> ALLEN, *supra* note 62, at 198-99.

<sup>119</sup> See *id.*

<sup>120</sup> See *id.* at 200; Lewis, *The History of Judicial Precedent I*, *supra* note 73, at 215; Lewis, *The History of Judicial Precedent III*, *supra* note 117, at 421-23.

<sup>121</sup> PLUCKNETT, *supra* note 71, at 302; See Lewis, *The History of Judicial Precedent II*, *supra* note 111, at 354-55; Lewis, *The History of Judicial Precedent III*, *supra* note 117, at 416, 421-22.

<sup>122</sup> See ALLEN, *supra* note 62, at 200.

why the decision was wrong."<sup>123</sup> In one case, Chief Justice Bereford responded to a claim that an earlier court had followed a certain procedure by declaring, "That was a mistake. We will not do so."<sup>124</sup> When urged in another case to award a type of damages that had been allowed previously, he replied, "You will never see them so long as I am here."<sup>125</sup> Even in later Year Books, judges often dismissed precedents outright. One judge in 1536, when told that his decision contradicted an earlier case, said simply, "Put this case out of your books for it is certainly not law."<sup>126</sup>

When judges did offer reasons for disregarding precedent, they usually invoked the nebulous principles of justice or reason. For instance, Bereford responded to an argument based on precedent by stating, "[J]udgments are founded not on examples, but on reason."<sup>127</sup> Several years later, Justice Sharshulle acknowledged a previous decision on the point before the court, but insisted that "no precedent is of such force as justice or that which is right."<sup>128</sup> When a lawyer responded that judges should follow the example of prior courts "for otherwise we do not know what the law is," one of Sharshulle's colleagues declared, "Law is the Will of the Justices."<sup>129</sup> He was quickly corrected by another judge, who said, "No; Law is Justice, or that which is right."<sup>130</sup>

The resort to justice or "that which is right" sheds light on the prevailing belief about the nature of law in medieval England. Although judges and lawyers frequently claimed that the common law was the custom that had always existed in England, they believed this custom was ultimately grounded in reason.<sup>131</sup> As a result, if a previous decision was consistent with the judge's view of reason, it might be considered for its instructive value. But if it conflicted with reason – in other words, if the judge disagreed with it – it could have no value. This is why judges "were not for a moment 'bound' by previous decisions of which they did not approve; justice stood above all precedent."<sup>132</sup> It also explains why, when judges later began to build a doctrine of precedent, they would need a theory to justify it.

<sup>123</sup> Lewis, *The History of Judicial Precedent II*, *supra* note 111, at 348.

<sup>124</sup> ALLEN, *supra* note 62, at 200.

<sup>125</sup> *Id.*

<sup>126</sup> Lewis, *The History of Judicial Precedent III*, *supra* note 117, at 414.

<sup>127</sup> Lewis, *The History of Judicial Precedent II*, *supra* note 73, at 220.

<sup>128</sup> POTTER, *supra* note 85, at 275.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> See TUBBS, *supra* note 2, at 187-88.

<sup>132</sup> ALLEN, *supra* note 62, at 200.

*B. The Growing Role of Precedent and the Influence of Sir Edward Coke*

In the middle of the sixteenth century, the Year Books abruptly ended and were replaced by a series of law reports named after their authors.<sup>133</sup> These reports, which continued until the nineteenth century, varied widely in quality and format; often they were compiled for the use of the author and his friends and published only upon later request.<sup>134</sup> But they continued the trend of the later Year Books in providing important information: the arguments of lawyers, the pleadings, and, usually, the decisions.<sup>135</sup> They also document the gradual emergence over the next two centuries of the view that precedents are not only instructive guides that help maintain consistency, but are authoritative statements of the law that should be followed in most cases.

The first step in this direction came in the late sixteenth and early seventeenth centuries when some judges began to follow precedents on procedural matters even when they disagreed with them.<sup>136</sup> In *Virley v. Gunstone*, for example, a pleading in the court below had been insufficient, but the appellate court did not reverse the judgment because similar pleadings had been allowed by other courts.<sup>137</sup> Further progress was brought about by the influence of Sir Edward Coke, who served as Chief Justice of the Court of Common Pleas from 1606-1613 and Chief Justice of the King's Bench from 1613-16.<sup>138</sup> Coke believed strongly that example and tradition should be followed, that the common law was ancient custom dating from time immemorial, and that the best way to learn that custom was to study the decisions of earlier courts.<sup>139</sup> "Our book cases" he said, in an early expression of the declaratory theory of law, "are the best proof [of] what the law is."<sup>140</sup> Consequently, Coke spent years poring over the Year Books and private reports, mastering the details of hundreds of cases.<sup>141</sup> When he had finished, he was the leading expert on the decisions of English courts.<sup>142</sup>

Coke helped secure a central role for precedent in two ways. First, he produced a thirteen-volume treatise known as "The Reports," which was the

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<sup>133</sup> See *id.* at 203.

<sup>134</sup> See T. Ellis Lewis, *The History of Judicial Precedent IV*, 48 L.Q. REV. 230, 230-31 (1932) [cited hereinafter as Lewis, *The History of Judicial Precedent IV*].

<sup>135</sup> See *id.* at 230-34.

<sup>136</sup> See ALLEN, *supra* note 62, at 205-06.

<sup>137</sup> See *id.* at 206.

<sup>138</sup> See PLUCKNETT, *supra* note 71, at 163-65.

<sup>139</sup> See ALLEN, *supra* note 62, at 207.

<sup>140</sup> *Id.*

<sup>141</sup> See PLUCKNETT, *supra* note 71, at 200, 203.

<sup>142</sup> See *id.* at 202-04.

most thorough collection of cases that had ever appeared.<sup>143</sup> His primary goal in writing *The Reports* was to explain the principles of English law through cases handed down over the years.<sup>144</sup> His secondary objective was to improve the quality of law reports. Coke thought inaccurate and unreliable reporting had undermined the usefulness of precedents.<sup>145</sup> Often, he complained, various reporters described the same case so differently that “the true parts of the case have been disordered and disjointed, and most commonly the right reason and rule of the Judge utterly mistaken.”<sup>146</sup> Coke hoped to remedy the situation by providing a model law report.<sup>147</sup> His model, it turned out, was less than ideal; Coke’s report of a case was often a “rambling disquisition,” “an uncertain mingling of genuine report, commentary, criticism, elementary instruction, and recendite legal history.”<sup>148</sup> Yet due to the force of his personality and the sheer bulk of cases he cited, his reports had a tremendous influence.<sup>149</sup> As a result, lawyers could no longer afford to ignore precedent, and citations to past decisions multiplied.<sup>150</sup>

The second way in which Coke solidified the role of precedent was by citing *Year Book* cases to challenge the King’s authority. During his ten years on the bench, Coke repeatedly cited ancient precedents to limit the jurisdiction of the ecclesiastical courts and the Chancery, both of which were controlled by the King.<sup>151</sup> He also relied on precedents to deny the King power to make arrests or to alter the common law and to argue that acts of Parliament “against common right and reason” were void.<sup>152</sup> His battle with the King intensified in the *Case of Prohibitions*, which involved a dispute over the jurisdiction of ecclesiastical courts.<sup>153</sup> Arguing on behalf of James I, the Archbishop of Canterbury

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<sup>143</sup> See *id.* at 200.

<sup>144</sup> See ALLEN, *supra* note 62, at 208; Lewis, *The History of Judicial Precedent IV*, *supra* note 134, at 235.

<sup>145</sup> See ALLEN, *supra* note 62, at 208.

<sup>146</sup> *Id.*

<sup>147</sup> See *id.*

<sup>148</sup> PLUCKNETT, *supra* note 71, at 200-01; see also WINFIELD, *supra* note 73, at 188.

<sup>149</sup> See ALLEN, *supra* note 62, at 208; PLUCKNETT, *supra* note 71, at 200-01; WINFIELD, *supra* note 73, at 189. In his report of Calvin’s Case alone, Coke cited 140 decisions. One analysis of his reports found that he cited sixteen times the number of precedents that appeared in the next most prolific reporter of his day. See Lewis, *The History of Judicial Precedent IV*, *supra* note 134, at 236.

<sup>150</sup> See Lewis, *The History of Judicial Precedent IV*, *supra* note 134, at 235.

<sup>151</sup> See JOHN HOSTETTLER, *SIR EDWARD COKE: A FORCE FOR FREEDOM*, 63, 66-69 (Barry Rose Law Publishers Ltd. 1997).

<sup>152</sup> *Id.* at 70, 73-75. Coke later conceded in his *Institutes* that statutes could not be struck down by reference to the common law. See *id.* at 75.

<sup>153</sup> See *id.* at 69.

claimed that judges were merely agents of the King and that what could be done by an agent could be done by the principal.<sup>154</sup> When Coke responded that the King had no right to hear cases, James argued that "the Law was founded upon Reason, and that he and others had Reason as well as the Judges."<sup>155</sup> Coke replied that what was needed to decide cases was not natural reason, which anyone could possess, but an "artificial Reason and Judgment of Law, which requires long Study and Experience before that a man can attain to the cognizance of it."<sup>156</sup> That, he claimed, the King did not have.<sup>157</sup>

Coke's invocation of "artificial reason" had two implications. It asserted a special place for precedent in the decision-making process because the long study and experience he spoke of was essentially the learning of cases. It also claimed for the judiciary the sole power to determine what the law was because judges were the only officials with the requisite knowledge of prior cases. This was a bold move. Prior to this moment, the power to decide cases had been exercised not only by the judiciary, but also by the King and Parliament.<sup>158</sup> Now, by putting precedent at the center of the common law, Coke claimed for the judiciary exclusive competence to decide cases. This was precisely what Justinian had feared more than a thousand years earlier when he forbade judges to build the law by following each other's decisions.<sup>159</sup> It also illustrates that Coke's commitment to precedent did not limit judicial power, but the power of the King.<sup>160</sup>

Of course, if Coke and other judges had followed precedents strictly, their power would have been diminished also. However, "[w]ith the victory of the common-law courts, the judges were unwilling to restrict their freedom so far as to bind themselves absolutely to previous decisions."<sup>161</sup> Coke often distorted precedents to suit his own purposes and claimed that inconvenience alone

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<sup>154</sup> *See id.*

<sup>155</sup> CATHERINE DRINKER BOWEN, *THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE 304-05* (1957).

<sup>156</sup> *Id.* at 305.

<sup>157</sup> *See id.* His point was proved shortly afterward when the King attempted to hear a case but became so confused he was forced to give up. "I could get by well hearing one side only," he said, "but when both sides have been heard, by my soul I know not what is right." HOSTETTLER, *supra* note 151, at 71.

<sup>158</sup> *See* ALLEN, *supra* note 62, at 245; PLUCKNETT, *supra* note 71, at 86.

<sup>159</sup> *See supra* notes 67-68 and accompanying text.

<sup>160</sup> *See* JOHN GREVILLE AGARD POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* 46-51 (1987); *see also* H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1537, & n.91 (1987) (discussing the way in which the use of precedent by Coke and later judges has been viewed as expanding the power of the common law courts).

<sup>161</sup> Berman & Reid, *supra* note 65, at 450.

was reason enough to depart from past decisions.<sup>162</sup> He also believed that precedents were frequently emphasized at the expense of principles.<sup>163</sup> In the Year Book period, he wrote, lawyers cited general principles without reference to particular cases.<sup>164</sup> In his day, he complained, lawyers cited precedents indiscriminately. “[I]n so long arguments with such a farrago of authorities, it cannot be but there is much refuse, which ever doth weaken or lessen the weight of the argument.”<sup>165</sup>

Judges not only feared that excessive reliance on precedent would obscure principles, but also that strict adherence to past decisions would undermine one of the common law’s most important features – its flexibility. Especially in the seventeenth century, as European nations adopted codes based on Roman civil law, English lawyers regarded the adaptability of the common law as its great strength.<sup>166</sup> In an eloquent essay, a lawyer named John Davies argued that the common law was superior to civil law because its customs grew up slowly to meet the people’s needs and became binding only after long use and acceptance:

For the *written Laws* which are made either by the Edicts of Princes, or by Councils of Estates, are imposed upon the Subject before any Trial or Probation made, whether the same be fit and agreeable to the nature and disposition of the people or whether they will breed any inconvenience or no. But a Custom doth never become a Law to bind the people, until it hath been tried and approved time out of mind, during all which time there did hereby arise no inconvenience: for if it had been found inconvenient at any time, it had been used no longer, but had been interrupted, and consequently it had lost the virtue of a Law.<sup>167</sup>

Davies’ argument provided a strong reason for following customs that

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<sup>162</sup> See *id.* at 446-47; Holdsworth, *supra* note 70, at 185 (“Coke is never tired of insisting that the fact that a rule would lead to inconvenient results – inconvenient either technically or substantially – is a good argument to prove that the rule is not law.”).

<sup>163</sup> See ALLEN, *supra* note 62, at 207-08.

<sup>164</sup> See *id.*

<sup>165</sup> *Id.*

<sup>166</sup> See Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 186-87 (1998).

<sup>167</sup> POCOCK, *supra* note 160, at 33. Matthew Hale similarly praised the adaptability of the common law, writing that “‘long experience and use,’ had successfully ‘wrought out’ the ‘errors, distempers or iniquities of men or times.’” DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED* 44 (1989) (quoting MATHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 30 (Charles M. Gray ed., Univ. of Chi. Press 1971)).

withstood the test of time: their very survival attested to their suitability for the English people. But this argument necessarily implied that until a custom became fixed by long usage, judges were not bound to follow it. To the contrary, they were obligated to test the usefulness of unfixd customs and to discard those that were unjust or inconvenient.<sup>168</sup> This is why, in Davies' opinion, the common law was superior to civil law. A rule announced in the civil law became fixed at once. In the common law, however, a rule only became fixed after its wisdom was proved by long experience.<sup>169</sup>

Coke expressed a similar view. In a famous passage from Calvin's Case, he declared that the law had been "fined and refined" by "long and continual experience" and "the trial of light and truth," and that as a result "no man ought to take it on himself to be wiser than the laws."<sup>170</sup> Although this statement urged adherence to fixed customs, it also suggested that the law was constantly changing to meet the needs of the people.<sup>171</sup> Indeed, Coke believed that judges should constantly refine the law, "declaring its principles with even greater precision and renewing it by application to the matter at hand."<sup>172</sup> He also believed that each decision should be "based on the experience of those before and tested by the experience of those after."<sup>173</sup> Under his view, therefore, attention to precedent was vital because it facilitated the continual accretion of knowledge. But a rigid approach to precedent would halt this process and fix the law in place, with no hope of further improvement.

### C. *Blackstonian Conservatism v. Mansfield's Reformism*

Coke died in 1633, and for the next century and a half, "the whole theory and practice of precedent was in a highly fluctuating condition."<sup>174</sup> On the one hand, judges paid greater attention to past decisions than before and often expressed an obligation to follow decisions they disliked. In a 1706 case, Justice

<sup>168</sup> See POCOCK, *supra* note 160, at 34 (explaining Davies's view that law enacted by a prince or parliament would grow obsolete, while the common law would adapt because it was constantly put to the test by judges).

<sup>169</sup> See *id.* at 34. When the doctrine of precedent hardened in the nineteenth century, it was the common law that came to be seen as rigid and the civil law that appeared flexible. See Holdsworth, *supra* note 70, at 192-93.

<sup>170</sup> POCOCK, *supra* note 160, at 35 (quoting SIR EDWARD COKE, SEVENTH REPORTS, CALVIN'S CASE (Thomas & Fraser (London 1826), vol. iv, page 6.)).

<sup>171</sup> See POCOCK, *supra* note 160, at 36.

<sup>172</sup> *Id.* at 35.

<sup>173</sup> *Id.*

<sup>174</sup> ALLEN, *supra* note 62, at 209; see also Lewis, *The History of Judicial Precedent IV*, *supra* note 134, at 247 (stating that "there were conflicting notions as to the authority of judicial decisions" during the seventeenth and eighteenth centuries and that "this conflict was not finally settled until late in the nineteenth century").

Powell explained that as long as precedent pointed in one direction, "he had to judge so, but had it been out of the way, he might have been of another opinion."<sup>175</sup> Reporters also placed greater emphasis on precedents, and some began to produce reports expressly for the purpose of being cited.<sup>176</sup> On the other hand, many judges continued to assert the right to disregard precedents they thought incorrect. In the 1673 case of *Bole v. Horton*, Chief Justice Vaughan stated that "if a Court give judgement judicially, another Court is not bound to give like judgement, unless it think that judgement first given was according to law."<sup>177</sup> Any court could make a mistake, Vaughan explained, "else errors in judgement would not be admitted, nor a reversal of them."<sup>178</sup>

Therefore, if a judge conceives a judgement given in another Court to be erroneous, he being sworn to judge according to law, that is, in his conscience, ought not to give the like judgement, for that were to wrong every man having a like cause, because another was wronged before . . . .<sup>179</sup>

This mixed attitude toward precedent resulted largely from two factors. First, judges during this period still believed in natural law, which was at odds with the idea of binding precedent. As long as judges accepted the existence of universal and unchangeable principles, they could never be bound by precedents that conflicted with those principles.<sup>180</sup> Moreover, the belief in natural law raised a troubling question: if the law was separate and apart from judicial decisions, what authority could precedents ever have? The answer agreed upon was that although decided cases were not actually the law, they were good evidence of the law because they resulted from a long tradition of common law judging. Coke had subscribed to this declaratory theory of law when he wrote that "our booke cases are the best proof of what the law is."<sup>181</sup> Matthew Hale endorsed the view in 1713, stating that although cases "do not make a law properly so-called . . . yet they have a great weight and authority in expounding, declaring and pub-

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<sup>175</sup> Lewis, *The History of Judicial Precedent IV*, *supra* note 134, at 244.

<sup>176</sup> *See id.* at 240-44.

<sup>177</sup> ALLEN, *supra* note 62, at 209.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 209-10.

<sup>180</sup> *See* CROSS & HARRIS, *supra* note 40, at 30 ("If a previous decision is only evidence of what the law is, no judge could ever be absolutely bound to follow it, and it could never be effectively overruled because a subsequent judge might always treat it as having some evidential value."); Peter Wesley-Smith, *Theories of Adjudication and the Status of Stare Decisis*, in PRECEDENT IN LAW 79 (Laurence Goldstein, ed., 1987) (noting that "[t]he law, unchanging and unchangeable in essential content, is formally independent of its judicial expression").

<sup>181</sup> *See* ALLEN *supra* note 62, at 207.

lishing what the law of this kingdom is."<sup>182</sup> Blackstone also put his stamp on it in 1765: "[J]udicial decisions," he wrote, "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."<sup>183</sup>

The declaratory theory was a tidy compromise between the dictates of natural law and the growing pressure to follow precedent. Because judges regarded decisions as evidence of the law, they could justify their adherence to precedent by pointing to the weight of the authorities on a given issue. At the same time, they could evaluate past decisions as they would any other evidence.<sup>184</sup> Thus, they frequently claimed that a decision was bad evidence of the law because it was unjust, inconvenient, or absurd.<sup>185</sup> They also gave little weight to a single decision, or even two decisions, looking instead to "the current of authorities" or to a "strong and uniform . . . train of decisions."<sup>186</sup>

The second factor that contributed to the fluctuating state of precedent was the poor quality of reports for most of the seventeenth and eighteenth centuries. Because judges issued their decisions orally, the bar depended upon reporters for an accurate account of the court's judgment and reasoning.<sup>187</sup> Yet the reporters were notoriously unreliable and made numerous mistakes.<sup>188</sup> Chief Justice Holt complained in 1704 that "these scrambling reports . . . will make us to appear to posterity for a parcel of blockheads."<sup>189</sup> Reporters also omitted many cases that seemed unimportant or wrongly decided.<sup>190</sup> In their view, "a

<sup>182</sup> *Id.* at 210.

<sup>183</sup> WILLIAM BLACKSTONE, COMMENTARIES \*69.

<sup>184</sup> See Holdsworth, *supra* note 70, at 184-85; see also CROSS & HARRIS, *supra* note 40, at 35 ("The declaratory theory was beneficial in at least one respect. It provided a court with an excellent reason not to follow or apply a case of which it strongly disapproved.").

<sup>185</sup> See Holdsworth, *supra* note 70, at 185-87.

<sup>186</sup> James Ram, *The Science of Legal Judgments*, in 9 LAW LIBR. 76 (John S. Littell 1835); see also Berman & Reid, *supra* note 65, at 514; Holdsworth, *supra* note 70, at 188-89; Kempin, *supra* note 64, at 30.

<sup>187</sup> See Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1, 5-9 (1986).

<sup>188</sup> See ALLEN, *supra* note 62, at 221-28; Lewis, *The History of Judicial Precedent IV*, *supra* note 134, at 244.

<sup>189</sup> ALLEN, *supra* note 62, at 228.

<sup>190</sup> See WILLIAM DOMNARSKI, IN THE OPINION OF THE COURT 13 (1996). This practice was so pervasive that one reporter confessed to having "a drawer marked 'Bad Law' into which I threw all cases which seemed to me to be improperly ruled." *Id.* at 14. The reporters not only omitted many cases, but also supplemented their accounts of cases with their own opinions. See *id.* Because they did not distinguish their contributions from the official opinion, this extra-judicial commentary was hard to separate from the judicial pronouncement that was intended to serve as evidence of the law. See *id.* As a result, "[t]he common law of England . . . was fashioned as much by the reporters . . . as by the judges and their decisions." *Id.* at 13; See also ALLEN, *supra* note 62, at 231 (noting that "by 'editing,' some learned reporters formulated better law than

case was precedential and worth reporting only when it significantly interpreted existing law. Cases turning only on their facts or involving only slight variations of existing law were not reported.<sup>191</sup>

Judges did not object to the omission of cases; to the contrary, they worried that an excess of precedents would threaten the stability of the law, and they requested even thinner reports.<sup>192</sup> However, the inaccuracies of the reports substantially undermined the evidentiary value of many decisions. As one writer has explained, "The first and most important problem of evidence is its credibility, and the eighteenth-century judge . . . had to decide whether the witness (i.e. the reporter, or the particular report) was both competent and credible."<sup>193</sup> This explains why judges often refused to follow precedents they could not verify in a reliable report and usually looked to a line of decisions rather than to a single case.<sup>194</sup> It also explains why a theory of binding precedent could not take hold until the quality of reporting improved significantly.<sup>195</sup>

That began to occur in the mid-eighteenth century when a lawyer named James Burrows produced his first volume of reports.<sup>196</sup> Burrows' reports were the most useful and accurate yet to appear, and they encouraged an increased adherence to precedent.<sup>197</sup> Though a judge could still declare in 1760 that "erroneous points of practice . . . may be altered at pleasure when found to be absurd or inconvenient,"<sup>198</sup> most judges agreed that precedent should be followed in cases involving property or contracts, where certainty was essential. In *Morecock v. Dickins*,<sup>199</sup> a 1768 case, Lord Camden deferred to the authority of precedent, declaring that "[m]uch property has been settled, and conveyances have

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the judges whom they were reporting").

<sup>191</sup> DOMNARSKI, *supra* note 190, at 13. The practice of reporting only select English decisions continued into the twentieth century. See ARTHUR L. GOODHART, *CASE LAW IN ENGLAND AND AMERICA IN ESSAYS IN JURISPRUDENCE AND COMMON LAW* 57 (1931) (stating that "unless a case deals with a novel point of law – and novelty is strictly construed – it will rarely find its way into the Reports").

<sup>192</sup> Coke "warned the judges, when there were not more than thirty books on the common law, against reporting all cases." Alden I. Rosbrook, *The Art of Judicial Reporting* 10 CORNELL L.Q. 103 (1925). Hale also argued for fewer reports, describing the growing body of precedents as "the rolling of a snowball [that] increaseth in bulk in every age, until it become utterly unmanageable." Braun, *supra* note 14, at 91.

<sup>193</sup> ALLEN, *supra* note 62, at 230.

<sup>194</sup> See Holdsworth, *supra* note 70, at 187-88.

<sup>195</sup> See ALLEN, *supra* note 62, 219-222; Holdsworth, *supra* note 70, at 187-88; Kempin, *supra* note 64, at 31; TUBBS, *supra* note 2, at 181-82.

<sup>196</sup> See ALLEN, *supra* note 62, at 209; WINFIELD, *supra* note 73, at 190.

<sup>197</sup> See TUBBS, *supra* note 2, at 181; WINFIELD, *supra* note 73, at 190.

<sup>198</sup> *Robinson v. Bland*, 96 Eng. Rep. 141, 142 (K.B. 1760).

<sup>199</sup> 27 Eng. Rep. 440 (Ch. 1768).

proceeded upon the ground of that determination . . . and therefore I cannot take upon me to alter it."<sup>200</sup>

Yet conflicting views about the force of precedent persisted and were reflected in the two most prominent judges of the day, Blackstone and Lord Mansfield.<sup>201</sup> Blackstone, an avowed conservative, was a leading proponent of *stare decisis* in the second half of the eighteenth century.<sup>202</sup> In his *Commentaries on the Laws of England*, published in 1765, he argued that adherence to precedent not only promoted certainty and stability in the law, but also flowed from the judge's duty to find the law rather than make 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 it 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 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>203</sup>

Blackstone qualified his statement by asserting that judges were not bound by precedents that were "flatly absurd or unjust," or "evidently contrary to reason."<sup>204</sup> Such decisions, he explained, were not good evidence of the law because "[w]hat is not reason is not law."<sup>205</sup> However, he was one of the first writers to speak of the rule of precedent as one of general obligation, and he left far less room for discretion than his predecessors.<sup>206</sup>

Mansfield, by contrast, was a reformer who often strayed outside the re-

<sup>200</sup> *Id.* at 441.

<sup>201</sup> See LIEBERMAN, *supra* note 167, at 86-87 (stating that precedents were viewed "in two lights" in the eighteenth century); Lewis, *The History of Judicial Precedent IV*, *supra* note 134, at 247 (noting that in the eighteenth century, "there were conflicting notions as to the authority of judicial decisions, and this conflict was not finally settled until late in the nineteenth century").

<sup>202</sup> See LIEBERMAN, *supra* note 167, at 86; Lewis, *The History of Judicial Precedent IV*, *supra* note 134, at 246-47.

<sup>203</sup> BLACKSTONE, *supra* note 183, at \*69.

<sup>204</sup> *Id.* at \*70.

<sup>205</sup> *Id.*

<sup>206</sup> See MAX RADIN, STABILITY IN LAW 18 (Brandeis Lawyers Soc'y Publ'g., vol. 1, 1942-46).

straints of precedents.<sup>207</sup> During his thirty years as Chief Justice of the King's Bench, he rewrote large sections of the commercial law and appealed to "law's rational principles . . . even on occasion at the expense of established precedents."<sup>208</sup> "The law would be a strange science if it rested solely upon cases, and if after so large an increase of Commerce, Arts and Circumstances accruing, we must go to the time of Richard I to find a case and see what is Law," he wrote in a 1774 case.<sup>209</sup> "[P]recedent, though it be Evidence of law, is not Law itself, much less the whole of the Law."<sup>210</sup>

Mansfield "never entirely ignored precedents."<sup>211</sup> He occasionally followed rules he did not agree with because "the authorities are too strong," or "the cases cannot be got over."<sup>212</sup> But he did so because he believed the law should be stable, not because he thought he lacked the power to do otherwise. "Certainty," he wrote, "is one great object of all legal determinations."<sup>213</sup> Thus, if an established rule provided certainty, Mansfield would accept it.<sup>214</sup> If, however, the rule created confusion or if another rule would work better, Mansfield was quick to innovate.<sup>215</sup>

The conflict between "Blackstonian conservatism and Mansfield's reformism"<sup>216</sup> reached its climax in *Perrin v. Blake*. The case centered on a property rule laid down by Coke (known as the Rule in Shelley's Case) that prevented an individual from placing certain limits on his heirs unless he used a specific formula, even if his will otherwise clearly expressed his intent.<sup>217</sup> Ruling for the King's Bench, Mansfield declined to follow the rule, arguing that it defied reason to subvert the intention of a clearly written will.<sup>218</sup> He and his col-

<sup>207</sup> See ALLEN, *supra* note 62, at 211; LIEBERMAN, *supra* note 167, at 122-133.

<sup>208</sup> LIEBERMAN, *supra* note 167, at 124.

<sup>209</sup> *Jones v. Randall* (1774) Cowp. 37.

<sup>210</sup> *Id.* at 39. Mansfield expressed similar sentiments in other cases. See, e.g., *Rust v. Cooper*, (1777) Cowper 629, 632 ("The law does not consist in particular cases, but in general principles which run through cases and govern the decision of them."); *James v. Price*, (1773) Lofft 219, 221 (the law is founded "in equity, reason, and good sense").

<sup>211</sup> LIEBERMAN, *supra* note 167, at 126.

<sup>212</sup> ALLEN, *supra* note 62, at 212.

<sup>213</sup> *Id.* at 212.

<sup>214</sup> See Daniel R. Coquillette, *Legal Ideology and Incorporation IV: The Nature of Civilian Influence on Modern Anglo-American Commercial Law*, 67 B.U. L. REV. 877, 957 (1987); Evans, *supra* note 70, at 36-37.

<sup>215</sup> See ALLEN, *supra* note 62, at 216 n.1; Coquillette, *supra* note 214, at 958-62; Evans *supra* note 70, at 37.

<sup>216</sup> LIEBERMAN, *supra* note 167, at 142.

<sup>217</sup> See *id.* at 135.

<sup>218</sup> See *id.*

leagues also attacked the pedigree of the rule, describing it as a feudal anachronism that "must not be extended one jot."<sup>219</sup> On appeal to the Exchequer Chamber, however, Mansfield's decision was reversed by Blackstone. Though he acknowledged that the rule was outdated, Blackstone argued that the courts were powerless to change it.<sup>220</sup>

There is hardly an ancient rule of real property but what has in it more or less of a feudal tincture. . . . [B]ut whatever their parentage was, they are now adopted by the common law of England, incorporated into its body, and so interwoven with its policy, that no court of justice in this kingdom has either the *power* or (I trust) the *inclination* to disturb them . . . .<sup>221</sup>

The decision in *Perrin v. Blake* can be seen as a "straightforward triumph of precedents over the reforming enterprises of" Mansfield.<sup>222</sup> Though Mansfield continued to press his innovations until he left the bench in 1788, in the years following his retirement the English doctrine of precedent hardened.<sup>223</sup> 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.<sup>224</sup> 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.<sup>225</sup> 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>226</sup>

These changes, however, were still many years off in the late eighteenth century and they were made possible by two developments: the gradual replacement of the declaratory theory with a positivist view of law and the emergence of a reliable system of law reports.<sup>227</sup> Until these things occurred, "the doctrine of *stare decisis* was a *principle* of adhering to decisions, not a set of rules. It did not identify any class of case as strictly binding, irrespective of cir-

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<sup>219</sup> See *id.* at 139.

<sup>220</sup> See *id.*

<sup>221</sup> *Id.* at 139-40.

<sup>222</sup> *Id.* at 140.

<sup>223</sup> See Evans, *supra* note 70, at 35.

<sup>224</sup> See *id.* at 46-53; Ram, *supra* note 186, at 72-74.

<sup>225</sup> See Evans, *supra* note 70, at 57-63.

<sup>226</sup> See *Beamish v. Beamish*, 11 Eng. Rep. 7359 H.L. Cas. 273 (1861); See also Evans, *supra* note 70, at 55-58.

<sup>227</sup> See Kempin, *supra* note 64, at 31-33.

cumstance.<sup>228</sup> Moreover, eighteenth-century English judges were not obligated to blindly accept precedents, but could argue for reason in the law, even at the expense of certainty and predictability.<sup>229</sup> “It was left to the nineteenth century finally to establish the rule that judges are absolutely bound by decisions.”<sup>230</sup>

*D. Precedent in Colonial America: A New Land and New Values*

If the English adherence to precedent was qualified in the seventeenth and eighteenth centuries, the American commitment was even more attenuated. The defining characteristic of law in colonial America was its mutability. Struggling to survive on a strange continent, the colonists had little use for strict, formal rules applied by an exacting judiciary. They needed a legal system that could be molded to meet the challenges of a developing society.<sup>231</sup> As a result, from their earliest years they demonstrated a marked preference for adaptability over certainty, for latitude over restraint.

One of the first questions they faced was what law would govern. The colonists brought with them no set of rules and little knowledge of the common law.<sup>232</sup> They also had few of the resources – books, law schools, trained judges – needed for the development of a case law system. So instead the colonists improvised, adopting simple codes to govern their lives.<sup>233</sup> These codes covered crimes, torts, and contracts and often departed significantly from common law rules.<sup>234</sup> They also left many matters to the discretion of popularly elected magistrates or appointed judges.<sup>235</sup> In Massachusetts, magistrates were instructed to decide all cases according to the established laws of the colonies, but when the law is silent, to decide “as near the law of God as they can.”<sup>236</sup> In Maryland, judges were authorized to fill in the gaps of the law by resorting to “equity and good conscience ‘not neglecting (so far as the judge shall be informed thereof

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<sup>228</sup> Evans, *supra* note 70, at 45.

<sup>229</sup> *See id.*

<sup>230</sup> POTTER, *supra* note 85, at 279.

<sup>231</sup> *See* Paul Samuel Reinsch, *The English Common Law in the Early American Colonies*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367, 369, 411, 414 (1907).

<sup>232</sup> *See* Kempin, *supra* note 64, at 52 n.75. One exception seems to be Virginia, which was initially governed by a code that was printed in London in 1612 and enforced by the first governor, Sir Thomas Smith. *See* Reinsch, *supra* note 231, at 404. The code was exceedingly severe, however, and was later replaced by a set of laws passed by Virginia’s first legislative assembly. *See id.*

<sup>233</sup> *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 90-91 (Simon & Schuster, 1973 2nd ed.); Reinsch, *supra* note 231, at 410.

<sup>234</sup> *See* Reinsch, *supra* note 231, at 410.

<sup>235</sup> *See id.* at 369, 411.

<sup>236</sup> *Id.* at 372.

and shall find no inconvenience in the application of this province) the rules by which right and justice useth and ought to be determined in England.”<sup>237</sup>

Some colonists objected to the broad discretion of judges and argued for the adoption of “a settled rule of adjudicature from which the magistrates cannot swerve.”<sup>238</sup> But two factors stood in their way. First, most settlers believed that the law of God or of nature was supreme and that statutes and precedents were binding only if consistent with this law.<sup>239</sup> To impose strict rules on judges was therefore pointless because they were bound to follow those rules only if they reflected divine or natural law. As one Massachusetts official told his constituents, “[t]he covenant between you and us is that we shall judge you and your causes by the rules of God’s law and our own.”<sup>240</sup>

Second, colonial courts were highly informal and unrefined. Due to a strong dislike for lawyers in nearly every colony, most of the judges had little or no legal training.<sup>241</sup> In addition, court records were rare, and the few that existed provided little information, usually noting only the verdict, not the facts or reasoning.<sup>242</sup> The result was that even had judges been inclined to follow strict rules and precedents, they lacked the resources and legal skills to do so.<sup>243</sup> Instead, they had to rely on their own judgment and “the pretense that the word of God is sufficient to rule us.”<sup>244</sup>

Over time, the administration of law in the colonies evolved. The number of lawyers increased, the training of the legal profession improved, and the courts began to follow more refined methods of legal reasoning.<sup>245</sup> Lawyers also

<sup>237</sup> *Id.* at 401. In Pennsylvania, “The administration of justice was rather founded upon the ideas of the magistrate than on any rules of positive law.” *Id.* at 398. In New York, judgments were given “according to law and good conscience.” *Id.* at 393.

<sup>238</sup> *Id.* at 380.

<sup>239</sup> *See id.* at 413.

<sup>240</sup> *Id.* at 376.

<sup>241</sup> *See id.* at 370, 382, 390, 412. In Delaware, no professionally trained lawyer sat as a judge until after the revolution. *See id.* at 396. In Massachusetts, only four of the 30 justices who sat between 1701 and 1776 were lawyers. *See* PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA 28 (1997).

<sup>242</sup> *See* WILLIAM HAMILTON BRYSON, LAW REPORTING AND LEGAL RECORDS IN VIRGINIA 329; Kempin, *supra* note 64, at 34-35; Reinsch, *supra* note 231, at 382.

<sup>243</sup> *See* Reinsch, *supra* note 231, at 410.

<sup>244</sup> *Id.* at 382; *see also* OLIVER P. CHITWOOD, JUSTICE IN COLONIAL VIRGINIA 51 (De Capo Press NY 1971) (Originally published by Johns Hopkins Press 1905); GEORGE LEWIS CHUMBLEY, COLONIAL JUSTICE IN VIRGINIA: THE DEVELOPMENT OF A JUDICIAL SYSTEM, TYPICAL LAWS AND CASES OF THE PERIOD 156 (orig. published The Dietz Press, Richmond, 1938) (reprint Gaunt, Inc. 1997).

<sup>245</sup> *See* Reinsch, *supra* note 231, at 370. The colonies also began to appoint professional lawyers to the bench. *See id.* In New York, a professional English lawyer was named Chief Justice in 1700 and resolved to introduce the common law and the practices of the English courts. *See id.* at 393-94. His approach was too aggressive, however, and after complaining

begin to push for the adoption of common law rules and practices. Their hope was that as a case law system developed, the courts would gain even greater influence.<sup>246</sup> Some colonies had already taken steps to embrace the common law. Maryland, which alone among the colonies did not establish a code, had declared in 1642 that it would be governed by the common law, in so far as it was applicable to the needs of the colony.<sup>247</sup> Now, at the beginning of the eighteenth century, other colonies followed suit.<sup>248</sup> And, by the time of the revolution, most had either formally or informally adopted the common law.<sup>249</sup>

This "transfer" of English law to the colonies was not absolute, however. Lawyers supported the move because it made their technical expertise more valuable, whereas the public hoped to benefit from English liberties such as habeas corpus.<sup>250</sup> Both groups, however, agreed that not all common law rules and practices were suited for the colonies.<sup>251</sup> Therefore, as Maryland had done in 1642, most colonies reserved the right to depart from common law rules when necessary.<sup>252</sup> In South Carolina, for example, the common law was to be followed "except where it may be found inconsistent with the customs and laws of the province"<sup>253</sup> and in North Carolina, the common law governed "so far as shall be compatible with our way of living and trade."<sup>254</sup>

One result of this qualified adoption of the common law was a willingness by colonial legislatures to innovate.<sup>255</sup> Another result was that some judges,

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that some colonists were unwilling to accept English laws, his popularity diminished. *See id.* Massachusetts appointed its first professional lawyer to the post of Chief Justice in 1712 and New Hampshire did the same in 1754. *See id.* at 385, 388.

<sup>246</sup> *See id.* at 370.

<sup>247</sup> *See id.* at 400, 410. Virginia had also expressed an early allegiance to the common law, using it as the model for its statutory scheme. *See id.* at 405.

<sup>248</sup> *See id.* at 408.

<sup>249</sup> *See id.* at 371; *See also* Morton J. Horwitz, *The Emergence of an Instrumental Conception of American Law: 1780-1820*, in 5 PERSPECTIVES IN AMERICAN HISTORY 294 (1971) [cited hereinafter as Horwitz, *The Emergence of an Instrumental Conception of American Law*]. The question of whether the colonies desired to adopt the common law was, of course, only one part of the debate. The other question was whether they were entitled to the common law. Although some English scholars, most notably Blackstone, claimed the colonies had no right to the common law until the King decided otherwise, the predominant view was to the contrary. *See id.* at 294.

<sup>250</sup> *See* Reinsch, *supra* note 231, at 370, 384, 415.

<sup>251</sup> *See id.* at 414-15.

<sup>252</sup> *See* Horwitz, *The Emergence of an Instrumental Conception of American Law*, *supra* note 249, at 293; ROBERT VON MOSCHZISKER, *STARE DECISIS, RES JUDICATA AND OTHER SELECTED ESSAYS* 108 (Cyrus M. Dixon Publ'g. 1929).

<sup>253</sup> Reinsch, *supra* note 231, at 408.

<sup>254</sup> *Id.*

<sup>255</sup> *See* CRAIG EVAN KLAFTER, *REASON OVER PRECEDENTS: ORIGINS OF AMERICAN LEGAL*

left free to choose among common law principles, never acquired a devotion to precedents and analogical reasoning.<sup>256</sup> In New Hampshire, one writer observes, "no man acknowledging a regular development of the law by precedents and finding an authoritative guidance in the adjudications of the common law judges, held judicial power . . . during the entire eighteenth century."<sup>257</sup> Samuel Livermore, the colony's Chief Justice in the 1780s, "paid little attention to precedent," and when reminded once of his previous decision in a similar case declared that "[e]very tub must stand on its own bottom."<sup>258</sup> John Dudley, an associate justice in the 1790s, took an equally dim view of precedents, describing Coke and Blackstone as "books that I never read and never will."<sup>259</sup>

Other judges, although not disdaining precedent, focused on principles rather than cases. James Otis, a Massachusetts lawyer and judge, argued in a 1761 case that it is "[b]etter to observe the known Principles of Law than any one Precedent."<sup>260</sup> The Provincial Court of Maryland agreed, stating in a 1772 case that a judge should begin with general principles and apply them to the case at hand.<sup>261</sup> When the Maryland court did cite a particular case, it often did so out of respect for the author, not out of an obligation to follow precedent.<sup>262</sup> Indeed, the court seemed influenced as much by extra-judicial authority as by actual cases. In the 1772 case of *Nicholson v. Sligh*,<sup>263</sup> the court sought the opinions of distinguished lawyers in the community, and in the 1771 case of *Belt v. Belt*,<sup>264</sup> it disregarded the decision in a previous case and instead followed the teachings of Mansfield.<sup>265</sup>

There is also some evidence that judges assumed the power to issue decisions that could not be cited in the future. In a 1764 Pennsylvania case, a cler-

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THOUGHT 42 (1993). For instance, Massachusetts rejected the common law rule of primogeniture in favor of more progressive inheritance laws; Rhode Island and Pennsylvania passed laws fostering religious freedom; and Virginia offered creditors relief against fraudulent devices. *See id.*

<sup>256</sup> See Reinsch, *supra* note 231, at 370-71.

<sup>257</sup> *Id.* at 388.

<sup>258</sup> King v. Hopkins, 57 N.H. 334, \*7 (1876) (giving an account of Livermore's statement).

<sup>259</sup> *Id.* at \*9.

<sup>260</sup> John Adams, *Minutes of the Argument*, in 2 LEGAL PAPERS OF JOHN ADAMS 127 (L. Kinvin Wroth & Hiller B. Zobel, eds., 1965).

<sup>261</sup> See Kempin, *supra* note 64, at 37 (citing 1 Har. & M' Hen. 452, 453.).

<sup>262</sup> *See id.* at 38.

<sup>263</sup> 1 H. & McH. 434, \*2 (Md. 1772).

<sup>264</sup> 1 H. & McH. 409, \*16 (Md. 1771).

<sup>265</sup> See Kempin, *supra* note 64, at 37-38 ("[I]t should be noticed that Mansfield is cited, rather than his case. It appears that the case merely provides a medium for the expression of the opinion of that eminent jurist.").

gyman had been charged with performing a marriage in which the woman already had another husband.<sup>266</sup> The clergyman moved to delay the trial so that he could obtain an affidavit from a witness, but the government opposed his request. On appeal, the Supreme Court of Pennsylvania granted the delay, pointing out that the defendant's livelihood was at stake. But the court explicitly precluded citation of the case, declaring that its opinion was "not to be a Precedent."<sup>267</sup>

Some judges, of course, did stress the importance of following rules and precedents. Thomas Hutchinson, Chief Justice of Massachusetts, wrote in 1767 that "laws should be established, else Judges and Juries must go according to their Reason, that is, their Will."<sup>268</sup> Two years earlier, the Massachusetts Supreme Court declared that when a "Usage had been uninterrupted . . . the Construction of the Law [is] thereby established" and the court "therefore would make no Innovation."<sup>269</sup> At least one historian has read such statements as evidence that precedents were strictly followed by colonial judges.<sup>270</sup> Little additional proof is offered to support this conclusion, however, and it seems untenable in light of the examples above and the exceptional degree of discretion enjoyed by colonial courts. Moreover, any adherence to precedent would have been necessarily selective: few reliable reports of American cases were produced before the late eighteenth and early nineteenth centuries, and access to English reports was limited.<sup>271</sup> And although some lawyers and judges may have cited cases from memory, there is no evidence that anyone regarded these cases as binding.<sup>272</sup> As in England, the only cases that were viewed as authoritative

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<sup>266</sup> See *King v. Rapp*, 1 Dall. 11 (Pa. 1764).

<sup>267</sup> *Id.*

<sup>268</sup> Horwitz, *The Emergence of an Instrumental Conception of American Law*, *supra* note 249, at 292. According to John Adams, however, Hutchinson himself "wriggled to evade" cases that were cited as authority. See KARSTEN, *supra* note 241, at 28.

<sup>269</sup> Horwitz, *The Emergence of an Instrumental Conception of American Law*, *supra* note 249, at 292.

<sup>270</sup> See *id.* at 297; MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780-1860* 8-9 (1977). Perhaps one reason Horwitz jumps so quickly to this conclusion is that his focus is on the status of stare decisis during the years after the Revolution, not in colonial America. Horwitz concludes that during this later period judges regularly disregarded precedent, and it is only by way of contrast that he makes any claims about pre-war attitudes toward precedent. *Id.* at 30.

<sup>271</sup> See Kempin, *supra* note 64, at 34-35; KARSTEN, *supra* note 241, at 28 (noting that "[a]s late as 1783 only about 1 in every 5 of the nearly 150 volumes of published reports of the opinions of English courts were, in fact, available in America"); John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 571-78 (1993).

<sup>272</sup> See KARSTEN, *supra* note 241, at 30. In his *Anastasoff* opinion, Judge Arnold cites Karsten for the proposition that judges and lawyers of the founding era "recognized the authority of unpublished decisions even when they were established only by memory or by a lawyer's unpublished memorandum." *Anastasoff v. United States*, 223 F.3d 898, 903 (8th Cir. 2000). Karsten says only that lawyers and judges sometimes used these decisions to help decide later

were those appearing in reliable law reports.<sup>273</sup> Thus, the more supportable conclusion is that despite some fidelity to past cases, colonial courts did not feel bound by precedents and were more likely to search for principles in the law than for a decision on all fours with the case at hand.<sup>274</sup>

E. *The Post-Revolutionary Attitude Toward Precedent*

The attitude of colonial courts toward precedent may be open to dispute, but there is little disagreement about the view that prevailed after the revolution. Although the majority of states adopted the common law as a rule of decision,<sup>275</sup> in the decades following the war the courts embarked on one of the most creative periods in American judicial history, shaping the law to meet the needs of the new nation and abandoning large numbers of precedents, both English and domestic. Judges during this period adopted an instrumental view of the law. They regularly considered the economic and social consequences of legal rules and did not hesitate to alter those they saw as impractical, illogical, or unjust.<sup>276</sup> Many of their actions "would have been regarded earlier as entirely within the powers of the legislature."<sup>277</sup> Indeed, by 1820, "the process of common-law decisionmaking had taken on many of the qualities of legislation."<sup>278</sup>

Early signs of this approach appeared in two 1786 cases. In *Wilford v. Grant*,<sup>279</sup> the Superior Court of Connecticut reviewed the convictions of two minors who had failed to appear at their trial because they were legally incapable of arranging for their defense.<sup>280</sup> The court concluded that the minors should have been represented by guardians and that their convictions should thus be reversed. The minors, however, had been convicted along with four adult co-defendants who were not entitled to a new trial, and common law precedents

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cases. He does not suggest that judges felt bound by unpublished decisions that were cited from memory or from a lawyer's notes of a case. See KARSTEN, *supra* note 241, at 30. And given that English and American judges felt free to disregard decisions that did not appear in reliable law reports, it seems highly unlikely that they would have felt bound by decisions that were not reported at all.

<sup>273</sup> See FRIEDMAN, *supra* note 233, at 322 ("What was not reported was barely law.").

<sup>274</sup> See Kempin, *supra* note 64, at 36-37, 50 (stating that "it can be established that American cases, up to the year 1800, had no firm doctrine of stare decisis").

<sup>275</sup> Between 1776 and 1884, eleven of the original 13 states adopted the common law. See Horwitz, *The Emergence of an Instrumental Conception of American Law*, *supra* note 249, at 291-92. The other two states, Rhode Island and Connecticut, followed suit in 1798 and 1818, respectively. See *id.* at 292 n.18.

<sup>276</sup> See *id.* at 287-89.

<sup>277</sup> *Id.* at 288.

<sup>278</sup> *Id.*

<sup>279</sup> 1 Kirby 114 (Conn. 1786).

<sup>280</sup> See *id.* at 114-15.

prohibited a partial reversal in such cases. The question before the court, therefore, was whether to follow precedent or its own sense of justice. The court's answer was unequivocal:

The common law of England we are to pay great deference to, as being a general system of improved reason, and a source from whence our principles of jurisprudence have been mostly drawn: The rules, however, which have not been made our own by adoption, we are to examine, and so far vary from them as they may appear contrary to reason or unadapted to our local circumstances, the policy of our law, or simplicity of our practice; which for the reasons above suggested, we do in this case, and reverse the judgement as to the minors only.<sup>281</sup>

The Pennsylvania Supreme Court also articulated a liberal view of precedent in the 1786 case of *Kerlin's Lessee v. Bull*.<sup>282</sup> "A court is not bound to give a like judgment which had been given by a former court, unless they are of opinion that the first judgment was according to law," the court wrote, echoing Chief Justice Vaughan's statements from a century earlier.<sup>283</sup> "[F]or any court may err, and if a judge conceives that a judgment given by a former court is erroneous, he ought not in conscience to give the like judgment, he being sworn to judge according to law."<sup>284</sup>

Over the next several decades, courts offered numerous reasons for departing from common law precedents. Often, they asserted that a rule established in past cases was illogical, unreasonable, or inconsistent with public policy.<sup>285</sup> In *Silva v. Low*,<sup>286</sup> for instance, the New York Supreme Court departed from an English rule it considered unjust and irrational,<sup>287</sup> and in *Starr v. Starr*,<sup>288</sup> the Connecticut Supreme Court refused to follow precedent it viewed as incompatible with state law.<sup>289</sup>

The most frequent justification, however, was that common law rules

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<sup>281</sup> *Id.* at 116-17.

<sup>282</sup> 1 Dall. 175 (Pa. 1786).

<sup>283</sup> *Id.* at 178.

<sup>284</sup> *Id.* The court did follow precedent in *Kerlin's Lessee*, but primarily to maintain consistency. In addition, the court did not indicate that it thought the earlier case had been wrongly decided. *See id.* at 178-79.

<sup>285</sup> *See* KLAFTER, *supra* note 255, at 57-58, 78-93.

<sup>286</sup> 1 Johns. Cas. 184, 190 (N.Y. Sup. Ct. 1799).

<sup>287</sup> *See id.*

<sup>288</sup> 2 Root 303 (Conn. 1795).

<sup>289</sup> *See id.* at \*7-\*8.

were inapplicable to American circumstances.<sup>290</sup> In the 1791 case of *Downman v. Downman's Executors*,<sup>291</sup> the Supreme Court of Virginia Court expressed its willingness to depart from English precedents requiring certain kinds of appeals to be filed immediately upon entry of a judgment.<sup>292</sup> The court noted that in a large country like the United States, attorneys and their clients lived far apart and could not communicate quickly about litigation. As a result, it concluded, "justice seems to require a relaxation of" the common law rule.<sup>293</sup> The Supreme Court of Judicature of New York also took into account American circumstances in the 1806 case of *Jackson, ex dem. Benton v. Laughhead*.<sup>294</sup> The question was whether a mortgagor who had fallen behind on his payments was entitled to notice before being ejected. Lord Mansfield had held in a 1778 case that such a mortgagor was not entitled to notice, but the New York court ruled otherwise.<sup>295</sup> The requirement of notice, it argued, would create "no hardship on the mortgagee, while a contrary practice may be much abused, in a country where so many thousand estates are held in this way."<sup>296</sup>

The *Benton* decision reflects the particular reluctance of courts to follow English decisions handed down after 1776. Most of the state provisions adopting the common law were limited expressly to English opinions issued prior to the revolution.<sup>297</sup> That qualification alone gave courts significant discretion; if an issue had not been settled by the English courts before that time, American judges had virtually legislative power to select the applicable rule.

But the courts not only disregarded post-1776 decisions; they also frequently departed from long-standing English precedents. In *Douglas v. Satterlee*,<sup>298</sup> an 1814 New York case, the plaintiff attempted to collect on a promissory note made by a man who had since died. The administrators of the man's estate responded that they would not have sufficient funds to pay off the note after settling previously submitted claims. Under an English rule followed since 1701, the administrators' response would have been taken as an admission that

<sup>290</sup> See KLAFTER, *supra* note 255, at 78.

<sup>291</sup> 1 Va. (1 Wash.) 26 (1791).

<sup>292</sup> *See id.*

<sup>293</sup> *Id.* at \*6.

<sup>294</sup> 2 Johns. 75 (N.Y. Sup. Ct. 1806).

<sup>295</sup> *See id.* at 76.

<sup>296</sup> *Id.* at 75-76. For other examples of courts adapting common law rules to meet American circumstances, see *Jackson v. Brownson*, 7 Johns. 227, 237 (N.Y. Sup. Ct. 1810) (opinion of Spencer, J.) (dismissing English law of waste as "inapplicable to a new, unsettled country" because it inhibited the improvement of land); *Findlay v. Smith*, 20 Va. (6 Munf.) 134, 142, 148 (Va. 1818) (same); *Ross v. Poythress*, 1 Va. (1 Wash.) 120 (1792) (rejecting English rule requiring that judgments be paid in cash because of the lack of currency in the United States).

<sup>297</sup> *See* FRIEDMAN, *supra* note 233, at 110-12.

<sup>298</sup> 11 Johns. 16 (N.Y. Sup. Ct. 1814).

they *did* have sufficient funds because they had not yet paid off the other claims.<sup>299</sup> But Chief Justice Kent discarded the rule and found for the defendants. "If the conclusion was just, the rule would be applicable,"<sup>300</sup> Kent ruled. But because the administrators made clear that the estate's money was already accounted for, "it would be illogical and unjust," to interpret their response as an admission that they had sufficient funds to pay the note.<sup>301</sup> The New York court also departed from a long-standing rule in *Palmer v. Mulligan*,<sup>302</sup> an 1805 case in which a downstream mill owner sued an upstream mill owner for obstructing the flow of water. Under the common law, a downstream plaintiff could always recover damages for obstruction of the natural flow.<sup>303</sup> However, the New York court relied on a functional analysis, asking which outcome would most benefit the public. Its answer was that under the common law rule, the public "would be deprived of the benefit which always attends competition and rivalry."<sup>304</sup> Therefore, it ruled for the defendant.<sup>305</sup>

Courts also overturned a number of domestic precedents. In the 1804 case of *Duncanson v. M'Lure*,<sup>306</sup> the Pennsylvania Supreme Court was asked to rule upon the validity of a transaction between a British trader and an American citizen concerning the sale of a ship. In a decision five years earlier, the court had ruled that the transaction was valid.<sup>307</sup> But when the issue arose again in a related case, the court overruled the decision. "The charge delivered in the [earlier] case . . . was erroneous and untenable," the court said, because the transaction conflicted with the laws and policies of the United States.<sup>308</sup> The Supreme Court of Judicature of New York also overruled domestic precedent in *Cunningham v. Morrell*.<sup>309</sup> The case involved a construction contract that provided

<sup>299</sup> See *id.*

<sup>300</sup> *Id.*

<sup>301</sup> See *id.* at 20.

<sup>302</sup> 3 Cai. R. 307 (N.Y. Sup. Ct. 1805).

<sup>303</sup> See Horwitz, *The Emergence of an Instrumental Conception of American Law*, *supra* note 249, at 289.

<sup>304</sup> *Palmer*, 3 Cai. R. at 314.

<sup>305</sup> See *id.* Other cases in which courts disregarded English decisions issued before 1776 include *Naylor v. Fosdick*, 4 Day 146 (Conn. 1810) (overruling early eighteenth century English precedents allowing a debtor to assign his estate to a trustee without the consent of all his creditors); *Chappel v. Brewster*, 1 Kirby 175 (Conn. 1786); *Wilford v. Grant*, 1 Kirby 114 (Conn. 1786) (ignoring established common law rule against partial reversals); *Downman v. Downman's Executors*, 1 Va. (1 Wash.) 26 (1791) (setting aside pleading requirement followed in England since 1705).

<sup>306</sup> 4 Dall. 308 (Pa. 1804).

<sup>307</sup> See *Murgatoyd v. Crawford*, 3 Dall. 491 (Pa. 1799).

<sup>308</sup> See *Duncanson*, 4. Dall. at \*16.

<sup>309</sup> 10 Johns. 203 (N.Y. Sup. Ct. 1813).

for the builder to be paid in installments as work progressed. After completing part of the work and receiving one installment, the builder demanded the entire payment. Two prior New York cases held that the builder in such a situation could receive full payment even though the work was incomplete.<sup>310</sup> Chief Justice Kent, however, thought that outcome would subvert the understanding of the parties.<sup>311</sup> Instead of following precedent, he invoked "the good sense and justice of the case" to rule that the builder could not receive full payment until the project was finished.<sup>312</sup>

Kent's approach in *Cunningham* was typical of his attitude toward precedent. Although he believed, like Blackstone, that decided cases were "the highest evidence" of the law, he did not speak of the obligation to follow precedent as a question of judicial power.<sup>313</sup> Instead, he considered *stare decisis* to be a functional doctrine, writing that it would "be extremely inconvenient to the public if precedents were not duly followed . . . . If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property."<sup>314</sup>

Kent also believed that not every case should be included in the law reports that served as the source of precedents. "The evils resulting from an indigestible heap of laws and legal authorities are great and manifest," he wrote, echoing a common concern of the day.<sup>315</sup> "They destroy the certainty of the law, and promote litigation, delay, and subtilty . . . . The spirit of the present age, and the cause of truth and justice, require more simplicity in the system and that the text authorities should be reduced within manageable limits."<sup>316</sup>

Finally, Kent made clear that judges were not bound by a previous decision if it could "be shown that the law was misunderstood or misapplied."<sup>317</sup> And to dispel any doubt that judges were bound by erroneous precedents, he

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<sup>310</sup> See *id.* at 204.

<sup>311</sup> See *id.* at 205.

<sup>312</sup> See *id.* at 205-06. For other cases in which state courts overruled domestic precedents, see *Bevan v. Taylor*, 7 Serg. & Rawle 397 (Pa. 1821) (overruling *Walker v. Smith*, 3 Yeates 480 (Pa. 1803)); *Girard v. Taggart*, 5 Serg. & Rawle 19 (Pa. 1818) (overruling *Willing v. Rowland*, 4 Dall. 106 (Pa. 1791)); *Conner v. Shepherd*, 15 Mass. 164 (1818) (overruling *Nash v. Boltwood* (Mass. 1783)); *Coffin v. Coffin*, 2 Mass. 358, 366 (1807) (overruling *Holbrook v. Pratt*, 1 Mass. 96 (1805)); *Fitch v. Brainerd*, 2 Day 163 (Conn. 1805) (overruling *Kellogg v. Adams* (1788)).

<sup>313</sup> JAMES KENT, I COMMENTARIES ON AMERICAN LAW 474 (14th ed., John M. Gould, ed. 1896) (1826).

<sup>314</sup> *Id.* at 475.

<sup>315</sup> *Id.*; see also DOMNARSKI, *supra* note 190, at 11 (noting that Daniel Webster thought reporters should "omit those cases that turned merely on evidence, while others suggested that cases should be omitted if they covered the same ground as already published cases").

<sup>316</sup> KENT, *supra* note 313, at 475.

<sup>317</sup> *Id.* at 474.

offered the following extensive qualification:

I wish not to be understood to press too strongly the doctrine of stare decisis when I recollect that there are more than one thousand cases to be pointed out in the English and American books of reports, which have been overruled, doubted, or limited in their application. It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and *such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error.* Even a series of decisions are not always conclusive evidence of what is law; and *the revision of a decision very often resolves itself into a mere question of expediency,* depending upon the consideration of the importance of certainty in the rule, and the extent of the property to be affected by a change in it.<sup>318</sup>

Other influential judges expressed similar views. James Wilson, the preeminent legal scholar of his day and the second most influential member at the Constitutional Convention, wrote that precedents were strong evidence of the common law because they were decided by wise judges whose opinions should be respected.<sup>319</sup> Like Kent, however, Wilson did not suggest that following prior decisions was a function of judicial power. Instead, he wrote that “every prudent and cautious judge will appreciate them.”<sup>320</sup> In addition, he warned that because the authority of the law rests on common consent, not on decided cases, judges should not follow precedents automatically.<sup>321</sup> English precedents, especially, “must be rejected or adopted very cautiously,” he wrote. “[W]e must have in this country an American common law drawing its doctrines from American wants and needs.”<sup>322</sup>

Even the conservative judge Nathaniel Chipman agreed that past cases should be discarded if inapplicable to present circumstances. Many precedents, he wrote in 1792, “were made at a time, when the state of society, and of property were very different, from what they are at present.”<sup>323</sup> Therefore, judges

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<sup>318</sup> *Id.* at 477 (emphasis added).

