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# Draining the Morass: Ending the Jurisprudentially Unsound Unpublication System

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# DRAINING THE MORASS: ENDING THE JURISPRUDENTIALLY UNSOUND UNPUBLICATION SYSTEM

DAVID R. CLEVELAND\*

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\* Assistant Professor of Law at Nova Southeastern University, Shepard Broad Law Center. Professor Cleveland would like to express his gratitude to Kathy Cerminara for her extremely helpful suggestions throughout the drafting process, and to his students, Ashley Zuckerman and Sin-Ting Mary Liu, for their outstanding research assistance. This Article, as well as his prior article, *Overturing the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, were the subject of a presentation at the Southeastern Association of Law Schools (SEALS) 2008 Conference; Professor Cleveland would like to thank SEALS for that forum and his mentor in that process, Scott Dodson, for his advice.

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## I. INTRODUCTION

The experiment with unpublication of federal appellate cases has failed. The constitutionality of declaring certain cases to be outside the body of precedent has never been addressed by a rulemaking body or determined by the United States Supreme Court, but cases seeking such a constitutional ruling should be brought. The history of our judicial system and the unfairness of the unpublication system suggest that the process of stripping precedential status from some decisions is not constitutional. Moreover, several Supreme Court Justices have expressed concern about the unpublication system or support for the historical perspective that precedent is integral to judicial power under the Constitution. Together, these things make the issue ripe for review.

The practice of issuing some federal appellate court opinions as unpublished, uncitable, and unprecedential was instituted in the mid-1970s following an influential report by the Advisory Council on Appellate Justice's Committee on Use of Appellate Court Energies (the 1973 Committee).<sup>1</sup> The practice of issuing opinions in this manner, referred to throughout this Article as the "unpublication system," was launched without addressing the jurisprudential implications of declaring some common law decisions to be nonprecedent.<sup>2</sup> The authors of the unpublication system viewed the task of justifying the denial of precedential status to some opinions as "a morass of

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1. The Advisory Council on Appellate Justice, Committee on Use of Appellate Court Energies, (the 1973 Committee) drafted a report, *Standards for Publication of Judicial Opinions: A Report of the Committee on Use of Appellate Energies of the Advisory Council on Appellate Justice*, which forms the basis for the present federal unpublication system. In that report, the 1973 Committee proposed issuing some decisions as unpublished and uncitable. When faced with the question of whether this new class of decisions would be precedent, it chose not to examine the issue, its constitutionality, or its practicality, calling it a "morass of jurisprudence." This unexamined, unjustified change to the common law system must be addressed. See ADVISORY COUNCIL ON APPELLATE JUSTICE, COMM. ON USE OF APP. CT. ENERGIES, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS: A REPORT OF THE COMMITTEE ON USE OF APPELLATE ENERGIES OF THE ADVISORY COUNCIL ON APPELLATE JUSTICE (1973) [hereinafter STANDARDS FOR PUBLICATION].

2. *Id.* at 20.

jurisprudence” and avoided it entirely.<sup>3</sup> Now that these formerly unworthy opinions are both widely published<sup>4</sup> and freely citable,<sup>5</sup> only the third alteration to the status of these opinions remains: they are not precedent. This is the most problematic and least justified of the three changes suggested by the 1973 Committee.

As a way to reduce the federal judicial workload and reduce case archiving and researching costs, the 1973 Committee decided that some cases that did not make new law could be issued as unpublished.<sup>6</sup> To ensure that there was no market for such opinions, it was decided to prevent citation to them.<sup>7</sup> Finally, the Committee considered what precedential status this new class of unpublished, uncitable opinions would have.<sup>8</sup> It understood that it would be best for the system if these decisions were unprecedential, but it also understood that proclaiming them to be so was problematic.<sup>9</sup> The Committee shrewdly refrained from denying that unpublished opinions were precedent. Instead, it took a position that “relies on the correspondence of publication and precedential value on the one hand, and of non-publication and non-precedential value on the other.”<sup>10</sup> That is, if the practicing bar and public cannot see the opinions, then they cannot use them as precedent—a sort of judicial out of sight, out of mind. Unfortunately, the number of federal appellate decisions rendered as “unpublished” has risen to over 84%.<sup>11</sup> The “correspondence” anticipated by the Committee has failed, despite rising rates of unpublished decisions. Lawyers and judges do value such cases, to the extent that they are now fully published and freely citable.

This correspondence upon which the Committee relied has unraveled almost entirely. It has been undermined by changes in technology, persistent practice by the federal bar and federal judiciary, and the new Federal Rule of

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3. *Id.*

4. Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. REV. 705, 709–10 (2006); Kirt Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541, 551 (1997). See generally E-Government Act of 2002, Pub. L. No. 107-347, § 205(a)(5), 116 Stat. 2899, 2913 (codified at 44 U.S.C. § 3501 (2006)); WEST’S FEDERAL APPENDIX.

5. FED. R. APP. P. 32.1.

6. STANDARDS FOR PUBLICATION, *supra* note 1, at 5, 12.

7. *Id.* at 18–20. The fact that such a limitation was necessary signals that these cases *do* make new law by expanding, contracting, or simply applying existing standards, which belies the error in the entire premise of the scheme.

8. *Id.* at 18.

9. *Id.* at 18–19.

10. *Id.* at 21.

11. ADMIN. OFFICE OF THE U.S. CTS., JUDICIAL BUSINESS OF THE UNITED STATES COURTS 52 tbl.S-3 (2006) [hereinafter JUDICIAL BUSINESS], available at <http://www.uscourts.gov/judbus2006/tables/s3.pdf> (showing the percentage unpublished in the twelve-month period ending September 30, 2006, to be 84.1%).

Appellate Procedure 32.1. Though still labeled “unpublished opinions,” these opinions are published, not only online but also in printed volumes such as the West’s Federal Appendix. This is in large part due to the continuous use of these opinions by practitioners and judges—despite the opinions’ citation or precedential status.<sup>12</sup> Finally, the new Federal Rule of Appellate Procedure allows citations of all opinions (albeit prospectively).<sup>13</sup> These opinions are now effectively published and plainly citable. The only remaining feature of the 1970s unpublication system is the fundamental jurisprudential impact of removing cases from the body of precedent—the most important feature of the system, but also the one with unexamined justifications. This should be examined and the precedential status of these opinions acknowledged.

The Supreme Court has referred to the issue of unpublished opinions only in passing, and it has never taken on the question directly, either on a petition for certiorari or as part of its rulemaking authority. It has been presented the issue directly as part of petitions for certiorari more than thirty times<sup>14</sup> but has

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12. David R. Cleveland, *Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. APP. PRAC. & PROCESS 61, 166–73 (forthcoming 2009).

13. FED. R. APP. P. 32.1.

14. Petition for Writ of Certiorari, *Untracht v. Fikri*, 128 S. Ct. 1666 (2008) (No. 07-932), 2008 WL 154432 [hereinafter *Untracht Petition*]; Petition for Writ of Certiorari, *Spiegel v. Volvo Cars N. Am., L.L.C.*, 128 S. Ct. 911 (2008) (No. 07-573), 2007 WL 3225519 [hereinafter *Spiegel Petition*]; Petition for Writ of Certiorari, *Canatella v. Van De Kamp*, 128 S. Ct. 669 (2007) (No. 07-453), 2007 WL 2890417 [hereinafter *Canatella Petition*]; Petition for Writ of Certiorari, *Family Fare, Inc. v. NLRB*, 127 S. Ct. 2991 (2007) (No. 06-1536), 2007 WL 1481871 [hereinafter *Family Fare Petition*]; Petition for Writ of Certiorari, *Wheeler v. Mo. Dir. of Revenue*, 549 U.S. 1266 (2007) (No. 06-1054), 2007 WL 275948 [hereinafter *Wheeler Petition*]; Petition for Writ of Certiorari, *Stilley v. Marschewski*, 549 U.S. 1112 (2007) (No. 06-520), 2006 WL 2966557 [hereinafter *Stilley Petition*]; Petition for Writ of Certiorari, *Shefchuk v. Ill. Union Ins. Co.*, 549 U.S. 952 (2006) (No. 05-1384), 2006 WL 1151375 [hereinafter *Shefchuk Petition*]; Petition for Writ of Certiorari, *N. Pacifica L.L.C. v. City of Pacifica*, 546 U.S. 1138 (2006) (No. 05-604), 2005 WL 3067191 [hereinafter *N. Pacifica Petition*]; Petition for Writ of Certiorari, *Heavrin v. Schilling*, 546 U.S. 1137 (2006) (No. 05-508), 2005 WL 2708404 [hereinafter *Heavrin Petition*]; Petition for Writ of Certiorari, *O.S.C. Co. v. Zymblosky*, 546 U.S. 936 (2005) (No. 05-156), 2005 WL 1811046 [hereinafter *O.S.C. Petition I*]; Petition for Writ of Certiorari, *O.S.C. Co.*, 546 U.S. 936 (No. 05-156), 2005 WL 1811047 [hereinafter *O.S.C. Petition II*]; Petition for Writ of Certiorari, *Rana v. United States*, 546 U.S. 877 (2005) (No. 05-255), 2005 WL 2055899 [hereinafter *Rana Petition*]; Petition for Writ of Certiorari, *Seils v. Rochester City Sch. Dist.*, 544 U.S. 920 (2005) (No. 04-807), 2004 WL 2912787 [hereinafter *Seils Petition*]; Petition for Writ of Certiorari, *Zimmerman v. City of Oakland*, 543 U.S. 819 (2004) (No. 03-1678), 2004 WL 1400165 [hereinafter *Zimmerman Petition*]; Petition for Writ of Certiorari, *Schmier v. Sup. Ct. of Cal.*, 543 U.S. 818 (2004) (No. 03-1660), 2004 WL 1369162 [hereinafter *Schmier III Petition*]; Petition for Writ of Certiorari, *Rodriguez v. HFP, Inc.*, 541 U.S. 903 (2004) (No. 03-971), 2004 WL 50121 [hereinafter *Rodriguez Petition*]; Petition for Writ of Certiorari, *Carey v. Knox County*, 540 U.S. 1218 (2004) (No. 03-770), 2003 WL 22867741 [hereinafter *Carey Petition*]; Petition for Writ of Certiorari, *Reply Brief, Test v. Comm’r*, 538 U.S. 961 (2003) (No. 02-1170), 2003 WL 21698680 [hereinafter *Test Reply Brief*]; Petition for Writ of Certiorari, *Martin v. KeyCorp*, 538 U.S. 961 (2003) (No. 02-1150), 2003 WL 21698636 [hereinafter *Martin Petition*]; Petition for Writ of Certiorari, *Berrafato v. Prudential Ins. Co. of Am. Sales Practice Litig.*, 537 U.S. 1233 (2003) (No. 02-1015), 2002 WL 32133835 [hereinafter *Berrafato Petition*]; Petition for Writ of

denied all but one request.<sup>15</sup> Even in that one case, the Court ultimately decided the case without reference to the unpublication system.<sup>16</sup> Individual Justices have commented in professional writings, interviews, speeches, concurring and dissenting opinions, and similar venues about the unpublication system in ways that may provide clues to the Court's willingness to rule on the issue. The citadel of unpublication is falling,<sup>17</sup> and while it is by no means clear, there is at least some evidence to suggest that the Supreme Court may help with, or at least approve of, the demolition.

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Certiorari, *S. Clay Prods., Inc. v. United Catalysts, Inc.*, 537 U.S. 1189 (2003) (No. 02-848), 2002 WL 32133762 [hereinafter *S. Clay Prods. Petition*]; Petition for Writ of Certiorari, *Lewin v. Cooke*, 537 U.S. 881 (2002) (No. 02-49), 2002 WL 32134165 [hereinafter *Lewin Petition*]; Petition for Writ of Certiorari, *Lemelson Med. v. Symbol Techs.*, 537 U.S. 825 (2002) (No. 01-1855), 2002 WL 32135953 [hereinafter *Lemelson Med. Petition*]; Petition for Writ of Certiorari, *Alcan Aluminum Corp. v. Prudential Assurance Co.*, 536 U.S. 959 (2002) (No. 01-1594), 2002 WL 32135303 [hereinafter *Alcan Aluminum Petition*]; Petition for Writ of Certiorari, *Wendt v. Mineta*, 536 U.S. 941 (2002) (No. 01-1613), 2002 WL 32135384 [hereinafter *Wendt Petition*]; Petition for Writ of Certiorari, *Mims v. United States*, 534 U.S. 1132 (2002) (No. 01-862), 2001 WL 34117254 [hereinafter *Mims Petition*]; Petition for Writ of Certiorari, *Pappas v. UNUM Life Ins. Co.*, 534 U.S. 1129 (2002) (No. 01-772), 2001 WL 34117413 [hereinafter *Pappas Petition*]; Petition for Writ of Certiorari, *Segal v. Mass. Mut. Life Ins. Co.*, 534 U.S. 1041 (2001) (No. 01-494), 2001 WL 34115636 [hereinafter *Segal Petition*]; Petition for Writ of Certiorari, *Bostron v. Massanari*, 534 U.S. 896 (2001) (No. 01-290), 2001 WL 34116247 [hereinafter *Bostron Petition*]; Petition for Writ of Certiorari, *Knight v. Maleng*, 534 U.S. 820 (2001) (No. 00-1808), 2001 WL 34125170 [hereinafter *Knight Petition*]; Petition for Writ of Certiorari, *Smyly v. IBM*, 528 U.S. 982 (1999) (No. 99-367), 1999 WL 33639987 [hereinafter *Smyly Petition*]; Petition for Writ of Certiorari, *Schmier v. Jennings*, 522 U.S. 1149 (1998) (No. 97-1206), 1998 WL 34112160 [hereinafter *Schmier II Petition*]; Petition for Writ of Certiorari, *Culp v. Hood*, 519 U.S. 1042 (1996) (No. 96-696), 1996 WL 33421950 [hereinafter *Culp Petition*]; Petition for Writ of Certiorari, *Litton Sys., Inc. v. Carroll*, 516 U.S. 816 (1995) (No. 94-1989), 1995 WL 17050077 [hereinafter *Litton Sys. Petition*]; Petition for Writ of Certiorari, *Friedman v. Montgomery County*, 489 U.S. 1079 (1989) (No. 88-1190), 1988 WL 1093420 [hereinafter *Friedman Petition*]; Petition for Writ of Certiorari, *Van Sant v. U.S. Postal Serv.*, 475 U.S. 1082, *reh'g denied*, 476 U.S. 1131 (1986) (No. 85-1096), 1985 WL 695444 [hereinafter *Van Sant Petition*]; *Do-Right Auto Sales v. U.S. Ct. of App. for 7th Cir.*, 429 U.S. 917 (1976).

15. *Untracht*, 128 S. Ct. 1666; *Spiegel*, 128 S. Ct. 911; *Canatella*, 128 S. Ct. 669; *Family Fare*, 127 S. Ct. 2991; *Wheeler*, 549 U.S. 1266; *Stilley*, 549 U.S. 1112; *Shefchuk*, 549 U.S. 952; *N. Pacifica L.L.C.*, 546 U.S. 1138; *Heavrin*, 546 U.S. 1137; *O.S.C. Co.*, 546 U.S. 936; *Rana*, 546 U.S. 877; *Seils*, 544 U.S. 920; *Zimmerman*, 543 U.S. 819; *Schmier*, 543 U.S. 818; *Rodriguez*, 541 U.S. 903; *Carey*, 540 U.S. 1218; *Test*, 538 U.S. 961; *Martin*, 538 U.S. 961; *Berrafato*, 537 U.S. 1233; *S. Clay Prods., Inc.*, 537 U.S. 1189; *Lewin*, 537 U.S. 881; *Lemelson Med.*, 537 U.S. 825; *Alcan Aluminum Corp.*, 536 U.S. 959; *Wendt*, 536 U.S. 941; *Mims*, 534 U.S. 1132; *Pappas*, 534 U.S. 1129; *Segal*, 534 U.S. 1041; *Bostron*, 534 U.S. 896; *Knight*, 534 U.S. 820; *Smyly*, 528 U.S. 982; *Schmier*, 522 U.S. 1149; *Culp*, 519 U.S. 1042; *Litton Sys., Inc.*, 516 U.S. 816; *Friedman*, 489 U.S. 1079; *Van Sant*, 475 U.S. 1082; *Do-Right Auto Sales*, 429 U.S. 917.

16. *Browder v. Dir., Dep't of Corr.*, 434 U.S. 257, 258 n.1 (1978).

17. See Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROCESS 473, 473 (2003) (referencing Judge Cardozo's famous phrase in *Ultramares Corp. v. Touche*, 174 N.E. 441, 445 (N.Y. 1931), that "[t]he assault upon the citadel of privity [was] proceeding . . . apace" to make a similar claim regarding no-citation rules).

This Article will address this issue in four parts. First, it will examine, briefly, the history of publication and precedent. Second, it will set forth the constitutional infirmities in denying the precedential value of some decisions. Third, it will discuss the Supreme Court's treatment of challenges to the unpublication system. Finally, it will examine the statements of current Supreme Court Justices in separate opinions, scholarship, and media comments on the issue of unpublication system and precedent.<sup>18</sup>

## II. BRIEF HISTORY OF PUBLICATION AND PRECEDENT

Throughout English and American history, the publication status of an opinion was not directly determinative of its precedential value. That is, while it may have been difficult for litigants to find a court's past decisions, nothing prevented a litigant from bringing such a decision to the court's attention or suggesting that the court need not follow it.<sup>19</sup> The 1973 Committee set in motion an odd distinction that had not been present in common law in England or America. On its face, the Committee's recommendation claims to deal with only whether an unpublished case can be

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18. This Article focuses on the potential for Supreme Court review rather than on its potential rulemaking. The Supreme Court has the authority to change the Federal Rules of Appellate Procedure (FRAP) to clarify the precedential status of all opinions. Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2006). It is unclear whether an addition to FRAP 32.1 recognizing the precedential value of all opinions would take as long to approve as FRAP 32.1 did, or whether, given the unraveling of the unpublication system, such a change would be more quickly adopted. What is clear is that a change to the rule would be easy to draft technically by adding a part (c): “(c) The precedential value of any opinion, order, judgment, or written disposition shall not be affected by its designation as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like.” This language tracks that already in FRAP 32.1 for similar concepts. Some believe that the Advisory Committee on Appellate Rules ought to have included a more meaningful statement about precedent in FRAP 32.1, while others question whether the Rules Enabling Act would allow such a substantive issue to be addressed by rule. *Compare Unpublished*, 7 GREEN BAG 105, 107 (2004) (“Reasonable minds differ about whether the constitution does, or sound public policy should, permit courts to limit the use and legal force of unpublished opinions. It’s too bad the Advisory Committee has done next to nothing to address those differences. Most judges give better reasons for their decisions—at least in their published opinions.”) with Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang Over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429, 1484 n.273 (2005) (“A rule that prescribed the legal force that must be accorded unpublished opinions would likely ‘abridge, enlarge or modify’ the ‘substantive right[s]’ of the parties and thus proposing such a rule is likely beyond the authority provided by 28 U.S.C. § 2072(b) (2000).”). The decision of the Advisory Committee to avoid the issue of precedent is an understandable, if regrettable, one. But the idea that the circuits may deny the precedential status of some opinions by rule but the Supreme Court may not acknowledge the precedential status of all opinions makes little sense. If recognizing that all decisions have precedential value enlarges substantive rights, then surely denying precedential value to some decisions reduces those rights.

19. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 204 (3d ed. 1990) (Even in the earliest days of reporting cases, “[t]he rolls continued to be the most authoritative source of precedents into later times, and it was common for counsel to ‘vouch the record’ when citing a previous case.”).

*cited as precedent* and not whether it *is precedent*.<sup>20</sup> This is a distinction without a difference. The 1973 Committee plainly understood that removing a decision from publication and citation very effectively removed it from the body of precedent as well as from view. In fact, it relied on this “correspondence of publication and precedential value on the one hand, and of non-publication and non-precedential value on the other,”<sup>21</sup> to avoid examining the precedent issue in greater detail. A brief examination of the history of common law demonstrates the centrality of precedent to that system.<sup>22</sup> While there may be normative arguments about the desirability of a common law system, it is readily apparent that we have historically had one. As a cornerstone of the common law system, this central notion of precedent has survived the unpublication system, unraveled that system, and now waits to be reacknowledged.

