Unpublished Opinions: A Convenient Means to an Unconstitutional End

ERICA S. WEISGERBER*

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INTRODUCTION

Presently, the federal judiciary disposes of more than three-quarters of its cases by unpublished opinions. Unpublished opinions, unlike published opinions, are given non-binding precedential status: their precedential value is treated differently merely because a judge has decided the case is not worthy of publication and therefore not worthy of binding precedential value. Before 2006, the federal circuit courts split regarding whether unpublished opinions might even be cited in briefs submitted to each circuit’s courts. In 2006, the Supreme Court adopted Federal Rule of Appellate Procedure 32.1, which required that all circuits permit litigants to cite unpublished opinions.¹ Some would claim that Rule 32.1 resolved the “problem” of unpublished opinions, but neither Rule 32.1 nor the Supreme Court has addressed whether it is constitutional to accord non-binding precedential status to unpublished opinions. Accordingly, unpublished opinions remain an issue today.

The use of unpublished opinions ignores the precedential value of each case. When the Framers of the Constitution articulated the “judicial power,”² they intended for that power to be constrained by the doctrine of precedent. Furthermore, they intended that each case would have precedential value, not just a select few. Although those who support the use of unpublished opinions argue that it would be inefficient and unworkable to accord proper precedential effect to all judicial opinions, this Note explains that this argument stems from a misunderstanding of the proper use of precedent. Precedent is rarely binding; only in instances in which precedent addresses similar material facts and legal issues will precedent be binding. Precedent also includes the legal rules articulated in a case; these rules may not be binding in all future contexts with similar facts, but the doctrine of precedent requires that those prior cases and legal rules

¹. FED. R. APP. P. 32.1(a).
². See U.S. CONST. art. III, § 1.
be addressed and distinguished, or overruled if they are on point. This is necessary for a properly functioning judiciary. However, the use of unpublished opinions allows judges to disregard the proper precedential effect of prior cases, and furthermore, it allows them to pick and choose which cases will receive binding precedential effect and which will not.

Part I of this Note explores the use of unpublished opinions. It discusses what unpublished opinions are, why the use of such opinions began, how the practice grew, and how judges decide whether to publish their decisions. Part I also examines the primary reason that most judges utilize unpublished opinions: time constraints resulting from bulging caseloads. Part II offers a brief overview of the circuit split regarding the constitutionality of unpublished opinions, as well as the two leading cases that weigh in on each side of the argument. Part III examines how the use of unpublished opinions flouts the Framers’ intent and ignores the Supreme Court’s holdings regarding the proper use of stare decisis. Part IV asserts that unpublished opinions must be accorded the same precedential effect as published opinions, and it explores potential solutions to the institutional limitations on the judiciary’s ability to grant such opinions binding precedential effect.

I. UNPUBLISHED OPINIONS: WHAT ARE THEY AND WHY ARE THEY USED?

Unpublished opinions are opinions that a court has designated as having non-binding precedential effect. They are written resolutions to specific cases, prepared exclusively for the involved parties, and they are intended to have no binding precedential effect—or even persuasive effect, for some jurisdictions—on future cases. The text of such opinions is usually sparse, containing only a minimal recitation of the facts and a limited description of the law.

Prior to Rule 32.1, in many jurisdictions, an unpublished opinion is also known as “opinions not for publication” or “non-precedential opinions.” This Note uses these phrases interchangeably.

3. “Unpublished opinions” are also known as “opinions not for publication” or “non-precedential opinions.” This Note uses these phrases interchangeably.


5. See, e.g., Hearing, supra note 4, at 14 (statement of J. Alex Kozinski, United States Court of Appeals for the Ninth Circuit) (“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.”). Published opinions, by contrast, are often of impeccable quality; decisions for publication must be complete on their face and adequately discuss the facts, nature, history, and reasoning of the case. See id.
opinion could not be cited for its precedential value in briefs submitted to the court, and it would have no binding or even persuasive effect on future dispositions of the court.6 As of September 2007, over 80% of U.S. courts of appeals opinions per year were unpublished.7

The term “unpublished opinions” is somewhat of a misnomer, however. Unpublished opinions are not included in the official volumes of published rulings, but this does not mean that they are actually not published anywhere. The opinions are still public records, often available on court websites, in the Federal Appendix, and on Lexis and Westlaw.8 Thus, though designated unpublished, these opinions are usually readily available and as accessible for research as published opinions.10

Why has the practice of designating some opinions “not for publication” grown so rapidly that it is employed by every federal court in every circuit? Defenders of the use of unpublished opinions assert that the main, and perhaps only genuine,11 reason for the creation of two tracks of cases is the institutional

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6. See infra Part II; see also Hearing, supra note 4, at 12 (statement of J. Alex Kozinski, United States Court of Appeals for the Ninth Circuit) (“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.”); Penelope Pether, Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts, 56 Stan. L. Rev. 1435, 1436–37 (2004) (“Unpublication means that an opinion is not designated for publication in the jurisdiction’s official reporter, if it has one; to a greater or lesser extent it makes the opinion difficult to find; it limits or destroys the precedential value of the opinion; and in most jurisdictions, citation to an unpublished opinion in documents filed in court or in argument is either banned or severely limited.”).


9. See JOYCE J. GEORGE, JUDICIAL OPINION WRITING HANDBOOK 202 (4th ed. 2000) (“The opinion is a public record even though it may remain unpublished. It details the reasoning that impels the decision of the reviewing court. While the law sets the legal boundaries within which people operate or should operate, the law has no voice; it is discernible only by reading a particular judge’s opinion which speaks the law.”).


limitation of the federal judiciary. This might be called an “efficiency justification.” Time pressure to decide cases, increasing caseloads, and the need for efficiency and clarity in the law despite the time pressure and caseloads have militated in favor of declaring some opinions non-precedential. By devoting less time to crafting unpublished opinions, the argument goes, judges are able to focus their attention and time on fashioning judicial opinions in cases that will have precedential effect. Because unpublished opinions are written with less attention to detail than precedential opinions, according them non-binding precedential effect alleviates the concern that “future litigants may seize on any ambiguity in order to achieve an unwarranted benefit or escape the opinion’s force.”

Judge Alex Kozinski of the Ninth Circuit Court of Appeals argues that, due to time constraints on judges, the use of unpublished opinions is essential to the maintenance of clarity in the law:

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.

Judge Kozinski’s argument is also based on the efficiency justification—judges should devote their limited and valuable time to opinions that will have precedential value, and they should devote less time and effort to writing opinions that will not be relied upon by future litigants. Other judges confirm that the use of unpublished opinions enables them to devote less time to those latter opinions and to hastily resolve certain cases, and they acknowledge that unpublished opinions do not receive the same scrutiny as published opinions.

12. See, e.g., Hearing, supra note 4, at 8 (statement of J. Samuel A. Alito, Jr., United States Court of Appeals for the Third Circuit) (“[T]he universal publication of opinions would either produce a deterioration in the quality of opinions or impose intolerable burdens . . . .”).
13. See id.
15. See Letter from Judge William C. Canby, Jr. to Peter G. McCabe, Sec’y, Comm. on Rules of Practice & Procedure (Jan. 8, 2004) (noting that when preparing a “memorandum disposition”—the
Statistics show that the caseload of federal courts is indeed increasing. Between 1960 and 2007, the caseload of federal courts of appeal multiplied by fifteen.16 As caseloads continue to grow, the efficiency justification for unpublished opinions asserts that judges should be able to dispose of certain cases in a quick and perfunctory manner, leaving more time for published opinions—decisions the holdings and rationales of which will shape the terrain of the law.17

Some judges themselves admit to devoting less time and attention to writing unpublished opinions. They assert that what “matters [in unpublished opinions] is the result, not the precise language of the disposition or its reasoning.”18 Some have acknowledged that unpublished decisions “[contain] minimal factual or legal analysis” and “less writing precision.”19 The overall result is an opinion of lesser quality than a published opinion.20

Others contend that unpublished opinions are justified when no new law is enunciated by the case, such that the case will not have unique value as precedent.21 Again, the efficiency justification underlies this idea: if a case is not proposing any groundbreaking propositions of law, judges should not be forced to painstakingly craft an opinion that thoroughly and qualitatively addresses parties’ arguments and elucidates the legal reasoning guiding the court’s decision. Then-Judge Samuel A. Alito, Jr., a former Chair of the Advisory Committee on the Federal Rules of Appellate Procedure, noted that unpublished opinions

Ninth Circuit term for unpublished opinions—the judge “does not concern [himself] greatly with how [he] describe[s] [his] reasons”); Letter from Judge Procter Hug, Jr. to Peter G. McCabe, Sec’y, Comm. on Rules of Practice & Procedure (Dec. 16, 2003) (stating that “unpublished opinions are specifically not intended” to present arguments for particular points of law); Letter from Judge Barry G. Silverman to Peter G. McCabe, Sec’y, Comm. on Rules of Practice & Procedure (Dec. 17, 2003) (noting that a “mem dispo can be knocked out in an hour or less”); Letter from Judge Kim McLane Wardlaw to Peter G. McCabe, Sec’y, Comm. on Rules of Practice & Procedure (Jan. 7, 2004) (noting that unpublished decisions “are designed to quickly and concisely deliver a decision to the litigants in a particular case [and usually] omit discussion of the facts and procedural posture of the case”). These letters are available at http://www.secretjustice.org/public_comments_re_frap_32_1.htm.