<sup>319</sup> See JAMES WILSON, *THE WORKS OF JAMES WILSON* 2, 37, 501-02 (Harvard Univ. Press 1967) (Robert Green McCloskey ed.) (1804).

<sup>320</sup> *Id.* at 501-02 (emphasis added).

<sup>321</sup> *See id.*

<sup>322</sup> *Id.* at 40.

<sup>323</sup> Nathaniel Chipman, *A Dissertation on the Act Adopting the Common and Statute Laws of England*, in N. CHIP. 124-26 (1793).

should not "entertain[] a blind veneration for ancient rules, maxims, and precedents" but should "distinguish between those, which are founded on the principles of human nature in society, which are permanent and universal, and those which are dictated by the circumstances, policy, manners, morals, and religion of the age."<sup>324</sup>

The post-colonial attitude toward precedent can be seen most clearly through the eyes of state judges like Kent and Chipman because state courts were the main forum for litigating common law issues. The U.S. Supreme Court primarily heard cases involving federal statutes and the Constitution.<sup>325</sup> Even so, several factors suggest that the early Supreme Court was equally ambivalent about the authority of decided cases.

First, when the court was established in 1789, it made no provision for the reporting of its opinions, most of which were issued orally.<sup>326</sup> Not until a Philadelphia lawyer named Dallas took on the task upon his own initiative in 1791 was there a system in place for circulating the opinions of the nation's highest court.<sup>327</sup> Even then, the opinions were not readily available. Dallas occasionally took five or six years to finish a term's decisions.<sup>328</sup> He also made numerous errors and omitted many cases he did not think important.<sup>329</sup> Dallas finally quit in 1800 when the Court moved to Washington, but his successor, a Boston lawyer named William Cranch, was not much better.<sup>330</sup> It was only in the 1830's, when the Court began to file written opinions, that the reports improved.<sup>331</sup> Thus, for the first few decades of the Supreme Court's history, the substance of its decisions was unknown to large segments of the bar.<sup>332</sup> Although not proof of the justices' attitude toward precedent, the lack of reliable reporters at least demonstrates that adherence to decided cases would have been difficult in the Court's early years.<sup>333</sup>

Second, until 1800, when Marshall was appointed Chief Justice, the Court issued its decisions seriatim, meaning that each justice gave his own opin-

<sup>324</sup> *Id.* at 129, 137-38.

<sup>325</sup> See David Currie, *The Constitution in the Supreme Court, 1789-1801*, 48 U. CHI. L. REV. 819 (1981).

<sup>326</sup> See DOMNARSKI, *supra* note 190, at 7.

<sup>327</sup> See *id.* at 6-7; Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1294-95 (1985).

<sup>328</sup> See DOMNARSKI, *supra* note 190, at 7; Joyce, *supra* note 327, at 1301.

<sup>329</sup> See DOMNARSKI, *supra* note 190, at 7; Joyce, *supra* note 327, at 1303-05.

<sup>330</sup> See DOMNARSKI, *supra* note 190, at 7.

<sup>331</sup> See *id.* at 8-9.

<sup>332</sup> See *id.* at 9.

<sup>333</sup> See Caminker, *supra* note 53, at 833 n.69.

ion.<sup>334</sup> This made it difficult for lawyers to rely on even those precedents they were familiar with, because although the decision was usually clear, the underlying reasons varied depending upon which opinion one read.<sup>335</sup>

Third, the content of the Court's opinions showed little concern for precedent. Many early justices wrote page after page without citing authority.<sup>336</sup> For them, the "law had to be chiseled out of basic principle; the traditions of the past were merely evidence of principle and rebuttable."<sup>337</sup> Marshall, in particular, wasted little ink citing cases even when they supported his conclusion, relying instead on the force of his own arguments.<sup>338</sup> As one scholar has observed, Marshall had a "marked disdain for reliance on precedent"<sup>339</sup> so that "precedent, while not wholly foreign to [his] opinions, was seldom prominent there."<sup>340</sup>

The Court did rely on past decisions in some cases. In *Ex Parte Bollman*,<sup>341</sup> the Court faced the question of whether it had jurisdiction to issue a writ of habeas corpus. Although the Court had issued habeas writs in two previous cases, the jurisdictional question had never been raised. Nonetheless, Marshall relied in part on the earlier cases to conclude that "the question is long since

<sup>334</sup> See FRIEDMAN, *supra* note 233, at 134.

<sup>335</sup> See Caminker, *supra* note 53, at 833 n.64.

<sup>336</sup> See FRIEDMAN, *supra* note 233, at 135.

<sup>337</sup> *Id.* at 119; See also David E. Engdahl, *What's In a Name? The Constitutionality of Multiple "Supreme" Courts*, 66 IND. L.J. 457, 502 n.225 (1991) (stating that "[i]n its earliest years, the Supreme Court cited its own prior holdings not as precedents in the common law sense, but to spare the trouble of reiterating sound analyses to which the Justices still subscribed. It was a kind of shorthand, not an ascription of authoritativeness.").

<sup>338</sup> See Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 667 (1999). The lack of reliable law reports and the fact that the court often addressed issues of first impression may explain Marshall's inattention to precedent in some cases. In others cases, however, he apparently was well aware that precedents supported his opinion, yet did not rely on them for his conclusion. See *id.*

<sup>339</sup> David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646, 661, 674, 701 (1982). Marshall's lack of regard for precedent was apparent even during his years as a practicing attorney. In *Ross v. Poythress*, 1 Va. (1 Wash.) 155 (1792), for example, he argued successfully that the English rule requiring judgments to be paid in cash should be abandoned because of the lack of currency in the United States.

<sup>340</sup> Currie, *supra* note 339, at 680. On the other hand, the Marshall Court only overruled three opinions during its thirty-five-year span, the lowest number of any Supreme Court since. See DAVID M. O'BRIEN, 1 CONSTITUTIONAL LAW & POLITICS 118 (W.W. Norton & Co. 1997). This statistic, however, is misleading. The Marshall Court frequently addressed questions of first impression, while later courts have been faced with "an ever-expanding target of 'settled decisions.'" Lee, *supra* note 338, at 649. In addition, the Marshall court was dominated by one justice – Marshall. See *id.* He wrote the majority of opinions and encountered little dissent from associate justices. It is not surprising, therefore, that his Court did not overrule many of its opinions. See *id.*

<sup>341</sup> 8 U.S. (4 Cranch) 75 (1807).

decided."<sup>342</sup> In *Ogden v. Saunders*,<sup>343</sup> an 1827 case dealing with the constitutionality of state bankruptcy laws, Justice Washington even followed a precedent he disagreed with:

To the decision of this Court, made in the case of *Sturges v. Crowninshield*, and to the reasoning of the learned Judge who delivered that opinion, I entirely submit; although I did not then, nor can I now bring my mind to concur in that part of it which admits the constitutional power of the State legislatures to pass bankrupt laws.<sup>344</sup>

Other important writers also emphasized the importance of following precedent. William Cranch, the second reporter of the Court's opinions, wrote in the preface to his reports that adherence to precedent was necessary to limit the discretion of judges.<sup>345</sup> "Every case decided," he wrote, "is a check upon the judge. He can not decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public."<sup>346</sup> Alexander Hamilton wrote in *Federalist No. 78* that in order "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents."<sup>347</sup> James Madison also wrote about the role of precedent on two occasions. In a 1789 letter to Samuel Johnson, he explained that "the exposition of the Constitution is frequently a copious source, and must continue so until its meaning on all great points shall have been settled by precedents."<sup>348</sup> Forty-two years later, he wrote to another friend that "judicial precedents, when formed on due discussion and consideration, and deliberately sanctioned by reviews and repetitions, [are] regarded as of binding influence, or rather, of authoritative force in settling the meaning of a law."<sup>349</sup>

These statements, however, do not outweigh the evidence presented above. Indeed, the second letter from Madison supports the proposition that the

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<sup>342</sup> See *id.* at 100. Marshall also relied on precedent in *Hampton v. McConnell*, 16 U.S. (3 Wheat.) 234 (1818) (writing that the case was covered by a doctrine announced in an earlier decision).

<sup>343</sup> 25 U.S. (12 Wheat.) 213 (1827).

<sup>344</sup> *Id.* at 263-64.

<sup>345</sup> See William Cranch, *Preface of 5 U.S.* (1 Cranch) iii-iv (1804).

<sup>346</sup> *Id.*

<sup>347</sup> THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

<sup>348</sup> Letter from James Madison to Samuel Johnson (June 21, 1789), reprinted in 12 PAPERS OF JAMES MADISON 250 (1979).

<sup>349</sup> Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), reprinted in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 391 (Marvin Meyers, ed. 1981).

founding generation had not adopted the rule of stare decisis. Madison does not claim that an individual decision is binding on subsequent judges. Instead, like English judges stretching back to Coke, he writes that only when a decision is “deliberately sanctioned by reviews and repetitions” does it have “binding influence.”<sup>350</sup> Although left unstated, the implication is that until a decision has been reviewed and repeated, judges are free to evaluate its merits.

This same idea was expressed in even stronger terms by Justice Johnson in the 1807 case of *Ex Parte Bollman*. Dissenting from Justice Marshall’s majority opinion, Justice Johnson argued that incorrectly decided cases could never bind the Court:

Uniformity in decisions is often as important as their abstract justice. But I deny that a court is precluded from the right or exempted from the necessity of examining into the correctness or consistency of its own decisions, or those of any other tribunal. . . . Strange indeed would be the doctrine, that an inadvertency once committed by a court shall ever after impose on it the necessity of persisting in its error. A case that cannot be tested by principle is not law, and in a thousand instances have such cases been declared so by courts of justice.<sup>351</sup>

The American commitment to stare decisis gradually strengthened during the nineteenth century, due mainly to the emergence of reliable law reports and a positivist conception of law.<sup>352</sup> In 1833, Justice Story maintained that adherence to precedent was a central feature of American jurisprudence.<sup>353</sup> “A more alarming doctrine could not be promulgated by any American court,” he wrote, “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>354</sup> State courts also began to recognize the binding effect of precedent.<sup>355</sup> “By 1851 . . . Maryland was prepared to accept a prior decision even though it was distasteful,” and “[b]y 1853 . . . Pennsylvania was in the camp of the ardent

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<sup>350</sup> *Id.*

<sup>351</sup> *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 103-04 (Johnson J., dissenting).

<sup>352</sup> See Kempin, *supra* note 64, at 31-36.

<sup>353</sup> JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 377, at 349-50 (Rothman & Co. 1991). Story, of course, greatly increased the power of the federal courts by expanding their admiralty jurisdiction and by ruling in *Swift v. Tyson* that diversity cases would be governed by federal common law. See GRANT GILMORE, THE AGES OF AMERICAN LAW 30-35 (1977). In addition, some scholars have suggested that his statement about the importance of precedent was directed toward the practice of vertical, not horizontal, stare decisis. See Lee, *supra* note 338, at 664 n.84.

<sup>354</sup> STORY, *supra* note 353, § 377 at 349.

<sup>355</sup> See Kempin, *supra* note 64, at 36-51.

followers of *stare decisis*.<sup>356</sup> American courts never adopted the nineteenth century English rule that precedents are absolutely binding in all circumstances. They instead reserved the right to overrule decisions that were absurd or egregiously incorrect.<sup>357</sup> However, during the "formative period of the doctrine . . . from 1800 to 1850," they accepted that prior decisions were presumptively binding and that mere disagreement alone is not sufficient to justify departure from the past.<sup>358</sup>

#### F. *The Historical Evidence Summarized*

This long and complex history demonstrates that the role of precedent has passed through many stages that are not marked by clear and definite boundaries. As a result, it is difficult to determine with precision what a given generation assumed about the authority of decided cases. Nonetheless, certain themes have emerged that cast considerable doubt on the claim that the founding generation viewed *stare decisis* as an inherent limit on judicial power.

First, the obligation to follow precedent is not an immemorial custom, nor was it likely regarded as one in the late eighteenth century. For hundreds of years, precedent played only a minor role in the decision-making process of English courts. Although judges sometimes looked to prior decisions for guidance, they did not feel bound to follow those decisions or even to explain their departure from them. It was not until the latter half of the eighteenth century that judges recognized a general obligation to follow decisions they disagreed with, and even then they were divided on the matter. As late as 1760, an English judge could state that "erroneous points of practice . . . may be altered at pleasure when found to be absurd or inconvenient,"<sup>359</sup> and Mansfield rewrote entire areas of established doctrine, asserting that the law is founded not in cases, but "in equity, reason, and good sense."<sup>360</sup> In America, many colonial courts never recognized an obligation to follow precedent. And during the decades after independence, state courts discarded English and American precedents wholesale, while the Supreme Court paid little attention to decided cases, choosing instead to reason from principle. The founding generation may not have been familiar with the entire history of precedent, but it was familiar with the work of eighteenth century courts. And it would have been difficult to assume from that evidence that *stare decisis* was an established doctrine, let alone immemorial.

Second, the practice of adhering to prior decisions did not emerge from

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<sup>356</sup> *Id.* at 39, 41.

<sup>357</sup> FRIEDMAN, *supra* note 233, at 21; Kempin, *supra* note 64, at 41.

<sup>358</sup> Kempin, *supra* note 64, at 50-52.

<sup>359</sup> *Robinson v. Bland*, 96 Eng. Rep. 141, 144 (K.B. 1760).

<sup>360</sup> LIEBERMAN, *supra* note 167, at 86, 122-32; *see also supra* notes 207-10 and accompanying text.

explicit theories about the nature of judicial power. Judges began to follow precedent for the sake of convenience and stability, not because they felt powerless to do otherwise. Even in the late eighteenth century, adherence to precedent was justified chiefly in instrumental terms. Although Blackstone argued that the obligation to follow precedent flowed from the judge's duty to find law rather than make it, judges such as Mansfield, Camden, and Kent viewed the practice primarily as a way to promote certainty, and Wilson spoke of it in terms of prudence and caution.<sup>361</sup> Therefore, even if the founding generation assumed that courts would adhere to precedent, it did not necessarily regard that adherence as a question of judicial power. Like many judges of the time, the founding generation could have assumed that courts were empowered to ignore precedent, but that they chose not to for instrumental reasons. Indeed, given the frequent departure from precedent in late eighteenth-century America, this is the more plausible conclusion.

Third, the history of stare decisis "is intimately bound up with the history of law reporting."<sup>362</sup> Until judges had a reliable record of prior cases, they were not willing to bind themselves to decisions with which they disagreed. Mansfield, for one, often "blam[ed] the reporter" when he did not like an inconvenient decision.<sup>363</sup> English reports significantly improved in the mid-eighteenth century, and consequently judges displayed increased adherence to precedent. But thorough and accurate law reports were virtually nonexistent in colonial America. Not until the very end of the eighteenth century and the beginning of the nineteenth century did reliable reports begin to appear, and then only in the older states.<sup>364</sup> This explains why the American commitment to precedent strengthened in the first half of the nineteenth century, and it suggests that stare decisis was not an established doctrine in this country by 1789.<sup>365</sup>

Of course, this conclusion is not indisputable. There is some evidence that American lawyers prior to and shortly after the framing of the Constitution recognized an obligation to follow precedents they disagreed with. William Cranch believed that courts could not depart from past cases without "strong reasons"<sup>366</sup> and Alexander Hamilton thought it was "indispensable that they should be bound down by strict rules and precedents."<sup>367</sup> In addition, although post-revolutionary courts showed little deference to precedents, many of the

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<sup>361</sup> See *supra* notes 199-200, 211-215, 313-14, 319-20 and accompanying text.

<sup>362</sup> Lewis, *The History of Judicial Precedent I*, *supra* note 73, at 207; see also TUBBS, *supra* note 2, at 180.

<sup>363</sup> ALLEN, *supra* note 62, at 222.

<sup>364</sup> See Kempin, *supra* note 64, at 34-35, 34 n.21.

<sup>365</sup> See *id.* at 50 (stating that "it can be established that American cases, up to the year 1800, had no firm doctrine of stare decisis").

<sup>366</sup> See *supra* note 346 and accompanying text.

<sup>367</sup> See *supra* note 347 and accompanying text.

cases they refused to follow were handed down by English courts after the Declaration of Independence. Many others were older English decisions that were inapplicable to American circumstances. One could argue that these two categories of cases were no more entitled to deference than the decisions of French or Italian courts and that American departure from them is therefore beside the point.<sup>368</sup> As long as American courts did not readily overrule domestic precedents, it might be possible to reconcile their approach to precedent with modern views of *stare decisis*.

However, American courts did freely overrule domestic precedents<sup>369</sup> and the leading judges of the day fully encouraged this practice. As late as 1826, Kent wrote that "hasty and crude decisions" should "be examined without fear, and revised without reluctance," rather than have the "beauty and harmony of the system destroyed by the perpetuity of *error*."<sup>370</sup> He also acknowledged that the "revision of a decision very often resolves itself into a mere question of expediency."<sup>371</sup> These are not the statements of a judge who considered courts bound by decisions with which they disagreed. And taken together with similar statements by other judges and the Supreme Court's lack of attention to precedent, they make it difficult to conclude that the founding generation had adopted the principle of *stare decisis*.

Even if it had, however, the historical evidence strongly indicates that courts were not expected to give precedential effect to every decision they issued. Under the declaratory theory, which was embraced throughout the eighteenth century, courts paid little attention to individual cases and looked instead to the "current of authorities" or a "strong and uniform train of decisions."<sup>372</sup> As a result, a single decision had little importance and could only exert precedential force when combined with other similar decisions. This differs substantially from modern practice, in which even one decision is viewed as authoritative, and it suggests that the founding generation would not have been troubled by the omission of individual decisions from the body of case law.

In fact, many decisions were omitted during the eighteenth century. Reporters had complete control over which decisions to report and often discarded those they disagreed with or thought unimportant. And because judges only recognized an obligation to follow decisions that appeared in reliable reports, omitted cases were essentially lost forever. Judges did not object to this situation, however, as one would expect if they viewed themselves bound by every deci-

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<sup>368</sup> It is harder to make this case for pre-revolutionary English decisions than for later cases, because most colonies expressly adopted the common law as it existed prior to 1776. However, as pointed out above, most colonies left room for the courts to depart from common law rules when local conditions made it necessary. See *supra* notes 252-54 and accompanying text.

<sup>369</sup> See *supra* notes 306-12 and accompanying text.

<sup>370</sup> KENT, *supra* note 313, at 477 (emphasis added).

<sup>371</sup> *Id.*

<sup>372</sup> See *supra* note 186 and accompanying text.

sion they issued. Instead, they encouraged reporters to ignore decisions that turned only on the facts or involved only slight variations of existing law.<sup>373</sup> Coke “warned the judges, when there were not more than thirty books on the common law, against reporting all cases”<sup>374</sup> and Kent believed that “an indigestible heap of laws and legal authorities” would “destroy the certainty of the law, and promote litigation, delay, and subtilty.”<sup>375</sup> Given this evidence, it seems doubtful that the practice of issuing non-precedential opinions conflicts with the background assumptions of the founding generation. In 1789, such decisions were already an accepted fact.

There is one final point I should make. One defender of *Anastasoff* argues that although critics might “quibble” with the historical record presented by Judge Arnold, his claim fares well under a preponderance of the evidence standard.<sup>376</sup> I hope I have shown that one might do more than quibble with Judge Arnold’s historical record and that his claim does not survive even a preponderance of the evidence test. I would also argue that judges and scholars should be required to meet a higher burden than this when making novel assertions about the content of constitutional terms on the basis of original understanding. Especially when an established and valuable practice is being questioned, we should demand greater certainty that the proposed interpretation reflects the meaning of the Constitution as the founding generation understood it.

## II. STARE DECISIS AS A STRUCTURAL CHECK

The historical evidence examined in Part I significantly undermines the claim that stare decisis is constitutionally required and that the practice of issuing non-precedential decisions violates that requirement. But even if stare decisis is not dictated by the founding generation’s assumptions about the nature of judicial power, one might argue that the Framers nonetheless intended for the courts to be bound by precedent as part of the separation of powers and checks and balances implicit in the Constitution’s structure. Though the Framers generally modeled the courts after the common law, they were not opposed to innovation.<sup>377</sup> The complete segregation of the courts from the legislature was itself a departure from an English tradition in which the House of Lords both wrote the laws and served as the supreme appellate court.<sup>378</sup> The Framers also declined to

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<sup>373</sup> See *supra* notes 192, 315-16 and accompanying text.

<sup>374</sup> Rosbrook, *supra* note 192, at 131.

<sup>375</sup> KENT, *supra* note 313, at 475.

<sup>376</sup> See Price, *supra* note 43, at 92-93.

<sup>377</sup> See Robert J. Pushaw, Jr., *Article III’s Case / Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 467 (1994) (noting that “the Framers broke with English legal principles in significant ways.”).

<sup>378</sup> See SOTIRIOS A. BARBER, *THE CONSTITUTION OF JUDICIAL POWER* 50 (1993).

follow the English division between law and equity, choosing instead to extend the jurisdiction of federal courts to both areas.<sup>379</sup> It is possible, then, that regardless of how precedent was viewed by English and colonial courts, the Framers might have intended for the courts of the United States to follow a different practice. In fact, one might argue that it was precisely because of other deviations from the common law that strict adherence to precedent would have been regarded as necessary. Federal courts were given far greater power and independence than English courts. Not only do they have the power of judicial review, but their decisions cannot be reversed by the legislature.<sup>380</sup> In light of these enlargements of the judicial power, it is certainly reasonable to ask whether the Framers contemplated a new mechanism to check that power.

One response to the question is that if the Framers did intend for the doctrine of precedent to limit judicial power, that intention was not reflected in the work of the early Supreme Court. As demonstrated above, the Supreme Court paid little attention to the force of precedent in its first several decades. The Court made no arrangement for its decisions to be reported, an undertaking that was essential to the practice of *stare decisis*, especially in an era when opinions were issued orally and *seriatim*; without reports, even the justices would have had trouble keeping track of past decisions and the reasoning behind them.<sup>381</sup> When a lawyer did begin reporting the Court's decisions upon his own initiative, the Court showed little concern for the way in which his inaccuracies and omissions undermined the usefulness of his reports.<sup>382</sup> Finally, even when they were aware of prior cases, the justices spent little time discussing them. Marshall put more stock in his own arguments than in past cases, and he and other justices often displayed an indifferent attitude toward precedent.<sup>383</sup>

This pattern of conduct is strong evidence that the Framers did not intend for *stare decisis* to operate as a check on judicial power. Five of the first ten justices appointed to the Court had attended the Constitutional Convention and one of them, James Wilson, played a major role in writing Article III.<sup>384</sup> Most other early justices had participated in the ratification debates, either writing

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<sup>379</sup> See U.S. CONST. art. III, § 2, cl. 1 (stating that "[t]he judicial Power shall extend to all Cases, in Law and Equity").

<sup>380</sup> See *Dickerson v. United States*, 530 U.S. 428, 443-44 (2000); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>381</sup> See Caminker, *supra* note 53, at 833 n.69.

<sup>382</sup> See Joyce, *supra* note 327, at 1298 (noting that the Court provided little assistance to early reporters, declining to reduce even its most important opinions to writing).

<sup>383</sup> See Currie, *supra* note 339, at 656, 661, 680, 694, 701; Lee, *supra* note 338, at 669-671.

<sup>384</sup> Apart from Wilson, the justices who had attended the Convention were John Blair Jr., John Rutledge, William Patterson, and Oliver Ellsworth. See *THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 25, 155, 347, 389, 535 (Melvin I. Urofsky, ed., Garland Publ'g, Inc., 1994).

essays or attending the ratifying conventions of their respective states.<sup>385</sup> If the doctrine of precedent was intended to function as a constitutional check, these justices would have known. Yet their early attitude toward decided cases does not reveal any awareness of a constitutional obligation to follow precedent.

Of course, relying on the attitude of the early Supreme Court to determine the Framers' intent is potentially hazardous. The Court had (and still has) a deep self-interest in the extent of its power and likely would have been reluctant to explain how that power was limited. In addition, despite its early inattention to precedent, by the mid-nineteenth century the Court had adopted a more rigorous approach to decided cases that is arguably consistent with the claim that stare decisis is constitutionally required.<sup>386</sup> It is unclear why the later Supreme Court would have been more attuned to the Framers' intentions or more willing to assert the limits of its own power. But the danger of relying exclusively on early Supreme Court practice is sufficient to justify a more thorough response to the claim that the Framers intended stare decisis to serve as a check on judicial power.

In this Part, I offer three additional arguments to rebut this claim. First, the Framers expressed few concerns about the potential abuse of judicial power. They viewed the judiciary as the least dangerous branch of government and felt little need to impose extensive checks on its power. To the contrary, they worried that the courts would be overwhelmed by the other branches. Second, the Framers addressed whatever concerns they had about the potential abuse of judicial power by instituting several checks apart from stare decisis, most notably congressional control over jurisdiction. The Framers thought these checks were sufficient to restrain the judiciary, especially in light of its limited power. Finally, stare decisis is not the sort of mechanism the Framers relied on to prevent overreaching. Because the Framers did not trust government officials to control their own appetite for power, they utilized *inter-branch* checks that pitted the ambition of each branch against the ambitions of the others. Stare decisis is an *intra-branch* check that depends upon the self-restraint of the very branch it is meant to constrain. It was precisely such self-policing that the Framers rejected as inadequate to prevent abuses of power.

#### A. *The Least Dangerous Branch*

One of the glaring defects of the Articles of Confederation was its lack of a national judiciary.<sup>387</sup> The Articles authorized Congress to appoint tribunals with limited jurisdiction over admiralty cases and interstate disputes, but these

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<sup>385</sup> John Jay, the first Chief Justice, wrote five of the Federalist Papers, while William Cushing and James Iredell attended their states' ratifying conventions. *See id.*

<sup>386</sup> *See supra* note 353 and accompanying text.

<sup>387</sup> *See* Pushaw, *supra* note 377, at 468.

courts served an advisory role and had little power.<sup>388</sup> There was no central court to ensure the supremacy and uniformity of national laws.<sup>389</sup> Only state courts had jurisdiction to interpret those laws, and they were notoriously biased toward state interests.<sup>390</sup>

The Framers recognized this problem. Hamilton argued in *Federalist No. 22* that “the circumstance that crowns the defects of the confederation . . . [is] the want of a judiciary power. . . . Laws are a dead letter without courts to expound and define their true meaning and operation.”<sup>391</sup> Madison expressed related complaints in a letter to Thomas Jefferson, arguing that the lack of restraints on state governments was a “serious evil.”<sup>392</sup> To address these concerns, the Constitution vested the judicial power of the United States in “one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”<sup>393</sup> It then extended that power to a broad range of matters, including all cases arising under federal law, treaties, and the Constitution.<sup>394</sup>

The Framers also thought it was vital to ensure the strength and independence of the federal judiciary. Indeed, the delegates to the Constitutional Convention exhibited more agreement on this point “than on all other aspects of the judiciary article.”<sup>395</sup> They believed that the judiciary was in danger of being “overpowered, awed, or influenced by its co-ordinate branches”<sup>396</sup> and that the only way to prevent this was by insulating it from political pressure.<sup>397</sup> Therefore, they provided that federal judges “shall hold their Offices during good behavior,”<sup>398</sup> a phrase modeled on an English statute that effectively guaranteed life tenure.<sup>399</sup> They also provided that the salary of federal judges could not be

<sup>388</sup> See *id.* at 469.

<sup>389</sup> See BARBER, *supra* note 378, at 34.

<sup>390</sup> See *id.*; Pushaw, *supra* note 377, at 469.

<sup>391</sup> THE FEDERALIST NO. 22, at 130 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Elsewhere, Hamilton called it a “striking absurdity” that the government lacked “even . . . the shadow of constitutional power to enforce the execution of its own laws.” THE FEDERALIST NO. 21, at 130 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

<sup>392</sup> Liebman & Ryan, *supra* note 18, at 709-10.

<sup>393</sup> U.S. CONST. art. III, § 1.

<sup>394</sup> See *id.* at § 2, cl. 1.

<sup>395</sup> Liebman & Ryan, *supra* note 18, at 747. The only disagreement was over “how best to insure [that] independence.” *Id.* at 713.

<sup>396</sup> THE FEDERALIST NO. 78, *supra* note 347, at 523 (Alexander Hamilton).

<sup>397</sup> *Id.*

<sup>398</sup> U.S. CONST. art. III, § 1.

<sup>399</sup> See Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 47 (1995). Life tenure for judges was considered so essential that the colonists listed the lack of tenure as one of their complaints against King George III in the Declaration of Independence. See THE DECLARATION OF INDEPENDENCE

diminished during their time in office.<sup>400</sup>

The Framers expressed little concern that judges would abuse this independence. Writing in *Federalist No. 78*, Hamilton maintained that the judicial branch was the “least dangerous to the political rights of the Constitution”<sup>401</sup> and “beyond comparison the weakest of the three departments of power.”<sup>402</sup> The executive branch “dispenses the honors” and holds the “sword of the community,”<sup>403</sup> he stated, while the legislative branch controls the purse and makes “the rules by which the duties and rights of every citizen are to be regulated.”<sup>404</sup> The judiciary “has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment . . . .”<sup>405</sup>

The Framers also thought that because the judiciary had been largely insulated from politics, it would be the least susceptible to partisan passions. Madison claimed that judges, due to the method of their appointment and their life tenure, “are too far removed from the people to share much in their prepossessions.”<sup>406</sup> According to Hamilton, the judiciary’s independence would be “the citadel of the public justice and the public security.”<sup>407</sup>

The Framers did acknowledge the potential danger of a combination of judicial and legislative power.<sup>408</sup> However, this was because they worried that the legislature would usurp the power of the courts, not the other way around. In *Federalist No. 48*, Madison warned that legislative power must be checked because that “department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.”<sup>409</sup> To illustrate his point, he noted that in Virginia, an unchecked legislature had “in many instances, decided rights which should have been left to judiciary controversy”<sup>410</sup> and in Pennsyl-

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para. 10 (U.S. 1776) (stating that “[h]e has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries”).

<sup>400</sup> See U.S. CONST. art. III, § 1.

<sup>401</sup> THE FEDERALIST NO. 78, *supra* note 347, at 522 (Alexander Hamilton).

<sup>402</sup> *Id.* at 522-23.

<sup>403</sup> *Id.* at 522.

<sup>404</sup> *Id.*

<sup>405</sup> *Id.* at 523.

<sup>406</sup> THE FEDERALIST NO. 49, at 341 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>407</sup> THE FEDERALIST NO. 78, *supra* note 347, at 524 (Alexander Hamilton).

<sup>408</sup> See *id.* at 523 (“For I agree, that ‘there is no liberty, if the power of judging be not separated from the legislative and executive powers.’”) (quoting MONTESQUIEU, *SPIRIT OF THE LAWS*, vol. 1 at 181).

<sup>409</sup> THE FEDERALIST NO. 48, at 333 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>410</sup> *Id.* at 336 (quoting THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 195).

vania "cases belonging to the judiciary department [had been] frequently drawn within legislative cognizance and determination."<sup>411</sup>

The Anti-Federalists, it is true, raised numerous concerns about the independence of the judiciary. They argued against life tenure and urged that the legislature be given power to overrule judicial decisions.<sup>412</sup> According to Brutus, the Constitution would make

judges independent in the full sense of the word. There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.<sup>413</sup>

The Anti-Federalist fear, however, related primarily to concerns of federalism, not separation of powers. In his main essay on the judiciary, Brutus complained that the federal courts would use their discretion not to limit Congressional power, but to expand that power at the expense of the states.<sup>414</sup> In cases pitting the federal government against the states, he claimed, judges would favor the former in the hopes of increasing their influence and salaries.<sup>415</sup> In the process, he argued, they would silently and imperceptibly subvert the legislative, executive, and judicial powers of the states.<sup>416</sup>

In addition, some Anti-Federalist rhetoric indicates that they thought adherence to precedent would exacerbate this problem rather than remedy it. In connection with his earlier complaint, Brutus predicted that the courts would seize upon expansive precedents, first to enlarge their own power and then to enlarge the power of the national legislature.<sup>417</sup> Brutus did not suggest that the courts would be bound by these precedents, only that they would use them to justify their actions.<sup>418</sup> Another opponent of the Constitution argued that strict judicial rules could ultimately result in judicial tyranny.<sup>419</sup> Over time, he argued,

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<sup>411</sup> *Id.* at 337. Hamilton also made clear that the legislature was more likely to assume judicial power than the courts were to encroach on legislative turf. *See* THE FEDERALIST NO. 78, *supra* note 347, at 522-23 (Alexander Hamilton).

<sup>412</sup> THE ANTI-FEDERALIST 183 (Herbert J. Storing ed., 1985).

<sup>413</sup> *Id.*

<sup>414</sup> *See id.* at 165-66.

<sup>415</sup> *See id.* at 166-67.

<sup>416</sup> *See id.*

<sup>417</sup> *See id.* at 186.

<sup>418</sup> *See* Paulsen, *supra* note 5, at 1575-76.

<sup>419</sup> *See* THE FEDERAL FARMER XV, *reprinted in* 2 THE COMPLETE ANTI FEDERALIST 315, 316

“the rigid systems of the law courts naturally become more severe and arbitrary, if not carefully tempered and guarded by the constitution, and by laws, from time to time.”<sup>420</sup> This echoed the refrain of English judges who feared that strict adherence to precedent would lead to inflexible and unreasonable rules,<sup>421</sup> and it suggests that at least some Anti-Federalists would have opposed a constitutional requirement of stare decisis.

*B. “All the Usual and Most Effectual Precautions”*

Despite the general lack of concern that the judiciary would overreach its authority – especially vis a vis the other branches of the federal government – the Framers did not leave the judiciary entirely unchecked. The Constitution includes a number of mechanisms, both direct and indirect, that the Framers thought were sufficient to prevent any abuses of power.

First, the political branches were given control over the appointment and removal process. Judges must be nominated by the president and confirmed by a majority of the Senate, a double hurdle that ensures they enjoy widespread support and confidence.<sup>422</sup> The Senate’s involvement in this process was especially important to the Framers because it allowed the states to block the appointment of judges hostile to state interests.<sup>423</sup> History has proven the potency of this check. Of the 148 nominations to the Supreme Court, twenty-nine have been rejected and many others have been influenced by the threat of rejection.<sup>424</sup> Still, because the Framers recognized that judges might become overzealous once in office, they also gave Congress the power to impeach judges for “Treason, Bribery or other high Crimes and Misdemeanors.”<sup>425</sup> This power has rarely been used,<sup>426</sup> and some Anti-Federalists complained that it provided little secu-

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(Herbert J. Storing ed., 1981).

<sup>420</sup> *Id.*

<sup>421</sup> See *supra* notes 167-73, 207-20 and accompanying text.

<sup>422</sup> See U.S. CONST. art. II, § 2, cl. 2 (declaring that “[the president] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law”).

<sup>423</sup> See THE FEDERALIST NO. 76, at 513 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (noting that the involvement of the Senate “would tend greatly to prevent the appointment of unfit characters from State prejudice”).

<sup>424</sup> See Michael J. Gerhardt, *Putting Presidential Performance in the Federal Appointments Process in Perspective*, 47 CASE W. RES. L. REV. 1359, 1366 n.10 (1997) (predicting that “the possibility of rejection” would motivate the president to nominate acceptable candidates for civil offices); see also THE FEDERALIST NO. 76, *supra* note 423, at 513 (Alexander Hamilton).

<sup>425</sup> U.S. CONST. art. II, § 4.

<sup>426</sup> Thirteen federal judges have been impeached by the House of Representatives. Of those, seven have been convicted by the Senate and removed from office. See Sambhav N. Sanker, *Disciplining the Professional Judge*, 88 CAL. L. REV. 1233, 1249 (2000).

rity because the process of impeachment and conviction would be too difficult.<sup>427</sup> But the Framers put great faith in this measure. Hamilton claimed that the power to impeach judges "is alone a complete security" against the threat of judicial overreaching.<sup>428</sup> "There never can be a danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with [the power of impeachment] . . . ."<sup>429</sup> That few judges have actually been impeached does not necessarily undermine his claim; it could demonstrate that the threat of impeachment has effectively deterred judicial excess.

The second way the Framers restrained the judiciary was by withholding the power to enforce its own judgments. Although this is a negative, not a positive, restraint, it operates in much the same way. In order for the judiciary to effectuate its decisions, it must win the cooperation of the executive branch, in the same way that Congress must solicit the aid of the president to enforce the laws it makes.<sup>430</sup> As Hamilton wrote in *Federalist No. 78*, the judiciary is so weak it "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."<sup>431</sup>

Finally, the Framers gave Congress control over the establishment of lower federal courts and the jurisdiction of both those courts and the Supreme Court.<sup>432</sup> Although Article III invites the creation of lower federal courts,<sup>433</sup> Congress ultimately has discretion over the size and shape of the federal judiciary.<sup>434</sup> In addition, although the Supreme Court's original jurisdiction is Constitutionally guaranteed, its appellate jurisdiction is subject to the exceptions and regulations made by Congress.<sup>435</sup> Congress also has latitude over the jurisdiction of the lower federal courts it chooses to create.<sup>436</sup> The extent of that latitude has

<sup>427</sup> See THE ANTI-FEDERALIST, *supra* note 412, at 185.

<sup>428</sup> THE FEDERALIST NO. 81, at 546 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

<sup>429</sup> *Id.*

<sup>430</sup> See U.S. CONST. art. II, § 3 (stating that the president "shall take Care that the Laws be faithfully executed").

<sup>431</sup> THE FEDERALIST NO. 78, *supra* note 347, at 523 (Alexander Hamilton).

<sup>432</sup> See Liebman & Ryan, *supra* note 18, at 703.

<sup>433</sup> See U.S. CONST. art. III, § 1 (declaring that "[t]he judicial Power shall be vested in on supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish").

<sup>434</sup> See Liebman & Ryan, *supra* note 18, at 716-718, 765.

<sup>435</sup> See U.S. Const. art. III, § 2.

<sup>436</sup> See Henry M. Hart Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Court: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1370 (1953); Liebman & Ryan, *supra* note 18, at 700 n.9 (describing the "majority view" that Congress has control over federal court jurisdiction).

been hotly debated.<sup>437</sup> Some scholars have argued that Congress may not entirely eliminate the jurisdiction of federal courts over special categories of cases, such as those involving federal questions, admiralty, and ambassadors.<sup>438</sup> In a recent article, Professors Liebman and Ryan offer a convincing rebuttal to this view, arguing that although Article III includes a presumption that federal courts will have appellate jurisdiction in these cases, the choice is up to Congress.<sup>439</sup> Under either scenario, however, Congress exercises significant control over the makeup and influence of the federal judiciary.

The Framers thought these limits on the courts were sufficient and rejected proposals for additional checks, including congressional review of judicial decisions. In *Federalist No. 81*, Hamilton argued that congressional oversight was unnecessary because “the supposed danger of judiciary encroachments on the legislative authority which has been upon many occasions reiterated is in reality a phantom.”<sup>440</sup> Although the courts may sometimes misconstrue the will of Congress, Hamilton argued, these instances “can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system.”<sup>441</sup>

Madison also thought the power of the judiciary had been sufficiently circumscribed. Responding to Anti-Federalist fears that the courts would favor the federal government in cases against the states, he wrote, “The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality.”<sup>442</sup> What were those precautions? Madison elaborated in an 1823 letter to Thomas Jefferson concerning Supreme Court review of state court decisions. “The impartiality of the judiciary,” he argued, was guaranteed by “the concurrence of the Senate, chosen by the State Legislatures, in appointing the Judges, and the oaths and official tenures of these, with the surveillance of public opinion.”<sup>443</sup> Thus, Madison thought the discretion of the courts would be kept in check even without a constitutional requirement of stare decisis.

The only indication that the Framers thought stare decisis was necessary

<sup>437</sup> See Liebman & Ryan, *supra* note 18, at 705-07.

<sup>438</sup> See, e.g., Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 229-30, 238-59 (1985); Lawrence Gene Sager, *The Supreme Court, 1980 Term - Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 42-68 (1981); Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 522, 527 (1974).

<sup>439</sup> See Liebman & Ryan, *supra* note 18, at 767-773.

<sup>440</sup> THE FEDERALIST NO. 81, *supra* note 428, at 545 (Alexander Hamilton).

<sup>441</sup> *Id.*

<sup>442</sup> THE FEDERALIST NO. 39, at 256 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>443</sup> Letter from James Madison to Thomas Jefferson (June 27, 1823), *reprinted in* 4 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 83-84 (Max Farrand ed., 1911).

to restrain the courts is a statement by Hamilton in *Federalist No. 78*. Responding to complaints that life tenure would give judges too much power, Hamilton first argued that tenure would provide judges with the independence they needed to resist political pressure.<sup>444</sup> He then offered a secondary justification:

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 their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them.<sup>445</sup>

Judge Arnold cites this statement as evidence that the Framers intended for *stare decisis* to operate as a constitutional check.<sup>446</sup> Yet although Hamilton's statement provides some support for this view, there are several reasons why it might be discounted. First, as several scholars have pointed out, Hamilton's "side-bar on precedent" was "hardly conceived as a comprehensive exposition of the doctrine of *stare decisis*."<sup>447</sup> He was responding to criticisms of life tenure, and he mentioned the role of precedent only to illustrate that judges would need many years to become familiar with the materials of their craft.<sup>448</sup> Had he wished to announce the Framers' intention that *stare decisis* would serve as a constitutional check, it seems likely he would have chosen a more direct way to make the point.

Second, Hamilton's statement is inconsistent with other arguments he made in *Federalist No. 78* concerning the power of judicial review. Responding to claims that this power would elevate the courts above the legislature and lead to judicial supremacy, Hamilton argued that judicial review would instead lead to constitutional supremacy: "[W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former."<sup>449</sup> This argument was necessary to allay anti-federalist fears about judicial review, but it is arguably undermined by his statements about binding precedent. For "a strict regime of precedent suggests that constitutional meaning is a product of the in-

<sup>444</sup> See THE FEDERALIST NO. 78, *supra* note 347, at 528-29 (Alexander Hamilton).

<sup>445</sup> *Id.* at 529.

<sup>446</sup> See *Anastasoff v. United States*, 223 F.3d 898, 902 (8th Cir. 2000).

<sup>447</sup> Lee, *supra* note 338, at 663; see also Paulsen, *supra* note 5, at 1573-74.

<sup>448</sup> See Paulsen, *supra* note 5, at 1573-74.

<sup>449</sup> THE FEDERALIST NO. 78, *supra* note 347, at 525 (Alexander Hamilton).

terpretative power of the courts,” a suggestion that would have deepened, not lessened, the fears of judicial supremacy.<sup>450</sup> Consequently, one scholar has argued that Hamilton’s “statement about precedent should be treated as a mistake.”<sup>451</sup>

Finally, Hamilton made no attempt to connect his discussion of precedent with either the text or the structure of the Constitution. He simply declared that because judges would be bound down by strict rules and precedents, they would need life tenure. This suggests that he was not announcing a constitutional requirement, but was only expressing his own expectations. In other words, “Hamilton is not explaining what the Constitution means about the judicial power, but describing what he expects judges will do – study and consider precedents . . . .”<sup>452</sup> This expectation might be relevant to the background assumptions of the founding generation (although it is outweighed by the bulk of the evidence examined in Part I), but it does not establish that the Framers intended for stare decisis to operate as a constitutional check on judicial power.<sup>453</sup>

### C. *The Wrong Kind of Check*

Not only does the evidence fail to establish a clear intent by the Framers to impose a constitutional requirement of stare decisis, but such a requirement cannot be inferred from the system of checks and balances they designed because stare decisis is not the type of mechanism the Framers relied on to prevent overreaching. Stare decisis is an internal check that depends for its effectiveness on the self-restraint of the very officials it is intended to check. Yet the Framers explicitly declined to rely on such self-policing and instead created a system in which each branch was given the means and the motive to frustrate the excesses of the other branches.

The workings of this system were spelled out by Madison in a series of Federalist Papers discussing the structural benefits of the Constitution. He began by responding to complaints that the Constitution did not conform to the principle of separation of powers because the duties of the three branches often overlapped.<sup>454</sup> These complaints, Madison argued, were based on a misunderstanding of Montesquieu’s statement that liberty cannot exist where the legislative,

<sup>450</sup> See BARBER, *supra* note 378, at 49; see also Paulsen, *supra* note 5, at 1576 (arguing that any claims about the binding effect of precedent would have provided Anti-Federalists with additional weapons in their attack on the judiciary).

<sup>451</sup> BARBER, *supra* note 378, at 111.

<sup>452</sup> Paulsen, *supra* note 5, at 1574.

<sup>453</sup> See *id.*

<sup>454</sup> THE FEDERALIST NO. 47, at 323 (James Madison) (Jacob E. Cooke ed., 1961) (“One of the principal objections inculcated by the more respectable adversaries of the constitution is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct.”).

executive, and judicial powers are not separated.<sup>455</sup> By this statement, he claimed, Montesquieu “did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other.”<sup>456</sup> He meant only “that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.”<sup>457</sup>

Madison then considered ways to ensure that no single branch would usurp the whole power of another branch. One possibility was to “mark, with precision, the boundaries of these departments in the constitution of the government, and to trust these parchment barriers against the encroaching spirit of power.”<sup>458</sup> Most state constitutions relied on this approach, Madison noted. “But experience assures us, that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary for the more feeble against the more powerful members of the government.”<sup>459</sup> In particular, he maintained, the judiciary and the executive needed protection from the legislature, “which is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.”<sup>460</sup>

Another possibility was to provide that whenever two of the three branches were dissatisfied with the third, they could call a convention for altering, or correcting breaches of, the Constitution.<sup>461</sup> This suggestion had been made by Thomas Jefferson in his Notes on the State of Virginia, and Madison agreed that it had some merit.<sup>462</sup> Because no branch had “an exclusive or superior right of settling the boundaries” of power, he argued, it made sense that disputes should be resolved by the “people themselves, who, as the grantors of the commission, can alone declare its true meaning, and enforce its observance.”<sup>463</sup> Madison, however, ultimately rejected this solution. He argued that frequent appeals to the people would shake their faith in the Constitution.<sup>464</sup> He also maintained that such appeals would be futile. Most conventions, he believed, would be called by the executive and the judiciary to restrain the legislature. But because legislators would outnumber judges and the president and have more influence with the people, they would win most public battles over

<sup>455</sup> See *id.* at 325.

<sup>456</sup> *Id.*

<sup>457</sup> *Id.* at 325-26.

<sup>458</sup> THE FEDERALIST NO. 48, *supra* note 409, at 332-33 (James Madison).

<sup>459</sup> *Id.* at 333.

<sup>460</sup> *Id.*

<sup>461</sup> See THE FEDERALIST NO. 49, *supra* note 406, at 339 (James Madison).

<sup>462</sup> See *id.* at 338-39.

<sup>463</sup> *Id.* at 339.

<sup>464</sup> *Id.*

the distribution of power.<sup>465</sup>

Having rejected the "mere demarcation on parchment of the constitutional limits of the several departments,"<sup>466</sup> as well as recurring conventions to clarify those limits, Madison turned to the only approach he thought likely to prevent the concentration of power. The interior structure of government, he argued, must be arranged so "that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."<sup>467</sup> How could this be done? Not by relying on the self-restraint of each branch. For "[i]f men were angels, no government would be necessary," and "[i]f angels were to govern men, neither external nor internal controls on government would be necessary."<sup>468</sup> Instead, Madison argued, the Constitution must rely on the ambitions of each department to check the ambitions of the others.<sup>469</sup> It must ensure that each branch, by pursuing its own desire for power, would thereby frustrate the efforts of the other two branches to augment their power.

[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department *the necessary constitutional means and personal motives to resist encroachments* of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.<sup>470</sup>

Madison's theory is reflected in numerous aspects of the Constitution. Congress is given broad authority to lay taxes, regulate foreign and interstate commerce, and make laws concerning a variety of subjects,<sup>471</sup> but these powers are checked by the president's right to veto legislation<sup>472</sup> and his obligation to

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<sup>465</sup> See *id.* at 339-40. In *Federalist No. 50*, Madison argued that similar concerns mitigated against a provision calling for conventions at fixed intervals. If the intervals were too short, he argued, the same passions that led to the dispute would govern its resolution, with the legislature being better placed to influence the public's decision. If the intervals were too long, the damage would be done before the distribution of powers could be clarified. See THE FEDERALIST No. 50, at 343-46 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>466</sup> THE FEDERALIST No. 48, *supra* note 409, at 338 (James Madison).

<sup>467</sup> THE FEDERALIST No. 51, at 347-48 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>468</sup> *Id.* at 349.

<sup>469</sup> See *id.*

<sup>470</sup> *Id.* (emphasis added).

<sup>471</sup> See U.S. CONST. art. I, § 8.

<sup>472</sup> See U.S. CONST. art. I, § 7, cl. 2.

“take Care that the Laws be faithfully executed.”<sup>473</sup> The president, in turn, is given the power to make treaties and appoint ambassadors, judges, and officers, but these powers are checked by the requirement that he obtain the advice and consent of two-thirds of the Senate.<sup>474</sup> In addition, although the president has the power to veto bills, the full Congress can override his veto with a two-thirds vote.<sup>475</sup> The two houses of Congress can also join forces to impeach and convict the president for treason, bribery or other high crimes and misdemeanors.<sup>476</sup> And should the president and Congress conspire to violate the Constitution, the courts can exercise the power of judicial review to strike such actions down.<sup>477</sup>

The structural checks on the judiciary also conform to this approach. The president and Senate have initial control over the appointment of judges and can use that authority to appoint individuals with a reputation for self-restraint.<sup>478</sup> Once in office, judges have the power to hear and resolve cases and controversies over which they have jurisdiction. But if they overstep their authority, the executive and legislative branches have “the necessary constitutional means and personal motives” to reign them in.<sup>479</sup> The president can refuse or delay enforcement of judicial orders,<sup>480</sup> and Congress can impeach renegade judges<sup>481</sup> or exercise its control over the size and jurisdiction of the judiciary.<sup>482</sup> Thus, any effort by the judiciary to aggrandize its power will be met by “opposite and rival interests,” and “the private interest of every individual may be a sentinel over the public rights.”<sup>483</sup>

Stare decisis does not operate like these inter-branch checks. It is not

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<sup>473</sup> U.S. CONST. art. II, § 3.

<sup>474</sup> See U.S. CONST. art. II, § 2, cl. 2.

<sup>475</sup> See U.S. CONST. art. I, § 7, cl. 2.

<sup>476</sup> See U.S. CONST. art. I, § 2, cl. 5 (providing for the power of the House to impeach); *Id.* at art. I, § 3, cl. 6 (providing for the power of the Senate to convict); *Id.* at art. II, § 4 (providing for the impeachment of the president).

<sup>477</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The Chief Justice of the United States also presides over any trial of conviction in the Senate. See U.S. CONST. art. I, § 3, cl. 6.

<sup>478</sup> See U.S. CONST. art. II, § 2, cl. 2.

<sup>479</sup> THE FEDERALIST NO. 51, *supra* note 467, at 349 (James Madison).

<sup>480</sup> See THE FEDERALIST NO. 78, *supra* note 347, at 523 (Alexander Hamilton) (explaining that the judiciary “must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments”).

<sup>481</sup> See U.S. CONST. art. I, § 2, cl. 5 (the power of the House to impeach); art. I, § 3, cl. 6 (the power of the Senate to convict); art. II, § 4 (providing for the impeachment of all civil officers of the United States).

<sup>482</sup> See U.S. CONST. art. III, § 1 (stating that Congress “may from time to time ordain and establish” lower federal courts); art. III, § 2, cl. 2 (giving Congress the power to make “Exceptions” and “Regulations” to the appellate jurisdiction of the Supreme Court).

<sup>483</sup> THE FEDERALIST NO. 51, *supra* note 467, at 349 (James Madison).

something the other branches *do* to prevent the judiciary from overreaching, but is instead an intra-branch doctrine of self-restraint. As a result, it is no more effective as a check on judicial overreaching than is a “mere demarcation” of the boundaries of judicial power.<sup>484</sup> And the Framers expressly declined to rely on such “parchment barriers against the encroaching spirit of power.”<sup>485</sup>

One might argue that stare decisis is an effective check on judicial power because a failure to adhere to precedent could lead the other branches to exercise their leverage over the courts. This is certainly possible. If Congress regards adherence to precedent as critical to judicial decision-making, it can penalize an inattention to precedent by restricting the courts’ jurisdiction. Under this scenario, however, stare decisis does not function as a check on judicial power. The check is congressional control over jurisdiction. Stare decisis is simply a policy by which the courts can forestall the imposition of that check.<sup>486</sup> To offer an analogy, the Senate would likely reject the president’s cabinet nominees if they were unqualified. But this does not mean that the president’s internal obligation to choose qualified cabinet members functions as a check on his power. The check is the Senate’s power to reject the president’s nominees. The policy of choosing qualified nominees is simply a way for the president to avoid the imposition of that check.

Of course, the mere fact that stare decisis is not the kind of check the Framers relied on does not mean they would have rejected it outright. As Madison stated in his letter to Jefferson, he thought the judges’ oath to uphold the Constitution would contribute to their impartiality.<sup>487</sup> The oath, like stare decisis, is not something the other branches do to the courts, but is instead a self-policing mechanism. And it would be absurd to suggest that the oath is only binding to the extent that the other branches punish judges for violating it. But, the oath, unlike stare decisis, is explicitly required by the text of the Constitution.<sup>488</sup> And though Madison argued that such “parchment barriers” were inad-

<sup>484</sup> *But see* Peterson, *supra* note 399, at 52-56 (arguing that the obligation to follow precedent restrains judicial power). Peterson does not explain how stare decisis can check judicial power if judges decline to police themselves. *See id.*

<sup>485</sup> THE FEDERALIST NO. 48, *supra* note 409, at 332-33 (James Madison). It is true that the Framers relied on intra-branch checks to restrain legislative power. They divided Congress into two houses, with different modes of election and terms of office, and ensured that neither house could accomplish anything without the cooperation of the other. However, as Madison explained in *Federalist No. 51*, this intra-branch checking mechanism was necessary to prevent legislative dominance over the other two branches. And it operates on the same principles underlying the larger system of checks and balances – that is, it pits the ambition of the two houses against each other instead of relying on the self-restraint of Congress as a whole.

<sup>486</sup> *Cf.* Liebman & Ryan, *supra* note 18, at 772 (pointing out that judicial compliance with internal obligations “confers a kind of *power* – i.e., the neutrality and integrity needed to command the respect and acquiescence of states and federal branches disadvantaged by the judges’ decisions”).

<sup>487</sup> *See supra* note 443 and accompanying text.

<sup>488</sup> *See* U.S. CONST. art. VI, cl. 2.

quate to prevent overreaching, the Framers nonetheless expressed a clear intent that the oath be honored. Stare decisis is not mentioned in the text, and there is little direct or indirect evidence that the Framers intended for it to serve as a check. Thus, in order to assert that it is constitutionally required, we must establish not only that it does not conflict with other checking mechanisms; numerous provisions that were never considered by the Framers could meet this test. Instead, we must establish that the Framers regarded stare decisis as necessary to the system of checks and balances. Yet as Madison's discussion makes clear, the Framers could not have regarded stare decisis as necessary to that system because it was precisely the kind of check they viewed as inadequate to guard against "the encroaching spirit of power."<sup>489</sup>

### III. NON-PRECEDENTIAL DECISIONS AND THE VALUES OF STARE DECISIS

To conclude that stare decisis is not dictated by the background assumptions of the founding generation or by the Framers' intent does not resolve the matter entirely. Regardless of what the Constitution required in 1789, it is possible that our expectations about the exercise of judicial power have changed sufficiently over time so that what was once simply a prudential concern has now assumed constitutional significance. The conduct of the courts alone may have altered the equation. By consistently following stare decisis for nearly a century and a half, the courts may have staked their legitimacy upon adherence to precedent. If so, could they really abandon the practice now? The Constitution may or may not require a specific procedure for deciding cases, but surely it requires a legitimate judiciary.<sup>490</sup> And if stare decisis has become indispensable to judicial legitimacy, then for all intents and purposes it has become a constitutional requirement as well.

The question remains, of course, whether stare decisis is in fact essential to judicial legitimacy. Some scholars and judges clearly believe that it is. More than a half-century ago, Justice Roberts wrote that "[r]espect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy."<sup>491</sup> More recently, the plurality in *Planned Parenthood v. Casey* wrote that "to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question."<sup>492</sup> Some, on the other hand, question whether stare decisis can even be defended. One pro-

<sup>489</sup> See THE FEDERALIST NO. 48, *supra* note 409, at 332-33 (James Madison) .

<sup>490</sup> Cf. *Planned Parenthood v. Casey*, 505 U.S. 833, 868 (1992) ("The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.").

<sup>491</sup> *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 113 (1944) (Roberts, J., dissenting).

<sup>492</sup> *Casey*, 505 U.S. at 867. See also Monaghan, *supra* note 5, at 748-762 (discussing the role of stare decisis in promoting system legitimacy).

fessor has argued that adherence to erroneous decisions, at least in the constitutional arena, violates the courts' duty "to say what the law is."<sup>493</sup> Others have suggested that a system ostensibly committed to justice cannot justify a decision-making process that necessarily produces unjust results.<sup>494</sup>

Part of the problem in answering the question is that legitimacy is subjective: it depends upon the perception of those who are empowered to confer acceptance – in a democracy, the people. Yet without abandoning the practice of stare decisis altogether, it is difficult to know whether the public would accept a judiciary that did not decide cases based on precedent. Even an opinion poll might not provide a conclusive answer because legitimacy is also a functional concept. One can speculate about what practices would or would not be legitimate, but the only real test is to put them into play and see what happens.<sup>495</sup>

A definitive answer to the problem of legitimacy is beyond the scope of this article, and is probably unnecessary in any case. The courts are unlikely to abandon stare decisis completely and deviations within a certain range have always been accepted.<sup>496</sup> More importantly, even if stare decisis is necessary for judicial legitimacy, it does not automatically follow that the discrete practice of issuing non-precedential opinions threatens that legitimacy. Stare decisis is not an end in itself, but a means to serve important values of the legal system.<sup>497</sup> Therefore, as long as non-precedential opinions do not undermine those values, the legitimacy of the courts will be preserved.

In this Part, I describe the values that are said to be served by adherence to precedent and consider the degree to which those values actually are promoted by the current practice of stare decisis. I then argue that non-precedential decisions do not significantly undermine these values. As long as courts adopt narrow rules for determining whether a decision should have precedential force, along with mechanisms to ensure compliance with those rules, non-precedential opinions pose little danger to the underlying values of stare decisis.

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<sup>493</sup> Lawson, *supra* note 5, at 28 ("At least as a prima facie matter, the reasoning of *Marbury* thoroughly de-legitimizes precedent.").

<sup>494</sup> See WASSERSTROM, *supra* note 39, at 42-53.

<sup>495</sup> See Bobbitt, *supra* note 38, at 751-75 (arguing that the legitimacy of judicial practices is guaranteed solely by their use and acceptance).

<sup>496</sup> By one count, the Supreme Court overruled 212 decisions between 1801 and 1986, yet the Court's legitimacy is not seriously in doubt. See O'BRIEN, *supra* note 340, at 118. Some departures from precedent, such as the Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), have even bolstered its legitimacy.

<sup>497</sup> See Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2037-40 (1996). A few scholars have offered deontological justifications for stare decisis, but as Professor Peters demonstrates, those accounts are difficult to defend. See *id.* at 2065-112. The far more common claim is that stare decisis is worthwhile because of the ends it serves. See *id.* at 2039-40.

A. *The Values Served by Adherence to Precedent*

The most frequent claim made on behalf of stare decisis is that it fosters certainty in the law.<sup>498</sup> By agreeing to follow established rules, the courts enable individuals to predict the legal consequences of their actions.<sup>499</sup> A person who writes a will according to accepted procedures can be confident that the courts will enforce that will after his or her death. Likewise, a corporation developing a new product can anticipate its liability for potential defects. This certainty is desirable in its own right: it satisfies a basic human need for security and stability.<sup>500</sup> Certainty also has instrumental worth. When individuals and businesses are able to predict the circumstances under which courts will enforce contracts, impose tort liability, or extend the protection of bankruptcy laws, they are more likely to engage in the kinds of activities that lead to a prosperous and productive society. By contrast, if courts routinely change legal rules, people will hesitate to risk their time and money in pursuit of goals that might ultimately be thwarted.

An equally important value said to be served by stare decisis is equality.<sup>501</sup> When the courts decide today's cases in accordance with yesterday's cases, they ensure that legal rules are applied consistently and fairly.<sup>502</sup> As Karl Llewellyn observed, there is an "almost universal sense of justice which urges that all men are properly to be treated alike in like circumstances."<sup>503</sup> This sense of justice is especially strong in our society. From the Declaration of Independence's claim that "all men are created equal"<sup>504</sup> to the Fourteenth Amendment's guarantee of "equal protection of the laws,"<sup>505</sup> our democracy has displayed a deep commitment to the principle of equal treatment. By adhering strictly to their own precedents, the courts help to strengthen that commitment.

The third value served by stare decisis is judicial efficiency.<sup>506</sup> Though less lofty than equality, efficiency is vital to our legal system. If individuals with legitimate grievances cannot have their complaints heard within a reasonable time, the courts will have failed in their role as a protector of rights. Stare de-

<sup>498</sup> See GOODHART, *supra* note 191, at 61-62; WASSERSTROM, *supra* note 39, at 60-66; Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 368 (1988); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 597 (1987).