#### A. Early England

The origins of modern common law and modern notions of legal precedent are typically traced to England under the reign of Henry II in the latter half of the twelfth century.<sup>23</sup> Henry II united England under a common system of laws and, as a contemporary legal treatise indicates, a coherent system of law involving both a central court and itinerant (circuit) court judges.<sup>24</sup> The result of this more fixed system was a professional bar and system of law so important that the arguments of members of the bar and the court itself were being recorded in books.<sup>25</sup> Once recorded, these arguments and the decisions of the court served as tools for the learning of the law, navigation of the court system by practitioners, and an aid to consistency in decision-making by courts.

After the first century under this budding system, famed jurist Henry de Bracton explained the principles and procedures of English law through a collection of cases (the *Note Book*) and an accompanying treatise (*Treatise on the Laws of England*) commonly referred to simply as *Bracton*.<sup>26</sup> Bracton’s treatise indicated existing reliance upon prior cases and aided future

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20. See STANDARDS FOR PUBLICATION, *supra* note 1, at 18–19.

21. *Id.* at 21.

22. A more lengthy recitation can be found in Cleveland, *supra* note 12, at 69–84.

23. BAKER, *supra* note 19, at 15.

24. *Id.* at 22.

25. *Id.* at 23.

26. HENRY DE BRACTON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE (ON THE LAWS AND CUSTOMS OF ENGLAND) (George E. Woodbine ed., Samuel E. Thorne trans., Harvard Univ. Press 1968) (1569); see also BAKER, *supra* note 19, at 201–02; JAMES W. TUBBS, THE COMMON LAW MIND: MEDIEVAL AND EARLY MODERN CONCEPTIONS 7–20 (2000).



development of the concept of precedent.<sup>27</sup> By the latter half of the thirteenth century, records of the arguments and decisions, in “the very words of judges and pleaders,” were being kept.<sup>28</sup> Yearbooks from the period reveal that both counsel and the court cited to prior decisions and openly acknowledged that their decisions would be viewed as precedent in later cases.<sup>29</sup> Early precedent was not limited to published accounts. By the sixteenth century, England had a number of case reports, including Plowden’s *Commentaries* and Bulstrode’s careful reporting of the decisions of the King’s Bench,<sup>30</sup> but the most influential of these was Sir Edward Coke’s thirteen-volume treatise of past cases, typically referred to as *The Reports*.<sup>31</sup> Sir Coke’s volumes were well-known, likely due to his comprehensiveness, style, and personal accomplishments.<sup>32</sup> Coke cited to both ancient and recent precedent and perceived precedent to be the center of the judicial exercise.<sup>33</sup> Coke viewed refinement of the law through repeated application as an important element of the common law.<sup>34</sup>

By the latter half of the eighteenth century there was a greater adherence to the dictates of precedent; a major proponent of this trend was Sir William Blackstone.<sup>35</sup> Blackstone perceived the adherence to precedent as the generally applicable rule and judicial discretion to ignore precedent as the exception—an exception that was limited to instances where the precedent was “manifestly absurd or unjust” or “contrary to reason.”<sup>36</sup> The effect of precedent as Blackstone perceived it became central to English jurisprudence:

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27. BRYCE LYON, A CONSTITUTIONAL AND LEGAL HISTORY OF MEDIEVAL ENGLAND 435–36 (2d ed. 1980).

28. BAKER, *supra* note 19, at 225.

29. *Id.* For example, one case reveals a judge, perhaps speaking directly to a case reporter, saying regarding his decision that “one may safely put that in his book for law.” *Id.* (citing *Midhope v. Prior of Kirkham*, 36 S.S. 178 (1313)).

30. *Id.* at 210.

31. Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 62 (2001); Anika C. Stucky, Comment, *Building Law, Not Libraries: The Value of Unpublished Opinions and Their Effects on Precedent*, 59 OKLA. L. REV. 403, 412–13 (2006).

32. Stucky, *supra* note 31, at 413.

33. *Id.*

34. Healy, *supra* note 31, at 66 (citing JOHN GREVILLE AGARD POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* 35 (1987)); H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1536–37 & n.91 (1987) (book review). Coke’s idealistic vision of improving the law itself through accumulation of applications of the law should be realized in modern common law systems. We possess the ability to record both arguments and decisions with greater certainty, to retain those records more permanently, and to disseminate the decisions to a wider audience. More applications of the principles of law to facts, such that those principles are tested and refined, improve our understanding of those principles and give greater certainty to those seeking to conform their conduct to them.

35. Healy, *supra* note 31, at 70.

36. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*69–70.

By the beginning of the nineteenth century, courts began to regard a line of decisions as absolutely binding, though they could still depart from a single decision, or even two decisions, for sufficient reasons. Gradually that exception also disappeared and by the latter half of the nineteenth century, courts asserted an obligation to follow all prior cases, no matter how incorrect. Even the House of Lords, which had never regarded its own precedents as binding, declared in 1861 that it was absolutely bound by its past decisions.<sup>37</sup>

Blackstone's ideas of precedent and common law are well-documented in his *Commentaries on the Laws of England* and were extremely influential in both England and America in the late eighteenth and early nineteenth centuries.<sup>38</sup> Indeed, Blackstone's *Commentaries* were influential in the early development of the United States legal system, which imported the common law system, with its notions of precedent.<sup>39</sup>

#### B. Early United States

"American courts have always adhered to a common law system that is dependent upon precedent."<sup>40</sup> America's<sup>41</sup> courts were varied during the founding and have changed since then, but their implicit reliance on inherited ideas about the law is difficult to deny. As Justice Story explained:

The case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and

37. Healy, *supra* note 31, at 72.

38. William S. Brewbaker III, *Found Law, Made Law and Creation: Reconsidering Blackstone's Declaratory Theory*, 22 J.L. & RELIGION 255, 255 (2007) ("Sir William Blackstone's *Commentaries on the Laws of England* is arguably the single most influential work of jurisprudence in American history."); Herbert J. Storing, *William Blackstone*, in HISTORY OF POLITICAL PHILOSOPHY 622-34 (Leo Strauss & Joseph Cropsey eds., 3d ed. 1987); see also Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 2 (1996); Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 489-96 (1996); Rupert Cross, *Blackstone v. Bentham*, 92 L.Q. REV. 516, 516 (1976); S.F.C. Milsom, *The Nature of Blackstone's Achievement*, 1 OXFORD J. LEGAL STUD. 1, 1 (1981); Wilfrid Prest, *Blackstone as Architect: Constructing the Commentaries*, 15 YALE J.L. & HUMAN. 103, 108 (2003).

39. Cleveland, *supra* note 12, at 78-80.

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

41. The use of "America" throughout this Article refers, of course, to the United States of America, not to the Americas at large. Hopefully, the meaning is clear, and the connotation is that the author is succinct, not that he is provincial.

authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them, when they first emigrated to this country; and it is, and always has been considered, as the great security of our rights, our liberties, and our property. It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice, or will of particular judges.<sup>42</sup>

Blackstone's *Commentaries* and his ideas about precedent were as resonant with American lawyers as they were with English lawyers: "[t]he *Commentaries* became the chief if not the only law books in every lawyer's office, and the most important if not the only textbook for law students."<sup>43</sup> Many scholars have noted the profound effect of Blackstone's common law scholarship on the thinking of both the revolutionary and founding generations of America.<sup>44</sup> Blackstone's *Commentaries* have been described as the principal source of legal education of Alexander Hamilton<sup>45</sup> and an awe-inducing inspiration to the young James Kent.<sup>46</sup>

In the late eighteenth and early nineteenth centuries, Blackstone's philosophy was married with increased reporting of case decisions.<sup>47</sup> Much as it had in England, the law had become less dependent upon natural or divine law and more a law of artificial reason.<sup>48</sup> It also became more the function of a professional, well-trained legal profession with an interest in increasing the power of the court system.<sup>49</sup> Once the states had adopted<sup>50</sup> the parts of

42. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 377 (1833) (quoted in *Anastasoff v. United States*, 223 F.3d 898, 903–04 (8th Cir. 2000), *vacated as moot on other grounds en banc*, 235 F.3d 1054 (8th Cir. 2000)).

43. DAVID A. LOCKMILLER, SIR WILLIAM BLACKSTONE 170 (1938).

44. William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 VT. L. REV. 5, 6 (1994).

45. JACOB ERNEST COOKE, ALEXANDER HAMILTON 29 (1982).

46. Bader, *supra* note 44, at 11 (quoting WILLIAM KENT, MEMOIRS AND LETTERS OF JAMES KENT LL.D. 18 (1898)).

47. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 89 (3d ed. 2005).

48. Compare Mark L. Jones, *Fundamental Dimensions of Law and Legal Education: An Historical Framework—A History of U.S. Legal Education Phase I: From the Founding of the Republic Until the 1860s*, 39 J. MARSHALL L. REV. 1041, 1099–1102 (2006) (recounting at length the circumstances of Lord Coke's explanation of artificial reason in the law) and Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 585 (2006) (discussing Coke's description of artificial reason) with Carl F. Stychin, *The Commentaries of Chancellor James Kent and the Development of an American Common Law*, 37 AM. J. LEGAL HIST. 440, 451–52 (1993) (discussing Chancellor Kent's similar view of American law as founded upon such "cultivated and artificial reason[ing]").

49. Bader, *supra* note 44, at 6–7; Stychin, *supra* note 48, at 451–52.

50. The technical term is "received."

English common law they felt *were* applicable and developed their own common law precedents, precedent took—and has maintained—a prominent position in American jurisprudence.<sup>51</sup>

Throughout the nineteenth century, *stare decisis* strengthened in the United States.<sup>52</sup> Chief Justice John Marshall's opinion in the landmark *Marbury v. Madison* emphasizes the importance of each judicial decision as an element of the developing case law.<sup>53</sup> Justice Story's well-known comment about the centrality of adherence to precedent in American law shows a similar reverence for all cases being of precedential value: "A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles."<sup>54</sup> From Justice Story's time to today, adherence to precedent and the application of *stare decisis* have been the most prominent features of the American legal system.<sup>55</sup> Indeed, "[o]ld common-law attitudes toward precedent are so deeply ingrained in the behavior of American lawyers and judges that they hardly rise to the conscious level,"<sup>56</sup> and "American attitudes toward precedent are the attitudes of Coke, Blackstone, Marshall, and Kent, although courts no longer feel the need to cite to these authors, or the decisions on which they relied."<sup>57</sup> That the concepts of precedent and *stare decisis* are inherent in our legal system is easy to see, but they have been sidestepped, without real consideration, by the unpublication system.

### C. Universal Publication in the Twentieth Century

While neither precedent nor case publication is a precondition for the other,<sup>58</sup> reliable case reports do strengthen the use of precedent.<sup>59</sup> The desire for an American common law noted above led to states designating "official"

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51. Mortimer N.S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 AM. J. COMP. L. SUPP. 67, 67 (2006).

52. Healy, *supra* note 31, at 87.

53. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."). Judge Arnold's phrasing of this principle in *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000), seems apt: "Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law."

54. STORY, *supra* note 42, § 377.

55. Sellers, *supra* note 51, at 67.

56. *Id.*

57. *Id.* at 73.

58. BAKER, *supra* note 19, at 204 (explaining that even when the only record of decision was the courts' rolls, lawyers and judges would rely upon their own memories and understanding of the cases' decisions "vouch[ing] [for] the record" as needed).

59. CARLETON KEMP ALLEN, *LAW IN THE MAKING* 297 (7th ed. 1964).

state reporters to increase the reliability of reports and create more systematic coverage in the early nineteenth century.<sup>60</sup> What had once been the bailiwick of motivated jurists and practitioners became a government function, and while this provided an official common reference, it was often slow and not as useful as the former reporters.<sup>61</sup> By the end of that century, John B. West and the West Publishing Co. changed the face of legal publishing by producing more efficient, complete, and systematic reports.<sup>62</sup> West's goal was interesting in two respects. First, he sought "to collect, arrange in an orderly manner and put into convenient and inexpensive form in the shortest possible time, the material which every judge and lawyer must use."<sup>63</sup> This statement reveals the importance, visible even to a non-lawyer, that the legal system placed on its decisions. Second, West chose to publish all judicial decisions, rather than choosing to publish only a selected subset of them.<sup>64</sup> This move was a departure from past practice and had its critics, but West's perception of the market was right—"[]lawyers chose the comprehensive [system] . . . preferring that all precedent be available."<sup>65</sup>

In the early twentieth century, lawyers' desire for comprehensive reporting of actual case decisions was poignantly shown by the rejection of the American Law Institute's attempt to replace case law with a Restatement that extracted the "best" principles of law.<sup>66</sup> Unwilling to accept that only certain core-principle cases mattered, lawyers continued to cite cases and relied upon the Restatement as a useful, but secondary, source.<sup>67</sup> Attempting to again direct lawyers only to certain allegedly more important cases by declaring certain cases unworthy at the time of publication has been similarly ineffective. The legal market has demanded publication and now citation of these decisions, and has used unpublished decisions throughout the life of the unpublication system.

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60. Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CAL. L. REV. 15, 19 (1987).

61. *Id.* at 20.

62. *Id.* at 21.

63. John B. West, *A Symposium of Law Publishers*, 23 AM. L. REV. 396, 406 (1889), quoted in Thomas A. Woxland, *Forever Associated With the Practice of Law: The Early Years of the West Publishing Company*, 5 LEGAL REFERENCE SERVICES Q. 115, 118-19 (1985).

64. Berring, *supra* note 60, at 21.

65. *Id.*

66. *Id.* at 23.

67. *Id.*

*D. Limited Publication and Justification*

Complaints about the growing body of case law are certainly not new.<sup>68</sup> However, the modern unpublication system was set in motion in 1964 when the Federal Judicial Conference recommended that the United States Courts of Appeals consider reporting only those decisions that would be of “general precedential value” in order to deal with “the ever increasing practical difficulty and economic cost of establishing and maintaining . . . law library facilities.”<sup>69</sup> Little action was taken on this suggestion until the 1973 Federal Judicial Center’s Advisory Council on Appellate Justice issued a report, *Standards for Publication of Judicial Opinions*, recommending limited publication and citation that included a draft plan for circuit courts to adopt.<sup>70</sup> In that report, nonpublication and noncitation seemed to go hand-in-hand because permitting citation would create a market for these decisions.<sup>71</sup> The federal circuit courts began to adopt rules limiting publication and citation, mostly according to the draft plan.<sup>72</sup> By 1974, each circuit, which had previously published all opinions,<sup>73</sup> had submitted plans to the Judicial Conference for how it would limit publication and citation.<sup>74</sup>

However, neither the 1964 Conference nor the 1973 Committee openly denied precedential status to these new unpublished opinions.<sup>75</sup> Publication plans limited publication to those cases of greatest, broadest precedential value but did not inherently diminish the precedential value of other cases.<sup>76</sup> In fact, the Advisory Council expressly considered a provision assigning

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68. 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, 1168–69 & n.17 (1978) (noting a prominent federal judge’s complaints about volume voiced in 1915).

69. ADMIN. OFFICE OF THE U.S. CTS., REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964) [hereinafter 1964 CONFERENCE REPORTS], cited in Reynolds & Richman, *supra* note 68, at 1169 n.17; Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 219 n.1 (1999).

70. STANDARDS FOR PUBLICATION, *supra* note 1, at 4.

71. *Id.* at 6.

72. See *id.* app. I at 22–23; see also Norman R. Williams, *The Failings of Originalism: The Federal Courts and the Power of Precedent*, 37 U.C. DAVIS L. REV. 761, 770 n.29, 772 (2004).

73. David Greenwald & Frederick A.O. Schwarz, Jr., *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133, 1142 (2002); see also Reynolds & Richman, *supra* note 68, at 1171.

74. Berring, *supra* note 60, at 15–20 (noting West Publishing Co.’s policy of publishing all case opinions rather than some subset of them in a movement toward complete publication); Jon A. Strongman, Comment, *Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value is Unconstitutional*, 50 U. KAN. L. REV. 195, 197 (2001) (noting that the 1970s proved a breaking point for the practice of uniform publication of federal circuit opinions).

75. Williams, *supra* note 72, at 770–71.

76. 1964 CONFERENCE REPORTS, *supra* note 69, at 11.

unpublished opinions no precedential value, but it purposely avoided making such a suggestion.<sup>77</sup> Instead, it attempted to take a position that “deal[t] with use rather than philosophic effect”;<sup>78</sup> that is, it recommended merely denying *publication* and *citation* of the unpublished opinions and said nothing about their actual precedential value.<sup>79</sup> Though the circuit courts initially took a similar approach by adopting publication plans that did not mandate a lesser or different precedential status for unpublished decisions,<sup>80</sup> within a few years, most federal court rules made these unpublished cases nonprecedential.<sup>81</sup>

Such a progression, from nonpublished to noncitable to nonprecedential, seems logical and in its own way almost necessary.<sup>82</sup> Limited publication is not a new idea; it dates back to the earliest reporters, which were selective in what they published.<sup>83</sup> But declaring decisions to be *uncitable* and, moreover, *not precedent* was contrary to jurisprudential theory underlying the common law paradigm.<sup>84</sup> This removal of decisions from the body of common law

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77. STANDARDS FOR PUBLICATION, *supra* note 1, at 20.

78. *Id.* at 20–21. Justice Alito described this same structural shift somewhat more charitably:

[I]t struck me that the judges of the early 1970s, mostly World War II veterans, had responded to the tremendous increase in the appellate caseload with the same uncomplaining, can-do attitude that their generation had displayed as young men. They quickly identified a number of techniques that permitted the courts of appeals to keep up with their cases without *seeming* to make fundamental alterations in their mode of operation.

Justice Samuel A. Alito, How Did We Get Here? Where Are We Going?, Keynote Address at Washington and Lee University School of Law, Law Review Symposium: Have We Ceased to Be a Common Law Country? A Conversation on Unpublished, Depublished, Withdrawn and Per Curiam Opinions SSA-01710 (Mar. 18, 2005) [hereinafter Alito Symposium Address] (transcript available at [http://www.law.com/pdf/dc/alito\\_unpublished.pdf](http://www.law.com/pdf/dc/alito_unpublished.pdf)).

79. STANDARDS FOR PUBLICATION, *supra* note 1, at 20.

80. Williams, *supra* note 72, at 771.

81. *Id.* at 772.

82. “Unpublished” cases that remained citable and precedential would be sought out despite their formal publication status, but creating a rule that a decision is both noncitable and nonprecedential effectively removes that decision from the body of common law. Only by restricting opinions on all three grounds (publication, citation, and precedent) could one hope to make some opinions truly “disposable.” This, of course, was unsuccessful because practitioners placed value on these opinions despite their diminished status. *See generally, e.g.*, Lauren K. Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399 (2002) (examining the recent surveys of federal judges and lawyers); Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989) (examining a survey of how government litigants use unpublished opinions).

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

84. *Id.* at 128–45.

was a fundamental shift in the common law system.<sup>85</sup> Even in the early days of Yearbooks or the unsettled post-Revolution days of early American courts, no matter how scarce the record, cases could always be cited to the court as evidence of its past rulings. In the unpublication system of the mid-1970s, however, federal courts were unwilling to be bound by what they had done in a similar case in the past; in fact, they were unwilling to even be *told* about it.<sup>86</sup> Not because they had decided it inapplicable, but because another panel of the court had decided *ex ante*, at the time of the decision, that it would not aid future decision-makers.<sup>87</sup> Neither the 1973 Committee's report nor its recommendation reveal that any consideration was given to whether the federal circuits had the power to remove some cases from the body of precedent, whether such a move would be constitutional, or whether jurisprudentially this was a good idea. What we now know is that the market for these decisions never abated (and they are now published thanks to improved technology) and that both judges and lawyers continue to believe they ought to be citable (as evidenced by the new FRAP 32.1).

### *E. Unraveling of the Unpublication System*

The unpublication system is at its base a simple idea. One way to reduce “the ever increasing practical difficulty and economic cost of establishing and maintaining private and public law library facilities”<sup>88</sup> is to publish fewer

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85. English and early American practice uniformly allowed citation to and reliance upon prior decisions regardless of their publication status. Modern English practice is similar to its historical practice: unreported cases are unlikely to be cited but may be cited, if appropriate. See ROBERT J. MARTINEAU, APPELLATE JUSTICE IN ENGLAND AND THE UNITED STATES: A COMPARATIVE ANALYSIS 104 (1990). But see F. Allan Hanson, *From Key Numbers to Keywords: How Automation Has Transformed the Law*, 94 LAW LIBR. J. 563, 565–66 (2002) (quoting Roderick Munday, *The Limits of Citation Determined*, 80 LAW SOC'Y GAZETTE 1337, 1337 (1983) (claiming the British courts are “restricting the use of unreported materials which the computer revolution has suddenly made available to the profession. In particular, the House of Lords . . . has effectively outlawed the citation of unreported cases in argument before it”)).