17. GEORGE, supra note 9, at 422 (“[L]imiting publication promotes judicial economy through a reduction in the time and resources expended in the pursuit of producing a decision opinion suitable for publication . . . . A decision/opinion written exclusively for the benefit of the parties in routine cases is less burdensome on the writing judge . . . . Time saved on party-oriented decisions/opinions can be better used on controversies more deserving of extensive research and the development of a formal decision/opinion.”).


19. Id.

20. Id.

21. See GEORGE, supra note 9, at 418 (“[A]ppellate judges must be vigilant in identifying those opinions that offer nothing to the body of law and excluding them from the publication process.”).
are frequently used to apply “well-established law to specific facts.”

One final context in which judges may use unpublished opinions—perhaps less likely to be admitted by judges themselves—is when judges on an appellate panel agree on the outcome of a case, but not on the reasoning. As a result, the panel issues an unpublished opinion, briefly noting the decision of the court with little, if any, reference to the law underlying the decision. This is much more efficient than requiring each judge to write a separate opinion, deciding on which rationales the majority of judges agree, and issuing separate opinions.

Judges control whether their opinions will be marked as published or unpublished. Each circuit has rules of procedure that suggest criteria for judges to consider when deciding whether to publish an opinion. Publication is favored for a case that involves a factual or legal issue of continuing public interest; establishes a new rule of law; criticizes existing law; resolves an apparent conflict of authority; serves as a significant guide to future litigants; or resolves a conflict of authority. Nonetheless, there has never been any check on a judge’s discretion to classify certain decisions as unpublished. Thus, the potential for abuse of unpublished opinions—in the form of how much time judges devote to writing them, what subject matters they cover, and even what rules of law, if any, are articulated in such opinions—is evident.

II. THE PROBLEM OF UNPUBLISHED OPINIONS COMES TO THE FORE

A. PRE-RULE 32.1 CIRCUIT SPLIT

Prior to Rule 32.1, although every circuit used unpublished opinions to dispose of certain cases, there was a circuit split regarding whether unpublished opinions could be cited and to what extent those opinions had precedential effect. Some circuits allowed the citation of unpublished opinions in related cases, but they generally discouraged it and would treat those opinions only as persuasive, not as binding precedent. Other circuits did not even permit the

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22. Hearing, supra note 4, at 8 (statement of J. Samuel A. Alito, Jr., United States Court of Appeals for the Third Circuit).
23. Judge Patricia Wald notes that this occurs on courts of appeals, but she does not state how regularly. Wald, supra note 7, at 1374.
24. See, e.g., 1st Cir. R. 36.0(b)(1); 9th Cir. R. 36-2; D.C. Cir. R. 36(a)(2). The standards in these sorts of rules are fairly consistent across circuits.
26. See D.C. Cir. R. 36(c)(2) (repealed 2006) (“While published orders and judgments may be cited to the Court in accordance with Circuit Rule 28(c)(1)(B), a panel’s decision to issue an unpublished opinion means that the panel sees no precedential value in that disposition.”); 1st Cir. R. 32.3(a)(2) (repealed 2006) (“The court will consider unpublished dispositions for their persuasive value but not as binding precedent.”); 4th Cir. R. 36(c) (repealed 2006) (“In the absence of unusual circumstances, this Court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this Court’s unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored . . . .”); 5th Cir. R. 47.5.4 (repealed 2006) (“Unpublished opinions . . . are not precedent . . . . An unpublished opinion may, however, be persuasive.”); 6th Cir. R. 206(c) (“Reported panel opinions are binding on subsequent panels. Thus, no
citation of these opinions in briefs submitted to the court. Only the Third Circuit permitted citation to unpublished opinions in unrelated cases, regardless of the existence of a published opinion on point.

Two cases in 2000 and 2001 brought the constitutionality of unpublished opinions to center stage. Judge Arnold’s opinion in *Anastasoff v. United States* fiercely attacked rules preventing the citation of unpublished opinions for their precedential effect as unconstitutional. On the other hand, Judge Kozinski’s opinion in the Ninth Circuit case of *Hart v. Massanari* defended the use of unpublished opinions and asserted the value and necessity of preventing their use as precedent.

In the events leading to *Anastasoff*, Faye Anastasoff mailed her refund claim to the IRS, which received the claim three years and one day after she overpaid her taxes in 1993. The IRS dismissed her claim. Ms. Anastasoff argued that the “mailbox rule” precluded dismissal of her claim. Although the Eighth Circuit had rejected the same legal claim in *Christie v. United States*, Ms. Anastasoff argued that the court was not bound by *Christie*, because it was an unpublished decision. Anastasoff’s argument was based on Eighth Circuit Rule 28A(i), which stated:

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 subsequent panel overrules a published opinion of a previous panel. Court en banc consideration is required to overrule a published opinion of the court.

27. See 2D CIR. R. 0.23 (repealed 2006) (“Since [dispositions made in open court or by summary order] do not constitute formal opinions of the court and are unreported or not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court.”); 8TH CIR. R. 28A(i) (repealed 2007) (“Unpublished opinions are decisions which a court designates for unpublished status. They are not precedent and parties generally should not cite them.”); 10TH CIR. R. 36.3(A) (repealed 2007) (“Unpublished orders and judgments of this court are not binding precedents . . . .”); 11TH CIR. R. 36-2 (repealed 2005) (“Unpublished opinions are not considered binding precedent. They may be cited as persuasive authority . . . .”).

28. 3D CIR. R. 0.23 (repealed 2006) (“Since [dispositions made in open court or by summary order] do not constitute formal opinions of the court and are unreported or not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court.”); 7TH CIR. R. 53(b)(2) (repealed 2007) (“Unpublished orders . . . shall not be cited or used as precedent . . . .”); 9TH CIR. R. 36-3(a) (repealed 2007) (“Unpublished dispositions and orders of this Court are not binding precedent . . . .”); FED. CIR. R. 47.6(b) (repealed 2006) (“An opinion or order which is designated as not to be cited as precedent . . . must not be employed or cited as precedent.”).


30. Hart v. Massanari, 266 F.3d 1155, 1174–79 (9th Cir. 2001).

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

32. *Id.*

33. *Id.* The “mailbox rule” treats the postmarked date on a piece of mail as the effective date of receipt. *Id.*


35. *Anastasoff*, 223 F.3d at 899.
opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well. . . . 36

The court held, per Judge Arnold, that the Eighth Circuit rule expanded the judicial power beyond the scope of Article III and was thus unconstitutional. 37 Judge Arnold’s reasoning focused on how the historical foundations of the doctrine of precedent in the American legal system were inextricably intertwined with the notion of “the judicial power” of the United States:

The doctrine of precedent was well-established by the time the Framers gathered in Philadelphia. Morton J. Horwitz, The Transformation of American Law: 1780-1860 8-9 (1977); J.H. Baker, An Introduction to English Legal History 227 (1990); Sir William Holdsworth, Case Law, 50 L.Q.R. 180 (1934). See, e.g., 1 Sir William W. Blackstone, Commentaries on the Laws of England *69 (1765) (“it is an established rule to abide by former precedents”). To the jurists of the late eighteenth century (and thus by and large to the Framers), the doctrine seemed not just well established but an immemorial custom, the way judging had always been carried out, part of the course of the law. In addition, the Framers had inherited a very favorable view of precedent from the seventeenth century, especially through the writings and reports of Sir Edward Coke; the assertion of the authority of precedent had been effective in past struggles of the English people against royal usurpations, and for the rule of law against the arbitrary power of government. In sum, the doctrine of precedent was not merely well established; it was the historic method of judicial decision-making, and well regarded as a bulwark of judicial independence in past struggles for liberty. 38

Judge Arnold perceived Article III issues with allowing federal courts not to acknowledge prior decisions, whether called “published” or “unpublished”: “The judicial power to determine law is a power only to determine what the law is, not to invent it.” 39 Judge Arnold noted the consequences of a judiciary free to pick and choose from precedent at whim: “If judges had the legislative power to ‘depart from’ established legal principles, ‘the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own

36. 8th Cir. R. 28A(i).
37. Anastasoff, 223 F.3d at 900.
38. Id. (footnotes omitted). Judge Arnold further explained:

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

Id. at 901 (internal citations and quotation marks omitted).
39. Id.
opinions....

Thus, the Eighth Circuit held that, as a constitutional matter, courts of appeal may not decide which of their opinions will be deemed binding on themselves and the courts below them.

In *Hart v. Massanari*, Judge Kozinski took an altogether different view of the historical perception of precedent and Article III and of the effect of each on unpublished opinion citation rules. An attorney who submitted a brief to the Ninth Circuit had cited an unpublished case as precedent; the issue in *Hart* was whether the Court would sanction him for disobeying Ninth Circuit Rule 36-3, which forbade altogether the citation of unpublished opinions. Taking issue with Judge Arnold’s description of Article III’s mandate that courts must be bound by the precedential effect of *all* of their decisions, Judge Kozinski countered that the judicial power is “more likely descriptive than prescriptive”—that is, the language of the Constitution in Article III that defines the “judicial power” merely describes the envisioned judiciary and some of its features, but does not provide specific proscriptions against certain practices, such as the use of unpublished opinions as non-binding precedent. Judge Kozinski argued that Judge Arnold had overstated the importance of precedential effect of decisions at the time of the Framing, because the concept of precedent developed long after Article III: “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.”