<sup>499</sup> See WASSERSTROM, *supra* note 39, at 61-66.

<sup>500</sup> See *id.*; Maltz, *supra* note 498, at 368.

<sup>501</sup> See WASSERSTROM, *supra* note 39, at 69-72; Maltz *supra* note 498, at 369.

<sup>502</sup> See WASSERSTROM, *supra* note 39, at 66-72.

<sup>503</sup> Karl Llewellyn, *Case Law*, in 3 ENCYCLOPEDIA OF SOCIAL SCIENCES 249 (Macmillan Co. 1930).

<sup>504</sup> THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

<sup>505</sup> U.S. CONST. amend. XIV, § 1.

<sup>506</sup> See WASSERSTROM, *supra* note 39, at 72-73.

cis helps prevents this from happening. By basing their decisions on precedent, courts avoid the need to reexamine all legal principles from scratch.<sup>507</sup> They can take for granted a certain number of principles and focus their energy on issues that are truly in dispute. “[T]he labors of judges would be increased almost to the breaking point if every past decision could be reopened in every case,” wrote Justice Cardozo.<sup>508</sup> By following precedent, a judge can lay his “own course of bricks on the secure foundation of the courses laid by others who ha[ve] gone before him.”<sup>509</sup>

Finally, proponents of stare decisis claim that it promotes judicial restraint and impartiality.<sup>510</sup> When judges are required to base their decisions primarily on precedent, they have less room to exercise discretion or bias.<sup>511</sup> This, in turn, reinforces the perception that we live under a government of laws and not of men. In the words of the second Justice Harlan, adherence to prior decisions, even those that are incorrect, is justified by “the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.”<sup>512</sup>

These four values provide strong support for a doctrine of precedent. Yet some scholars question the extent to which the actual practice of stare decisis serves these values. For instance, because American courts do not regard precedent as absolutely binding, some writers argue that the value of certainty is not significantly realized.<sup>513</sup> How, they ask, can individuals predict the legal consequences of their actions if courts are free to overrule precedents they find sufficiently disagreeable?<sup>514</sup> A non-absolute policy of stare decisis also impairs

<sup>507</sup> *See id.*

<sup>508</sup> BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1925).

<sup>509</sup> *Id.* *See also* *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (“[N]o judicial system could do society’s work if it eyed each issue afresh in every case.”).

<sup>510</sup> *See* WASSERSTROM, *supra* note 39, at 75-78; Maltz, *supra* note 498, at 371.

<sup>511</sup> *See* WASSERSTROM, *supra* note 39, at 78; Maltz, *supra* note 498, at 371.

<sup>512</sup> *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). Justice Thurgood Marshall expressed similar sentiments in *Vasquez v. Hillery*, 474 U.S. 254, 265-56 (1986) (stating that adherence to precedent “contributes to the integrity of our constitutional system of government both in appearance and in fact” and ensures “that bedrock principles are founded in law rather than in the proclivities of individuals.”).

<sup>513</sup> *See* WASSERSTROM, *supra* note 39, at 64.

<sup>514</sup> *See id.* One scholar has gone so far as to suggest that stare decisis has not contributed at all to legal certainty:

Our judicial law is as uncertain as any law could well be. We possess all the detriment of uncertainty, which stare decisis was supposed to avoid, and also all the detriment of ancient law-lumber, which stare decisis concededly involves -- the government of the living by the dead, as Herbert Spencer has called it.

judicial efficiency.<sup>515</sup> When the courts are not absolutely bound by prior decisions, they must evaluate precedents for their merit as well as their applicability.<sup>516</sup> They also must apply the standard for determining whether a particular decision can be overruled. This creates additional work for the courts, especially as the number of precedents increases. In *Planned Parenthood v. Casey* alone, the Court devoted fifteen pages to a discussion of stare decisis.<sup>517</sup> Thus, it is unclear how much efficiency is created by adherence to precedent.<sup>518</sup>

Another writer argues that even if stare decisis were strictly followed, it could never achieve the goal of equality.<sup>519</sup> When a court treats one party unjustly, this argument goes, stare decisis dictates that the court also treat a similarly situated party unjustly.<sup>520</sup> But although the court thereby ensures equal treatment among those two parties, it necessarily treats them differently from all other parties who are treated justly.<sup>521</sup> And because "every person in the world is situated identically with respect to his or her entitlement to be treated justly," this differential treatment violates the principle of equality.<sup>522</sup>

Finally, some scholars question whether stare decisis actually ensures judicial impartiality.<sup>523</sup> This claim is valid, they argue, "if and only if it can be assumed that the judge who laid down the original rule was himself free from bias or prejudice."<sup>524</sup> If he was not, "the doctrine of precedent surely runs the risk of inexorably perpetuating that bias or prejudice in every subsequent decision . . ."<sup>525</sup> Other scholars argue that stare decisis is not even needed to ensure judicial integrity.<sup>526</sup> The civil law expressly forbids reliance on precedent, they argue. Yet, "there is no complaint on the Continent that the judges are not sufficiently bound, as impartiality may be obtained by requiring a statement of the reasons on which a judgment is based even though no prior cases are cited."<sup>527</sup>

These arguments raise valid questions about the extent to which the cur-

<sup>515</sup> See Maltz, *supra* note 498, at 370.

<sup>516</sup> See WASSERSTROM, *supra* note 39, at 72-73.

<sup>517</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 854-69.

<sup>518</sup> See Paulsen, *supra* note 5, at 1545 ("It is not clear at all that the 'obligation to follow precedent' . . . creates any true judicial efficiency gains at all.").

<sup>519</sup> See Peters, *supra* note 497, at 2065-73.

<sup>520</sup> See *id.*

<sup>521</sup> See *id.*

<sup>522</sup> *Id.* at 2068.

<sup>523</sup> See WASSERSTROM, *supra* note 39, at 75-79.

<sup>524</sup> *Id.* at 78.

<sup>525</sup> *Id.* at 78-79.

<sup>526</sup> See Lawson, *supra* note 5, at 24.

<sup>527</sup> GOODHART, *supra* note 191, at 56.

rent practice of stare decisis promotes the values it is thought to serve. However, even if the current practice has not been fully successful, it also has not been entirely unsuccessful. Individuals may not always be able to predict the legal consequences of their actions, but vast areas of the law remain fixed and unchanged. Likewise, although absolute equality may be unobtainable, the practice of treating like cases alike assures a measure of equal treatment that would be difficult to obtain if judges were free to apply different substantive rules in every case. And though the efficiency benefits of stare decisis may diminish as precedents pile up, a system in which the courts "eyed each issue afresh in every case"<sup>528</sup> would certainly be more unwieldy. Thus, any attempt to eliminate stare decisis, even in its non-absolute form, would threaten values that are important to the legal system.

*B. Non-Precedential Opinions and the Rule of Disposition*

But although a complete abandonment of stare decisis might undermine these values, the practice of issuing non-precedential decisions does not necessarily have the same effect. For one thing, the practice likely increases judicial efficiency instead of reducing it. According to one empirical study, "selective publication significantly enhances the courts' productivity."<sup>529</sup> Judges save time writing non-precedential opinions because they need not include the facts or worry about how their words will be scrutinized in the future.<sup>530</sup> They also save time researching legal issues, because the body of case law is substantially reduced.<sup>531</sup>

More fundamentally, non-precedential opinions do not eliminate the restraining force of stare decisis. As Professor Frederick Schauer has demonstrated, the doctrine of precedent restrains courts in two ways.<sup>532</sup> First, it requires a court to decide today's case in conformance with yesterday's decision.<sup>533</sup> This is the backward-looking aspect of stare decisis. Second, because

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<sup>528</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992).

<sup>529</sup> Keith H. Beyler, *Selective Publication Rules: An Empirical Study*, 21 *LOY. U. CHI. L.J.* 1, 12 (1989). Another study found "no support for the hypothesis that limited publication enhances productivity." William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Circuit Court of Appeals: The Price of Reform*, 48 *U. CHI. L. REV.* 573, 596 (1981). However, the authors did find that unpublished opinions are usually much shorter than published opinions, which they said suggests that the practice may save judges time. *See id.* at 600. In any event, there is no evidence that writing non-precedential opinions reduces productivity.

<sup>530</sup> *See Martin, supra* note 21, at 190 (estimating that he and his clerks spend half the time working on unpublished opinions that they spend on published opinions).

<sup>531</sup> *See id.*

<sup>532</sup> Schauer, *supra* note 498, at 572-573.

<sup>533</sup> *See id.*

tomorrow's court must treat today's decision as presumptively binding, a court must also consider the implications of its decision for any case that might arise in the future.<sup>534</sup> This is the forward-looking aspect of *stare decisis*. A court issuing a non-precedential decision is relieved of this latter responsibility, but still has an obligation to follow past decisions. And it is this obligation that preserves the force of *stare decisis*. In other words, if Tuesday's court is bound by Monday's decision, and Wednesday's court is also bound by Monday's decision, why should it matter that Tuesday's decision is non-precedential? As long as both the Tuesday and Wednesday courts follow Monday's decision, there will be no difference between the two opinions, and certainty, equality, and judicial integrity will be maintained.

The primary objection to this argument is that although both the Tuesday and Wednesday courts must adhere to the same decision, few cases are identical. The facts of Tuesday's case will likely differ in some way from the facts of both Monday's and Wednesday's cases. As a result, Tuesday's decision will carve out a rule that was not encompassed by Monday's decision. And because Wednesday's court will not be bound by that rule – and may not even be aware of it – there will be less certainty and equality in the law and a greater potential for judicial bias.

The objection does not refute the argument, however; it merely demonstrates that the key consideration is the scope of the rule that determines how a case must be disposed – what I will call the rule of disposition. If the rule is broad, allowing courts to issue non-precedential decisions whenever a case is remotely similar to an earlier case, the deviation between precedential and non-precedential decisions will be significant and a body of underground law will develop. However, if the rule is sufficiently narrow, the deviation between Monday's and Tuesday's decisions will be practically non-existent, and the values of certainty, equality, and judicial impartiality will be preserved.

In many circuits, the rule of disposition is already narrow. The Seventh Circuit provides that an opinion shall be published – and therefore precedential – if it does any one of the following: 1) establishes or changes a rule of law; 2) involves an issue of continuing public interest; 3) criticizes or questions existing law; 4) constitutes a significant and non-duplicative contribution to legal literature; 5) reverses a lower court opinion that was published; or 6) disposes of a case on remand from the Supreme Court.<sup>535</sup> The Fourth, Fifth, Sixth, Ninth, and D.C. Circuits also have fairly extensive rules.<sup>536</sup> Other circuits, by contrast, pro-

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<sup>534</sup> See *id.* at 589.

<sup>535</sup> See 7TH CIR. R. 53(c)(1).

<sup>536</sup> See 4TH CIR. R. 36(a) (an opinion will be published only if it establishes, alters, modifies, clarifies, or explains a rule of law within the circuit; involves a legal issue of continuing public importance; criticizes existing law; contains an historical review of a legal rule that is not duplicative; or resolves an intra-circuit conflict, or creates a conflict with another circuit); 5TH CIR. R. 47.5.1 (an opinion is published if it establishes, alters, or modifies a rule of law, or calls into question a rule of law that has been generally overlooked; applies an established rule to

vide almost no guidance as to when a decision should be given precedential effect. The Eighth Circuit rules state that unpublished opinions are not precedents, but do not specify how judges should decide whether or not to publish.<sup>537</sup> The Tenth and Eleventh Circuits are similarly silent on this matter.<sup>538</sup> Apparently, in these circuits the decision is left to the discretion of the panel issuing the opinion. It is no surprise, therefore, that Judge Arnold complains about the growth of an underground body of case law.<sup>539</sup> Without a detailed rule of disposition, such a development is inevitable.<sup>540</sup>

What exactly should the rule of disposition provide? The goal is to en-

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facts significantly different from those in prior published opinions; explains, criticizes, or reviews the history of existing case law or statutes; creates or resolves an intra-circuit or inter-circuit conflict; concerns or discusses a factual or legal issue of significant public interest; or is rendered in a case that has been reviewed by, and had its merits addressed by, the U.S. Supreme Court); 6TH CIR. R. 206(a) (in deciding whether to publish, court shall consider whether the opinion establishes, alters, or modifies a rule of law or applies an established rule to novel facts; creates or resolves an intra-circuit or inter-circuit conflict; discusses a legal or factual issue of continuing public interest; is accompanied by a concurrence or dissent; reverses the decision below; addresses a lower court or agency decision that was published; or is a decision that has been reviewed by the Supreme Court); 9TH CIR. R. 36-2 (a disposition should be published only if it establishes, alters, modifies, or clarifies a rule of law; calls attention to a rule generally overlooked; criticizes existing law; involves a legal or factual issue of unique interest or substantial public importance; addresses a lower court or agency decision that was published; disposes of a case following reversal or remand by the Supreme Court; is accompanied by a concurrence or dissent written by a judge who requests publication); D.C. CIR. R. 36(a)(2) (opinion should be published if it resolves an issue of first impression; alters, modifies, or significantly clarifies a rule of law previously announced by the court; calls attention to a rule of law generally overlooked; criticizes or questions existing law; resolves an intra-circuit conflict or creates an inter-circuit conflict; reverses a published agency or district court decision, or affirms on different grounds; or warrants publication in light of other factors that give it general public interest).

<sup>537</sup> The Eighth Circuit does list criteria by which judges should decide whether to affirm or enforce a lower court decision without an opinion. The court may forego a written opinion if the judgement of the district court is based on findings of fact that are not clearly erroneous; the evidence in support of a jury verdict is not insufficient; the order of an agency is supported by substantial evidence on the record as a whole; or no error of law appears. See 8TH CIR. R. 47B. The Circuit provides no separate guidelines for when a written opinion should be published. See generally 8TH CIR. R. 47.

<sup>538</sup> The Tenth Circuit rules state only that issuance of an unpublished opinion means that "the case does not require application of new points of law that would make the decision a valuable precedent." 10TH CIR. R. 36.1. An advisory note to the Eleventh Circuit rules explains that "[o]pinions that the panel believes to have no precedential value are not published." 11TH CIR. R. 36-1, Advisory Note 5.

<sup>539</sup> See Arnold, *supra* note 14, at 224-25.

<sup>540</sup> See Reynolds & Reichman, *supra* note 529, at 629 ("[T]he publication decision will be made in a more intelligent and consistent manner if the judges have detailed criteria to guide them."); Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 313 (1990) (explaining how a lack of precise, detailed publication rules leads to inconsistent behavior among judges).

sure that non-precedential opinions offer nothing that cannot already be found in the case law. Therefore, the rule should be narrow enough to ensure that all non-precedential opinions are merely mechanical and rote applications of existing doctrine. Although the Seventh Circuit rule is a promising start, the courts should adopt an even more detailed rule that combines aspects of the current practice in all the circuits and in some state courts. I recommend that an opinion be given precedential effect if it:<sup>541</sup>

- 1) establishes, alters, modifies or clarifies a rule of law;
- 2) calls attention to a rule of law that appears to have been generally overlooked;
- 3) applies an established rule to facts significantly different from those in previous published opinions applying the rule;
- 4) contains an historical review of a legal rule that is not duplicative, or explains, criticizes, or reviews the history of existing decisional law or enacted law;
- 5) criticizes or questions the existing rule;
- 6) disposes of a case in which the lower court or agency decision was published;
- 7) reverses a decision by a lower court or agency, or affirms the decision on grounds different from those set forth below;
- 8) involves a case that has been reviewed by the Supreme Court and had its merits addressed by a Supreme Court opinion;
- 9) resolves, identifies, or creates an apparent conflict within the circuit or between the circuit and other circuits;
- 10) interprets state law in a way conflicting with state or federal precedent interpreting the state rule;
- 11) is accompanied by a concurring or dissenting opinion;
- 12) is an en banc opinion; or
- 13) involves a legal or factual issue of unique interest or substantial public importance.

This rule is admittedly complex at first glance, but it can be broken down into several categories that make it easier to understand. Sections 1 through 5 concern the substantive legal rule in the case and direct the court to issue a precedential opinion if it has done anything other than routinely apply an established rule to facts highly similar to those of previous precedential opinions. Sections 6 through 8 relate to the actions of lower and higher courts in the same case. The point here is to flag cases that have been addressed in a meaningful way by either a lower or a higher court or that have been the subject of disagreement along the hierarchical ladder. Sections 9 and 10 focus on potential conflicts both within a circuit and between circuits, and on conflicting interpre-

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<sup>541</sup> For a similar recommendation, see Braun, *supra* note 14, at 93 (2000).

tations of state law. Sections 11 and 12 concern the status of the court deciding the case: if the court is divided or is en banc, there is good reason for giving the opinion precedential effect. Finally, section 13 focuses on the subject matter of the case and requires a precedential opinion if the topic is of unique public interest or importance. The reasoning here is that such cases will usually raise new and significant legal issues even if they appear to be squarely covered by an existing legal rule.

Categorized in this way, the rule can be easily grasped and applied. If judges follow these guidelines, an opinion adding anything even remotely new to the law would become binding precedent. And any opinion not given precedential effect would be so redundant and routine that its absence from the body of case law would in no way undermine the values served by stare decisis.

Of course, this leads to another objection, which is that even if courts adopt a narrow rule of disposition, there is no guarantee that it will be followed. Judges are faced with many pressures when deciding a case and may be tempted to issue a non-precedential opinion even though the rules direct otherwise. They may hope to bury a decision that is unsupported by case law or that fails to adequately address arguments by one party.<sup>542</sup> Whatever the reason, if judges wish to circumvent the requirements of the rule, there is nothing to prevent them from doing so.

This argument proves too much, however. Judges are free to ignore and distort not only the rule of disposition, but any rule of law. Even in a precedential opinion, they can rely on false distinctions, shoddy reasoning, or incomplete statements of the law to avoid the force of precedent. So if the lack of assurance that judges will follow a given rule renders stare decisis ineffective, we are in trouble even without non-precedential decisions. Yet most of us do not believe that simply because judges can get away with ignoring rules of law they will necessarily do so. We recognize that judges are restrained by the very methods and practices that constitute the activity of judging – what Karl Llewellyn called “operating technique.”<sup>543</sup> In addition, Stanley Fish has emphasized the way in which people are constrained by membership in a “community of interpretation.”<sup>544</sup> Because judges are socialized members of a profession with similar training and practice, Fish argues, they internalize ways of reading and understanding legal texts that limit their discretion.<sup>545</sup> If such constraints give us confidence that judges will follow ordinary rules of law, they should also provide assurance that judges will follow a rule of disposition. “We are trusted suffi-

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<sup>542</sup> See Arnold, *supra* note 14, at 223 (describing ways in which judges can abuse the practice of issuing non-published decisions).

<sup>543</sup> KARL N. LLEWELLYN, *Introduction to THE CASE LAW SYSTEM IN AMERICA* xviii (Univ. of Chi. Press 1989).

<sup>544</sup> STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* 147-48 (1980).

<sup>545</sup> See *id.*

ciently to decide a case[.]" one judge has noted. "Why can't [sic] we be trusted enough to then make the ancillary decision whether it should be published?"<sup>546</sup>

Two potential responses might be offered. The first is that a rule concerning the *manner* of disposition is less likely to command respect and adherence than a rule concerning the *content* of the disposition. It is one thing for a judge to disregard a rule that protects the vague and indefinite values of certainty and equality; it is far different to ignore a rule that protects the legitimate expectations of a party immediately at hand. The injustice of the latter situation is more palpable and therefore more of a restraint on the judge. Although this argument initially seems appealing, it has several flaws. For one thing, it assumes that judges care more about the interests of the parties before them than about the overall integrity of the law, an assumption that is questionable in light of the frequency with which courts apply precedents they believe to be unjust. Moreover, the most likely reason a judge would disregard a rule of disposition is to cover up her manipulation of a rule affecting the outcome of the case. Therefore, it makes little difference whether judges are more inclined to disregard rules of disposition than rules of decision. Their fidelity to the former will usually be tested only after they have already decided to ignore the latter.

The more formidable response is that although judges are trusted to apply rules of law generally, their work is policed by Supreme Court and en banc review. Even if only a small fraction of cases are ultimately reversed through this process, the mere possibility of being caught keeps judges from intentionally distorting rules of law. Non-precedential decisions are also subject to reversal. But because of limited time and resources, the Supreme Court and en banc courts are less likely to review decisions that affect only the immediate parties and will not become binding precedent.<sup>547</sup> Judges realize this, and thus feel less constrained to follow not only the rule of disposition, but any rule of law, because by issuing non-precedential decisions they can keep deviations from precedent off the radar screen.

The strength of this argument depends upon the validity of the premise that the Supreme Court and the en banc courts care more about the long-term effects of bad decisions than about whether the parties receive justice – or at least that given two equally unjust decisions, the courts would first review the one likely to be perpetuated. With regard to the Supreme Court, this premise seems mostly accurate. The Court follows a general policy of using its certiorari discretion to resolve important issues of law, not to correct case-specific errors.<sup>548</sup> And although the justices occasionally grant certiorari to review non-

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<sup>546</sup> Martin, *supra* note 21, at 192.

<sup>547</sup> See William L. Reynolds & William L. Richman, *The Non-Precedential Precedent: Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1203 (1978) (speculating that the Supreme Court would be less likely to review unpublished opinions than published opinions).

<sup>548</sup> See SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of

precedential opinions,<sup>549</sup> it seems a safe bet that they are more likely to review opinions that have precedential effect. The circuit courts use varying criteria for deciding whether to hear a case en banc,<sup>550</sup> and they may be more inclined than the Supreme Court to review non-precedential opinions that deviate from circuit precedent. Unfortunately, there appears to be no way of testing this empirically. Even if the majority of decisions reviewed en banc are precedential, this could simply be evidence that judges are in fact following the rule of disposition. It could also be evidence that non-precedential opinions, true to design, rarely involve important issues worthy of review (in which case, they would not attract en banc attention even if they were precedential).

That said, I am willing to accept the proposition that, other things being equal, the en banc courts, like the Supreme Court, are more likely to review precedential opinions than non-precedential opinions. Even so, that is not a sufficient reason to eliminate non-precedential opinions. For although these modes of review cannot be relied upon to keep judges in line, there are other mechanisms available to guard against potential abuses.

The first mechanism is a requirement that even when a court issues a non-precedential opinion it must give reasons for its decision. Surprisingly, Judge Arnold's opinion does not mention this requirement; it leaves courts free to issue one-line summary dispositions that simply state "affirmed" or "reversed" – as long as the disposition can be cited as precedent in later cases.<sup>551</sup> But surely courts will be more constrained under a regime in which they must explain their decisions, however briefly, than under a regime in which they need not give reasons but must allow citation to one-line summary dispositions. Setting aside the problem of how a court could possibly be held to a one-line disposition that gives no details of the case, the requirement of a written opinion has

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law."); ROBERT L. STERN, ET AL., *SUPREME COURT PRACTICE* 113 (7th ed. 1993).

<sup>549</sup> See *Johnson v. United States*, 529 U.S. 694 (2000); *Sims v. Apfel*, 530 U.S. 103 (2000); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994); *Houston v. Lack*, 487 U.S. 266 (1988); *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147 (1984); *Connick v. Myers*, 461 U.S. 138 (1983); *Moore v. Illinois*, 434 U.S. 220 (1977).

<sup>550</sup> The Tenth Circuit rules, for instance, state that en banc review "is an extraordinary procedure intended to focus the entire court on an issue of exceptional public importance or on a panel decision that conflicts with a decision of the United States Supreme Court or of this court." 10TH CIR. R. 35.1(A). The Federal Rules of Appellate Procedure, which many circuits follow in the absence of a local rule on point, state that en banc review should be used to maintain the uniformity of the circuit's decisions or to resolve a question of exceptional importance. See FED. R. APP. P. 35(a). The Sixth Circuit disapproves of en banc review for errors in non-precedential opinions, but appears to leave open the possibility of en banc review for non-precedential opinions that "directly conflict" with Supreme Court or Sixth Circuit precedent. See 6TH CIR. R: 35(c).

<sup>551</sup> Judge Arnold does argue that courts should be required to justify deviations from precedent. See 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, *Anastasoff v. United States*, 235 F.3d 1054 (8th Cir. 2000) (en banc). But he makes no mention of a general requirement that they explain the reasons for their decisions. See *id.*

at least two advantages. First, the process of justification itself has a restraining effect for it forces a court to confront the weaknesses of its conclusion.<sup>552</sup> This is a familiar phenomenon: nearly everyone has had the experience of making a snap judgment, only to find that it cannot be justified on paper. Judges face this same difficulty and often talk about decisions that just “won’t write” no matter how appealing they seemed during conference.<sup>553</sup> Second, a written opinion provides a basis for evaluation by the parties in a case, by the bar at large, and by the academy. Judges pride themselves on their independence, and rightly so. However, they are still part of the legal community, and when forced to write an opinion that will be read and scrutinized by others within this community, they are less likely to deviate from rules of law.

One might respond that the requirement of a written opinion will only encourage compliance with substantive rules of law, not with the rule of disposition. After all, how many lawyers and scholars will examine whether a particular opinion was properly labeled as non-precedential; they are more likely to focus on the outcome of the case. However, this response misses the point. As noted above, the most likely reason a judge would circumvent the rule of disposition is to cover up her manipulation of substantive rules of law. So any measure that increases compliance with substantive rules of law will also increase compliance with the rule of disposition by eliminating the incentive to depart from it.<sup>554</sup>

In addition to this external scrutiny of court decisions, there are also several internal mechanisms that can be employed to guard against judicial non-compliance. First, the circuits can require that decisions be given precedential effect unless all three judges on the panel agree otherwise. Although a few circuits already have adopted this rule, most either leave the decision to a majority of judges on the panel or provide no guidelines.<sup>555</sup> Some judges claim that, in

<sup>552</sup> See Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1447-48 (1995); Reynolds & Richman, *supra* note 529, at 603.

<sup>553</sup> See Nichols, *supra* note 31, at 915 (describing how the process of writing an opinion often clarifies whether it should be precedential or non-precedential); Peter M. Shane, *Federalism's "Old Deal": What's Right and Wrong With Conservative Judicial Activism*, 45 VILL. L. REV. 201, 225 (2000). It is true that the process of justification is most likely to encourage compliance with substantive rules of law, but it can also promote adherence to the rule of disposition. In other words, judges may find that a particular decision just “won’t write” as a non-precedential opinion.

<sup>554</sup> Nor should the fact that non-precedential opinions are not published in the federal reporters make any difference. Non-precedential opinions, like published opinions, are searchable in the Westlaw and Lexis databases. See Martin, *supra* note 21, at 185-86. Additionally, few lawyers today spend their time combing through the federal reporters.

<sup>555</sup> The First, Fifth, and Sixth Circuits require all three judges to agree on whether a decision will be published (and thus precedential). See 1ST CIR. R. 36(b)(2)(B); 5TH CIR. R. 47.5.2; 6TH CIR. R. 206(b). The Seventh, Ninth, and Eleventh Circuits require only a majority vote to determine the issue of publication. See 7TH CIR. R. 53(d)(1); 9TH CIR. R. 36-5; 11TH CIR. R. 36-2. The Fourth Circuit states that either the author or a majority of joining judges can decide whether to publish. See 4TH CIR. R. 36(a). The Eighth, Tenth, and D.C. Circuits provide for

practice, the decision is nearly always left to the author, which would suggest that it makes no difference what the rule specifies.<sup>556</sup> However, it seems probable that at least sometimes judges defer to the author's preference because they cannot insist on publication alone and do not want to appear difficult. A formal requirement of unanimity may lessen the reluctance of judges to express their true beliefs on the matter and thus provide a front-line defense against manipulation of the practice.<sup>557</sup>

Second, because it is possible that an entire panel may agree to circumvent the rule of disposition, the staff of each circuit could distribute summaries of non-precedential opinions before they are issued. Several circuits currently distribute pre-publication reports of precedential opinions so that judges can quickly scan for decisions that appear erroneous. If non-precedential decisions were added to this list, judges would be more aware of the opinions that are being omitted from the body of case law. The D.C. Circuit has already adopted this approach.<sup>558</sup> As a further check, the circuits could adopt rules allowing any judge on the court to request, within a certain time frame, that a decision previously designated as non-precedential be given precedential effect. The panel could then be given an opportunity to explain its reasons for issuing a non-precedential decision. But if the judge was unsatisfied with the explanation and could persuade a limited number of other judges that the opinion should be given precedential effect, the panel would be required to change the form of disposition.<sup>559</sup>

Other safeguards could also be implemented. Circuits could require that each non-precedential decision explain not only the reasons for the outcome but also the panel's reason for not issuing a precedential opinion. They could also assign staff members to scrutinize recently issued non-precedential opinions and distribute lists of those that potentially deviate from the circuit's rules. Judges

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unpublished opinions, but do not specify how many judges on a panel must agree to this form of disposition. The Third Circuit rules do not address the topic of unpublished opinions at all.

<sup>556</sup> See Arnold, *supra* note 14, at 221.

<sup>557</sup> See Nichols, *supra* note 31, at 924 (stating that a requirement of unanimity is a "safeguard against injudicious failure to publish"). Indeed, there is some empirical evidence that merely specifying the number of judges on a panel who must vote on the issue of publication tends to result in a higher number of published opinions. See Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 89 (2001) (finding that cases are more likely to be published in circuits requiring a majority vote for publication than in those circuits that do not specify how many judges are needed to vote on publication).

<sup>558</sup> See D.C. CIR. R. 36(c).

<sup>559</sup> I do not think it should require a majority vote to change the form of disposition. I also do not think one judge should have this power. The reason is that if an individual judge objected to the practice of issuing non-precedential decisions, she could single-handedly eliminate the practice. A requirement that one-fourth of the judges agree before the form of disposition is changed seems like a reasonable compromise.

could then examine the opinions on these lists and request that any non-precedential opinions be re-designated as precedential.

A likely objection to these internal mechanisms is that they would be expensive and time-consuming. Judges already have enough work without monitoring the flood of non-precedential opinions that are issued each week. But although these procedures might increase the workload somewhat, the complete elimination of non-precedential opinions would certainly increase it more. Moreover, if courts are able to assign some of the oversight duties to staff members, the burden on judges would be minimal.

The point of this discussion is not to provide a detailed framework that the circuits can implement wholesale. Each circuit has different needs and must develop a monitoring system that suits those needs. The point is to demonstrate that there are ways to guard against the use of non-precedential opinions to deviate from rules of law, and that those methods are every bit as effective as the potential for Supreme Court and en banc review. If non-precedential opinions are undermining the values that are served by stare decisis, it is not because they necessarily must do so. It is only because adequate safeguards have not been implemented to assure the same degree of conscientiousness that is expected of judges generally.

#### CONCLUSION

After being ignored for more than two centuries, the constitutional status of stare decisis is poised to emerge as a central topic in federal courts litigation and scholarship. Judge Arnold's analysis in *Anastasoff v. United States* has opened up a provocative line of inquiry that lawyers and judges will likely mine for years to come. This is unquestionably a positive development. For decades, most scholars have focused exclusively on the jurisdictional aspects of Article III, asking how far the judicial power extends. Now, the academic community can begin to focus on the equally important question of what the judicial power entails.

But although Judge Arnold's analysis points out a valuable new area of research, his conclusions about the history of stare decisis are contestable. Far from being an immemorial custom, the obligation to follow precedent developed over hundreds of years in response to the changing needs and conditions of the legal system. It was not finally accepted in England until the late eighteenth century and was widely disregarded by judges in this country until the beginning of the nineteenth. It is therefore doubtful that the founding generation would have viewed stare decisis as an inherent limit on judicial power. It is also doubtful that the Framers intended for stare decisis to operate as part of the checks and balances implicit in the Constitution's structure. The Framers expressed few concerns about the potential abuse of judicial power and thought the courts would be sufficiently restrained by other checks, such as impeachment and congressional control over jurisdiction. Moreover, stare decisis is an intra-branch check that depends upon the self-restraint of the very officials it is meant to con-

strain. The Framers, however, eschewed such self-policing in favor of a system in which each branch was given “the necessary constitutional means and personal motives” to frustrate the ambitions of the other branches.

If stare decisis is constitutionally required, it is not because of original understanding, intent, or the structure of the constitution. Instead, it is simply because the courts have staked their legitimacy upon adherence to precedent. Even if this is true, however, it does not follow that non-precedential opinions are also unconstitutional. Stare decisis is not an end in itself, but a means to serve important values in the legal system. And as this Article demonstrates, the practice of issuing non-precedential opinions does not necessarily undermine those values. As long as courts adopt a narrow rule of disposition and mechanisms to assure compliance with that rule, the values of stare decisis will be preserved and the legitimacy of the courts will be maintained.

## PLEASE DON'T CITE THIS!

WHY WE DON'T ALLOW CITATION TO UNPUBLISHED DISPOSITIONS

By Alex Kozinski and Stephen Reinhardt

**L**ike other courts of appeals, the Ninth Circuit issues two types of merits decisions: opinions and memorandum dispositions, the latter affectionately known as memdispos. Opinions contain a full-blown discussion of legal issues and are certified for publication in the Federal Reporter. Once final, they are binding on all federal judges in the circuit—district, bankruptcy, magistrate, administrative, and appellate. Until superseded by an en banc or Supreme Court opinion, they are the law of the circuit and may be cited freely; indeed, if they are directly on point, they *must* be cited.

The rule is different for memdispos. Pursuant to Ninth Circuit Rule 36-3, memdispos are not published in the Federal Reporter, nor do they have precedential value. Although memdispos can be found on Westlaw and Lexis, they may not be cited. So far as Ninth Circuit law is concerned, memdispos are a nullity.

Few procedural rules have generated as much controversy as the rule prohibiting citation of memdispos. At bench and bar meetings, lawyers complain at length about being denied this fertile source of authority. Our Advisory Committee on Rules of Practice and Procedure, which is composed mostly of lawyers who practice before the court, regularly proposes that memdispos be citable. When we refuse, lawyers grumble that we just don't understand their problems.

In fact, it's the lawyers who don't understand *our* problems. Court of appeals judges perform two related but separate tasks. The first is error-correction: We review several thousand cases every year to ensure that

the law is applied correctly by the lower courts, as well as by the many administrative agencies whose decisions we review. The second is development of the circuit's law: We write opinions that announce new rules of law or extensions of existing rules.

Writing a memdispo is straightforward. After carefully reviewing the briefs and record, we can succinctly explain who won, who lost, and why. We need not state the facts, as the parties already know them; nor need we announce a rule general enough to apply to future cases. This can often be accomplished in a few sentences with citations to two or three key cases.

Writing an opinion is much harder. The facts must be set forth in sufficient detail so lawyers and judges unfamiliar with the case can understand the question presented. At the same time, it is important to omit irrelevant facts that could form a spurious ground for distinguishing the opinion. The legal discussion must be focused enough to dispose of the case before us yet broad enough to provide useful guidance in future cases. Because we normally write opinions where the law is unclear, we must explain why we are adopting one rule and rejecting others. We must also make sure that the new rule does not conflict with precedent or sweep beyond the questions fairly presented.

While a memdispo can often be prepared in a few hours, an opinion generally takes many days (often weeks, sometimes months) of drafting, editing, polishing, revising. Frequently, this process brings to light new issues, calling for further research, which, in turn, may send the author back to square one. In short, writing an opinion is a tough, delicate, exacting, time-consuming process. Circuit judges devote something like half their time, and their clerks' time, to cases in which they write opinions, dissents, or concurrences.

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Once an opinion is circulated, the other judges on the panel and their clerks scrutinize it very closely. Often they suggest modifications, deletions, or additions. It is quite common for judges to exchange lengthy memoranda about a proposed opinion. Sometimes, differences can't be ironed out, precipitating a concurrence or dissent. By contrast, the phrasing (as opposed to the result) of a memdispo is given relatively little scrutiny by the other chambers; dissents and concurrences are rare.

Opinions take up a disproportionate share of the court's time even after they are filed. Slip opinions are circulated to all chambers, and many judges and law clerks review them for conflicts and errors. Petitions for rehearing en banc are filed in about three-quarters of the published cases. Based on the petition and an independent review of the case, off-panel judges frequently point out problems with opinions, such as conflicts with circuit or Supreme Court authority. A panel may modify its opinion; if it does not, the objecting judge may call for a vote to take the case en banc. In 1999 there were 44 en banc calls, 21 of which were successful.

Successful or not, an en banc call consumes substantial court resources. The judge making the call circulates one or more memos criticizing the opinion, and the panel must respond. Frequently, other judges circulate memoranda supporting or opposing the en banc call. Many of these memos are as complex and extensive as the opinion itself. Before the vote, every active judge must consider all of these memos, along with the panel's opinion, any separate opinions, the petition for rehearing, and the response thereto. The process can take months to complete.

If the case does go en banc, eleven judges must make their way to San Francisco or Pasadena to hear oral argument and confer. Because the deliberative process is much more complicated for a panel of eleven than a panel of three, hammering out an en banc opinion is even more difficult and time-consuming than writing an ordinary panel opinion.

Now consider the numbers. During calendar year 1999, the Ninth Circuit decided some 4,500 cases on the merits, approximately 700 by opinion and 3,800 by memdispo. Each active judge heard 450 cases as part of a three-judge panel and had writing responsibility in a third of those cases. That works out to an average of 150 dispositions—20 opinions and 130 memdispos—per judge. In addition, each of us was required to review, comment on, and eventually join or dissent from 40 opinions and 260 memdispos circulated by other judges with whom we sat.

Writing 20 opinions a year is like writing a law review article every two and a half weeks; joining 40 opinions is akin to commenting extensively once a week or so on articles written by others. Just from the numbers, it's obvious that memdispos get written a lot faster than opinions—about one every other day. It is also obvious that explaining to the parties who wins, who loses, and why takes far less time than preparing an opinion that will serve as precedent throughout the circuit and

beyond. Moreover, we seldom review the memdispos of other panels or take them en banc. Not worrying about making law in 3,800 memdispos frees us to concentrate on those dispositions that affect others besides the parties to the appeal—the published opinions.

If memdispos could be cited as precedent, conscientious judges would have to pay much closer attention to their precise wording. Language that might be adequate when applied to a particular case might well be unacceptable if applied to future cases raising different fact patterns. And, though three judges might all agree on the outcome of the case before them, they might not agree on the precise reasoning or the rule to be applied in future cases. Unpublished concurrences and dissents would become much more common, as individual judges would feel obligated to clarify their differences with the majority, even when those differences had no bearing on the case before them. In short, we would have to start treating the 130 memdispos for which we are each responsible, and the 260 memdispos we receive from other judges, as mini-opinions. We would also have to pay much closer attention to the memdispos written by judges on other panels—at the rate of 10 a day.

Obviously, it would be impossible to do this without neglecting our other responsibilities. We write opinions in only 15 percent of the cases already and may well have to reduce that number. Or we could write opinions that are less carefully reasoned. Or spend less time keeping the law of the circuit consistent through the en banc process. Or reduce our memdispos to one-word judgment orders, as have other circuits. None of these are palatable alternatives, yet something would have to give.

Lawyers argue that we need not change our internal practices, that we should just keep doing what we're doing but let the memdispos be cited as precedent. But what does *precedent* mean? Surely it suggests that the three judges on a panel subscribe not merely to the result but also to the phrasing of the disposition.

With memdispos, this is simply not true. Most are drafted by law clerks with relatively few edits from the judges. Fully 40 percent of our memdispos are in screening cases, which are prepared by our central staff. Every month, three judges meet with the staff attorneys who present us with the briefs, records, and proposed memdispos in 100 to 150 screening cases. If we unanimously agree that a case can be resolved without oral argument, we make sure the result is correct, but we seldom edit the memdispo, much less rewrite it from scratch. Is it because the memdispos could not be improved by further judicial attention? No, it's because the result is what matters in those cases, not the precise wording of the disposition. Any refinements in language would cost valuable time yet make little difference to the parties. Using the language of the memdispo to predict how the court would decide a different case would be highly misleading.

We are a large court with many judges. Keeping the law of the circuit clear and consistent is a full-time job,

*Continued on page 81*

## DON'T CITE THIS!

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even without having to worry about the thousands of unpublished dispositions we issue every year. Trying to extract from memdispos a precedential value that we didn't put into them may give some lawyers an undeserved advantage in a few cases, but it would also damage the court in important and permanent ways. Based on our combined three decades of experience as Ninth Circuit judges, we can say with confidence that citation of memdispos is an uncommonly bad idea. We urge lawyers to drop it once and for all. □

FEDERAL AND STATE COURT RULES GOVERNING  
PUBLICATION AND CITATION OF OPINIONS

Melissa M. Serfass\* and Jessie L. Cranford\*\*

Since publication of last summer's *Anastasoff*<sup>1</sup> decision by a panel of the Eighth Circuit, there has been renewed interest in and debate over the issue of unpublished appellate court opinions and their precedential value. However, this controversy is certainly not new. Many articles have analyzed the practice of using unpublished opinions and the rationale behind their limited precedential value.<sup>2</sup> Other works have surveyed or compiled court publication and citation rules.<sup>3</sup>

Many jurisdictions have publication standards similar to those proposed in the *Model Rules on Publication of Judicial*

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\*Electronic Resources and Reference Librarian, Associate Professor of Law Librarianship, University of Arkansas at Little Rock William H. Bowen School of Law, UALR/Pulaski County Law Library. This article is dedicated to the memory of Athalene Lierly Crook, Melissa's mom. Her support was unwavering, as always.

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1. *Anastasoff v. U.S.*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

2. See e.g. Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions and the Nature of Precedent*, 4 Green Bag 2d 17 (2000); Martha J. Dragich, *Will the Federal Courts of Appeal 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 (1995); Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 Vand. L. Rev. 71 (2001); Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. Mich. J.L. Reform 119 (1994) (see n. 39 for extensive compilation of articles discussing issue).

3. Carol R. Flango & David B. Rottman, *Appellate Court Procedures* 139 tbl. 3.7 (National Ctrs. for State Cts. 1998); Jane Williams, *Survey of State Court Opinion Writing and Publication Practices*, 83 Law. Lib. J. 21 (1991); Fed. Proc. L.Ed. vol. 2A §§ 3:826-3:827 (1994).

*Opinions.*<sup>4</sup> Some jurisdictions have no publication criteria at all, while others fall somewhere between the two extremes. Most publication guidelines are contained in court rules, which also often provide that unpublished opinions cannot be cited as precedent.

This article provides updated information in chart form for ease of accessibility and comparison. It focuses on the basic guidelines for publishing opinions and citing unpublished opinions in the federal courts of appeal and the appellate courts of the fifty states and the District of Columbia. We have sought to convey the essence of the rules; however, the format and scope of this piece does not allow for extensive analysis or procedural detail. In most instances, we have provided rules or standard practices for the court of last resort and the intermediate appellate court.<sup>5</sup> When we found a court rule, we cited it. When no court rule governed, we looked to internal operating procedures, statutes, and cases. When we found no criteria for full published opinions, we cited standards for disposition by summary order or memorandum opinions. In listing publication criteria, we have used the term “affects” to encompass the terms “alter,” “modify,” “clarify,” “explain,” or “call attention to” existing law. When a phrase such as “criteria include” introduces a list, it may be illustrative, rather than all-inclusive.

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4. Comm. on Use of Appellate Court Energies, Advisory Council on Appellate Justice, *Standards for Publication of Judicial Opinions* 22-23 (1973). The model rule proposes that an opinion should not be published unless it establishes a new rule of law, alters, modifies or criticizes an existing rule, involves a legal issue of continuing public interest or resolves an apparent conflict of authority.

5. Delaware, the District of Columbia, Maine, Montana, Nevada, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming do not have intermediate appellate courts. *Directory of State and Federal Courts, Judges, and Clerks*, xi-xiv (Catherine A. Kitchell, comp., 2001 ed., BNA 2000).

TABLE 1: PUBLICATION RULES IN FEDERAL COURTS

<i>Circuit</i>	<i>Publication Standards</i>	<i>Citation Rule</i>
First	1st Cir. R. 36(b) The general policy is that opinions be published and available for citation. An exception may be made if an opinion would not articulate a new rule of law, modify an established rule, apply an established rule to novel facts or would "serve otherwise as a significant guide to future litigants."	1st Cir. R. 36(b)(2)(F) "Unpublished opinions may be cited only in related cases . . . Unpublished means the opinion is not published in the printed West reporter."
Second	2d Cir. R. 0.23 "[I]n those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order."	2d Cir. R. 0.23 The court may append a brief written statement to dispositions by summary order. These statements shall not be cited or otherwise used in unrelated cases before this or any other court.
Third	3d Cir. I.O.P. 5.2 "An opinion, whether signed or per curiam, is published when it has precedential or institutional value."  3d Cir. I.O.P. 5.3 Opinions which appear to have value only to the trial court or the parties are designated as unreported and are not sent for publication.	3d Cir. I.O.P. 5.3 Unreported opinions are not precedential.  3d Cir. I.O.P. 5.8 "Because the court historically has not regarded unreported opinions as precedents that bind the court, as such opinions do not circulate to the full court before filing, the court by tradition does not cite to its unreported opinions as authority."
Fourth	4th Cir. R. 36(a) An opinion will be published if it establishes or affects a rule of law within the circuit, involves a legal issue of continuing public interest, criticizes existing law, contains an original historical review of a legal rule or resolves a conflict between panels of the court, or creates a conflict with a decision in another circuit.	4th Cir. R. 36(c) "Citation of this Court's unpublished dispositions. . . in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case." If counsel believes that an unpublished disposition of any court has precedential value and that there is no published opinion that would serve as well, such disposition may be cited.

<i>Circuit</i>	<i>Publication Standards</i>	<i>Citation Rule</i>
<b>Fifth</b>	<p>5th Cir. R. 47.5.1            "[O]pinions that may in any way interest persons other than the parties to a case should be published." Criteria include establishing a new rule of law, affecting an existing rule, applying an established rule to significantly different facts from those in published opinions, creating or resolving a conflict within the circuit or between circuits, or discussing a factual or legal issue of significant public interest.</p>	<p>5th Cir. R. 47.5.3            Unpublished opinions issued before January 1, 1996 are precedent. Because opinions believed to have precedential value are published, unpublished opinions should normally be cited only in the limited circumstances of res judicata, collateral estoppel or law of the case.</p> <p>5th Cir. R. 47.5.4            Unpublished opinions issued on or after January 1, 1996 are not precedent except in limited circumstances of res judicata, collateral estoppel or law of the case. Unpublished opinions may be cited as persuasive authority.</p>
<b>Sixth</b>	<p>6th Cir. R. 206(a)            Criteria considered by panels in determining publication include whether a new rule of law is established, an existing rule is affected or applied to a novel fact situation, a conflict is created or resolved within the circuit or between circuits, or a legal or factual issue of continuing public interest is discussed.</p>	<p>6th Cir. R. 28(g)            "Citation of unpublished decisions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case." If a party believes that an unpublished disposition has precedential value and that no published opinion would serve as well, it may be cited.</p>
<b>Seventh</b>	<p>7th Cir. R. 53(b)            The court may dispose of an appeal by unpublished order or published opinion.</p> <p>7th Cir. R. 53(c)(1)            Criteria for publication include establishing a new rule of law or affecting an existing rule, involving an issue of continuing public interest, criticizing or questioning existing law, or constituting a significant and non-duplicative contribution to legal literature.</p>	<p>7th Cir. R. 53(b)(2)(iv)            Unpublished orders shall not be cited or used as precedent except to support a claim of res judicata, collateral estoppel, or law of the case.</p>

<i>Circuit</i>	<i>Publication Standards</i>	<i>Citation Rule</i>
Eighth	<p>8th Cir. R. App. I(4) An opinion should be published when it establishes a new rule of law or affects an existing rule, newly interprets or conflicts with a decision of a federal or state appellate court, applies an established rule of law to facts significantly differing from those in published opinions, involves a legal or factual issue of continuing public or legal interest, rejects the rationale of a previously published opinion in the same case, or is a significant contribution to legal literature.</p>	<p>8th Cir. R. 28A(i) "Unpublished opinions are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well."</p>
Ninth	<p>9th Cir. R. 36-1 Written dispositions of the court are designated as opinions, memoranda, or orders. All opinions are published; no memoranda are published; orders are not published except by order of the court.</p> <p>9th Cir. R. 36-2 Criteria for designating dispositions as opinions include establishing or affecting a rule of law, criticizing existing law, or involving a legal or factual issue of unique or substantial public interest.</p>	<p>9th Cir. R. 36-3 Unpublished opinions are not binding precedent except when relevant under the doctrines of law of the case, res judicata and collateral estoppel and they may only be cited in those circumstances or for factual purposes<sup>6</sup></p>

6. This rule has been adopted for a limited 30-month period, beginning July 1, 2000. Litigants are invited to submit comments, after which the Circuit Advisory Committee on Rules will report to the court not only the frequency of citation of unpublished dispositions, but also any problems or concerns, and will issue its recommendation whether the rule should be permanent. Unless the court extends the rule by December 31, 2002, it will automatically expire on that date, and its former version, prohibiting citation of unpublished dispositions, will be reinstated.

<i>Circuit</i>	<i>Publication Standards</i>	<i>Citation Rule</i>
Tenth	10th Cir. R. 36.1-.2 The court writes opinions only in cases requiring application of new points of law that would make the decision a valuable precedent. When the opinion below has been published, the court ordinarily designates its disposition for publication. If the disposition is by order and judgment, the court will publish only the result of the appeal.	10th Cir. R. 36.3 Unpublished orders and judgments are not binding precedents, except under the doctrines of law of the case, res judicata, and collateral estoppel. While citation of unpublished decisions is disfavored, an unpublished decision may be cited if it has persuasive value regarding a material issue not addressed in a published opinion and its use would assist the court in its disposition of the present case.
Eleventh	11th Cir. R. 36-1, 36-2 When the court determines that an opinion would have no precedential value and the record below supports affirmance, the judgment or order may be affirmed or enforced without opinion. An opinion is unpublished unless a majority of the panel decides to publish it.	11th Cir. R. 36-2 Unpublished opinions are not considered binding precedent; however they may be cited as persuasive authority.  11th Cir. R. 36-3, I.O.P. 5 The court does not favor reliance on unpublished opinions.
District of Columbia	D.C. Cir. R. 36(a) The policy of the court is to publish opinions of general public interest. Publication criteria include whether it is a case of first impression; whether it alters, affects, criticizes, or questions existing law; or whether it resolves an apparent conflict within the circuit or creates a conflict between circuits.	D.C. Cir. R. 28(c) Unpublished orders or judgments of the court may not be cited as precedent. Counsel may refer to an unpublished disposition when its binding or preclusive effect, rather than its quality as precedent, is relevant.

<i>Circuit</i>	<i>Publication Standards</i>	<i>Citation Rule</i>
<b>Federal</b>	<p>Fed. Cir. R. 47.6(a) Disposition of an appeal may be announced in an opinion or in a judgment of affirmance without opinion. Dispositions not to be cited as precedent are issued specifically stating that fact.</p> <p>Fed. Cir. R. App. V I.O.P. 10 The court's policy is to limit precedential opinions. Criteria for publication include issues of first impression; cases that establish a new rule of law, affect, or criticize existing law; cases that apply existing rules to novel fact situations; cases that create or resolve conflicts in the circuit or between circuits; or cases treating legal issues of substantial public interest, a new constitutional or statutory issue, or a previously overlooked rule of law.</p>	<p>Fed. Cir. R. 47.6(b) An opinion designated as nonprecedential may not be cited except in relation to a claim of res judicata, collateral estoppel or law of the case.</p>

TABLE 2: PUBLICATION RULES IN STATE COURTS

<i>State</i>	<i>Publication Standards</i>	<i>Citation Rule</i>
Alabama	Ala. R. App. P. 53, 54 All supreme court, court of civil appeals and court of criminal appeals opinions are published in the official reports of Alabama decisions. Trial court judgments or orders may be affirmed without opinion when the court determines that an opinion would serve no significant precedential purpose (such dispositions are designated as "No Opinion" cases and are not published).	Ala. R. App. P. 53(d), 54(d) Unpublished decisions of the supreme court, court of civil appeals and court of criminal appeals "have no precedential value and shall not be cited in arguments or briefs and shall not be used by any court within this state, except for . . . establishing the application of the doctrines of law of the case, res judicata, collateral estoppel, double jeopardy, or procedural bar."
Alaska	Alaska R. App. P. 214(a) "The court may determine that an appeal shall be disposed of by summary order and without formal written opinion. To assist the court in making this determination, the parties may request in writing that an appeal be so decided." This rule applies to both the supreme court and the court of appeals. Alaska R. App. P. 201.	Alaska R. App. P. 214(d) "Summary decisions under this rule are without precedential effect and may not be cited in the courts of this state."
Arizona	Ariz. Sup. Ct. R. 111(a)-(b); Ariz. R. Civ. App. P. 28(a)-(b) An opinion is a written disposition intended for publication. A memorandum decision is a written disposition not intended for publication. Publication standards include establishing, criticizing, or affecting existing law; calling attention to rules of law which appear to have been generally overlooked, or involving issues of unique interest or substantial public importance.	Ariz. Sup. Ct. R. 111(c); Ariz. R. Civ. App. P. 28(c) Memorandum decisions are neither regarded as precedent nor cited in any court except to establish defenses of res judicata, collateral estoppel, or law of the case. Cases may be cited to inform the appellate court of other memorandum decisions so that the court can decide whether to issue a published opinion, grant a motion for reconsideration, or grant a petition for review.

<i>State</i>	<i>Publication Standards</i>	<i>Citation Rule</i>
Arkansas	<p>Ark. S. Ct. &amp; Ct. App. R. 5-2(a), (c)            All signed opinions of the supreme court are published. Court of appeals opinions may be in conventional or memorandum form. Court of appeals opinions resolving novel or unusual issues will be published. Unpublished opinions are marked "Not Designated for Publication."</p> <p>See <i>In Re Memorandum Opinions</i>, 700 S.W.2d 63 (Ark. 1985) (per curiam) for standards governing issuance of memorandum opinions.</p>	<p>Ark. S. Ct. &amp; Ct. App. R. 5-2(d)            Court of appeals opinions not designated for publication are not published in the official reporter and "shall not be cited, quoted or referred to by any court or in any argument, brief, or other materials presented to any court (except in continuing or related litigation upon an issue such as res judicata, collateral estoppel, or law of the case)."</p>
California	<p>Cal. R. Ct. 976(a)            All opinions of the supreme court are published in the official reports.</p> <p>Cal. R. Ct. 976(b)            Opinions of the court of appeals or appellate departments of the superior court are not published unless the opinion establishes a new rule of law, applies an existing rule to novel facts, criticizes or affects an existing rule, resolves or creates a conflict in the law, involves a legal issue of continuing public interest, or makes a significant contribution to legal literature.</p> <p>California has a rule on partial publication, Cal. R. Ct. 976.1, and a rule on depublishation, Cal. R. Ct. 979.</p>	<p>Cal. R. Ct. 977            Opinions of a court of appeal or appellate departments of the superior court that are not certified for publication or ordered published may not be cited or relied on by a court or a party in any other action or proceeding except when it is relevant under the doctrines of law of the case, res judicata or collateral estoppel or it affects the same defendant in another criminal or disciplinary proceeding.</p>

<i>State</i>	<i>Publication Standards</i>	<i>Citation Rule</i>
Colorado	<p>Although all supreme court opinions are published, the court does dispose of some issues by unpublished order.<sup>7</sup></p> <p>Colo. App. R. 35(f) A court of appeals opinion is not published unless it establishes a new rule of law, affects an existing rule, applies an established rule to a novel fact situation, involves a legal issue of continuing public interest, "directs attention to the shortcomings of existing common law or inadequacies in statutes," or resolves an apparent conflict of authority. Unpublished opinions bear the legend, "Not Selected for Publication."</p>	<p>Unpublished orders of the supreme court may not be cited.<sup>8</sup></p> <p>Colo. App. R. 35(f) "Those opinions selected for official publication shall be followed as precedent by the trial judges of the State of Colorado."</p>
Connecticut	<p>Conn. Gen. Stat. § 51-212(b) "The reporter or the person appointed to perform his duties shall make reports of [all] the cases argued and determined in the Supreme Court, [and] prepare the reports for publication."</p> <p>Conn. Gen. Stat. § 51-215a(b) The clerk of the appellate court files copies of memoranda of decisions in appellate court cases with the reporter of judicial decisions. The reporter prepares all of the decisions for publication.</p>	<p>Conn. R. App. P. 67-9 Unreported decisions from other jurisdictions may be cited before the court if the person making reference to the decision provides the court and opposing counsel with copies.</p>

7. Telephone interview with Susan Festag, Chief Deputy Clerk, Colo. Sup. Ct. (May 11, 2001).

8. *Id.*

State	Publication Standards	Citation Rule
Delaware	<p>Del. Sup. Ct. R. 17(a)            "All decisions finally determining or terminating a case shall be made by written opinion, or by written order, as determined by the Court."</p> <p>See Del. Sup. Ct. I.O.P. XI(2) for criteria on disposition by order.</p> <p>Del. Sup. Ct. R. 93(b)(i)            Each opinion of the supreme court is reported for official publication in full text. All final orders of the supreme court are reported for publication only in table form.</p>	<p>Del. Sup. Ct. R. 14(b)(vi)(4)            Unreported opinions or orders may be cited, but a copy must be provided.</p> <p>Del. Sup. Ct. R. I.O.P. X(8)            "Supreme Court Rule 17 has been amended to permit orders of the Delaware Supreme Court to be cited as precedent. . . . Even though both published opinions and case dispositive judgment orders have precedential value, the Court avoids citing to its orders as authority."</p>
District of Columbia	<p>D.C. Ct. App. R. 36(c)            "An opinion may be either published or unpublished. Any party or other interested person may request that an unpublished opinion be published by filing a motion . . . stating why publication is merited. Publication shall be granted by a vote of two or more members . . . but a motion filed by a non-party shall not be granted except on a showing of good cause. The court sua sponte may also publish at any time a previously issued but unpublished opinion."</p>	<p>D.C. Ct. App. R. 28(h)            "Any published opinion or order of this court may be cited in any brief. Unpublished opinions or orders of this court shall not be cited in any brief, except when they are relevant under the doctrines of the law of the case, res judicata, or collateral estoppel, or in a criminal action or proceeding involving the same defendant."</p>
Florida	<p>All Supreme Court opinions are published unless the file is sealed. Disposition orders are published in table form. In the District Courts of Appeal, full opinions are generally published; many cases are disposed of as per curiam affirmances without written opinion.<sup>10</sup></p>	<p><i>Dept. of Legal Affairs v. Dist. Ct. of App., Fifth Cir.</i>, 434 S.2d 310 (Fla. 1983); Per curiam affirmances without written opinion have no precedential value and should not be cited.</p>

9. See *New Castle County v. Goodman*, 461 A.2d 1012, 1013 (Del. 1983) (citing rule change).

10. Telephone interview with James Logue, Florida Reporter of Decisions (Apr. 16, 2001).

<i>State</i>	<i>Publication Standards</i>	<i>Citation Rule</i>
Georgia	<p>Ga. Sup. Ct. R. 59 The supreme court may affirm without opinion when one or more of the following circumstances exists and is dispositive of the appeal: the judgment is supported by the evidence; there is no harmful error of law requiring reversal; or an opinion would have no precedential value because the judgment below contains an adequate explanation of the decision.</p> <p>Ga. Ct. App. R. 34 "Opinions are reported except as otherwise designated by the court."</p> <p>Ga. Ct. App. R. 36 Court of appeals cases may be affirmed without opinion when the evidence supports the judgment; there is no reversible error of law and an opinion would have no precedential value; the judgment below contains an adequate explanation of the decision; and/or "the issues are controlled adversely to the appellant for the reasons and authority given in the appellee's brief."</p>	<p>Unpublished supreme court opinions may not be cited.<sup>11</sup></p> <p>Ga. Ct. App. R. 36 "Rule 36 cases have no precedential value."</p> <p>Ga. Ct. App. R. 33(a) A judgment fully concurred in by all judges in a division, or a full concurrence by a majority in an appeal decided by a seven- or twelve-judge court is a binding precedent.</p> <p>Ga. Ct. App. R. 33(b) An unreported opinion establishes the law of the case, but is neither a "physical" nor binding precedent.</p> <p>Under Ga. Ct. App. R. 33(a), a "physical precedent" is: [a] judgment which is fully concurred in by all judges of the Division is a binding precedent; if there is a special concurrence without a statement of agreement with all that is said in the opinion or a concurrence in the judgment only, the opinion is a physical precedent only. If the appeal is decided by a seven or twelve judge Court, a full concurrence by a majority of judges is a binding precedent, but if the judgment is made only by special concurrences without a statement of agreement with all that is said in the opinion or by concurrence in the judgment only, there being general concurrence by less than a majority of the Judges, it is a physical precedent only.</p>

<sup>11</sup>. Telephone interview with Ginger Wade, Editor of Supreme Court Advance Sheets, Ga. Sup. Ct. (May 18, 2001).