86. Arnold, *supra* note 69, at 221 (“The bar is gagged. We are perfectly free to depart from past opinions if they are unpublished, and whether to publish them is entirely our own choice.”).

87. This shift was borne not out of a philosophical or jurisprudential need to prune the law; rather, it was created because of a need to reduce the expense of publishing, collecting, and maintaining law libraries as well as reducing the workload of the federal judiciary and lawyers. See STANDARDS FOR PUBLICATION, *supra* note 1, at 6–8. Aside from a general comment that “[u]nlimited proliferation of published opinions constitutes a burden and a threat to a cohesive body of law,” the balance of the Committee's seven factors are made up of pragmatic concerns about workload and logistics—many of which are wholly inapplicable in today's legal information setting. *Id.* at 6. Without diminishing the true economic and pragmatic need to deal with the problem of volume, which is a real one, it is troubling that the jurisprudential problems were not explicitly raised and weighed in to the proposed solution.

88. 1964 CONFERENCE REPORTS, *supra* note 69, at 11 (cited in Arnold, *supra* note 69, at 219 n.1; Reynolds & Richman, *supra* note 68, at 1169 n.17). A 1990 Federal Courts Study Committee, created by Congress in 1988, recognized that the decision to limit publication and citation was



cases. However, to achieve this, the cases must be declared uncitable, or publishers will continue to publish them.<sup>89</sup> Finally, if the case decisions were unpublished and uncitable, perhaps they are not precedent. This last piece, the least justified and most important piece, is the only one of the three that remains.

This tripartite scheme has unraveled under the natural pressure of the American legal system. Publication of these decisions has returned to near universality.<sup>90</sup> Citation of these decisions has been returned by federal procedural rule.<sup>91</sup> What remains is the question of the precedential value of these decisions—the very “morass of jurisprudence” the 1973 Committee was unwilling to wade into.

Comprehensive publication of these opinions is now a foregone conclusion. Technological advances have drastically altered the landscape of legal publishing and legal research over the last thirty to forty years.<sup>92</sup> Unpublished decisions, despite their moniker, are typically included in the commercial databases right alongside published decisions, such that a search for a given term in the Sixth Circuit, for example, retrieves both published and unpublished cases containing that term. Similarly, a search using West’s Keynotes or Lexis’s similar system retrieves both published and unpublished cases. Citation is now also a settled issue.<sup>93</sup> Federal Rule of Appellate Procedure 32.1 permits citation of all decisions issued after January 1, 2007.<sup>94</sup> The federal rulemaking process that led to this final rule is a long one, well-detailed elsewhere.<sup>95</sup> It is worth noting, however, that the Advisory Committee, which studied the issue and drafted the rule, was firm in its support of the new rule.<sup>96</sup> Most importantly, at least for the purposes of this

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always one of pragmatism and never one of principle, explaining, “[t]he policy in courts of appeals of not publishing certain opinions, and concomitantly restricting their citation, has always been a concession to perceived necessity.” FED. CTS. STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 130 (1990).

89. This happened anyway, regardless of the citation rules, which demonstrates the legal community’s understanding of the value of these cases. See Gant, *supra* note 4, at 709–10; Shuldberg, *supra* note 4, at 551. See generally E-Government Act of 2002, Pub. L. No. 107-347, § 205(a)(5), 116 Stat. 2899, 2913 (codified at 44 U.S.C. § 3501 (2006)); WEST’S FEDERAL APPENDIX.

90. Gant, *supra* note 4, at 709–10; Shuldberg, *supra* note 4, at 551. See generally E-Government Act of 2002, § 205(a)(5); WEST’S FEDERAL APPENDIX.

91. FED. R. APP. P. 32.1.

92. Shuldberg, *supra* note 4, at 551 (“These historic rationales for the limited publication/no-citation plans warrant re-examination in light of current technology.”).

93. FED. R. APP. P. 32.1.

94. *Id.*

95. Cleveland, *supra* note 12, at 94–106; Schiltz, *supra* note 18, at 1434–58.

96. At its April 2004 meeting, every member, save one, spoke in favor of the rule, and most did so in very serious terms, arguing that “an Article III court should not be able to forbid parties from

Article, is that Committee members, including Judge John G. Roberts, Jr. (now Chief Justice of the United States Supreme Court) and Judge Samuel A. Alito (now Associate Justice of the United States Supreme Court), noted that in their circuits, which already liberalized citation to allow unpublished opinions, no delay, backlogs, increased workload, or other problems were occurring, and both favored the rule.<sup>97</sup> Approval of this rule was also widespread among jurists and lawyers practicing in the federal system.<sup>98</sup>

What needs to be done “is to wade into the ‘morass of jurisprudence’ and confront the issue of precedential status. It is an issue of both principle and pragmatism, of what we must do and what we ought to do.”<sup>99</sup> To continue to allow the tail of practicality to wag the jurisprudential dog is to perpetuate a jurisprudence of doubt. Denying the precedential value of these decisions, now widely published and freely citable, is fraught with constitutional infirmities and practical problems.

### III. CONSTITUTIONAL ARGUMENTS FOR RETURNING TO PRECEDENT

There are numerous arguments for acknowledging the precedential status of all opinions.<sup>100</sup> First, the premises on which the unpublication system was built were faulty in the mid-1970s, and the ground has only shifted even further out from underneath them since then. Second, the practice of declaring some opinions not precedent at the time of decision is unconstitutional because it is outside of the judicial power granted by the Constitution and because it violates equal protection and due process.<sup>101</sup> Finally, both legal and lay audiences continue to believe in the power of precedent.<sup>102</sup> The

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citing back to it the public actions that the court itself has taken” and

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

Minutes of the Spring 2004 Meeting of the Advisory Committee on Appellate Rules 7–8 (Apr. 13–14, 2004) [hereinafter Advisory Committee], available at <http://www.uscourts.gov/rules/Minutes/app0404.pdf>. Other members called no-citation rules “extreme” and “ludicrous,” and one member-judge noted that limited citation rules made federal circuit judges “the only government officials who can shield themselves from being confronted with their past actions.” *Id.* at 8.

97. *Id.* at 7–8; see also Cleveland, *supra* note 12, at 102.

98. Cleveland, *supra* note 12, at 102–03; Schiltz, *supra* note 18, at 1453–57; Minutes of the Committee on Rules of Practice and Procedure 11 (June 17–18, 2004), available at <http://www.uscourts.gov/rules/Minutes/june2004.pdf>.

99. Cleveland, *supra* note 12, at 106.

100. *Id.* at 106–73.

101. *Id.* at 147–61.

102. *Id.* at 162–73.

expectation that the way a court decided a case yesterday is predictive of how it will (and ought to) rule tomorrow is well-ingrained in our legal system.<sup>103</sup> This powerful concept of how precedent underlies our legal system has sustained demand of unpublished opinions throughout the thirty-five-year unpublication system's operation, and it has led to the return of citation of these decisions.<sup>104</sup> Among this panoply of arguments arrayed against the unpublication system, the constitutional arguments are ripe for Supreme Court review. While the others provide background for any argument to the Court, it is the core constitutional claims that are most likely to gain certiorari.

Potential constitutional challenges could be brought on any of three bases: 1) judicial power under Article III meant the power to decide cases according to precedent; 2) nonprecedential opinions allow for unequal treatment of similarly situated parties in a way that violates the Equal Protection Clause; and 3) the removal of the ability to rely on all prior cases as precedent, a well-established feature of the common law, violates the Due Process Clause.

The fundamental constitutional infirmity with the process of denying the precedential status of unpublished cases is that Article III of the United States Constitution does not give federal courts the authority to decide which of their cases are precedential and which are good only for a single time and place. The crux of this argument is that *all* cases decided by the federal courts are precedent. The foremost proponent of this view, in both time and importance, has been Judge Richard Arnold.<sup>105</sup> Some proposed such a view of precedent prior to Judge Arnold's writings,<sup>106</sup> and many picked up the banner after Judge Arnold's provocative decision in *Anastasoff v. United States*.<sup>107</sup> In

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103. *Id.*

104. *Id.*

105. *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000); Arnold, *supra* note 69, at 221.

106. *See, e.g., In re Rules of U.S. Ct. of App. for 10th Cir.*, Adopted Nov. 18, 1986, 955 F.2d 36, 37 (1992) (Halloway, Barrett & Baldock, JJ., dissenting) ("Each ruling, published or unpublished, involves the facts of a particular case and the application of law—to the case. Therefore all rulings of this court are precedents, like it or not, and we cannot consign any of them to oblivion by merely banning their citation."); Bader, *supra* note 44, at 9–11; Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 754–55 (1988).

107. Stephen R. Barnett, *From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 1–2 (2002); Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 759 (2003); Charles R. Eloschway, *Say It Ain't So: Non-Precedential Opinions Exceed the Limits of Article III Powers*, 70 GEO. WASH. L. REV. 632, 632–33 (2002); Kenneth Anthony Laretto, *Precedent, Judicial Power, and the Constitutionality of "No-Citation" Rules in the Federal Courts of Appeals*, 54 STAN. L. REV. 1037, 1037–38 (2002); Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 73 (2001); Penelope Pether, *Take a Letter, Your Honor: Outing the Judicial Epistemology of Hart v. Massanari*, 62 WASH. & LEE L. REV. 1553, 1557 (2005); Johanna S. Schiavoni, *Who's Afraid of Precedent?: The Debate Over the Precedential Value of Unpublished Opinions*, 49 UCLA L. REV. 1859, 1864

*Anastasoff*, Judge Arnold authored an Eighth Circuit panel decision ruling that denying decisions precedential status exceeded the court's "judicial power" granted by Article III.<sup>108</sup> This decision was later vacated when the United States changed its policy and made the case itself moot.<sup>109</sup> However, this reading of Article III still has considerable merit.<sup>110</sup> Article III, Section 1, Clause 1 of the United States Constitution states: "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."<sup>111</sup> The term "judicial power" is not any further defined, but Judge Arnold sets forth a persuasive argument that the Framers understood a grant of limited power and that power does not extend to rendering nonprecedential opinions.<sup>112</sup> As a first principle, *Anastasoff* finds that every judicial decision is a declaration of law, which must be applied in subsequent similar cases.<sup>113</sup> The Framers were influenced by the writings of Coke, Hale, and Blackstone, which describe a common law system in which "the judge's duty to follow precedent derives from the nature of the judicial power itself."<sup>114</sup> Such authors viewed each decision of the court as adding to the body of law, "the law in that case, being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule."<sup>115</sup> The Framers' writings reveal a similar understanding of the centrality of precedent to the judicial power of the early American courts. For example, James Madison understood

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(2002); Steve Sheppard, *The Unpublished Opinion: How Richard Arnold's Anastasoff Opinion is Saving America's Courts from Themselves*, 2002 ARK. L. NOTES 85, 86 (2002); Michael B.W. Sinclair, *Anastasoff Versus Hart: The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions*, 64 U. PITT. L. REV. 695, 695, 699 (2003); Strongman, *supra* note 74, at 204; Jennifer Adams, Comment, *Law Today; Gone Tomorrow*, 53 BAYLOR L. REV. 659, 661 (2001); William J. Miller, Note, *Chipping Away at the Dam: Anastasoff v. United States and the Future of Unpublished Opinions in the United States Courts of Appeals and Beyond*, 50 DRAKE L. REV. 181, 183 (2001); Sheree L.K. Nitta, Note, *The Price of Precedent: Anastasoff v. United States*, 23 U. HAW. L. REV. 795, 796 (2001); Lance A. Wade, Note, *Honda Meets Anastasoff: The Procedural Due Process Argument Against Rules Prohibiting Citation to Unpublished Judicial Decisions*, 42 B.C. L. REV. 695, 731–32 (2001).

108. *Anastasoff*, 223 F.3d at 900, *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000).

109. *Anastasoff v. United States*, 235 F.3d, 1054, 1056 (8th Cir. 2000).

110. Cleveland, *supra* note 12, at 130–45.

111. U.S. CONST. art. III, § 1, cl. 1.

112. *Anastasoff*, 223 F.3d at 900.

113. *Id.* at 899–900 ("Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties. These principles, which form the doctrine of precedent, were well established and well regarded at the time this nation was founded. The Framers of the Constitution considered these principles to derive from the nature of judicial power, and intended that they would limit the judicial power delegated to the courts by Article III of the Constitution." (citations omitted)).

114. *Id.* at 901.

115. *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*69).

the courts as being bounded by the “authoritative force” of “judicial precedents” and observing the “obligation arising from judicial expositions of the law on succeeding judges.”<sup>116</sup> Similarly, Alexander Hamilton emphatically stated that “[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.”<sup>117</sup>

However, “the Anti-Federalists also assumed that federal judicial decisions would become authorities in subsequent cases.”<sup>118</sup> For example, the *Essays of Brutus Number XV* reveals concern that “one adjudication will form a precedent to the next, and this to a following one. These cases will immediately affect individuals only; so that a series of determinations will probably take place before even the people will be informed of them,”<sup>119</sup> while the Federal Farmer expressed the concern that the federal courts to be established had “no precedents in this country, as yet, to regulate the divisions in equity as in Great Britain; equity, therefore, in the supreme court for many years will be mere discretion.”<sup>120</sup> The contemporary writings reveal a broad and deep-seated understanding that the courts under the new United States Constitution would be of binding authority.<sup>121</sup> For the Framers, the concept of precedent was part and parcel of their understanding of judicial power, a power that was bounded by an obligation to find the law rather than make it.<sup>122</sup> It seems contrary to every notion of judicial power at the time of the founding that the Framers would have intended a system (or understood one) that would allow federal courts to make a decision good in only a single time and place and having no bearing on later decisions, or that courts could without reason or explanation depart from past decisions. In addition, the Framers did not possess the same “correspondence” between publication and

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116. *Id.* at 902 n.10 (quoting Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), reprinted in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 390, 391 (Marvin Meyers ed., rev. ed. 1981)).

117. *Id.* at 902 (quoting *THE FEDERALIST* NO. 78 (ALEXANDER HAMILTON)).

118. *Id.* at 902–03 (citing *ESSAYS OF BRUTUS* NO. XV (Mar. 20, 1788), reprinted in 2 *THE COMPLETE ANTI-FEDERALIST* 437, 441 (Herbert J. Storing ed., 1981); *LETTERS FROM THE FEDERAL FARMER* NO. 3 (Oct. 10, 1787), reprinted in 2 *THE COMPLETE ANTI-FEDERALIST*, *supra*, at 234, 244.

119. *ESSAYS OF BRUTUS* NO. XV, *supra* note 118, at 441.

120. *LETTERS FROM THE FEDERAL FARMER* NO. 3, *supra* note 118, at 224.

121. *Anastasoff*, 223 F.3d at 903; see also Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 *NOTRE DAME L. REV.* 1075, 1101 (2003) (“[R]emarks on the subject of precedent of these most prominent Federalists and Anti-Federalists show that they adhered to a theory of precedent basically consistent with the major common-law treatises of the day, and that they believed that the accumulating force of precedents would, over time, tend to authoritatively ‘fix’ the meaning of the Constitution. One theme to be found in their remarks is that adherence to precedent forestalls the accumulation of arbitrary power in the courts . . .”).

122. *Anastasoff*, 223 F.3d at 901–02.

precedent that underlies the 1973 Committee's work. "Unpublished" did not historically mean "unprecedented," and to equate the two flies in the face of the expectations and experiences of English common law and the founding generation of this country.<sup>123</sup> Judge Arnold summarized his case for the Framers' understanding of precedent as an inherent aspect of judicial power:

To summarize, in the late eighteenth century, the doctrine of precedent was well-established in legal practice (despite the absence of a reporting system), regarded as an immemorial custom, and valued for its role in past struggles for liberty. The duty of courts to follow their prior decisions was understood to derive from the nature of the judicial power itself and to separate it from a dangerous union with the legislative power. The statements of the Framers indicate an understanding and acceptance of these principles. We conclude therefore that, as the Framers intended, the doctrine of precedent limits the "judicial power" delegated to the courts in Article III.<sup>124</sup>

A second constitutional infirmity in the denial of precedent to unpublished cases is that it violates the Equal Protection Clause.<sup>125</sup> The practice of designating some opinions as nonprecedential violates equal protection because it treats similarly situated litigants in a disparate manner.<sup>126</sup> This unequal treatment inhibits a fundamental right, and the government's pragmatic justification is insufficient to meet the strict scrutiny standard.<sup>127</sup>

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123. *Id.* at 903 ("[T]he Framers did not regard this absence of a reporting system as an impediment to the precedential authority of a judicial decision. . . . [J]udges and lawyers of the day recognized the authority of unpublished decisions even when they were established only by memory or by a lawyer's unpublished memorandum."); *see also* BAKER, *supra* note 19, at 204 (noting that even the earliest common law courts allowed counsel to vouch for the record of prior cases when urging the court to decide similarly).

124. *Anastasioff*, 223 F.3d at 903; *see also* STORY, *supra* note 42, §§ 377–78 ("The case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them, when they first emigrated to this country; and it is, and always has been considered, as the great security of our rights, our liberties, and our property. It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice or will of particular judges. A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.").

125. *See, e.g.*, Miller, *supra* note 107, at 204; Strongman, *supra* note 74, at 215–17; Wade, *supra* note 107, at 714.

126. Strongman, *supra* note 74, at 220.

127. Cleveland, *supra* note 12, at 147–55; *see, e.g.*, 16B C.J.S. *Constitutional Law* §§ 1116–1120 (2007) (setting forth the standards for scrutiny).

The unpublication system's unequal treatment of similarly situated parties—actually the exact same party—is apparent in a pair of cases in which the Dallas Area Rapid Transit authority (DART) received diametrically opposed decisions from the Fifth Circuit without explanation in a span of just three years. In 1998 in *Anderson v. DART*, the United States District Court for the Northern District of Texas held that “DART is a political subdivision of the state of Texas, and is therefore immune from suit under the Eleventh Amendment,”<sup>128</sup> and the Fifth Circuit affirmed in an unpublished opinion.<sup>129</sup> When the Supreme Court denied certiorari, DART must have felt about as secure as possible that the rule establishing its immunity was settled in the Fifth Circuit. Yet while the federal district court applied this rule again in 2000 in *Williams v. DART*,<sup>130</sup> this time the Fifth Circuit held that DART was not entitled to Eleventh Amendment immunity based on Fifth Circuit case law dating back to 1986.<sup>131</sup> The Fifth Circuit in *Williams* is wholly dismissive of the prior result in *Anderson* (and two similar cases).<sup>132</sup> So, because the prior case holding DART immune was unpublished, it was not accorded precedential weight under the Fifth Circuit Rule 47.5.4,<sup>133</sup> and the court felt free to depart from it without distinguishing it in some fashion (which it could not do because the legally relevant facts were identical) or overruling the law on which the case was based.<sup>134</sup> Two identical cases decided within two years were decided differently based not on factually distinguishable factors or a change in the governing law, but merely the whim of one panel choosing not

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128. *Anderson v. Dallas Area Rapid Transit*, No. CA3:97-CV-1834-BC, 1998 U.S. Dist. LEXIS 15493, at \*24 (N.D. Tex. Sept. 29, 1998), *aff'd per curiam*, *Anderson v. DART*, 180 F.3d 265 (5th Cir. 1999) (per curiam) (unpublished), *cert. denied*, 528 U.S. 1062 (1999).

129. *Anderson*, 180 F.3d 265, *cert. denied*, 528 U.S. 1062 (1999).

130. The district court stated that “[i]t is firmly established that DART is a governmental unit or instrumentality of the State of Texas” and therefore entitled to Eleventh Amendment immunity. *Williams v. DART*, 256 F.3d 260, 261 (5th Cir. 2001) (Smith, Jones & DeMoss, JJ., dissenting) (quoting from district court opinion) (dissenting from denial of petition for rehearing en banc).

131. *Williams v. DART*, 242 F.3d 315, 318–19 (5th Cir. 2001).