Because the concept of precedent is not specifically addressed in the Constitution, Judge Kozinski argued that treating unpublished opinions as non-precedential is not an unconstitutional practice. Rather, Judge Kozinski asserted, unpublished opinions are necessary due to the time constraints and increasing caseload burden on judges.

Judge Kozinski spends the majority of his opinion refuting the idea of rigid, permanently binding precedent, as opposed to the more tempered view of precedent that Judge Arnold presents. Judge Kozinski principally attacks the

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40. *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *258–59*).
41. *Id.* at 905.
42. *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001).
43. *Id.* at 1158–59.
44. *Id.* at 1161.
45. *Id.* at 1175.
46. *Id.* at 1163.
47. *Id.* at 1178 (“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.”).
48. Judge Arnold notes that he is not articulating a requirement that opinions can never be overruled or distinguished:

Finally, lest we be misunderstood, we stress that we are not here creating some rigid doctrine of eternal adherence to precedents. Cases can be overruled. Sometimes they should be. On our Court, this function can be performed by the en banc Court, but not by a single panel. If the
notion that binding precedent must be stiffly adhered to, even if it has become unworkable in future contexts. However, Judge Arnold does not insist that all judicial opinions must be rigidly adhered to, unchanging, never overruled, and thus stifling to the development of the law. Rather, Judge Arnold’s primary critique is that by using unpublished opinions and affording them less precedential effect than published decisions, the judiciary has unacceptably removed an entire class of cases from the body of precedent that will shape future cases.49 Thus, Hart cannot be understood as refuting the main idea articulated by Anastasoff: that courts cannot unilaterally decree by rule that certain decisions shall have no precedential effect on their future dispositions.

B. THE ADOPTED SOLUTION, FEDERAL RULE OF APPELLATE PROCEDURE 32.1: A SMALL STEP IN THE RIGHT DIRECTION

Amid the vigorous debate amongst the circuits that ensued as a result of the Anastasoff and Hart opinions, and further prompted by confusion over the varying rules of each circuit on unpublished decision citation, the Supreme Court adopted Federal Rule of Appellate Procedure 32.1 in 2006. The Rule requires all U.S. courts of appeals to permit litigants to cite to unpublished opinions decided after January 2007. The Rule reads:

**Rule 32.1. Citing Judicial Dispositions**

(a) **Citation Permitted.** A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like; and (ii) issued on or after January 1, 2007.

(b) **Copies Required.** If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.50

The Supreme Court’s adoption of Rule 32.1 is only a small step. Because it

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49. Id.

requires that all litigants be allowed to at least cite to unpublished opinions, unpublished opinions can no longer be removed completely from the table when litigants feel they will bolster their arguments before the court. Despite this, neither the Supreme Court nor the Rule spoke to the precedential weight to which unpublished opinions are entitled. Indeed, it seems that this was intentional.

In his memorandum from the Advisory Committee on Appellate Rules to the Chair of the Standing Committee on Rules of Practice and Procedure, then-Judge Alito, the Advisory Committee Chair, emphasized that Rule 32.1 “does not require any court to issue an unpublished opinion or forbid any court from doing so.” He further noted that the Rule does not delineate criteria for deciding whether to publish an opinion, nor does the Rule take a position “on whether refusing to treat an unpublished opinion of a federal court as binding precedent is constitutional.” Furthermore, Rule 32.1 only allows citation to unpublished opinions that are issued after January 1, 2007, and it allows circuits to continue the ban on citing to cases before that date. Thus, Rule 32.1 allows courts to continue to treat certain cases differently from others, as non-binding precedential decisions, merely because they have been labeled “unpublished.”

III. The Treatment of Unpublished Opinions as Non-Binding Precedent Is Unconstitutional

Federal Rule of Appellate Procedure 32.1 does not address the constitutional issues implicated by the use of unpublished opinions, and thus the debate between Judge Arnold and Judge Kozinski remains open today. Even if litigants may now cite to unpublished opinions in their briefs, judges need not accord unpublished cases the same precedential treatment as published cases, or any precedential treatment at all. In fact, no federal circuit today treats unpublished opinions the same as published opinions. This inferior treatment of unpub-

51. Alito Memorandum, supra note 10, at 3.
52. Id.
53. See D.C. Cir. R. 32.1(b)(1)(A) (“Unpublished orders or judgments of this court, including explanatory memoranda and sealed dispositions, entered before January 1, 2002, are not to be cited as precedent.”); 1st Cir. R. 32.1.0(a) (“An unpublished judicial opinion, order, judgment or other written disposition of this court may be cited regardless of the date of issuance. The court will consider such dispositions for their persuasive value but not as binding precedent. A party must note in its brief or other filing that the disposition is unpublished. The term ‘unpublished’ as used in this subsection and Local Rule 36.0(c) refers to a disposition that has not been selected for publication in the West Federal Reporter series, e.g., F., F.2d, and F.3d.”); 2d Cir. R. 32.1(b) (“Rulings by summary order do not have precedential effect.”); 3d Cir. R. 28.3(b) (“For each legal proposition supported by citations in the argument, counsel shall cite to any opposing authority if such authority is binding on this court, e.g., U.S. Supreme Court decisions, published decisions of this court, or, in diversity cases, decisions of the applicable state supreme court.”) (emphasis added)); 4th Cir. R. 32.1 (“Citation of this Court’s unpublished dispositions issued prior to January 1, 2007, 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, nevertheless, that an unpublished disposition of this Court issued prior to January 1, 2007, has precedential value in relation to a material issue in a case and
lished opinions is contrary to the role and understanding of precedent in America’s constitutional and legal history.

A. THE ROLE OF PRECEDENT IN THE AMERICAN LEGAL SYSTEM

On examination, it is apparent that precedent has been understood from the beginning of the nation’s history through today as a restraint on the judiciary in the exercise of its constitutionally delegated powers. Specifically, the Framers of the Constitution envisioned that precedent would serve as a check on “the judicial power,” thus giving the doctrine of precedent constitutional status, and the Supreme Court’s case law over the past two hundred years has firmly entrenched the doctrine of precedent in the American legal system.

1. The Framers Envisioned Binding Precedent as a Limitation on the Judicial Power

Article III, section 1 of the Constitution reads: “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.”54 Because the Constitution does not explicitly mention precedent,55 the primary question in

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55. Precedent is a prior legal case that establishes a principle or rule by which the court will abide when deciding subsequent cases with similar issues or facts. The doctrine of stare decisis, according respect for prior court decisions, is closely related to precedent. The two are often used interchangeably in legal scholarship, and accordingly are used interchangeably in this Note. See, e.g., John Harrison, The Power of Congress over the Rules of Precedent, 50 DUKE L.J. 503, 513 & n.25 (2000); Todd J. Zywicki, The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis, 97 NW. U. L. REV. 1551, 1566 (2003).

There are two types of precedent: binding and persuasive. Precedent is binding only if it is directly on...
the debate over the constitutional basis for the doctrine of precedent is whether legal scholarship and thought at the time of the Framing suggests that the Framers did indeed envision the judiciary being bound by precedent, and if so, whether they envisioned all judicial opinions—or merely a subset of them—serving as precedent.

To be sure, there was no pre-existing body of American case law at the time of the Framing; however, the doctrine of precedent was already “well-established.” The Framers accepted the declaratory theory of adjudication, as first pronounced in England by Lord Hale and Lord Coke, two English jurists, and William Blackstone, an English jurist and professor. The declaratory theory of adjudication asserts that it is “a judge’s duty to expound and maintain old law, not to pronounce new law.” The Framers envisioned a system, similar to the English system, in which judges were constrained both by the law as articulated by Congress in its legislative enactments and by the law as previously articulated by the courts in interpreting congressional enactments.

In deciding to accept the idea of adherence to precedent, the commentaries on the law by William Blackstone profoundly influenced the Founders. In fact, his textbooks were used by the Framers when they drafted the Constitution. Blackstone stressed that judges were to become “depositaries of the laws,” by studying the “judicial decisions of their predecessors” as the “most authoritative evidence” of the law. Other early commentators on the law, during the period


58. Id. at 868 (citing Anastasoff, 223 F.3d at 900); see also The Federalist No. 81 (Alexander Hamilton) (discussing the wisdom of placing the judiciary outside the legislative branch because the legislative function, to make the law, and the judicial function, to interpret the law, are best kept separate).