<i>State</i>	<i>Publication Standards</i>	<i>Citation Rule</i>
Hawaii	<p>Haw. R. App. P. 35 (a)-(b) Dispositions may take the form of published, per curiam or memorandum opinions or dispositional orders. Memorandum opinions and dispositional orders are not published except when ordered by the court.</p> <p>Haw. Intermediate Ct. App. R. 2(a) “A full opinion of the intermediate court of appeals shall be published in a manner authorized by the supreme court. The supreme court, however, may order that a full opinion be changed to a memorandum opinion.”</p> <p>The Hawaii Rules of Appellate Procedure govern all proceedings in the Hawaii appellate courts unless otherwise provided by statute or supreme court rules. Haw. R. App. P. 1.</p>	<p>Haw. R. App. P. 35(c); Haw. Intermediate Ct. App. R. 2(b) A memorandum opinion or unpublished dispositional order may not be cited except to establish the law of the pending case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same respondent.</p>
Idaho	<p>Idaho Sup. Ct. Internal R. 13(f) “At or after the oral conference following the presentation of oral argument or the submission of the case to the Court on the briefs, the Court, by unanimous consent of all justices, may determine not to publish the final opinion of the Court.”<sup>12</sup></p>	<p>Idaho Sup. Ct. Internal R. 13(f) “If an opinion is not published, it may not be cited as authority or precedent in any court.”</p>

12. The Idaho Court of Appeals follows this rule as well. E-mail from Fred Lyon, Reporter of Judicial Decisions, Idaho Sup. Ct., to Melissa Serfass (Mar. 26, 2001).

<i>State</i>	<i>Publication Standards</i>	<i>Citation Rule</i>
Illinois	<p>All Supreme Court opinions are published.<sup>13</sup></p> <p>Ill. Sup. Ct. R. 23 Decisions of the Appellate Court may be in the form of a full opinion, a written order or a summary order.<sup>14</sup> Only opinions will be published. Opinions are issued only when the decision establishes a new rule of law, criticizes or affects an existing rule, or resolves, creates, or avoids an apparent conflict within the Appellate Court.</p> <p>Publication of opinions is subject to limitations contained in Supreme Court Administrative Order MR No. 10343 (1994). This order limits the total number of opinions each district appellate court may file annually.</p>	<p>Ill. Sup. Ct. R. 23(e) "An unpublished order is not precedential and may not be cited by any party except to support contentions of double jeopardy, res judicata, collateral estoppel or law of the case."</p>
Indiana	<p>Ind. R. App. P. 65(A) All supreme court opinions are published. Court of appeals opinions are published if the case establishes, affects or criticizes a rule of law or discusses "a legal or factual issue of unique interest or substantial public importance." Other court of appeals cases are decided by memorandum decisions designated as not-for-publication.</p>	<p>Ind. R. App. P. 65(D) "Unless later designated for publication, a not-for-publication memorandum decision shall not be regarded as precedent and shall not be cited to any court except by the parties to the case to establish res judicata, collateral estoppel, or law of the case."</p>
Iowa	<p>Iowa Code Ann. § 602.4106 All supreme court decisions and opinions shall be in writing. Only those decisions deemed of sufficient general importance by the court are published.</p> <p>Iowa Sup. Ct. R. 10 The court of appeals writes full opinions only in those cases that do not meet the criteria for disposition by memorandum opinion.</p> <p>For criteria, see Iowa Sup. Ct. R. 9.</p>	<p>Iowa R. App. P. R. 14(e) "Unpublished opinions of the Iowa appellate courts or any other court may not be cited as authority."</p> <p>Iowa Sup. Ct. R. 10(f) Unpublished court of appeals decisions may not be cited except when establishing the law of the case, res judicata or collateral estoppel, or in a criminal action involving the same defendant.</p>

13. Telephone interview with Brian Ervin, Reporter of Judicial Decisions, Illinois Supreme Court (May 11, 2001).

14. Specific publication criteria for Illinois Supreme Court opinions were not found.

<i>State</i>	<i>Publication Standards</i>	<i>Citation Rule</i>
Kansas	<p>Kan. Sup. Ct. R. 7.04 Opinions of the appellate courts may be memorandum opinions or formal opinions. Memorandum opinions are normally marked "Not Designated for Publication." Opinions are published in the official reports only when they meet certain standards such as establishing a new rule of law, affecting or criticizing existing law, involving a legal issue of continuing public interest, applying an established rule of law to a novel fact situation, resolving an apparent conflict of authority, or contributing significantly to legal literature.</p> <p>A memorandum opinion may be prepared when a case decides no new question of law or is otherwise considered to have no precedential value. Kan. Stat. Ann. § 60-2106(a).</p>	<p>Kan. Sup. Ct. R. 7.04 Unpublished opinions are deemed to be without value as precedent and are not uniformly available to all parties. Opinions marked "Not Designated for Publication" shall not be cited as precedent, except to support a claim of res judicata, collateral estoppel, or law of the case.</p>
Kentucky	<p>Ky. Rev. Stat. § 21A.070 All supreme court opinions are published. The supreme court determines which opinions of the court of appeals and lower courts are published.</p> <p>Ky. R. Civ. P. 76.28(4)(a) Opinions of the appellate courts will be published as directed by the court issuing the opinion. Every opinion shall be marked either "To Be Published" or "Not To Be Published."</p> <p>Rule 76 also applies in criminal actions. Ky. R. Crim. P. 12.02.</p>	<p>Ky. R. Civ. P. 76.28(4)(c) Unpublished opinions shall not be cited or used as authority in any other case in any court of this state.</p>

<i>State</i>	<i>Publication Standards</i>	<i>Citation Rule</i>
Louisiana	<p>The types of opinions issued by the Louisiana Supreme Court include signed opinions, per curiam opinions and summary orders. All opinions are public record and are published in the Southern Reporter.<sup>15</sup></p> <p>La. Unif. R. Ct. App. 2-16.2 Court of appeals opinions are published when a majority of the panel decide that the opinion establishes a new rule of law or affects an existing rule; involves a legal issue of continuing public interest; criticizes existing law; resolves an apparent conflict of authority; or will serve as a useful reference, such as one reviewing case law or legislative history.</p> <p>See La. Unif. R. Ct. App. 12-16.1 for the standards for issuance of memorandum and per curiam opinions as well as full opinions.</p>	<p>All supreme court opinions may be cited.<sup>16</sup></p> <p>La. Unif. R. Ct. App. 2-16.3 "Opinions marked 'Not Designated for Publication' shall not be cited, quoted, or referred to by any counsel, or in any argument, brief, or other materials presented to any Court, except in continuing or related litigation."</p>
Maine	<p>4 Me. Rev. Stat. Ann. § 702 The reporter of decisions reports cases at his discretion, under the supervision of the chief justice of the supreme judicial court.</p>	<p>Admin. Orders Sup. Jud. Ct.—New Citation Form, 8/20/1996 "Memorandum Decisions and Summary Orders shall not be published in the Atlantic Reporter and shall not be cited as precedent for a matter addressed therein."</p>
Maryland	<p>Md. Cts. &amp; Jud. Proceedings Code Ann. § 13-203 (2000) The state reporter prepares reports of cases designated for publication by the court of appeals and the court of special appeals.</p> <p>Md. R. App. Rev. 8-113 The court of special appeals designates for publication only those opinions that have substantial general interest as precedent.</p>	<p>Md. R. App. Rev. 8-114 An unreported opinion of the court of appeals or court of special appeals is neither precedent nor persuasive authority, but may be cited in either court for other purposes. In any other court, an unreported opinion of either court may be cited only when relevant under the doctrine of the law of the case, res judicata, or collateral estoppel, in a criminal action or related proceeding involving the same defendant, or in a disciplinary action involving the same respondent.</p>

15. E-mail from John Tarlton Olivier, Clerk of La. Sup. Ct., to Melissa Serfass (May 4, 2001).

16. *Id.*

State	Publication Standards	Citation Rule
Massachusetts	<p>Mass. Ann. Laws ch. 221 § 64 The reporter of the supreme judicial court has discretion to report the cases more or less at large according to their relative importance.</p> <p>Mass. Ann. Laws ch. 211A § 9 All decisions of the appeals court shall be in writing, except that in appropriate cases an order, direction, judgment, or decree may be entered without stating reasons. The reporter of decisions publishes opinions of the appeals court.</p> <p>Mass. App. Ct. R. 1:28 The court may affirm, modify or reverse the lower court's action by written order upon determination that no substantial question of law is presented by the appeal or that no clear error of law was committed.</p>	<p><i>Lyons v. Labor Relations Commn.</i>, 476 N.E.2d 243 (Mass. App. 1985). "This court's summary decisions pursuant to Rule 1:28 of the Appeals Court... are without precedential value and may not be relied upon or cited as authority in unrelated cases. . . [T]he so called summary decisions, while binding on the parties, may not disclose fully the facts of the case or the rationale of the panel's decision. . . . Summary decisions, although open to public examination, are directed to the parties and to the tribunal which decided the case, that is, only to persons who are cognizant of the entire record."</p> <p>A recent case, <i>Horner v. Boston Edison Co.</i>, 695 N.E.2d 1093 (Mass. App. 1998) affirms this principle, stating, "We have never suggested that summary decisions of this court issued pursuant to rule 1:28 . . . may be relied upon or cited as authority in other cases. In fact, we reached the opposite conclusion in at least two other cases." <i>Id.</i> n. 7.</p>

<i>State</i>	<i>Publication Standards</i>	<i>Citation Rule</i>
Michigan	<p>All supreme court opinions and orders are published.<sup>17</sup></p> <p>Mich. Ct. R. 7.215(A)-(B)            Court of appeals opinions must be written in the form of a signed opinion, a per curiam opinion, or a memorandum opinion. Memorandum opinions are not published; per curiam opinions are not published unless one of the deciding judges directs the reporter to do so. Circumstances when an opinion must be published include if it establishes a new rule of law, construes a constitutional or statutory provision or court rule, affects or criticizes existing law, extends existing law in a new factual context, reaffirms a legal principle or creates or resolves an apparent conflict of authority.</p> <p>Rule 7.215(A) was amended by Mich. Sup. Ct. Order 99-35, 99-56 issued December 13, 2000, and effective April 1, 2001. Prior to this amendment, publication of a per curiam or memorandum opinion required a majority of the judges to direct its publication.</p>	<p>Mich. Ct. R. 7.215(C)            An unpublished opinion is not binding precedent under the rule of stare decisis, but may be cited if a copy is provided to the court and to opposing parties. A published opinion of the court of appeals has precedential effect under the rule of stare decisis.</p>

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17. Telephone interview with Brian Draper, Assistant to the Reporter of Decisions, Mich. Sup. Ct. (May 11, 2001).

<i>State</i>	<i>Publication Standards</i>	<i>Citation Rule</i>
Minnesota	<p>All supreme court opinions are published.<sup>18</sup></p> <p>Minn. R. Civ. App. P. 136.01 Court of Appeals dispositions may be in the form of published, unpublished or order opinions.</p> <p>Minn. Stat. Ann. § 480A.08(3)(c) The court of appeals publishes only those decisions that establish a new rule of law, overrule a previous court of appeals' decision not reviewed by the supreme court, provide important procedural guidelines in interpreting statutes or administrative rules, involve a significant legal issue, or that would significantly aid in the administration of justice.</p> <p>This rule is restated in Minn. Ct. App. Spec. R. of Prac. 4.</p>	<p>Minn. R. Civ. App 136.01(b) "Unpublished opinions and order opinions are not precedential except as law of the case, res judicata or collateral estoppel, and may be cited only as provided in Minn. Stat. § 480A.08, subd. 3."</p> <p>Minn. Stat. Ann. §480A.08(3) Unpublished opinions are not precedential except as law of the case, res judicata or collateral estoppel. Unpublished opinions may be cited if copies are provided to all parties.</p> <p>This rule is restated in Minn. Ct. App. Spec. R. of Prac. 4.</p>
Mississippi	<p>Miss. R. App. P. 35-A(a); Miss. R. App. P. 35-B(a) The supreme court or court of appeals "may write opinions on all cases heard by that Court and shall publish all such written opinions. In cases where the judgment of the trial court is affirmed, an opinion will be written in all cases where the . . . Court assesses damages for a frivolous appeal and in other cases if a majority of the justices deciding the case determine that a written opinion will add to the value of the jurisprudence of this state or be useful to the parties or to the trial court."</p> <p>See Miss. R. App. P. 35-A(c) and Miss. R. App. P. 35-B(d) for standards on per curiam affirmance without formal opinion when an opinion would have no precedential value.</p>	<p>Miss. R. App. P. 35-A(b); Miss. R. App. P. 35-B(b) "Opinions in cases decided prior to the effective date of this rule [Nov. 1, 1998] which have not been designated for publication shall not be cited, quoted or referred to by any court or in any argument, brief or other materials presented to any court except in continuing or related litigation upon an issue such as res judicata, collateral estoppel or law of the case."</p>

18. Telephone interview with Janet Chapdelaine, Reporter of Judicial Decisions, Minn. Sup. Ct. (May 11, 2001).

<i>State</i>	<i>Publication Standards</i>	<i>Citation Rule</i>
Missouri	<p>Mo. Sup. Ct. R. 84.16(b)            In the supreme court and the court of appeals, when all judges in a case agree to affirm and believe that an opinion would have no precedential value, disposition may be by memorandum decision or written order. A memorandum decision or written order may be entered when the appellate court unanimously determines that any of the following circumstances exists and is dispositive: the trial court judgment is supported by substantial evidence and is based on findings that are not clearly erroneous, the evidence sufficiently supports a jury verdict, an administrative agency order is supported by the evidence, or no error of law appears.</p> <p>See Mo. Sup. Ct. R. 30.25 for the rule governing summary orders in criminal cases.</p>	<p>Mo. Sup. Ct. R. 84.16(b)            "A written statement may be attached to the memorandum decision or written order setting out the basis for the court's decision. The statement shall be unanimous, shall not constitute a formal opinion of the court, shall not be reported, and shall not be cited or otherwise used in any case before any court."</p>
Montana	<p>Mont. Code Ann. § 3-2-601            All decisions of the supreme court must be in writing, stating the grounds of the decision.</p> <p>Mont. Internal Op. R. § I(c)            Appeals that present no constitutional issues or issues of first impression, or do not establish new precedent, modify existing precedent, or, in the opinion of the court, will not provide future guidance for citation purposes, may be classified by the court as noncitable opinions. Such decisions will not include a detailed statement of facts or law.</p>	<p>Mont. Internal Op. R. § I(c)            Appeals disposed of under this section shall not be citeable as precedent but shall be filed as a public document with the clerk, and shall be reported by result only.</p>

<i>State</i>	<i>Publication Standards</i>	<i>Citation Rule</i>
Nebraska	<p>Neb. Sup. Ct. R. 2(E)(1); Neb. Sup. Ct. R. 12 The supreme court and court of appeals prepare written opinions in cases believed to require explanation or believed to have precedential value.</p> <p>Neb. Rev. Stat. § 24-208 The supreme court reports decisions which reverse or modify a district court judgment, and other decisions which determine or modify any previously unsettled or new and important question of law, or construe any provision of the constitution or a statute not construed before, and other decisions deemed interesting or important.</p> <p>Neb. Rev. Stat. § 24-1104(1) Court of appeals decisions are issued in the form of an order that may be accompanied by a memorandum opinion. Memorandum opinions are not published unless ordered by the court.</p> <p>Neb. Rev. Stat. § 24-1104(2) provides criteria for determining when memorandum opinions are appropriate.</p>	<p>Neb. Sup. Ct. R. 9(C)(4) "Nebraska cases shall be cited by the state reports, but may include citation to such other reports as may contain such cases." The implication is that only reported cases may be cited. Some Nebraska Supreme Court cases may be disposed of by summary disposition under Neb. Sup. Ct. R. 7.</p> <p>Neb. Sup. Ct. R. 2(E)(4)-(5) Court of appeals opinions which have been designated "For Permanent Publication" are precedential and may be cited in any court; other opinions and memorandum opinions may be cited only when related by identity between the parties or the causes of action.</p>
Nevada	<p>There are no established rules governing when an opinion is written. Opinions are published; dispositions that are not published are framed as orders.<sup>19</sup></p> <p>Nev. Rev. Stat. § 2.160 "All opinions and decisions rendered by the supreme court shall be in writing . . . ."</p>	<p>Nev. Sup. Ct. R. 123 Unpublished opinions are not precedential and may not be cited as legal authority except when relevant under the doctrines of law of the case, res judicata or collateral estoppel or relevant in a criminal or disciplinary proceeding affecting the same individual.</p>

19. Telephone interview with Janette Bloom, Clerk of the Court, Nev. Sup. Ct. (May 11, 2001).

<i>State</i>	<i>Publication Standards</i>	<i>Citation Rule</i>
New Hampshire	<p>N.H. Sup. Ct. R. 25(1)            The supreme court may dispose of cases summarily. An order of summary affirmance may be entered in those circumstances when no substantial question of law exists and the court does not disagree with the result below, the opinion of the lower court identifies and discusses the issues presented and the supreme court does not disagree with them, or no substantial question of law is presented in an administrative agency appeal and the court does not find the decision unjust or unreasonable, or for other just cause, in which case a succinct statement of the reason for affirmance must be included. An order of summary dismissal or summary reversal for just cause must also contain a succinct statement of the reason for dismissal or reversal.</p>	<p>N.H. Sup. Ct. R. 25(5)            "Cases summarily disposed of under this rule shall not be regarded as establishing precedent or be cited as authority."</p>
New Jersey	<p>N.J. R. Gen. App. 1:36-2            All opinions of the supreme court are published unless the court directs otherwise. Appellate division opinions are published only when the issuing panel directs their publication. Publication guidelines for opinions include whether the decision involves a substantial question of U.S. or N.J. constitutional law, determines a new and important question of law, affects or criticizes existing law, determines a substantial question with no N.J. case law after Sept. 15, 1948, is of continuing public interest, resolves an apparent conflict or authority, or contributes significantly to legal literature.</p> <p>N.J. Ct. R. 2:11-3(e)(1)-(2) sets out the guidelines for affirmance without opinion in civil, criminal, quasi-criminal, and juvenile appeals.</p>	<p>N.J. R. Gen. App. 1:36-3            Unpublished opinions do not constitute precedent and are not binding on any court. Unpublished opinions may be cited for purposes of res judicata, collateral estoppel, the single controversy doctrine, or any other similar principle of law only.</p>

<i>State</i>	<i>Publication Standards</i>	<i>Citation Rule</i>
New Mexico	<p>N.M. R. App. P. 12-405 All formal opinions of the appellate court are published. A formal opinion is not always necessary. An order, decision, or memorandum opinion is appropriate when the issues have previously been decided by the supreme court or court of appeals; the issue is disposed of by the presence or absence of substantial evidence; a statute or court rule is controlling; the asserted error is not prejudicial; or the issues are manifestly without merit.</p> <p>This rule applies to both the supreme court and the court of appeals. N.M. R. App. P. 12-101.</p>	<p>N.M. R. App. P. 12-405(C) “An order, decision, or memorandum opinion, because it is unreported and not uniformly available to all parties, shall not be published nor shall it be cited as precedent in any court.”</p>
New York	<p>N.Y. CLS Jud. § 431 The Law Reporting Bureau is required to publish every opinion, memorandum, and motion transmitted to it by the court of appeals and the appellate divisions. The state reporter also selectively publishes appellate term and trial court opinions in the <i>Miscellaneous Reports</i>.<sup>20</sup></p>	<p>There is no official court rule or statute prohibiting citation of unpublished opinions.<sup>21</sup></p>
North Carolina	<p>All supreme court opinions are published, some as per curiam orders.<sup>22</sup></p> <p>N.C. R. App. P. 30(e)(1) The Court of Appeals is not required to publish an opinion in every decision. If the deciding panel determines that the appeal involves no new legal principles and that a published opinion would have no precedential value, it may direct that no opinion be published.</p>	<p>N.C. R. App. P. 30(e)(3) “A decision without a published opinion is authority only in the case in which such decision is rendered and should not be cited in any other case in any court for any purpose, nor should any court consider any such decision for any purpose except in the case in which such decision is rendered.”</p>

20. Telephone interview with Gary Spivey, State Reporter, N.Y. Ct. App. (Apr. 27, 2001). For details on selection criteria for the *Miscellaneous Reports*, see the New York State Law Reporting Bureau web site at <<http://www.courts.state.ny.us/reporter/Selection.htm>> (visited Apr. 27, 2001).

21. Spivey interview, *supra* n. 20. Regarding the precedential value of unpublished New York Supreme Court opinions, in *Eaton v. Chahal*, 553 N.Y.S.2d 642, 646 (Sup. Ct. 1990), the court commented upon “the practice of citing to this court unreported decisions issued by Judges of coordinate jurisdiction. Such decisions, although entitled to respectful consideration, are not binding precedent upon this court.”

22. Telephone interview with Ralph A. White, Jr., Reporter of Judicial Decisions, N.C. Sup. Ct.

<i>State</i>	<i>Publication Standards</i>	<i>Citation Rule</i>
North Dakota	N.D. R. App. P. 35.1 The supreme court may affirm by summary opinion in any case in which no reversible error of law occurred and one of the following situations exists: the appeal is frivolous and completely without merit, the judgment of the trial court is based on findings of facts that are not clearly erroneous, the jury verdict is substantially supported by evidence, the trial court did not abuse its discretion, the administrative agency order is supported by a preponderance of the evidence, the summary judgment, directed verdict, or judgment on the pleadings is supported by the record, or a previous controlling appellate decision is dispositive of the appeal. The court may also reverse by summary opinion when a previous controlling appellate is dispositive. <sup>23</sup>	Rule 35.1 summary dispositions may be cited as precedent. <sup>24</sup>

23. The North Dakota Court of Appeals is not a permanent sitting court. It receives assignments from the supreme court mainly to alleviate the supreme court's workload. Although the rules establishing the court of appeals allow for discretionary publication, court of appeals opinions have not been numerous, and all opinions are published in a manner similar to the supreme court. E-mail from Penny Miller, Clerk of N.D. Sup. Ct., to Melissa Serfass (May 14, 2001).

24. Telephone interview with Penny Miller, Clerk of N.D. Sup. Ct. (Apr. 20, 2001).

<i>State</i>	<i>Publication Standards</i>	<i>Citation Rule</i>
Ohio	<p>Ohio Sup. Ct. R. for Reporting Op. 1(A) All supreme court opinions are reported in the Ohio official reports.</p> <p>Ohio Sup. Ct. R. for Reporting Op. 2(F) A court of appeals opinion may be selected for official reporting if the supreme court reporter determines that the case contributes significantly to Ohio case law, and the court which heard the case certifies that it meets certain standards, which include establishing a new rule of law; affecting an existing rule; applying an established rule to significantly different facts; explaining, criticizing, or reviewing the history of an existing rule; creating or resolving a conflict of authority; or discussing factual or legal issues of significant public interest.</p>	<p>Ohio Sup. Ct. R. for Reporting Op. 2(G) Unofficially published opinions and unpublished opinions of the courts of appeals may be cited as controlling authority in the judicial district in which they were decided when relevant under the doctrines of the law of the case, res judicata or collateral estoppel or in a criminal proceeding involving the same defendant. In all other situations, such opinions shall be considered persuasive authority. Opinions reported in the Ohio official reports are controlling authority for all purposes in the judicial district in which they were rendered unless and until each such opinion is reversed or modified by a court of competent jurisdiction.</p>

State	Publication Standards	Citation Rule
Oklahoma	<p>Okla. Sup. Ct. R. 1.200(a)            Supreme court and court of civil appeals opinions are issued in memorandum form unless they establish, criticize or affect a rule of law, involve a legal issue of continuing public interest, apply an established rule to a novel fact situation, resolve an apparent conflict, or contribute significantly with a historical legal review or description of legislative history.</p> <p>Okla. Ct. Crim. App. R. 3.13(A)            "Opinions may be by Summary Opinion form, memorandum or of such length and detail as the Court determines."<sup>25</sup></p>	<p>Okla. Sup. Ct. R. 1.200(b)(5)            Memorandum opinions, unless otherwise required to be published, are marked: "Not for Official Publication." These opinions shall not be considered as precedent by any court or cited in any brief or other, except for purposes of res judicata, collateral estoppel, or law of the case. They shall neither be published in the unofficial or official reporter, nor on the Supreme Court World Wide Web site.</p> <p>Okla. Sup. Ct. R. 1.200(b)(6)-(8)            governs reporting of opinions and dispositions in the unofficial reporter, <i>Oklahoma Bar Journal</i>. Opinions designated "For Publication in O.B.J. Only" are not precedential.</p> <p>Okla. Ct. Crim. App. R. 3.5(C)(3)            "In all instances, an unpublished opinion is not binding on this Court. However, parties may cite and bring to the Court's attention the unpublished opinions of this Court provided counsel states that no published case would serve as well the purpose of which counsel cites it . . . ."</p>

25. Specific publication standards for the Court of Criminal Appeals were not found. Standards for the Emergency Appellate Division of the Court of Criminal Appeals are found at Okla. Ct. Crim. App. R. 12.12(C). For a discussion of issues raised by use of summary opinions in the court, see *Johnson v. State*, 1993 OK CR 11, 847 P.2d 810 (Okla. Crim. App. 1993).

<i>State</i>	<i>Publication Standards</i>	<i>Citation Rule</i>
Oregon	<p>Or. Rev. Stat. § 19.435 The Supreme Court and the Court of Appeals may decide cases by memorandum decision. Full opinions are prepared only in those cases deemed proper by the court.</p> <p>All opinions, memorandum decisions, and orders are published.<sup>26</sup></p> <p>Or. Ct. App. Internal Practices Forms of Decisions When the deciding judges agree on the result and agree that an opinion would have no precedential value, a case may be decided without opinion. Per curiam opinions are issued when the judges agree on the analysis and the result, the law is clear, and an extensive opinion is not needed. The court generally decides cases by signed opinion when an opinion would have precedential value because it involves a previously undecided issue of law or because it applies established law to new or "exceptionally illustrative" facts, issues of unusual public concern exist, or a summary statement of the reasons for reversal or modification would not suffice.</p>	<p>Supreme Court affirmances without opinion may be cited, but have no authority.<sup>27</sup></p> <p>Or. R. App. P. 5.20(5) "Cases affirmed without opinion by the Court of Appeals should not be cited as authority."</p>

26. Telephone interview with Mary Bauman, Reporter of Judicial Decisions, Oregon Supreme Court (May 18, 2001).

27. *Id.*

State	Publication Standards	Citation Rule
Pennsylvania	<p>Pa. R. Sup. Ct. I.O.P. III (Notes) A per curiam order may be used when the Court's decision does not establish a new rule of law, does not affect or criticize an existing rule, does not apply an established rule to novel facts, does not constitute the only, or only recent binding precedent on an issue, does not involve a legal issue of continuing public interest, or whenever the Court decides it is appropriate.</p> <p>Pa. R. Cmmw. Ct. I.O.P. §412 The author of a commonwealth court opinion of a panel or the court en banc recommends whether it is reported. This recommendation is followed unless a majority of the court disagrees.</p> <p>Pa. R. Cmmw. Ct. I.O.P. §413 Each reported opinion is designated as an "opinion." An unreported opinion is designated as a "memorandum opinion."</p> <p>Pa. R. Super. Ct. I.O.P. 65.37(C) Publication of decisions is within the panel's discretion, but generally a decision should be published when any of the following apply: it is by a court en banc; it establishes a new rule of law, applies an existing rule to novel facts, affects or criticizes an existing rule, or resolves an apparent conflict of authority; it involves a legal issue of continuing public interest; or it constitutes a significant, non-duplicative contribution to law by way of an historical legal review, a review of legislative history, or a review of conflicting decisions among the courts or other jurisdictions.</p>	<p><i>Commonwealth v. Tilghman</i>, 673 A.2d 898 (Pa. 1996). The court in <i>Tilghman</i> attempted to clear up the "confusion within the Bar of this Commonwealth regarding the precedential value of orders of this Court affirming (or reversing) per curiam an order of a lower court." <i>Id.</i> "If a majority of the Justices of this Court, after reviewing an appeal before us . . . join in issuing an opinion, our opinion becomes binding precedent on the courts of this Commonwealth." <i>Id.</i> (citing <i>Commonwealth v. Mason</i>, 456 Pa. 602, 322 A.2d 357 (1974)).</p> <p>When a per curiam opinion of the supreme court affirms on the basis of the opinion of the lower court, the holding and reasoning of that opinion become supreme court precedent. When a per curiam supreme court affirmance says nothing more, the lower court rationale is not adopted and is not precedential.<sup>28</sup></p> <p>Pa. R. Cmmw. Ct. I.O.P. §414 "Unreported opinions of the court shall not be cited in any opinion of this court or in any brief or argument addressed to it, except that any opinion filed in the same case may be cited as representing the law of the case. A one-judge opinion, even if reported, shall be cited only for its persuasive value, not as a binding precedent."</p>

28. Richard B. Cappalli, *What Is Authority? Creation and Use of Case Law by Pennsylvania's Appellate Courts*, 72 Temple L. Rev. 303, 362-365 (1999). This article provides an outline of the "rules" set forth in *Tilghman* and a discussion of each rule's precedential value.

<i>State</i>	<i>Publication Standards</i>	<i>Citation Rule</i>
Pennsylvania, <i>cont'd</i>	Pa. R. Super. Ct. I.O.P. 65.37(D) An appeal may be decided by a judgment order without separate memorandum decision when the decision is unanimous and requires minimal explanation because it is based on established law or is clearly supported by the evidence.	Pa. R. Super. Ct. I.O.P. 65.37(A) An unpublished memorandum decision may not be relied upon or cited except when relevant under the doctrine of law of the case, res judicata, or collateral estoppel, or when it is relevant to a criminal action or proceeding involving the same defendant.
Rhode Island	R.I. Gen. Laws § 8-1-3 "The supreme court shall render written opinions in all cases decided by it wherein points of law, pleading, or practice have arisen which are novel or of sufficient importance to warrant written opinions."  R.I. Gen. Laws § 8-1-6 "The reporter shall make true reports of all cases in which written opinions have been rendered, and of all decisions and rescripts of the court which he or she may deem to be important and useful, and also all such matters as the court may order to be reported."	R.I. Sup. Ct. R. 16(h) "Unpublished orders will not be cited by the Court in its opinions and such orders will not be cited by counsel in their briefs. Unpublished orders shall have no precedential effect."

<i>State</i>	<i>Publication Standards</i>	<i>Citation Rule</i>
South Carolina	<p>S. C. App. Ct. R. 220</p> <p>The appellate court may make its decisions in writing either by published or memorandum opinion. The supreme court may file a memorandum opinion when the court unanimously decides that a published opinion would have no precedential value and any one or more of the following circumstances exists: The judgment of the trial court is based on findings of fact which either are or are not clearly erroneous; the evidence to support a jury verdict is or is not insufficient; an administrative agency order meets or does not meet the standard of review; or no error of law appears. "The Court of Appeals need not address a point which is manifestly without merit."</p> <p>This rule governs both the South Carolina Supreme Court and the South Carolina Court of Appeals. S.C. App. Ct. R. 101.</p>	<p>S. C. App. Ct. R. 220(a)</p> <p>Memorandum opinions are not published in the official reports and have no precedential value.</p> <p>S. C. App. Ct. R. 239(d)(2)</p> <p>"Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved."</p>
South Dakota	<p>S.D. R. App. P. 15-26A-87.1</p> <p>The supreme court may affirm or reverse a judgment or order of a trial court by order or memorandum opinion when it is clear from the record that the issues are clearly controlled by settled law, findings of fact or jury verdict are clearly supported by sufficient evidence, an issue of material fact made summary judgment inappropriate, or the issue was one of judicial discretion and abuse is clearly present or absent.</p>	<p>S.D. R. App. P. 15-26A-87.1(E)</p> <p>Orders or memorandum opinions issued under this section shall not be cited or relied on as authority in any court except when they establish the law of the case, res judicata, collateral estoppel, or involve the same defendant in a criminal action, or the same person in a disciplinary action.</p>

<i>State</i>	<i>Publication Standards</i>	<i>Citation Rule</i>
Tennessee	<p>Tenn. R. Sup. Ct. 4(A)(2) All opinions of the supreme court are published in the official reporter unless explicitly designated "Not for Publication."</p> <p>Tenn. Ct. App. R. 11; Tenn. Ct. Crim. App. R. 19 General criteria for publication of opinions of the court of appeals or the court of criminal appeals include whether the opinion establishes a new rule of law, affects or criticizes an existing rule or legal principle, applies an existing rule to novel facts, involves a legal issue of continuing public interest, resolves an apparent conflict, or makes a significant contribution to legal literature.</p> <p>Publication of intermediate appellate court opinions does not go forward until the issue of appeal to the supreme court has been resolved. The individual rules provide specific publication guidelines when application for permission to appeal has been filed, granted, or denied. Tenn. Ct. App. R. 10 sets out the guidelines for affirmances without opinion and memorandum opinions in the court of appeals.</p>	<p>Tenn. R. Sup. Ct. 4(F)(1)-(2) "If an application for permission to appeal is hereafter denied by the Court with a 'Not for Citation' designation, the opinion of the intermediate appellate court has no precedential value." These opinions are not published in any official reporter and may not be cited by any judge or by any litigant except in the circumstance of res judicata, collateral estoppel, law of the case, or a criminal action involving the same defendant.</p> <p>Tenn. R. Sup. Ct. 4(H)(1) Unpublished opinions are controlling authority for purposes of res judicata, collateral estoppel, or law of the case. Unless designated "Not for Citation" under subsection (F) of this rule, unpublished opinions are persuasive authority in all other circumstances.</p> <p>Tenn. Ct. App. R. 12; Tenn. Ct. Crim. App. R. 19(4) When unpublished opinions are cited, copies must be provided.</p>
Texas	<p>Tex. R. App. P. 67 The supreme court hands down a written opinion in every case in which it renders a judgment.</p> <p>Tex. R. App. P. 47.4 A court of appeals opinion should be published only when it establishes, affects, or criticizes a rule of law, applies an existing rule to a new fact situation, involves a legal issue of continuing public interest, or resolves an apparent conflict of authority.</p> <p>Tex. R. App. P. 77.2 Court of criminal appeals opinions will be published upon the determination of a majority of the judges.</p>	<p>Tex. R. App. P. 47.7 Court of appeals opinions that are not designated for publication have no precedential value and may not be cited as authority.</p> <p>Tex. R. App. P. 77.3 Unpublished opinions of the court of criminal appeals have no value as precedent and may not be cited as authority.</p>

<i>State</i>	<i>Publication Standards</i>	<i>Citation Rule</i>
Utah	<p>Utah R. App. P. 30(c),(d) When a judgment, decree or order is reversed or modified, the reasons shall be given in writing. The court may dispose of a case by expedited decision without written opinion if it satisfies the criteria of Rule 31(b).</p> <p>The Utah Rules of Appellate Procedure apply to the supreme court and the court of appeals. Utah R. App. P. 1.</p> <p>Utah R. App. P. 31(b), (d) Types of cases qualifying for expedited decision without opinion include appeals that involve uncomplicated factual issues primarily based on documents; summary judgments; dismissals for failure to state a claim or for lack of jurisdiction; and cases based on uncomplicated issues of law. Expedited appeal will not be granted when a case raises a substantial constitutional issue, an issue of significant public interest, an issue of first impression or a complicated issue of fact or law.</p>	<p>Utah R. App. P. 31(f) "Appeals decided under this rule will not stand as precedent, but, in other respects, will have the same force and effect as other decisions of the court."</p> <p>Utah Code Jud. Admin. R. 4-508, 4-605 "Unpublished opinions, orders and judgments have no precedential value and shall not be cited or used in the courts of this state, except for purposes of applying the doctrine of the law of the case, res judicata, or collateral estoppel. Unpublished opinions are "any memorandum decision, per curiam opinion, or other disposition of the Court designated 'not for official publication.'"</p> <p>The stated intent of Rule 4-508, governing civil practice, and Rule 4-605, governing criminal practice, is to establish a uniform standard for the citation of unpublished opinions.</p>

State	Publication Standards	Citation Rule
Vermont	<p>Vt. R. App. P. 33.2</p> <p>A full opinion may be appropriate when the court is establishing a new rule of law, affecting or criticizing an existing rule, or applying an established rule to a novel fact situation; the appeal involves a legal issue of substantial public interest; or the court may be resolving a conflict or apparent conflict between panels of the court. In other instances, an entry order or per curiam opinion may be appropriate.</p>	<p>Vt. R. App. P. 33.1(c)</p> <p>An entry order decision issued by a three-justice panel under the guidelines set forth in Rule 33.2 that is not published in the Vermont reports may be cited as persuasive authority but is not considered controlling precedent. These decisions may be cited as controlling authority with respect to issues of claim preclusion, law of the case, and similar issues involving the parties or facts of the case in which the decision was issued.</p>
Virginia	<p>The supreme court determines by judicial discretion during conference which cases will be decided by order and which will be decided by a published opinion.<sup>29</sup></p> <p>Va. Sup. Ct. R 5:42(i)</p> <p>“A written opinion of the Supreme Court stating the law governing each question certified will be rendered as soon as practicable after the submission of briefs and after any oral argument. The opinion will be sent by the clerk under the seal of the Supreme Court to the certifying court and to counsel for the parties and shall be published in the Virginia Reports.”</p> <p>Va. Code Ann. § 17.1-413(A)</p> <p>The court of appeals in its discretion may render its decision by order or memorandum opinion. All orders and opinions of the court are preserved with the record of the case. Opinions that the court designates as having precedential value or other legal significance are reported in separate court of appeals reports in the same manner as the decisions and opinions of the supreme court.</p>	<p>There is no prohibition against citing unpublished orders of the supreme court, though their value is probably just as persuasive authority.<sup>30</sup></p> <p>In <i>Grajales v. Commonwealth</i>, 353 S.E.2d 789, 790 n.1 (Va. App. 1987), the court wrote: “Unpublished memorandum opinions of [the Court of Appeals] are not to be cited or relied upon as precedent except for the purpose of establishing res judicata, estoppel or the law of the case.” Later, in <i>Fairfax County Sch. Bd. v. Rose</i>, 509 S.E.2d 525, 528 n. 3 (Va. App. 1999), the court wrote: “Although an unpublished opinion of the Court has no precedential value [citing <i>Grajales</i>], a court or the commission does not err by considering the rationale and adopting it to the extent it is persuasive.”</p>

29. Telephone interview with David Beach, Clerk of the Virginia Supreme Court (Apr. 27, 2001).

30. *Id.*

State	Publication Standards	Citation Rule
Washington	<p>All Washington Supreme Court opinions are published.<sup>31</sup></p> <p>Wash. R. App. P. 12.3(d) Whether an opinion will be printed in the Washington appellate reports or be filed for public record only will be determined by a majority of the issuing panel pursuant to RCW 2.06.040. In making this determination the panel will use at least the following criteria: whether a case decides an unsettled or new question of law or constitutional principle; affects or reverses an established principle of law; is of general public interest or importance or is in conflict with a prior opinion of the court of appeals.<sup>32</sup></p>	<p>Wash. R. App. P. 10.4(h) An unpublished opinion of the court of appeals may not be cited as authority. Unpublished opinions are defined as those not published in the Washington appellate reports.</p>
West Virginia	<p>W. Va. Const. Art. VIII, § 4 The state constitution requires the court "to prepare a syllabus of the points adjudicated in each case in which an opinion is written . . . which shall be prefixed to the published report of the case." Thus, all opinions are published. However, memorandum orders in administrative appeals and certain per curiam orders are not published.<sup>33</sup></p>	<p>Only signed, justice-authored opinions have precedential value.<sup>34</sup></p> <p>"Per curiam opinions . . . are used to decide only the specific case before the Court; everything in a per curiam opinion beyond the syllabus point is merely obiter dicta. A per curiam opinion that appears to deviate from generally accepted rules of law is not binding on the circuit courts, and should be relied upon only with great caution. [I]f rules of law or accepted ways of doing things are to be changed, then this Court will do so in a signed opinion, not a per curiam opinion." <i>Lieving v. Hadley</i>, 423 S.E.2d 600, 604 n. 4 (W. Va. 1992).</p>

31. Telephone interview with Truman Fuller, Editorial Coordinator, Washington Supreme Court Reporter of Decisions (May 11, 2001).

32. Specific publication standards for Supreme Court of Washington opinions were not found.

33. Facsimile from Rory L. Perry II, Clerk, and Blake Westfall, Deputy Clerk, W. Va. Sup. Ct., to Melissa Serfass (May 8, 2001).

34. *Id.*

<i>State</i>	<i>Publication Standards</i>	<i>Citation Rule</i>
Wisconsin	<p>All supreme court opinions are published; the court disposes of some issues by unpublished order.<sup>35</sup></p> <p>Wis. Stat. § 809.23(1)(a) In the court of appeals, criteria for publication in the official reports include whether the opinion states a new rule of law or affects or criticizes an existing rule; applies an established rule to a novel fact situation; resolves or identifies a conflict of authority; contributes to the legal literature by reviewing case law or legislative history; or decides a case of substantial and continuing public interest.</p>	<p>Per curiam orders and authored opinions may be cited as precedent; unpublished orders may not.<sup>36</sup></p> <p>Wis. Stat. § 809.23(3) An unpublished opinion is of no precedential value and may not be cited as precedent or authority, except to support a claim of res judicata, collateral estoppel, or law of the case.</p>
Wyoming	<p>Wyo. R. App. P. 9.01 Appellate court decisions are set forth in a written opinion or order.</p> <p>Wyo. R. App. P. 9.06 The appellate court may issue a ruling without a published decision when all parties to an appeal stipulate in writing that they so desire. Such abbreviated opinions provide the ultimate disposition without a detailed statement of facts or law.</p>	<p>Wyo. R. App. P. 9.06 Abbreviated opinions are not published or generally disseminated and do not constitute precedent of the appellate court.</p>



35. Telephone interview with Cornelia Clark, Reporter of Judicial Decisions, Wis. Sup. Ct. (May 11, 2001).

36. *Id.*

afford him sufficient time to comment on and review pertinent documents prior to his final appeal to the Administrative Committee. Under 29 C.F.R. § 2560.503-1(g)(1), an ERISA plan must allow a claimant to “[r]eview pertinent documents” and “[s]ubmit issues and comments in writing.” *Id.* This requirement means that a benefit plan must “provide claimants with access to ‘the evidence the decisionmaker relied upon’ in denying their claim.” *Wilczynski v. Lumbermens Mutual Cas. Co.*, 93 F.3d 397, 402 (7th Cir.1996). A benefit plan does not need to allow a claimant to review every document in his administrative file, but only those documents that are influential in the plan’s decision. *See id.* By Regula’s own admission, his attorney was able to review and comment upon the reports provided by Drs. Kumar and O’Brien, which the Plan relied on exclusively in denying Regula’s claim. Therefore, although Regula may not have inspected all the information in his administrative file, he was able to examine and comment upon all the information that formed the basis for the denial of his claim.

The Plan did not deny Regula a full and fair review of his claim because the Plan substantially complied with the procedural requirements found in ERISA’s implementing regulations. *See* 29 C.F.R. § 2560.503-1.

#### IV.

For these reasons, I respectfully dissent. The judgment of the district court should be affirmed.



\* Larry G. Massanari is substituted for his predecessor, Kenneth Apfel, as Acting Commissioner of the Social Security Administration. Fed. R.App. P. 43(c)(2).

**Patricia HART, Plaintiff-Appellant,**

v.

**Larry G. MASSANARI, Acting Commissioner of Social Security Administration,\* Defendant-Appellee.**

No. 99-56472

United States Court of Appeals,  
Ninth Circuit.

Sept. 24, 2001.

Submitted March 5, 2001 \*\*

Filed Sept. 24, 2001

Action was brought against Acting Commissioner of Social Security Administration (SSA). The United States District Court for the Central District of California, Arthur Nakazato, United States Magistrate Judge, found for Acting Commissioner, and appeal was taken. After ordering appellant’s counsel to show cause why he should not be disciplined for citing unpublished opinion in his opening brief, the Court of Appeals, Kozinski, Circuit Judge, held that: (1) Ninth Circuit rule generally prohibiting citation to unpublished dispositions and orders did not violate constitutional article governing judiciary, but (2) counsel’s violation of such rule was not willful so as to warrant sanctions.

Order to show cause discharged.

#### 1. Courts ⇐96(1)

When ruling on a novel issue of law, federal courts will generally consider how

\*\* The panel unanimously finds this case suitable for decision without oral argument. Fed. R.App. P. 34(a)(2).

other courts have ruled on the same issue; this consideration will not be limited to courts at the same or higher level, or even to courts within the same system of sovereignty.

## 2. Courts ⇨96(1)

While the Court of Appeals would consider it bad form to ignore contrary authority from other courts by failing even to acknowledge its existence, courts may, in the absence of binding precedent, forge a different path than suggested by prior authorities that have considered the issue; so long as the earlier authority is acknowledged and considered, courts are deemed to have complied with their common law responsibilities.

## 3. Courts ⇨96(3, 4)

Binding authority, in the form of a ruling by a Court of Appeals on a controlling legal issue, or Supreme Court Justices writing for a majority of the Court, cannot be considered by a district judge and cast aside, for it is not merely evidence of what the law is; rather, caselaw on point is the law.

## 4. Courts ⇨96(1)

If a federal court must decide an issue governed by a prior opinion that constitutes binding authority, the later court is bound to reach the same result, even if it considers the rule unwise or incorrect; binding authority must be followed unless and until overruled by a body competent to do so.

## 5. Courts ⇨89

In determining whether it is bound by an earlier decision, a court considers not merely the reason and spirit of cases, but also the letter of particular precedents, and this includes not only the rule announced, but also the facts giving rise to the dispute, other rules considered and rejected, and the views expressed in re-

sponse to any dissent or concurrence; thus, when crafting binding authority, the precise language employed is often crucial to the contours and scope of the rule announced.

## 6. Courts ⇨96(3, 4)

A decision of the Supreme Court will control that corner of the law unless and until the Supreme Court itself overrules or modifies it, and judges of the inferior courts may voice their criticisms, but follow it they must; the same is true as to circuit authority.

## 7. Courts ⇨90(2), 96(4)

Circuit law binds all courts within a particular circuit, including the court of appeals itself; thus, the first panel to consider an issue sets the law not only for all the inferior courts in the circuit, but also future panels of the court of appeals.

## 8. Courts ⇨90(2)

Once a circuit court panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court, or unless Congress changes the law.

## 9. Courts ⇨90(2)

A later three-judge circuit court panel considering a case that is controlled by the rule announced in an earlier panel's opinion has no choice but to apply the earlier-adopted rule; it may not any more disregard the earlier panel's opinion than it may disregard a ruling of the Supreme Court.

## 10. Courts ⇨90(2)

Designating an opinion as binding circuit authority is a weighty decision that cannot be taken lightly, because its effects are not easily reversed.

**11. Courts ⇌90(2)**

Because en banc procedures are cumbersome, and are seldom used merely to correct errors of individual panels, it is very important that three-judge panel opinions be decided correctly and that they state their holdings in a way that is easily understood and applied in future cases.

**12. Courts ⇌96(1)**

Using the techniques developed at common law, a federal court confronted with apparently controlling authority must parse the precedent in light of the facts presented and the rule announced; insofar as there may be factual differences between the current case and the earlier one, the court must determine whether those differences are material to the application of the rule or allow the precedent to be distinguished on a principled basis.

**13. Courts ⇌96(5)**

The decision of a newly-created circuit whether to adopt wholesale the circuit law of another court is a matter of judicial policy, not a constitutional command.

**14. Courts ⇌96(1)**

The first district judge to decide an issue within a district or within a circuit does not bind all similarly situated district judges.

**15. Courts ⇌90(7), 91(2)**

Under California law, an opinion by one of the courts of appeal is binding on all trial courts in the state, not merely those in the same district; however, court of appeal panels are not bound by the opinions of other panels, even those within the same district.

**16. Courts ⇌107**

The California Supreme Court may “depublish” a court of appeal opinion, that is, strip a published decision of its prece-

dential effect. Cal.Rules of Court 976(c)(2).

**17. Courts ⇌96(4)**

A district court bound by circuit authority has no choice but to follow it, even if convinced that such authority was wrongly decided.

**18. Courts ⇌96(4), 107**

Courts of Appeals may decide which of their opinions will be deemed binding on themselves and the courts below them, inasmuch as the principle of strict binding authority is not constitutional, but is a matter of judicial policy. U.S.C.A. Const. Art. 3, § 1 et seq.

**19. Courts ⇌106**

In writing a precedential opinion, a federal court must be careful to recite all facts that are relevant to its ruling, while omitting facts that it considers irrelevant; omitting relevant facts will make the ruling unintelligible to those not already familiar with the case, while including inconsequential facts can provide a spurious basis for distinguishing the case in the future.

**20. Courts ⇌103**

In a precedential opinion of a federal court, the rule of decision cannot simply be announced, but must be selected after due consideration of the relevant legal and policy considerations.

**21. Courts ⇌106**

Where more than one rule could be followed in a precedential federal judicial opinion, the court must explain why it is selecting one and rejecting the others; moreover, the rule must be phrased with precision and with due regard to how it will be applied in future cases.

**22. Courts ⇌106**

A federal judge drafting a precedential opinion must not only consider the

facts of the immediate case, but must also envision the countless permutations of facts that might arise in the universe of future cases; modern opinions generally call for the most precise drafting and re-drafting to ensure that the rule announced sweeps neither too broadly nor too narrowly, and that it does not collide with other binding precedent that bears on the issue.

### 23. Courts ⇌87, 103

Federal judges have a responsibility to keep the body of law cohesive and understandable, and not muddy the water with a needless torrent of published opinions.

### 24. Courts ⇌87

All courts must follow the law.

### 25. Constitutional Law ⇌67

#### Courts ⇌107

Ninth Circuit rule, stating that unpublished dispositions and orders of Court of Appeals were not binding precedent and generally could not be cited to or by courts of Circuit, did not violate constitutional article governing judiciary, inasmuch as such article did not require that all case dispositions and orders issued by appellate courts be binding authority, and an inherent aspect of function of judges appointed under such article was managing precedent to develop coherent body of circuit law to govern litigation in Court of Appeals and other courts of Ninth Circuit. U.S.C.A. Const. Art. 3, § 1 et seq.; U.S.Ct. of App. 9th Cir.Rule 36-3, 28 U.S.C.A.

### 26. Attorney and Client ⇌37.1

Counsel's violation of Ninth Circuit rule generally prohibiting citation to Court of Appeals' unpublished dispositions and

orders was not willful, and Court of Appeals would not exercise its discretion to impose sanctions, inasmuch as Eighth Circuit's opinion in *Anastasoff v. United States*, holding that similar Eighth Circuit rule violated constitutional article governing judiciary, may have cast doubt on Ninth Circuit rule's constitutional validity. U.S.C.A. Const. Art. 3, § 1 et seq.; U.S.Ct. of App. 8th Cir.Rule 28A(i), 28 U.S.C.A.; U.S.Ct. of App. 9th Cir.Rule 36-3, 28 U.S.C.A.

### 27. Attorney and Client ⇌37.1

The Ninth Circuit's rules providing for sanctions are not meant to punish attorneys who, in good faith, seek to test a rule's constitutionality.

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Appeal from the United States District Court for the Central District of California Arthur Nakazato, Magistrate Judge, Presiding. D.C. No. CV-97-02082-TJH(ANx).

Before: KOZINSKI and TALLMAN, Circuit Judges, and ZAPATA, District Judge.\*\*\*

KOZINSKI, Circuit Judge.

Appellant's opening brief cites *Rice v. Chater*, No. 95-35604, 1996 WL 583605 (9th Cir. Oct.9, 1996). *Rice* is an unpub-

ting by designation.

\*\*\* The Honorable Frank Zapata, United States District Judge for the District of Arizona, sit-

## HART v. MASSANARI

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

1159

lished disposition, not reported in the Federal Reporter except as a one-line entry in a long table of cases. See Decisions Without Published Opinions, 98 F.3d 1345, 1346 tbl. (9th Cir.1996). The full text of the disposition can be obtained from our clerk's office, and is available on Westlaw® and LEXIS®. However, it is marked with the following notice: "This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir.R. 36-3." Our local rules are to the same effect: "Unpublished dispositions and orders of this Court are not binding precedent . . . [and generally] may not be cited to or by the courts of this circuit . . ." 9th Cir. R. 36-3.

We ordered counsel to show cause as to why he should not be disciplined for violating Ninth Circuit Rule 36-3. Counsel responds by arguing that Rule 36-3 may be unconstitutional. He relies on the Eighth Circuit's opinion in *Anastasoff v. United*

*States*, 223 F.3d 898, *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000). *Anastasoff*, while vacated, continues to have persuasive force. See, e.g., *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260 (5th Cir.2001) (Smith, J., dissenting from denial of reh'g en banc).<sup>1</sup> It may seduce members of our bar into violating our Rule 36-3 under the mistaken impression that it is unconstitutional. We write to lay these speculations to rest.

## I

A. *Anastasoff* held that Eighth Circuit Rule 28A(i), which provides that unpublished dispositions are not precedential—and hence not binding on future panels of that court<sup>2</sup>—violates Article III of the Constitution. See 223 F.3d at 899. According to *Anastasoff*, exercise of the "judicial Power" precludes federal courts

1. See also Coleen M. Barger, *Anastasoff, Unpublished Opinions, and "No-Citation" Rules*, 3 J.App. Prac. & Process 169, 169-70 (2001). Barger notes that "[t]he chief judge of the District of Massachusetts seems determined to force the issue in the First Circuit," citing 1st Cir. R. 36(b)(2)(F) ("Unpublished opinions may be cited only in related cases . . ."), "as he has begun to routinely insert the following footnote in his opinions whenever he cites unpublished opinions to support his reasoning":

For the propriety of citing unpublished decisions, see *Anastasoff v. United States*, 223 F.3d 898, 899-905 (8th Cir.) (R. Arnold, J.) (holding that unpublished opinions have precedential effect), *vacated as moot*, No. 99-3917, 2000 WL 1863092 (8th Cir. Dec. 18, 2000); *Giese v. Pierce Chem. Co.*, 43 F.Supp.2d 98, 103 (D.Mass.1999) (relying on unpublished opinions' persuasive authority), and Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J.App. Prac. & Process 219 (1999).

See, e.g., *Suboh v. City of Revere*, 141 F.Supp.2d 124, 144 n. 18 (D.Mass.2001) (Young, C.J.).

2. Our rule operates somewhat differently from that of the Eighth Circuit, though it is in essential respects the same. While Eighth Circuit Rule 28A(i) says that "[u]npublished decisions are not precedent," we say that unpublished dispositions are "not binding precedent." Our rule, unlike that of the Eighth Circuit, prohibits citation of an unpublished disposition to any of the courts of our circuit. The Eighth Circuit's rule allows citation in some circumstances, but provides that the authority is persuasive rather than binding. See 8th Cir. R. 28A(i) ("Parties may . . . cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well."). The difference is not material to the rationale of *Anastasoff* because both rules free later panels of the court, as well as lower courts within the circuit, to disregard earlier rulings that are designated as nonprecedential.

For a comprehensive table of nonpublication and noncitation rules across all circuits and states, see Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J.App. Prac. & Process 251, 253-85 tbl. 1 (2001).

from making rulings that are not binding in future cases. Or, to put it differently, federal judges are not merely required to follow the law, they are also required to *make* law in every case. To do otherwise, *Anastasoff* argues, would invite judicial tyranny by freeing courts from the doctrine of precedent: “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.” *Id.* at 904 (quoting Joseph Story, *Commentaries on the Constitution of the United States* § 377 (1833)).<sup>3</sup>

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. But such rules have a much more limited effect: They allow panels of the courts of appeals to determine whether future panels, as well as judges of the inferior courts of the circuit, will be bound by particular rulings. This is hardly the same as turning our back on all precedents, or on the concept of precedent altogether. Rather, it is an effort to deal with precedent in the context of a modern legal system, which has evolved considerably since the early days of common law, and even since the time the Constitution was adopted.

The only constitutional provision on which *Anastasoff* relies is that portion of Article III that vests the “judicial Power” of the United States in the federal courts. U.S. Const. art. III, § 1, cl. 1. *Anastasoff* may be the first case in the history of the

Republic to hold that the phrase “judicial Power” encompasses a specific command that limits the power of the federal courts. There are, of course, other provisions of Article III that have received judicial enforcement, such as the requirement that the courts rule only in “Cases” or “Controversies,” *see, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), and that the pay of federal judges not be diminished during their good behavior. *See, e.g., United States v. Hatter*, 532 U.S. 557, ———, 121 S.Ct. 1782, 1790–91, 149 L.Ed.2d 820 (2001). The judicial power clause, by contrast, has never before been thought to encompass a constitutional limitation on how courts conduct their business.

There are many practices that are common or even universal in the federal courts. Some are set by statute, such as the courts’ basic organization. *See, e.g.,* 28 U.S.C. § 43 (creating a court of appeals for each circuit); 28 U.S.C. § 127 (dividing Virginia into two judicial districts); 28 U.S.C. § 2101 (setting time for direct appeals to the Supreme Court and for applications to the Supreme Court for writs of certiorari). *See generally* David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 Geo. J. Legal Ethics 509, 509–10 (2001). Others are the result of tradition, some dating from the days of the common law, others of more recent origin. Among them are the practices of issuing written opinions that speak for the court rather than for individual judges, adherence to the adversarial (rather than inquisitorial) model of developing cases, limits on the exercise of equitable relief,

3. In the passage cited by *Anastasoff*, Justice Story argued only that the judicial decisions of the Supreme Court were “conclusive and binding,” and that inferior courts were not free to disregard the “decisions of the highest tribunal.” He said nothing to suggest that

the principle of binding authority constrained the “judicial Power,” as *Anastasoff* does; rather, he recognized that the decisions of the Supreme Court were binding upon the states because they were the “supreme law of the land.” Story, *supra*, §§ 376–78.

## HART v. MASSANARI

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

1161

hearing appeals with panels of three or more judges and countless others that are so much a part of the way we do business that few would think to question them. While well established, it is unclear that any of these practices have a constitutional foundation; indeed, Hart (no relation so far as we know), in his famous Dialogue, concluded that Congress could abolish the inferior federal courts altogether. See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L.Rev. 1362, 1363–64 (1953). While the greater power does not always include the lesser, the Dialogue does suggest that much of what the federal courts do could be modified or eliminated without offending the Constitution.

*Anastasoff* focused on one aspect of the way federal courts do business—the way they issue opinions—and held that they

are subject to a constitutional limitation derived from the Framers' conception of what it means to exercise the judicial power. Given that no other aspect of the way courts exercise their power has ever been held subject to this limitation,<sup>4</sup> we question whether the “judicial Power” clause contains any limitation at all, separate from the specific limitations of Article III and other parts of the Constitution. The more plausible view is that when the federal courts rule on cases or controversies assigned to them by Congress, comply with due process, accord trial by jury where commanded by the Seventh Amendment and generally comply with the specific constitutional commands applicable to judicial proceedings, they have ipso facto exercised the judicial power of the United States. In other words, the term “judicial Power” in Article III is more likely descriptive than prescriptive.<sup>5</sup>

4. To be sure, exercise of the judicial power is subject to a number of explicit constraints, such as the requirements of due process, trial by jury, the availability of counsel in criminal cases, the ex post facto clause and the prohibition against bills of attainder—to name just a few.

5. Because the matter arises so seldom, there is little authority on this point, but the authority that does exist supports the view that the text of the judicial power clause is merely descriptive. For example, *United States v. Ferreira*, 54 U.S. (13 How.) 40, 14 L.Ed. 40 (1851), considered whether decisions of district courts as to whether certain Spanish citizens were entitled to compensation pursuant to a treaty between Spain and the United States were an exercise of the judicial power. If the district judges found the claimants entitled to compensation, they were to recommend that the Secretary of the Treasury make such payments, and the latter could (but was not required to) pay the claim. In concluding that such recommendations did not constitute an exercise of the judicial power (and hence were not reviewable by the Supreme Court), the opinion noted the ways in which the procedures for establishing these claims differed

from “the ordinary forms of a court of justice”:

For there is to be no suit; no parties in the legal acceptance of the term, are to be made—no process to issue; and no one is authorized to appear on behalf of the United States, or to summon witnesses in the case. The proceeding is altogether *ex parte*; and all that the judge is required to do, is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain. But neither the evidence, nor his award, are to be filed in the court in which he presides, nor recorded there; but he is required to transmit, both the decision and the evidence upon which he decided, to the Secretary of the Treasury; and the claim is to be paid if the Secretary thinks it just and equitable, but not otherwise. It is to be a debt from the United States upon the decision of the Secretary, but not upon that of the judge.

See also *Missouri v. Jenkins*, 515 U.S. 70, 130–33, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995) (Thomas, J., concurring) (listing various functional limitations on the exercise of the judicial power, including federalism, separation of powers and the prohibition against decid-

If we nevertheless were to accept *Anastasoff's* premise that the phrase "judicial Power" contains limitations separate from those contained elsewhere in the Constitution, we should exercise considerable caution in recognizing those limitations, lest we freeze the law into the mold cast in the eighteenth century. The law has changed in many respects since the time of the Framing, some superficial, others quite fundamental. For example, as Professor William Nelson has convincingly demonstrated, colonial juries "usually possessed the power to find both law and fact in the cases in which they sat," and were not bound to follow the instructions given to them by judges. See William E. Nelson, *Marbury v. Madison: The Origins and Legacy of Judicial Review* 16-17 (2000). Today, of course, we would consider it unfair—probably unconstitutional—to allow juries to make up the law as they go along.

Another example: At the time of the Framing, and for some time thereafter, the practice that prevailed both in the United States and England was for judges of appellate courts to express separate opinions, rather than speak with a single

ing political questions); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 815-18, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987) (Scalia, J., concurring) (discussing the functional limitation of separation of powers on the exercise of the judicial power).