132. *Id.* at 319 (“Although all three cases upheld DART’s immunity from suit, they are neither binding nor persuasive in this context.”).

133. 5TH CIR. R. 47.5.4 (“Unpublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case . . .”).

134. *Williams*, 242 F.3d at 322 (holding that “[t]he district court therefore erred in finding DART immune from suit”). This decision was not without a strong dissent. *Williams*, 256 F.3d at 260 (Smith, Jones & DeMoss, JJ., dissenting) (dissenting from denial of petition for rehearing en banc) (“The refusal of the en banc court to rehear this case en banc is unfortunate, for this is an opportunity to revisit the questionable practice of denying precedential status to unpublished opinions. . . . I respectfully dissent from the denial of rehearing en banc, which would have given this court an opportunity to examine the question of unpublished opinions generally, an issue that is important to the fair administration of justice in this circuit.”).

to publish. Not only was the defendant DART similarly situated in each case, but also as far as legally relevant facts go, it was *identically* situated.<sup>135</sup>

Another case that demonstrates the unequal treatment wrought by the unpublication system can be found in the Ninth Circuit's decision in *United States v. Rivera-Sanchez*.<sup>136</sup> In that case, the Ninth Circuit was forced to admit that no less than twenty prior panels had issued unpublished decisions on a certain issue, and those decisions split three different ways on the answer.<sup>137</sup> For three years, these Ninth Circuit cases escaped review and provided different answers to the same legal question. If not for the *Rivera-Sanchez* court's request during oral argument that counsel prepare and provide a list of unpublished cases, this unequal disposition of cases would have continued.<sup>138</sup> The confusion within the circuit was resolved only because the Ninth Circuit itself ignored its own noncitation rule.<sup>139</sup>

These are not isolated examples. In fact, such situations may be common. "Empirical evidence suggests that cases such as *Christie* and *Anderson* are more common than one might think."<sup>140</sup> Unpublished cases contain "a noticeable number of reversals, dissents, or concurrences," and "significant associations between case outcome and judicial characteristics."<sup>141</sup> This treatment of litigants violates equal protection. That is, "failing to give unpublished opinions precedential effect raises the very specter described by the Eighth Circuit [in *Anastasoff*]: that like cases will be decided in unlike ways"<sup>142</sup>

The Supreme Court has made clear that "[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors,"<sup>143</sup> and it has repeatedly held other concerns, such as the right to

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135. See *Williams*, 256 F.3d at 260–61 ("If the *Anderson* panel had published its opinion, it would have been binding on the panel in the instant case—*Williams*—and the result here would have been different. Based, however, on the mere fortuity that the *Anderson* panel decided not to publish, our panel in *Williams* was free to disagree with *Anderson* and to deny to DART the same immunity that *Anderson* had conferred on it less than two years earlier. What is the hapless litigant or attorney, or for that matter a federal district judge or magistrate judge, to do?").

136. 222 F.3d 1057 (9th Cir. 2000).

137. *Id.* at 1063.

138. *Id.*

139. See 9TH CIR. R. 36-3 (barring citation of unpublished opinions except for extremely limited purposes).

140. *Williams*, 256 F.3d at 262 (Smith, Jones & DeMoss, JJ., dissenting) (dissenting from denial of petition for rehearing en banc) (referring to *Anderson v. DART*, 180 F.3d 265 (5th Cir. 1999) (per curiam) (unpublished), and *Christie v. United States*, No. 91-2375MN, 1992 U.S. App. LEXIS 38446 (8th Cir. Mar. 20, 1992) (per curiam) (unpublished)).

141. Merritt & Brudney, *supra* note 107, at 120.

142. *Id.* at 119 (referring to, in part, *Anastasoff v. United States*, 223 F.3d 898, 901, 905 (8th Cir. 2000)).

143. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991).



counsel, to be important in protecting the “fundamental right to a fair trial.”<sup>144</sup> As such, strict scrutiny must be applied to the government’s discrimination. The government cannot meet the standard of demonstrating that this discrimination inhibiting a fundamental right is necessary to achieve a compelling government interest. The Court has rejected claims that administrative efficiency was a compelling government interest sufficient to justify discrimination based on gender.<sup>145</sup> Likewise, the Court has struck down a statutory provision that inhibited a fundamental right by applying strict scrutiny, stating, “[s]ince the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest.”<sup>146</sup> The Court has rejected arguments that administrative needs or budgetary benefits of the program were compelling state interests in the face of such a fundamental right.<sup>147</sup> This denial of precedent is not sufficiently justified or narrowly tailored.<sup>148</sup>

Finally, the practice of denial of precedent to some cases violates due process. As with the equal protection claim, which has been raised by commentators but not ruled on by the Court, it has been suggested that the scheme of declaring some decisions nonprecedential violates due process requirements.<sup>149</sup> The Due Process Clause of the Fifth Amendment to the United States Constitution provides that: “No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .”<sup>150</sup> This clause has been held to contain both substantive and procedural requirements.<sup>151</sup> The substantive due process objection is similar to the equal protection objection outlined above.<sup>152</sup> The right to a fair trial, as embodied in the requirement that courts should be bound to rely upon prior decisions (or distinguish them or

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144. *Lockhart v. Fretwell*, 506 U.S. 364, 368 (1993) (right to counsel exists to protect the fundamental right to a fair trial); *see also* *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 137 n.8 (1994) (peremptory challenges are a means to ensure the fundamental right to a fair trial); *Chandler v. Florida*, 449 U.S. 560, 577 (1981) (Judicial control of media coverage of court proceedings are constitutional when exercised to “protect the fundamental right of the accused to a fair trial.”).

145. *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (“[O]ur prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, ‘the Constitution recognizes higher values than speed and efficiency.’”) (quoting *Stanley v. Illinois*, 405 U.S. 645, 656 (1972)).

146. *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).

147. *Id.* at 636–38.

148. *Cleveland*, *supra* note 12, at 155.

149. *Miller*, *supra* note 107, at 204; Analisa Pratt, Comment, *A Call for Uniformity in Appellate Courts’ Rules Regarding Citation of Unpublished Opinions*, 35 *GOLDEN GATE U. L. REV.* 195, 214 (2005); *Wade*, *supra* note 107, at 722–31.

150. U.S. CONST. amend. V.

151. *Pratt*, *supra* note 149, at 214; *Wade*, *supra* note 107, at 717, 722–32.

152. *Cleveland*, *supra* note 12, at 156–61.

change the law), is a “fundamental right” and “implicit in the concept of ordered liberty” as set forth in the Constitution and intrinsic to our judicial system.<sup>153</sup> The practice of issuing nonprecedential opinions infringes upon that right<sup>154</sup> and must, therefore, be subject to strict scrutiny and justified by showing that the action is the least burdensome means of achieving a compelling interest.<sup>155</sup> As discussed above in the equal protection analysis, the practice of declaring opinions in advance to hold no precedential weight is not the least burdensome means of achieving any compelling state interest.<sup>156</sup>

The procedural due process requirement guarantees that people who are deprived of life, liberty, or property “are entitled to a reasonable level of judicial or administrative process.”<sup>157</sup> This “duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions” serves “not only to ensure abstract fair play to the individual” but also “[i]ts purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property.”<sup>158</sup> The Supreme Court has been skeptical of the abrogation of a deeply rooted common law judicial procedure without adequate replacement, often finding that such an abrogation violated litigants’ procedural due process rights.<sup>159</sup> A parallel case, *Honda Motor Co. v. Oberg*, demonstrates the due process violation present in denying a well-established common law procedure.<sup>160</sup> In *Honda*, the Supreme Court invalidated, on due process grounds, Oregon’s departure from the well-established common law procedure of judicial oversight of punitive damage awards.<sup>161</sup> The Court ruled that the practice of judicial oversight of punitive damage verdicts remained a

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

154. Cf. *Loritz v. U.S. Ct. of App. for 9th Cir.*, 382 F.3d 990, 992 (9th Cir. 2004) (finding a litigant whose case was disposed of by unpublished opinion lacked Article III standing because he was asserting due process rights of later litigants). But see *id.* at 993 (Beam, J., concurring) (stating that the argument that prior unpublished case law, if it were precedential, would dictate a different outcome creates the necessary standing).

155. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (stating that “classifications affecting fundamental rights are given the most exacting scrutiny” (citation omitted)); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (“We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.”).

156. *Cleveland*, *supra* note 12, at 155.

157. *Pratt*, *supra* note 149, at 214; *Wade*, *supra* note 107, at 717.

158. *Fuentes v. Shevin*, 407 U.S. 67, 80–81 (1972).

159. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994) (holding that “Oregon has removed that safeguard [which the common law provided] without providing any substitute procedure and without any indication that the danger of arbitrary awards has in any way subsided over time”); see also *Pratt*, *supra* note 149, at 214; *Wade*, *supra* note 107, at 717.

160. See *Honda Motor Co.*, 512 U.S. at 430.

161. *Id.* at 432.

part of common law from 1763 England to present-day American courts.<sup>162</sup> Based on this well-established protection in the common law, the Court held Oregon's statute denying remittur violative of due process.<sup>163</sup> *Honda* provides, by analogy, a simple but persuasive argument that the practice of denying precedential status to unpublished decisions violates procedural due process.<sup>164</sup> The practice of referring to past cases as establishing the governing law stretches back further and is of far more fundamental importance than the judicial oversight of punitive damage awards.<sup>165</sup> Despite the efficiency gains of the unpublication system, they must give way to due process rights.<sup>166</sup>

These constitutional arguments seem both strong and, thus far, unexamined.<sup>167</sup> They should be examined. The Supreme Court's past jurisprudence on the unpublication system reveals an uneasiness with the practice.<sup>168</sup> Likewise, several individual Justices have expressed concern that unpublished opinions are a troubling practice or at odds with historical notions of precedent.<sup>169</sup>

#### IV. SUPREME COURT'S PRIOR RULINGS AND PETITIONS FOR CERTIORARI DENIALS

The question of what the Supreme Court might do must begin by examining what it has done in the past.<sup>170</sup> The Court has granted certiorari on only a single case squarely addressing the issue, and it decided that case on

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162. *Id.* at 421–29.

163. *Id.* at 430.

164. Wade, *supra* note 107, at 722.

165. *Id.* at 723 (“The history of lawyers citing to all prior judicial decisions is much lengthier than the comprehensive punitive damage review considered ‘deeply rooted’ by the *Honda* Court. Whereas the *Honda* Court traced the practice of punitive damage review to the mid-seventeenth century, the ability to cite prior decisions dates back four hundred years further—to the middle of the thirteenth century. The long history of this citation procedure is sufficient to indicate a deeply-rooted common law practice in accord with *Honda*.”).

166. *Cf.* *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (“[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.”).

167. Nonconstitutional arguments based on the underlying mistaken premises and community understanding of precedent also are unexamined. *See Cleveland*, *supra* note 12, at 106–30, 162–73.

168. *See infra* Part IV.

169. *See infra* Part V.

170. Though the Court is not bound by its past decisions in the purest precedential sense, *stare decisis* is, of course, a powerful factor. *See Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 854 (1992). This Article is confined to an examination of what the Court has done regarding the specific issue of unpublished opinions.

jurisdictional grounds and did not reach the unpublication issue.<sup>171</sup> The Court has denied certiorari on numerous cases directly raising the issue,<sup>172</sup> and on several occasions it has expressed concern at the unpublication practice in the context of other cases.<sup>173</sup> Individual Justices, writing in dissents or separate concurrences, have also expressed concern that unpublished cases were evading review or being improperly used.<sup>174</sup>

#### A. Supreme Court's Single Grant of Certiorari

The Supreme Court has never addressed the constitutionality or propriety of the unpublication system directly. It did accept certiorari on the issue once, shortly after the unpublication system's inception, but it chose not to address the issue in its opinion.<sup>175</sup> In *Browder v. Director, Department of Corrections*

171. *Browder v. Dir., Dep't of Corr. of Ill.*, 434 U.S. 257, 258 & n.1 (1978) (After granting certiorari on the issue, the Court did not address it.).

172. *Untracht v. Fikri*, 128 S. Ct. 1666 (2008); *Spiegel v. Volvo Cars N. Am., L.L.C.*, 128 S. Ct. 911 (2008); *Canatella v. Van De Kamp*, 128 S. Ct. 669 (2007); *Family Fare, Inc. v. NLRB*, 127 S. Ct. 2991 (2007); *Wheeler v. Mo. Dir. of Revenue*, 549 U.S. 1266 (2007); *Stilley v. Marschewski*, 549 U.S. 1112 (2007); *Shefchuk v. Ill. Union Ins. Co.*, 549 U.S. 952 (2006); *N. Pacifica L.L.C. v. City of Pacifica*, 546 U.S. 1138 (2006); *Heavrin v. Schilling*, 546 U.S. 1137 (2006); *O.S.C. Co. v. Zymblosky*, 546 U.S. 936 (2005); *Rana v. United States*, 546 U.S. 877 (2005); *Seils v. Rochester City Sch. Dist.*, 544 U.S. 920 (2005); *Zimmerman v. City of Oakland*, 543 U.S. 819 (2004); *Schmier v. Sup. Ct. of Cal.*, 543 U.S. 818 (2004); *Rodriguez v. HFP, Inc.*, 541 U.S. 903 (2004); *Carey v. Knox County*, 540 U.S. 1218 (2004); *Test v. Comm'r*, 538 U.S. 961 (2003); *Martin v. KeyCorp*, 538 U.S. 961 (2003); *Berrafato v. Prudential Ins. Co. of Am. Sales Practice Litig.*, 537 U.S. 1233 (2003); *S. Clay Prods., Inc. v. United Catalysts, Inc.*, 537 U.S. 1189 (2003); *Lewin v. Cooke*, 537 U.S. 881 (2002); *Lemelson Med. v. Symbol Techs.*, 537 U.S. 825 (2002); *Alcan Aluminum Corp. v. Prudential Assurance Co.*, 536 U.S. 959 (2002); *Wendt v. Mineta*, 536 U.S. 941 (2002); *Mims v. United States*, 534 U.S. 1132 (2002); *Pappas v. UNUM Life Ins. Co.*, 534 U.S. 1129 (2002); *Segal v. Mass. Mut. Life Ins. Co.*, 534 U.S. 1041 (2001); *Bostron v. Massanari*, 534 U.S. 896 (2001); *Knight v. Maleng*, 534 U.S. 820 (2001); *Smyly v. IBM*, 528 U.S. 982 (1999); *Schmier v. Jennings*, 522 U.S. 1149 (1998); *Culp v. Hood*, 519 U.S. 1042 (1996); *Litton Sys., Inc. v. Carroll*, 516 U.S. 816 (1995); *Friedman v. Montgomery County*, 489 U.S. 1079 (1989); *Van Sant v. U.S. Postal Serv.*, 475 U.S. 1082 (1986), *reh'g denied*, 476 U.S. 1131 (1986); *Do-Right Auto Sales v. U.S. Ct. of App. for 7th Cir.*, 429 U.S. 917 (1976).

173. *United States v. Edge Broad. Co.*, 509 U.S. 418, 425 & n.3 (1993); *Comm'r v. McCoy*, 484 U.S. 3, 7 (1987); *Griffith v. Kentucky*, 479 U.S. 314, 322–23 (1987).

174. *See Langston v. United States*, 506 U.S. 930, 930 (1992) (White & Thomas, JJ., dissenting); *Costa v. United States*, 506 U.S. 929, 929 (1992) (White & O'Connor, JJ., dissenting); *Waller v. United States*, 504 U.S. 962, 962–65 (1992) (White & O'Connor, JJ., dissenting); *Smith v. United States*, 502 U.S. 1017, 1019–20 & n.\* (1991) (Blackmun, O'Connor & Souter, JJ., dissenting) (“The fact that the Court of Appeals’ opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the Circuit and surely is as important to the parties concerned as is a published opinion.”); *Taylor v. United States*, 493 U.S. 906, 906–07 (1989) (Stevens, J., concurring); *St. Louis S.W. Ry. Co. v. Bhd. of Ry.*, 484 U.S. 907, 907 (1987) (White & Brennan, JJ., dissenting); *Whisenhunt v. Spradlin*, 464 U.S. 965, 965–68 (1983) (Brennan, Marshall & Blackmun., JJ., dissenting); *Hyman v. Rickman*, 446 U.S. 989, 990–91 (1980) (Blackmun, Brennan & Marshall, JJ., dissenting).

175. *Browder*, 434 U.S. at 258 n.1 (After granting certiorari on the issue, the Court did not

of *Illinois*, the Supreme Court heard the case of petitioner Browder, who alleged that his state court criminal conviction should be reversed because it was based on a warrantless arrest, search, and seizure, and because of irregularities in the federal courts' habeas review of his case.<sup>176</sup> The sixth and final of Browder's questions presented to the Court was: "Does a federal court of appeals have the inherent power to withhold any of its opinions from publication and to a priori deprive such opinions of precedential value?"<sup>177</sup> Browder argued in his brief that the federal circuit courts do not have the power to deprive their decisions of precedential effect.<sup>178</sup> Browder argued, first, that unpublication of opinions creates the possibility that the decision of the Seventh Circuit panel in his case was contrary to the law of the Seventh Circuit.<sup>179</sup> This possibility arises because of the possible existence of an unpublished opinion (or opinions), which would be unavailable to him, and because the unpublished nature of the disposition against him removed all incentive for en banc review of his case.<sup>180</sup> Second, Browder argued that the Supreme Court's refusal to promulgate a uniform rule and the circuit court's wide variation on the precedential effect given to unpublished cases illustrated the need for a Supreme Court ruling that all cases are precedential.<sup>181</sup> In support of this assertion, Browder cited to Supreme Court cases emphasizing the universality of precedent in all cases in the federal court.<sup>182</sup> For example, in *Hicks v. Miranda*, the Court held that a decision on the merits, even one contained only in a summary dismissal or affirmance, is precedential and

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address it.).

176. *Id.*

177. Brief of Petitioner Ben Earl Browder at 7, *Browder*, 434 U.S. 257 (No. 76-5325), 1977 WL 204850 [hereinafter *Browder Petition*]. This question was presented in the petition for certiorari as:

May a United States Court of Appeals reverse a decision of a district court in an unpublished and non-citable opinion, when the case is not controlled by direct precedent, involves a substantial question pertaining to the protections of the Fourth Amendment, and where public notice of the decision might encourage Illinois to follow the lead of the American Law Institute and other states in enacting a statute to protect its citizenry from warrantless arrests for investigation?

Brief for the Chicago Council of Lawyers as Amicus Curiae Supporting Petitioner at 3, *Browder*, 434 U.S. 257 (No. 76-5325), 1977 WL 189280 [hereinafter *Browder Brief Amicus Curiae*].

178. *Browder Petition*, *supra* note 177, at 50 ("This is the first case to reach the Court where the propriety of a circuit rule authorizing dispositions in unpublished orders which may not be cited as precedent in subsequent cases is squarely at issue.").

179. *Id.* at 51.

180. *Id.* at 51-52.

181. *Id.* at 52-53.

182. *Id.* at 53 (citing *Hicks v. Miranda*, 422 U.S. 332 (1975); *Garrison v. Patterson*, 391 U.S. 464 (1968)).

binding on the lower courts.<sup>183</sup> Third, Browder argued that freeing appellate courts from the necessity of producing precedential decisions allows them “to avoid making a difficult or troublesome decision or to conceal divisive or disturbing issues”<sup>184</sup>—a prescient comment given the later remarks of federal appellate Judges Arnold and Wald.<sup>185</sup> Fourth, Browder noted that the chair of the 1973 Committee upon which the unpublication system is based had, by the time of the promulgation of the circuit rules, reconsidered his position and stood against unpublication.<sup>186</sup> Finally, Browder asserted that the act of issuing nonprecedential opinions exceeded the circuit courts’ rulemaking authority under 28 U.S.C. § 2071 (limiting the circuit courts’ authority to regulating practices of their own courts) and that the power to promulgate rules with such a broad impact on all the federal courts and its litigants properly belonged to the Supreme Court alone under 28 U.S.C. § 2072.<sup>187</sup>

In addition to Browder’s arguments, the Chicago Council of Lawyers<sup>188</sup> filed an amicus curiae brief exclusively on the unpublication-nonprecedent issue presented by the Seventh Circuit Rule 35, which permitted designation of some decisions as unpublished.<sup>189</sup> The amicus brief addressed both constitutional and nonconstitutional arguments against the unpublication system. First, the amicus brief recited several nonconstitutional flaws in the unpublication system that call out for Supreme Court action, including: 1) that the system has an unequal impact on those who can search the courthouse records versus those who have no access to unpublished opinions; 2) that the authority of appellate courts to write single-use opinions reduces judicial rigor

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183. *Hicks*, 422 U.S. at 343–45.