59. See The Federalist No. 78, at 427 (Alexander Hamilton) (E.H. Scott ed., 2002) (“The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be regarded by the Judges, as a fundamental law. It must therefore belong to them to ascertain its meaning, as well as the meaning of any particular proceeding from the Legislative body.”).


of the Founding and thereafter, also stressed the importance of precedent as a limitation on the judiciary’s interpretation of the law.62

Indeed, the concept of precedent was explicitly noted by the Framers themselves. Mention of precedent appears in the pamphlets of the Federal Farmer. The Federal Farmer was an Anti-Federalist who wrote two pamphlets that discussed the proposed United States Constitution. The author, though still unknown, was rumored to be Melancton Smith, a delegate to the Constitutional Convention.63 Similarly, Robert Yates, another well-known politician during the time of the Founding, was an Anti-Federalist who wrote papers in favor of ratification of the Constitution under the pseudonym Brutus.64 As one modern observer puts it, “both the Federal Farmer and Brutus viewed the tendency of common law courts to move toward ‘rigidity,’ presumably from their practice of following precedent.”65 Brutus also stated that the principles from court decisions would “become fixed, by a course of decisions.”66

Furthermore, in their elucidation of the concept of precedent, it appears that the Framers did envision that all cases would serve as precedent, not just certain cases. At no point did the Framers or any of the early American jurists mention that precedent would be accorded only to certain cases and not others. The Federalist Papers, penned by Alexander Hamilton, James Madison, and John Jay, elaborate on the theories supporting ratification of the U.S. Constitution. Since these three men played pivotal roles in the drafting of the Constitution, the Federalist Papers serve as one of the best primary sources in interpreting the Constitution from an originalist perspective.67 Alexander Hamilton’s Federalist No. 78, one of the most cited of the Federalist Papers, expanded on Article III and the Constitution’s envisioned judiciary. In Federalist No. 78, Hamilton notes that the judiciary is to be bound by precedent:

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62. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 475–78 (Oliver Wendell Holmes, Jr. ed., Boston, Little, Brown & Co. 1873) (“A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness . . . . When a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and never by the same court, except for very cogent reasons, and upon a clear manifestation of error . . . .”); Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 389, 391 (Marvin Meyers ed., rev. ed. 1981) (noting that the authoritative force of precedent arises from the “obligations arising from judicial expositions of the law on succeeding judges”).
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.\(^{68}\)

Thus, the Framers envisioned that over time the body of precedent would grow and expand, creating a large body of law, which would bind future judges in their articulation of the law.\(^{69}\) Hamilton further noted that “[t]he courts must

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68. The Federalist No. 78, supra note 59, at 430 (Alexander Hamilton) (emphasis added); see also 1 Joseph Story, Commentaries on the Constitution of the United States § 377, at 350 (1833) (“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.”).

69. It should be noted, however, that the concept of stare decisis as articulated by Lord Hale, Lord Coke, and William Blackstone, and as subsequently understood by the Framers, was not a rigid, unbending one. Stare decisis does not require broad interpretations of prior cases to cover all new situations, but rather it allows for distinguishing facts to make a difference in the disposition of a case. What stare decisis does require, however, is that precedent be acknowledged and, if sufficiently similar, followed. This has been acknowledged by the Supreme Court:

[S]tare decisis is not . . . a universal and inexorable command. The rule of stare decisis . . . is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to answer a question once decided. . . . Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right . . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.


Furthermore, all the language of a case does not automatically constitute precedent. Precedent consists of the rules the court has laid down and its holding. The court’s holding, and thus precedent, can include the application of law to facts—it is not limited to purely legal rules. See 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, 1186 (1978). By contrast, “[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.” Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 170 (2004) (quoting Webster v. Fall, 266 U.S. 507, 511 (1925)). Thus, not all language in a judicial opinion constitutes precedent for subsequent cases. In fact, much of judicial opinions are dicta, statements that are not an essential part of the legal reasoning in the decision of the court. See Frederick G. Kempin, Jr., Precedent and Stare Decisis: The Critical Years, 1800 to 1850, 3 Am. J. Leg. Hist. 28, 28–29 (1959); Frederick Schauer, Precedent, 39 Stan. L. Rev. 571, 594 (1987) (“[When a prior decision] is simply different, [there is] no relevant precedent to follow or disregard.”).
declare the sense of the law.”70 This requires that judges exercise “judgment” about what the law is, based on precedent; they may not “will” about what it should be.71

Hamilton was not the only Framer who envisioned that judges would be restrained by precedent in all cases. Fellow Framer John Adams believed that “every possible Case [should be] settled in a Precedent, leav[ing] nothing, or but little to the arbitrary Will or uninformed Reason of Prince or Judge.”72 It seems the Framers viewed precedent as the cornerstone of a properly functioning judiciary. James Madison, the “father of the Constitution,” viewed precedent as such a fundamental piece of the American political system that he asserted that it ought to restrain the actions of each political branch—not just the judiciary. Madison viewed that precedent would confine the decisions of judges in almost every case that came before them, with exceptions falling only within “extraordinary and peculiar circumstances.”73

James Wilson, a preeminent legal scholar of the Founding era, who served as a delegate to the Constitutional Convention and played a significant role in authoring the Constitution, also shared this view. During a lecture on the American legal system, Wilson noted:

[J]urors possess the power of determining legal questions. But they must determine those questions, as judges must determine them, according to law. The discretionary powers of jurors find no place for exertion here . . . [L]aw, particularly the common law, is governed by precedents, and customs, and authorities, and maxims: those precedents, and customs, and authorities, and maxims are alike obligatory upon jurors as upon judges, in deciding questions of law.74

Wilson also served as one of the six original Supreme Court justices, which gave him the opportunity to implement the practice of looking to past precedent for guidance in deciding cases for the judiciary. Indeed, during the late colonial period, it would seem that “Americans adhered to the traditional common law conception of judges” whereby “a judge is sworn to determine, not according to

70. The Federalist No. 78, supra note 59, at 428 (Alexander Hamilton).
71. See Anastasoff v. United States, 223 F.3d 898, 902 (8th Cir.) (citing The Federalist No. 78 (Alexander Hamilton)), vacated as moot, 235 F.3d 1054 (8th Cir. 2000). Judges are literally to be constrained by the doctrine of precedent. As further noted by philosopher Ronald Dworkin, contained in the law are principles which “reflect . . . the equities and efficiencies of consistency . . . [and which] incline toward the status quo . . . .” Ronald Dworkin, Taking Rights Seriously 37 (2d ed. 1978).
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.\textsuperscript{75}

The idea that each case would form precedent for subsequent cases was
further elucidated by William Cranch, one of the early Supreme Court reporters.
Within fifteen years of ratification of the Constitution, Cranch wrote in the
preface to a set of his reports about the doctrine of precedent as a restraint upon
the federal judiciary:

> Whatever tends to render the laws certain, equally tends to limit that discre-

> tion; and perhaps nothing conduces more to that object than the publication of

> reports. Every case decided is a check upon the judge. He can not decide a

> similar case differently, without strong reasons, which, for his own justifica-

> tion, he will wish to make public. The avenues to corruption are thus

> obstructed, and the sources of litigation closed.\textsuperscript{76}

To be sure, it would be bizarre for only certain judicial opinions to be accorded
proper precedential status. Neither the Framers, early politicians or legal schol-
ars, nor the early Supreme Court ever suggested that certain judicial decisions
may be treated as lacking precedential value.

\section{2. Precedent Has Become “Firmly Entrenched” in the American Legal System
Since the Framing}

The Supreme Court’s treatment of the doctrine of stare decisis and the respect
it has accorded precedent have firmly entrenched the doctrines in the American
legal system, emphasizing that respect for precedent is required in some man-
ner, if not necessarily constitutionally. The Court’s articulation of stare decisis
is consistent with the view of precedent discussed earlier: a doctrine requiring that
each case be distinguished, overruled, or accorded binding precedential status
by similar subsequent cases.

The Court has continually reinforced the importance of stare decisis: “As a
general rule, the principle of \textit{stare decisis} directs courts to adhere not only to the
holdings of their prior cases, but also to their explications of the governing rules
of law.”\textsuperscript{77} The Court has noted that the doctrine imposes “a severe burden on
the litigant who asks [the Court] to disavow one of [its] precedents.”\textsuperscript{78}

The Court has articulated several bases for the principle of stare decisis, noting that it serves interests in “the evenhanded, predictable, and consistent


\textsuperscript{76} William Cranch, \textit{Preface to 1 Reports of Cases Argued and Adjudged in the Supreme Court of
the United States} iii, iii–iv (1804) (emphases added).

ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 668 (1989)).

development of legal principles, . . . reliance on judicial decisions, and . . . the actual and perceived integrity of the judicial process.” In Moragne v. States Marine Lines, Inc., the Court stated three primary bases for the rule 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 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 judgment.” The Court further noted that “reasons for rejecting any established rule must always be weighed against these factors.”

In light of these important bases for respecting precedent in subsequent decisions, the Court has admonished that it “will not depart from the doctrine of stare decisis without some compelling justification.” Without such a compelling justification, the Court will adhere to prior precedent, even if it would not reach the same conclusion today. Indeed, the Court has stated that stare decisis is “a cornerstone of [the American] legal system” and “of fundamental importance to the rule of law.”