6. The three examples we have given, though apparently disparate, actually bear on the question of what weight was given to precedent at the time of the Framing. In a regime where juries have power to decide the law, the concept of "binding" precedent has a very different, and much more diluted, meaning than in the current regime where jury verdicts are routinely reversed if they are not supported by the evidence in light of the applicable law. Similarly, binding precedent means something different altogether when a court speaks with seven or nine voices than with a single voice. Nine judges speaking separately may well agree on the outcome of a case, but they cannot give the kind of specif-

(or at least majority) voice. The practice changed around the turn of the nineteenth century, under the leadership of Chief Justice Marshall. See George L. Haskins & Herbert A. Johnson, *Foundations of Power: John Marshall, 1801-15*, in 2 *The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States* 382-89 (Paul A. Freund ed., 1981).

And yet another example: At the time of the Framing, and for some time thereafter, it was considered entirely appropriate for a judge to participate in the appeal of his own decision; indeed, before the creation of the Circuit Courts of Appeals, appeals from district court decisions were often taken to a panel consisting of a Supreme Court Justice riding circuit, and the district judge from whom the decision was taken. Act of March 2, 1793, ch. 22, § 1, 1 Stat. 333; see also Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3504 (2d ed.1984). Today, of course, it is widely recognized that a judge may not hear the appeal from his own decision. There are doubtless many more such examples.<sup>6</sup>

ic guidance as to the conduct of future cases that can be found in a single opinion speaking for the court. Finally, during the time when appeals were conducted by two-judge panels consisting of the circuit justice flanked by the district judge whose ruling was being appealed produced remarkably few—if any—written rulings. The precedential value of rulings from such panels was, for obvious reasons, not particularly valuable guidance in future cases. *Anastasoff's* view that the judicial process underwent such fundamental changes, yet the process of producing precedential opinions remained essentially unchanged, strikes us as inherently doubtful. *Anastasoff's* historical analysis has been called into question even by academics who generally agree with the result. See, e.g., Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L.Rev. 81, 84, 90-93 (2000); Salem M. Katsh & Alex V. Chachkes, *Constitutionality of "No-Citation" Rules*.<sup>7</sup>

## HART v. MASSANARI

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

1163

One danger of giving constitutional status to practices that existed at common law, but have changed over time, is that it tends to freeze certain aspects of the law into place, even as other aspects change significantly. See note 6 *supra*. This is a particularly dangerous practice when the constitutional rule in question is not explicitly written into the Constitution, but rather is discovered for the first time in a vague, two-centuries-old provision. The risk that this will allow judges to pick and choose those ancient practices they find salutary as a matter of policy, and give them constitutional status, is manifest. Compare Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J.App. Prac. & Process 219 (1999) (suggesting that all opinions be published and given precedential value), with *Anastasoff*, 223 F.3d 898 (holding that the Eighth Circuit's rule barring citation to unpublished opinions violates Article III). Thus, in order to follow the path forged by *Anastasoff*, we would have to be convinced that the practice in question was one the Framers considered so integral and well-understood that they did not have to bother stating it, even though they spelled out many other limitations in considerable detail. Specifically, to adopt *Anastasoff*'s position, we would have to be satisfied that the Framers had a very rigid conception of precedent, namely that all judicial decisions necessarily served as binding authority on later courts.

This is, in fact, a much more rigid view of precedent than we hold today. As we

explain below, most decisions of the federal courts are not viewed as binding precedent. No trial court decisions are; almost four-fifths of the merits decisions of courts of appeals are not. See p. 1177 *infra*.<sup>7</sup> To be sure, *Anastasoff* challenges the latter practice. We find it significant, however, that the practice has been in place for a long time, yet no case prior to *Anastasoff* has challenged its constitutional legitimacy. The overwhelming consensus in the legal community has been that having appellate courts issue nonprecedential decisions is not inconsistent with the exercise of the judicial power.

To accept *Anastasoff*'s argument, we would have to conclude that the generation of the Framers had a much stronger view of precedent than we do. In fact, as we explain below, our concept of precedent today is far stricter than that which prevailed at the time of the Framing. The Constitution does not contain an express prohibition against issuing nonprecedential opinions because the Framers would have seen nothing wrong with the practice.

**B.** Modern federal courts are the successors of the English courts that developed the common law, but they are in many ways quite different, including how they understand the concept of precedent. Common law judges did not make law as we understand that concept; rather, they "found" the law with the help of earlier cases that had considered similar matters. An opinion was evidence of what the law

J.App. Prac. & Process 287, 288 & n. 5 (2001).

7. Rules limiting the precedential effect of unpublished decisions exist in every federal circuit and all but four states (Connecticut, Delaware, New York and North Dakota). See Serfass & Cranford, note 2 *supra*, at 260-61 tbl. 1, 273-74 tbl. 1. But see *Eaton v. Chahal*,

146 Misc.2d 977, 553 N.Y.S.2d 642, 646 (N.Y.Sup.Ct.1990) ("[U]nreported decisions issued by judges of coordinate jurisdiction . . . are not binding precedent upon this court. . . .") The near-universal adoption of the practice illustrates not only that the practice is consistent with the prevailing conception of the judicial power, but also that it reflects sound judicial policy.

is, but it was not an independent source of law. See Theodore F.T. Plucknett, *A Concise History of the Common Law* 343-44 (5th ed.1956).<sup>8</sup> The law was seen as something that had an existence independent of what judges said: "a miraculous something made by nobody . . . and merely declared from time to time by the judges." 2 John Austin, *Lectures on Jurisprudence or The Philosophy of Positive Law* 655 (4th ed. 1873) (emphasis omitted). Opinions were merely judges' efforts to ascertain the law, much like scientific experiments were efforts to ascertain natural laws. If an eighteenth-century judge believed that a prior case was wrongly decided, he could say

8. As Hale described it, judicial decisions "do not make a Law properly so-called," but "they have a great Weight and Authority in Expounding, Declaring, and Publishing what the Law of this Kingdom is, [and] are a greater Evidence [of a law] than the Opinion of any private Persons, as such, whatsoever." Sir Matthew Hale, *The History of the Common Law of England* 68 (London, Nutt & Gosling 1739). In Lord Mansfield's view, "[t]he reason and spirit of cases make law; not the letter of particular precedents." *Fisher v. Prince*, 97 Eng. Rep. 876, 876 (K.B.1762).

9. As Holdsworth put it:

The general rule is clear. Decided cases which lay down a rule of law are authoritative and must be followed. But in very many of the statements of this general rule there are reservations of different kinds. . . . The fundamental principle, upon which all these reservations ultimately rest, is the principle stated by Coke, Hale and Blackstone, that these cases do not make law, but are only the best evidence of what the law is. They are not, as Hale said, "law properly so called," but only very strong evidence of the law. They are evidence, as Coke said, of the existence of those usages which go to make up the common law; and, conversely, the fact that no case can be produced to prove the existence of an alleged usage is evidence that there is no such usage. This principle is the natural, though undesigned, result of the unofficial character of the reports; and it is clear that its adoption gives the courts power to mould

that the prior judge had erred in his attempt to discern the law. See *Bole v. Horton*, 124 Eng. Rep. 1113, 1124 (C.P. 1673). Neither judges nor lawyers understood precedent to be binding in *Anastoff's* strict sense.<sup>9</sup>

One impediment to establishing a system of strict binding precedent was the absence of common law of a distinct hierarchy of courts. See Plucknett, *supra*, at 350.<sup>10</sup> Only towards the end of the nineteenth century, after England had reorganized its courts, was the position of the House of Lords at the head of its judicial hierarchy confirmed. Before that, there

as they please the conditions in which they will accept a decided case or a series of decided cases as authoritative. If the cases are only evidence of what the law is the courts must decide what weight is to be attached to this evidence in different sets of circumstances. *The manner in which they have decided this question has left them many means of escape from the necessity of literal obedience to the general rule that decided cases must always be followed.* They have allowed many exceptions to, and modifications of, this rule if, in their opinion, a literal obedience to it would produce either technical departures from established principles, or substantial inconveniences which would be contrary to public policy.

Sir William Holdsworth, 12 *A History of English Law* 150-51 (1938) (footnotes omitted) (emphasis added).

10. As one commentator has noted:

[T]wo conditions had to be satisfied before the doctrine of *stare decisis* could be established. (1) There had to exist reliable reports of cases. It is obvious that if cases are to be binding, there should be precise records of what they lay down. (2) There had also to be a settled judicial hierarchy. Equally obvious is it that until this was settled it could not be known which decisions were binding. Not until roughly the middle of the last century were these conditions fulfilled, and it is from about then that the modern doctrine [of *stare decisis*] emerges.

R.W.M. Dias, *Jurisprudence* 30-31 (2d ed.1964).

## HART v. MASSANARI

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

1165

was no single high court that could definitively say what the law was. Thus, as late as the middle of the nineteenth century, an English judge might ignore decisions of the House of Lords,<sup>11</sup> and the Exchequer and Queen's Bench held different views on the same point as late as 1842.<sup>12</sup> See *id.* at 350. Common law judges looked to earlier cases only as examples of policy or practice, and a single case was generally not binding authority.<sup>13</sup> Eighteenth-century judges did not feel bound to follow most decisions that might lead to inconvenient results, and judges would even blame reporters for cases they disliked. See Plucknett, *supra*, at 349.

The idea that judges declared rather than made the law remained firmly entrenched in English jurisprudence until

the early nineteenth century. David M. Walker, *The Oxford Companion to Law* 977 (1980). Blackstone, who wrote his Commentaries only two decades before the Constitutional Convention and was greatly respected and followed by the generation of the Framers, noted that "the 'law,' and the 'opinion of the judge' are not . . . one and the same thing; since it sometimes may happen that the judge may mistake the law"; in such cases, the precedent simply "was not law." 1 William Blackstone, *Commentaries* \*70-71 (1765).

For centuries, the most important sources of law were not judicial opinions themselves, but treatises that restated the law, such as the commentaries of Coke and Blackstone. Because published opinions were relatively few, lawyers and judges

11. One reason that House of Lords decisions commanded little respect was that as late as 1844, judicial deliberations could be conducted by lay peers, who brought far less training and experience to bear on legal issues than did the judges of the Exchequer Chamber. Dias, note 10 *supra*, at 32-33.

12. The three common law courts of first instance—the King's (or Queen's) Bench, Common Pleas and Exchequer—had overlapping jurisdiction in many common classes of cases. See Plucknett, *supra*, at 210.

13. The absence of an appellate hierarchy that could definitively settle legal issues was a continuing problem until the nineteenth century. The need for such definitive resolution nevertheless existed and the common law judges invented a substitute: the Exchequer Chamber. When a particularly vexing legal issue arose that was common to two or more of the courts, all the judges would meet, sometimes including the Lord Chancellor, the barons of the Exchequer, the members of the Council and the serjeants. See Plucknett, *supra*, at 151 (the Council consisted of the King's closest advisers); *id.* at 224 (serjeants were, essentially, lawyers known for wearing the coif, "a close-fitting cap of white silk or linen fastened under the chin; hence the term 'order of the coif.'")

The Exchequer Chamber debated particular legal issues and came up with a definitive ruling, which was then announced in the court where the case raising the issue originated. *Id.* at 162-63. The Exchequer Chamber was not a separate court; it was referred to by that name because these meetings were held in the court of the Exchequer, which "had ample office accommodation" to allow all the judges to meet in one place. Plucknett, *supra*, at 162 n. 7. The Exchequer Chamber might best be viewed as a super-en banc court including all of England's judicial officers.

Unlike other decisions at common law, decisions reached by the Exchequer Chamber were considered binding precedent and, according to Plucknett, this is the first time we find "the principle that a single case may be precedent." *Id.* at 348. The Exchequer Chamber is significant for our analysis because it clearly suggests common law judges knew the distinction between binding and persuasive precedent. The vast majority of precedents at common law were considered more or less persuasive; only the few decisions agreed-to by all English judges sitting together were afforded the status that the *Anastasoff* court would now afford to every decision of a three-judge court of appeals as a matter of constitutional imperative.

relied on commentators' synthesis of decisions rather than the verbatim text of opinions.<sup>14</sup>

Case reporters were entrepreneurs who scribbled down jury charges as they were delivered by judges, then printed and sold them. Or, reporters might cobble together case reports from secondhand sources and notes found in estates, sometimes years after the cases were decided. See Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 Cal. L.Rev. 15, 18-19 (1987). For example, *Heydon's Case* was decided in 1584, but Lord Coke did not publish his account of it until 1602. See Allen Dillard Boyer, "Understanding, Authority, and Will": *Sir Edward Coke and the Elizabethan Origins of Judicial Review*, 39 B.C. L.Rev. 43, 79 (1997). Not surprisingly, case reports often contradicted each other in describing the reasoning, and even the names, of particular cases. See Berring, *supra*, at 18.<sup>15</sup> The value of case reports turned not on the accuracy of the report

but on the acuity of their authors. See *id.* at 18-19.<sup>16</sup>

Coke's intellectual reputation made him the most valued, and the most famous, of the private reporters. His reports were not verbatim transcriptions of what the judges actually said, but vehicles for Coke's own jurisprudential and political agenda. See Boyer, *supra*, at 80 ("In the name of judicial reason, Coke was willing to rewrite the law. . . . In 1602, his chief way of shaping the law was in the way he reported it."). Like other reporters, Coke often distorted the language and meaning of prior decisions that were inconsistent with what he considered the correct legal principle. See Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 Emory L.J. 437, 447 (1996). "There was no clear boundary in his mind between what a case said and what he thought it ought to say, between the reasons which actually prompted the decision, and the elaborate commentary which he could easily weave around any question."

14. In the first century of American jurisprudence, Blackstone's "Commentaries were not merely an approach to the study of law; for most lawyers they constituted all there was of the law." Daniel J. Boorstin, *The Mysterious Science of the Law* 3 (1941).

15. For example, "*Clerk v. Day* was reported in four different books, and in not one of them correctly—not even as to name. . . . Arbitrary spelling of the names of cases is a bibliographical irritation, and sometimes a difficulty. *Fetter v. Beal* . . . is a pretty good disguise for *Fitter v. Veal* . . ." Percy H. Winfield, *The Chief Sources of English Legal History* 185 n. 3 (1925) (citations omitted).

16. As Holdsworth wrote:

[I]n the eighteenth century, because the reports were made by private reporters, the reports of decided cases possessed, as we have seen, very different degrees of authority. It was always possible for a judge who was trying a case to decry the authority of a

report which laid down a rule with which he disagreed. We have seen that Lord Mansfield, when he was pressed by a case which laid down a rule with which he did not like, was rather too apt to take this line. It is no doubt a line which it became less possible to take as the reports improved in quality, and as reporting became more standardized and more stereotyped. But within limits this censorship of reports is both legitimate and necessary. . . . Thus in the case of *Chillingworth v. Esche* [1924] 1 Ch. at pp. 112-113 Warrington L.J. said, "there are one or two points raised by Mr. Micklem with which I think I ought to deal. He relies on *Moeser v. Wisker* ((1871) L.R. 6 C.P. 120). In my opinion that is a case which never ought to have been reported. It was an *ex parte* application. The judges seized on a single fact, and decided on that fact. The purchaser in that case had no opportunity of stating his view."

Holdsworth, note 9 *supra*, at 154 & 154 n. 3 (footnotes omitted).

## HART v. MASSANARI

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

1167

Plucknett, *supra*, at 281.<sup>17</sup> Contrary to *Anastasoff's* view, it was emphatically not the case that all decisions of common law courts were treated as precedent binding on future courts unless distinguished or rejected. Rather, case reporters routinely suppressed or altered cases they considered wrongly decided. Indeed, sorting out the decisions that deserved reporting from those that did not became one of their primary functions.<sup>18</sup>

A survey of the legal landscape as it might have been viewed by the generation of the Framers casts serious doubt on the proposition—so readily accepted by *Anastasoff*—that the Framers viewed precedent in the rigid form that we view it today. Indeed, it is unclear that the Framers would have considered our view of precedent desirable.<sup>19</sup> The common law, at its

core, was a reflection of custom, and custom had a built-in flexibility that allowed it to change with circumstance. Thus, “when Lord Mansfield incorporated the custom of merchants into the common law, it was a living flexible custom, responding to the growth and change of mercantile habits.” Plucknett, *supra*, at 350. Embodying that custom into a binding decision raised the danger of ossifying the custom: “[I]f perchance a court has given a decision on a point of that custom, it loses for ever its flexibility and is fixed by the rule of precedent at the point where the court touched it.” *Id.* It is entirely possible that lawyers of the eighteenth century, had they been confronted with the regime of rigid precedent that is in common use today, would have reacted with alarm.<sup>20</sup>

17. Coke was not alone in this practice:

[B]arristers have sometimes exercised some kind of censorship over the cases which they have reported.... For instance ... Atlay, *The Victorian Chancellors* ii 138, says, “Campbell was no mere stenographer; he exercised an absolute discretion as to what decisions he reported and what he suppressed, and sternly rejected any which appeared to him inconsistent with former rulings or recognised principles. He jocularly took credit for helping to establish the Chief Justice’s reputation as a lawyer, and he used to boast that he had, in one of his drawers, material for an additional volume in the shape of ‘bad Ellenborough law’.” Holdsworth, note 9 *supra*, at 158 & 158 n. 1.

18. As one commentator has noted:

It would appear also that from about 1785 judges were beginning to favour particular reporters chosen for each court and to prefer citation from them and no other.... The question what cases should be reported bristles with problems. The decision rests ultimately with the individual reporter. Dias, note 10 *supra*, at 33.

19. As another commentator has noted:

The Framers were familiar with the idea of precedent. But ... [t]he whole idea of just what precedent entailed was unclear. The relative uncertainty over precedent in 1789

also reflects the fact that “many state courts were manned by laymen, and state law and procedure were frequently in unsettled condition. The colonial and state courts did not enjoy high prestige, and their opinions were not even deemed worthy of publication.”

Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 *Colum. L.Rev.* 723, 770 n. 267 (1988) (citations omitted). See also Melissa H. Weresh, *The Unpublished, Non-Precedential Decision: An Uncomfortable Legality?*, 3 *J.App. Prac. & Process* 175, 186 (2001) (“Stare decisis and the American common law system have never required the publication of all decisions.”)

20. Far from being the strict and uncontroverted doctrine that *Anastasoff* attempts to portray, the concept of precedent at the time of the Framers was the subject of lively debate. Adherence to the common law was not “inevitable and unopposed.” Robert H. Jackson, *The Supreme Court in the American System of Government* 29 (1955). “[T]he parameters of judicial power were highly contested in the late colonial and early Republic periods.... [N]o one knew the exact role that judges would have in the new experiment in government that formed the United States.” R. Ben Brown, *Judging in the Days of the Early Republic: A Critique of Judge Richard*

The modern concept of binding precedent—where a single opinion sets the course on a particular point of law and must be followed by courts at the same level and lower within a pyramidal judicial hierarchy—came about only gradually over the nineteenth and early twentieth centuries. Lawyers began to believe that judges made, not found, the law. This coincided with monumental improvements

in the collection and reporting of case authorities. As the concept of law changed and a more comprehensive reporting system began to take hold, it became possible for judicial decisions to serve as binding authority.<sup>21</sup>

Early American reporters resembled their English ancestors—disorganized and meager<sup>22</sup>—but the character of the report-

*Arnold's Use of History in Anastasoff v. United States*, 3 J.App. Prac. & Process 355, 375, 383 (2001). Therefore, "lawyers, judges and legal commentators contested the question of just what body of law judges should use to decide cases in the early Republic." *Id.* at 358.

On one side of the debate was Blackstone himself. "Far from providing support for Judge Arnold's claim that the colonial judiciary was bound by common law precedent, Blackstone's thesis was just the opposite": that American courts were not bound by English precedent. *Id.* at 357 (footnotes omitted). St. George Tucker, a prominent nineteenth-century American scholar, disagreed. *Id.* at 358.

Amidst this disagreement, American judges not only routinely picked and chose which English precedents to follow, but also felt free to ignore their *own* decisions. *Id.* at 359, 360-63 (discussing *Fitch v. Brainerd*, 2 Day 163 (Conn.1805) (available at 1805 WL 203), in which the Connecticut Supreme Court declared, without explanation, that its prior decision adopting an English precedent authored by Lord Mansfield, "was not law.") Such cavalier treatment of precedent—the *Fitch* court did not acknowledge the precedent as binding and distinguish or reject it, but simply declared it "was not law"—illustrates that precedent at the time of the Framers was a far more fluid concept than it is today, and certainly more so than the strict form advocated by *Anastasoff*.

21. As Plucknett notes, "[t]he nineteenth century produced the changes which were necessary for the establishment of the rigid and symmetrical theory [of case precedent] as it exists today." Plucknett, *supra*, at 350. Among the changes he points to was the establishment of a strict appellate hierarchy and the standardization of case law reporting. *Id.*

22. The first volumes of the United States Reports reveal the idiosyncratic and sometimes

unreliable character of the early reporters. The first volume contains not a single decision of the United States Supreme Court. See Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 Mich. L.Rev. 1291, 1296 (1985). The reporter, Alexander James Dallas, began his career by publishing decisions of the Pennsylvania and Delaware courts, but not until 1806 were Pennsylvania judges required to reduce their opinions to writing (and then only at the parties' request). Dallas's first volume therefore contains only brief descriptions of the earliest decisions, based on notes preserved by judges and lawyers. See *id.* at 1295-98. And, while his second volume does contain decisions of the United States Supreme Court, Dallas could not always rely on a written opinion as the basis of his report because the Court did not invariably reduce its opinions to writing:

Not a single formal manuscript opinion is known to have survived from the Court's first decade; and few, if any, may ever have existed for Dallas to draw upon. Nor may it be confidently assumed that in all instances Dallas was present in court to take down what the Justices said, or that he was able afterwards to consult any notes they may have kept of the opinions they announced. . . . Delay, expense, omission and inaccuracy: these were among the hallmarks of Dallas' work.

*Id.* at 1305 (footnotes omitted).

At that time, the Supreme Court had no official reporter and cases were never printed. *United States v. Yale Todd*, decided by the Supreme Court in 1784, is a typical example. Because "[t]here was no official reporter at that time, [the] case has not been printed." *United States v. Ferreira*, 54 U.S. (13 How.) 40, 52, 14 L.Ed. 40 (1851). So said Chief Justice Taney in a note added following *Ferreira*, describing *Yale Todd*. "[A]s the subject is one of much interest, and concerns the nature and extent of judicial power, the sub-

## HART v. MASSANARI

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

1169

ing process began to change, after the Constitution was adopted, with the emergence of official reporters in the late eighteenth century and the early nineteenth century. See Berring, *supra*, at 20–21. And, later in the nineteenth century, the West Company began to publish standardized case reporters, which were both accurate and comprehensive, making “it possible to publish in written form all of the decisions of courts.” *Id.* at 21. Case reports grew thicker, and the weight of precedent began to increase—weight, that is, in terms of volume.

The more cases were reported, the harder became the task of searching for relevant decisions. At common law, circuit-riding judges often decided cases without referring to any reporters at all, see *Fentum v. Pocock*, 5 Taunt. 192, 195, 128 Eng. Rep. 660, 662 (C.P.1813) (Mansfield, C.J.) (“It [was] utterly impossible for any Judge, whatever his learning and abilities may be, to decide at once rightly upon every point which [came] before him at Nisi Prius . . .”), and reporters simply left out decisions they considered wrong or those that merely repeated what had come before. Sir Francis Bacon recommended that cases “merely of iteration and repetition” be omitted from the case reports altogether, and Coke warned judges against reporting all of their decisions for fear of weighing down the law. See Kirt Shulberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 Cal. L.Rev. 541, 545 & n. 8 (1997). Indeed, the English opin-

ion-reporting system has never published, and does not today publish, every opinion of English appellate courts, even though the total number of opinions issued each year in both the English Court of Appeal and House of Lords combined is little more than 1000—less than a quarter of the number of dispositions issued annually by the Ninth Circuit in recent years, see note 37 *infra*. Robert J. Martineau, *Appellate Justice in England and the United States: A Comparative Analysis* 107, 150 (1990); Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. Mich. J.L. Ref. 119, 136 (1995).<sup>23</sup>

## II

[1] Federal courts today do follow some common law traditions. When ruling on a novel issue of law, they will generally consider how other courts have ruled on the same issue. This consideration will not be limited to courts at the same or higher level, or even to courts within the same system of sovereignty. Federal courts of appeals will cite decisions of district courts, even those in other circuits; the Supreme Court may cite the decisions of the inferior courts, see, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (citing *Associated Gen. Contractors of Cal. v. City & County of San Francisco*, 813 F.2d 922, 929 (9th Cir.1987)), or those of the state courts, see, e.g., *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 121 S.Ct. 1446, 1452, 149 L.Ed.2d 391 (2001)

stance of the decision in *Yale Todd's case* is inserted here, in order that it may not be overlooked, if similar questions should hereafter arise.” *Id.*

23. In 1986, only 39% of the 884 opinions of the English Court of Appeal were reported. Martineau, *Appellate Justice*, *supra*, at 107, 150. “Although technically a judgment need not be reported to be cited as precedent [in

England] . . . the reality is that unless a judgment is reported it is not likely to be used as precedent.” *Id.* at 104. Nevertheless, “[t]here does not appear to be among the judges and the bar any current dissatisfaction with the system except that some believe too many, not too few, judgments are reported.” *Id.* at 107.

(citing *J & K Painting Co. v. Bradshaw*, 45 Cal.App.4th 1394, 1402, 53 Cal.Rptr.2d 496 (Cal.Ct.App.1996)). It is not unusual to cite the decision of courts in foreign jurisdictions, so long as they speak to a matter relevant to the issue before us. See, e.g., *Mozes v. Mozes*, 239 F.3d 1067, 1071 (9th Cir.2001). The process even extends to non-case authorities, such as treatises and law review articles. See *id.* at 1071 & n. 7.

[2] Citing a precedent is, of course, not the same as following it; “respectfully disagree” within five words of “learned colleagues” is almost a cliché. After carefully considering and digesting the views of other courts and commentators—often giving conflicting guidance on a novel legal issue—courts will then proceed to follow one line of authority or another, or sometimes strike out in a completely different direction. While we would consider it bad form to ignore contrary authority by failing even to acknowledge its existence, it is well understood that—in the absence of binding precedent—courts may forge a different path than suggested by prior authorities that have considered the issue. So long as the earlier authority is acknowledged and considered, courts are deemed to have complied with their common law responsibilities.

24. The same practice is followed in the state courts as well. See, e.g., *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County*, 57 Cal.2d 450, 20 Cal.Rptr. 321, 369 P.2d 937, 940 (Cal.1962) (“Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court.”).

25. For example, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985), a majority held that the rule announced in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997,

[3, 4] But precedent also serves a very different function in the federal courts today, one related to the horizontal and vertical organization of those courts. See John Harrison, *The Power of Congress Over The Rules of Precedent*, 50 Duke L.J. 503 (2000). A district judge may not respectfully (or disrespectfully) disagree with his learned colleagues on his own court of appeals who have ruled on a controlling legal issue, or with Supreme Court Justices writing for a majority of the Court.<sup>24</sup> Binding authority within this regime cannot be considered and cast aside; it is not merely evidence of what the law is. Rather, caselaw on point *is* the law. If a court must decide an issue governed by a prior opinion that constitutes binding authority, the later court is bound to reach the same result, even if it considers the rule unwise or incorrect. Binding authority must be followed unless and until overruled by a body competent to do so.

[5] In determining whether it is bound by an earlier decision, a court considers not merely the “reason and spirit of cases” but also “the letter of particular precedents.” *Fisher v. Prince*, 97 Eng. Rep. 876, 876 (K.B.1762). This includes not only the rule announced, but also the facts giving rise to the dispute, other rules considered and rejected and the views expressed in response to any dissent or concurrence.<sup>25</sup> Thus, when crafting binding

41 L.Ed.2d 789 (1974) (plaintiff must show “actual malice” to obtain punitive damages for false and defamatory statements), applies only to statements involving matters of public concern. Relying on the language and context of *Gertz*, the Court rejected the dissenters’ claim that the *Gertz* rule applied to all defamatory statements, and instead concluded that *Gertz* left it an open question whether the rule applied to statements not of public concern. Compare *Dun & Bradstreet*, 472 U.S. at 757 n. 4, 105 S.Ct. 2939 (“The dissent states that [a] several points the Court in *Gertz* makes perfectly clear [that] the restrictions of presumed and punitive damages were to apply in

## HART v. MASSANARI

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

1171

authority, the precise language employed is often crucial to the contours and scope of the rule announced.<sup>26</sup>

[6, 7] Obviously, binding authority is very powerful medicine. A decision of the Supreme Court will control that corner of the law unless and until the Supreme Court itself overrules or modifies it. Judges of the inferior courts may voice their criticisms, but follow it they must. See, e.g., *Ortega v. United States*, 861 F.2d 600, 603 & n. 4 (9th Cir.1988) (“This case is squarely controlled by the Supreme Court’s recent decision. . . . [We] agree[ ] with the dissent that [appellant] deserves better treatment from our Government. Unfortunately, legal precedent deprives us of discretion to do equity.”). The same is true as to circuit authority, although it usually covers a much smaller geographic area.<sup>27</sup> Circuit law, a concept wholly unknown at the time of the Framing, see Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 Green Bag 2d 17, 22 (2000), binds all courts within a particular circuit, including the court of appeals itself. Thus, the first panel to consider an issue sets the law not only for all the inferior courts in

the circuit, but also future panels of the court of appeals.

[8–11] Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court.<sup>28</sup> As *Anastasoff* itself states, a later three-judge panel considering a case that is controlled by the rule announced in an earlier panel’s opinion has no choice but to apply the earlier-adopted rule; it may not any more disregard the earlier panel’s opinion than it may disregard a ruling of the Supreme Court. *Anastasoff*, 223 F.3d at 904; see also *Santamaria v. Horsley*, 110 F.3d 1352, 1355 (9th Cir.1997) (“It is settled law that one three-judge panel of this court cannot ordinarily reconsider or overrule the decision of a prior panel.”), *rev’d*, 133 F.3d 1242 (9th Cir.) (en banc), *amended by* 138 F.3d 1280 (9th Cir.), *cert. denied*, 525 U.S. 823–24, 119 S.Ct. 68, 142 L.Ed.2d 53 (1998); *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 425–26 (5th Cir.1987) (A “purpose of institutional orderliness [is served] by our insistence that, in the absence of intervening Supreme Court precedent, one panel cannot overturn another panel, regardless of how

all cases.’ Given the context of *Gertz*, however, the Court could have made ‘perfectly clear’ only that these restrictions applied in cases involving *public speech*.” (citations omitted)), *with id.* at 785 n. 11, 105 S.Ct. 2939 (“Distrust of placing in the courts the power to decide what speech was of public concern was precisely the rationale *Gertz* offered for rejecting [an alternative] approach. It would have been incongruous for the Court to go on to circumscribe the protection against presumed and punitive damages by reference to a judicial judgment as to whether the speech at issue involved matters of public concern.” (citation omitted)).

26. This is consistent with the practice in our court—and all other collegial courts of which we are aware—in which the judges who join an opinion authored by another judge make

substantive suggestions, often conditioning their votes on reaching agreement on mutually acceptable language.

27. The exception is the Federal Circuit, which has a geographic area precisely the same as the Supreme Court, but much narrower subject-matter jurisdiction. See 28 U.S.C. § 1295(a).

28. Or, unless Congress changes the law. See, e.g., *Van Tran v. Lindsey*, 212 F.3d 1143, 1149 (9th Cir.) (earlier caselaw established that mixed questions in habeas petitions were reviewed de novo, but under the Anti-Terrorism and Effective Death Penalty Act of 1996, the standard of review is governed by 28 U.S.C. § 2254(d)), *cert. denied*, 531 U.S. 944, 121 S.Ct. 340, 148 L.Ed.2d 274 (2000).

wrong the earlier panel decision may seem to be.”). Designating an opinion as binding circuit authority is a weighty decision that cannot be taken lightly, because its effects are not easily reversed. Whether done by the Supreme Court or the court of appeals through its “unwieldy” and time-consuming en banc procedures, Richard A. Posner, *The Federal Courts: Crisis and Reform* 101 (1985),<sup>29</sup> overruling such authority requires a substantial amount of courts’ time and attention—two commodities already in very short supply.

[12] Controlling authority has much in common with persuasive authority. Using the techniques developed at common law, a court confronted with apparently controlling authority must parse the precedent in light of the facts presented and the rule

29. An impressive array of judges and academics have noted the rigors of en banc procedures. See Richard S. Arnold, *Why Judges Don't Like Petitions for Rehearing*, 3 J.App. Prac. & Process 29, 37 (2001) (“[O]n many days, I confess, I find myself wishing that there were no such thing [as en banc rehearing].”); Pamela Ann Rymer, *How Big Is Too Big?*, 15 J.L. & Pol. 383, 392 (1999) (“expensive and time consuming”); Joseph T. Sneed, *The Judging Cycle: Federal Circuit Court Style*, 57 Ohio St. L.J. 939, 942 (1996) (“time consuming and complex”); James Oakes, *Personal Reflections on Learned Hand and the Second Circuit*, 47 Stan. L.Rev. 387, 393 (1995) (“enormously time-consuming and expensive”); Deaneell Reece Tacha, *The “C” Word: On Collegiality*, 56 Ohio St. L.J. 585, 590 (1995) (“time-consuming and expensive”); Irving R. Kaufman, *Do the Costs of the En Banc Proceeding Outweigh Its Advantages?*, 69 Judicature 7, 7 (1985) (“the most time consuming and inefficient device in the appellate judiciary’s repertoire”); J. Woodford Howard, Jr., *Courts of Appeals in the Federal Judicial System: A Study of the Second, Fifth, and District of Columbia Circuits* 217 (1981) (“most circuit judges regard en bancs as a ‘damned nuisance’”).

Because they are so cumbersome, en banc procedures are seldom used merely to correct

announced. Insofar as there may be factual differences between the current case and the earlier one, the court must determine whether those differences are material to the application of the rule or allow the precedent to be distinguished on a principled basis. Courts occasionally must reconcile seemingly inconsistent precedents and determine whether the current case is closer to one or the other of the earlier opinions. See, e.g., *Mont. Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1057 (9th Cir.2000).

But there are also very important differences between controlling and persuasive authority. As noted, one of these is that, if a controlling precedent is determined to be on point, it must be followed. Another important distinction concerns the scope of controlling authority. Thus, an opinion of our court is binding within our circuit, not

the errors of individual panels: “[W]e do not take cases en banc merely because of disagreement with a panel’s decision, or rather a piece of a decision.... We take cases en banc to answer questions of general importance likely to recur, or to resolve intracircuit conflicts, or to address issues of transcendent public significance—perhaps even to curb a ‘runaway’ panel—but not just to review a panel opinion for error, even in cases that particularly agitate judges....” *EEOC v. Ind. Bell Tel. Co.*, 256 F.3d 516, 86 Fair Empl. Prac. Cas. (BNA) 1, 2001 WL 717685, at \*11 (7th Cir.2001) (en banc) (Posner, J., concurring). See also Fed. R.App. P. 35(a) (“An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court’s decisions; or (2) the proceeding involves a question of exceptional importance.”); Arnold, *supra*, at 36 (“Petitions for rehearing are generally denied unless something of unusual importance—such as a life—is at stake, or a real and significant error was made by the original panel, or there is conflict within the circuit on a point of law.”) It is therefore very important that three-judge panel opinions be decided correctly and that they state their holdings in a way that is easily understood and applied in future cases.

elsewhere in the country. The courts of appeals, and even the lower courts of other circuits, may decline to follow the rule we announce—and often do. This ability to develop different interpretations of the law among the circuits is considered a strength of our system. It allows experimentation with different approaches to the same legal problem, so that when the Supreme Court eventually reviews the issue it has the benefit of “percolation” within the lower courts. See Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court’s Responsibilities: An Empirical Study*, 59 N.Y.U. L.Rev. 681, 716 (1984). Indeed, the Supreme Court sometimes chooses not to grant certiorari on an issue, even though it might deserve definitive resolution, so it will have the benefit of a variety of views from the inferior courts before it chooses an approach to a legal problem. See *McCray v. New York*, 461 U.S. 961, 963, 103 S.Ct. 2438, 77 L.Ed.2d 1322 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari) (“[I]t is a sound exercise of discretion for the Court to allow [other courts] to serve as laboratories in which the issue receives further study before it is addressed by this Court.”).

[13] The various rules pertaining to the development and application of binding authority do not reflect the developments of the English common law. They reflect, rather, the organization and structure of the federal courts and certain policy judgments about the effective administration of justice. See *Payne v. Tennessee*, 501 U.S. 808, 828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (stare decisis is a “principle of policy,” and “not an inexorable command”); see, e.g., *Textile Mills Secs. Corp. v. Comm’r*, 314 U.S. 326, 334–35, 62 S.Ct. 272, 86 L.Ed. 249 (1941) (en banc rehearing “makes for more effective judicial administration”). Circuit boundaries are set

by statute and can be changed by statute. When that happens, and a new circuit is created, it starts without any circuit law and must make an affirmative decision whether to create its circuit law from scratch or to adopt the law of another circuit—generally the circuit from which it was carved—as its own. Compare *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc) (adopting as binding precedent all decisions issued by the former Fifth Circuit before its split into the Fifth and Eleventh Circuits), and *South Corp. v. United States*, 690 F.2d 1368, 1370–71 (Fed.Cir.1982) (en banc) (adopting as binding precedent all decisions of the Federal Circuit’s predecessor courts, the Court of Claims and the Court of Customs and Patent Appeals), with *Estate of McMorris v. Comm’r*, 243 F.3d 1254, 1258 (10th Cir.2001) (“[W]e have never held that the decisions of our predecessor circuit [the former Eighth Circuit] are controlling in this court.”). The decision whether to adopt wholesale the circuit law of another court is a matter of judicial policy, not a constitutional command.

How binding authority is overruled is another question that was resolved by trial and error with due regard to principles of sound judicial administration. Early in the last century, when the courts of appeals first grew beyond three judges, the question arose whether the courts could sit en banc to rehear cases already decided by a three-judge panel. The lower courts disagreed, but in *Textile Mills Securities Corporation v. Commissioner*, the Supreme Court sustained the authority of the courts of appeals to sit en banc. *Textile Mills Secs. Corp. v. Comm’r*, 314 U.S. 326, 335, 62 S.Ct. 272, 86 L.Ed. 249 (1943) (“Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted. Those considerations are especially important in view of the fact that in our federal judicial system

these courts are the courts of last resort in the run of ordinary cases.”). En banc rehearing would give all active judges an opportunity to hear a case “[w]here . . . there is a difference in view among the judges upon a question of fundamental importance, and especially in a case where two of the three judges sitting in a case may have a view contrary to that of the other . . . judges of the court.” *Comm’r v. Textile Mills Secs. Corp.*, 117 F.2d 62, 70 (3d Cir.1940), *aff’d*, 314 U.S. 326, 62 S.Ct. 272, 86 L.Ed. 249 (1943). Congress codified the *Textile Mills* decision just five years later in 28 U.S.C. § 46(c), leaving the courts of appeals “free to devise [their] own administrative machinery to provide the means whereby a majority may order such a hearing.” *W. Pac. R.R. v. W. Pac. R.R.*, 345 U.S. 247, 250, 73 S.Ct. 656, 97 L.Ed. 986 (1953).

[14–16] That the binding authority principle applies only to appellate decisions, and not to trial court decisions, is yet another policy choice. There is nothing inevitable about this; the rule could just as easily operate so that the first district judge to decide an issue within a

district, or even within a circuit, would bind all similarly situated district judges, but it does not. The very existence of the binding authority principle is not inevitable. The federal courts could operate, though much less efficiently, if judges of inferior courts had discretion to consider the opinions of higher courts, but “respectfully disagree” with them for good and sufficient reasons.<sup>30</sup>

### III

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. It may be true, as *Anastasoff* notes, that “judges and lawyers of the day recognized the authority of unpublished decisions even when they were established only by memory or by a lawyer’s unpublished memorandum,” 223 F.3d at 903, but precedents brought to the attention of the court in that fashion obviously could not serve as the kind of rigid constraint that binding authority provides today. Unlike our practice today, a single

30. Some state court systems apply the binding authority principle differently than do the federal courts. In California, for example, an opinion by one of the courts of appeal is binding on all trial courts in the state, not merely those in the same district. Judicial Council of California, *Report of the Appellate Process Task Force* 59 (2000); Jon B. Eisenberg, Ellis J. Horvitz & Justice Howard B. Wiener, *California Practice Guide: Civil Appeals and Writs* § 14:193 (2000) (“A court of appeal decision must be followed by all superior and municipal courts, regardless of which appellate district rendered the opinion.”) However, court of appeal panels are not bound by the opinions of other panels, even those within the same district. *In re Marriage of Shaban*, 88 Cal.App.4th 398, 105 Cal.Rptr.2d 863, 870–71 (2001) (“[B]ecause there is no ‘horizontal stare decisis’ within the Court of Appeal, intermediate appellate court

precedent that might otherwise be binding on a trial court . . . is not absolutely binding on a different panel of the appellate court.” (citations omitted)). See also *Report of the Appellate Process Task Force*, *supra*, at 60–61; Eisenberg, Horvitz & Wiener, *supra*, § 14:193.1 (“In contrast, a decision by one court of appeal is not binding on other courts of appeal.”)

California’s management of precedent differs from that of the federal courts in another important respect: The California Supreme Court may “depublish” a court of appeal opinion—i.e., strip a published decision of its precedential effect. See Cal. R. Ct. 976(c)(2); Steven B. Katz, *California’s Curious Practice of “Pocket Review”*, 3 J.App. Prac. & Process 385 (2001). California’s depublishation practice shows that it is possible to adopt more aggressive methods of managing precedent than those used by the federal courts.

## HART v. MASSANARI

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

1175

case was not sufficient to establish a particular rule of law, and case reporters often filtered out cases that they considered wrong, or inconsistent with their view of how the law *should* develop. See pp. 1166–67 *supra*. The concept of binding case precedent, though it was known at common law, see note 13 *supra*, was used exceedingly sparingly. For the most part, common law courts felt free to depart from precedent where they considered the earlier-adopted rule to be no longer workable or appropriate.

Case precedent at common law thus resembled much more what we call persuasive authority than the binding authority which is the backbone of much of the federal judicial system today. The concept of binding precedent could only develop once two conditions were met: The development of a hierarchical system of appellate courts with clear lines of authority, and a case reporting system that enabled later courts to know precisely what was said in earlier opinions. See note 21 *supra*. As we have seen, these developments did not come about—either here or in England—until the nineteenth century, long after Article III of the Constitution was written.

[17] While many consider the principle of binding authority indispensable—perhaps even inevitable—it is important to note that it is not an unalloyed good. While bringing to the law important values such as predictability and consistency, it also (for the very same reason) deprives the law of flexibility and adaptability. See *Planned Parenthood v. Casey*, 505 U.S. 833, 868, 112 S.Ct. 2791, 120 L.Ed.2d 674

31. It also forces judges in certain instances to act in ways they may consider to be contrary to the Constitution. Some have argued that the duty of judges to follow the Constitution stands on a higher footing than the rule requiring adherence to precedent, and judges

(1992) (“The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete.”).<sup>31</sup> A district court bound by circuit authority, for example, has no choice but to follow it, even if convinced that such authority was wrongly decided. Appellate courts often tolerate errors in their caselaw because the rigors of the en banc process make it impossible to correct all errors. See note 29 *supra*.

A system of strict binding precedent also suffers from the defect that it gives undue weight to the first case to raise a particular issue. This is especially true in the circuit courts, where the first panel to consider an issue and publish a precedential opinion occupies the field, whether or not the lawyers have done an adequate job of developing and arguing the issue.

[18] The question raised by *Anastasoff* is whether one particular aspect of the binding authority principle—the decision of which rulings of an appellate court are binding—is a matter of judicial policy or constitutional imperative. We believe *Anastasoff* erred in holding that, as a constitutional matter, courts of appeals may not decide which of their opinions will be deemed binding on themselves and the courts below them. For the reasons explained, the principle of strict binding authority is itself not constitutional, but rather a matter of judicial policy. Were it otherwise, it would cast doubt on the federal court practice of limiting the binding effect of appellate decisions to the courts of a particular circuit. Circuit bound-

should not follow precedent when they believe that to do so would violate the Constitution. See Gary Lawson, *The Constitutional Case Against Precedent*, 17 Harv. J.L. & Pub. Pol’y 23, 27–28 (1994).

aries—and the very system of circuit courts—are a matter of judicial administration, not constitutional law. If, as *Anastasoff* suggests, the Constitution dictates that every “declaration of law . . . must be applied in subsequent cases to similarly situated parties,” 223 F.3d at 900, then the Second Circuit would have no authority to disagree with a ruling of the Eighth Circuit that is directly on point, and the first circuit to rule on a legal issue would then bind not only itself and the courts within its own circuit, but all inferior federal courts.

Another consequence of *Anastasoff*'s reasoning would be to cast doubt on the authority of courts of appeals to adopt a body of circuit law on a wholesale basis, as did the Eleventh Circuit in *Bonner*, and the Federal Circuit in *South Corp.* See p. 1173 *supra*. Circuits could, of course, adopt individual cases from other circuits as binding in a case raising a particular legal issue. See, e.g., *Charles v. Lundgren & Assocs., P.C.*, 119 F.3d 739, 742 (9th Cir.) (“Because we have the benefit of the Seventh Circuit’s cogent analysis, we will not replot plowed ground. Instead, we adopt the reasoning of the Seventh Circuit . . .” ) *cert. denied*, 522 U.S. 1028, 118 S.Ct. 627, 139 L.Ed.2d 607 (1997). But adopting a whole body of law, encompassing countless rules on matters wholly unrelated to the issues raised in a particular case, is a very different matter. If binding authority were a constitutional imperative, it could only be created through individual case adjudication, not by a decision unconstrained by the facts before the court or its prior caselaw.

Nor is it clear, under the reasoning of *Anastasoff*, how courts could limit the binding effect of their rulings to appellate decisions. Under *Anastasoff*'s reasoning, district court opinions should bind district courts, at least in the same district, or even nationwide. After all, the Constitu-

tion vests the same “judicial Power” in all federal courts, so *Anastasoff*'s conclusion that judicial decisions must have precedential effect would apply equally to the thousands of unpublished decisions of the district courts.

No doubt the most serious implication of *Anastasoff*'s constitutional rule is that it would preclude appellate courts from developing a coherent and internally consistent body of caselaw to serve as binding authority for themselves and the courts below them. Writing an opinion is not simply a matter of laying out the facts and announcing a rule of decision. Precedential opinions are meant to govern not merely the cases for which they are written, but future cases as well.

[19–22] In writing an opinion, the court must be careful to recite all facts that are relevant to its ruling, while omitting facts that it considers irrelevant. Omitting relevant facts will make the ruling unintelligible to those not already familiar with the case; including inconsequential facts can provide a spurious basis for distinguishing the case in the future. The rule of decision cannot simply be announced, it must be selected after due consideration of the relevant legal and policy considerations. Where more than one rule could be followed—which is often the case—the court must explain why it is selecting one, and rejecting the others. Moreover, the rule must be phrased with precision and with due regard to how it will be applied in future cases. A judge drafting a precedential opinion must not only consider the facts of the immediate case, but must also envision the countless permutations of facts that might arise in the universe of future cases. Modern opinions generally call for the most precise drafting and re-drafting to ensure that the rule announced sweeps neither too broadly nor too narrowly, and that it does not

## HART v. MASSANARI

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

1177

collide with other binding precedent that bears on the issue. See Fred A. Bernstein, *How to Write it Right*, Cal. Lawyer, at 42 (June 2000). Writing a precedential opinion, thus, involves much more than deciding who wins and who loses in a particular case. It is a solemn judicial act that sets the course of the law for hundreds or thousands of litigants and potential litigants. When properly done, it is an exacting and extremely time-consuming task.<sup>32</sup>

It goes without saying that few, if any, appellate courts have the resources to write precedential opinions in every case that comes before them.<sup>33</sup> The Supreme Court certainly does not. Rather, it uses its discretionary review authority to limit its merits docket to a handful of opinions per justice, from the approximately 9000 cases that seek review every Term.<sup>34</sup> While federal courts of appeals generally lack

discretionary review authority, they use their authority to decide cases by unpublished—and nonprecedential—dispositions to achieve the same end: They 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. In our circuit, published dispositions make up approximately 16 percent of decided cases; in other circuits, the percentage ranges from 10 to 44, the national average being 20 percent. Administrative Office of the United States Courts, *Judicial Business of the United States Courts* 44 tbl. S-3 (2000).

That a case is decided without a precedential opinion does not mean it is not fully considered, or that the disposition does not reflect a reasoned analysis of the issues presented.<sup>35</sup> What it does mean is that

32. Opinion writing is a “reflective art,” an absolute necessity of which is “fully adequate time to contemplate, think, write and re-write.” Howard T. Markey, *On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand*, 33 S.D. L.Rev. 371, 379, 384 (1988). Judge Markey rightly mourns the age when a judge could, as Judge Hand did, talk at length about each case, “with his feet on the desk and hands behind his head,” and “having reached his decision, . . . wr[ite] the entire opinion in longhand.” *Id.* at 380. Today, “[i]here simply isn’t time” to engage in such “reflective personal craftsmanship.” *Id.* at 379–80.

33. As Judge Posner has noted:

Given the workload of the federal courts of appeals today, the realistic choice is not between limited publication, on the one hand, and, on the other, improving and then publishing all the opinions that are not published today; it is between preparing but not publishing opinions in many cases and preparing no opinions in those cases. It is a choice, in other words, between giving the parties reasons for the decision of their appeal and not giving them reasons even though the appeal is not frivolous.

Richard A. Posner, *The Federal Courts: Challenge and Reform* 168–69 (1996).

34. The United States Supreme Court decided seventy-seven cases in October Term 1999, which represents less than nine opinions per justice. *Statistics for the Supreme Court’s October Term 1999*, 69 U.S.L.W. 3076 (BNA 2000). By comparison, in 1999, each active judge in our court heard an average of 450 cases and had writing responsibility for an average of twenty opinions and 130 unpublished dispositions. See *infra* note 37.

35. Sufficient restrictions on judicial decision-making exist to allay fears of irresponsible and unaccountable practices such as “burying” inconvenient decisions through nonpublication. In *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J.App. Prac. & Process 325 (2001), Professor Stephen L. Wasby concludes, after “extended observation of the . . . Ninth Circuit,” *id.* at 331, that formal publication guidelines and judges’ enforcement of them through their interactions with each other, keep judges honest in deciding whether or not to publish. See also Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, *supra*, at 132

the disposition is not written in a way that will be fully intelligible to those unfamiliar with the case, and the rule of law is not announced in a way that makes it suitable for governing future cases. As the Federal Judicial Center recognized, "the judicial time and effort essential for the development of an opinion to be published for posterity and widely distributed is necessarily greater than that sufficient to enable the judge to provide a statement so that the parties can understand the reasons for the decision." Federal Judicial Center, *Standards for Publication of Judicial Opinions* 3 (1973). An unpublished disposition is, more or less, a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the court's decision. Deciding a large portion of our cases in this fashion frees us to spend the requisite time drafting precedential opinions in the remaining cases.

Should courts allow parties to cite to these dispositions, however, much of the time gained would likely vanish. Without comprehensive factual accounts and precisely crafted holdings to guide them, zealous counsel would be tempted to seize upon superficial similarities between their clients' cases and unpublished dispositions. Faced with the prospect of parties citing

these dispositions as precedent, conscientious judges would have to pay much closer attention to the way they word their unpublished rulings. Language adequate to inform the parties how their case has been decided might well be inadequate if applied to future cases arising from different facts. And, although three judges might agree on the outcome of the case before them, they might not agree on the precise reasoning or the rule to be applied to future cases. Unpublished concurrences and dissents would become much more common, as individual judges would feel obligated to clarify their differences with the majority, even when those differences had no bearing on the case before them. In short, judges would have to start treating unpublished dispositions—those they write, those written by other judges on their panels, and those written by judges on other panels—as mini-opinions.<sup>36</sup> This new responsibility would cut severely into the time judges need to fulfill their paramount duties: producing well-reasoned published opinions and keeping the law of the circuit consistent through the en banc process. The quality of published opinions would sink as judges were forced to devote less and less time to each opinion.<sup>37</sup>

("American appellate systems . . . have many built-in protections to prevent against [judicial] irresponsibility without mandatory publication of opinions.")

36. See Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 Ohio St. L.J. 177, 196 ("[I]t will not save us any time if [unpublished opinions] are being cited back to us. We will have to prepare unpublished opinions as we do published opinions—as if they were creating precedent.").

37. Recent figures tell a striking story. In 1999, our court decided some 4500 cases on the merits, about 700 by opinion and 3800 by unpublished disposition. Each active judge

heard an average of 450 cases as part of a three-judge panel and had writing responsibility in a third of those cases. That works out to an average of 150 dispositions—20 opinions and 130 unpublished dispositions—per judge. In addition, each judge had to review, comment on, and eventually join or dissent from 40 opinions and 260 unpublished dispositions circulated by other judges with whom he sat. See Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, Cal. Law., June 2000, at 44; see also *Report of the Federal Courts Study Committee* 109 (Apr. 2, 1990) (noting the federal appellate courts' "crisis of volume").

[23] Increasing the number of opinions by a factor of five, as *Anastasoff* suggests, doesn't seem to us a sensible idea, even if we had the resources to do so. Adding endlessly to the body of precedent—especially binding precedent—can lead to confusion and unnecessary conflict. Judges have a responsibility to keep the body of law “cohesive and understandable, and not muddy[ ] the water with a needless torrent of published opinions.” Martin, note 36 *supra*, at 192. Cases decided by nonprecedential disposition generally involve facts that are materially indistinguishable from those of prior published opinions. Writing a second, third or tenth opinion in the same area of the law, based on materially indistinguishable facts will, at best, clutter up the law books and databases with redundant and thus unhelpful authority. Yet once they are designated as precedent, they will have to be read and analyzed by lawyers researching the issue, materially increasing the costs to the client for absolutely no legitimate reason. Worse still, publishing redundant opinions will multiply significantly the number of inadvertent and unnecessary conflicts, because different opinion writers may use slightly differ-

ent language to express the same idea. As lawyers well know, even small differences in language can have significantly different implications when read in light of future fact patterns, so differences in phrasing that seem trivial when written can later take on a substantive significance.

The risk that this may happen vastly increases if judges are required to write many more precedential opinions than they do now, leaving much less time to devote to each.<sup>38</sup> Because conflicts—even inadvertent ones—can only be resolved by the exceedingly time-consuming and inefficient process of en banc review, see *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1478–79 (9th Cir.1987) (en banc) (conflict in panel opinions must be resolved by en banc court), *cert. denied*, 485 U.S. 989, 108 S.Ct. 1293, 99 L.Ed.2d 503 (1988), an increase in intracircuit conflicts would leave much less time for us to devote to normal panel opinions. Maintaining a coherent, consistent and intelligible body of caselaw is not served by writing more opinions; it is served by taking the time to make the precedential opinions we do write as lucid and consistent as humanly possible.<sup>39</sup>

38. Concerned that judges spend too little time writing (as opposed to editing) precedential opinions, commentators have suggested that judges should do the preliminary drafting of all published opinions. See, e.g., David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 Geo. J. Legal Ethics 509, 514, 555–56 (2001). Adoption of such proposals would, however, “produce fewer published opinions [and] more unpublished dispositions.” *Id.* at 593. By preventing judges from determining which of their opinions will be citable as precedent, *Anastasoff* would have precisely the opposite effect, forcing judges to spread their resources more thinly, resulting in even less judicial involvement in precedential opinions.

39. *Anastasoff* suggests that the appointment of more judges would enable courts to write binding opinions in every case. See 223 F.3d at 904. We take no position as to whether

there should be more federal judges, that being a policy question for Congress to decide. We note, however, that Congress would have to increase the number of judges by something like a factor of five to allocate to each judge a manageable number of opinions each year. But adding more judges, and more binding precedents, creates its own set of problems by significantly increasing the possibility of conflict within the same circuit as each judge will have an increased body of binding caselaw to consider and reconcile.

That problem, in turn, could be ameliorated by increasing the number of circuits, but that would increase the number of inter-circuit conflicts, moving the problem up the chain of command to the Supreme Court, which likewise does not have the capacity to significantly increase the number of opinions it issues each year. See *Wisniewski v. United States*, 353 U.S. 901, 901–02, 77 S.Ct. 633, 1 L.Ed.2d

## IV

[24] 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. The common law has long recognized that certain types of cases do not deserve to be authorities, and that one important aspect of the judicial function is separating the cases that should be precedent from those that should not.<sup>40</sup> Without clearer guidance than that offered in *Anastasoff*, we see no constitutional basis for abdicating this important aspect of our judicial responsibility.

[25–27] Contrary to counsel's contention, then, we conclude that Rule 36–3 is constitutional. We also find that counsel violated the rule. Nevertheless, we are aware that *Anastasoff* may have cast doubt on our rule's constitutional validity. Our rules are obviously not meant to punish attorneys who, in good faith, seek to test a rule's constitutionality. We therefore conclude that the violation was not willful and exercise our discretion not to impose sanctions.

658 (1957) (per curiam) (noting the problems of intra-circuit consistency raised by the growing number of circuit judgeships). In the end, we do not believe that more law makes for better law.

40. This is hardly a novel view:

[C]ertain types of cases do not deserve to be authorities. One type, already alluded to, is

The order to show cause is DISCHARGED.



UNITED STATES of America,  
Plaintiff–Appellee,

v.

Tommy Lee GILBERT, Defendant–  
Appellant.

No. 00–10314.

United States Court of Appeals,  
Ninth Circuit.

Argued and Submitted June 14, 2001

Filed Sept. 24, 2001

Following a jury trial, defendant was convicted in the United States District Court for the Northern District of California, D. Lowell Jensen, J., on three counts of willful failure to collect and pay over tax. The Court of Appeals, Lay, Circuit Judge, sitting by designation, held that: (1) as a matter of first impression, individual could be guilty under statute criminalizing willful failure to collect or to pay over tax by failing to perform either obligation; (2) sufficient evidence supported defendant's conviction for willful failure to collect or pay over tax; (3) six-year limitations period applied to offense; (4) purported motiva-

that in which there is no discoverable *ratio decidendi*. Others are cases turning purely on fact, those involving the exercise of discretion, and those which judges themselves do not think worthy of being precedents. Dias, note 10 *supra*, at 55 (footnotes omitted) (citing *R. v. Stokesley* (Yorkshire) Justices, Ex parte Bartram [1956] 1 All E.R. 563 at 565).

## HOW TO WRITE IT RIGHT

THE ART ISN'T IN THE WRITING. IT'S IN THE REWRITING.

By Fred A. Bernstein

**Y**ou are reading the eleventh version of this sentence. (Trust me: The first ten weren't nearly as good.) Anyone can write; rewriting takes talent. There may be a wordsmith somewhere who gets it right the first time—moving down a page with the sureness of Johnnie Cochran examining a friendly witness—but I'm not him. He is.

My first drafts invariably present seemingly insurmountable problems. Reading my disjointed sentences and flabby paragraphs, I can't imagine where I'm going, much less how to get there. At first, all I can do is tinker—change a word or two, substitute a comma for a dash—while consciously avoiding the real issues.

Yet, as I've learned as a journalist and teacher of legal writing, the small changes add up. Make enough of them, day after day and week after week, and, eventually, order emerges from the chaos. A sentence here, a paragraph there, each slowly coming into focus, and then suddenly the whole thing works. And when it does, you know it.

It was while clerking for Judge Alex Kozinski, on the Ninth U.S. Circuit Court of Appeals, that I really came to understand the magic of rewriting. Judge Kozinski is known as one of the best writers on the federal bench. His clear, forcefully stated opinions seem to flow as if he dictated them without stopping for breath. In reality, the judge may go through 70 or 80 drafts of an opinion, usually over a period of months.

As the judge's law clerk, one of my duties was to manage the drafts, a task that left me feeling like a '90s version of the sorcerer's apprentice. If I left an opinion on his desk, then stopped by the chambers kitchen to pour myself a

cup of coffee, the pages might be back in my office before I was—their once-white spaces filled with instructions, corrections, and queries. (I considered making the margins smaller, so there'd be less room for the judge's meddling, but I knew he'd just write on the back.)

My job, turning around three or four drafts a day, might sound tedious, but I was much more than a typist: I had the judge's permission to make changes, large or small, up to and including a new legal theory that had come to me during the night. There was no danger that something he didn't like would find its way into the finished opinion because he reread all of it whenever he reviewed the latest changes. In his view (which I share), the only way to tell whether a word, sentence, or paragraph is working is to consider it in context. To him, rereading only part of a draft would have been like working on half of a painting with the other half obscured.

Thanks to the miracle of faxing, drafts kept arriving long after the judge went home—sometimes until 2 or 3 A.M. Often, my co-clerks would join me at the fax machine, where we would struggle to decipher the judge's EKG-like writing, knowing he was waiting by his machine for a typed draft. Like contestants on *Wheel of Fortune*, we would have happily paid for a vowel.

Eventually, the judge would write OK on the first page of a draft. That meant I could begin preparing the opinion for circulation to the other judges on the appellate panel (with emphasis on *begin*); Judge Kozinski might still want to see the opinion another dozen times.