184. Browder Petition, *supra* note 177, at 54 (quoting *NLRB v. Amalgamated Clothing Workers*, 430 F.2d 966, 972 (5th Cir. 1970)).

185. See Arnold, *supra* note 69, at 223; Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1374 (1995) (discussing her own observations as a judge on the D.C. Circuit).

186. Browder Petition, *supra* note 177, at 55; see also PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 31–43 (1976) (referring to the recommendations of the 1973 Committee, “If a non-publication policy is to be adopted, those guidelines seem sound. We do not, however, support such a policy,” and regarding the issue of precedent specifically, “trying to impose a non-precedent status on decisions by declaring them non-citable is like attempting to throw away a boomerang. The earlier decisions keep coming back because of lawyers’ and judges’ ingrained devotion to the force of stare decisis”).

187. Browder Petition, *supra* note 177, at 18–19, 56.

188. Browder Brief Amicus Curiae, *supra* note 177, at 1–2 (“The Chicago Council of Lawyers is an association of approximately 1,200 attorneys in Chicago. The Council’s principal concern is the improvement of the administration of justice, both in the federal and the state courts. . . . The Council’s interest in this case relates to petitioner’s challenge to Circuit Rule 35 of the United States Court of Appeals for the Seventh Circuit, entitled ‘Plan for Publication of Opinions of the Seventh Circuit.’ The Council is concerned that this Rule raises serious jurisprudential and constitutional questions, as amicus discusses *infra*.”).

189. *Id.*

and jeopardizes the rightness of individual outcomes; 3) that rules that bar litigants from relying on decisions do not also prohibit court use leading to unequal use of unpublished decisions; 4) that guidelines for choosing which cases to publish do not ensure the publication of all necessary cases; 5) that unpublished cases unfairly limit litigants' ability to seek review; and 6) that the system of selective publication creates an appearance of unfairness and impropriety.<sup>190</sup> The amicus brief's constitutional argument relied primarily on the First Amendment, citing the inherent public nature of the courts, a right to know, the unpublication system's impermissible censorship of speech, and unconstitutional vagueness.<sup>191</sup> The Chicago Lawyers' Council's Amicus Brief expressed a grave concern about the practice of selective publication and precedent.<sup>192</sup> Yet the Respondent did not address the unpublication issue in its statement of questions presented or argument.<sup>193</sup>

Unfortunately, the Supreme Court did not address the issue in its ruling in *Browder*.<sup>194</sup> Finding that the circuit court lacked jurisdiction because the time for appeal had expired before the motion was filed, the Court chose not to address any of Browder's other claims.<sup>195</sup> Regarding the unpublished opinion issue, the Court stated only, "[f]inally, petitioner questioned the validity of the Seventh Circuit's 'unpublished opinion' rule. We leave these questions to another day."<sup>196</sup>

### B. Several Denials of Certiorari

Since *Browder*, the Court has never granted certiorari on a case directly challenging the unpublished opinion practice. It has chosen not to hear cases presenting the issue on several occasions. In at least thirty-six cases, the constitutionality or propriety of the unpublication system (and its denial of precedent) was directly challenged in the petition for certiorari.<sup>197</sup> In seven

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190. *Id.* at 4–6.

191. *Id.* at 45–55.

192. *Id.*

193. Brief of Respondent, *Browder v. Dir., Dep't of Corr. of Ill.*, 434 U.S. 257 (1978) (No. 76-5325), 1977 WL 189277.

194. *Browder*, 434 U.S. at 258 n.1.

195. *Id.* at 258.

196. *Id.* at 258 & n.1.

197. Untracht Petition, *supra* note 14; Spiegel Petition, *supra* note 14; Canatella Petition, *supra* note 14; Family Fare Petition, *supra* note 14; Wheeler Petition, *supra* note 14; Stilley Petition, *supra* note 14; Shefchuk Petition, *supra* note 14; N. Pacifica Petition, *supra* note 14; Heavrin Petition, *supra* note 14; O.S.C. Petition I, *supra* note 14; O.S.C. Petition II, *supra* note 14; Rana Petition, *supra* note 14; Seils Petition, *supra* note 14; Zimmerman Petition, *supra* note 14; Schmier III Petition, *supra* note 14; Rodriguez Petition, *supra* note 14; Carey Petition, *supra* note 14; Test Reply Brief, *supra* note 14; Martin Petition, *supra* note 14; Berrafato Petition, *supra* note 14; S. Clay Prods. Petition, *supra* note 14; Lewin Petition, *supra* note 14; Lemelson Med. Petition, *supra* note 14; Alcan Aluminum Petition, *supra* note 14; Wendt Petition, *supra* note 14; Mims Petition, *supra* note 14;

other petitions, the issue was discussed at some length in the petition without being part of the question presented for certiorari.<sup>198</sup>

The first petition for certiorari directly challenging the use of unpublished opinions was in *Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit*.<sup>199</sup> In *Do-Right Auto Sales*, the petitioner sought a writ of mandamus, a rare and extraordinary remedy, overriding the circuit court's striking of an unpublished opinion from the petitioner's brief.<sup>200</sup> The Supreme Court denied the petitioner's motion for leave to file a petition for writ of mandamus without comment.<sup>201</sup> After *Do-Right Auto Sales*, petitioners continued to challenge the use of unpublished, allegedly nonprecedential, opinions. During the period for which petitions are publicly available,<sup>202</sup>

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Pappas Petition, *supra* note 14; Segal Petition, *supra* note 14; Bostron Petition, *supra* note 14; Knight Petition, *supra* note 14; Smyly Petition, *supra* note 14; Schmier II Petition, *supra* note 14; Culp Petition, *supra* note 14; Litton Sys. Petition, *supra* note 14; Friedman Petition, *supra* note 14; Van Sant Petition, *supra* note 14; Gant, *supra* note 4, at 717 n.53 (“Whether Seventh Circuit Rule 28, which prohibits the publication of written ‘Orders’ which set forth reasons for judgments, and further prohibits a litigant from citing as precedent and relying upon such orders, denies due process of law and violates First Amendment rights?” (quoting Motion for Leave to File Petition for Writs of Mandamus and Prohibition at 2, *Do-Right Auto Sales v. U.S. Ct. of App. for 7th Cir.*, 429 U.S. 917 (1976) (No. 85-1404))).

198. Petition for Writ of Certiorari at 16–17, *Granite State Outdoor Adver., Inc. v. City of Fort Lauderdale*, 127 S. Ct. 2910 (2007) (No. 06-1175), 2007 WL 608452 (stating that the “attempt to sweep these four cases ‘under the rug’ by issuing markedly similar unpublished decisions on a very contentious issue of law represents a misuse of unpublished decisions”); Petition for Writ of Certiorari at 27–28, *Cusano v. Klein*, 549 U.S. 816 (2006) (No. 05-1492), 2006 WL 1440820 (expressing concern about the unpublished nature of decision below as contrary to established law); Petition for Writ of Certiorari at 3, 7–8, 18 n.1, *B. Braun Med., Inc. v. Rogers*, 549 U.S. 824 (2006) (No. 05-1624), 2006 WL 1706947 (disputing claim that an “unpublished” decision below does not cause conflict or justify certiorari); Petition for Writ of Certiorari at 21–23, *Hatteberg v. Adair Enters.*, 534 U.S. 890 (2001) (No. 01-102), 2001 WL 34116502 (pro se petition refers in passing to *Anastasoff* and the unpublished opinion issue); Petition for Writ of Certiorari at 11–21, *Youngblood v. Prudential Ins. Co. of Am.*, 531 U.S. 1152 (2001) (No. 00-1105), 2001 WL 34117089 (arguing that litigants have a right to know the reasons for a decision, though not necessarily claiming that there is a right to publication or precedent); Petition for Writ of Certiorari at 15–21, *Green v. City of Plano*, 531 U.S. 1112 (2001) (No. 00-643), 2000 WL 34000170 (claiming departure from precedent via unpublished opinion departs from accepted appellate methods without substantial analysis of the legal standard at issue); Petition for Writ of Certiorari at 27–29, *Bennett v. Law Firm of Jones, Waldo, Holbrook & McDonough*, 519 U.S. 1108 (1997) (No. 96-678), 1996 WL 33439051 (arguing, briefly, for precedential status for circuit opinions, but only to seek correction of the specific unpublished case on appeal); Petition for Writ of Certiorari at 9–12, *Stephenson v. Okla. Turnpike Auth.*, 503 U.S. 971 (1992) (No. 91-1296), 1992 WL 12074502 (pro se petition containing a bare allegation that the precedent-limiting rule of the Tenth Circuit exceeds its rulemaking authority without explaining the basis for that claim or the relevance to the underlying case).

199. 429 U.S. 917 (1976) (denying a writ of mandamus filed following the Seventh Circuit's striking of citation to an unpublished opinion from party's brief); *see also* *Wade*, *supra* note 107, at 713.

200. *Do-Right Auto Sales*, 429 U.S. 917; *see also* *Wade*, *supra* note 107, at 713.

201. *Do-Right Auto Sales*, 429 U.S. 917.

202. Petitions for certiorari in cases where certiorari was denied are generally available from



thirty-five other cases have presented the unpublication issue when seeking certiorari.<sup>203</sup> None were granted.<sup>204</sup> Each of those thirty-five petitions challenged the constitutionality of the unpublication practice directly as a question presented for certiorari, though on a varying array of grounds and with varied depths of analyses.<sup>205</sup> Nine of the thirty-five challenged state

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1995 forward, though some earlier petitions have been published.

203. Untracht Petition, *supra* note 14; Spiegel Petition, *supra* note 14; Canatella Petition, *supra* note 14; Family Fare Petition, *supra* note 14; Wheeler Petition, *supra* note 14; Stilley Petition, *supra* note 14; Shefchuk Petition, *supra* note 14; N. Pacifica Petition, *supra* note 14; Heavrin Petition, *supra* note 14; O.S.C. Petition I, *supra* note 14; O.S.C. Petition II, *supra* note 14; Rana Petition, *supra* note 14; Seils Petition, *supra* note 14; Zimmerman Petition, *supra* note 14; Schmier III Petition, *supra* note 14; Rodriguez Petition, *supra* note 14; Carey Petition, *supra* note 14; Test Reply Brief, *supra* note 14; Martin Petition, *supra* note 14; Berrafato Petition, *supra* note 14; S. Clay Prods. Petition, *supra* note 14; Lewin Petition, *supra* note 14; Lemelson Med. Petition, *supra* note 14; Alcan Aluminum Petition, *supra* note 14; Wendt Petition, *supra* note 14; Mims Petition, *supra* note 14; Pappas Petition, *supra* note 14; Segal Petition, *supra* note 14; Bostron Petition, *supra* note 14; Knight Petition, *supra* note 14; Smyly Petition, *supra* note 14; Schmier II Petition, *supra* note 14; Culp Petition, *supra* note 14; Litton Sys. Petition, *supra* note 14; Friedman Petition, *supra* note 14; Van Sant Petition, *supra* note 14.

204. Untracht v. Fikri, 128 S. Ct. 1666 (2008); Spiegel v. Volvo Cars N. Am., L.L.C., 128 S. Ct. 911 (2008); Canatella v. Van De Kamp, 128 S. Ct. 669 (2007); Family Fare, Inc. v. NLRB, 127 S. Ct. 2991 (2007); Wheeler v. Mo. Dir. of Revenue, 549 U.S. 1266 (2007); Stilley v. Marschewski, 549 U.S. 1112 (2007); Shefchuk v. Ill. Union Ins. Co., 549 U.S. 952 (2006); N. Pacifica L.L.C. v. City of Pacifica, 546 U.S. 1138 (2006); Heavrin v. Schilling, 546 U.S. 1137 (2006); O.S.C. Co. v. Zymblosky, 546 U.S. 936 (2005); Rana v. United States, 546 U.S. 877 (2005); Seils v. Rochester City Sch. Dist., 544 U.S. 920 (2005); Zimmerman v. City of Oakland, 543 U.S. 819 (2004); Schmier v. Sup. Ct. of Cal., 543 U.S. 818 (2004); Rodriguez v. HFP, Inc., 541 U.S. 903 (2004); Carey v. Knox County, 540 U.S. 1218 (2004); Test v. Comm'r, 538 U.S. 961 (2003); Martin v. KeyCorp, 538 U.S. 961 (2003); Berrafato v. Prudential Ins. Co. of Am. Sales Practice Litig., 537 U.S. 1233 (2003); S. Clay Prods., Inc. v. United Catalysts, Inc., 537 U.S. 1189 (2003); Lewin v. Cooke, 537 U.S. 881 (2002); Lemelson Med. v. Symbol Techs., 537 U.S. 825 (2002); Alcan Aluminum Corp. v. Prudential Assurance Co., 536 U.S. 959 (2002); Wendt v. Mineta, 536 U.S. 941 (2002); Mims v. United States, 534 U.S. 1132 (2002); Pappas v. UNUM Life Ins. Co., 534 U.S. 1129 (2002); Segal v. Mass. Mut. Life Ins. Co., 534 U.S. 1041 (2001); Bostron v. Massanari, 534 U.S. 896 (2001); Knight v. Maleng, 534 U.S. 820 (2001); Smyly v. IBM, 528 U.S. 982 (1999); Schmier v. Jennings, 522 U.S. 1149 (1998); Culp v. Hood, 519 U.S. 1042 (1996); Litton Sys., Inc. v. Carroll, 516 U.S. 816 (1995); Friedman v. Montgomery County, 489 U.S. 1079 (1989); Van Sant v. U.S. Postal Serv., 475 U.S. 1082 (1986), *reh'g denied*, 476 U.S. 1131 (1986).

205. Untracht Petition, *supra* note 14; Spiegel Petition, *supra* note 14; Canatella Petition, *supra* note 14; Family Fare Petition, *supra* note 14; Wheeler Petition, *supra* note 14; Stilley Petition, *supra* note 14; Shefchuk Petition, *supra* note 14; N. Pacifica Petition, *supra* note 14; Heavrin Petition, *supra* note 14; O.S.C. Petition I, *supra* note 14; O.S.C. Petition II, *supra* note 14; Rana Petition, *supra* note 14; Seils Petition, *supra* note 14; Zimmerman Petition, *supra* note 14; Schmier III Petition, *supra* note 14; Rodriguez Petition, *supra* note 14; Carey Petition, *supra* note 14; Test Reply Brief, *supra* note 14; Martin Petition, *supra* note 14; Berrafato Petition, *supra* note 14; S. Clay Prods. Petition, *supra* note 14; Lewin Petition, *supra* note 14; Lemelson Med. Petition, *supra* note 14; Alcan Aluminum Petition, *supra* note 14; Wendt Petition, *supra* note 14; Mims Petition, *supra* note 14; Pappas Petition, *supra* note 14; Segal Petition, *supra* note 14; Bostron Petition, *supra* note 14; Knight Petition, *supra* note 14; Smyly Petition, *supra* note 14; Schmier II Petition, *supra* note 14; Culp Petition, *supra* note 14; Litton Sys. Petition, *supra* note 14; Friedman Petition, *supra* note 14; Van Sant Petition, *supra* note 14.

court unpublication practices,<sup>206</sup> and twenty-six addressed the rules of the federal circuit courts of appeals.<sup>207</sup> All but one of the petitions presented claims that the lower court's failure to publish its decision *in that case* violated constitutional protections,<sup>208</sup> and the outlier was a case seeking declaratory judgment that California's limited publication/citation bar rule was unconstitutional based on alleged wrongs in other cases.<sup>209</sup> The constitutional protection most asserted was due process (twenty-four cases),<sup>210</sup> followed by equal protection (thirteen cases).<sup>211</sup> Only ten cases made a core

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206. Spiegel Petition, *supra* note 14; Wheeler Petition, *supra* note 14; O.S.C. Petition I, *supra* note 14; O.S.C. Petition II, *supra* note 14; N. Pacifica Petition, *supra* note 14; Schmier III Petition, *supra* note 14; Alcan Aluminum Petition, *supra* note 14; Schmier II, *supra* note 14; Culp Petition, *supra* note 14; Friedman Petition, *supra* note 14.

207. Untracht Petition, *supra* note 14; Canatella Petition, *supra* note 14; Family Fare Petition, *supra* note 14; Stilley Petition, *supra* note 14; Shefchuk Petition, *supra* note 14; Heavrin Petition, *supra* note 14; Rana Petition, *supra* note 14; Seils Petition, *supra* note 14; Zimmerman Petition, *supra* note 14; Rodriguez Petition, *supra* note 14; Carey Petition, *supra* note 14; Test Reply Brief, *supra* note 14; Martin Petition, *supra* note 14; S. Clay Prods. Petition, *supra* note 14; Berrafato Petition, *supra* note 14; Lewin Petition, *supra* note 14; Lemelson Med. Petition, *supra* note 14; Wendt Petition, *supra* note 14; Mims Petition, *supra* note 14; Pappas Petition, *supra* note 14; Segal Petition, *supra* note 14; Bostron Petition, *supra* note 14; Knight Petition, *supra* note 14; Smyly Petition, *supra* note 14; Litton Sys. Petition, *supra* note 14; Van Sant Petition, *supra* note 14.

208. Untracht Petition, *supra* note 14; Spiegel Petition, *supra* note 14; Canatella Petition, *supra* note 14; Family Fare Petition, *supra* note 14; Wheeler Petition, *supra* note 14; Stilley Petition, *supra* note 14; Shefchuk Petition, *supra* note 14; N. Pacifica Petition, *supra* note 14; Heavrin Petition, *supra* note 14; O.S.C. Petition I, *supra* note 14; O.S.C. Petition II, *supra* note 14; Rana Petition, *supra* note 14; Seils Petition, *supra* note 14; Zimmerman Petition, *supra* note 14; Rodriguez Petition, *supra* note 14; Carey Petition, *supra* note 14; Test Reply Brief, *supra* note 14; Martin Petition, *supra* note 14; Berrafato Petition, *supra* note 14; S. Clay Prods. Petition, *supra* note 14; Lewin Petition, *supra* note 14; Lemelson Med. Petition, *supra* note 14; Alcan Aluminum Petition, *supra* note 14; Wendt Petition, *supra* note 14; Mims Petition, *supra* note 14; Pappas Petition, *supra* note 14; Segal Petition, *supra* note 14; Bostron Petition, *supra* note 14; Knight Petition, *supra* note 14; Smyly Petition, *supra* note 14; Schmier II, *supra* note 14; Culp Petition, *supra* note 14; Litton Sys. Petition, *supra* note 14; Friedman Petition, *supra* note 14; Van Sant Petition, *supra* note 14.

209. Schmier III Petition, *supra* note 14.

210. Spiegel Petition, *supra* note 14; Family Fare Petition, *supra* note 14; Wheeler Petition, *supra* note 14; Stilley Petition, *supra* note 14; Shefchuk Petition, *supra* note 14; N. Pacifica Petition, *supra* note 14; Heavrin Petition, *supra* note 14; O.S.C. Petition I, *supra* note 14; O.S.C. Petition II, *supra* note 14; Rana Petition, *supra* note 14; Seils Petition, *supra* note 14; Zimmerman Petition, *supra* note 14; Schmier III Petition, *supra* note 14; Rodriguez Petition, *supra* note 14; Martin Petition, *supra* note 14; S. Clay Prods. Petition, *supra* note 14; Lewin Petition, *supra* note 14; Lemelson Med. Petition, *supra* note 14; Alcan Aluminum Petition, *supra* note 14; Segal Petition, *supra* note 14; Bostron Petition, *supra* note 14; Culp Petition, *supra* note 14; Litton Sys. Petition, *supra* note 14; Friedman Petition, *supra* note 14; Van Sant Petition, *supra* note 14.