The Supreme Court has never suggested that stare decisis should be accorded to only some cases and not others. Justice Scalia has recognized the difficulties imposed upon the courts by the doctrine of adherence to precedent amidst an ever-growing amount of cases:

80. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970). The Court also explained that, “The confidence of people in their ability to predict the legal consequences of their actions is vitally necessary to facilitate the planning of primary activity and to encourage the settlement of disputes without resort to the courts.” Id.
81. Id.
82. Hilton v. S.C. Pub. Rys. Comm’n, 502 U.S. 197, 202 (1991); see also Dickerson v. United States, 530 U.S. 428, 443 (2000) (noting that “even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some ‘special justification’”) (quoting United States v. Int’l Bus. Machs. Corp., 517 U.S. 843, 856 (1996))); Payne, 501 U.S. at 827 (“Adhering to precedent ‘is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.’”) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting))); Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 644 (1819) (“[A]lthough a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given.”).
83. See, e.g., Dickerson, 530 U.S. at 443 (“Whether or not we would agree with Miranda’s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of stare decisis weigh heavily against overruling it now.”); Hudgens v. NLRB, 424 U.S. 507, 518 (1976) (“It matters not that some Members of the Court may continue to believe that the Logan Valley case was rightly decided. Our institutional duty is to follow until changed the law as it now is, not as some Members of the Court might wish it to be.”) (citations omitted)); see also Nat’l Bank v. Whitney, 103 U.S. 99, 102 (1880) (“Judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, certainly not because of subsequent doubts as to their soundness.”).
Art. III, § 1, must be deemed to be the judicial power as understood by our common-law tradition. That is the power “to say what the law is,” not the power to change it. I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense “make” law. But they make it as judges make it, which is to say as though they were “finding” it—discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be. Of course this mode of action poses “difficulties of a practical sort,” when courts decide to overrule prior precedent. But those difficulties are one of the understood checks upon judicial law-making; to eliminate them is to render courts substantially more free to “make new law,” and thus to alter in a fundamental way the assigned balance of responsibility and power among the three branches.86

Despite his recognition of the difficulties posed by the necessity of following precedent and overruling precedent when it has become unworkable, Justice Scalia believes that stare decisis provides the U.S. legal system with a “workable prescription for judicial governance”; it allows for predictability and stability in the law, without which judges’ methodology would be “so disruptive of the established state of things that it [would] be useful only as an academic exercise.”87

Proponents of unpublished opinions respond, however, that the Court has merely articulated the prudential nature of stare decisis. They claim that stare decisis is a policy, not an absolute requirement; specifically, they cite language in Lawrence v. Texas, in which the Court noted that “[t]he doctrine of stare decisis is essential to the respect accorded to judgments of the Court and to stability of the law. It is not, however, an inexorable command.”88 However, the Court seems to have used this language to suggest that stare decisis does not require that the Court abide by past decisions that have become unworkable in contemporary context; indeed, the Court can overrule or distinguish prior precedent.89 Thus, as a policy—whether the Court recognizes it as constitutional or otherwise—stare decisis is not a rigid policy that demands blind adherence to prior decisions of the Court; however, it does require that prior cases be followed or overruled if they are “on all fours” with a subsequent case, or that prior cases be acknowledged and accordingly distinguished if their facts

87. Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 138–40 (1997). Justice Scalia states, however, that stare decisis is not a part of his originalist philosophy, but rather a “pragmatic exception to it.” Id. at 140.
89. See Richard H. Fallon, Jr., Stare Decisis and the Constitution: An Essay on Constitutional Methodology, 76 N.Y.U. L. Rev. 570, 583 (2001) (“Occasionally a Justice will protest that to accord too much weight to the doctrine would be incompatible with the judicial oath. But these protests are best understood as involving the appropriate strength of stare decisis, not whether the doctrine should exist at all.” (footnotes omitted)).
lead to a different ultimate conclusion. The Court has recognized this more tempered view of stare decisis and has acknowledged that this tempered view still means that prior cases must be accorded some precedential effect—they cannot be completely disregarded: “While stare decisis is not an inexorable command . . . the doctrine carries such persuasive force that [the Court has] always required a departure from precedent to be supported by some special justification.” Moreover, that special justification should be articulated in the Court’s opinion, not merely implied.

Furthermore, the Supreme Court alluded to the constitutional status of the doctrines of precedent and stare decisis in Planned Parenthood of Southeastern Pennsylvania v. Casey: “the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.” Although the Court has not held that stare decisis has a constitutional basis since, it has continued to firmly entrench the doctrine in its case law.

In light of over 200 years of case law entrenching the doctrine of stare decisis, it is apparent that the Supreme Court regards stare decisis as a check on judicial power in all cases, and departure from precedent must always be supported by some special justification. Unpublished opinions are contrary to 200 years of Supreme Court doctrine and, in light of the Framers’ intent, contrary to the constitutionally required respect that must be accorded precedent.

90. See Pollock v. Farmers’ Loan & Trust Co., 157 U.S. 429, 647 (1895) (White, J., dissenting) (“[A]n adjudication need not be extended beyond the principles which it decides. While conceding this, it is submitted that, if decided cases do directly, affirmatively, and necessarily, in principle, adjudicate the very question here involved, then, under the very text of the opinions referred to by the court, they should conclude this question.”); see also Baker v. Carr, 369 U.S. 186, 236–37 (1962) (“The discretionary exercise or nonexercise of equitable or declaratory judgment jurisdiction . . . in one case is not precedent in another case where the facts differ.” (alteration in original) (emphasis added) (quoting Cook v. Fortson, 329 U.S. 675, 678 n.8 (1946)).

As noted supra note 69, the binding precedent of an opinion is the holding and articulated rules of law as applied to a specific set of facts; it does not encompass language outside of those pieces of the opinion. See Kastigar v. United States, 406 U.S. 441, 454–55 (1972) (noting that broad language unnecessary to the Court’s prior decision “cannot be considered binding authority”); Humphrey’s Ex’r v. United States, 295 U.S. 602, 627–28 (1935) (noting that language of the Court that is beyond the point involved in the opinion is not within the rule of stare decisis, even though it “may be followed if sufficiently persuasive” (emphasis added)); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399 (1821) (“[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.”). It does, however, encompass “those portions of the opinion necessary to that result by which [the Court is] bound.” Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 67 (1996).


92. Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 18 (2000) (“This Court does not normally overture, or so dramatically limit, earlier authority sub silentio.”).

B. UNPUBLISHED OPINIONS DO NOT ACCORD PROPER RESPECT FOR PRECEDENT AS REQUIRED BY THE CONSTITUTION AND THE HISTORY OF THE U.S. LEGAL SYSTEM

The use of unpublished opinions fails to accord the proper respect for stare decisis that is demanded by the Supreme Court’s delineation of the doctrine and the Framers’ understanding of the judicial power as embedded in the Constitution. The use of non-precedential opinions not only fails to provide a constitutionally required check on the judiciary but rather provides judges with greater freedom in the performance of their duties. First, unpublished opinions, instead of constraining judges, present the opportunity for abuse. In practice, judges have used unpublished opinions to deal with unsettled areas of law and to announce new rules of law. Second, the American system of precedent is one whereby the precedential value of a case is defined in light of past and future cases. Thus, individual judges should not determine the precedential status of their own opinions at the time of writing them. Lastly, judges should not be able to depart from the holdings or rules of prior opinions without the “special justification” demanded by the Supreme Court for departing from precedent.

1. In Practice, Unpublished Opinions Have Not Merely Applied Well-Settled Law to Fact

Amongst the values of the doctrine of precedent, the Supreme Court has recognized that “[c]ertainly the courts could not provide expeditious resolution of disputes if every rule were fair game for de novo reconsideration in every case.”94 Thus, an important question to be explored is whether the use of unpublished opinions creates a system whereby rules of law are reconsidered in subsequent cases, instead of prior articulations of rules of law governing subsequent cases, as demanded by the doctrine of precedent.

Proponents of unpublished opinions assert that these opinions are proper to use when no new law is enunciated, and most circuit rules counsel in favor of publication when a case articulates a new rule of law, modifies an established rule, or applies an established rule to novel facts.95 However, one internal study conducted by the D.C. Circuit found that forty percent of the Circuit’s unpublished decisions presented issues that warranted publication according to the Circuit’s publication rules because they dealt with unsettled areas of law or articulated new rules of law.96 It appears that unpublished opinions have been used (1) to discuss and dispose of cases that deal with unsettled areas of the law and (2) to announce new rules of law. Litigants should not be prevented from relying on the new precedent contained in such decisions.

95. See supra notes 24–25 and accompanying text.
(1) One sign that the treatment of unpublished opinions as non-binding contributes to the relitigation of rules of law is that the law discussed in unpublished decisions has not been, in all instances, unsettled. Many unpublished decisions have dissents or concurrences, indicating that the law is not as well-settled as courts would assert. If the three judges on a panel cannot agree on the proper resolution of an issue, this suggests that at least one of those judges does not find the case law—even case law within the circuit—settled on the issue.

Here, an important distinction should be made. Case law might be well-settled within a particular circuit but not well-settled elsewhere. The federal judicial system contains thirteen separate federal circuits or jurisdictions. Each court of appeals is responsible for ensuring the consistency of case law within its own circuit. However, under the system of vertical precedent, the decisions of the Supreme Court are binding on each of the courts of appeals. Thus, each court of appeals is also supposed to ensure that its decisions are consistent with both the case law of the circuit generally and that of the Supreme Court.

Two unpublished decisions of circuit courts were even reversed by the Supreme Court, indicating that the highest court in the country did not agree that the issue was well-settled as the circuit court resolved it. In United States v. Edge Broadcasting Co., the Supreme Court reversed an unpublished decision of the Fourth Circuit that held a federal statute unconstitutional.98 The Supreme Court itself expressed bewilderment at the use of an unpublished opinion for such an important decision: “We deem it remarkable and unusual that although the Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished *per curiam* opinion.” Similarly, in County of Los Angeles v. Kling, the Supreme Court ordered summary reversal of an unpublished Ninth Circuit decision based on a prior ruling.100 Justice Stevens dissented from the summary disposition of the Court’s decision and criticized the Ninth Circuit for failing to publish the decision: “That decision not to publish the opinion . . . like the decision to promulgate a rule spawning a body of secret law—was plainly wrong.” Supreme Court reversal of unpublished opinions demonstrates that

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99. Id. at 425 n.3.
101. Id. at 938 (Stevens, J., dissenting).
use of unpublished opinions has not been solely reserved for issues of settled law.