Until that OK appeared, there was no telling whether an opinion was in its infancy or its dotage. There might be a period of days or weeks in which the judge requested only small changes—a word substitution here or there, a transposition of phrases—leading me to think the worst was over.

*Fred A. Bernstein is a New York-based writer.*

*Continued on page 81*

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## HOW TO WRITE IT RIGHT

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*Continued from page 42*

Then, suddenly, without warning, a torrent of major alterations occurs, including whole sections pounded out by the judge on his manual typewriter to be retyped by me on my computer. "If it was okay last week," I'd ask myself of the opinion, "why does it need rewriting this week?" But revision is a mysterious, non-linear process. Small changes can get a piece of writing to the point where, suddenly, big changes are required.

What's the lesson of all this? You might be thinking: Judges are lucky; they can afford to rewrite endlessly because they have clerks to manage the flow of words and paper. That's true, but it's beside the point. In the ways that really matter, judges aren't all that different from the rest of us. What judges have—the ability to write and rewrite—is something we all have, though it may take some of us a little longer. We should all treat writing as a continuous process, making whatever changes we can make whenever we can make them. A computer, which makes it possible to revise almost effortlessly, is a godsend. And technology is getting better all the time. Lately, I've been doing all my writing by e-mail, sending drafts to myself so I can pick them up anywhere there's a modem, anytime I have a few minutes to tinker.

Make yourself your own law clerk—that's what I do, and I'd like to think my writing is the better for it. Trust me: If you'd read the first ten versions of this sentence, you'd agree. □

## The Censorial Judiciary

*David Greenwald*<sup>\*</sup> and  
*Frederick A. O. Schwarz, Jr.*<sup>\*\*</sup>

*Under the federal circuit courts' nonpublication policies, appellate judges designate for exclusion from the Federal Reporter approximately 80% of the opinions they write. Under their companion "no-citation" rules, judges prohibit lawyers from referring to these "unpublished" opinions in their briefs and arguments.*

*Dissatisfaction with the policies and rules is widespread. Academics question whether unpublished opinions lack any material of citable value, and some find the concept of a nonprecedential appellate opinion a contradiction in terms. Practitioners resent the loss of the opportunity to support arguments with unpublished cases and labor under ethical dilemmas the rules create. Moreover, some practitioners suspect that noncitable opinions conceal the result-driven nature of certain appellate decisions.*

*This Article criticizes the no-citation rules. The rules violate the First Amendment's guarantees of freedom of speech and of the right to petition for redress of grievances. They also diminish confidence in adjudication, eliminate checks on judicial power, and result in government waste because there is no persuasive reason why taxpayers should pay for the production of opinions they cannot use as precedents. This Article calls for their repeal.*

*To address the caseload pressures that originally motivated the no-citation rules, this Article proposes a measure significantly different from those previously advanced. Unlike other commentators, the authors do not recommend increasing the number of judges. Nor do the authors recommend that judges prepare published opinions in every case. The primary*

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The authors gratefully acknowledge the helpful comments of Frank Barron, Elie Jerome Benveniste, Norman Dorsen, Ward Farnsworth, John R. Hopper, Jane Jihyun Jaang, Burke Marshall, Richard A. Posner, Paul Rosenthal, Stuart Shapiro, Bruce Taggart, Kevin Teruya and Allan Tulchin on prior drafts, and thank the librarians of Cravath, Swaine & Moore for their assistance.

1134

*University of California, Davis*

[Vol. 35:1133

*recommendation is that appellate judges dispose of appeals that would presently generate uncitable opinions through oral opinions that, if transcribed, could be cited. This practice — which English courts of appeal and federal district courts follow — strikes a workable compromise and has other benefits as well.*

## TABLE OF CONTENTS

I.	THE NON-PUBLICATION POLICIES AND NO-CITATION RULES .....	1137
A.	<i>The Non-Publication Policies</i> .....	1137
B.	<i>The No-Citation Rules</i> .....	1138
1.	Citation Forbidden.....	1139
2.	Citation Strongly Disfavored and/or Restricted .....	1140
C.	<i>History</i> .....	1141
D.	<i>The Appellate Caseload “Explosion”</i> .....	1145
II.	THE UNEASY CASE FOR THE NO-CITATION RULES.....	1147
A.	<i>“Lost Savings”</i> .....	1147
B.	<i>“Unequal Access”</i> .....	1149
C.	<i>“Too Many Precedents”</i> .....	1151
1.	Are There “Too Many” Precedents?.....	1151
2.	Judges Are Not Necessarily Good Judges of the Value of Their Own Opinions .....	1152
III.	THE CASE AGAINST THE NO-CITATION RULES.....	1155
IV.	THE CONSTITUTIONAL INFIRMITIES OF THE NO-CITATION RULES ..	1159
A.	<i>Article III and Anastasoff v. United States</i> .....	1159
B.	<i>The First Amendment</i> .....	1161
1.	The Free Speech Clause.....	1162
a.	Content-Neutral.....	1163
b.	Content-Based .....	1164
2.	The Free Petition Clause .....	1165
V.	PROPOSALS FOR REFORM .....	1166
A.	<i>More Judges?</i> .....	1166
B.	<i>Other Opinion Formats</i> .....	1168
1.	Per Curiam Opinions.....	1168
2.	Oral Opinions .....	1169
	CONCLUSION.....	1173

2002]

*The Censorial Judiciary*

1135

It is a strange feature of American government that the body entrusted with protecting the right of free expression is itself a habitual censor of speech. Stranger still that the speech that is censored is not the speech of a subversive minority, but instead that body's own official pronouncements. In this country, for more than a quarter of a century, the federal appellate judiciary has adhered to a set of policies and rules designed to ensure that the names and content of well over half of the opinions its courts release each day can never be uttered in those courts' presence.

We are referring to the federal appellate judiciary's nonpublication policies and their companion "no-citation" rules. Under the former, the federal appellate judges specifically designate for exclusion from the bound volumes of the Federal Reporter approximately 80% of the opinions they write. Under the latter, the judges prohibit advocates from referring to such "unpublished" or "unreported" cases in their briefs and oral arguments. Similar rules exist in most states.<sup>1</sup> The consequences to the lawyer of violating "no-citation" rules can range from disregard of the cited opinions to reprimand or even sanction.

The nonpublication policies and no-citation rules came about in response to the sharp increase in the appellate caseload that began during the 1960s and continued until the middle of the last decade. In the mid-1970s, the courts adopted these policies and rules so that they could save time by issuing less polished, less elaborate written opinions and dispose of the myriad insubstantial appeals that dogged the appellate dockets. Today, the overwhelming majority of all federal appeals are disposed of in this fashion. But dissatisfaction with the policies and rules is widespread. Academics question whether unpublished opinions are indeed as insignificant as their authors assert, and some find the concept of a nonprecedential appellate opinion a contradiction in terms. Practitioners, sharing those views, bristle at the loss of the opportunity to bolster legal arguments by reference to unpublished cases and labor under ethical dilemmas the rules create, not only for the advocate but for the counselor as well. Moreover, practitioners harbor suspicions that noncitable opinions are used to paper over poorly reasoned, result-driven outcomes. Nonetheless, the rules continue to find steadfast defenders among their judicial sponsors, who assert that if unpublished opinions could be cited, they would lose

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<sup>1</sup> See, e.g., Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. APP. PRAC. & PROCESS 251 (2001); Keith H. Beyler, *Selective Publication Rules: An Empirical Study*, 21 Loyola U. L.J. 1, 3-7 (1989).

1136

*University of California, Davis*

[Vol. 35:1133]

the time savings that accrue from nonpublication. They fear that knowing that nonpublished opinions could be cited back to them would cause them to lavish as much attention on drafting nonpublished opinions as they do in composing published, precedential opinions.

In this Article, we criticize the no-citation rules and argue that the rules should be repealed, if not invalidated on First Amendment grounds. While the nonpublication policies are merely irrelevant anachronisms in an age in which even “unpublished” opinions have permanent places on electronic databases and public internet sites, the no-citation rules are something far worse. They censor expression and advocacy, in violation of the First Amendment’s guarantees of the freedom of speech and of the right to petition for redress of grievances. They diminish lay and professional confidence in appellate adjudication and eliminate checks on judicial power, of which there are few at the appellate level. They also result in government waste because there is no persuasive reason why taxpayers should pay public servants to write essays explaining why litigants have lost their appeals, if members of the public cannot use those works as precedents to help guide future behavior and resolve future disputes.

Significantly, none of our criticisms turns upon the much-debated but perhaps indeterminate question whether unpublished opinions “deserve” to be published. Our own sense from reading these opinions and from our own experience as practitioners and former law clerks to circuit judges<sup>2</sup> is that unpublished opinions generally (though not always) arise out of appeals that are as legally uninteresting as their drafters assert. Nonetheless, the ill effects from the no-citation rules that we identify here are the same, and the arguments we advance for their eradication equally valid, whether or not noncitable opinions contain material of jurisprudential value. If anything, our argument that public judicial resources should not be expended in the preparation of noncitable opinions is stronger if the substance of these opinions is thin.

Although we join the chorus of practitioners, scholars and a handful of judges who have criticized the no-citation rules, our chief proposal for reform is significantly different from those previously advanced. Unlike other commentators, we do not recommend an increase in the number of judges. Nor do we believe that judges should be required to prepare full-blown signed opinions in every case. Even if that were desirable —

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<sup>2</sup> One of us clerked for Richard A. Posner, Chief Judge, United States Court of Appeals for the Seventh Circuit, during 1993-94. The other clerked for J. Edward Lumbard, Chief Judge, United States Court of Appeals for the Second Circuit, during 1960-61.

2002]

*The Censorial Judiciary*

1137

and we are not sure it would be — that is, in the current environment, an impractical and irresponsible suggestion. There are simply too many appeals to permit that approach. Rather, our primary recommendation is that appellate judges resurrect the practice of disposing of certain appeals through oral opinions delivered extemporaneously from the bench. We believe that this practice — a practice with historical roots and that English courts of appeal and federal district courts still follow — strikes a workable compromise and brings with it other benefits as well.

#### I. THE NON-PUBLICATION POLICIES AND NO-CITATION RULES

##### A. *The Non-Publication Policies*

Approximately 80% of the caseload of the federal appellate courts is resolved by means of “unpublished” opinions.<sup>3</sup> The term “unpublished” means that the court has designated the opinion for exclusion from the bound volumes of the Federal Reporter, the official reporter for the federal courts of appeals. The Federal Reporter presently comprises over 1,500 volumes.

Whether an opinion is published or unpublished is governed by policies maintained by the individual courts of appeals. In some circuits, these policies take the form of formal standards that call for publication of opinions only when certain enumerated conditions are met. The Fourth Circuit’s standards are fairly typical:

Opinions delivered by the Court will be published only if the opinion satisfies one or more of the standards for publication:

- i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or
- ii. It involves a legal issue of continuing public interest; or

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<sup>3</sup> Leonidas Ralph Mecham, Administrative Office of the United States Courts, *Judicial Business of the United States Courts* (2001), Table S-3, available at <http://www.uscourts.gov/judbus2001/tables/s03sep01.pdf>. These figures are approximate because the United States Court of Appeals for the Federal Circuit does not release statistics on its unpublished opinions to the Administrative Office. Telephone interview with David Sellers, Assistant Director Public Affairs, Administrative Office of the United States Courts (Jan. 18, 2002). At the Federal Circuit’s Annual Judicial Conference in 1999, the Chief Judge reported that 68% of that court’s opinions issued during 1998 were uncitable. *Proceedings of the Sixteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 193 F.R.D. 263, 266 (Apr. 6, 1999).

1138

*University of California, Davis*

[Vol. 35:1133]

- iii. It criticizes existing law; or
- iv. It contains a historical review of a legal rule that is not duplicative; or
- v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.<sup>4</sup>

In other circuits, publication is withheld if the opinion does not “add[] significantly to the body of law,”<sup>5</sup> does not “require application of new points of law that would make the decision a valuable precedent,”<sup>6</sup> or if “no jurisprudential purpose would be served by a written opinion.”<sup>7</sup>

Although unpublished opinions are not published in bound volumes of the Federal Reporter, the opinions are not hidden. Hard copies of the opinions are maintained at the clerk’s offices and most of the circuits release them for inclusion on the Westlaw and Lexis databases. In recent years, unpublished opinions have become even more accessible. Many circuits post the text of these “unpublished” opinions on their public websites, and recently, in September 2001, the West Publishing Company began publishing “unpublished” opinions in hardbound volumes, complete with keyed headnotes. Volume 1 of the “Federal Appendix” — identical in its look and faux-leather-bound feel to a Federal Reporter volume — was released in September 2001. By the end of 2001, the series had reached Volume 14.

### *B. The No-Citation Rules*

The main effect of the designation of an opinion as “unpublished” is to make it subject to rules, promulgated by the courts of appeals themselves, that govern reference to those opinions. These rules are generally referred to as “no-citation rules.” They fall into two general classes: those in which citation is forbidden and those in which it is strongly disfavored or restricted.

<sup>4</sup> 4TH CIR. R. 36(a). *See also* D.C. CIR. R. 36(a)(2); 1ST CIR. R. 36(b)(1); 5TH CIR. R. 47.5.1; 6TH CIR. R. 206; 7TH CIR. R. 53(c); 8TH CIR. R. App. 1 (Plan for Publication of Opinions); 9TH CIR. R. 36-2.

<sup>5</sup> FED. CIR. R. 47.6(b).

<sup>6</sup> 10TH CIR. R. 36.2.

<sup>7</sup> 2D CIR. R. 0.23.

2002]

*The Censorial Judiciary*

1139

### 1. Citation Forbidden

In six of the circuits, no-citation rules take the form of an outright prohibition on reference to unpublished opinions in briefs and arguments.<sup>8</sup> Each circuit phrases its rules somewhat differently. First Circuit Rule 36(b)(2)(E) states, "Unpublished opinions may be cited only in related cases. Only published opinions may be cited otherwise." Federal Circuit Rule 47.6 provides that opinions designated for nonpublication "must not be employed or cited as precedent." Ninth Circuit Rule 36-3(b) states that unpublished opinions "may not be cited to or by the courts of this circuit." The gist of the rules is the same: citing unpublished opinions to the appellate court that issued them is a violation of the rules of that court that may subject the advocate to discipline.

The rules of some of the circuits are even more far-reaching. In the D.C. and Seventh Circuits, advocates are forbidden from citing the unpublished opinions of those courts and the unpublished opinions of other courts if those courts would themselves forbid citation.<sup>9</sup> And the Second Circuit, apparently concerned that other courts may not give its own no-citation rule such "full faith and credit," instructs that its unpublished opinions "shall not be cited or otherwise used in unrelated cases before this or any other court."<sup>10</sup> Thus, it would appear that an attorney subjects himself to discipline in the Second Circuit if he mentions one of that court's summary orders in another circuit court, a district court in another circuit, a state court, or, for that matter, a court of another country.<sup>11</sup> Rules in other circuits apply not only to advocates

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<sup>8</sup> See 1ST CIR. R. 36(b)(2)(E); 2D CIR. R. 0.23; 7TH CIR. R. 53 (b)(2)(IV); 9TH CIR. R. 36-3(b); D.C. CIR. R. 28(c); FED. CIR. R. 47.6. All the rules permit citing unpublished opinions to establish res judicata, collateral estoppel, law of the case, or to invoke other procedural doctrines in procedurally related cases.

The D.C. Circuit recently amended its no-citation rule to permit citation to all cases decided after January 1, 2002. D.C. CIR. R. 28(c)(1)(B). However, citation to all unpublished opinions from earlier years remains subject to a strict no-citation rule. *Id.* R. 28(c)(1)(A). Therefore, it is still appropriate to classify the D.C. Circuit as a strict no-citation circuit. At least for the near future, the overwhelming majority of its unpublished opinions remain uncitable.

<sup>9</sup> D.C. CIR. R. 28(c) ("The same rule applies to unpublished dispositions of district courts, and to unpublished dispositions of other courts of appeals if those appellate courts have a rule similar to this one."); 7TH CIR. R. 53(e) ("... no unpublished opinion or order of any court may be cited in the Seventh Circuit if citation is prohibited in the rendering court.").

<sup>10</sup> 2D CIR. R. 0.23 (emphasis added).

<sup>11</sup> But note that the ABA Committee on Ethics and Professional Responsibility has opined that it is ethical for a lawyer to cite an unpublished opinion to a court that permits

1140

*University of California, Davis*

[Vol. 35:1133]

but to federal judges as well. The Seventh Circuit's no-citation rule prohibits "cit[ation] or use as precedent (a) in any federal court within the circuit in any written document or in oral argument; or (b) *by any such court for any purpose*," and the Ninth Circuit's rule, quoted above, similarly purports to bind all judges within the circuit.<sup>12</sup>

## 2. Citation Strongly Disfavored and/or Restricted

Four other circuits follow a somewhat less restrictive approach.<sup>13</sup> In these circuits, unpublished opinions have no precedential value and citation to them is "disfavored" and discouraged.<sup>14</sup> However, if an advocate believes that no other published opinion of any court will serve as well, the advocate may cite the unpublished opinion.<sup>15</sup> Thus, in these circuits, the unpublished opinion has status comparable to that of daughters of monarchs in Tudor England: they may govern, but only if there is no citable "son." The three remaining circuits permit citation to unpublished opinions without regard to whether there are published cases available,<sup>16</sup> but the Fifth<sup>17</sup> and Eleventh permit advocates only to urge them for their limited "persuasive" value, and the latter only grudgingly at that.<sup>18</sup> Only the Third Circuit permits advocates to cite

use of such opinions, even if the issuing court prohibits use in other courts. See American Bar Association, *Citing of Unpublished Opinions Where Court Rules Prohibit Such Usage*, ABA Formal Op. 94-386R (Aug. 6, 1994, revised Oct. 15, 1995).

<sup>12</sup> On at least one occasion, the Supreme Court has cited and relied upon unpublished circuit court opinions. See *Rose v. Hodges*, 423 U.S. 19, 21 n.3 (1975) (per curiam). In dissent, Justice Brennan asked whether the Supreme Court itself was obliged to abide by the relevant circuit's no-citation rule. *Id.* at 23-24 n.2 (Brennan, J., dissenting).

<sup>13</sup> See 4TH CIR. R. 36(c); 6TH CIR. R. 28(g); 8TH CIR. R. 28A(i); 10TH CIR. 36.3(b).

<sup>14</sup> *E.g.*, 8TH CIR. R. 28A(i) ("Unpublished opinions are not precedent and parties generally should not cite them."); 6TH CIR. R. 28(g) ("Citation of unpublished decisions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored . . .").

<sup>15</sup> *E.g.*, 8TH CIR. R. 28A(i) ("Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well.").

<sup>16</sup> See 3D CIR. R. 28.3; 5TH CIR. R. 47.5.3, 47.5.4; 11TH CIR. R. 36-2.

<sup>17</sup> The Fifth Circuit's rule is a bit more complex:

Unpublished opinions issued *before* January 1, 1996, are precedential. 5TH CIR. R. 47.5.3. Therefore, citation thereto is permitted. *Id.* "However, because every opinion believed to have precedential value is published, such an unpublished opinion should normally be cited only when the doctrine of *res judicata*, collateral estoppel or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like)." *Id.*

Unpublished opinions issued on or after January 1, 1996 are not precedential, but they may be cited. 5TH CIR. R. 47.5.4.

<sup>18</sup> See 11TH CIR. R. 36-3 IOP 5 ("Reliance on unpublished opinions is not favored by

2002]

*The Censorial Judiciary*

1141

unpublished opinions whenever and however they wish. But perhaps hoping to set a good example, it refrains, as a matter of policy, from citing them itself.<sup>19</sup>

### C. History

How did these rules come about? Accounts of their development generally begin with the 1964 Federal Judicial Conference.<sup>20</sup> At that conference, the judges resolved:

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.<sup>21</sup>

The conference report cited two reasons for the resolution: first, "the rapidly growing number of published opinions of the courts of appeals and the district courts of the United States," and, second, "the ever increasing practical difficulty and economic cost of establishing and maintaining accessible private and public law library facilities."<sup>22</sup> Although (mostly unsuccessful) efforts at curtailing publication had occurred in the Fifth and Third Circuits in the late 1940s,<sup>23</sup> the 1964 resolution marked the first expression of concern about the proliferation of opinions by the federal judiciary as a whole.

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the court.").

<sup>19</sup> 3D CIR. R. APP. I, IOP 5.8 ("Because the court historically has not regarded unreported opinions as precedents that bind the court, as such opinions do not circulate to the full court before filing, the court by tradition does not cite to its unreported opinions as authority.").

<sup>20</sup> E.g., Deborah J. Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 75-76 (2001); 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, 577-78 (1981); Donna Stienstra, *Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals* 5-6 (Federal Judicial Center 1985).

<sup>21</sup> REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 11 (1964) [hereinafter PROCEEDINGS]. Between 1960 and 1983, the estimated average length of appellate majority opinions went from 2,863 words to 4,020. RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985) [hereinafter, FEDERAL COURTS '85].

<sup>22</sup> PROCEEDINGS, *supra* note 21, at 11.

<sup>23</sup> 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, 1169 n.17 (1978).

1142

*University of California, Davis*

[Vol. 35:1133

In 1971, limited publication received another spur. In that year, the four year old Federal Judicial Center, a study group established by Congress to recommend improvements in judicial administration,<sup>24</sup> noted in its annual report that there was "widespread consensus that too many opinions are being printed or published or otherwise disseminated."<sup>25</sup> The following year, the Center's Board recommended to the Judicial Conference that it instruct the circuits to adopt procedures for publication of only some of the opinions they issued and to promulgate rules forbidding citation to the remaining, unpublished opinions.<sup>26</sup> In response to the recommendation, the Judicial Conference, at its October 1972 meeting, asked each circuit to formulate a limited publication plan.<sup>27</sup> By the time the Judicial Conference met again in spring 1974, the Judicial Conference had received proposed plans from each circuit,<sup>28</sup> and over the next few years the plans went into effect.<sup>29</sup>

We will consider the asserted justifications for the no-citation rules shortly but first it is appropriate to consider separately the justifications for nonpublication. The overarching justification for nonpublication was the perception on the part of the judges that simply too many opinions were being published. As Judge Charles Joiner wrote in 1972:

[I]t is plain to every lawyer, every judge, and to most law students that many opinions are written that do not merit publication. Often, the matter decided has no potential effect upon our knowledge of the law or its development, yet it results in a written opinion that takes time and energy the judges could better spend in more

<sup>24</sup> *Id.* at 1170 n.18.

<sup>25</sup> *Id.* at 1169-70.

<sup>26</sup> *Id.* at 1170.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 1171. By the beginning of 1973, the D.C., First, Seventh, Ninth, and Tenth Circuits all had nonpublication policies and/or no-citation rules in effect. FEDERAL JUDICIAL CENTER, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS: A REPORT OF THE COMMITTEE ON USE OF APPELLATE COURT ENERGIES OF THE ADVISORY COUNCIL ON APPELLATE JUSTICE 29-37 (1973) [hereinafter FEDERAL JUDICIAL CENTER]. In a published opinion, the Fourth Circuit expressed its preference that unpublished opinions not be cited. *Jones v. Superintendent*, 465 F.2d 1091, 1094 (4th Cir. 1972).

<sup>29</sup> During this time, another group took up study of the limited publication issue as well. In 1973, the Committee on Use of Appellate Court Energies of the Advisory Council on Appellate Justice, a group of distinguished judges, academics and lawyers, issued a report whose centerpiece was a "Model Rule on Publication of Judicial Opinions." FEDERAL JUDICIAL CENTER, *supra* note 28, at 22-23. The model rule was the template for many of the limited publication policies that the circuit courts adopted after the 1974 Judicial Conference. Compare *id.* with 4TH CIR. R. 36(a), 5TH CIR. R. 47.5.1, 6TH CIR. R. 206, and 8TH CIR. R. APP. I ¶ 4.

2002]

*The Censorial Judiciary*

1143

attentively considering and developing resolution of significant issues in other cases.<sup>30</sup>

Nonpublication would help address that waste of time and energy because judges would “no longer sense quite the same need to polish the prose and to monitor each phrase as they do with opinions which are intended for general distribution.”<sup>31</sup>

But the costs of superfluous publication were not just wasted judge-hours. Advocates of nonpublication also contended that the proliferation of precedents made legal research too time consuming for lawyers:

The burden on the lawyer is commensurate with that of the judge in terms of accountability in preparing his cases. The endless search for factual analogy requires immense expenditure of time and funds that can result in reliance upon quirks rather than upon careful rationalization and application of the developing law.<sup>32</sup>

It also resulted in higher overhead costs, as lawyers were required to purchase and shelve an ever increasing sprawl of case reporters.<sup>33</sup>

Perhaps, however, the most serious threat posed by promiscuous publication was that it could compromise the integrity of the common law by making it increasingly likely that judges, unable to digest the burgeoning volumes of case law, would inadvertently make inconsistent rulings. The following excerpt from Judge Joiner’s 1972 article illustrates this strain of argument:

Unlimited proliferation of published opinions constitutes a burden and threat to a cohesive body of law. . . . There are limits on the capacity of judges and lawyers to produce, research and assimilate the sheer mass of judicial opinions. These limits are dangerously near at present and in some systems may already be exceeded. . . . Common law in the United States could be crushed by its own weight if present trends continue unabated.<sup>34</sup>

<sup>30</sup> Charles W. Joiner, *Limiting Publication of Judicial Opinions*, 56 JUDICATURE 195, 195 (1972).

<sup>31</sup> Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change* 50 (1975) (Senator Roman Hruska, Chair) [hereinafter *Hruska Report*].

<sup>32</sup> FEDERAL JUDICIAL CENTER, *supra* note 28, at 7.

<sup>33</sup> “The logistical burden for the courts and practitioners has become dangerously heavy. Posting, maintenance, shelving, and librarian services result in time and money costs disproportionate to the value of the materials.” *Id.* at 8.

<sup>34</sup> Joiner, *supra* note 30, at 195.

1144

*University of California, Davis*

[Vol. 35:1133

To be sure, Malthusian concerns that the population of precedents was increasing too rapidly were not new in 1972. In a 1915 address, Professor Edward Warren of Harvard Law School complained that a scholar would have to read 180 pages of cases an hour to keep up with the current growth in case law and called for limited publication to slow that growth.<sup>35</sup> In the same year, the chief justice of the Wisconsin Supreme Court wrote:

Looking ahead a half century to the time when there shall be two or three times as many inhabitants within our borders and a corresponding increase in our litigation, what are we to expect if the present rate of production of precedents be maintained? The law library of the future staggers the imagination as one thinks of multitudes of shelves which will stretch away into the dim distance, rank upon rank, and tier upon tier, all loaded with their many volumes of precious precedents. One shrinks from the contemplation of the intellectual giants who will be competent to keep track of the authorities and make briefs in those days; they, as well as the judges who pass upon the briefs, must needs be supermen indeed,

and called for limited publication policies similar to those in place today.<sup>36</sup>

Nor were the concerns unique to the last century or to this country. Two American commentators in 1824 argued that:

The multiplication of reports . . . is becoming an evil alarming and impossible to be borne. . . . Such has been this increase, that very few of the profession can afford to purchase, and none can read all the books which it is thought desirable, if not necessary to possess. By their number and variety they tend to weaken the authority of each other, and to perplex the judgment.<sup>37</sup>

Lord Coke called for limited publication of English decisions, lest the law books “grow to be like *elephantini libri*, of infinite length, and in mine opinion lose somewhat of their present authority and reverence.”<sup>38</sup> A century earlier, Sir Matthew Hale, the Lord Chief Justice, reportedly

<sup>35</sup> Edward H. Warren, *The Welter of Decisions*, 10 ILL. L. REV. 472, 473 (1916).

<sup>36</sup> John B. Winslow, *The Courts and the Papermills*, 10 ILL. L. REV. 157, 158 (1915).

<sup>37</sup> E. Bliss & E. White, *The Common Law*, 10 N. AM. REV. 411, 433 (1824), quoted in J. Myron Jacobstein, *Some Reflections on the Control of the Publication of Appellate Court Opinions*, 27 STAN. L. REV. 791, 791 (1975).

<sup>38</sup> 2 Coke's Rep. iii-iv (1777), quoted in Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119, 121 (1995).

2002]

*The Censorial Judiciary*

1145

compared the accretion of case law to “the rolling of a snowball, [that] increaseth in bulk in every age, until it become utterly unmanageable.”<sup>39</sup> And Francis Bacon, while he was Lord Chancellor, recommended the exclusion from law reports of cases “merely of iteration and repetition.”<sup>40</sup>

#### *D. The Appellate Caseload “Explosion”*

But though concern about unlimited publication was not new in the early 1970s, what was new was the extraordinary growth in the appellate caseload that had given the movement for limited publication its new-found force. As the above-quoted passages and the 1964 Judicial Conference resolution indicate, the primary concern about unlimited publication prior to the 1970s was that it made it hard for judges to stay current with the development of the law. By the 1970s, the judges’ primary concern had become the far more serious one of staying current with their own personal caseloads.

The American appellate judiciary witnessed a huge increase in caseload during the 1960s, which became greater during the ensuing decades.<sup>41</sup> Various reasons have been supplied for this caseload “explosion.”<sup>42</sup> The 1960s and 1970s saw a large increase in the number of laws (e.g., civil rights laws, environmental laws, ERISA) and private causes of action thereunder, which increased the caseloads of the district courts and those of the circuit courts in turn.<sup>43</sup> Criminal litigation, however, contributed much more to the growth of the appellate caseload than civil. Between 1960 and 1983, the number of criminal appeals grew by 669%,<sup>44</sup> a growth spurt fueled by both the expansion of criminal appellate rights by the Warren Court and the passage of federal legislation appropriating funds for appellate counsel in criminal cases.<sup>45</sup> The contribution and complexity of criminal appeals became still greater in the mid-80s, as the passage of the Sentencing Reform Act and the promulgation of the Sentencing Guidelines created an entirely new type

<sup>39</sup> Robert L. Black, Jr., *Hide and Seek Precedent: Phantom Opinions in Ohio*, 50 U. CIN. L. REV. 477, 477 (1981) (citing D. MELLINKOFF, *THE LANGUAGE OF THE LAW* 141 (1963)).

<sup>40</sup> John J. O’Connell, *A Dissertation on Judicial Opinions*, 23 TEMP. L.Q. 13, 14 (1949).

<sup>41</sup> See generally, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 53-86 (1996) [hereinafter, *FEDERAL COURTS ‘96*].

<sup>42</sup> See, e.g., *id.* at 87-123; COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT 13-17 (1998) [hereinafter, *STRUCTURAL ALTERNATIVES ‘98*].

<sup>43</sup> *FEDERAL COURTS ‘96*, *supra* note 41, at 98-99 & n. 18.

<sup>44</sup> *FEDERAL COURTS ‘85*, *supra* note 21, at 82.

<sup>45</sup> *FEDERAL COURTS ‘96*, *supra* note 41, at 96.

1146

*University of California, Davis*

[Vol. 35:1133]

of appeal — challenges to sentencing guideline computations. Sentencing guideline appeals drove the growth in the appellate caseload after 1984<sup>46</sup> and gave many a complexity that was new to federal criminal law.

Whatever the reasons for the increase in appellate litigation, the raw numbers were breathtaking. Between 1934 and 1960, circuit court filings grew at an average annual rate of only 0.5%.<sup>47</sup> Between 1960 and 1983, by contrast, the number of appeals filed annually rose from fewer than 4,000 to 29,580, an average annual rate of growth of 9%.<sup>48</sup> By 1995, the number had climbed further to 49,625.<sup>49</sup> Even when adjustments are made to account for the fact that many appeals do not require significant judicial attention because they disappear before argument owing to settlement or nonprosecution, the increase was still quite large. The number of appellate “terminations on the merits” — essentially decisions reached based on judicial analysis, rather than settlement or dismissal for procedural reasons — grew from 2,681 in 1960 to 28,167 in 1995.<sup>50</sup>

The increases might not have been cause for concern if the appellate judiciary had expanded to keep up with the caseload growth. That is not what happened. The number of federal appellate judges grew from 66 in 1960 to 150 in 1995, only a two-and-a-half-fold increase, clearly not enough to keep pace with the twelve-fold increase in filings.<sup>51</sup> Accordingly, filings per circuit judge shot up from 57 in 1960 to 331 in 1995,<sup>52</sup> and the number of terminations on the merits per judge, a rough measure of judicial productivity, went from 40.6 in 1960 to 187.9 in 1995.<sup>53</sup> While each appellate judge issued an average of 48 opinions annually in 1960, the figure stood at 168 in 2001.<sup>54</sup> Nonpublication policies have unquestionably helped to tame the substantial increase in

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<sup>46</sup> *Id.* at 97 (“The continued growth in the appeal rate since 1983 was due entirely to the Sentencing Reform Act of 1984, which greatly expanded the appealability of federal sentences.”).

<sup>47</sup> *Id.* at 55.

<sup>48</sup> *Id.* at 59-62. The more than seven-fold increase occurred during a period in which the population increased by only 29%. See U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1982-83, at 6 (103d 1982).

<sup>49</sup> FEDERAL COURTS '96, *supra* note 41, at 64.

<sup>50</sup> *Id.* at 72-73, Table 3.6.

<sup>51</sup> *Id.* at 120. The figures exclude judges of the Federal Circuit, which was created in 1982 to hear patent appeals and other specialized appeals.

<sup>52</sup> *Id.* at 400-01, Table A.4.

<sup>53</sup> *Id.* at 74.

<sup>54</sup> The 1960 figure comes from *id.* at 154, Table 5.3. The 2001 figure comes from Administrative Office of the U.S. Courts, *Federal Court Management Statistics 2001*, available at <http://www.uscourts.gov/cgi-bin/cmsa2001.pl>.

2002]

*The Censorial Judiciary*

1147

workload. Although the average annual number of opinions per active judge today is 168, the average annual number of signed (i.e., published, non-per curiam) opinions is only 54, roughly the same as in 1960.<sup>55</sup>

## II. THE UNEASY CASE FOR THE NO-CITATION RULES

It seems clear that nonpublication has served as a kind of judicial surge protector, permitting the judiciary to maintain a steady output of published opinions despite the sustained spike in its overall caseload. But it remains to consider whether the no-citation rules, promulgated as adjuncts to the nonpublication policies, serve a similar function, and, if they do, whether their value as methods of caseload control justifies the restrictions they impose upon advocacy and expression.

### A. "Lost Savings"

The first justification offered for the no-citation rules is that the savings realized through nonpublication would vanish if citation to unpublished opinions were allowed. That justification, which has been advanced since the rules' inception,<sup>56</sup> has been restated recently with great vigor by one of the rules' staunchest present-day defenders, Judge Alex Kozinski of the Ninth Circuit:

Should courts allow parties to cite to these dispositions, however, much of the time gained would likely vanish. Without comprehensive factual accounts and precisely crafted holdings to guide them, zealous counsel would be tempted to seize upon superficial similarities between their clients' cases and unpublished dispositions. Faced with the prospect of parties citing these dispositions as precedent, conscientious judges would have to pay much closer attention to the way they word their unpublished rulings. Language adequate to inform the parties how their case has been decided might well be inadequate if applied to future cases arising from different facts. And, although three judges might agree on the outcome of the case before them, they might not agree on the precise reasoning or the rule to be applied to future cases. Unpublished concurrences and dissents would become much more common, as individual judges would feel obligated to clarify their

<sup>55</sup> *Federal Court Management Statistics*, *supra* note 54.

<sup>56</sup> *See, e.g.*, FEDERAL JUDICIAL CENTER, *supra* note 28, ¶ 3, at 19 ("The absence of a non-citation rule would encourage the inclusion in opinions not designated for publication of facts and details of reasoning, thus frustrating the purposes underlying non-publication."); Reynolds & Richman, *supra* note 23, at 1186.

1148

*University of California, Davis*

[Vol. 35:1133]

differences with the majority, even when those differences had no bearing on the case before them. In short, judges would have to start treating unpublished dispositions — those they write, those written by other judges on their panels, and those written by judges on other panels — as mini-opinions. [This] new responsibility would cut severely into the time judges need to fulfill their paramount duties: producing well-reasoned published opinions and keeping the law of the circuit consistent through the en banc process. The quality of published opinions would sink as judges were forced to devote less and less time to each opinion.<sup>57</sup>

Within this defense of the no-citation rules, however, lies a very troubling admission: that in a significant number of cases whose opinions are designated for nonpublication — enough, one must assume, to make Judge Kozinski's argument persuasive — the judges agree on the result but not the reasoning. That is troubling for at least two reasons.

The first, most basic reason is, of course, that judicial decisions are not supposed to be result-driven. The purpose of every judicial opinion is to persuade the litigants and the public at large that the case was not only decided — a one-word decision could do that — but decided according to specific legal principles of impartial application. An opinion that is written succinctly, not because the case is simple but because more extended treatment might expose disagreements among the judges or weak points in their logic, does not serve that goal. It is not impertinent to suggest that no-citation rules eliminate checks on result-driven adjudication. Experienced jurists, such as Judges Richard Posner<sup>58</sup> and Richard Arnold,<sup>59</sup> have made this same point. And Patricia Wald of the D.C. Circuit — hardly a court with a reputation for cutting corners — has herself witnessed the phenomenon:

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<sup>57</sup> *Hart v. Massanari*, 266 F.3d 1155, 1178 (9th Cir. 2001).

<sup>58</sup> FEDERAL COURTS '96, *supra* note 41, at 165, 168. Judge Posner acknowledges the force of the argument that a no-citation rule "encourages judicial sloppiness" and "provides a temptation for judges to shove difficult issues under the rug in cases where a one-liner would be too blatant an evasion of judicial duty." *Id.* However, Judge Posner is a reluctant supporter of nonpublication and no-citation rules. He believes that the inferior quality of nonpublished opinions is not "remediable" under present workload conditions and because "[n]o one should want careless opinions to be published and to be citable as precedents." *Id.*

<sup>59</sup> Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 223 (1999) ("Again, I'm not saying that [result-driven adjudication] 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.").

2002]

*The Censorial Judiciary*

1149

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.<sup>60</sup>

The second troubling aspect of the lost savings defense is its implicit admission that the appeals whose opinions are selected for nonpublication, ostensibly because they do not raise significant legal issues, are, in fact, occasionally more complex than their designation for nonpublication would suggest. If a case truly fails to “establish[], alter[], modify[], or clarify[] a rule of law,”<sup>61</sup> why then can three judges not agree on the appropriate reasoning? If a case is clearly governed by well-established precedent and presents no special facts, what possible need could there be for separate concurrences? If there is, that is itself a strong indication that the case, no matter how trivial it may have seemed on first blush, did not belong on the nonpublication track in the first place. It should not come as a surprise or an embarrassment to judges to discover that early case screening decisions need to be revised as fuller consideration of a case reveals subtleties and difficulties not apparent from a cursory review of the (often inadequate) briefs. But the response to that discovery should not be to cover up the difficulties with a once-over-lightly unpublished opinion, but to discuss and, if possible, resolve them so that future litigants and judges do not have to struggle so much when they confront a similar scenario again.

### B. “Unequal Access”

The second justification for the no-citation rules is that if citation to unpublished opinions were permitted, it would place lawyers without access to such opinions at an unfair disadvantage. In the 1970s, this argument was quite popular.<sup>62</sup> It is an irrelevant anachronism

<sup>60</sup> Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1374 (1995).

<sup>61</sup> 9TH CIR. R. 36-2(a) (Criteria for Publication).

<sup>62</sup> Reynolds & Richman, *supra* note 23, at 1187 n. 111 (“This argument is probably the most frequently mentioned aspect of the entire limited publication, no-citation debate.”). See, e.g., *United States v. Joly*, 493 F.2d 672, 676 (2d Cir. 1974); *Jones v. Superintendent*, 465 F.2d 1091, 1094 (4th Cir. 1972); FEDERAL JUDICIAL CENTER, *supra* note 28, at 19 ¶ 1; *Hruska Report*, *supra* note 31, at 51 (“Where opinions are, in fact, not published, access to such opinions may be unequal, favoring those members of the bar with the resources to monitor, acquire and file them.”); PAUL D. CARRINGTON ET AL., *JUSTICE ON APPEAL*, 36 (1976) (“If these opinions are citable, we have a violation of a fundamental presupposition of our legal

1150

*University of California, Davis*

[Vol. 35:1133]

today.<sup>63</sup> As noted above, most unpublished opinions have long appeared on Lexis and Westlaw,<sup>64</sup> where they are searchable to the same extent and at the same cost as published opinions. For lawyers unable to afford Lexis or Westlaw, the opinions are available on the public websites of some circuits.<sup>65</sup> In addition, West, responding to private demand for unpublished opinions has begun publishing them, complete with syllabi and keynotes, at a cost of \$35 per volume.<sup>66</sup>

Even if unequal access were a significant phenomenon, the "unequal access" argument would nonetheless betray questionable logic. If unpublished opinions do nothing other than apply hornbook law in run-of-the-mill factual settings, what advantage is conferred upon the litigant who, supposedly because of greater resources, has fuller access to this recondite body of law? As one lawyer-critic of the no-citation rules rhetorically asked, "Why should any lawyer in his right mind go to the trouble of finding and citing unpublished opinions which merely reiterate rules and rely on precedents already larding the published reports?"<sup>67</sup> The "unequal access" argument is also in considerable

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order, that the law be knowable and equally accessible to all.").

<sup>63</sup> E.g., Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG 2d 17, 18 (2000) ("Between Lexis and Westlaw, internet sites . . . , and networks of attorneys practicing in particular fields, it is the rare opinion that is not disseminated for mass consumption."); Kirt Shuldberg, Comment, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541, 566 (1997) ("When the limited publication plans were adopted, unpublished opinions were essentially banished from public existence since the bound volumes were the sole source of case law. Technological advances, however, have changed this reality.").

<sup>64</sup> See Ronald Jay Cohen, Section on Litigation, American Bar Association, *Report on Recommendation for Publication and Reliance Upon Unpublished Opinions in the Federal Courts of Appeals* 9 (Aug. 2001). The Fifth and Eleventh Circuits do not release their unpublished opinions to Westlaw or Lexis.

<sup>65</sup> The First, Second, Third, Fourth, and Eighth Circuits make unpublished opinions available on their websites. See First Circuit at <http://www.ca1.uscourts.gov>; Second Circuit at <http://www.ca2.uscourts.gov>; Third Circuit at <http://www.ca3.uscourts.gov>; Fourth Circuit at <http://www.ca4.uscourts.gov>; Eighth Circuit at <http://www.ca8.uscourts.gov>.

<sup>66</sup> Upon release of the first volume of the Federal Appendix, the First Circuit adopted "Interim Local Rule 36(b)(2)(F)," clarifying that notwithstanding the publication of unpublished First Circuit opinions in the Federal Appendix, the circuit's no-citation rule remained in effect.

<sup>67</sup> Gideon Kanner, *The Unpublished Appellate Opinion: Friend or Foe?*, 48 CAL. ST. B.J. 386, 446 n. 75 (1973); see also Mark D. Hinderks & Steve A. Leben, *Restoring the Common in the Law: A Proposal for the Elimination of Rules Prohibiting the Citation of Unpublished Decisions in Kansas and the Tenth Circuit*, 31 WASHBURN L.J. 155, 219 n.423 (1992); Salem M. Katsh & Alex V. Chachkes, *Constitutionality of "No-Citation" Rules*, 3 J. APP. PRAC. & PROCESS 287, 310 n.75 (2001) ("Yet if summary orders indeed added nothing to the law, then it would not matter if they were not uniformly available to all parties.").

2002]

*The Censorial Judiciary*

1151

tension with the longstanding laissez-faire approach of the American legal system to selection of counsel of one's choice, which permits litigants to spend as much as they wish in prosecuting or defending actions and does not attempt to handicap the contest by putting caps on the services counsel can provide.<sup>68</sup>

### C. "Too Many Precedents"

Defenders of the no-citation rules offer a third argument: that there are simply "too many" precedents. On this view, the bar has more than enough raw material to support any good-faith argument it may wish to make. Issuing more opinions would simply encourage citation to superfluous authorities. This, in turn, it is feared, would waste judges' time in reading them.<sup>69</sup> Rather than issue an outright ban on dissemination on unpublished opinions — which would plainly violate the First Amendment and exceed judges' authority — the judges hope to achieve the same result by barring their use.<sup>70</sup>

#### 1. Are There "Too Many" Precedents?

Are there in fact "too many" precedents? One must first ask what it means to say that there are "too many" precedents? Too many to read? No one is expected to read them all. Too many to index? Electronic search technology has greatly enhanced the legal profession's ability to locate precedents on point, even in the absence of comprehensive written digests. More than lawyers "need" to construct legal arguments? Judge

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<sup>68</sup> Cf. Boggs & Brooks, *supra* note 63, at 21-22 ("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.").

<sup>69</sup> Chief Judge Boyce Martin of the Sixth Circuit is a forceful proponent:

Good precedent is good precedent. One does not need to pile on the excess verbiage of string cites to random, minor cases. String cites are largely a product of judges' and clerks' experience on law journals and law firms — tribes in which overkill is an art form. When I read a lengthy string cite in a brief or slip opinion, I often find that I have lost the gist of the argument after fighting through line after line of gobbledygook. I see no need for more published opinions in order to flesh out unneeded string cites.

Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 193 (1999).

<sup>70</sup> As Judge Philip Nichols, Jr. of the Federal Circuit writes, judges "cannot prevent publication by others, which frequently occurs, although restriction on citation limits the economic gain from doing so." Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909, 911 (1986).

1152

*University of California, Davis*

[Vol. 35:1133]

Richard Posner, who is sympathetic to nonpublication policies and favors them on balance, has nonetheless noted that:

[d]espite the vast number of published opinions, most federal circuit judges will confess that a surprising fraction of federal appeals, at least in civil cases, are difficult to decide not because there are too many precedents but because there are too few on point.<sup>71</sup>

That there is at least some legitimate demand for the content of unpublished opinions is evidenced, among other things, by West's and Lexis's inclusion of these opinions on their commercial databases, and by the several instances in which courts themselves — including the Supreme Court — have cited them, often in defiance of the applicable no-citation rule.<sup>72</sup>

Practitioners who appreciate the several functions case citation performs in legal writing will not be surprised that there is a demand for unpublished opinions. Even if the main holding of a case is trite and there are many other cases to the same effect, cases are not cited only for their “binding” force as precedents. A case may be cited for its persuasive authority, for illustrating how law should be applied to a particular fact pattern, or for its helpful, cogent summary of bedrock legal principles. Sometimes lawyers may wish to cite opinions to demonstrate the frequency with which an issue arises, as in, for example, a petition for certiorari. Often it is valuable to cite cases merely restating an established proposition to demonstrate that the proposition is uncontroversial. Quite clearly, however, a lawyer cannot tell a court that a published case has been followed many times and is still “good law” if the cases that cite it are uncitable.<sup>73</sup>

## 2. Judges Are Not Necessarily Good Judges of the Value of Their Own Opinions

Even if there were “too many” precedents, that would only be an argument in favor of the no-citation rules if one had confidence that judges are nearly unerring judges of the value of the opinions they write.

<sup>71</sup> FEDERAL COURTS '96, *supra* note 41, at 166. Practitioners agree. See John P. Borger & Chad M. Oldfather, *Anastasoff v. United States and the Debate Over Unpublished Opinions*, 36 TORT & INS. L.J. 899, 902-03 (2001).

<sup>72</sup> See, e.g., *Rose v. Hodges*, 423 U.S. 19, 21 n.3 (1975) (per curiam); *Giese v. Pierce Chem. Co.*, 43 F. Supp. 2d 98, 103 & n.1 (D. Mass. 1999); *Mohr v. Jordan*, 370 F. Supp. 1149, 1154 (D. Md. 1974); *Durkin v. Davis*, 390 F. Supp. 249, 254 (E.D. Va. 1975); *Curley v. Bryan*, 362 F. Supp. 48, 52 & n.2 (D.S.C. 1973).

<sup>73</sup> See *Nichols*, *supra* note 70, at 916.

2002]

*The Censorial Judiciary*

1153

We say “nearly unerring,” rather than just “good,” because the consequence of not publishing a useful precedent is much greater than the consequence of publishing a redundant, useless one. Although some circuits permit parties to petition to have unpublished opinions published,<sup>74</sup> many allow only a short time within which to bring such a petition, and some do not have formal provisions for such petitions at all. Hence, if an opinion is improvidently withheld from the published reports, the precedential loss is permanent and irremediable, at least in those circuits with strict no-citation rules.

There is evidence that judges are not unerring judges of the value of their own work product.<sup>75</sup> To begin with, a wide body of anecdotal evidence suggests that nontrivial opinions have gone unreported. Review of samples of unpublished opinions by scholars and practitioners has yielded a significant number of instances in which, at least according to the reviewers, unpublished opinions merited publication under the applicable circuit standards.<sup>76</sup> There are instances

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<sup>74</sup> The First, Fourth, Fifth, Seventh, Ninth, Eleventh, D.C. and Federal Circuits entertain petitions to publish unpublished cases. See 1ST CIR. R. 36.2(b)(4); 4TH CIR. I.O.P. 36.5; 5TH CIR. R. 47.5.2; 7TH CIR. R. 53(d)(3); 9TH CIR. R. 36-4; 11TH CIR. R. 36-3 I.O.P.(5); D.C. CIR. R. 36(d); FED. CIR. R. 47.6(c).

Though it lacks a formal rule, the Second Circuit has, on at least two occasions, granted a motion to publish an unreported decision. See *Ottaviani v. State Univ. of N.Y.*, 646 F.2d 21 (2d Cir. 1981) (per curiam); *Cont'l Stock Transfer & Trust Co. v. SEC*, 566 F.2d 373, 374 n.1 (2d Cir. 1977). *Ottaviani* was published upon the motion of one of us (Schwarz), who wished to bring the opinion to the attention of the Supreme Court. The Court was then considering a petition for certiorari in a similar case, *Kremer v. Chem. Constr. Corp.*, 623 F.2d 786 (2d Cir. 1980). The motion requesting permission to cite *Ottaviani* argued that “to prohibit any and all citation and use of a statement of the court raises serious questions under the Due Process clause and the First Amendment, at least in circumstances such as these”. Letter from Frederick A.O. Schwarz, Jr., to Hon. Wilfred Feinberg, Chief Judge, United States Court of Appeals for the Second Circuit (Apr. 27, 1981) (on file with Cravath, Swaine & Moore). The Second Circuit promptly published *Ottaviani*, noting that “there is a split in authority in the circuits. . . .” 646 F.2d at 21. The Supreme Court subsequently granted certiorari in *Kremer*.

<sup>75</sup> One of the most prominent skeptics is Justice John Paul Stevens, who stated in 1977:

[A no-citation 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.

Address to the Illinois State Bar Association’s Centennial Dinner 9 (Jan. 22, 1977), quoted in Katsh & Chachkes, *supra* note 67, at 310-11.

<sup>76</sup> *E.g.*, Advisory Committee on Procedures Concerning Unpublished Dispositions by the United States Court of Appeals for the District of Columbia Circuit (June 8, 1984)

1154

*University of California, Davis*

[Vol. 35:1133

of inter- and intra-circuit splits created by unpublished opinions,<sup>77</sup> unpublished opinions that avowedly consider issues of first impression,<sup>78</sup> unpublished opinions later reversed by the Supreme Court,<sup>79</sup> and at least one instance in which a circuit court declared a federal statute unconstitutional in an unpublished, uncitable opinion.<sup>80</sup>

Statistics bolster the anecdotal evidence. A study from the mid-1980s found that in 1984, 24% of all unpublished opinions were reversals.<sup>81</sup> That may be significant because a reversal reflects a disagreement about the appropriate legal outcome among judges and therefore serves as a rough indicator of the significance of the legal issue addressed in the opinion.<sup>82</sup> Further, a significant proportion of unpublished opinions contain concurrences or dissents,<sup>83</sup> another signal that noteworthy legal issues may have been at stake.<sup>84</sup> One may also detect the difficulty judges face in applying objective standards to the publication decision in the widely variant frequencies with which the different circuits designate

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(concluding that 40% of unpublished D.C. Circuit opinions arguably should have been published under circuit criteria for publication), *discussed in* Nat'l Classification Comm. v. United States, 765 F.2d 164, 173 (D.C. Cir. 1985) (Wald, J., concurring); Reynolds & Richman, *supra* note 23, at 607-11; Comment, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 39 U. PITT. L. REV. 309, 315-40 (1977); Katsh & Chachkes, *supra* note 67, at 308-10 & n.68.

<sup>77</sup> Katsh & Chachkes, *supra* note 67, at 308 n.67.

<sup>78</sup> *Id.* at 309 & n.68.

<sup>79</sup> Boggs & Brooks, *supra* note 63, at 20-21 & n.17, *citing* Johnson v. United States, 529 U.S. 694 (2000); Sims v. Apfel, 530 U.S. 103 (2000); Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375 (1994); Houston v. Lack, 487 U.S. 266 (1988); Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984); Connick v. Myers, 461 U.S. 138 (1983); Moore v. Illinois, 434 U.S. 220 (1977).

<sup>80</sup> United States v. Edge Broad. Co., 509 U.S. 418, 425 (1993), *rev'g*, 956 F.2d 263 (4th Cir. 1992) (*per curiam*) (table), 1992 WL 35795. In his majority opinion, Justice White "deem[ed] it remarkable and unusual that although the [Fourth Circuit] 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." *Id.* at 425 n.3.

<sup>81</sup> Stienstra, *supra* note 20, at 42. A study of all appellate opinions issued between 1986 and 1993 concerning unfair labor practices under the NLRA found that 7.15 percent of all unpublished opinions reversed determinations of the NLRB. Merritt & Brudney, *supra* note 20, at 113-14.

<sup>82</sup> Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 310 (1990) ("If the case involves, as the criteria suggest, the straightforward application of clear and well settled precedent which is not in need of any published explanation by the courts of appeals, then the correct decision and the correct basis of decision should be obvious to any person who is well trained in the law.").

<sup>83</sup> Stienstra, *supra* note 20, at 44 (stating that 11.3% of unpublished opinions issued in 1984 contained separate opinions). *E.g.*, McLatchey v. Parson (*In re* Lazy Acres Farm, Inc.), 1997 WL 809968 (6th Cir. Dec. 18, 1997), *discussed in* Boggs & Brooks, *supra* note 63, at 21.

<sup>84</sup> Katsh & Chachkes, *supra* note 67, at 307 & n. 65.

2002]

*The Censorial Judiciary*

1155

opinions for publication.<sup>85</sup> The variances do not appear to arise out of the slightly different criteria the circuits use under their publication policies.<sup>86</sup> Similarly telling is the finding that judges within the same circuit differ greatly in the frequency with which the appeals they hear result in published opinions.<sup>87</sup> Because case assignment is random, it is difficult to explain that result if the judges, notwithstanding their temperamental and philosophical bents, are nonetheless adhering to the same objective standards for publication.<sup>88</sup>

### III. THE CASE AGAINST THE NO-CITATION RULES

At the end of the day, whether or not judges accurately distinguish between opinions that have future value as citable precedents and those that do not may be an unanswerable question, mired in sampling error and subjectivity.<sup>89</sup> The timeless opinion for the ages for one reader may, for another, resolve an appeal that was appropriately put out of its misery with the least possible fanfare. Despite the ability of commentators to cull from the body of unpublished opinions a significant number that arguably should have been published, the overwhelming sense one gets from reading a bulk of unpublished opinions en masse is that they are generally fairly unremarkable stuff. But either way, it is fair to ask why taxpayers are paying for this prose if they cannot cite it for whatever value it may have, small or large?<sup>90</sup>

<sup>85</sup> In 2001, the percentage of opinions that were not published ranged from 60% (7th Circuit) to 91% (4th Circuit). See Meham, *supra* note 3; see also Merritt & Brudney, *supra* note 20, at 85-86.

<sup>86</sup> At least in the late 1970s, there was no discernible correlation between the content of a circuit's publication standards and the frequency with which appeals resulted in published opinions. Reynolds & Richman, *supra* note 20, at 588-90 & n.47; see also Borger & Oldfather, *supra* note 71, at 913 (discussing publication rates between 1986 and 1993 of opinions concerning unfair labor claims).

<sup>87</sup> Nichols, *supra* note 70, at 924 ("Some appellate judges like to see their own deathless prose in published format, while others much prefer the unpublished mode, and are perfectly happy with assignments to put out decisions for nonpublication by the dozens."); Songer, *supra* note 82, at 312-13 (demonstrating large differences in rates of participation in appeals that resulted in published opinions); Wald, *supra* note 60, at 1376 ("In my own D.C. Circuit, the wide gap between the number of published and unpublished opinions written by different judges gives pause.").

<sup>88</sup> Songer, *supra* note 82, at 310.

<sup>89</sup> Cf. Reynolds & Richman, *supra* note 20, at 607 (noting difficulties of assessing whether large sample of opinions individually make 'new law'); Songer, *supra* note 82, at 309.

<sup>90</sup> The law dedicates judicial opinions to the public domain. See 17 U.S.C. § 101 (defining "work of the United States Government"); *id.* § 105 (excluding works of the United States Government from copyright protection).

1156

*University of California, Davis*

[Vol. 35:1133]

This is not a flippant question. To be sure, the benefits of public dispute resolution — the reduction of private violence, the smooth functioning of a contract-based economy, and the protection of property — amply justify the full public subsidy of the courts. But public dispute resolution in and of itself does not necessarily require written opinions<sup>91</sup> or even rights of appeal.<sup>92</sup> Still less does public dispute resolution necessarily require written opinions produced at public expense. One could easily imagine, at least in private civil cases, a regime under which court costs included extra user-based fees for written opinions, which litigants could either accept or decline to pay.

No, to justify the free provision of written opinions to litigants, it is not enough simply to cite the need for a system of courts. Courts could easily dispense with written opinions and litigants probably would not miss them very much. As Landes and Posner have observed, “most litigants do not anticipate a recurrence of the same or even of similar issues in future litigation to which they will be parties, and from their standpoint the precedent produced by the current litigation is a worthless by-product of dispute resolution.”<sup>93</sup> The more convincing reason for society’s incurring the cost of written judicial opinions is that the exposition and refinement of the law that occur through the issuance of reasoned opinions have significant and potentially long-lasting public benefits. Reasoned written opinions enable people to learn what the law is and to act in accordance with it. Reasoned written opinions also help

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<sup>91</sup> It is not a compelling argument that it is necessary to provide a written opinion to a losing appellate litigant so that he may seek review from a higher court, at least in the federal system. The Supreme Court hears argument in astonishingly few instances. See William H. Rehnquist, *2000 Year-End Report on the Federal Judiciary* (2001) available at <http://www.supremecourtus.gov/publicinfo/year-end/2000year-endreport.html> (reporting that during 1999 Term, 7,377 cases were filed but only 83 were argued in Supreme Court). To require the preparation of opinions merely to facilitate review by the Supreme Court seems greatly disproportionate to the likely benefits of that review, particularly, when, as we explain below, a fully reviewable record can be created even without written opinions.

<sup>92</sup> The popularity of arbitration attests to the viability of a system that features neither. Although arbitration agreements occasionally contain provisions requiring arbitrators to issue written opinions and occasionally provide for more searching appellate review, e.g., *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997), that is not the norm.

<sup>93</sup> William M. Landes and Richard A. Posner, *Legal Precedent: Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 271 (1976). This insight is confirmed by our experience as litigators. Although repeat-players in litigation, such as certain major corporations, advocacy groups, and nearly all governments, may take great interest in the content of the opinions that resolve their cases, most other litigants do not share that interest. The winning party generally cares only for the judgment or result, and an opinion provides cold comfort to the loser, who rarely finds the reasoning persuasive.

2002]

*The Censorial Judiciary*

1157

resolve future disputes by providing precedents for decisions.<sup>94</sup> As Cardozo wrote, “[t]he labor of judges would be increased almost to the breaking point if . . . one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.”<sup>95</sup> Those purposes — the derivation of the efficiencies that come from public reliance on precedent and from citation thereto — fully justify the production of written opinions at public expense.

Those purposes, however, are obviously thwarted when the opinion cannot be cited. In such instances, members of the public cannot reasonably rely upon the opinion as a guide for future conduct, nor can judges consider it as a guide for decision in later cases. Consider a lawyer counseling a client concerning a proposed course of action. If the only legal authority on point is a noncitable case that permits the conduct, what advice can the lawyer properly give?<sup>96</sup> Or what if the noncitable opinion forbids the conduct? Can the lawyer tell the client that he or she is safe to proceed because an adversary could not cite a case that has prohibited it?<sup>97</sup> What if, during litigation, a lawyer asserts that an old precedent has never been followed? If the case has in fact been followed many times, albeit in uncitable opinions withheld from publication because they merely “restate” the law, is his or her adversary expected to remain mute and thereby deprive the court of information helpful in evaluating the vitality of the case? These scenarios present awkward ethical problems.<sup>98</sup> They also illustrate the utter worthlessness of noncitable opinions to the public at large. Taxpayers are well within their rights to ask why they are paying for them.

But the pernicious effects of the no-citation rules go beyond the loss of public benefits for which the public has paid. By prospectively rejecting the doctrine of *stare decisis* in the overwhelming majority of appeals, the no-citation rules diminishes the accountability of life-tenured officials

<sup>94</sup> RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 358-59 (1990).

<sup>95</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921).