211. Untracht Petition, *supra* note 14; Family Fare Petition, *supra* note 14; O.S.C. Petition I, *supra* note 14; O.S.C. Petition II, *supra* note 14; Schmier III Petition, *supra* note 14; Rodriguez Petition, *supra* note 14; Carey Petition, *supra* note 14; S. Clay Prods. Petition, *supra* note 14; Alcan Aluminum Petition, *supra* note 14; Wendt Petition, *supra* note 14; Bostron Petition, *supra* note 14; Smyly Petition, *supra* note 14; Schmier II Petition, *supra* note 14; Culp Petition, *supra* note 14.

Article III claim,<sup>212</sup> and only three of the thirty-five significant petitions relied on the First Amendment.<sup>213</sup>

### 1. Cases Unlikely to Gain Certiorari on the Unpublication Issue

The thirty-five petitions noted above vary widely in their approaches, and some seem particularly doomed for failure in bringing the unpublished opinion issue before the Court. These petitions ranged from the accusatory and impassioned,<sup>214</sup> to the vague,<sup>215</sup> to relatively cursory (at least in regard to the unpublished opinion issue or the constitutional analyses).<sup>216</sup> An example

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212. Canatella Petition, *supra* note 14; Family Fare Petition, *supra* note 14; Heavrin Petition, *supra* note 14; Schmier III Petition, *supra* note 14; Rodriguez Petition, *supra* note 14; Carey Petition, *supra* note 14; Berrafato Petition, *supra* note 14; Mims Petition, *supra* note 14; Pappas Petition, *supra* note 14; Knight Petition, *supra* note 14.

213. Zimmerman Petition, *supra* note 14, at 24; Schmier III Petition, *supra* note 14, at 13 (arguing that the restriction of citing unpublished opinions violates free speech); S. Clay Prods. Petition, *supra* note 14, at 18–19. Under the present reality of published “unpublished” opinions and free citation under FRAP 32.1, First Amendment arguments based on a right to know or speak would likely be irrelevant in the federal system. However, the First Amendment “right to access” argument advanced in *Southern Clay Products, Inc.* retains viability.

214. Rodriguez Petition, *supra* note 14, at 7 n.6 (“Because the surreal nature of the unpublished decisions provided a prima facie case of political skullduggery, Rodriguez filed a Judicial Complaint under 28 U.S.C. § 372, CA4C No. 02-9008, against the various federal judges for acting outside of their jurisdiction.”); Alcan Aluminum Petition, *supra* note 14, at 2, 5, 7 (“For example, in this case, the trial and appellate court actually construct an economic penalty against Alcan for exercising its right to appeal. They do this because both courts share a mutual dislike for California state law which they are obliged to follow in this diversity action but refuse to do so. They do not disclose their conduct, but attempt to bury it in the shadows of a NPO. . . . The reality is that the inferior courts have used NPOs to disguise the fact that they have blatantly ignored explicit precedent of this Court. They have used it to hide the fact that their holdings created clear disputes between the Circuits on pre-Victorian statements by this Court, and that they are again disregarding clear state law. . . . Precedent can change, but it must do so rationally, visibly and PERMIT EVERYONE TO BENEFIT FROM THE CHANGE.”); Culp Petition, *supra* note 14, at 29, 30, 35, 45 (containing accusations of “repeated occurrences of judicial decisions being fixed,” a comparison to Watergate, a certain conclusion being called “asinine,” and a conclusion of “E tu [sic] Rehnquist? Stevens? O’Connor? Scalia? Kennedy? Souter? Thomas? Ginsburg? Breyer?”).

215. Shefchuk Petition, *supra* note 14, at 10 (never using the terms “due process” or “equal protection” nor their analytical requirements and discussing only “rational system” and “fairness”); Wendt Petition, *supra* note 14, at 13 (a pro se petition mentioning the unpublished opinion debate for an inscrutable reason); Bostron Petition, *supra* note 14, at ii, 4–12 (raising the issue in the questions presented but completely ignoring it elsewhere in the petition).

216. Untracht Petition, *supra* note 14, at 34–35 (pro se petition seeking review on the unpublished opinion issue by reciting concerns of both scholars and Supreme Court Justices, but only as a fallback preferable to summary dismissal, and using hyperbolic phrases like “this Court bears the ultimate responsibility to defend the Constitution against such mockery and rape”); Spiegel Petition, *supra* note 14, at 4 (mentioning unpublished opinions in the larger context of the possibility of an improper decision rendered by law clerks and without oral argument); Canatella Petition, *supra* note 14, at 14–19 (the underlying matter does not even involve any unpublished cases, but the petitioner analogizes the lower court’s alleged failure to follow precedent to the exceeding of judicial power referenced in *Anastasoff*); Stilley Petition, *supra* note 14, at 5–7 (claiming due process was violated

of one such case, which invoked the unpublished opinion system as a problem but then did not directly address it, was *Van Sant v. United States Postal Service*.<sup>217</sup> In *Van Sant*, the petition challenged the unpublished decision of the Fourth Circuit below as the second of two issues on appeal.<sup>218</sup> However, despite being one of only two issues on which certiorari was sought, the discussion of the issue was minimal.<sup>219</sup> The issue accounted for just under five of the petition's forty-six pages and relied upon only one authority—a D.C. Circuit Advisory Committee on Procedures to the U.S. Court of Appeals report.<sup>220</sup> The petition contained no analysis on any constitutional claim. Similarly, in *Stilley v. Marschewski*, the petition made only a bare claim that the lower court's disposition via unpublished opinion violates due process.<sup>221</sup> The petition did not set forth an analysis supporting its conclusion or cite to any authority on the constitutional issue.<sup>222</sup> Moreover, even in the discussion of the unpublished circuit court decision, the primary complaint seems not to be the lack of publication but that the lower court did not address all the petitioner's points on appeal.<sup>223</sup> Whatever these cases' prospects of gaining certiorari on other issues, they had little chance of bringing the unpublished opinion issue to the forefront of the Court's attention.

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by the circuit court's failure to address all his points on appeal); N. Pacifica Petition, *supra* note 14, at 27–28 (raising the fact that the lower court decision was unpublished as a pejorative without substantially arguing against such decisions); Heavrin Petition, *supra* note 14, at 25–30 (making a well-written, but brief, constitutional argument following an extensive and intricate bankruptcy law analysis); Rana Petition, *supra* note 14, at 5 & n.4 (seeking review under Sup. Ct. R. 10(a), which allows certiorari when a circuit court “has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power” and mentioning due process only in passing); Carey Petition, *supra* note 14, at 22 (mentioning the issue only briefly and relying upon *Anastasoff* as the only authority on the issue two years after that case's vacation); Martin Petition, *supra* note 14, at 7–17 (addressing the unpublished opinion precedent issue fairly directly, but only among additional arguments about law clerks, judicial ghostwriting, and publication rules and without analysis of the governing due process and equal protection standards); Segal Petition, *supra* note 14, at 18–20 (identifying the problem but including no constitutional analysis); Friedman Petition, *supra* note 14, at 31–36 (arguing that the state courts' nonpublication of litigants' prior cases was arbitrary and briefly mentioning due process); Van Sant Petition, *supra* note 14, at 43–46 (relying in this appeal from the Fourth Circuit on only a D.C. Circuit committee report).

217. Van Sant Petition, *supra* note 14, at 15, 41–46.

218. *Id.* at ii.

219. *Id.* at 41–46.

220. *Id.* at 43–44.

221. Stilley Petition, *supra* note 14, at 5–7.

222. *Id.*

223. *Id.* at 7 (claiming due process was violated by the circuit court's failure to address all his points on appeal).

## 2. Promising Petitions for Certiorari on the Unpublication Issue

Several of the thirty-five petitions seemed more promising but were ultimately unsuccessful. Two such cases presented primarily the very narrow claim that the circuit courts' failures to publish their decisions below reduced the likelihood of direct review.<sup>224</sup> These cases claimed that by not publishing the decisions below, the intermediate appellate courts reduced the petitioners' chances for review by the states' highest courts.<sup>225</sup> Such a factually intensive claim, brought without significant factual support, against a state court system was understandably unappealing to the Court.<sup>226</sup> Other cases presented the unpublished opinion issue directly but quite briefly or without fully elucidating the constitutional analyses.<sup>227</sup> For example, the petition in *Lemelson Medical v. Symbol Technologies* noted that the Federal Circuit below, in an unpublished opinion, departed from prior published opinions of the circuit and then discussed the national debate in the wake of *Anastasoff* and the Supreme Court's recent concern with due process.<sup>228</sup> But this argument is clearly secondary to the substantive argument that the circuit court erred on the merits.<sup>229</sup>

Another relatively promising case, *Schmier v. Supreme Court of California*,<sup>230</sup> technically involved two cases: an action for injunctive relief<sup>231</sup> and a declaratory judgment action based on alleged infringement of constitutional rights in the underlying action.<sup>232</sup> Both essentially argued that California's unpublication scheme stifles protected First Amendment speech by barring citation and violates due process and equal protection guarantees of the Fourteenth Amendment by allowing for "unbridled exercise of raw

224. Wheeler Petition, *supra* note 14; Schmier II Petition, *supra* note 14.

225. Wheeler Petition, *supra* note 14, at 13–16; Schmier II Petition, *supra* note 14, at 13–14.

226. *Cf.* SUP. CT. R. 10 (noting that the Court does not take cases primarily for error correction or on issues of state law application).

227. Seils Petition, *supra* note 14, at 2–21, 21–25 (containing over twenty pages of factual argument and less than four pages of fairly general due process allegations regarding unpublished opinions); Lemelson Med. Petition, *supra* note 14, at 26–28 (arguing briefly that the unpublished nature of the circuit court decision prevents review of the erroneous decision below); Mims Petition, *supra* note 14, at 12–15 (noting that circuit rules on unpublished opinions vary and referencing the recent *Anastasoff* opinion's Article III argument with minimal analysis); Knight Petition, *supra* note 14, at 14–18 (relying upon *Anastasoff* with little additional analysis); Smyly Petition, *supra* note 14, at 8–10 (pro se petition raising the issue of unfairness and extra-judicial acts).

228. Lemelson Med. Petition, *supra* note 14, at 26–28.

229. *Id.* (including a three-page discussion of the issue at the end of a thirty-page petition that extensively details the underlying claim).

230. 543 U.S. 818 (2004).

231. *Schmier v. Sup. Ct. of Cal.*, 531 U.S. 958 (2000); Petition for Writ of Certiorari, *Schmier*, 531 U.S. 958 (No. 00-302), 2000 WL 33999285 [hereinafter Schmier I Petition].

232. *Schmier*, 543 U.S. 818; Schmier III Petition, *supra* note 14.

governmental power.”<sup>233</sup> *Schmier I*, the 2000 petition, argued that nonpublication rules allow courts to create a system of “selective prospectivity”; that is, the courts impermissibly violate an individual’s due process or equal protection rights by treating the individual differently than other similarly situated litigants.<sup>234</sup> The petition also argued that prohibitions on citation to court opinions represented unlawful prior restraint on free speech.<sup>235</sup> *Schmier II* was an appeal regarding attorneys’ fees sought after *Schmier I*, which gave rise to further complaints about California’s unpublication rules.<sup>236</sup> *Schmier III*, the 2004 petition, addressed alleged violations in both *Schmier I* and *II*.<sup>237</sup> The petition for certiorari in *Schmier III* echoed the arguments from *Schmier I* in part but argued the First Amendment point almost exclusively.<sup>238</sup> Both cases were dismissed by the lower courts for either lack of standing or lack of merit on the constitutional issue.<sup>239</sup> The Supreme Court denied certiorari, for reasons known only to the Court itself, though several factors may have militated against certiorari. First, the underlying nature of the case was a challenge to state court rules brought by petitioner on his own behalf (and behalf of all those similarly situated).<sup>240</sup> Second, *Schmier I* at least was denied below based on lack of standing, a determination under state law.<sup>241</sup> Finally, while written with great passion, neither petition fully set forth the constitutional arguments mentioned in the Questions Presented section of the brief nor hewed closely to the extant Supreme Court tests for such claims.

### 3. Particularly Thorough or Compelling Petitions

Finally, five of these thirty-five significant petitions presented particularly clear, thorough, and well-pled challenges to the nonpublication of opinions. First, though relying only on the core Article III argument, *Pappas v. UNUM*

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233. *Schmier I* Petition, *supra* note 231, at 8; *see also* *Schmier III* Petition, *supra* note 14, at 13.

234. *Schmier I* Petition, *supra* note 231, at 10–15.

235. *Id.* at 16–18.

236. *Schmier III* Petition, *supra* note 14, at 6.

237. *Id.* at 5–6.

238. *Schmier III* Petition, *supra* note 14.

239. *See* *Schmier v. Sup. Ct. of Cal.*, 93 Cal. Rptr. 2d 580, 583–84, 585–86 (Cal. Ct. App. 2000) (holding *Schmier* lacked standing and that the court’s standards for publication prevent “selective prospectivity”); *Schmier v. Sup. Ct. of Cal.*, No. A101206, 2003 WL 22954266 (Cal. Ct. App. Dec. 16, 2003) (unpublished/noncitable) (holding *Schmier*’s First Amendment argument without merit).

240. *Schmier III* Petition, *supra* note 14, at 7.

241. *Schmier*’s claim was not that the lack of standing was incorrect but that California’s nonpublication and noncitation rule violated rights guaranteed by the U.S. Constitution. *Id.* at 11–14. Still, the case involved a challenge to state law administrative rules and a state law determination that the case did not belong before the court. *Id.*

*Life Insurance Co. of America* made both the usual claim of wrongly applied precedent via unpublished opinion and detailed the judicial and scholarly concern with the practice of denying the precedent of unpublished opinions and the wide range of circuit rules on the issue.<sup>242</sup> The petition made clear that this is a fundamental issue of national concern—usually a plus in gaining certiorari, though it was unsuccessful here.<sup>243</sup>

Second, in *Lewin v. Cooke*, the appellant Lewin presented a very straightforward claim that the issuance of unpublished opinions violated due process.<sup>244</sup> Lewin argued that allowing circuit courts to issue unpublished opinions: (1) allows circuits to contradict the Supreme Court or themselves; (2) effectively denies the litigant of further review given the small percentage of en banc motions and petitions for certiorari granted; and (3) lessens the public's confidence in, and regard for, the federal judiciary.<sup>245</sup> Lewin did not argue for the publication of all opinions but only the narrower subset of cases, which he called the “disobedient” opinions—those opinions in which the circuit deviated from settled Supreme Court or circuit law.<sup>246</sup> Lewin proposed that the aggrieved party serve as the arbiter of which opinions fit into that subset and that upon decision of that party the opinion would be published.<sup>247</sup> Lewin argued that the losing party should have the right to insist upon publication in the name of due process to facilitate further review:

Publication upon an appellant's request seems like a modest and minimal safe guard, doing no harm if the appellant's fears are misguided. If the inclusion of a few extra pages in a Federal Reporter can help to guarantee the integrity of the appellate process and sustain public confidence in that process against the suspicion of possible abuse, then the minimal cost should be well worth it. By asserting such a deterrent due process right, parties should be able to reinforce the sovereignty of this Court when that sovereignty is undermined by disobedience cloaked in abuses of nonpublication.<sup>248</sup>

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242. Pappas Petition, *supra* note 14.

243. *Id.* at 10–11 (“Not only is the escalating practice of issuing non-precedential opinions of concern to the bench and to legal scholars, it also is a matter of fundamental importance to litigants such as petitioner.”). A similar argument was made in Berrafato Petition, *supra* note 14, at 24–30.

244. Lewin Petition, *supra* note 14, at 6–18. A similar due process argument was raised in *Litton Systems, Inc. v. Carroll*. Litton Sys. Petition, *supra* note 14, at 14–21.

245. Lewin Petition, *supra* note 14, at 6–18.

246. *Id.* at 14.

247. *Id.*

248. *Id.* at 17–18.

It is difficult to see how this narrower remedy could work, though; few losing litigants, aside from repeat litigants seeking to avoid a “bad” precedent, would prefer an unpublished opinion to a published one. Moreover, the litigant has no basis for determining what “disobedient” means; presumably, the vast majority of litigants believe the court to be disobedient to the controlling law whenever the court rules against them. Discerning the reason for denial, which coincidentally may be merely a function of volume, is difficult at best. Perhaps the problem is that while *Lewin* presents the due process challenge to the unpublication system directly, it does not do so in the analytical terms commonly used by the Court. So, though the challenge is clear and direct, it is not in the language of a due process challenge and proposes a solution that is probably untenable.

Third, in *O.S.C. Co. v. Zymblosky*, O.S.C. Co. challenged the lower courts’ decisions to invalidate its deeds without a jury trial, claiming that the lower courts acted in an unpublished opinion contrary to clear published authority.<sup>249</sup> The crux of that equal protection claim was that the Pennsylvania courts’ internal operating procedure permitting unpublished opinions allowed the courts below to treat O.S.C.’s claim differently than similarly situated parties.<sup>250</sup> While it is well-established that an incorrect decision by a court is not a constitutional violation,<sup>251</sup> O.S.C. claimed that the problem extended beyond mere misapplication of the law to a procedure that permitted, without recourse, the abandonment of governing precedent.<sup>252</sup> The respondent, Zymblosky, argued that O.S.C.’s complaint was: (1) in error on the substantive law; (2) a complaint about mere misapplication of the law; and (3) contrary to a recent Pennsylvania Superior Court decision approving the internal operating procedure in question.<sup>253</sup> While it is impossible to know what persuaded the Supreme Court to deny certiorari, it seems likely that the fact that it was a state court internal operating procedure, combined with the fact that the Pennsylvania courts had recently found the practice acceptable under the Pennsylvania Constitution,<sup>254</sup> may have deterred the Supreme Court from granting certiorari.

Fourth, in *Southern Clay Products, Inc. v. United Catalysts, Inc.*, the Court was presented with an interesting challenge to the Federal Circuit’s combination of precedent-denying and en banc restricting rules.<sup>255</sup> Southern

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249. O.S.C. Petition II, *supra* note 14, at 7–10.

250. *Id.*

251. *Beck v. Washington*, 369 U.S. 541, 554–55 (1962).

252. O.S.C. Petition II, *supra* note 14, at 12–17.

253. Brief in Opposition at 7–10, *O.S.C. Co. v. Zymblosky*, 546 U.S. 936 (2005) (No. 05-156), 2005 WL 2104235.

254. *Schaaf v. Kaufman*, 850 A.2d 655, 658–59 (Pa. Super. Ct. 2004).

255. *S. Clay Prods. Petition*, *supra* note 14.



Clay Products, Inc. had its eighty million dollar trial verdict overturned by the Federal Circuit over the vigorous dissent of the Chief Judge.<sup>256</sup> Southern Clay then petitioned the Supreme Court for review armed with several factors in its favor. First, the case was a challenge to federal court rules based on federal constitutional law.<sup>257</sup> Second, the Federal Circuit had rules explicitly denying unpublished opinions precedential value<sup>258</sup> and virtually required a precedential opinion to gain en banc review,<sup>259</sup> which effectively shielded the Federal Circuit's panel decisions from further review.<sup>260</sup> Third, Southern Clay's petition was brought following both a favorable jury determination and the Federal Circuit Chief Judge's dissent to vacation of that jury verdict.<sup>261</sup> Southern Clay's petition presented a well-organized and somewhat detailed argument claiming that the whipsaw of Federal Circuit rules violates the First Amendment right of access to the courts<sup>262</sup> and the Fifth Amendment rights of due process and equal protection.<sup>263</sup> The petition included significant authority demonstrating that Southern Clay's access to the courts, and the manner in which the rules regarding unpublished opinions, violate those rights.<sup>264</sup> It also argued that by deciding its case by unpublished opinion, in contravention of the circuit's established precedent, the Federal Circuit effectively removed Southern Clay's due process right to rely upon precedent and created a class of one in contravention of equal protection.<sup>265</sup> This petition seemed to present a strong case for certiorari under Supreme Court Rule 10(a), its only immediately apparent weakness being its intra-circuit, rather than inter-circuit, nature; yet, it was denied.

Finally, the most clear, direct, and complete challenge to the federal courts' practice of issuing unpublished opinions was made in the recent case of *Family Fare, Inc. v. NLRB*.<sup>266</sup> In this case, the petitioner, Family Fare, Inc., claimed that the Sixth Circuit's unpublished decision in the case overruled

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256. *S. Clay Prods., Inc. v. United Catalysts, Inc.*, 43 Fed. Appx. 379 (Fed. Cir. 2002); *see also* *S. Clay Prods. Petition*, *supra* note 14, at 9–12.