Why is it so important that judicial opinions that adjudicate unsettled issues of law have precedential value? Because if an area of law is unsettled, future cases dealing with the same area of law will surely arise in the future. If these future cases deal with the same material facts and same legal issues, the prior case will be on all fours with the subsequent case; in such an instance, the doctrine of precedent demands that the prior case be binding on the subsequent one. As discussed earlier, stare decisis does not require broad interpretations of prior cases to cover all new situations, but it does require that sufficiently similar cases be bound by the holding of a prior case. If the material facts and legal issues of a subsequent case are similar but not precisely on point, the doctrine of precedent also requires that future courts either apply, distinguish, or overrule the prior case, but certainly not ignore it.

(2) Another issue is that some unpublished opinions have announced new rules of law, whether or not their authors intended them to do so, and have applied law to facts in new situations. If this occurs, judges are creating new law and then, by making their decisions unpublished (and thus non-binding precedent), preventing future litigants who may be similarly situated from relying on this new law.

As noted in the preceding Part, the Eighth Circuit’s holding in Christie v. United States announced a new rule of law, which Faye Anastasoff attempted to avoid having applied (by claiming it was not binding) in Anastasoff v. United States. Furthermore, many litigants cite to unpublished decisions, and attempted to do so in the past even when circuit rules prior to Rule 32.1 prohibited them from doing so. This suggests that those opinions contain something which published opinions do not. This phenomenon was acknowledged in In re Rules of the United States Court of Appeals for the Tenth Circuit, which noted that if unpublished opinions did not contain new rules of law, “considerations of efficiency and economy would lead counsel to rely on published decisions, rather than dig for unpublished rulings.” If unpublished opinions merely applied rules of law that had been previously articulated in published opinions, litigants would rely primarily on that published opinion, because published decisions, unlike unpublished opinions, would be accorded binding effect. However, litigants cite to unpublished decisions because they have value: even if unpublished decisions do not contain new rules of law, they may contain application of established law to new facts that are similar to those in a future case. Litigants should be able to at least cite to these cases for

102. See supra note 69 and accompanying text.
104. Anastasoff v. United States, 223 F.3d 898, 900–04 (8th Cir.), vacated as moot, 235 F.3d 1054 (8th Cir. 2000).
binding precedential effect if the case is directly on point.106

2. Individual Judges Should Not Determine the Precedential Status of Their Own Opinions

If unpublished opinions are being used to handle unsettled areas of law and announce new rules of law that will not have binding effect on future cases, the potential for abuse is much greater in light of the fact that individual judges are the ones that determine the precedential status of their opinions. In fact, this unchecked power of judges to decide whether their opinions will have precedential value is one of the primary problems with the current system of unpublished opinions. This ability to relegate some opinions to unpublished status is contrary to the proper understanding of precedent, which notes that the precedential value of a particular case is determined over time, as it is analyzed by subsequent cases. The current practice detrimentally affects the public’s perception of the federal judiciary.

A judge should not be the one determining whether his opinion should have subsequent effect on future decisions.107 As Justice Stevens has articulated: “[A] rule which authorizes any court to censor the future of its own opinions rests on a false premise. Such a rule assumes that the author is a reliable judge of the quality and importance of his own work product.”108

One of the important features of precedent is that subsequent decisions will expound upon prior ones, allowing the law to grow and develop over time.109 Thus, the precedential value of a case is determined by subsequent opinions, not from one particular opinion: “An uncontrovertible answer to the question of which factual differences are relevant to a case’s precedential impact cannot be obtained until the precedent case is actually interpreted by later courts.”110

To be sure, the way that a subsequent court characterizes a prior case is important to the way that case will be understood in the future.111 This was acknowledged by the Tenth Circuit in In re Rules of the United States Court of Appeals for the Tenth Circuit: “Furthermore, when we make our ad hoc determination that a ruling is not significant enough for publication, we are not in as informed a position as we might believe. Future developments may well

106. See Price, supra note 55, at 112.
107. RUPERT CROSS, PRECEDENT IN ENGLISH LAW 41 (3d ed. 1977) (“One thing a judge cannot do is prevent his decision on a point of law from constituting precedent.”); see also Quitschau, supra note 57, at 871 (“It is not wholly the province of the ruling judge to decide the precedential value of his or her decision.”).
108. John Paul Stevens, Some Thoughts and Reflections on the Litigation Explosion and How It Has Affected the Court’s Ability To Cope with the Problem, 65 ILL. B.J. 508, 510 (1977).
109. See 1 Laurence H. Tribe, American Constitutional Law §§ 1–16, at 79 (3d ed. 2000) (“The course of human events . . . is capable of teaching lessons that seem to compel one to read the same text in a new way.”).
111. See Martha Dragich Pearson, Citation of Unpublished Opinions as Precedent, 55 HASTINGS L.J. 1235, 1258–59 (2004).
reveal that the ruling is significant indeed.” 112 The rules laid out in a particular court opinion will most properly develop as part of the body of law only in light of past and future decisions. 113

Yet another way that this practice of judges determining the precedential effect of their own decisions undermines the restraints of precedent is that precedent requires judges to consider the implications of their decision both on the parties at bar and on future similarly situated litigants. It requires that today’s decisionmakers “take into account what would be best for some different but assimilable events yet to occur.” 114 However, judges armed with a preconception before writing that an opinion is not worthy of publication remove this constraint from themselves. They are no longer obligated to take into account what effect the opinion would have on future parties. This is particularly dangerous if, as the previous section notes, unpublished opinions are in fact announcing new rules of law and handling issues in unsettled areas of law.

Furthermore, the practice of judges making ad hoc determinations that remove certain opinions from the body of precedent may be detrimental to the courts’ institutional authority. One basis for the rule of stare decisis articulated by the Supreme Court is that the constraint of abiding by precedent preserves “public faith in the judiciary as a source of impersonal and reasoned judgments.” 115 Precedent “fosters the appearance of certainty and impartiality by providing a seemingly neutral source of authority” to justify decisions and “[limit[s] the actual impact which any single judge . . . has on the shape of the law,” 116 by “dampen[ing] the variability that would otherwise result from dissimilar decisionmakers.” 117 Stare decisis assures a continuity from decision to decision that ensures that the law is being impartially applied. This virtually unchecked authority of judges to assign precedential or non-precedential authority to their own opinions detrimentally affects the public perception of the courts. Confidence in judges’ impartial administration of the law is essential to the judiciary as an institution. 118 An understanding of precedent as binding would serve to “enhance the perceived power of the judiciary, and would make it somewhat more likely that courts will be able to impose a single authoritative vision of federal law on the other branches of government.” 119

Some would posit that judicial review of unpublished opinions is a sufficient

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112. In re Rules of the U.S. Court of Appeals for the Tenth Circuit, 955 F.2d 36, 38 (10th Cir. 1986).
113. See Comments of Trial Lawyers for Public Justice, supra note 18, at 12–19.
114. Schauer, supra note 69, at 589; see also id. at 573 (“A system of precedent . . . involves the special responsibility accompanying the power to commit the future before we get there.”).
116. Maltz, supra note 110, at 371 (second emphasis added).
117. Schauer, supra note 69, at 600.
118. See, e.g., Bush v. Gore, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting) (“It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law.”).
safeguard on those opinions. Supporters of the practice of unpublished opinions argue that as long as a higher court can reverse unpublished opinions that articulate new rules that are incorrect or erroneously apply law to facts, there is a sufficient check on the judiciary. However, at the federal appellate level, review by the Supreme Court or even the en banc court of appeals is extremely unlikely. Particularly when eighty-three percent of judicial opinions are designated unpublished, and only about four percent of the certiorari petitions submitted to the Supreme Court are granted, judicial review of unpublished opinions is not a satisfactory check on the potential for their abuse. The federal court system’s legitimacy is undermined when a court departs from precedent without special justification.

3. Judges Should Not Be Able To Depart from the Holdings or Rules of Prior Opinions Without Explanation or Justification

The problem of unpublished opinions is compounded by the fact that, under the present system, judges can determine themselves whether or not their opinions have precedential value, and they may subsequently depart from the rules or holdings in those prior unpublished opinions.

Stare decisis “carries such persuasive force that . . . departure from precedent . . . [must] be supported by some ‘special justification.’” However, departures from precedent contained in unpublished decisions do not require special justification. Rather, unpublished opinions are automatically accorded non-binding status, even if they are on all fours with subsequent cases. As previously articulated, precedent is only binding if it is on all fours with subsequent cases. However, if the same exact facts and circumstances are not present in a subsequent case, the doctrine of precedent still requires at least that prior cases on point be acknowledged, and then overruled or distinguished if they prove unworkable or inapplicable to the present case. Moreover, the doctrine of precedent applies to all cases, not just those which a judge has designated as worthy of precedent. The use of unpublished opinions allows judges to ignore relevant precedent, merely because it is unpublished. Although under Rule 32.1, parties must be permitted to cite the case, there is no obligation to address and distinguish or overrule a prior unpublished decision that is on point.