<sup>96</sup> *See, e.g., Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, 260-61 (5th Cir. 2001) (Smith, J., dissenting from denial of rehearing en banc) (overruling unpublished opinion conferring Eleventh Amendment immunity on transit authority). “What is the hapless litigant or attorney . . . to do? . . . Competent counsel reasonably would have concluded, and advised his or her client, that it could count on Eleventh Amendment immunity. . . . One can only wonder what competent counsel will advise the client now.” *Id.* at 261.

<sup>97</sup> *See, e.g., Hinderks & Leben, supra* note 67, at 212-13 (stating that neither lawyer nor client may rely on uncitable decisions).

<sup>98</sup> *See American Bar Association, supra* note 11 (concluding that ethics rules bar citation of unpublished opinions to court that forbids it).

1158

*University of California, Davis*

[Vol. 35:1133]

already subject to few, if any, checks on their power.<sup>99</sup> And even if that concern seems overstated, rules that say to losing litigants that although their cases have been decided fairly and correctly according to established legal rules, the judges do not necessarily wish to apply those same rules in future cases cannot engender confidence in the judicial system.

That problem seems particularly acute in specific classes of appeals that generate unpublished opinions with disproportionate frequency, such as appeals from denials of prisoner pro se petitions and from rulings in civil rights and social security cases, which typically pit “underdog” plaintiff-appellants against institutional or government defendant-appellees.<sup>100</sup> It is generally believed that these appeals — particularly the pro se prisoner petitions — are overwhelmingly weak and often frivolous. One does not need to reject that common wisdom, however, to have concerns about the routine resolution of these appeals through unpublished opinions.

For one thing, the very fact that meritless appeals arise so frequently in these areas may signify the need for additional opinions, even opinions that merely restate and reemphasize prior holdings. Clearly the precedential opinions that exist are not getting the message across. Additional concerns are the specter of two-track justice<sup>101</sup> and a concern, voiced even by judges themselves, that the consignment of such appeals to the unpublished track may result in the appearance of “knee-jerk” justice.<sup>102</sup> We are not aware of any evidence to suggest that the high affirmance rate in these appeals stems from anything other than their lack of merit. It would seem to us, however, that appellants who may, rightly or wrongly, perceive themselves as disenfranchised, marginalized victims of bureaucracies or the “establishment” — the stereotypical appellants in such appeals — are precisely the types of litigants whose confidence in the system of justice is apt to be most undermined by the issuance of opinions that announce in bold face at

<sup>99</sup> See Rehnquist, *supra* note 91.

<sup>100</sup> See Reynolds & Richman, *supra* note 20, at 621-24 (noting comparatively low publication of opinions resolving certain types of litigation, including prisoners’ petitions and social security cases); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 295 (1996) (stating that courts are less likely to publish opinions in social security or civil rights cases or prisoners’ petitions); Songer, *supra* note 82, at 310, 313 (stating that identity of parties should not determine publication); Wald, *supra* note 60, at 1376 (stating that certain types of appeals generate unpublished opinions more frequently than others).

<sup>101</sup> E.g., Richman & Reynolds, *supra* note 100, at 595-97.

<sup>102</sup> E.g., Wald, *supra* note 60, at 1374; Reynolds & Richman, *supra* note 20, at 623-24.

2002]

*The Censorial Judiciary*

1159

their outset that the judges never want to hear about these cases ever again. It may well be that no opinion, no matter how carefully reasoned and written, would give these litigants confidence in the results of appeals they invariably lose. But if so, why do judges prepare noncitable opinions in these cases? Because the opinions cannot be cited by future litigants, their only ostensible purpose is to assure losing parties that their appeals received full consideration. These opinions, however, with their boilerplate incantations that the appeal lacks merit, that the district court did not "abuse its discretion," and that the court finds "no reversible error"<sup>103</sup> do not serve that purpose very well at all. As Judge Wald has wittily remarked of these opinions, "The message comes through clearly to the losing party: 'You never had a real chance, and we have gone to the least possible trouble to tell you why.'"<sup>104</sup>

#### IV. THE CONSTITUTIONAL INFIRMITIES OF THE NO-CITATION RULES

The uneasy case for the no-citation rules is harder still because of their constitutional infirmities.

##### A. *Article III and Anastasoff v. United States*

In recent years, the constitutional attack on no-citation rules has focused upon whether federal judges may, consistently with their judicial role, disregard uncitable, nonprecedential opinions in later cases. The argument, raised first as a question in a 1999 article by Judge Richard Arnold,<sup>105</sup> later became the basis for the Eighth Circuit's invalidation of its own rule permitting designation of opinions as nonprecedential. In *Anastasoff v. United States*,<sup>106</sup> Judge Arnold, writing for the Eighth Circuit, held that declining to follow the holdings of prior cases because those cases were designated as nonprecedential exceeded the proper exercise of the "judicial power" that Article III vests in the federal courts.<sup>107</sup> According to *Anastasoff*, when judges disregard the holdings of prior appellate cases they arrogate to themselves legislative

<sup>103</sup> E.g., *Clausen v. North Central Blood Servs.*, 1 Fed. Appx. 566, 566 (8th Cir. 2001) (per curiam) (no "abuse of discretion"); *Rhem v. Britain*, 1 Fed. Appx. 137 (4th Cir. 2001) ("no reversible error"). Cf. *Reynolds & Richman*, *supra* note 20, at 601-03.

<sup>104</sup> Wald, *supra* note 60, at 1373.

<sup>105</sup> Arnold, *supra* note 59.

<sup>106</sup> 223 F.3d 898 (8th Cir. 2000).

<sup>107</sup> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may, from time to time, ordain and establish." U.S. CONST. art. III, § 1, cl. 1.

1160

*University of California, Davis*

[Vol. 35:1133]

power in violation of the doctrine of separation of powers. That is because a fundamental distinction between legislative and judicial power is that while legislators can depart from established legal principles for any reason or none at all, judges cannot.<sup>108</sup> If judges depart from the law as expounded in earlier cases, they must do so either because they reasonably conclude that that law is not applicable (“distinction”) or that the law was mistaken and should be changed (“overruled”). On this theory, ignoring the holding of a prior case without attempting to distinguish the case or explaining why it should be overruled is an unconstitutional cop-out.

*Anastasoff*'s reasoning strikes a chord because it purports to provide a constitutional mooring for the intuition that judges should treat similarly situated litigants similarly unless there is a good reason not to. *Stare decisis* is a notoriously flexible concept,<sup>109</sup> but if it means anything, it means that the outcome of a case should not turn on whether a prior case was sufficiently “interesting” to merit publication. But as reasonable as that position may be as a matter of jurisprudence, the argument that Article III's vesting of “judicial power” in the federal courts constitutionalizes that position places a heavy load on the relevant constitutional language. After all, the language of Article III merely confers “judicial power” on a body; it does not purport to define or limit how that power may be exercised. Although the argument that conferring “judicial power” upon the federal courts limits that power by implication to power one can reasonably characterize as “judicial,”

<sup>108</sup> *Anastasoff* had a strange, short life. On rehearing en banc, the Eighth Circuit, per Judge Arnold, vacated *Anastasoff* as moot because, subsequent to the filing of *Anastasoff*'s petition for rehearing, the IRS paid her claim in full, thereby disposing of the case. *Anastasoff v. United States*, 235 F.3d 1054, 1055 (8th Cir. 2000) (en banc). Eleven days after *Anastasoff* had been vacated, the court issued a published opinion in *United States v. Langmade*, in which it relied upon the vacated opinion in *Anastasoff* for the proposition that “unpublished decisions are binding precedent that district courts in this circuit must follow.” 8th Cir. Slip. Op. No. 00-2019 (Dec. 29, 2000, withdrawn Jan. 2, 2001), available at <http://www.ca8.uscourts.gov/opndir/00/12/002019P.pdf>. A few days later, the court withdrew *Langmade* and issued a new opinion, one purged of any reference to *Anastasoff*. See *United States v. Langmade*, 236 F.3d 931 (8th Cir. 2001); Borger & Oldfather, *supra* note 71, at 907-08.

It is unclear why the original opinion was vacated as moot because the case settled only after that opinion was rendered. Settlement after an opinion is rendered does not generally justify vacatur of the opinion. To the contrary, several courts have refused, against the wishes of the litigants, to vacate lower court decisions in cases that have settled pending appeal. See generally, e.g., *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27, 30 n.2 (1993) (per curiam).

<sup>109</sup> See generally, e.g., Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643, 644-46 (2000).

2002]

*The Censorial Judiciary*

1161

“judicial power,” as that term is used in the Constitution, does not necessarily mean power constrained by modern concepts of *stare decisis*. Judge Arnold marshaled impressive scholarship to suggest that the Framers understood judicial power in precisely this way, but, as the two cases rejecting *Anastasoff* have demonstrated, there is sufficient scholarship pointing in other directions to make that conclusion tentative at best.<sup>110</sup> In particular, the ad hoc nature of case reporting in the eighteenth century and the unclear hierarchical relationships of English courts prior to the middle of the nineteenth century<sup>111</sup> make the premise upon which *Anastasoff*’s reasoning rests — that the Framers would have considered the issuance of an uncitable, unprecedented opinion an illegitimate exercise of judicial power — open to reasonable question.

That question does not become any easier if one moves away from the originalist approach that has dominated the debate over *Anastasoff* thus far and instead asks what a more modern understanding of federal “judicial power” would suggest about whether federal appellate judges have the power to issue nonprecedential decisions. The very intensity of the debate that the now-vacated *Anastasoff* has set off attests to the lack of any consensus within the legal community even today whether the exercise of “judicial power” necessarily requires judges to adhere to *stare decisis* in the most rigid sense (i.e., all opinions are precedents, no matter how they are designated), or whether an exception can be made for the four-fifths of all federal appellate cases that appellate judges have specifically exempted from that doctrine’s scope.

### *B. The First Amendment*

The simpler and stronger argument is that no-citation rules violate the First Amendment. Several commentators have questioned the constitutionality of the no-citation rules under the First Amendment,<sup>112</sup> and the Supreme Court, in 1976, fielded a First Amendment challenge to

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<sup>110</sup> See Hart v. Massanari, 266 F.3d 1155, 1160-69 (9th Cir. 2001) (disagreeing with *Anastasoff*); Symbol Techs., Inc. v. Lemelson Med., 277 F.3d 1361, 1367-68 (Fed. Cir. 2002); Thomas R. Lee and Lance S. Lehnhof, *The Anastasoff Case and the Judicial Power to ‘Unpublish’ Opinions*, 77 NOTRE DAME L. REV. 135, 136 (2001) (stating that Judge Arnold “held that the 8th Circuit rule on unpublished opinions was unconstitutional”).

<sup>111</sup> See Hart, 266 F.3d at 1164-66 (noting that lack of clear hierarchy of common law courts was an impediment to applying doctrines of strict binding precedent).

<sup>112</sup> See Hinderks & Leben, *supra* note 67, at 215-19 (discussing First Amendment arguments for and against no-citation rules); Katsh & Chachkes, *supra* note 67, at 297-300 (stating that no-citation rules violate First Amendment Free Petition Clause and Free Speech Clause).

1162

*University of California, Davis*

[Vol. 35:1133]

a no-citation rule, but it rejected the challenge without comment.<sup>113</sup> A more recent legal challenge to the Ninth Circuit's no-citation rule foundered on standing grounds: the lawyer challenging the rules had not in fact tried to cite any unpublished opinions or been sanctioned for citing them so he could not demonstrate that the rule had injured him.<sup>114</sup> But with opposition to the no-citation rules growing amongst lawyers,<sup>115</sup> it seems to be only a matter of time before a procedurally proper test case is brought.<sup>116</sup>

### 1. The Free Speech Clause

The argument that no-citation rules abridge the freedom of speech is straightforward. Legal argument is speech<sup>117</sup> and the no-citation rules abridge that form of speech by prohibiting or discouraging arguments of

<sup>113</sup> *Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit*, 429 U.S. 917 (1976). *Do-Right Auto Sales* sought a writ of mandamus against the Seventh Circuit for having struck a citation to an unpublished opinion from the petitioner's appellate brief. *Id.*

In *Browder v. Director, Illinois Dep't of Corrections*, 434 U.S. 257, 258 n.1 (1978), the petitioner challenged the Seventh Circuit's authority to issue nonprecedential opinions, but the Court's holding that the Seventh Circuit lacked jurisdiction to reverse an order releasing him from custody obviated the challenge. *Id.* See also Note, *Unreported Decisions in the United States Courts of Appeals*, 63 CORNELL L. REV. 128, 143 n. 103 (1977). The petitioner in *Browder* did not challenge the Seventh Circuit's nonpublication policy on First Amendment grounds. Brief for Petitioner at 50-56, *Browder* (No. 76-5325) ("A Federal Court of Appeals Lack the Power to Withhold Any of its Opinions from Publication and to *a Priori* Deprive Such Opinions of Precedential Value."). An amicus curiae brief submitted by the Chicago Council of Lawyers did present such a challenge, but the brief argued only that nonpublication infringed the public's First Amendment right to obtain information about judicial decisions, not that noncitation violated an advocate's freedom of expression. See Brief of Amicus Curiae Chicago Council of Lawyers, at 45-49, *Browder* (No. 76-5325).

<sup>114</sup> *Schmier v. United States Court of Appeals for the Ninth Circuit*, 136 F. Supp. 2d 1048, 1052 (N.D. Cal. 2001), *aff'd*, 279 F.3d 817, 820 (9th Cir. 2002).

<sup>115</sup> Last year, the American Bar Association called for abolition of no-citation rules. See Cohen, *supra* note 67. Committees of the Association of the Bar of the City of New York have also criticized the rules on several occasions. See Katsh & Chachkes, *supra* note 67, at 294 nn.24, 27 (citing bar committee reports opposing Second Circuit's no-citation rule). There is even a website, maintained by the "Committee for the Rule of Law," devoted to abolition of nonpublication policies and no-citation rules. See COMMITTEE FOR THE RULE OF LAW, MISSION STATEMENT, available at <http://www.nonpublication.com/CRLmission.htm>.

<sup>116</sup> *Schmier*, 279 F.3d at 825 ("Given the wide range of interest shown in the debate about unpublished opinions, . . . it is only a matter of time before the theoretical questions raised by *Schmier's* complaint are all properly presented and resolved.")

<sup>117</sup> See *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) ("By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression under which courts must depend for the proper exercise of the judicial power.")

2002]

*The Censorial Judiciary*

1163

a certain type.<sup>118</sup> That conclusion is the same whether one classifies the rules as “content-neutral” or “content-based” restrictions on expression.

a. Content-Neutral

Content-neutral restrictions on expression are valid if they “further an important or substantial government interest” and do so through restrictions that are “no greater than is essential to the furtherance of that interest.”<sup>119</sup> No-citation rules satisfy neither requirement. The judicial interest in being spared from briefs citing unpublished cases is slight, for it is hard to see how exposure to such briefs could significantly interfere with the work of the judiciary, particularly if the cited cases are as pedestrian as the standards for nonpublication would require. As Judge Tatel of the D.C. Circuit has written, “any risk of harm from citing [uncitable] judgments is minimal so long as the court abides by Rule 36, reserving abbreviated dispositions for cases where existing precedent dictates the result.”<sup>120</sup> Moreover, even if there were a significant interest, there is clearly a less restrictive alternative: the judges may disregard citations to the nonpublished opinions, just as they may disregard citations to district court opinions or other noncontrolling authority. First Amendment law recognizes that even if speech is offensive, it is generally preferable to place the burden on the nonspeaker not to listen or to cover his ears, rather than to censor the speaker.<sup>121</sup> That principle seems all the more forceful in a setting in which the speech is not offensive and in which the audience is not “captive” in any meaningful sense. Judges are neither required nor expected to read every case lawyers may cite.<sup>122</sup>

<sup>118</sup> *E.g.*, that *X v. Y* (unpublished) supports P’s position.

<sup>119</sup> *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) (citation omitted).

<sup>120</sup> David S. Tatel, *Some Thoughts on Unpublished Decisions*, 64 *Geo. Wash. L. Rev.* 815, 817 (1996).

<sup>121</sup> *See City of Houston v. Hill*, 482 U.S. 451, 472 (1987) (“The First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive.”); *Erznoznik v. Jacksonville*, 422 U.S. 205, 209-11 (1975) (stating that in the absence of “narrow circumstances,” such as the viewer’s “captivity,” the “burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes.” (quoting *Cohen v. California*, 403 U.S. 15, 21 (1970))).

<sup>122</sup> “Nothing in the First Amendment or in this Court’s case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals’ communications on public issues.” *Minn. Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 285 (1984).

By contrast, we believe there is at least an expectation, if not a requirement, that

1164

*University of California, Davis*

[Vol. 35:1133]

## b. Content-Based

As it happens, however, we think the better view is that no-citation rules should be judged under the more stringent standard that applies to content-based restrictions. While no-citation rules may seem content-neutral on first blush as they apply to all unpublished opinions to the same extent, that neutrality is deceptive. The no-citation rules permit citation to an opinion only if the authors of that opinion endorsed the content of the opinion as a precedent when they released it. If so, the no-citation rules permit the citation and any arguments based on the opinion; if not, they are censored. Thus, because the "very basis for the regulation is the difference in content" between published and unpublished opinions, no-citation rules are more properly classified as content-based restrictions on speech.<sup>123</sup>

Content-based restrictions on speech are rarely valid. They are (to use the lingo of constitutional law) subject to "strict scrutiny," a legal test that can be met only if the restrictions serve compelling governmental interests and employ the least restrictive means to effectuate those interests.<sup>124</sup> No-citation rules do not pass these tests. These are not rules that protect against physical or psychological harm, such as rules forbidding child pornography, or economic loss, such as rules prohibiting fraud or libel. Nor can no-citation rules be analogized to rules penalizing frivolous arguments, which, though they unquestionably restrict the content of legal argument, nonetheless pass First Amendment muster.<sup>125</sup> Rules against frivolous arguments are necessary means of protecting courts and private litigants from the abuse and expense of patently worthless lawsuits.<sup>126</sup> In contrast, no-citation

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judges will read briefs submitted to them and will listen to oral arguments. Accordingly, brief page limits and oral argument time limits are appropriate content-neutral "time" and "manner" restrictions that serve the important governmental interest in the orderly and fair allocation of limited judicial resources among litigants. The government has a legitimate interest in ensuring that the speech of some does not drown out the speech of others, see *United States v. Harris*, 347 U.S. 612, 625 (1954), which it might if litigants could present filibustering arguments and file briefs of unlimited length.

<sup>123</sup> *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 429 (1993); see also *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (discussing tests of content neutrality).

<sup>124</sup> See, e.g., *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978).

<sup>125</sup> See *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983) (stating that frivolous litigation does not enjoy First Amendment protection); see generally Carol Rice Andrews, *The First Amendment Problem With the Motive Restrictions in the Rules of Professional Conduct*, 24 J. LEGAL PROF. 13, 64-65 (2000) (discussing governmental interest in ensuring that frivolous claims do not consume judicial resources).

<sup>126</sup> Federal courts lack jurisdiction over frivolous cases. See, e.g., *Walters v. Edgar*, 163 F.3d 430, 433 (7th Cir. 1998) ("a frivolous suit does not engage the jurisdiction of the federal

2002]

*The Censorial Judiciary*

1165

rules forbid the truthful communication of relevant information to a governmental body solely because certain members of that body *might* find it bothersome to consider that information. Again, even if that were a compelling governmental interest, a less restrictive means of furthering that same interest exists: judges may disregard the citations. There is no need for censorship.

Nor is it a persuasive reply that no-citation rules are not censorious because they permit the citation, publication, or discussion of the cases in media other than legal briefs.<sup>127</sup> The mere fact that a restriction on speech forecloses expression through only one medium does not insulate that restriction from invalidation under the First Amendment if the forbidden medium is a particularly important one for that expression.<sup>128</sup> Legal briefs and arguments are indisputably important media for the communication of ideas about judicial opinions.

## 2. The Free Petition Clause

The same arguments that support a challenge to no-citation rules under the free speech clause also support a challenge under the First Amendment's free petition clause. The free petition clause guarantees the right "to petition Government for a redress of grievances." That right is "cut from the same cloth" as the right of free speech<sup>129</sup> and is, in a sense, simply an application of the right of free speech in the specific context of speech requesting action from governmental bodies — political speech in perhaps its purest form. Federal courts are governmental bodies before which the right to petition applies.<sup>130</sup> Hence, the only interpretive question is whether no-citation rules impair the presentation to federal courts of "grievances."

They clearly do. Regardless of whether one accepts *Anastasoff's* view that a judge may not disregard the holdings of prior unpublished cases,

courts").

<sup>127</sup> Judge Kozinski made this argument at a debate in April 2001. See Appellate Practice Section, Bar Association of San Francisco, *Unpublished Decisions: Caught Between Scylla and Charybdis* 45-46 ("You can publish an unpublished decision in the San Francisco Examiner. You can put it online on a web page. You can tattoo it to your chest. You can write articles about it. You can't do it in a brief. . . . But that is not a First Amendment issue.") (Apr. 24, 2001) available at <http://www.nonpublication.com>.

<sup>128</sup> See *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) (city cannot bar residents from posting signs on front lawns even though residents remained free to convey "their desired messages by other means, such as hand-held signs, letters, handbills, flyers, telephone calls," etc.).

<sup>129</sup> *McDonald v. Smith*, 472 U.S. 479, 482 (1984).

<sup>130</sup> See *Bill Johnson's Restaurants*, 461 U.S. at 741.

1166

*University of California, Davis*

[Vol. 35:1133]

it is nonetheless fair to describe any instance in which a court has done that or may do that imminently as a "grievance." It may not be a meritorious grievance, to be sure. The case may not in fact control, or its designation as nonprecedential may, contrary to *Anastasoff*, have reflected a proper exercise of the "judicial power" so that disregarding it now is legitimate. But the mere fact that, for example, a district court judge, faced with a situation similar to that discussed in an unpublished opinion, nonetheless acted differently than he would have had he been aware of or chosen to follow the unpublished opinion is a bona fide "grievance." The free petition clause would therefore require a reviewing court to permit a litigant to inform the court of the discrepancy and to argue that the reasoning of the unpublished opinion is more sound.

#### V. PROPOSALS FOR REFORM

The conclusion that the no-citation rules are unconstitutional seems inescapable, and even if it were not, their many other drawbacks would counsel against their retention. We recognize, however, the gravity of the problem they attempt to address and the need to offer a workable alternative. The workload of the federal appellate judiciary is enormous, and it is unrealistic to expect 179 individuals,<sup>131</sup> even individuals as qualified and hard-working as federal appellate judges, each to author up to 498 polished, detailed, signed opinions a year.<sup>132</sup> Even judges of such Olympian productivity as Richard Posner and Frank Easterbrook author only between 75 and 90 opinions annually, and the average judge, together with his or her three to four law clerks, writes only 54 published majority opinions each year.<sup>133</sup>

##### A. *More Judges?*

The most obvious solution would be simply to increase the number of federal judges, and responsible critics of the no-citation rules have made this proposal.<sup>134</sup> That is not, however, an advisable or easy solution to implement. The budget of the federal judiciary has already increased

<sup>131</sup> 28 U.S.C. § 44(A) (2000).

<sup>132</sup> Federal Court Management Statistics, *supra* note 54 (terminations on the merits per active circuit judge).

<sup>133</sup> *Id.*; FEDERAL COURTS '96, *supra* note 41, at 154, Table 5.3.

<sup>134</sup> *See, e.g.,* *Anastasoff v. United States* 223 F.3d 898, 904 (8th Cir. 2000); Richman & Reynolds, *supra* note 100.

2002]

*The Censorial Judiciary*

1167

ten-fold, in real terms, over the past forty years,<sup>135</sup> and there are far too many more pressing social needs today to justify another several-fold increase or to make one politically feasible. Even the judges themselves do not want more judges.<sup>136</sup> They complain that increasing the number of judges would make the courts less congenial, less cohesive, and more bureaucratic,<sup>137</sup> and would make the en banc rehearing process unwieldy.<sup>138</sup>

Nor is it advisable to keep the number of judges constant but to increase the number of law clerks and other parajudicial personnel each judge supervises. Today, circuit judges are entitled to as many as four clerks<sup>139</sup> (up from one in 1960), and receive additional help from permanent staff attorneys, who also help draft opinions.<sup>140</sup> To add more clerks would make judges' responsibilities less judicial and more managerial.<sup>141</sup> The efficiencies that could, in theory, be derived from an increase in opinion-drafting manpower would at some point be drowned by the inefficiency of having only a single judge available to interview, hire, and train these recent law school graduates and to edit their work.<sup>142</sup> Moreover, much of the beauty and value of the clerkship experience is that it permits a young lawyer at the threshold of a career to enjoy a fairly close working relationship with a successful and experienced member of the legal profession. Much of that would be lost if the clerk

<sup>135</sup> FEDERAL COURTS '96, *supra* note 41, at 129.

<sup>136</sup> See, e.g., Richman & Reynolds, *supra* note 100, at 299 *et seq.* ("The Judicial Establishment has consistently lobbied *against* the single most obvious solution to the caseload glut — the creation of additional judgeships." (Emphasis in original)).

<sup>137</sup> See, e.g., *id.* at 323-25.

<sup>138</sup> FEDERAL COURTS '96, *supra* note 41, at 133-34.

Judges frequently express the concern that increasing the number of judges would reduce their prestige. E.g., Richman & Reynolds, *supra* note 100, at 336-39; Howard T. Markey, *On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand*, 33 S.D. L. REV. 371, 374-75 (1988); Lumberman's Cas. Co. v. Elbert, 348 U.S. 48, 59 (1954) (Frankfurter, J., concurring). It might, but we do not believe that the pool of qualified individuals who want to be appellate judges because of the opportunities judging provides for interesting, varied legal work and public service would be significantly reduced if the prestige of the office were lower. See Richman & Reynolds, *supra* note 100, at 337-38.

<sup>139</sup> In fact, if the judge can make do without a secretary, the judge may hire five clerks. Letter from Richard A. Posner to David Greenwald (Jan. 22, 2002) (on file with authors) ("In this electronic age, a judge can do quite nicely with no secretary, and then if he wants have five clerks.").

<sup>140</sup> FEDERAL COURTS '96, *supra* note 41, at 139. The Seventh Circuit, for example, employs 20 staff attorneys, "which is almost two per judge." Letter from Richard A. Posner to David Greenwald, *supra* note 139.

<sup>141</sup> Carrington, *supra* note 62, at 48; Markey, *supra* note 138, at 378-79.

<sup>142</sup> FEDERAL COURTS '96, *supra* note 41, at 140, 188; Markey, *supra* note 138, at 381-82.

1168

*University of California, Davis*

[Vol. 35:1133]

became only one of a large handful of judge's helpers.

### B. Other Opinion Formats

For this reason, responsible, realistic suggestions for reform must assume that the size of the federal judiciary remains more or less constant. On that assumption, available options are limited to changes in the way opinions are produced. We consider two such possible changes here. Although neither is perfect and both are inferior, in our view, to simply allowing advocates to cite any and all opinions, whether published or unpublished,<sup>143</sup> they both strike us as more sensible and constitutional approaches to an admittedly difficult problem than the current regime of court-sponsored censorship.

#### 1. Per Curiam Opinions

One suggestion would be for judges to make greater use of per curiam, unsigned opinions in lieu of unpublished, uncitable opinions. The per curiam opinion — generally a short opinion issued by the court (hence the name) and not by a particular member — is used commonly by the Supreme Court when it wishes to issue an opinion which, though citable, is tacitly understood to be a less significant precedent than a signed opinion.<sup>144</sup> Prior to nonpublication policies, a far greater percentage of the circuit courts' caseload was disposed of in this way. In 1962, 21% of all written opinions were per curiam opinions. By 1994, the percentage had dropped to 6%,<sup>145</sup> suggesting that many of the functions traditionally performed by per curiam opinions have been taken over by the noncitable opinion. Presumably, the per curiam opinion can take up those functions once again. This proposal balances the public interest in obtaining citable opinions and the individual's First Amendment right to cite them, with judges' interests in issuing less elaborate opinions in run-of-the-mill appeals.<sup>146</sup> It also has the advantage of simplicity. It could easily be implemented by simply amending the current nonpublication policies of the courts to call for a per curiam opinion in instances where an unpublished opinion is now appropriate.

<sup>143</sup> As the D.C. Circuit has recently done on a prospective basis. See *supra* note 8.

<sup>144</sup> FEDERAL COURTS '96, *supra* note 41, at 173.

<sup>145</sup> *Id.* at 173-74.

<sup>146</sup> The 1975 Hruska Commission Report proposed use of per curiam opinions as a means of addressing the caseload crisis. *Hruska Report*, *supra* note 31, at 51. See also David L. Walther, *The Noncitation Rule and the Concept of Stare Decisis*, 61 MARQ. L. REV. 581, 591 (1978).

2002]

*The Censorial Judiciary*

1169

## 2. Oral Opinions

A far more meaningful proposal would be to change the way in which many opinions are delivered. A fallacy common to many of the judicial defenses of the no-citation rules, both the passionate<sup>147</sup> and the lukewarm,<sup>148</sup> is that the courts face a Hobson's choice between unpublished, uncitable written opinions on the one hand and one-word opinions — "Affirmed," "Reversed" — on the other. If those were in fact the only alternatives, then we would agree that the current regime of unpublished opinions is preferable to a regime under which judges issue one-word, oracular pronouncements.<sup>149</sup> But the choice is not between the lesser of these two evils. There is at least one other option.

In lieu of reasoned written opinions, appellate judges could deliver reasoned (or well-enough reasoned) oral opinions. In cases in which the result was clear, dictated by well-known, well-established precedent, and in which preparation of a full-blown written opinion would be overkill — in short, precisely those in which uncitable opinions are supposed to be prepared today — the members of the panel could instead deliver their opinion extemporaneously, perhaps immediately after argument, perhaps at a later sitting of the court,<sup>150</sup> or perhaps even via conference call in open court. The opinion would be recorded, and could be e-mailed in digital format to the parties, mailed to the parties as a cassette, and/or posted on the court's website as a playable audio file. The opinions could also be transcribed for an appropriate fee upon request of the parties. Transcribed opinions would be citable, but their

<sup>147</sup> E.g., Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This: Why We Don't Allow Citation to Unpublished Dispositions*, CALIFORNIA LAWYER June 2000, at 43; Martin, *supra* note 69, at 181-83.

<sup>148</sup> FEDERAL COURTS '96, *supra* note 41, at 169; Wald, *supra* note 60, at 1374.

<sup>149</sup> As it happens, the Fifth and Eleventh Circuits occasionally issue one-word affirmances despite the widespread condemnation of that practice. One interesting defense of the practice comes from a circuit judge who has sat on these courts' panels as a visiting judge:

"[T]he real reason [for one-word affirmances] . . . is that the case presents no genuine appealable issue and the parties who initiated the appeal should have known this and probably did. Invocation of the rule is thus a rebuke for misuse of the appellate process, but administered with true Southern courtesy."

Nichols, *supra* note 70, at 920.

<sup>150</sup> That would be the appropriate setting for the oral deposition of pro se prisoner appeals, which are generally resolved without oral argument. Pro se prisoner appeals presently comprise 27% of the federal appellate docket and the opinions resolving them make up a large portion of the unpublished opinions prepared each year. Mecham, *supra* note 3, at Table S-4.

1170

*University of California, Davis*

[Vol. 35:1133]

informal nature would inevitably make them, in the vast majority of cases, less forceful precedents than their written counterparts.

Although the proposal may strike some as novel, we are not the first to propose it as a means of controlling appellate caseloads. A 1968 article by Chief Judge Lumbard of the Second Circuit proposed that judges dictate oral opinions from the bench in appeals that would otherwise generate *per curiam* opinions.<sup>151</sup> Following up on the suggestion, a congressional commission appointed to recommend changes in federal appellate court procedures noted in its final report that "savings in judicial time become truly dramatic when, for example, judgments are announced from the bench, with the reasoning of the court tape-recorded and available to the litigants and to the public in written form on request."<sup>152</sup>

As it happens, oral opinion delivery is common in other common law countries. English appellate judges have traditionally delivered most of their opinions orally, and some of the old English opinions most familiar to American lawyers were delivered in just this manner.<sup>153</sup> The majority of appeals heard in the English Court of Appeal are still disposed of through extemporaneous oral decisions. Though generally not reported, they are nonetheless, upon transcription, citable by advocates to the same extent as written opinions.<sup>154</sup> In Australia, the courts regularly issue oral — or *ex tempore* — opinions. Last year, the Federal Court of Australia (an intermediate federal appellate court, roughly analogous to a federal circuit court) resolved 700 of its 1,897 appeals through *ex tempore* opinions.<sup>155</sup>

<sup>151</sup> J. Edward Lumbard, *Current Problems of the Federal Courts of Appeals*, 54 CORNELL L. REV. 29, 37-38 (1968) ("After rereading the *per curiam* opinions of the Second Circuit for the past two years, I see no reason why at least half of them could not have been dictated in open court with some little extra preparation.").

<sup>152</sup> *Hruska Report*, *supra* note 31, at 50.

<sup>153</sup> *Raffles v. Wichelhaus*, 2 Hurlstone & Coltman 906 (Ex. 1864) and *Kingston v. Preston*, 2 Doug. 689 (K.B. 1773) (Mansfield, J.) — chestnuts of the first-year contracts course in law school, e.g., JOHN P. DAWSON ET AL., *CONTRACTS: CASES AND COMMENT* 353, 772 (5th ed. 1987) — were both oral opinions, summarized by private barristers.

<sup>154</sup> See ROBERT J. MARTINEAU, *APPELLATE JUSTICE IN ENGLAND AND THE UNITED STATES: A COMPARATIVE ANALYSIS* 104-08 (1990). Opinions rendered by the law lords in the House of Lords are called "speeches." *Id.* at 104.

<sup>155</sup> Information obtained from the Librarian of the Federal Court of Australia indirectly via the Office of the Commonwealth Director of Public Prosecutions. E-mail of Bruce Taggart to David Greenwald (Jan. 14, 2002) (on file with author).

For an Australian High Court Justice's perspective on oral opinion delivery, including tips for judges new to the practice, see Michael Kirby, *Ex Tempore Judgments — Reasons on the Run*, 25 WEST. AUST. L. REV. 213 (1995).

2002]

*The Censorial Judiciary*

1171

The practice has precedent in this country as well. During the first decade of the Supreme Court's existence, the Court reduced few of its opinions to writing.<sup>156</sup> Not until 1834 did the justices systematically file written opinions with the clerk of the Court, and even at that time not all of the Court's opinions were written.<sup>157</sup> Reported opinions from that period and preceding ones came from notes of reporters or lawyers who heard the opinions as they were spoken in court.<sup>158</sup> In the 1960s and 1970s, the Second Circuit regularly issued oral per curiam opinions from the bench,<sup>159</sup> and the Sixth Circuit still occasionally resolves appeals orally.<sup>160</sup>

However, oral decision making is most widespread today in American federal district courts. It is quite common today for district judges and magistrate judges — no strangers to caseload pressures — to announce rulings on motions extemporaneously from the bench. Pretrial detention orders and criminal sentences — perhaps the most solemn exercises of judicial power — are routinely announced orally. At bail proceedings, magistrate judges explain orally the bases for their findings that individuals present a risk of flight or danger to the community, applying a fairly elaborate set of statutory presumptions. And at federal sentencings, judges explain their often highly complex calculations under the sentencing guidelines from the bench, using notes perhaps, but almost never a prepared text. Transcripts of the proceedings adequately preserve a record for higher court review.

<sup>156</sup> THE OXFORD COMPANION TO THE SUPREME COURT 608 (Kermit L. Hall ed., 1992).

<sup>157</sup> Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on the Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1298 & n.46 (1985).

William Cranch, who assumed his position as the Supreme Court's first official reporter in 1801 before the development of audio recording or sophisticated stenography, expressed relief when the Court adopted the practice of "reducing their opinions to writing in all cases of difficulty or importance" during the early nineteenth century. THE OXFORD COMPANION, *supra* note 156, at 608.

<sup>158</sup> Joyce, *supra* note 157, at 1304.

<sup>159</sup> THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 124 (1994); *Cont'l Stock Transfer & Trust Co. v. SEC*, 566 F.2d 373, 374 (2d Cir. 1977) (noting practice of deciding appeals from bench).

<sup>160</sup> 6TH CIR. R. 36 provides:

In those cases in which the decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition of the case may be made in open court following oral argument. A written judgment shall be signed and entered by the clerk in accordance with the decision of the panel from the bench. Counsel may obtain from the clerk a copy of the transcript of the decision as it was announced from the bench.

*Id.* In 2001, the Sixth Circuit resolved 30 appeals orally. Mecham, *supra* note 3.

1172

*University of California, Davis*

[Vol. 35:1133]

There is little reason to believe that appellate judges could not emulate their colleagues on trial courts. In 1974, the American Academy of Judicial Education performed an experiment in which it assembled 26 active, mostly appellate judges.<sup>161</sup> These judges were presented with oral arguments, an eight-page bench memorandum, and record materials (but not briefs<sup>162</sup>) from an actual appeal from a state court rape conviction. After hearing the arguments, the judges were asked to complete a questionnaire including the question, "Do you think it would have been feasible to announce your decision from the bench immediately after the close of argument, or within a few minutes thereafter?" Twenty-four of the twenty-six judges answered "yes."<sup>163</sup>

A variant of this experiment was performed three years later at the 1977 annual meeting to the American Bar Association.<sup>164</sup> At that meeting, Judge Shirley Hufstедler of the Ninth Circuit, Justice Robert Braucher of the Massachusetts Supreme Judicial Court, and Justice Winslow Christian of the California Court of Appeal heard 30 minutes of oral argument based on an actual criminal appeal and then retired to confer. Fifteen minutes later they returned and unanimously reported that they would feel comfortable rendering a reasoned decision from the bench, which they did.<sup>165</sup>

The conclusion to be drawn from these experiments should hold particularly true for appeals resolved today through unpublished opinions. If such appeals are as rote as the nonpublication designation would suggest, then it should be feasible for circuit judges to address the issues they raise in a brief oral presentation, thereby saving the time associated with drafting, editing, circulating, and proofing a written opinion. If no member of a panel feels confident to do so, that would itself suggest that the issues the appeal presents merit closer examination through a written opinion. And if only some issues are simple enough to be resolved orally, while the rest require further consideration, the simpler issues can be disposed of on the spot and a written opinion on the others can be released later. That mode of partial oral disposition might facilitate post-argument settlement, which would, in turn, further reduce the courts' opinion-writing workloads.

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<sup>161</sup> See Daniel J. Meador, *Toward Orality and Visibility in the Appellate Process*, 42 MD. L. REV. 732, 742-44 (1983).

<sup>162</sup> *Id.* One purpose of the experiment was to determine whether oral argument could serve as an adequate substitute for written briefs.

<sup>163</sup> *Id.* at 744.

<sup>164</sup> *Id.* at 745-46.

<sup>165</sup> *Id.*

2002]

*The Censorial Judiciary*

1173

There may be other benefits, besides speed and efficiency, to be obtained from oral opinions. Oral opinions bring with them the opportunity to put a face on justice and to give it a voice. They would allow lawyers and the public to see how the judicial mind works as it works. They would also perhaps satisfy a desire on the part of litigants and their counsel to interact directly with their decision makers<sup>166</sup> by hearing the reasons for decisions explained from the judges' own mouths and in the judges' own words, not through the screens of a ghostwritten opinion released months later. Judges might even enjoy the experience of delivering their opinions orally as they shed their role as editors of the prose of recent law graduates and recapture their traditional role as direct and immediate exponents of common law. The experiment is worth trying.

#### CONCLUSION

Some defenders of the no-citation rules have referred to published opinions as if they were refined commodities, whose quality would suffer if judges had to produce them in every case. For one, the published opinions are "wheat," the unpublished, "chaff";<sup>167</sup> for another, published opinions are "diamonds" or "gold" and unpublished, "dross."<sup>168</sup> The metaphor of the published opinion as a valuable, even precious, commodity, may be apt, but if so, the no-citation rules are restrictions on the output of those commodities and should be condemned as such. The law does not permit producers of a commodity to agree to limit the number of items they produce on the pretext that the limits allow production of a higher quality good overall. Why then permit courts — the makers of precedents — to bar advocates from referring to certain appellate opinions on the theory that the quality of a subset of opinions — published opinions — would somehow plummet if

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<sup>166</sup> See *id.* at 736-37:

Deep within the Anglo-American legal psyche, mixed in with notions about the opportunity to be heard and the concept of due process, is the idea that a litigant and his lawyer should be able to face their judges and communicate directly with them. Nothing else affords the same assurance that the judges in fact have been confronted with the theories and arguments of the parties and have put their minds to the case. The acceptability and the integrity of the judicial process may be heavily affected by such assurance, and only the visible, orally presented appellate proceeding can provide it.

<sup>167</sup> Markey, *supra* note 138, at 372.

<sup>168</sup> Martin, *supra* note 69, at 178, 191.

1174

*University of California, Davis*

[Vol. 35:1133]

reference to all were allowed?

Obviously, the analogy goes only so far. But there is nonetheless something unsettling about rules that say to litigants that although their cases were decided correctly, the judges do not want anyone to let their judicial colleagues know what they did; something censorious and upside-down about rules that say to lawyers that although they may cite district court opinions, state court opinions, law review articles, or even nonlegal materials in their briefs, those briefs may subject their authors to professional discipline if they refer to certain writings of the very judges who sit on the court hearing the appeal; something confiscatory about rules that say to members of the public that although they have, through their taxes, paid for the production of an opinion, they may not derive any use from that opinion in subsequent disputes; and something arrogant about rules that confer upon judges the power to determine prospectively what cases will provide useful precedential or persuasive authority in cases years down the line, cases that raise issues the judges, for all their experience and collective wisdom, cannot pretend to foresee. Whatever the "judicial power" under Article III encompasses, regulation of the use of opinions to support legal arguments is not a traditional judicial or governmental function. Citation of legal authority, like other expressive conduct, should be left to the free marketplace of ideas.

June 26, 2002

The Honorable Howard Coble  
Chairman,  
Subcommittee on Courts, the Internet,  
and Intellectual Property  
Committee on the Judiciary  
United States House of Representatives  
Washington, D.C.

Re: Hearing on Unpublished Opinions  
in Federal Courts of Appeals

Dear Chairman Coble:

In connection with the Subcommittee's scheduled hearing for June 27, 2002, on unpublished opinions and no-citation rules in the Federal Courts of Appeals, I would like to submit as my statement the attached article: Stephen R. Barnett, From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules, 4 *Journal of Appellate Practice and Process* 1 (2002).

I hope this may be of some assistance to the Subcommittee. If I can be of further assistance, please feel free to call on me.

Thank you.

Sincerely,

STEPHEN R. BARNETT  
Elizabeth J. Boalt Professor of Law  
University of California, Berkeley

Berkeley, California  
June 26, 2002

Attachment

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# THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

## ESSAYS

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### FROM *ANASTASOFF* TO *HART* TO WEST'S *FEDERAL APPENDIX*: THE GROUND SHIFTS UNDER NO- CITATION RULES

Stephen R. Barnett\*

#### I. INTRODUCTION: A FAST-PACED YEAR

Last year's mini-symposium on unpublished opinions<sup>1</sup> seems to have unleashed a wave of further developments. The fast-breaking events include these:

1. Judge Richard S. Arnold's opinion for the Eighth Circuit in *Anastasoff v. United States*,<sup>2</sup> holding—until vacated as moot—that the circuit's rule denying precedential effect to unpublished opinions exceeded the Article III judicial power, has been

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\* Elizabeth J. Boalt Professor of Law, University of California, Berkeley. I thank the several federal circuit judges, the many court officials, and the West Group representative who spoke to me for this essay. I also thank Bob Berring for helpful comments, Florence McKnight for research assistance, and the reference staff of the Boalt Hall Library.

1. *Anastasoff*, *Unpublished Opinions, and "No Citation" Rules*, 3 J. App. Prac. & Process 169 (2001).

2. 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

ringingly answered by Judge Alex Kozinski's opinion for the Ninth Circuit in *Hart v. Massanari*.<sup>3</sup>

2. The American Bar Association's House of Delegates has declared that the practice of some federal circuits in "prohibiting citation to or reliance upon their unpublished opinions" is "contrary to the best interests of the public and the legal profession."<sup>4</sup> The ABA urges the federal appellate courts to "make their unpublished opinions available through print or electronic publications [and] publicly accessible media sites," as well as to "permit citation to relevant unpublished opinions."<sup>5</sup>

3. In a startling action that drains the meaning from the term "unpublished" opinion, the West Group in September 2001 launched its *Federal Appendix*.<sup>6</sup> This is a new case-reporter series in West's National Reporter System that consists entirely of "unpublished" opinions from the federal circuit courts of appeals (except, currently, the Fifth and Eleventh Circuits).<sup>7</sup> By late April 2002, West had published twenty-seven volumes of the *Federal Appendix*, averaging some 400 cases per volume, and was

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3. 266 F.3d 1155 (9th Cir. 2001). Meanwhile, two federal appeals cases in which panels refused to follow unpublished opinions have drawn pro-*Anastasoff* dissents. *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315 (5th Cir. 2001), *petition for reh. en banc denied*, 256 F.3d 260 (5th Cir. 2001) (Smith, Jones & DeMoss, JJ., dissenting); *Symbol Techs., Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361, 1368 (Fed. Cir. 2002) (Newman, J., dissenting). *See infra* n. 72.

4. American Bar Association, Sections of Litigation, Criminal Justice, Tort and Insurance Practice and Senior Lawyers Division, *Report to the House of Delegates*, Resolution No. 01A115 (Aug. 1, 2001).

5. *Id.*

6. *See* West Group Press Release, *West Group Launches New National Reporter System Publication for Unpublished Decisions* (Sept. 5, 2001) (copy on file with author). The press release explained that "many legal researchers want access to unpublished opinions because they often include relevant fact situations and particular applications of settled law." *Id.* It stated that "all U.S. Court of Appeals unpublished decisions" issued from January 1, 2001, would be included, and that each case would "receive full West Group editorial enhancements, be given a new citation and be made available in print in the West's *Federal Appendix* volumes, on CD-ROM and on Westlaw." *Id.*

7. In line with their policy of denying online access to their unpublished opinions (while allowing citation of them), *see infra* nn. 12, 27-28 and accompanying text, the Fifth and Eleventh Circuits make available to West only the information needed for the Decisions Without Published Opinions tables in the Federal Reporter. Telephone Interviews with West Group representative (Jan. 10, 2002, Mar. 4, 2002, May 3, 2002). (All interviews for this essay with judges, court personnel, and West Group representatives were conducted on the understanding that the sources' identities would not be disclosed. Redacted notes of each interview are on file with the author.)

expecting to report some 12,000 cases per year.<sup>8</sup> The cases in the *Federal Appendix* are supplied with headnotes, indexed to West's Key Number system, garnished with the other "editorial enhancements" of West's reporting system, and christened with their own citation form: "\_\_ Fed. Appx. \_\_." Except for its citation restrictions,<sup>9</sup> the Federal Appendix looks, reads, and quacks like a book of "published" case reports. If nothing else, West's action is requiring that definitions of "unpublished" be radically revised.<sup>10</sup>

4. The most significant move by the federal courts has come from the District of Columbia Circuit. Effective January 1, 2002, that court abandoned its no-citation rule and declared that all unpublished opinions issued on or after that date "may be cited as precedent."<sup>11</sup> Meanwhile, the Third Circuit has become the

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8. Telephone Interview with West Group representative (Mar. 4, 2002); see also e.g. West's *Federal Appendix*, vol. 27 (West Group 2002).

9. West runs a disclaimer on each volume's title page and on the report of each case, stating that the cases "have not been selected for publication in the Federal Reporter." This implies, misleadingly, that West has made some sort of case-by-case selection, and it fails to state the central point that the cases are all "unpublished." However, the title-page notice does advise readers to "consult local court rules to determine when and under what circumstances these cases may be cited," and each case bears a notice reciting whatever formula the issuing circuit employs to designate its unpublished opinions and restrict their usage. See e.g. *U.S. v. Martini*, 27 Fed. Appx. 1 (1st Cir. 2001) ("[NOT FOR PUBLICATION—NOT TO BE CITED AS PRECEDENT]").

10. The First Circuit reacted with instant alarm, hurriedly amending its rules to redefine a "published opinion" as "one that appears in the ordinary *West Federal Reporter* series (not including *West's Federal Appendix*)." 1st Cir. Interim Loc. R. 36 (b)(2)(F) (Sept. 24, 2001) (emphasis in original). See also 8th Cir. R. 28A(i) (amended Jan. 16, 2002) ("Unpublished decisions are decisions which a court designates for unpublished status"). The need for other rule-makers to take similar steps is suggested in Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. App. Prac. & Process 199, 205-206 (2001) ("In regard to federal circuit court opinions, 'unpublished' appears to mean that the opinion is not available in print.").

11. D.C. Cir. R. 28(c)(12)(B). A companion rule advises counsel, however, that "a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition." D.C. Cir. R. 36(c)(2). The D.C. Circuit simultaneously amended its *Handbook of Practice and Internal Procedures* to caution that while the new rule "makes a major change in the Court's practice," and while counsel "will now be permitted to argue that an unpublished disposition is binding precedent on a particular issue," the court's decision to issue an unpublished disposition "means that the Court sees no precedential value in that disposition. . . . i.e., the order or judgment does not add anything to the body of law already established and explained in the Court's published precedents." D.C. Cir., *Handbook of Practice and Internal Procedures* 42, 52 (as amended through Jan. 1, 2002). Further, "counsel should recognize that the Court believes that its published precedents already establish and adequately explain the legal principles applied in

eleventh of the thirteen federal circuits to post its unpublished opinions online and make them available to legal publishers.<sup>12</sup>

5. The action by the D.C. Circuit tips the balance in the federal courts against no-citation rules. Of the thirteen circuits, there remain only five—the First,<sup>13</sup> Second,<sup>14</sup> Seventh,<sup>15</sup> Ninth,<sup>16</sup>

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the unpublished disposition, and that there is accordingly no need for counsel to base their arguments on unpublished dispositions." *Id.* at 41.

Asked why they made the rule change, two D.C. Circuit judges called the move "long overdue" and mentioned variously the *Federal Appendix*, the *Anastasoff* opinion, the broad availability of unpublished opinions through online sources and elsewhere, and that "we don't like secret law." Telephone Interviews with D.C. Cir. judges (Jan. 11, 2002, Feb. 28, 2002).

12. See 3d Cir. Press Release (Dec. 5, 2001) (announcing that as of January 2, 2002, all court opinions in counseled cases "will be posted on the court's web site . . . and available for dissemination by legal publishers"; the court, however, will continue to observe Internal Operating Procedure (I.O.P.) 5.8, "which provides that the *court* will not cite to non-precedential opinions as authority") (emphasis in original) (available at <<http://www.ca3.uscourts.gov/>> (accessed Apr. 4, 2002; copy on file with *Journal of Appellate Practice and Process*)). This surrender to the online world was an about-face for the Third Circuit. Until this year it had been "generally considered that the Third, Fifth and Eleventh circuits have banned electronic dissemination of unpublished opinions, and these cases are neither added to Westlaw or LEXIS nor available from the courts' websites." Hannon, *supra* n. 10, at 211. The Third Circuit clarified its new procedures in late February, announcing that opinions in counseled cases will now be labeled either "precedential" or "not precedential," and that "the court will continue to observe its practice of not citing not precedential opinions as authority." 3d Cir. Press Release (Feb. 21, 2002) (available at <<http://www.ca3.uscourts.gov/>>) (accessed Apr. 14, 2002; copy on file with *Journal of Appellate Practice and Process*)).

The Fifth Circuit, on the other hand, lost heart. After announcing that it would put its unpublished opinions online, in late January 2002 it reconsidered and decided to maintain the status quo. Telephone interview with Fifth Cir. official (Feb. 1, 2002). See also 5th Cir. Website FAQ ("*Only opinions designated for publication (published opinions) are put on our website.*") (emphasis in original) (available at <<http://www.ca5.uscourts.gov/>> (accessed Mar. 25, 2002; copy on file with *Journal of Appellate Practice and Process*)).

13. See 1st Cir. R. 36(b)(2)(F) (unpublished opinions may be cited "only in related cases").

14. See 2d Cir. R. 0.23 (citation of written statements attached to summary orders prohibited, since they "do not constitute formal opinions of the court and are unreported or not uniformly available to all parties").

15. See 7th Cir. R. 53(b)(2)(iv) (unpublished orders "shall not be cited or used as precedent").

16. See 9th Cir. R. 36-3 (unpublished dispositions "not binding precedent" and "may not be cited") A provisional rule in effect for the thirty month period ending December 31, 2002, allows citation of unpublished dispositions in petitions for rehearing or rehearing en banc and in requests to publish an opinion, but only for the purpose of showing conflict among published and/or unpublished dispositions. *Id.* R. 36-3(b)(iii).

and Federal<sup>17</sup>—that ban citation of unpublished opinions (except, of course, for related-case uses such as *res judicata*). The other eight circuits discourage citation of unpublished opinions, typically calling it “disfavored,” but grudgingly allow it. They do this generally under one of two formulas—(1) that the opinions may be cited as “precedent” or for “precedential value” (the Fourth,<sup>18</sup> Sixth,<sup>19</sup> and D.C.<sup>20</sup> Circuits), or (2) that they are “not precedent” but may be cited for their “persuasive” value (the Fifth,<sup>21</sup> Eighth,<sup>22</sup> Tenth,<sup>23</sup> and Eleventh<sup>24</sup> Circuits). The Third Circuit, a loner, uses no formula but allows citation.<sup>25</sup>

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17. See Fed. Cir. R. 47.6(b) (opinion or order “designated as not to be cited as precedent . . . must not be employed or cited as precedent”).

18. See 4th Cir. R. 36(c) (citation of unpublished opinions “disfavored,” but “[i]f counsel believes, nevertheless, that an unpublished disposition . . . has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited”).

19. See 6th Cir. R. 28(g) (citation of unpublished decisions “disfavored,” but “[i]f a party believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case, and that there is no published opinion that would serve as well, such decision may be cited”).

20. See D.C. Cir. R. 28(c) (unpublished orders entered before January 1, 2002, “are not to be cited as precedent,” but ones entered on or after January 1, 2002, “may be cited as precedent”). See also D.C. Cir. R. 36(c)(2) (panel’s decision to issue unpublished disposition “means that the panel sees no precedential value in that disposition”); *D.C. Circuit Handbook*, *supra* n. 11, at 42, 52.

21. The Fifth Circuit uses both formulas, depending on when the opinion was issued. See 5th Cir. R. 47.5.3 (unpublished opinions issued before January 1, 1996, “are precedent,” but “because every opinion believed to have precedential value is published,” unpublished opinions “normally” should not be cited); 5th Cir. R. 47.5.4 (unpublished opinions issued on or after January 1, 1996, are “not precedent”; such opinions “may, however, be persuasive,” and may be cited).

22. See 8th Cir. R. 28A(i) (unpublished opinions “are not precedent and parties generally should not cite them,” but parties may do so if the opinion “has persuasive value on a material issue and no published opinion of this or another court would serve as well”).

23. See 10th Cir. R. 36.3 (unpublished decisions “are not binding precedents,” and their citation is “disfavored”; but an unpublished decision may be cited if it has “persuasive value with respect to a material issue that has not been addressed in a published opinion” and it would “assist the court in its disposition”).

24. See 11th Cir. R. 36-2 (unpublished opinions “are not considered binding precedent,” but “may be cited as persuasive authority”); see also 11th Cir. R. 36-3, I.O.P. 5 (stating that “[c]onclusions that the panel believes to have no precedential value are not published,” and that “[r]eliance on unpublished opinions is not favored by the court”).

25. See 3d Cir. I.O.P. 5.8 (explaining that “the court by tradition does not cite its unpublished opinions as authority”); 3d Cir. Press Release, Dec. 5, 2001 (“The court will continue to observe Internal Operating Procedure 5.8, which provides that the *court* will not cite to non-precedential opinions as authority,” (emphasis in original)). In stating carefully that “the court” does not cite to unpublished opinions, the Third Circuit tacitly allows

The balance tips toward citability in numbers of cases as well. The citable unpublished cases from the eight territorial circuits that allow citation total some 15,000 per year, while the noncitable cases from the four territorial circuits that ban citation total about half that.<sup>26</sup> It should be noted, however, that the Fifth and Eleventh Circuits, which each put out more than 3,000 unpublished opinions per year, withhold those opinions from online distribution (or West's *Federal Appendix*), while schizophrenically allowing them to be cited.<sup>27</sup> It appears, nonetheless, that these opinions are not effectively suppressed and in fact are cited.<sup>28</sup>

6. While this essay focuses on the federal courts, there is noteworthy movement in the state courts as well. In what would be a seismic shift, the Texas Supreme Court has tentatively decided to lift the "Do Not Publish" stamp now affixed to some eighty-five percent of the opinions of the Texas court of appeals and to "remove prospectively any prohibition against the citation of opinions as authority."<sup>29</sup> Meanwhile, California's court of

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lawyers to do so. Telephone Interview with 3d Cir. official (Jan. 9, 2002) (First Amendment cited as reason for the policy).

26. *Judicial Business of the United States Courts, 2001*, tbl. S-3 (available at <<http://www.uscourts.gov/judbus2001/tables/s03Sep00.pdf>> (accessed April 20, 2002; copy on file with *Journal of Appellate Practice and Process*)). The eight "citable" circuits have 14,806 unpublished cases, while the four noncitable circuits have 7,114. *Id.* (The Federal Circuit is not included in Table S-3, so the number of unpublished cases it issues is not available. Telephone Interview with Fed. Cir. official (Jan. 11, 2002). The statistics show a total of 1,500 case dispositions for the Federal Circuit, but do not indicate how many of them are unpublished. See *Judicial Business*, at tbl. B 8.)

27. See *supra* nn. 7, 12, 21, 24.

28. An official in the Fifth Circuit reports that the unpublished opinions of that court are not uncommonly cited and that lawyers obtain them principally in two ways: (1) Lawyers who practice in a given area (immigration law, for example) have their own "networks" within which relevant unpublished opinions are passed around and even bound into mini-collections; law offices such as those of the U.S. Attorney and Public Defender also collect opinions relevant to their work; and (2) the opinions are available in chronological binders in the circuit's library. Telephone Interview with 5th Cir. official (Mar. 15, 2002); see also *Williams v. Dallas Area Rapid Transit*, 242 F.3d at 318 n. 1 (discussing unpublished Fifth Circuit cases). In the Eleventh Circuit, two court officials state that unpublished opinions are cited. One reports that "some of the larger law offices keep track" of the opinions, in some cases "running their own data banks." The other notes that the opinions are available in the court clerk's office and that unpublished opinions are commonly cited in briefs filed with that circuit. Telephone Interviews with 11th Cir. officials (Jan. 11, 2002, Mar. 15, 2002).

29. Texas Supreme Court, *Comparison of Advisory Committee TRAP Recommendations and Supreme Court's Tentative Conclusions* 12-15 (Jan. 14, 2002) (addressing Rule 47.7) (available at <<http://www.supreme.courts.state.tx.us/rules/Committee/>> (accessed Mar. 26,

appeal, which brands some ninety-four percent of its opinions “unpublished,”<sup>30</sup> has begun posting all its unpublished opinions on the court’s website.<sup>31</sup> Citation is still prohibited, but the technological (and psychological) infrastructure is in place for possible pressure to follow a Texas lead.

Against the backdrop of these developments, I shall in this Essay first appraise the face-off between Judge Arnold and Judge Kozinski in *Anastasoff* and *Hart*, setting their disagreement about “precedent” against the spectrum of meanings which that word may convey. I will argue that Judge Kozinski’s opinion in *Hart*, for all its scholarly brilliance, demonstrates, in part, something different from what he may have intended. I will then consider Judge Kozinski’s arguments against no-citation rules, finding them inadequate, and will conclude by considering the degree of “precedential” force that unpublished opinions should be accorded in the federal courts.

## II. ANASTASOFF, HART, AND THE SPECTRUM OF PRECEDENT

### A. Anastasoff and Hart

#### Amid the continued controversy over unpublished opinions

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2002; copy on file with *Journal of Appellate Practice and Process*). The court was divided on the issue of retroactivity and sought further guidance from its Advisory Committee, with a final decision expected by summer of 2002. Telephone Interviews with Tex. Sup. Ct official (Jan. 10, 2002, Feb. 1, 2002, Mar. 28, 2002).

The debate over unpublished opinions has become something of a public issue in Texas, with several of the state’s leading newspapers editorializing in favor of the proposed rule change. See e.g. *Publish or Perish: Unpublished Appellate Court Opinions Corrode Texas Law*, Houston Chron. 2C (Dec. 9, 2001); *Court Blackout: Too Many Opinions Are Kept Under Wraps*, Dallas Morning News 14A (Dec. 31, 2001); *Court Opinions Should Become Public*, San Antonio Express-News 2G (Dec. 16, 2001) (characterizing no-citation rules as “unfair to Texans who must pick their judges in the voting booth”); *Editorial*, Fort Worth Star-Telegram 10 (Dec. 17, 2001) (“One would think that, any time a Texas appeals court issues a ruling, anyone could find it in the law books and rely on it to make an argument in one’s own case. One would be wrong.”).