257. *S. Clay Prods. Petition*, *supra* note 14, at 14–25.

258. FED. CIR. R. 47.6(b) (2001), *superseded by* FED. CIR. R. 32.1 (2006).

259. FED. CIR. R. 35(b)(2).

260. *S. Clay Prods. Petition*, *supra* note 14, at 5.

261. *S. Clay Prods., Inc.*, 43 Fed. Appx. at 389 (Mayer, C.J., dissenting) (“The issue of infringement was fully presented to the jury who returned a verdict of willful infringement against United. United’s only defenses were invalidity or unenforceability and because it cannot prove the elements of those defenses, I respectfully dissent.”).

262. *S. Clay Prods. Petition*, *supra* note 14, at 18.

263. *Id.* at 19–22.

264. *Id.* at 18–19.

265. *Id.* at 19–22; Reply to Brief in Opposition at 5–7, *S. Clay Prods, Inc. v. United Catalysts, Inc.*, 537 U.S. 1189 (2003) (No. 02-848), 2003 WL 21698023.

266. *Family Fare Petition*, *supra* note 14.

and conflicted with its prior published decisions, thus violating Family Fare's due process and equal protection rights and exceeding the court's judicial power under Article III of the United States Constitution.<sup>267</sup> The underlying case involved Family Fare's challenge to the "validity of a union election based on objectionable conduct by statutory supervisors under the National Labor Relations Act ("NLRA")."<sup>268</sup> Family Fare explained that the Sixth Circuit's published standard held that "[t]he party challenging the election need not introduce proof of actual coercion,"<sup>269</sup> and the Sixth Circuit panel's unpublished opinion in this case held, "[s]ome showing of coercion is required to sustain a finding of objectionable conduct."<sup>270</sup> Under Sixth Circuit Rule 206(c): "Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court en banc consideration is required to overrule a published opinion of the court."<sup>271</sup> Thus, what the Sixth Circuit panel in *Family Fare* did was one of two things, both of which violated Family Fare's constitutional rights. Either the panel departed from the published legal standard in a way that did not alter the published law of the circuit, effectively treating Family Fare differently than all other similarly situated parties before and after this decision, or it altered published law of the circuit contrary to rule 206(c).<sup>272</sup> Family Fare seemed concerned that it was the former and that "[t]he Sixth Circuit has subjected the election here to a legal standard different than the one that applies in every other comparable union election case in the Sixth Circuit";<sup>273</sup> whereas, the NLRB seemed to view the case as the latter, an alteration of the governing law, as evidenced by its motion to the Sixth Circuit to publish the case as one that "sets a framework for addressing an issue of considerable importance to the labor bar and provides much-needed guidance on a new approach to what previously [has] been an area of dispute between the Board and the Sixth Circuit."<sup>274</sup> Either the Sixth Circuit treated Family Fare differently, violating its equal protection rights, or it departed from its precedent without reason or justification and without following its own process for departing from a panel decision, thereby failing to afford Family Fare due process.

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267. *Id.* at i.

268. *Id.* at 3.

269. *Id.* at 4 (quoting *Harborside Healthcare, Inc. v. NLRB*, 230 F.3d 206, 210 (6th Cir. 2000); *Evergreen Healthcare, Inc. v. NLRB*, 104 F.3d 867, 874 (6th Cir. 1997)).

270. *Id.*

271. 6TH CIR. R. 206(c).

272. Family Fare seemed concerned with the former—that it was being treated differently than every other comparable employer.

273. Family Fare Petition, *supra* note 14, at 6.

274. *Id.* at 6–7 (emphasis omitted) (quoting NLRB's motion for publication).

The petition set forth clear and cogent arguments for the unconstitutionality of the unpublication practice as applied to Family Fare's case.<sup>275</sup> It organized both its equal protection and due process arguments according to the relevant constitutional tests and made reasonable claims that those tests were met.<sup>276</sup> Additionally, the petition for certiorari challenged the circuit court's constitutional authority to issue unpublished, nonprecedential opinions.<sup>277</sup> Its argument on this point relied on the analysis in *Anastasoff* and noted the weight of scholarly and judicial authority siding with that analysis.<sup>278</sup> The petition's own analysis on this point was minimal, relying largely on the readers' understanding of the debate referenced in the cited authorities. In addition to its well-organized and argued constitutional claims, this petition very clearly set forth a justification for granting certiorari: "Review by this Court is required to protect the parties' constitutional rights and to provide guidance to all Circuit Courts of Appeal that face the problem of panel decisions that circumvent binding published authority in conflict with their own rules."<sup>279</sup> This case seemed a good one for review; it challenged the federal rules and practice, involved wholly federal case law, set forth thorough claims of constitutional violations tracking the relevant tests ably, and rhetorically made a persuasive case for the need for review. Moreover, both parties appeared to have agreed on the underlying nature of the unpublished case, that is, that the unpublished case deviated from prior published circuit authority.

This deviation from published authority, as well as the possibility that unpublished decisions may be evading review, had been mentioned before in the dissents to several denials of certiorari.<sup>280</sup> One such dissent read:

The fact that the Court of Appeals' opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a

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275. *Id.* at 14–27.

276. *Id.*

277. *Id.* at 27–29.

278. *Id.*

279. *Id.* at 5.

280. *Langston v. United States*, 506 U.S. 930, 930 (1992) (White & Thomas, JJ., dissenting); *Costa v. United States*, 506 U.S. 929, 929 (1992) (White & O'Connor, JJ., dissenting); *Waller v. United States*, 504 U.S. 962, 962–65 (1992) (White & O'Connor, JJ., dissenting); *Smith v. United States*, 502 U.S. 1017, 1017–20 (1991) (Blackmun, O'Connor & Souter, JJ., dissenting); *St. Louis S.W. Ry. Co. v. Bhd. of Ry.*, 484 U.S. 907, 907 (1987) (White & Brennan, JJ., dissenting); *Whisenhunt v. Spradlin*, 464 U.S. 965, 965–72 (1983) (Brennan, Marshall & Blackmun, JJ., dissenting); *Hyman v. Rickman*, 446 U.S. 989, 989–92 (1980) (Blackmun, Brennan & Marshall, JJ., dissenting) (all dissenting opinions finding circuit split based on at least one unpublished opinion).

lingering effect in the Circuit and surely is as important to the parties concerned as is a published opinion.<sup>281</sup>

Yet, the Court in 2007 was unwilling to take up the issue in *Family Fare, Inc.* Still, other comments from the Court over the years demonstrate that the practice of unpublished opinions does not sit well with the Court,<sup>282</sup> that the Court recognizes the potential for abuse,<sup>283</sup> and even that the Court does not fully accept the assertion that they are nonprecedential.<sup>284</sup>

### C. Supreme Court Comments in Other Cases

While the Supreme Court has never directly addressed the constitutionality or propriety of the unpublication system, it has mentioned the practice, often with great skepticism, in the course of deciding cases on other issues. These cases can be grouped into three categories. First, there are a number of cases in which the Court cited to or mentioned unpublished opinions. For example, there are a half-dozen cases in which the Court cited to the Federal Appendix specifically<sup>285</sup> and numerous cases in which the Court referred to an unpublished decision below.<sup>286</sup>

Second, and more probative, are a number of cases in which the Court granted certiorari because an unpublished decision was in conflict with a published decision.<sup>287</sup> For example, in *Harris v. Forklift Systems, Inc.*,

281. *Smith*, 502 U.S. at 1020 n.\* (mem.) (Blackmun, O'Connor & Souter, JJ., dissenting).

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

283. *County of L.A. v. Kling*, 474 U.S. 936, 937–40 (1985) (Stevens, J., dissenting) (“As this Court’s summary disposition today demonstrates, the Court of Appeals would have been well advised to discuss the record in greater depth. . . . That decision not to publish the opinion or permit it to be cited—like the decision to promulgate a rule spawning a body of secret law—was plainly wrong.”).

284. *Comm’r v. McCoy*, 484 U.S. 3, 7 (1987) (“The Court of Appeals exceeded its jurisdiction regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished.”).

285. *Sole v. Wyner*, 1274 S. Ct. 2188, 2194 (2007); *Burton v. Stewart*, 549 U.S. 147, 151, 152, 153 (2007); *Domino’s Pizza, Inc. v. McDonald*, 546 U.S. 470, 474 (2006); *Banks v. Dretke*, 540 U.S. 668, 687 (2004); *Cruz-Osornio v. United States*, 540 U.S. 1131, 1131 (2004); *Pacheco-Zepeda v. United States*, 532 U.S. 966, 966 (2001).

286. *E. Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 61 (2000); *Johnson v. United States*, 529 U.S. 694, 699 n.3 (2000); *Lynce v. Mathis*, 519 U.S. 433, 436 (1997); *Old Chief v. United States*, 519 U.S. 172, 177 (1997); *Thompson v. Keohane*, 516 U.S. 99, 106 (1995); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20 (1993); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 452–53 (1993); *Terrell v. Morris*, 493 U.S. 1, 3 (1989); *Comm’r*, 484 U.S. at 7.

287. *E. Associated Coal Corp.*, 531 U.S. at 61; *Old Chief*, 519 U.S. at 177–78; *Lynce*, 519 U.S. at 436; *Thompson*, 516 U.S. at 106; *Harris*, 510 U.S. at 20; *Spectrum Sports*, 506 U.S. at 453–54 (“The [unpublished] decision below, and the Lessig line of decisions on which it relies, conflicts with

involving an abusive work environment claim, the Court granted certiorari to resolve the conflict between the Sixth Circuit's unpublished decision (requiring a showing of serious effect on a claimant's psychological well-being) and the Ninth's Circuit's contrary rule.<sup>288</sup> The Court's taking of these cases suggests that it views unpublished opinions as precedential and capable of causing conflict in the law. The Supreme Court does not take cases for the purpose of correcting errors in a single case but to resolve inter-circuit conflict or important national issues.<sup>289</sup> If, as most circuit court rules suggest,<sup>290</sup> unpublished decisions are without precedential value, then there would be no chance of affecting the state of the law and no need to correct the error in a single case. Instead, the Court has granted certiorari to resolve the conflicts caused by these unpublished decisions.

Third, there is a single case in which the Court's majority opinion directly mentioned the issue of unpublished opinions.<sup>291</sup> In *Commissioner v. McCoy*, the Supreme Court ruled that the court of appeals exceeded its jurisdictional authority and noted that it would not accept the premise that the unpublished circuit court decision was unreviewable or nonprecedential:

We note in passing that the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case. The Court of Appeals exceeded its jurisdiction regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished.<sup>292</sup>

Beyond this single direct reference, there is little in the Court's jurisprudence dealing with unpublished opinions as an issue.<sup>293</sup> However,

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holdings of courts in other Circuits. . . . We granted certiorari to resolve this conflict among the Circuits. We reverse." (citation omitted)).

288. *Harris*, 510 U.S. at 20.

289. SUP. CT. R. 10.

290. See Melissa M. Serfass & Jessie Wallace Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions: An Update*, 6 J. APP. PRAC. & PROCESS 349, 351–57 (2004) (citing 1ST CIR. R. 36(b); 2D CIR. R. 0.23; 3D CIR. I.O.P. 5.2; 4TH CIR. R. 36(a); 6TH CIR. R. 206(a); 7TH CIR. R. 53(b), (c)(1); 8TH CIR. R. APP. I(4); 9TH CIR. R. 36-1, 36-2; 10TH CIR. R. 36.1, 36.2; 11TH CIR. R. 36-1, 36-2; FED. CIR. R. 47.6(a)).

291. *Comm'r*, 484 U.S. at 7. The other direct statement about the system itself came in a dissent from Justice Stevens to a summary reversal of a Ninth Circuit unpublished decision. See *County of L.A. v. Kling*, 474 U.S. 936, 937–41 (1985) (criticizing the Supreme Court's growing practice of summary reversals, stating: "For, like a court of appeals that issues an opinion that may not be printed or cited, this Court then engages in decision-making without the discipline and accountability that the preparation of opinions requires").

292. *Comm'r*, 484 U.S. at 7.

293. Though an examination of the Court's view of stare decisis, precedent, and original intent

specific Justices' statements in separately authored opinions, scholarly writings, and public comments may provide further evidence about how the sitting Court may view the issue and will be addressed in Part V.

#### V. SUPREME COURT JUSTICES' DISPOSITIONS TOWARD THE UNPUBLICATION PRACTICE

While far less probative of the Court's perspective than its prior opinions, the Justices' statements in separately authored opinions, scholarly writings, and public comments may provide some indication about how the sitting Court may view the issue of unpublication and whether it might take up the issue in an upcoming term. Each sitting Justice's writings of these types have been examined to find any comment on the unpublication system.

##### A. Justice Stevens: *Outspoken Critic of the Unpublication System*

The most direct and persistent critic of the unpublication system on the high Court is Justice John Stevens. In 1976, Justice Stevens spoke to the Illinois State Bar Association regarding the issue, condemning the practice in its earliest days:

A rule which authorizes any court to censor the future citation of its own opinions or orders rests on a false premise. Such a rule assumes that an author is a reliable judge of the quality and importance of his own work product. If I need authority to demonstrate the invalidity of that assumption, I refer you to a citizen of Illinois who gave a brief talk in Gettysburg, Pennsylvania that he did not expect to be long remembered. Judges are the last persons who should be authorized to determine which of their decisions should be long remembered.<sup>294</sup>

This statement, made in Justice Stevens's first year on the Court, expresses a fundamental disagreement with the premise of the unpublication system. He does not appear to have waived from this position, as evidenced by his recent comments:

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

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on these issues may provide some insights, such an undertaking is beyond the scope of this Article, which focuses on direct commentary on the unpublished opinion issue.

294. Justice John Paul Stevens, Remarks at the Illinois State Bar Association's Centennial Dinner (Jan. 22, 1977), *quoted in* Browder Brief Amicus Curiae, *supra* note 177, at 37.

A [Justice Stevens]: Well, I tend to vote to grant more on unpublished opinions, on the theory that occasionally judges will use the unpublished opinion as a device to reach a decision that might be a little hard to justify.<sup>295</sup>

Though stated diplomatically, Justice Stevens's concern is a serious one and finds support in a number of recent studies<sup>296</sup> and circuit judges' writings.<sup>297</sup> Similarly, in a dissent to a denial of certiorari, Justice Stevens gently chided the Fifth Circuit for issuing directly contradictory published and unpublished opinions and noted that while the lack of an *inter*-circuit conflict made denial of certiorari technically proper, it worked an injustice on the petitioner.<sup>298</sup> Justice Stevens expressed dismay that the petitioner's unpublished case condemned him to eighteen months in prison whereas the similarly situated defendant in *United States v. Lopez*, a case decided two days after the petitioner's, was sentenced to less.<sup>299</sup> While acknowledging the propriety of denial of certiorari, Justice Stevens lamented the system itself:

That, however, is the kind of burden that the individual litigant must occasionally bear when efficient management is permitted to displace the careful administration of justice in

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

296. Brian P. Brooks, *Publishing Unpublished Opinions: A Review of the Federal Appendix*, 5 GREEN BAG 259, 260–63 (2d ed. 2002); David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. CIN. L. REV. 817, 820 (2005) (“[V]oting and publication are, for some judges, strategically intertwined: for example, judges may be prepared to acquiesce in decisions that run contrary to their own preferences, and to vote with the majority, as long as the decision remains unpublished, but can be driven to dissent if the majority insists upon publication.”); Robert A. Mead, “Unpublished” Opinions as the Bulk of the Iceberg: *Publication Patterns in the Eighth and Tenth Circuits of the United States Courts of Appeals*, 93 LAW LIBR. J. 589, 602–03 (2001) (studying publication rates by subject matter in the Eighth and Tenth Circuits over a six-month period and finding great disparity in publication rates, especially in areas where the government is a litigant); Merritt & Brudney, *supra* note 107, at 120 (finding unpublished decisions are substantive and contain “a noticeable number of reversals, dissents, or concurrences,” and “significant associations between case outcome and judicial characteristics”); Wald, *supra* note 185, at 1374 (noting a six-month study of D.C. Circuit cases found forty percent of unpublished cases arguably met the publication standards and noting she believed that percentage to be much higher in 1995); Pamela Foa, Comment, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 39 U. PITT. L. REV. 309, 315–40 (1977) (citing a six-month study of Seventh Circuit cases that revealed fifteen percent of unpublished cases were substantively significant and met the publication standards).

297. See Arnold, *supra* note 69, at 223 (discussing his concern with strategic decision-making encouraged by the unpublished opinion system); Wald, *supra* note 185, at 1374 (discussing her observations of misuse of unpublished opinions as a judge on the D.C. Circuit).

298. *Taylor v. United States*, 493 U.S. 906, 906 (1989).

299. *Id.*

each case. Perhaps it is not too late for the Court of Appeals to exercise additional care in the administration of justice in this case.<sup>300</sup>

Justice Stevens expressed another concern in his dissent to withdrawal of certiorari in *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*,<sup>301</sup> a case which challenged the practice of vacating judgments at the behest of the parties who have come to a separate settlement. In Justice Stevens's view, the Court ought to have decided the case and rejected the practice.<sup>302</sup> He noted that making decisions disappear, even at the will of the parties, was contrary to American law: "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur."<sup>303</sup> While not dealing with unpublished opinions specifically, the comment demonstrates a viewpoint regarding the nature of precedent and litigants' right to rely upon what the courts have previously done.

This same concern is apparent in Justice Stevens's dissent in *County of Los Angeles v. Kling*.<sup>304</sup> In *Kling*, the Supreme Court granted certiorari and summarily reversed, but Justice Stevens dissented, comparing the majority's failure to examine the case to the troubling practice of issuing unpublished opinions: "For, like a court of appeals that issues an opinion that may not be printed or cited, this Court then engages in decisionmaking without the discipline and accountability that the preparation of opinions requires."<sup>305</sup> To support this view, Justice Stevens quoted Karl Llewellyn:

"In our law the opinion has in addition a central forward-looking function which reaches far beyond the cause in hand: the opinion has as one of its major offices to show how like cases are properly to be decided in the future. This also frequently casts its shadow before, and affects the deciding of the cause in hand. (If I cannot give a reason I should be willing to stand to, I must shrink from the very result which

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300. *Id.* But see *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 165 (1984) (stating that a lower court's interlocutory and summary reversal was in an "unpublished opinion with no precedential significance").

301. 510 U.S. 27, 34–41 (1993) (Stevens & Blackmun, JJ., dissenting).

302. *Id.*

303. *Id.* at 40.

304. 474 U.S. 936, 937–40 (1985).

305. *Id.* at 940.



otherwise seems good.) Thus the opinion serves as a steadying factor which aids reckonability.”<sup>306</sup>

A similar comment, chiding a lower court and expressing concern with both the Court’s summary decisions and the lower courts’ unpublished opinions, can be found in *Board of Education of Rogers, Arkansas v. McCluskey*:

In ever-increasing numbers, appeals throughout the federal system are being decided in this anonymous fashion. It is not uncommon for courts of appeals to issue opinions that are not to be cited as authority in other cases. In one recent published case—which was sufficiently important to induce this Court to grant certiorari even before a conflict in the circuits had developed—the court purported to justify such an ad hoc adjudication by asserting that it lacked “precedential character.” The threat to the quality of our work that is presented by the ever-increasing impersonalization and bureaucratization of the federal judicial system is far more serious than is generally recognized. Regrettably the example set by this Court in cases of this kind is not one of resistance, but rather of encouragement, to the rising administrative tide.<sup>307</sup>

Another, more telling, sign can be seen in Justice Stevens’s signing on to a concurring opinion, authored by Justice Antonin Scalia, which describes the Framers’ understanding of common law judicial decisionmaking in precisely the same manner as that of Judge Arnold and other critics of the unpublication system.<sup>308</sup> As noted in Part III, critics of the unpublication system view the Framers’ perception of “judicial power” granted by Article III of the U.S. Constitution as inherently precedent-based. Judge Arnold’s *Anastasoff* decision reviewed the fundamental sources of law known to the Framers, such as Coke, Blackstone, and Hale, as well as the Framers’ (both the Federalists’ and the Anti-Federalists’) own comments.<sup>309</sup> *Anastasoff* held that Article III prohibited the issuance of nonprecedential opinions and described our nation’s judicial foundations this way:

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306. *Id.* at 940 n.6 (quoting KARL LLEWELLYN, *THE COMMON LAW TRADITION* 26 (1960)).