A judge cannot truly know the precedential value of an opinion before writing it. Precedent is a doctrine that functions over time: it “is both backward-looking (when a court today looks to the past for guidance) and forward-looking (when a court today contemplates the future ramifications of its decision in the

120. DUFF, supra note 7, at 48 tbl.S-3.
123. See supra section III.A.2.
Because these prior cases are not binding, a court might have little reservation in deciding a similar case differently; it could treat a case decided by the court of appeals of its own circuit as though it were decided by a state court or a court within a different circuit. This is inconsistent with the hierarchy of courts in the federal system, wherein a district court is bound by the (published) decisions of a higher court within the same circuit. People within a specific jurisdiction should be able to treat the decisions of their circuit court of appeals as a clear guide for individual conduct. Courts should not “lightly...set aside specific guidance” in judicial precedent within their jurisdiction, and precedent is contained in each and every decision that a court issues, not just in published opinions.

IV. THE EFFICIENCY JUSTIFICATION’S INADEQUACY & PROPOSED SOLUTIONS

A. THE EFFICIENCY JUSTIFICATION IS NOT A SATISFACTORY JUSTIFICATION FOR THIS SYSTEM OF DEPARTURE FROM PRECEDENT

As discussed earlier, the efficiency justification is the primary defense offered by supporters of using unpublished opinions and treating them as non-binding precedent. However, the doctrine of stare decisis is a constitutionally required restraint on the judiciary, which ensures that judges are constrained in the performance of their duties. This check on the judiciary ought not to be disregarded merely on grounds of efficiency.

To be sure, the Court has recognized that the system of checks and balances makes the U.S. political system unwieldy at times. However, such a system is necessary in a constitutional democracy, which aims to prevent the concentration of power in any one person or branch of government:

[To best achieve democratic government, the Framers] rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity. Not so long ago it was fashionable to find our system of checks and balances obstructive to effective government. It was easy to ridicule that system as outmoded—too easy. The experience through which the world has passed in our own day has made vivid the realization that the Framers of our Constitution were not inexperienced doctrinaires. These long-headed statesmen had no illusion that our people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power.

Assuredly, the Framers knew the evils of an unconstrained judiciary and desired
to restrain the exercise of the judicial power. They thus adopted a system in which each branch would serve as a check on the other two branches and each would also be restrained in its own powers. James Madison, in *Federalist No. 51*, acknowledged this reality: “[Y]ou must first enable the government to control the governed; and in the next place oblige it to control itself.” The constraint of precedent on the judiciary is one way that the government has been obliged to control itself. But supporters of unpublished opinions would shirk this restraint due to their concerns for efficiency.

Although supporters of unpublished opinions contest that unpublished decisions are necessary because otherwise the bulk of precedent would become too unwieldy and create an unworkable system, this problem was foreseen by the Founders. However, they accepted this future problem as necessary to provide restraint on the judicial branch. The Supreme Court has noted that the Framers’ envisioned structure of the American political system may pose burdens on the government’s efficiency; however, the Court has noted that inefficiency is not a justification for disregarding the governmental system contemplated by the Framers. Indeed, it appears that:

[T]he Framers ranked other values higher than efficiency . . . .

. . . .

The choices we discern as having been made in the Constitutional Convention impose burdens of governmental processes that often seem clumsy, inefficient, even unworkable, but . . . [t]here is no support in the Constitution

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128. See *Youngstown*, 343 U.S. at 594 (“The Framers, however, did not make the judiciary the overseer of our government. They were familiar with the revisory functions entrusted to judges in a few of the States and refused to lodge such powers in this Court.”).

129. *The Federalist No. 51*, at 348 (James Madison) (Carl van Doren ed., 1945). Indeed, the judiciary should control itself, in its own exercise of power, and operate as a check on the legislative and executive branches in their exercise of power. As former Attorney General Levi noted:

The essence of the separation of powers concept formulated by the Founders from the political experience and philosophy of the revolutionary era is that each branch, in different ways, within the sphere of its defined powers and subject to the distinct institutional responsibilities of the others is essential to the liberty and security of the people. Each branch, in its own way, is the people’s agent, its fiduciary for certain purposes.

. . . . Fiduciaries do not meet their obligations by arrogating to themselves the distinct duties of their master’s other agents.


130. See supra section III.A.1; see also *The Federalist No. 78*, supra note 59, at 430 (Alexander Hamilton) (“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.*” (emphases added)).
or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided... 131

The burden imposed by the doctrines of precedent and stare decisis—the need to examine all prior cases to determine if they are directly on point and therefore binding—is heavy, “but it is what a system based on the rule of precedent requires in all cases, not only novel or difficult ones.” 132 To be sure, this may mean that more time needs to be devoted to the writing of certain opinions and that backlogs may grow, but “[t]he doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power.” 133 The Constitution purposefully restrained the judiciary by imposing the requirement of adherence to precedent, 134 and as constitutional scholar Laurence Tribe has noted, “[t]he Constitution cannot be cabined in any calculus of costs and benefits.” 135 Thus, in light of the constitutional status of precedent and the doctrine’s entrenched nature in the American legal system, institutional limitations do not justify the refusal to treat unpublished opinions as binding precedent. A better, more constitutionally acceptable solution is required.

B. POSSIBLE SOLUTIONS TO THE INSTITUTIONAL LIMITATIONS OF THE JUDICIARY

As this Note has articulated, the practice of using unpublished opinions undermines the constitutionally and historically perceived role of precedent as a restraint on the judiciary. However, the pressure exerted on the judiciary from an ever-increasing caseload and continuous time pressure is not to be discounted. This Note recognizes the severe burden that bulging caseloads work on the federal judiciary. Because the institutional limitations of the judiciary remain a problem, merely declaring that all unpublished opinions should have binding precedential effect in situations when their published counterparts would have binding effect will not solve the problem. As some judges have suggested, that would require them to devote more time to cases and would result in an unreasonable backlog of cases. Although Judge Arnold found this to

131. INS v. Chadha, 462 U.S. 919, 959 (1983); see also id. at 944 (“Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . .”). In Kokkonen v. Guardian Life Insurance, the Supreme Court held that concerns for judicial efficiency did not justify federal courts taking ancillary jurisdiction over breach of a settlement agreement over breach of a settlement agreement from a prior federal case that had been dismissed due to settlement. Kokkonen v. Guardian Life Ins., 511 U.S. 375, 380–81 (1994); see also Charles K. Bloeser, Note, Kokkonen v. Guardian Life: Limiting the Power of Federal District Courts To Enforce Settlement Agreements in Dismissed Cases, 30 TULSA L.J. 671, 689 (1995).
132. Pearson, supra note 111, at 1292.
134. See supra section III.A.
be an acceptable resolution in *Anastasoff*; this Note recognizes that it is not desirable. Thus, this Note argues that both published and unpublished decisions should have binding precedential value and suggests two proposed solutions to the institutional limitations of the current federal judiciary: (1) an increase in the number of Article III judges; or (2) use of a separate committee to review judges’ designations of opinions as published or unpublished and inclusion of boilerplate language in unpublished opinions stating that established law has only been applied to new facts.

1. Increasing the Number of Article III Judges

The primary solution to the institutional limitations of the federal judiciary is to increase the number of Article III judges. If the increasing federal caseload continues to be incredibly burdensome, the judiciary would benefit from more judges to shoulder the burden. This idea was proposed by Judge Arnold in the *Anastasoff* opinion. The idea was also proposed earlier—in 1993—by Judge Stephen Reinhardt of the Ninth Circuit. Reinhardt acknowledged that “our federal court system is too small for the job,” and that “when our caseload increases, we inevitably pay less attention to the individual cases.”

Increasing the size of the federal judiciary has been proposed several times, most recently by the Federal Judgeship Act of 2008. This bill was introduced in the Senate in March 2008. The bill would add twelve permanent seats to U.S. courts of appeals and thirty-eight permanent seats to U.S. district courts. It would also make permanent five temporary judgeships and create two new temporary seats in the Ninth Circuit and fourteen temporary district court seats. Although the bill’s sponsors do not expressly mention unpublished opinions as a problem necessitating the increase in the size of the judiciary, one sponsor, Senator Leahy, noted that the increase was necessary “to maintain the integrity of the Federal courts and the promptness that justice demands, judges must have a manageable workload.”