30. See Cal. R. Ct. 977(a); Jud. Council of Cal., Admin. Off. of the Cts., 2001 *Court Statistics Report, Courts of Appeal*, tbl. 9 (available at <<http://www.courtinfo.ca.gov/>> (accessed Mar. 21, 2002; copy on file with *Journal of Appellate Practice and Process*)).

31. See *Unpublished Opinions* (available at <<http://www.courtinfo.ca.gov/opinions/nonpub.htm>> (accessed May 8, 2002; copy on file with *Journal of Appellate Practice and Process*)).

and the uses of precedent, the debate between Judge Arnold in *Anastasoff* and Judge Kozinski in *Hart* focuses, perhaps surprisingly, on one facet of this subject. These two intellectual heavyweights go to the mat over whether Article III requires that all decisions of the federal courts of appeals be regarded as “binding precedents.” Judge Arnold finds from his examination of eighteenth-century sources that “[t]he Framers thought that, under the Constitution, judicial decisions would become binding precedents in subsequent cases.”<sup>32</sup> He thus concludes—given the “law-of-the-circuit” rule, under which a panel’s decision cannot be overruled by another panel, but only by the court en banc<sup>33</sup>—that his panel was required to follow an unpublished Eighth Circuit decision.<sup>34</sup> Judge Arnold further concludes that the Eighth Circuit’s Rule 28A(i), stating that unpublished opinions “are not precedent,” purports to “expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional.”<sup>35</sup>

In *Hart*, Judge Kozinski—who, like Judge Arnold, had previously written extra-judicially on this subject<sup>36</sup>—seized on the opportunity presented by a lawyer who cited an unpublished Ninth Circuit opinion and then defended his violation of the court’s no-citation rule by arguing that the rule was unconstitutional under *Anastasoff*. Meeting Judge Arnold on his chosen ground of eighteenth-century history, Judge Kozinski offers a scholarly account that refutes *Anastasoff*’s claim of a historically-based constitutional requirement of binding precedent. The modern concept of binding precedent required two conditions, reliable case reports and a settled hierarchy of courts, that were not in place until at least the mid-nineteenth century, Judge Kozinski points out.<sup>37</sup> When the Constitution was drafted,

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32. 223 F.3d at 902.

33. *Id.* at 904; see n. 41 *infra* and accompanying text.

34. The issue was the scope of the “mailbox rule” for filing federal tax refund claims. See *Anastasoff*, 223 F.3d 898.

35. 223 F.3d at 900. Judge Arnold’s opinion was vacated as moot when the Government acceded to the contrary decision of another circuit. *Anastasoff v. United States*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

36. See Alex Kozinski & Stephen Reinhardt, *Please Don’t Cite This!* 20 Cal. Law. 43 (June 2000); Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. App. Prac. & Process 219 (1999).

37. 266 F.3d at 1164 n. 10 (quoting R.M.W. Dias, *Jurisprudence* (2d ed., Butterworth 1964)).

then, it was “emphatically not the case that all decisions of common law courts were treated as precedent binding on future courts unless distinguished or rejected.”<sup>38</sup> Judge Kozinski’s panel thus declines to follow *Anastasoff* and holds the Ninth Circuit’s no-citation rule constitutional.<sup>39</sup>

Fascinating as this historical duel is, the opinions by Judge Arnold and Judge Kozinski deal with only one variety of precedent. That word can mean many things; “binding” precedent is only one of those things, and arguably not the most important for the current debate. Although the categories overlap and the lines blur, one can identify at least five species of precedent that may be relevant to this discussion.

### B. The Spectrum of Precedent

1. *Binding precedent.* “Binding” precedent is what the shouting is about in *Anastasoff* and *Hart*. It is the rule, as stated by Judge Kozinski, that a court’s decision “must be followed by courts at the same level and lower within a pyramidal judicial hierarchy.”<sup>40</sup> By virtue of the words “at the same level,” this formulation incorporates in the concept of binding precedent the law-of-the-circuit rules, existing in all circuits, which mandate that only the en banc court can overrule a panel decision.<sup>41</sup> Accordingly, an unpublished opinion recognized under a particular circuit’s rules as “precedent”—which can happen in the D.C. Circuit<sup>42</sup>—and possibly one recognized as having

38. *Id.* at 1167.

39. The court also held that the rule (9th Cir. R. 36-3) had been violated, but declined to impose sanctions in view of the attorney’s good-faith constitutional challenge. 266 F.3d at 1180. Attorneys who henceforth cite unpublished cases in the Ninth Circuit presumably cannot expect such leniency, at least not from Judge Kozinski. *But cf. U.S. v. Rivera-Sanchez*, 222 F.3d 1057, 1063 (9th Cir. 2000) (court asks counsel to submit list of unpublished opinions superseded by its decision and cites them in its opinion, “[t]o avoid even the possibility that someone might rely upon them”).

40. 266 F.3d at 1168.

41. *See e.g. Hart*, 266 F.3d at 1171 (“[T]he first panel to consider an issue sets the law not only for all the inferior courts in the circuit, but also future panels of the court of appeals.”); *U.S. v. Humphrey*, 2002 U.S. App. LEXIS 6984 (6th Cir. 2002), at \*71 (“It is axiomatic that a court of appeals must follow the precedent of prior panels within its own circuit.”); Salem M. Katsh & Alex V. Chachkes, *Constitutionality of “No-Citation” Rules*, 3 J. App. Prac. & Process 287, 288 n. 5 (2001).

42. *See supra* nn. 11, 20. The D.C. Circuit expressly permits lawyers to argue that an unpublished disposition is “binding precedent,” or at least “precedent.” *See supra* n. 11. In

“precedential value”—which can happen in the Fourth and Sixth Circuits<sup>43</sup>—may become binding precedent for other panels in that circuit.<sup>44</sup>

2. *Overrutable precedent.* “Overrutable” precedents are decisions the court ordinarily will follow under *stare decisis*, but may overrule if sufficient reasons present themselves. The category typically includes earlier decisions of the same court. Some kinds of precedents, even from the same court, can be overruled more readily than others. The Supreme Court’s summary dispositions, for example, receive “less deference” from the Court than its decisions made “after briefing, argument, and a written opinion.”<sup>45</sup> Under the law-of-the-circuit rule, on the other hand, overruling is restricted; one circuit panel cannot overrule another panel’s decision.

3. “*Precedent*,” or “*precedential value*.” In the third category are simply “precedents,” or cases having “precedential value.” These are omnibus terms whose meaning can run the gamut from binding precedent to mere citable precedent (discussed shortly). Of the eight circuits that allow citation of unpublished opinions, one—the D.C. Circuit—permits their citation “as precedent,”<sup>46</sup> while two—the Fourth and Sixth Circuits—allow that unpublished opinions may have

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the Fifth Circuit, unpublished opinions issued before January 1, 1996, likewise “are precedent.” See *supra* n. 11 and text accompanying n. 20.

43. See *supra* nn. 18, 19.

44. The Sixth Circuit apparently disagrees. See *Humphrey*, 2002 U.S. App. LEXIS 6984 at \* 71 (“unpublished decision[s] with no binding effect”; “unpublished opinions are not controlling precedent”) (citing *U.S. v. Emmenga*, 263 F.3d 499, 504 (6th Cir. 2001); *Salamalekis v. Commr.*, 221 F.3d 828 (6th Cir. 2000)). The explanation could be that in all these cases the court rejected the claim that the particular unpublished opinion cited had precedential value; the cases, however, are categorical in what they say about unpublished opinions. The cases do all use qualifying terms such as “binding” or “controlling” precedent. So the point may be that the Sixth Circuit does not regard “precedential value” as translating into “binding” precedent or as constituting the law of the circuit.

45. See e.g. *Ashland Oil, Inc. v. Caryl*, 497 U.S. 916, 920 n. \* (1990) (“The Court gives less deference to summary dispositions . . . .”); *Caban v. Mohammed*, 441 U.S. 380, 390 n. 9 (1979) (“not entitled to the same deference given a ruling after briefing, argument, and a written opinion”); Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* 216 (7th ed., BNA 1993) (“It thus seems fair to say that the whole Court agrees that summary affirmances are entitled to some weight, but to less than fully articulated decisions.”).

46. See *supra* n. 11 and accompanying text. The Fifth Circuit also regards unpublished opinions issued before January 1, 1996, as “precedent.” See *supra* n. 21.

“precedential value” (which may or may not be the same thing).<sup>47</sup>

4. *Persuasive value.* A fourth category comprises cases citable for their “persuasive value.” This somewhat elusive term evidently means persuasive force independent of any precedential claim; the decision must persuade on its own argumentative merits, without regard for its status as a precedent or for any notions of *stare decisis*.<sup>48</sup> The problem is, of course, that the concepts of precedent and persuasiveness are difficult to disentangle. The habit of *stare decisis* is hard-wired into the brains of common law judges. And, other things being equal, it is easier to follow a lead than to blaze one’s own trail. Nonetheless, as Judge Kozinski stresses in *Hart*, “persuasive” authority is a concept familiar to judges and lawyers.<sup>49</sup> Of the eight circuits that allow citation of unpublished opinions, four—the Eighth, Tenth, Eleventh, and Fifth—provide that such opinions are “not precedent,” or “not binding precedent,” but that they may be cited for their “persuasive value.”<sup>50</sup> This presumably has the important effect of denying these opinions the force conferred by the law-of-the-circuit rule, thus allowing them to be overruled—or simply rejected as unpersuasive—by subsequent panels of the same circuit.

5. *Citable precedent.* Last comes citable precedent. This term means only that the case may be cited, with the weight to be given it left open. Minimal as the concept may seem, the ability to cite a case is, of course, precisely what is at stake in no-citation rules. The ABA’s recent resolution, for example, urges only that the federal appeals courts “[p]ermit citation” to unpublished

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47. See *supra* nn. 18, 19, 44.

48. The idea resembles the administrative-law concept of “*Skidmore* deference,” under which an agency’s informal interpretations of its statute are “‘entitled to respect,’ . . . but only to the extent [they] have the power to persuade.” *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); see also *U.S. v. Mead Corp.*, 533 U.S. 218, 227–28 (2001). Justice Jackson stated in *Skidmore* that the weight accorded to the administrative judgment in a particular case “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” 323 U.S. at 140.

49. “[C]ommon law judges knew the distinction between binding and persuasive precedent. The vast majority of precedents at common law were considered more or less persuasive.” 266 F.3d at 1165 n. 13.

50. See *supra* nn. 21–24.

opinions.<sup>51</sup> Given the habit of *stare decisis* and the attraction of following a path already broken, I would say that, if opinions may be cited, they will be followed more often than if they may not be. Judge Kozinski memorably disagrees.<sup>52</sup> Be that as it may, the concept of citability may have important symbolic value in a system of law based on precedent, value essential to respect for the law and to the rule of law itself. Judge Kozinski in *Hart* has usefully articulated the rationale for citability, grounding it on a court's obligation to "acknowledge[] and consider[]" prior decisions.<sup>53</sup>

Precedent thus is a rich palette. In depicting unpublished opinions as "precedents," one needs to consider the broad range of colors that may be applied.

### III. THE BACKHANDED IMPACT OF *HART*: NO-CITATION RULES AT THE BAR OF THE COMMON LAW

The key issue today is not whether unpublished opinions must be binding precedents; it is whether they may be cited at all. The central split among the circuits, for example, is not over binding precedent. Of the eight circuits that permit citation, only one (the D. C. Circuit) explicitly contemplates "binding precedent"; two (the Tenth and Eleventh) state that unpublished opinions are *not* "binding precedent[s]"; while another two (the Fifth and Eighth) deny that they are even "precedents."<sup>54</sup> The battle is over citability. Judicial defenders circle their wagons around the no-citation feature of the rules,<sup>55</sup> while many critics aim their arrows at only that feature.<sup>56</sup> Emblematic of the debate

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51. See *supra* nn. 4-5 and accompanying text.

52. "Citing a precedent is, of course, not the same as following it; 'respectfully disagree' within five words of 'learned colleagues' is almost a cliché." *Hart*, 266 F.3d at 1170.

53. "So long as the earlier authority is acknowledged and considered, courts are deemed to have complied with their common law responsibilities." *Id.* at 1170.

54. See *supra* nn. 11, 20-24.

55. E.g. Kozinski & Reinhardt, *supra* n. 36 at 43; Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 Ohio St. L.J. 177, 196 (1999).

56. E.g. Katsh & Chachkes, *supra* n. 41; Stephen R. Barnett, "Unpublished" *Judicial Opinions in the United States: Law Or Not?* 2 European Bus. Org. L. Rev. 429, 434-437 (2001). The claim that no-citation rules violate the First Amendment by prohibiting litigants from telling the court about a prior court decision, see Katsh & Chachkes, *supra* n. 41, at 289, draws support from *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533 (2001). The Court there struck down, under the First Amendment, a Congressional prohibition against the use

is Judge Arnold's widely-quoted comment in *Anastasoff*: "[S]ome 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.'"<sup>57</sup>

Judge Kozinski in *Hart*, while rejecting the claim that unpublished opinions must be binding precedents, goes further and upholds the Ninth Circuit's rule banning citation of those opinions.<sup>58</sup> This issue indeed was presented; the validity of the no-citation rule, as applied to a citation carrying no claim of binding authority, was the question raised by the facts of *Hart*.<sup>59</sup> Judge Kozinski concentrated, however, on the binding-authority question,<sup>60</sup> and almost as an afterthought<sup>61</sup> addressed the rule's ban on citation.<sup>62</sup> At this point, moreover, his argument (to which I'll return) exchanged history and constitutional principle for wholly prudential considerations.

Nevertheless, much of what Judge Kozinski says in his discussion of binding precedent seems quite relevant to no-citation rules. Backhandedly, Judge Kozinski provides a fresh and

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of LSC funds in cases involving an effort to "amend or otherwise challenge existing welfare law." *Id.* at 537. Calling the ban "inconsistent with the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case," the Court declared that the enactment under review, in its attempt to "prohibit the analysis of certain legal issues and to truncate presentation to the courts, . . . prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power." *Id.* at 545.

57. 233 F.3d at 904.

58. 9th Cir. R. 36-3 (unpublished dispositions "are not binding precedent" and "may not be cited").

59. The attorney whose citation of an unpublished Ninth Circuit opinion precipitated Judge Kozinski's ruling in *Hart* was not citing that opinion as precedent, at least not in the sense of asking the court to follow it, but was using it to illustrate his statement that "[t]he Ninth Circuit has not explicitly ruled on the issue before this court." See Appellant's Brief at 13 n. 6, *Hart v. Massanari, sub nom. Hart v. Apfel*, filed Dec. 13, 1999 (citing *Rice v. Chater*, No. 95-35604, 1996 WL 583605 (9th Cir., Oct. 9, 1996) (reported in Decisions Without Published Opinions, 98 F.3d 1346 tbl. (9th Cir. 1996))). Judge Kozinski did not consider arguments of history or common law practice that might make the rule unconstitutional in prohibiting the mere citation of an unpublished opinion, which the attorney in *Hart* was doing, as distinct from application of the rule to deny an unpublished opinion the force of binding precedent, which was not involved in *Hart*.

60. Together, the terms "binding authority" and "binding precedent" appear forty-five times in the twenty-two page opinion.

61. On page twenty of the twenty-two-page opinion.

62. 266 F.3d at 1178.

cogent rationale for regarding those rules as inconsistent with the common law tradition and with modern federal practice. In the course of arguing that the principle of “strict binding precedent”<sup>63</sup> is not constitutionally compelled, Judge Kozinski goes a long way toward demonstrating that the principle of citable precedent may be.

Consider two examples:

(1) In his discussion of history and the Constitution, Judge Kozinski writes:

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 . . . . The concept of binding case precedent, though it was known at common law, was used exceedingly sparingly. For the most part, common law courts felt free to depart from precedent where they considered the earlier-adopted rule to be no longer workable or appropriate.

*Case precedent at common law thus resembled much more what we call persuasive authority than the binding authority which is the backbone of much of the federal judicial system today.*<sup>64</sup>

Judge Kozinski thus appears to say that “the principle of precedent was well established” when the Constitution was written, but that it “resembled much more what we call persuasive authority” than it did “binding authority.” Does this not suggest that a principle akin to persuasive authority may have been embodied in Article III, or at least in the “common law traditions” that federal courts follow?<sup>65</sup> Given the distinguished common law pedigree that Judge Kozinski credits to the principle of persuasive authority, one might have expected him to consider that principle before upholding a rule that prohibits lawyers from citing court decisions they claim to be persuasive. While Judge

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63. *Id.* at 1164.

64. *Id.* at 1174-1175 (citations omitted) (emphasis added); *see also id.* at 1165 n. 13 (“[C]ommon law judges knew the distinction between binding and persuasive precedent. The vast majority of precedents at common law were considered more or less persuasive. . . .”).

65. *See* 266 F.3d at 1169 (“Federal courts today do follow some common law traditions.”).

Kozinski writes that “common law judges knew the distinction between binding and persuasive precedent,”<sup>66</sup> he himself seems to rub out that distinction.

(2) In discussing the common law tradition, Judge Kozinski writes:

Federal courts today do follow some common law traditions. When ruling on a novel issue of law, they will generally consider how other courts have ruled on the same issue.

. . . .

Citing a precedent is, of course, not the same as following it; “respectfully disagree” within five words of “learned colleagues” is almost a cliché. . . . While *we would consider it bad form to ignore contrary authority by failing even to acknowledge its existence*, it is well understood that—in the absence of binding precedent—courts may forge a different path than suggested by prior authorities that have considered the issue. *So long as the earlier authority is acknowledged and considered, courts are deemed to have complied with their common law responsibilities.*<sup>67</sup>

When a rule prohibits citation of unpublished opinions, does that not require courts to “ignore contrary authority by failing even to acknowledge its existence”? If an earlier authority cannot be cited to the court, it cannot be “acknowledged and considered” by the court; hence, it would seem, courts have not “complied with their common law responsibilities.” It is hard to see why these considerations of judicial responsibility should not have been considered in *Hart* as bearing on the validity of the Ninth Circuit’s no-citation rule.

The case against no-citation rules asks not that unpublished opinions be regarded as binding precedents, or as precedents at all in the normative, *stare decisis* sense. It asks only that they be acknowledged and considered.<sup>68</sup> This obligation serves the ends of fairness and consistency, assuring that the prior decision not be

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66. *Id.* at 1165 n. 13.

67. *Id.* at 1169-1170 (emphasis added).

68. On this point Judge Kozinski and Judge Arnold seem to agree. Judge Arnold rejects the courts’ message that “you cannot even tell us what we did yesterday,” while Judge Kozinski insists that earlier authority be “acknowledged and considered.” See *Anastasoff*, 223 F.3d at 904; *Hart*, 266 F.3d at 1170.

rejected without on-the-record consideration and explanation. It is a lesser requirement than the “burden of justification” that Judge Arnold considers necessary for overruling a prior decision.<sup>69</sup> But it serves the same purpose, assuring that when the law changes, it does so “in response to the dictates of reason, and not because judges have simply changed their minds.”<sup>70</sup> It is one thing to tell a litigant she lost her case because the court reconsidered and rejected a prior opinion that was in her favor; it is another thing to tell her she lost her case under a rule that barred her lawyer from telling the court about that prior opinion. As Judge Kozinski says, it is “bad form to ignore contrary authority by failing even to acknowledge its existence.”<sup>71</sup> Why is it bad form? Because, at bottom, it disrespects the principle of precedent on which our court-made law is based, and hence dishonors the rule of law itself. Judge Kozinski’s articulation of the need to “acknowledge and consider” prior decisions thus provides an apt and cogent rationale for rejecting no-citation rules.<sup>72</sup>

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69. *Anastasoff*, 223 F.3d at 905.

70. *Id.*

71. *Hart*, 266 F.3d at 1170.

72. The relevant difference can be seen in two recent cases in which federal appeals panels refused to follow unpublished opinions, provoking dissents based on *Anastasoff*. In *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315 (5th Cir. 2001), *rehearing en banc denied*, 256 F.3d 260 (2001), a Fifth Circuit panel held that DART was not an arm of the State of Texas for purposes of Eleventh Amendment immunity, in the face of three prior unpublished dispositions to the contrary. The unpublished opinions were cited to the panel, under the Fifth Circuit rule allowing citation as “persuasive authority,” see *supra* n. 21, and the panel discussed them in a lengthy footnote, finding them unpersuasive. 242 F.3d at 318-319 n. 1. Three judges dissented from the denial of rehearing en banc, saying the court should “revisit the questionable practice of denying precedential status to unpublished opinions.” 256 F.3d at 260 (Smith, Jones & DeMoss, JJ., dissenting).

In *Symbol Technologies, Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361 (Fed. Cir. 2002), a divided panel upheld a defense of laches to a claim of patent infringement, contrary to two prior non-precedential opinions of the Federal Circuit. (The court “reluctantly” permitted those opinions to be discussed despite the Circuit’s no-citation rule, see 277 F.3d at 1370 (Newman, J., dissenting).) While the defendant argued that the court was bound by those opinions, citing *Anastasoff*, the majority agreed instead with Judge Kozinski in *Hart*. It thus concluded: “[W]e decline to consider” the opinions. 277 F.3d at 1368. The dissenting judge agreed that the opinions were not binding, but found them worth considering at some length. 277 F.3d at 1370.

While *Williams* and *Symbol* both declined to follow unpublished opinions, they differ crucially. The Fifth Circuit considered the opinions and rejected them, while the Federal Circuit “decline[d] to consider” them. The Federal Circuit’s failure even to acknowledge and consider the opinions was, in Judge Kozinski’s term, “bad form,” *Hart*, 266 F.3d at 1170; it may also have been unconstitutional. See *Katsh & Chachkes*, *supra* nn. 41, 56; *Velasquez*,

## IV. VANISHING TIME: THE KOZINSKI DEFENSE OF NO-CITATION RULES

When Judge Kozinski ultimately moves in *Hart* from whether unpublished opinions are binding authority to whether they are citable, he departs from his earlier consideration of history, common law practice, and “persuasive precedent” and makes an argument that is wholly prudential. “Should courts allow parties to cite to these dispositions,” Judge Kozinski writes, “much of the time gained [from not having to write precedential opinions in every case] would likely vanish.”<sup>73</sup> In support of this conclusion Judge Kozinski offers two arguments, one based on the additional time that judges (and their staffs) assertedly would need to produce opinions worthy of citation, the other stressing the extra time that judges and lawyers assertedly would need to research and process those opinions once produced. Both are legitimate concerns—especially for the Ninth Circuit, with the highest case volume of any federal circuit.<sup>74</sup> Both concerns, however, appear exaggerated.

Judge Kozinski first argues that if unpublished opinions could be cited, “conscientious judges would have to pay much closer attention to the way they word their unpublished rulings. Language adequate to inform the parties how their case has been decided might well be inadequate if applied to future cases arising from different facts.”<sup>75</sup> Further, “[w]ithout comprehensive factual accounts and precisely crafted holdings to guide them, zealous counsel would be tempted to seize upon superficial similarities between their clients’ cases and unpublished dispositions.”<sup>76</sup> This exaltation of judges’ language not only harks back to Legal Realism, as Judge Danny J. Boggs and Brian P. Brooks have pointed out.<sup>77</sup> It also ignores what we all were taught in the first year of law school:<sup>78</sup> that the law is not what the judges say—

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531 U.S. at 545.

73. 266 F.3d at 1178.

74. And especially for Judge Kozinski, whose superb published opinions are worth all the time he can put into them.

75. 266 F.3d at 1178.

76. *Id.*

77. Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 Green Bag 2d 17, 22 (2001).

78. Even, I’m told, at Yale.

that's dictum; it's what they *decide*. Although imprecise language indeed may mask the true facts of a case, law clerks and staff attorneys are good at stating facts—they do it often enough in published opinions—and lawyers and judges have abundant experience in distinguishing cases on their facts. When a lawyer cites an unpublished opinion, it is less likely to be because of its language than because the facts of that case are closer to those in the case before the court than are the facts of any case decided with a published opinion.<sup>79</sup> As Judge Richard Posner, himself a backer of no-citation rules, has conceded: “Despite the vast number of published opinions, most federal circuit judges will confess that a surprising fraction of federal appeals, at least in civil cases, are difficult to decide not because there are too many precedents but because there are two few on point.”<sup>80</sup> When a lawyer finds one of those few precedents on point, why shouldn't she be allowed to tell the court about it?

Judge Kozinski further predicts that court time will be lost because “publishing redundant opinions will multiply significantly the number of inadvertent and unnecessary conflicts,” since “different opinion writers may use slightly different language to express the same idea.”<sup>81</sup> And under the law-of-the-circuit rule, “conflicts—even inadvertent ones—can only be resolved by the exceedingly time-consuming and inefficient process of en banc review.”<sup>82</sup>

Whatever the apparent conflicts in judicial language, though, circuit judges surely are expert at distinguishing cases on their facts. (Take a look at almost any unsuccessful petition for rehearing en banc.) And for true intra-circuit conflicts involving unpublished opinions, en banc review is not the only remedy. Others are—as I'll consider shortly—(a) making unpublished opinions citable for their “persuasive” value only, and (b) lifting the law-of-the-circuit rule for unpublished opinions, so they can be overruled by subsequent panels in published opinions.<sup>83</sup>

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79. Circuit rules so require. See e.g. 4th Cir. R. 36(c) (allowing citation of unpublished opinion only if “there is no published opinion that would serve as well”).

80. Richard A. Posner, *The Federal Courts: Challenge and Reform* 166 (Harvard U. Press 1996).

81. *Hart*, 266 F.3d at 1179.

82. *Id.*

83. Judge Kozinski sees yet another drain on judicial time under a citable-opinion regime resulting from an increase in dissenting and concurring opinions: “Although three judges

Furthermore, any diversion of judicial time that might originally have resulted from allowing citation of unpublished opinions may already have occurred, thanks to the availability of those opinions on line, in LEXIS and Westlaw, and now in West's *Federal Appendix*. Indeed, the entire controversy over unpublished opinions may be laid at the feet of LEXIS, Westlaw, and the Internet, with their technological capacity to make everything available; the issue would not have come up, at least not with anything like its present force, in the world of books.<sup>84</sup> With the online cat now out of the bag, judges know that their opinions, designated for publication or not, are going to be read, collected, and analyzed.<sup>85</sup> In most federal circuits, moreover, they may be cited. Since the sky has not fallen in those circuits, one may conclude that allowing citation not only recognizes a technological *fait accompli*, but need not produce the dire results that Judge Kozinski fears.

Judge Kozinski's second argument is based on the resources assertedly needed to research and process the unpublished opinions if they are citable. "[A]dding endlessly to the body of precedent—especially binding precedent—can lead to confusion

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might agree on the outcome of the case before them, they might not agree on the precise reasoning of the rule to be applied to future cases," and hence "[u]npublished concurrences and dissents would become much more common." 266 F.3d at 1178. A survey of Volume 27 of the *Federal Appendix* (the latest one available as I write) yields the following figures. Among the 220 cases reported from circuits where citation is permitted, there were four dissents or concurrences, representing 1.8 percent of the cases. Among the 149 cases reported from circuits where citation of unpublished cases is banned, there were likewise four dissents or concurrences, representing 2.7 percent of the cases. The "citable" circuits thus had a *lower* rate of dissenting or concurring opinions than the "noncitable" circuits. Further, among the eighty-two cases reported from the Ninth Circuit, there were four dissents or concurrences, or 4.9 percent. The only other dissents or concurrences were from the (citable) Fourth and Sixth Circuits, which had two such opinions each (among forty-five and 116 reported cases, respectively). The rates of dissenting or concurring opinions thus were 4.4 percent in the Fourth Circuit and 1.7 percent in the Sixth—both figures lower than the 4.9 percent in the noncitable Ninth Circuit. Although admittedly limited, these data are inconsistent with Judge Kozinski's hypothesis that making the opinions citable increases the rate of dissents and concurrences.

84. I owe this observation to Bob Berring.

85. See *U.S. v. Rivera-Sanchez*, 222 F.3d 1057, 1063 (9th Cir. 2000) ("While our present circuit rules prohibit the citation of unpublished memorandum dispositions, [citation omitted] we are mindful of the fact that they are readily available in on line legal databases such as Westlaw and Lexis"); Katsh & Chachkes, *supra* n. 41, at 301-302 ("[I]n practice, citation prohibitions hardly ease the case-review burden on the prudent practitioner.").

and unnecessary conflict,” he writes.<sup>86</sup> The primary victims would be lawyers and their clients:

Cases decided by nonprecedential disposition generally involve facts that are materially indistinguishable from those of prior published opinions. Writing a second, third or tenth opinion in the same area of the law, based on materially indistinguishable facts, will, at best, clutter up the law books and databases with redundant and thus unhelpful authority. Yet once they are designated as precedent, they will have to be read and analyzed by lawyers researching the issue, materially increasing the costs to the client for absolutely no legitimate reason.<sup>87</sup>

If a case involves facts “materially indistinguishable” from those of prior published opinions, one wonders in the first place why it was appealed.<sup>88</sup> And if it was, one wonders why a lawyer—wanting to make her best arguments and facing a page limit on briefs—would cite the unpublished opinion instead of a published one.<sup>89</sup> In any event, the law books and legal databases already are “clutter[ed] up” with unpublished opinions, which many lawyers now routinely research whether they are citable or not.<sup>90</sup> And it seems not insignificant that lawyers themselves tend to be strongly opposed to no-citation rules.<sup>91</sup>

While Judge Kozinski’s fears thus seem overstated, they do

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86. 266 F.3d at 1179.

87. *Id.*

88. See Katsh & Chachkes, *supra* n. 41, at 301 (“[T]he myth that there exist great batches of redundant unpublished appellate cases is true only in certain discrete areas of law where meritless cases are litigated even to appeal—e.g., cases involving prisoners and social security claimants,” and even if those cases were citable, courts and practitioners “would understand . . . that the case law is well settled”).

89. Especially since such citation likely would violate a circuit rule. See *supra* n. 79.

90. See Katsh & Chachkes, *supra* n. 41, at 301-302 (observing that prudent practitioners research uncitable cases “to mine them for new ideas,” because they indicate how a court has ruled in past and thus might rule in future, and because they “still may influence a court that reads (or remembers deciding) them itself”).

91. See ABA Resolution, *supra* n. 4; see also Kozinski & Reinhardt, *supra* n. 36, at 43 (“At bench and bar meetings, lawyers complain at length about being denied this fertile source of authority. Our Advisory Committee on Rules of Practice and Procedure, which is composed mostly of lawyers who practice before the court, regularly proposes that memdispos be citable. When we refuse, lawyers grumble that we just don’t understand their problem”). A court official in a circuit in which unpublished opinions are not citable reports “a lot of clamor” to allow citation. Telephone Interview with circuit official (May 8, 2002). (Of course, the lawyers may just want to pad their bills, but that seems a questionable conclusion for a court to draw *a priori*.)

give pause. This is especially so for the Ninth Circuit, which issues some 4,100 unpublished opinions per year.<sup>92</sup> But that is not so many more than the 3,500 issued by the Eleventh Circuit, or the 3,200 by the Fifth—opinions that in both circuits are citable.<sup>93</sup> With eight circuits now allowing citation, the burden of proof would seem to lie with those who say that citability cannot be acceptably managed.

#### V. WHAT PRECEDENTIAL FORCE FOR UNPUBLISHED OPINIONS?

If unpublished opinions are to be citable, the question remains, what degree of “precedential” force should they carry? I see three possibilities: (1) binding precedent, fully subject to the law-of-the-circuit rule and thus overrutable only by the en banc court; (2) “persuasive” authority that is “not precedent,” and hence not subject to the law-of-the-circuit rule; and (3) a new “overrutable” status based on lifting the law-of-the-circuit rule to allow panel overruling of a prior panel’s unpublished opinion, but only if the second panel does so in a published opinion.

1. Unpublished opinions, in my view, should not be regarded as binding precedents, or otherwise as equivalent to published opinions. Judge Kozinski has shown in *Hart* that the Constitution does not require that all precedents be viewed as binding. Of the eight circuits that allow citation of unpublished opinions, none treat them as full-fledged, first-class, binding precedents. All eight circuits discourage citation of these opinions, and four of the eight—the Fifth, Eighth, Tenth, and Eleventh Circuits—declare that they are “not precedents” and may be cited only for their “persuasive” value.

Treating unpublished opinions as second-class precedents—but, of course, citable ones—is readily defended. Just as the Supreme Court gives “less deference” to its summary dispositions than to cases decided with briefing, argument, and a full opinion,<sup>94</sup> no reason appears why a court of appeals may not devote less of its time and attention to a designated class of opinions and accordingly treat those opinions as having less

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92. *Judicial Business of the United States Courts*, *supra* n. 26.

93. *Id.* It is true that they are not posted online or given to legal publishers. But they are citable by rule and, apparently, cited in practice. See *supra* nn. 12, 21, 24, 28.

94. See *supra* n. 45.

precedential weight than others. The legitimate caseload concerns support at least this much adjustment of judicial technique. And there is little danger of deception or surprise in allowing citation. An “unpublished” opinion, even when published in the *Federal Appendix*, wears a scarlet “U”; no one should be surprised to discover that it carries less authority than a “published” opinion.<sup>95</sup>

2. If citable unpublished opinions are not to be binding precedents, some way must be found to free them from the law-of-the-circuit rule, which says a panel opinion is binding on all subsequent panels. The easiest way out would appear to lie in the approach presently taken by the Fifth, Eighth, Tenth, and Eleventh Circuits; these courts declare unpublished opinions to be “not precedent” (or “not binding precedent”) and citable only for their “persuasive” value. Under this regime, the law-of-the-circuit rule apparently does not apply to unpublished opinions, because they are not “precedents.”<sup>96</sup> The “persuasive authority” approach thus enables a circuit panel to reject an unpublished opinion as unpersuasive—with reasons, of course—without having to take the case en banc or otherwise to formally overrule the opinion. This approach can claim an extensive historical and common law pedigree, as Judge Kozinski demonstrates in *Hart*. It also has a familiar administrative-law analogue in *Skidmore* deference.<sup>97</sup> In sum, there is much to be said for the persuasive-authority approach.

3. The other approach would accord unpublished opinions “precedential” status that requires overruling, but would lift the law-of-the-circuit rule to let subsequent panels overrule them. In the D. C. Circuit, which now allows citation of unpublished opinions “as precedent,” and possibly in the Fourth and Sixth Circuits, which allow citation for “precedential value,” it apparently follows today that an unpublished opinion found to

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95. See *supra* n. 9 (citation restrictions in *Federal Appendix*). Indeed, citation of unpublished opinions makes clear their unpublished status and avoids confusion that may otherwise result. Cf. *Rivera-Sanchez*, 222 F.3d at 1063 (citing unpublished opinions superseded by court’s (published) decision “[t]o avoid even the possibility that someone might rely upon them”).

96. See *In re: United States of America*, 60 F.3d 729, 732 (11th Cir. 1995) (cited unpublished opinion is “not law of this circuit and will not be binding on any future panel”). (The Eleventh Circuit’s Rule 36-2, allowing citation as “persuasive authority,” see *supra* n. 24, was in effect in 1995. Telephone Interview with 11th Cir. official (May 7, 2002)).

97. See *supra* n. 48.

meet these tests becomes the law of the circuit and hence cannot be overruled by another panel.<sup>98</sup> The proposed approach would alter the law-of-the-circuit rule to allow a citable unpublished opinion to be overruled by a subsequent panel, as long as the subsequent panel did so in a published opinion.

A circuit apparently would have power to revise its rules this way. While it has been suggested that the law-of-the-circuit rule rests on constitutional,<sup>99</sup> or at least statutory,<sup>100</sup> compulsion, neither appears to be the case.<sup>101</sup> And such modification would promote, not subvert, the rule's purpose of avoiding intra-circuit conflicts: As between two conflicting panel decisions, it would be clear which one governed—the one that was published. Panels thus would not have to resort to finespun factual distinctions or aggressive claims of dictum in order to avoid the force of an unpublished precedent with which they disagreed. They could simply overrule it, if willing to do so in a published opinion. Such an approach also accords with the responsibilities of law-making. If the issuing panel did not consider its decision important enough to publish and make into law, why should that panel's opinion be binding on another panel which, having duly considered it, comes out differently and *is* willing to make its opinion into law? As between the two panels, the one that is consciously making law,

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98. *But see* Sixth Cir. cases cited *supra* n. 44.

99. *See* Katsch & Chachkes, *supra* n. 41, at 288 n. 5 (pointing out that *Anastasoff* assumes law-of-circuit rule is constitutionally required and refuting that assumption).

100. The court in *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996), described the law-of-the-circuit rule as "derived from legislation and from the structure" of the federal circuits. But the court's quotation of 28 U.S.C. § 46(c), stating that the circuits normally sit in panels, or divisions, of "not more than three judges," and its quotation of the Revision Notes to 28 U.S.C. § 46, stating that "the 'decision of a division' is the 'decision of the court,'" 87 F.3d at 1395, do not appear to make the case. The Revision Notes state that the new statutory language "preserves the interpretation established by" *Textile Mills Sec. Corp. v. Commr.*, 314 U.S. 326 (1941)—which held that circuits may sit en banc, and not only in three-judge panels. But, the Notes continue, the new language provides normally for three-judge panels and "makes the decision of a division, the decision of the court, unless rehearing in banc is ordered." The issue to which this quotation was directed thus was the size of the panel in which the judges would sit, three judges or en banc, and not the relationship between panels. The Court's concern in *Textile Mills*, paraphrased in *LaShawn A.*, that "[w]ere matters otherwise, the finality of our appellate decisions would yield to constant conflicts within the circuit," 87 F.3d at 1395, was expressed in support of the Court's holding that en banc courts were permissible. *See Textile Mills*, 314 U.S. at 335. The statement was not made in support of an argument that en bancs could be avoided by application of the law-of-the-circuit rule.

101. *See supra* nn. 99-100.

that is willing to put its precedential money where its mouth is, ought to prevail.

Lifting the law-of-the-circuit rule thus seems desirable for circuits in which citable unpublished opinions are regarded as “precedents” and thus might invoke the rule. It might well also be done by circuits taking the “persuasive”-authority approach. While that approach allows a panel to deem a prior, unpublished panel opinion “unpersuasive” without overruling it, there will be cases in which the subsequent panel thinks the prior opinion should be formally overruled.<sup>102</sup> When a panel desires to overrule an unpublished opinion by a published one, it should not have to go en banc.

For circuits deciding between “persuasive” authority and “precedent,” the “persuasive” approach might be better for large circuits, where volume argues for giving less weight to unpublished authority. For any circuit, moreover, the “persuasive” approach has the virtue of providing a brighter line, one making clear that unpublished opinions, though citable, are in a class by themselves, and thus reducing the uncertainty involved in having different levels of “precedential” authority.

## VI. CONCLUSION

Judge Kozinski’s opinion in *Hart* shoots down *Anastasoff*’s claim that unpublished opinions must be binding precedents, but simultaneously demonstrates that they must be citable. The arguments of history and common law tradition that Judge Kozinski invokes, particularly his insistence that earlier authority be “acknowledged and considered,” confirm the essential role of precedent in our law and undermine the case for no-citation rules. Advancing technology is compelling the same result. In all but two federal circuits, unpublished opinions now are available not only on line, but also in West’s *Federal Appendix*, a published reporter of unpublished opinions that is worthy of *Alice in Wonderland*. It is no wonder that a majority of the federal circuits, recognizing reality, now allow citation of their unpublished opinions.

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102. Cf. *Rivera-Sanchez*, 222 F.3d at 1063 (unpublished opinions affected by decision not citable but court nonetheless lists them as “superseded”).

While rules permitting citation of these decisions thus seem inevitable, it does not follow that unpublished opinions should be treated as binding precedents, or as precedents at all in the *stare decisis* sense. They may be citable only for their “persuasive” value. And even where they are regarded as precedents, the circuits should lift their law-of-the-circuit rules so that unpublished opinions may be overruled by published panel opinions. The better choice, probably, is to treat unpublished opinions as citable only for their persuasive value.

Whatever the degree of deference to be accorded unpublished opinions, the arguments for making them citable seem likely to carry the day. These arguments combine the claims of fairness, due process, public access, and respect for law itself with a new technological reality that is transforming the terms of the debate. As it becomes increasingly difficult to use the term “unpublished” with a straight face, the necessary replacement becomes the candid “uncitable.” The power of courts to issue uncitable opinions is difficult to defend, and the task will only get harder as the opinions become more accessible. Powerful as the federal courts may be, they cannot hold back this wave.



622 Raleigh Avenue, # 3  
Norfolk, VA 23507-2034  
July 8, 2002

The Honorable Howard Coble,  
Chairman  
Subcommittee on Courts, the Internet,  
and Intellectual Property  
B 351A Rayburn House Office Building  
Washington, D.C. 20515

Re: Submission for the Congressional Hearing Record  
of the June 27, 2002 Oversight Hearing  
on "Unpublished Judicial Opinions."

Dear Chairman Coble,

Melissa McDonald, Counsel for the Majority, assured me that an e-mail sent today would still be considered timely.

I hope this letter and its attachment may add to the proposals for your Committee's review.

Like others you have heard from, I am concerned that unpublished opinions have become the blind spot, the Bermuda Triangle of jurisprudence, the Twilight Zone where the Constitution ceases to exist, because the unpublished case is assumed to be comparatively unimportant, and is calculated to be the least likely to obtain Supreme Court review.

The judges of inferior courts know that there is a great crowd of litigants clamoring for the attention of the Supreme Court. The Supreme Court can only grant review to a very small percentage of those cases. The Supreme Court has to ration its attention to cases that have the most impact on society, i.e., published opinions that have precedential value.

But unpublished opinions are not considered precedent.

Therefore, what inferior courts do with unpublished opinions tends to become invisible. Unpublished opinions avoid notice by the Bar and by the public, and avoid review and correction by the Supreme Court.

Most opinions issued by the Courts of Appeals are now unpublished. This should be a matter of concern to every citizen who hopes to be treated fairly if he or she must go to a federal court.

There is reason for most citizens to believe that they will not be treated according to the law on the books, as shown by news reports in the attached pages.

The public has reason to be concerned if the Courts of Appeals now feel (1) that their routine decisions will receive no correction, and (2) that they can go about their routine dishonestly if they please, following their own inclinations even when their own inclinations disobey controlling precedents of the Supreme Court.

I have seen a case which a Court of Appeals decided not to publish, and I have seen how it became a free-for-all for the worst kind of abuse.

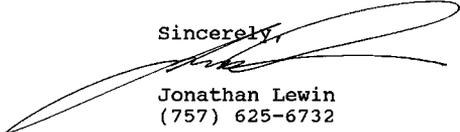
I attach to this letter twelve pages which propose a solution to the problem. These pages, numbered "6" through "17" are from a Petition for Writ of Certiorari to the Supreme Court in Lewin v. Cooke, which was filed last Friday, July 5, 2002.

Even if the Supreme Court does not grant certiorari to this case, I hope your Committee will consider initiating legislation that will remove the shield of secrecy from unlawful judicial opinions that disobey the precedents of the Supreme Court.

To deter such disobedience, the solution must be for appellants before Courts of Appeals to have the right to compel publication of the decisions in their own cases.

Thank you.

Sincerely,



Jonathan Lewin  
(757) 625-6732

Enclosure

## REASONS FOR GRANTING THE WRIT

**I. When an appellant asserts that the circuit court's unpublished opinion in his case disobeys this Court's controlling precedent, and that publication could help to deter the disobedience, there is a due process right to publication.**

This Petition concerns the ability of the United States Supreme Court to deter disobedience by inferior courts despite the much heralded "crisis of volume" in which the overwhelming number of petitioners seeking Supreme Court review makes it appear that many cases of disobedience by inferior courts must of necessity receive no review at all.

Repeatedly this Court has found it necessary to remind the circuits that Supreme Court precedent must be obeyed.<sup>2</sup>

The disobedience of the Fourth Circuit is at issue in this Petition. This Court explicitly rebuked the Fourth Circuit for disobedience in Hutto v. Davis.<sup>3</sup>

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<sup>1</sup>The Federal Courts Study Committee declared that the "appellate courts are in a 'crisis of volume' that has transformed them from the institutions they were even a generation ago." Report of the Federal Courts Study Committee 110 (1990).

<sup>2</sup>"[I]t is this Court's prerogative alone to overrule one of its precedents." State Oil v. Kahn, 522 U.S. 3, 20 (1997); See Agostini v. Felton, 521 U.S. 203, 237 (1997); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484, 486 (1989).

<sup>3</sup>454 U.S. 370, 374-75 (1982): "[T]he Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress.... [U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts ..."

More recently, the Fourth Circuit has again challenged this Court.<sup>4</sup>

Disobedience is often subtle. It is seldom bluntly announced as disobedience by an offending inferior court. "...[All judges] know how to mouth the correct legal rules with ironic solemnity while avoiding those rules' logical consequences." TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 500 (1993) (O'Conner, J., dissenting) (citation omitted).<sup>5</sup>

Commentators have warned for many years that the crisis of volume and the associated use of nonpublished opinions lessen the likelihood of correction by this Court, and therefore lessen inhibitions that might otherwise deter disobedience.<sup>6</sup> This Court

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<sup>4</sup>In United States v. Dickerson, 166 F.3d 667, 691-92 (4th Cir. 1999) the Fourth Circuit held that this Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966), was not binding in federal courts because of a statute enacted by Congress shortly after Miranda was decided. The Fourth Circuit would have revised the effect of the more than thirty years during which Miranda had been acknowledged and reaffirmed as controlling precedent. This Court reversed. Dickerson v. United States, 530 U.S. 428 (2000).

<sup>5</sup>Professor Charles Fried of Harvard Law School defines disobedient subtlety as "impudence": "The impudent judge does not admit his alienation from the system he claims to serve. He admits that his moral title to exercise authority over his fellow citizens derives from the authority of that system—and yet he will not act according to its terms." Fried, Impudence, 1992 Supreme Court Review 156, 192.

<sup>6</sup>See Reynolds & Richman, The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals, 78 Columbia L. Rev. 1167, 1203 (1978) The "felt need" of Circuit Courts to correct error in unpublished opinions is less because "[i]t is not often that the [Supreme] Court will make room on its discretionary and highly crowded docket for a case that merely settles a dispute incorrectly ..." i.e., a case that may have been disobedient, but which is merely another example of unpublished law that is not binding precedent. See also id at 1201.

has warned the Circuit Courts not to suppose that unpublished decisions automatically escape review.

In Commissioner v. McCoy, 484 U.S. 3 (1987), this Court reversed an unpublished opinion from the Sixth Circuit. This Court stated: "the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case. 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." Id at 7.

But one warning, issued in 1987, was not enough.

The Fourth Circuit's choice not to publish a decision in 1993 drew a rebuke from this Court: "We deem it remarkable and unusual that although the Court of Appeals affirmed a

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Cf. Justice Steven's scorn for "secret law" in County of Los Angeles v. Kling, 474 U.S. 936, 938 (1985). Justice Stevens, dissenting from summary reversal, criticized the Ninth Circuit's choice not to publish its opinion: "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."

Disobedient secret law is not binding on future cases because unpublished opinions are not binding. See e.g., the Fourth Circuit's captions on the unpublished opinions in this case: "Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c)." App. 3a & 28a. But if, because of unpublished cases' non-binding character, it appears that unpublished disobedience is not to be corrected, then it becomes more difficult to deter inferior courts from resorting to it at will.

See also skepticism as to the legitimacy of unpublished opinions in Wald, The Rhetoric of Results and the Results of Rhetoric: Judicial Writings, 62 U. Chi. L. Rev. 1371, 1374 (1995); Andreani, Independent Panels to Choose Publishable Opinions: A Solution to the Problems of California's Selective Publication System, 12 Pac. L.J. 727, 736 (1981); Arnolds & Kamp, Civil Procedure: A Review of the Published Opinions of the United States Court of Appeals for the Seventh Circuit for the 1981-82 Term, 59 Chi. Kent. L. Rev. 475, 518 (1983); R. Posner, The Federal Courts: Crisis and Reform 123 (1985) (repeated in the 1996 edition, The Federal Courts: Challenge and Reform, at 165).

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." United States v. Edge Broadcasting Co., 509 U.S. 418, 425 n.3 (1993).

The Fourth Circuit produced another noteworthy abuse of nonpublication which this Court chose to correct. Commentators listing such abuses tell the cautionary tale of Proctor v. Warden:

In reviewing an unpublished decision of the Fourth Circuit, the Supreme Court found that the appellate court had filed an order that, "clearly ha[d] nothing whatsoever to do with the petitioner's case." Proctor v. Warden, 435 U.S. 559, 560 (1978). the Fourth Circuit order had "disposed" of the case by mistaking plaintiff's requested remedy, the court in which it was filed, and apparently, the very name of the case.<sup>7</sup>

After the Fourth Circuit made its initial mistake, Mr. Proctor petitioned for rehearing en banc, but the Fourth Circuit denied rehearing. Blatant as the appearance of injustice had been in that case, the Fourth Circuit would not correct it until compelled by this Court to do so.<sup>8</sup>

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<sup>7</sup>Reynolds & Richman, supra note 5 at 1202 n. 173. For other incongruities in the Fourth Circuit's treatment of particular unpublished appeals, see id at 1193, n. 135 and at 1197 n. 153.

<sup>8</sup>For more recent examples of how Fourth Circuit denials of rehearings failed to anticipate reversals from this Court, see George, The Dynamics and Determinants of the Decision to Grant En Banc Review, 74 Wash. L. Rev. 213, 215-6 & nn. 8-11 (1999).

The Fourth Circuit leads the Circuits in its use of unpublished opinions.<sup>9</sup> This high rate does not correlate with a greater workload.<sup>10</sup>

The Eighth and Ninth Circuits have recently argued whether unpublished decisions should be counted as precedents.

Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000) vacated on other grounds 235 F.3d 1054 (2000), attracted much attention because it held on constitutional grounds that unpublished decisions do count as precedents.

Groups on the left and right of the political spectrum were quick to interpret the issue as one of judicial accountability.<sup>11</sup>

Anastosoff concluded that the constitutional limits of judicial power, separate from legislative power, require Article III courts to give their unpublished opinions precedential effect.

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<sup>9</sup>And in that leading role, 91.5% of the Fourth Circuit's opinions were unpublished in 2001, according to Judicial Business of the United States Courts: 2001 Annual Report of the Director, 40, tbl. S-3 (available at <http://www.uscourts.gov/judbus2001/> under "contents.html").

<sup>10</sup>"[T]he Fourth Circuit's publication rate ... is very low given its also low workload rank ..." Robel, The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community, 35 Ind. L. Rev. 399, 403 (2002) ["Robel"] (referring to figures from Comm'n on Structural Alternatives for the Fed. Cts. of Appeals, Working Papers 101 (1998)).

<sup>11</sup>Pambianco, Taking Judicial Notice, National Review Online, at [http://www.nationalreview.com/comment/commentprint\\_101000a.html](http://www.nationalreview.com/comment/commentprint_101000a.html) (Oct. 10, 2000) (from the conservative side of the political spectrum, the Washington Legal Foundation's chief policy counsel praised Anastasoff for having "done much to restore accountability to one branch of the federal government."); Mauro, Stealth Decisions Under Fire, Legal Times, Sept. 4, 2000, at 6, cols. 1, 3 (from the liberal side of the political spectrum, the executive director of Trial lawyers for Public Justice praised Anastasoff for opposing a "'two-tiered body of law' where judges are unaccountable and 'there is the rampant possibility of abuse.'")

Anastosoff quoted Justice Joseph Story to the effect that the refusal to treat like cases alike "would have been deemed [by the Framers] an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all just checks upon judicial authority."<sup>12</sup>

The Ninth Circuit opposed Anastasoff in Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001), which noted that "Anastasoff, while vacated [on other grounds], continues to have persuasive effect." Id. at 1159.

Hart allowed that disobedience to controlling precedent might be "cause for alarm." Id. at 1160. But Hart also noted that disobedience--by definition--is not officially permitted. Id. at 1160 n.3, 1170-71. Therefore--on the premise that only what is officially permitted is actually done--Hart concluded that disobedience is not fostered by nonpublication.

Nonetheless, the Ninth Circuit made this interesting concession which goes to the difficulty on appeal of correcting a disobedient decision: "[E]n banc procedures are seldom used merely to correct the errors of individual panels." Id. at 1172 n. 29. "Appellate courts often tolerate errors in their case law because the rigors of the en banc process make it impossible to correct all errors." Id. at 1175.

Therefore, Hart concludes that the "binding authority" of a circuit's own controlling precedent would not be "an unalloyed good" because it would complicate a circuit court's tolerance of error. Id. In Hart's formulation, panels err, but parties on appeal should have no greater recourse, neither to deter error beforehand, nor to have a realistic hope of persuading a court en banc to correct error afterwards. And indeed, what incentive would a circuit court have to take on the burden of acting en banc when the effect of an unpublished error is not binding?

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<sup>12</sup>223 F.3d at 904 (quoting J. Story, Commentaries on the Constitution of the United States, sections 377-78 (1833)).

Only if the error were published would there be an incentive to correct it.

Hart's priorities contrast sharply with the statement of this Court in Stanley v. Illinois, 405 U.S. 645, 656 (1972):

...the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.<sup>13</sup>

One judge of the Fourth Circuit has already candidly confided that rights may routinely disappear through the judicial strategy of nonpublication. Judge Murnaghan refers to the "repeated" disappearance of rights, rights which, nonetheless, may be "clearly established":

It seems logical that repeated decisions refusing to recognize a right would be evidence that the right was not clearly established even if the opinions were unpublished. However, it is well known that judges may put considerably less effort into opinions that they do not intend to publish. Because these opinions will not be binding precedent in any court, a judge may be less careful about his legal analysis, especially when dealing with a novel issue of law. For this reason we are loathe to cite to unpublished opinions, see Local Rule 36(c), nor will we consider them to be evidence that a right is or is not clearly established.

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<sup>13</sup>Accord, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 319 n.53 (1978) ("[A]n underlying assumption of the rule of law is the worthiness of a system of justice based on fairness to the individual.")

Wilson v. Layne, 141 F.3d 111, 124 n.6 (4th Cir. 1998) (Murnaghan, J., dissenting) (emphasis added).

A right may have been clearly established. And how else could it have been clearly established except by the controlling precedent of published decisions? But the reality for people who must rely on the appellate process is that a right can be disestablished at any time by nonpublication of a decision to deny the right. Through nonpublication there is no security in any kind of controlling precedent, and, as Hart too-candidly confides, there is little incentive for a circuit court to correct an error afterwards with en banc review--especially if it is a nonbinding, unpublished error.

Through the potential for abuse inherent in nonpublication, the crisis of volume leads to a crisis of confidence as the growing circle of criticism expands beyond the academy into politics.<sup>14</sup>

This Court has found it necessary to remind the circuits that this Court's precedent must be obeyed. Public perceptions of the legitimacy of the courts are also of special concern to this Court: "The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nations' law means and to declare what it demands." Planned Parenthood v Casey, 505 U.S. 833, 865 (1992).

The two concerns are related: inferior federal courts that defy controlling precedent compromise their own appearance of legitimacy, and lessen the public's regard for the judicial process.

The problem is compounded by the appearance that the Courts of Appeals are the courts of last resort. Hart supplies figures suggesting that less than one percent of Petitions for Writs of Certiorari can be granted. 266 F.3d at 1177 & n.34.

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<sup>14</sup>Robel, supra note 10 at 417, and supra, note 11.

Certainly the proportion of cases that can be granted Certiorari is small.

This Court would correct disobedience if it could, but this Court cannot be everywhere at once. An alternative proposed by one commentator<sup>15</sup> may have been reinforced by Hart.

As Hart implied, the publication of a disobedient opinion interferes with a circuit court's ability to tolerate the error. A disobedient opinion, published as precedent, could prove to be a more public embarrassment, threaten to complicate future cases, and give the court incentive to "bite the bullet" and rehear the disobedient opinion en banc. Better yet, the probability that a not-yet-drafted opinion, if it were to be disobedient, might become public and precedential, could deter the writing of such a disobedient opinion altogether.

This is not to say that all unpublished opinions need to be published. The solution is much narrower.<sup>16</sup> Of all the unpublished opinions, only a small subset--hopefully a very small

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<sup>15</sup>See Gardner, Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?, 61 A.B.A.J. 1224, 1227 (1975) (proposing a right to require publication for the sake of its "effective 'embarrassment potential'").

<sup>16</sup>Narrowness may be a virtue, since petitioners have repeatedly sought constitutional relief of varying scope from various abuses of nonpublication.

Constitutional challenges on this topic began to reach this Court more than twenty years ago. See Note, Honda meets Anastasoff: The Procedural Due Process Argument against Rules Prohibiting Citation to Unpublished Judicial Decisions 42 Boston Col. L. Rev. 695, 713 (2001) (describing the Petitioners' arguments in Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit, 429 U.S. 917 (1976), and in Browder v. Director, 434 U.S. 257 (1978)).

Constitutional challenges have resumed more recently. Like Anastasoff, the other, more recent challenges would have a more sweeping effect than the relief sought in this Petition. See Petitions for Writs of Certiorari in Schmier v. Jennings, 522 U.S. 1149 (1998), Schmier v. Supreme Court of California, 531 U.S. 958 (2000), Alcan Aluminum Corp. v. Prudential Assurance Co. Ltd. (No. 01-1594).

subset--namely the disobedient subset--should be published so it will be corrected--and repetition deterred--without intervention by this Court.

Who decides whether an opinion is disobedient? Ideally not someone who has an interest in preventing its publication, i.e., not its drafters. Rather, the party who stands to benefit from deterring disobedience is most likely to defend controlling precedent, and therefore should be able to say: "In the name of due process, I veto nonpublication."

This Petitioner twice petitioned the Fourth Circuit for rehearing en banc [App. 135a & 186a], and in conjunction with each petition for rehearing, he made a separate motion asserting a due process right to require publication. App. 163a & 208a.

In reaction to the first petition for rehearing en banc, the per curiam panel that had drafted the January 7, 2002 unpublished opinion amended that opinion to correct its misquotation of a statute and its misreliance on that error. App. 23a. But the panel substituted another misreading--this time misconstruing the record--to maintain the same outcome for its March 8, 2002 amended opinion. App. 192a - 202a. Indeed, by amending the January 7 unpublished opinion, the panel as much as admitted that the January 7 version, which relied on a misquotation of a statute, had been unlawful.

The Fourth Circuit's order of April 11, 2002 denied this Petitioner's motions for publication, and therefore denied his assertion of a due process right to have the unpublished opinion count as precedent--before or after its amendment. App. 48a.

"To the suspicious, unpublished will often suggest secret and corrupt.<sup>17</sup> The harm from such a perception is great.<sup>18</sup> The cost of protecting against that harm, in an instance such as this, is quite modest.

This Court has required judicial accommodation--even disqualification of a judge from presiding over a case--to avoid that harm:

The problem, however, is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. [Continuing in note "12":] As we held in Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986), this concern has constitutional dimensions. In that case we wrote: "[...] The Due Process Clause 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, "justice must satisfy the appearance of justice.'"" Id., at 825, 106 S.Ct. at 1587 (citations omitted).

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 864-65 & n.12 (1988).

Therefore, due process would even require recusal of a judge if anything less "is unlikely significantly to quell the concerns of the skeptic." Id., 486 U.S. at 865 n.12.

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<sup>17</sup>Render, On Unpublished Opinions 73 Kentucky L.J. 145, 158 (1984-85).

<sup>18</sup>See Bush v. Gore, 531 U.S. 98 (2000) ("It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law." Id. at 128, Stevens, J., dissenting; "[T]he public's confidence ... is a public treasure. ... It is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself." Id. at 157-58, Breyer, J., dissenting.)

If recusal can be a preventive measure, then surely publication at an appellant's request is a far less burdensome preventive measure aimed at the same goal of sustaining public confidence.

The alternative--the appearance of a resolve by the circuit courts to hide mistakes or abuses behind nonpublication, regardless of protests from appellants--promotes the popular perception published in Forbes Magazine;

[A]n unpublished decision ... means the judges can be sloppy. They are not accountable for illogic or inconsistency in the rulings. ... "[Unpublished decisions] are not prepared with the same kind of exactness," admits Procter R. Hug Jr., chief judge of the 9th Circuit ... "They can't justify what they're going to do, so they don't publish it," says [Russell] Lukes [Esq.], who works out of Washington, D.C.<sup>19</sup>

Publication upon an appellant's request seems like a modest and minimal safeguard, doing no harm if the appellant's fears are misguided. If the inclusion of a few extra pages in a Federal Reporter can help to guarantee the integrity of the appellate process and sustain public confidence in that process against the suspicion of possible abuse, then the minimal cost should be well worth it.

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<sup>19</sup>McMenamin, Justice in the Dark: Federal Appeals Judges Say They Are So Overworked that They Have To Dispense Quickie Jurisprudence-- Meaning, No Accountability, Forbes Magazine, October 30, 2000, at 72 col. 3, 74 col. 1-2 (Also available at <http://www.nonpublication.com> under "Press Clippings". As suggested by the name of this website, the movement for reform of nonpublication now sponsors an online clearinghouse on the topic.)

The New York Times, in a front page article, even quotes the Honorable Richard A. Posner, Chief Judge of the Seventh Circuit, describing unpublished opinions as "sort of a formula for irresponsibility." Glaberson, Caseload Forcing Two-Level System for U.S. Appeals, N.Y. Times, March 14, 1999, at 1, 26 col. 3.