Although the entire federal judiciary would undoubtedly benefit from an increase in the size of its ranks, a better proposal to address the issue of unpublished opinions would be to increase only the size of the courts of appeals. Because increasing the number of district courts would result in hastier resolution of district court cases, yielding an increase the appellate courts’ workload, and because the courts of appeals are in a hierarchical position in the

136. Anastasoff v. United States, 223 F.3d 898, 904 (8th Cir.), vacated as moot, 235 F.3d 1054 (8th Cir. 2000).
137. Id. (“The remedy, instead, is to create enough judgeships to handle the volume . . . .”).
140. Id. §§ 2(a), 3(a).
141. Id. §§ 2(b), 3(b)–(c).
federal judiciary whereby their precedential decisions have greater effect (i.e., they will bind all the district court judges in the circuit), an increase in the number of appellate judges alone would be beneficial.\textsuperscript{143} Increasing only the number of appellate judges would also cost less money than increasing the size of the entire judiciary.\textsuperscript{144}

Some argue that an increase in the number of judges will increase inconsistency among panels and decisions, thus undermining the stability of the law and the value of precedent.\textsuperscript{145} However, even with doubling the number of circuit judges, this would be unlikely. There are currently 178 federal courts of appeals judges.\textsuperscript{146} The First Circuit has the fewest judges—six—and the Ninth Circuit has the most—twenty-eight.\textsuperscript{147} It certainly cannot be argued that doubling the number of judges in circuits with fewer than fourteen judges (nine of the thirteen circuits) would erode stability in the law, since the Ninth Circuit currently operates with twenty-eight. In the remaining four circuits, an increase, even to fifty-six judges, would not be unreasonable. Of course, a concerted effort would need to be made by the judges to be familiar with the case law of the circuit and to cooperate with each other in performance of their duties. But because one prerequisite of this solution is that all individual panels’ decisions and en banc decisions will be accorded proper binding effect, the intended result should be greater consistency among each circuit’s decisions, not less.\textsuperscript{148}

Increasing the size of the Article III appellate judiciary would allow for the courts’ increasing caseload to be dispersed more evenly. The addition of judges would assuredly allow appellate judges to devote more time to the opinions on their docket. This would allow the appellate judges to treat all opinions equally, not requiring for a distinction between the treatment given to published and unpublished opinions. In reality, by giving all opinions equal precedential

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143. Recognizing that district court judges are struggling under bulging caseloads as well, an alternative would be to increase the number of federal district court judges modestly, while doubling the number of appellate judges. \textit{Cf.} Reinhardt, \textit{supra} note 138, at 53.

144. This Note recognizes that financial constraints are a realistic concern regarding increasing the size of the federal judiciary. However, “the cost of operating the judicial system is an infinitesimal part of our national expenditures,” Reinhardt, \textit{supra} note 138, at 53, and, as this Note has demonstrated, the problem of unpublished opinions affects the entire federal judiciary in a real way. Accordingly, the expenditure is important enough to justify the federal budget’s attention, and it is indeed necessary to the proper functioning of the government as a whole.

145. \textit{See, e.g., Gordon Bermant et al., Fed. Judicial Ctr., Imposing a Moratorium on the Number of Federal Judges: Analysis of Arguments and Implications 23–54 (1993) (analyzing arguments for and against increasing the size of the federal judiciary).}


147. \textit{Id.}

148. Of course, other modifications might need to be made to the current system. For example, it is unclear whether an en banc panel of fifty-six judges would be effective or desirable. One possible modification might be that instead of en banc panels, majority panels (constituted of thirty judges from the circuit) could meet to review panel decisions. Again, however, this would primarily be a concern only with the Ninth Circuit. The next largest circuit, the Fifth Circuit, has seventeen judges, so an increase would only result in a thirty-four judge panel not much larger than the twenty-eight judge panel that currently meets en banc in the Ninth Circuit.
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effect, courts may save themselves time in the future. If a prior case is fairly on point, as long as that opinion has “published” precedential status, the court’s opinion can assert that a new case is governed clearly by the prior case and explain why. Judges would not feel compelled to “reinvent the wheel” (or even just to cursorily reinvent the wheel, as in some unpublished opinions) by painstakingly avoiding reliance on or citation to an unpublished case. Nor would they have to fear confusion, if they do rely upon an unpublished case, as to why that case was unpublished in the first place.

Because the time and caseload pressures on the judiciary are the primary reason articulated for the necessity of unpublished opinions, the addition of judgeships would be a substantial step in solving this problem.

2. A Separate Committee Designating Opinions as Published or Unpublished & Boilerplate Language

Another possible solution to the problem would not require a substantial change to the way that unpublished opinions are written, nor a change in the terminology used to describe opinions. This solution largely consists of using unpublished opinions to address the same time constraints and bulging caseloads they were originally intended to confront but changes the process by which such opinions are issued and their precedential treatment. If time constraints truly necessitate that members of the judiciary devote less time to certain opinions, judges could continue to write opinions the way they do, by initially making a determination for themselves whether an opinion involves a factual or legal issue of continuing public interest; establishes a new rule of law; criticizes existing law; resolves an apparent conflict of authority; serves as a significant guide to future litigants; or resolves a conflict of authority. In this regard, the current rules that circuits have regarding publication would be instructive, and the process would not be significantly different from the present system.

After the judge drafts the opinion, the opinion could be reviewed by an independent Publication Review Board, which would examine the opinion in light of existing law in the circuit to determine if the opinion does conform to publication or non-publication standards. This addresses the potential problem


150. The idea of an independent review board might present certain constitutional problems. For this reason, I would advocate that the members of the review board be appointed, in a presidential-appointment-and-congressional-approval process like that required for Article III judges, and that they receive life tenure and compensation. This naturally invites the question how this is different from increasing the number of Article III judges. However, the independent review board would have a singular function, as articulated above. Furthermore, the idea of this board responds to a concern of many judges that increasing the number of Article III judges would diminish the prestige of the Article III judiciary, resulting in an inability to continually attract the best candidates. See, e.g., Bankruptcy Court Revision: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary on H.R. 8200, 95th Cong. 9–10 (statement of Simon Rifkind, Past President, American College of Trial Lawyers); Daniel J. Meltzer, Legislative Courts, Legislative Power, and the Constitution, 65 Ind. L.J. 291, 293 (1990); Eric A. Posner, The Political Economy of the Bankruptcy Reform Act of 1978, 96 Mich. L. Rev. 47, 79–80 (1997).
of judges making their own determinations of whether an opinion contains new law or other novel facets. If this review confirms that the opinion indeed fits the criteria for an opinion that need not be published, the opinion could be marked as unpublished and include boilerplate language stating that the opinion does not expand or create new rules of law, but rather applies preexisting law to the context of the specific facts of the case at bar. The boilerplate language could make clear that the language and wording of the opinion do not intend to enunciate new rules of law. This will prevent litigants from citing the opinion in unrelated cases, such as when litigants filing a brief merely pluck a sentence from a court opinion unrelated to the issue in their case, but it will allow future litigants to use the opinion for factually based arguments—arguments in subsequent cases that similar facts and the same legal issue mandate the same holding as in the prior case.

Because such a prior case, even if it announced no new rules of law, would be binding in a factually similar case, the precedential concerns would be addressed. Again, this is because precedent is not intended to be rigidly binding in all future cases: precedent should only bind factually similar cases, and in cases which are not similar, prior cases may be persuasive, but need not be binding. This proposed solution addresses several other concerns. First, because the opinion would have binding effect on a factually similar case or claim in the future, the law as articulated in the unpublished opinion would provide a clear guide for the conduct of individuals. Parties in subsequent cases would be able to argue their cases based on the pre-existing rules of law utilized in the opinion (which presumably would appear originally in published opinions) and analogize the facts of their case to the facts in the unpublished case. Because the boilerplate language warns that no new rules of law were announced in the opinion, these parties would be prevented from arguing that the precise wording of the opinion creates new rules applicable to the subsequent case. In effect, the boilerplate language would merely be stating what it is that unpublished opinions currently are intended to signify: that no new law is announced in a particular opinion. However, this system would preclude judges from being in a position whereby they could abuse their ability to designate opinions as unpublished. These cases would still have an effect consistent with the Framers’ and Supreme Court’s conception of precedent: if a future case is on all fours with a prior case, even though it be designated unpublished, that prior case will still have binding precedential effect, and stare decisis will compel judges to follow that prior decision’s logic. However, litigators would be prevented from seizing upon hastily written language to extend the law further than was intended in the initial case. Furthermore, because the unpublished opinion would be binding on future cases containing similar facts and legal issues, there would be no unnecessary re-litigation of rules of law. Finally, public faith in the judiciary would be instilled because the judiciary would not be removing an entire class of cases from the body of binding precedent, and thereby removing a constitutionally required restraint on the judiciary.
CONCLUSION

Although Federal Rule of Appellate Procedure 32.1 presents a step forward in the use of unpublished opinions, their continued treatment as non-binding precedent is not constitutionally acceptable. Failure to accord unpublished opinions the same precedential effect as published opinions ignores the constitutional requirement of stare decisis intended by the Framers and the cautionary words of the Supreme Court regarding the treatment of precedent. This Note has addressed concerns that have been raised by unpublished opinions—namely, that they have not always been used to apply well-settled law to fact, that there is a potential for abuse when judges determine the precedential status of their own opinions, and that an explanation or justification is required when judges depart from the legal holdings or rules of prior cases.

Accordingly, unpublished opinions need to be given the same binding precedential effect as published opinions. This Note recognizes and explains that part of the resistance to according unpublished opinions full precedential status stems from a misunderstanding of the proper role of binding and persuasive precedent. Once the proper role of precedent is embraced, in order to deal with the resulting burden to the judiciary, this Note proposes two possible, modest solutions: an increase in the number of Article III judges, or the use of a separate committee to designate opinions as published or unpublished and the inclusion of boilerplate language asserting that no new rules of law were articulated in the opinion. Either solution would be a step in the right direction toward restoring the Framers’ original conception of precedent to the way the current judicial system operates and would be much more consistent with the Supreme Court’s case law regarding the importance of stare decisis and precedent.