307. *Bd. of Educ. v. McCluskey*, 458 U.S. 966, 972 (1982) (Stevens, J., dissenting with Brennan & Marshall, JJ.) (internal citations omitted) (reproaching the Second Circuit over its recent use of an unpublished decision in *Rowley v. Board of Education of Hendrick Hudson Central School District*, 632 F.2d 945, 948 n.7 (2d Cir. 1980), *rev’d*, 458 U.S. 176 (1982)).

308. *Rogers v. Tennessee*, 532 U.S. 451, 467–81 (2001) (Scalia, Stevens & Thomas, JJ., dissenting).

309. *Anastasoff v. United States*, 223 F.3d 898, 900–04 (8th Cir. 2000).

Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties. These principles, which form the doctrine of precedent, were well established and well regarded at the time this nation was founded. The Framers of the Constitution considered these principles to derive from the nature of judicial power, and intended that they would limit the judicial power delegated to the courts by Article III of the Constitution.<sup>310</sup>

The opinion in *Rogers v. Tennessee*, signed onto by Justice Stevens, contains a consonant view of history and the centrality of precedent.<sup>311</sup> For example, the opinion explains:

The near-dispositive strength Blackstone accorded *stare decisis* was not some mere personal predilection. Chancellor Kent was of the same view: “If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have [sic] a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it.” See also Hamilton’s statement in *The Federalist*: “To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.”<sup>312</sup>

Justice Stevens has a long-standing and abiding concern with the propriety of nonprecedential precedents, the ill-justified unfairness that they invite, and the departure from our nation’s historical legal foundations they represent.

*B. Justices Scalia and Thomas: Historical Consonance Regarding Precedent*

Justice Antonin Scalia seems to hold a similar view of history, though he has commented less on the unpublication dilemma than Justice Stevens. For example, while it is not specifically about unpublished opinions, Justice

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310. *Id.* at 899–900 (citing *Marbury v. Madison*, 5 U.S. 137, 177–78 (1803); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991); *Cohens v. Virginia*, 19 U.S. 264, 290 (1821)) (other citations omitted).

311. *Rogers*, 532 U.S. at 472–81.

312. *Id.* at 473 n.2 (internal citations omitted).

Scalia's dissent in *Rogers v. Tennessee*, discussed above, not only reflects the originalist constitutional exegesis that he is known for,<sup>313</sup> but also parallels the view of the Framers' notions of precedent that underpin Judge Arnold's *Anastasoff* opinion.<sup>314</sup> Justice Scalia is a self-avowed textualist, one who is concerned with the text of the document being interpreted, and originalist, one who is concerned with the meaning given to a text by its authors.<sup>315</sup> As he describes it, "[t]he theory of originalism treats a constitution like a statute, giving the constitution the meaning that its words were understood to bear at the time they were promulgated."<sup>316</sup> This form of constitutional interpretation is fundamental to the argument that nonprecedential opinions exceed the Framers' (and therefore Article III's) meaning of "judicial power."<sup>317</sup> Justice Scalia has similarly said, "[The Constitution] means today not what current society (much less the Court) thinks it ought to mean, but what it meant when it was adopted," and "I look at a text. I take my best shot at getting the fairest meaning of that text, and where it is a constitutional text, understanding what it meant at the time it was adopted."<sup>318</sup>

Justice Scalia has not spoken directly to the unpublication system, but he has clearly expressed an interpretation of the concept of "judicial power" that the argument against nonprecedential opinions rests upon:

If the division of federal powers central to the constitutional scheme is to succeed in its objective, it seems to me that the

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313. See generally Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

314. Compare *Rogers*, 532 U.S. at 473 n.2, with *Anastasoff*, 223 F.3d at 899–900.

315. See Justice Antonin Scalia, *A Theory of Constitutional Interpretation*, Speech at Catholic University of America (Oct. 18, 1996) [hereinafter *Scalia Theory of Constitutional Interpretation*] (transcript available at <http://www.proconservative.net/PCVol5Is225ScaliaTheoryConstlInterpretation.shtml>) ("I belong to a school, a small but hardy school, called 'textualists' or 'originalists.' That school used to be 'constitutional orthodoxy' in the United States."); see also Justice Antonin Scalia, *Remarks at the Woodrow Wilson International Center for Scholars in Washington, D.C.* (Mar. 14, 2005) (transcript available at [http://www.cfif.org/htdocs/freedomline/current/guest\\_commentary/scalia-constitutional-speech.htm](http://www.cfif.org/htdocs/freedomline/current/guest_commentary/scalia-constitutional-speech.htm)) ("I am one of a small number of judges, small number of anybody—judges, professors, lawyers—who are known as originalists. Our manner of interpreting the Constitution is to begin with the text, and to give that text the meaning that it bore when it was adopted by the people. I'm not a 'strict constructionist,' despite the introduction. I don't like the term 'strict construction.' I do not think the Constitution, or any text should be interpreted either strictly or sloppily; it should be interpreted reasonably. Many of my interpretations do not deserve the description 'strict.' I do believe, however, that you give the text the meaning it had when it was adopted.").

316. See *Scalia Theory of Constitutional Interpretation*, *supra* note 315.

317. *Anastasoff*, 223 F.3d at 899–904.

318. See Justice Antonin Scalia, *Call for Reckoning: God's Justice and Ours*, Panel Discussion Before the Pew Center Conference (Jan. 25, 2002) (transcript available at <http://pewforum.org/deathpenalty/resources/transcript3.php>).

fundamental nature of those powers must be preserved as that nature was understood when the Constitution was enacted. The Executive, for example, in addition to “[tak]ing Care that the Laws be faithfully executed,” Art. II, § 3, has no power to bind private conduct in areas not specifically committed to his control by Constitution or statute; such a perception of “[t]he Executive power” may be familiar to other legal systems, but is alien to our own. So also, I think, “[t]he judicial Power of the United States” conferred upon this Court and such inferior courts as Congress may establish, Art. III, § 1, must be deemed to be the judicial power as understood by our common-law tradition.<sup>319</sup>

As the advocates of full precedential value for all cases make a similarly originalist, due process argument, Justice Scalia may be amenable to an appeal on that ground as well.<sup>320</sup>

Justice Thomas, also an avowed originalist, would seem to approach the issue of judicial power in a similar manner,<sup>321</sup> but because he has said nothing on this issue directly, little can be said about Justice Thomas’s views on the unpublication system without engaging in presumptuous speculation.

### C. Chief Justice Roberts and Justice Alito: Citation Advocates

Unlike Justices Scalia and Thomas, who have rarely, if ever, addressed the unpublication system directly, the Court’s two newest Justices, Chief Justice John Roberts and Justice Samuel Alito, were both significantly involved with returning citability to all federal decisions. Both Chief Justice Roberts and Associate Justice Alito served on the Judicial Conference Advisory Committee on Appellate Rules during the recent drafting and approval of FRAP 32.1 on citation of unpublished opinions.<sup>322</sup> Both were advocates of a

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319. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, Marshall & Blackmun, JJ., concurring) (alterations in original).

320. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 435–36 (1994) (Scalia, J., concurring) (“The Court’s opinion establishes that the right of review eliminated by the amendment was a procedure traditionally accorded at common law. The deprivation of property without observing (or providing a reasonable substitute for) an important traditional procedure for enforcing state-prescribed limits upon such deprivation violates the Due Process Clause.”).

321. *See* Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1130 (2008) (describing “self-proclaimed originalist Justices Scalia and Thomas”); Robert J. Pushaw, Jr., *Partial-Birth Abortion and the Perils of Constitutional Common Law*, 31 HARV. J. L. & PUB. POL’Y 519, 527 (2008) (describing “self-professed ‘originalists’ like Justices Thomas and Scalia”).

322. Justice Alito served on the Committee from 1997 to 2005, serving as its chairman from 2001 to 2005. *See* Samuel Alito, Responses to Senate Confirmation Questionnaire, available at [http://judiciary.senate.gov/pdf/Alito\\_Questionnaire.pdf](http://judiciary.senate.gov/pdf/Alito_Questionnaire.pdf). Chief Justice Roberts, then a judge on the D.C. Circuit, was said to be the next in line to chair the committee and a person with a “personal

uniform citation rule.<sup>323</sup> Justice Alito, for example, has said of the noncitation system in the federal courts: “Such a system cannot be justified.”<sup>324</sup> Though he has expressed concern about how change would be achieved,<sup>325</sup> he has stated that change is needed: “I do not think that we should—or that we will be able to—retain precisely the system we now have.”<sup>326</sup> He further explained, “[p]rohibiting or limiting citation of unpublished opinions at times deprives the court of valuable information. . . . More important, allowing citation of unpublished opinions sends an important message about the nature of a court’s unpublished opinions. . . . By allowing citation, a court recognizes the legitimacy of all of its opinions.”<sup>327</sup> Justice Alito was a strong proponent of the rule regarding citation.<sup>328</sup>

Justice Alito has also expressed a belief that the issue of precedent would be best addressed by the Court. In 2002, Justice Alito testified before the House Subcommittee on Courts, the Internet, and Intellectual Property (of the Committee on the Judiciary):

[T]he question of precedential value, of course, implicates the doctrine of stare decisis, which has traditionally been developed by the courts in the course of deciding cases. This is an area in which there have been some very interesting developments in recent years. There has been a renewal of academic interest in the area, there have been some very interesting and provocative judicial decisions in the area, and I think it is the overwhelming sentiment of the judiciary that this development should continue in this manner in the

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interest” in the unpublished opinion issue. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 341* (2005) [hereinafter *Roberts Confirmation Hearing*] (in response to a question by Senator Kohl, “Well, I am familiar with how the Judicial Conference operates for at least part of its role. I’ve been on the Advisory Committee on Appellate Rules. I was there as a lawyer and I kept on as a judge. In fact, I was slated to be the Chairman of that Committee starting in October.”); Tony Mauro, *Judicial Conference Supports Citing Unpublished Opinions*, LEGAL TIMES, Sept. 21, 2005, available at <http://www.law.com/jsp/article.jsp?id=1127207112718>.

323. Schiltz, *supra* note 18, at 1475 (“[A]ll of the appellate judges on the Advisory Committee (including Judges Alito and Roberts) have supported Rule 32.1.”).

324. Alito Symposium Address, *supra* note 78, at SAA-01719.

325. *Id.* at SAA-01715 (noting that while abandoning the published/unpublished distinction would be “the preferred option of a great many practitioners and academics,” it would be unworkable without some other systemic change).

326. *Id.* at SAA-01717.

327. *Id.* at SAA-01719–20.

328. *Id.* at SAA-01718 (“The other feature of current practice that I believe must be altered concerns the issue addressed by proposed Federal Rule of Appellate Procedure 32.1, the issue whether lawyers should be allowed to cite ‘unpublished’ opinions in their briefs.”).

common law tradition and should not be regulated by the national rules process.<sup>329</sup>

It is apparent that Justice Alito favored lifting the citation ban and believed the issue of precedent was a rule for the Court rather than the rule-making body.

In terms of a historical view of the nature of precedent, Justice Alito relies, as did Justice Roberts in his own confirmation process, on *Federalist No. 78*, by Alexander Hamilton:

In all the areas that you mentioned, there is now a considerable body of case law, and that is a real limitation on the exercise of judicial power. That is one of the important reasons for the doctrine of *stare decisis*. In the 78th Federalist Paper, when Alexander Hamilton was responding to the people who were worried about this power of judicial review, who thought that it would give the judiciary too much power, he specifically cited the fact that members of the judiciary would be bound up by precedent and this would restrain them. This would keep them from injecting their own views into the decisionmaking process.<sup>330</sup>

While Justice Alito holds a view of history consonant with Judge Arnold's *Anastasoff* opinion and Justice Scalia's concurring opinion in *James B. Beam Distilling Co. v. Georgia*,<sup>331</sup> it is less clear what opinion he holds regarding the constitutional issues surrounding nonprecedential opinions.<sup>332</sup> Certainly, he would regard the views of the Framers as a starting point for constitutional interpretation,<sup>333</sup> but no more specific statements by Justice Alito exist.

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329. *Unpublished Judicial Opinions, Hearing Before the H. Subcomm. on Courts, the Internet, and Intellectual Property*, 107th Cong. 6 (2002) [hereinafter *Alito Unpublished Judicial Opinions*].

330. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 526 (2006) [hereinafter *Alito Confirmation Hearing*].

331. 501 U.S. 529, 548–49 (1991) (Scalia, Marshall & Blackmun, JJ., concurring).

332. Justice Alito recounted a conversation with Judge Richard Arnold on the issue but expressed only the pragmatic concerns rather than any opinion on the jurisprudential question. Alito Symposium Address, *supra* note 78, at SAA-01708–09. Likewise, in advocating for full citation, he carefully explained that such a citation rule did not mandate that precedential status similar to cases in the *Federal Reporter* needed to be granted to unpublished opinions. *Id.* at SAA-01710–14.

333. *Alito Confirmation Hearing, supra* note 330, at 465 (in response to questioning by Senator Brownback, “In interpreting the Constitution, I think we should proceed in the way we proceed in interpreting other important legal authorities. In interpreting statutes, for example, I think we should look to the text of the Constitution and we should look to the meaning that someone would have taken from the text of the Constitution at the time of its adoption.”).

Chief Justice Roberts has similarly stated his approval of the new citation rule and been more circumspect on the precedent issue. Chief Justice Roberts has been quoted on the citation issue as saying, “[a] lawyer ought to be able to tell a court what it has done,” in support of FRAP 32.1.<sup>334</sup> In the April 2004 Advisory Committee Meeting, he expressed concern that there was a tension between the noncitation advocates’ arguments and the practical and historical issues of precedent:

Traditionally I think in our adversary system we allow disputes about the value of citable materials to be resolved by the lawyers in the exercise of their professional judgment in the interest of their client and let the judges decide whether we think that’s worth anything, whether it’s an opinion from another circuit, a district court opinion, a student comment in a law review. . . . However basic the proposition, in my professional judgment this is what I want that court to know on my client’s behalf and I found it frustrating to have a rule saying you can’t do that.<sup>335</sup>

Justice Roberts, in his confirmation process, affirmed a belief in the historical underpinnings of the pro-precedent argument. For example, in responding to questions about the nature of precedent put to him by then-Senator Biden, Justice Roberts responded: “As Alexander Hamilton explained in Federalist No. 78: ‘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.’”<sup>336</sup> He likewise noted that the intent of the Framers was an important starting place for constitutional analysis.<sup>337</sup> But he rejected being categorized as an originalist,<sup>338</sup> strict constructionist,<sup>339</sup> or any other label,<sup>340</sup> and neither his confirmation hearings nor prior scholarship or court opinions touch at all on the unpublished opinion issue.

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334. See Mauro, *supra* note 322.

335. Transcript, Meeting of the Advisory Committee on Appellate Rules 52–54 (Apr. 13, 2004), available at <http://www.nonpublication.com/aphearing.htm> (also using the term “noncitable precedent” to refer to unpublished opinions).

336. Letter from Judge John Roberts to Sen. Arlen Specter, Senate Judiciary Committee (Sept. 21, 2005), available at <http://www.gpoaccess.gov/congress/senate/judiciary/sh109-158/549-555.pdf> (responses to written questions from then Senator Biden).

337. See *Roberts Confirmation Hearing*, *supra* note 322, at 182 (in response to questioning by Senator Grassley, “I do think it’s the—that the Framers’ intent is the guiding principle that should apply”).

338. See *id.* at 158.

339. See *id.*

340. See *id.* (When asked directly by Senator Hatch: “Some of the philosophies [Cass

Whether these views by Chief Justice Roberts and Justice Alito translate to a view that the Constitution compels precedential value of all opinions is unknown. Part of the difficulty in assessing the predisposition of Justices Roberts and Alito on the issue of precedent is that, as Advisory Committee members, they were concerned with the citation rule before them and not the precedent issue. In educating others and moving toward a uniform citation rule, the committee was scrupulous in separating the issues of publication, citation, and precedent.<sup>341</sup> In their positions as circuit judges, they were not in a position to address the practice, and they have not yet had opportunity on the Supreme Court to do so.

*D. Justices Ginsburg and Breyer: Scholarly and Structural Concerns*

Justices Ginsburg and Breyer have both addressed the issue of volume in the federal courts in their scholarship while serving on the circuit courts. While Justice Breyer's work barely touches on the issue of unpublished opinions, Justice Ginsburg addresses the issue at some length, finding it to be "a problematic device."<sup>342</sup>

Justice Ginsburg has made no comment in the form of judicial opinions on the unpublication system, but her scholarship reveals considerable thought on the practice. First, in 1983 Justice Ginsburg, then a judge on the D.C. Circuit, wrote a thoughtful law review article on the establishment of the federal judiciary under Article III of the Constitution.<sup>343</sup> In that piece she examined, *inter alia*, the issue of caseload volume and workload in the federal courts.<sup>344</sup> Regarding unpublished opinions, she recognized their usefulness, "unpublished memoranda are time savers generally reserved for cases presenting neither a novel issue nor a question of evident significance to

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Sunstein's recent book] discussed were whether a judge should be an originalist, a strict constructionist, a fundamentalist, a perfectionist, a majoritarian or a minimalist. Which of those categories do you fit in?" Judge Roberts replied: "Like most people, I resist the labels. I have told people when pressed that I prefer to be known as a modest judge, and to me that means some of the things that you talked about in those other labels. It means an appreciation that the role of the judge is limited, that a judge is to decide the cases before them, they're not to legislate, they're not to execute the laws. Another part of that humility has to do with respect for precedent that forms part of the rule of law that the judge is obligated to apply under principles of *stare decisis*."

341. See Alito *Unpublished Judicial Opinions*, *supra* note 329, at 5 ("The issue of these unpublished or 'non-precedential' opinions, as some of us now call them, seems to raise three major questions. They are related, but I think it is worth trying to keep them separate."); Advisory Committee, *supra* note 96, at 11 ("[T]his Committee has gone out of its way to avoid expressing a view on *Anastasoff*.").

342. Ruth Bader Ginsburg, *Reflections on the Independence, Good Behavior, and Workload of Federal Judges*, 55 U. COLO. L. REV. 1, 10 (1983) (internal citations omitted).

343. See generally *id.*

344. *Id.* at 7–13.



persons other than the parties,”<sup>345</sup> but also their downside, “[e]ven so, the unpublished decision is a problematic device, for the signed opinion has a checking function; as former Chief Judge of the First Circuit Frank Coffin said, a fully articulated written opinion ‘represent[s] some guarantee against loose thinking, sloppy workmanship, and arbitrariness.’”<sup>346</sup> In addition, she noted that the practice of issuing decisions without opinions is not desirable to litigants: “My court has a local rule promising an expedited decision if the parties stipulate to disposition without opinion. I know of no case in which litigants have invoked the rule.”<sup>347</sup>

Similarly, in 1985, Justice Ginsburg discussed her experiences and thoughts about the federal appellate judiciary in a law review article entitled *The Obligation to Reason Why*.<sup>348</sup> In that piece, Justice Ginsburg discussed the keenly felt obligation of the federal appellate judiciary to arrive at correct and fair conclusions as well as her insider’s look at how decisions are arrived at and communicated to the public.<sup>349</sup> She again noted the utility of unpublished memoranda as a tool to deal with the rising tide of cases but expressed serious concern with their use: “[t]he unsettling question, to which I will return, is whether cases resolved by abbreviated disposition are in fact decided with sufficient care and hard thought.”<sup>350</sup> In addition, she noted: “A study of the use of unpublished abbreviated dispositions, sponsored by the Federal Judicial Center, indicates the need for further attention to this question by the Judicial Conference of the United States.”<sup>351</sup> Justice Ginsburg addressed directly the question of “[h]ow do these dispositions, our practice of not publishing them, and our rule against citation of unpublished orders as precedent, measure up against the court’s obligation to reason why?”<sup>352</sup> She approved of abbreviated dispositions<sup>353</sup> but not dispositions that omit any

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345. *Id.* at 9.

346. *Id.* at 10.

347. *Id.*

348. Ruth Bader Ginsburg, *The Obligation to Reason Why*, 37 U. FLA. L. REV. 205 (1985).

349. *Id.*

350. *Id.* at 213–14.

351. *Id.* at 214 n.41 (citing William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 631 (1981)).

352. *Id.* at 218.

353. This is perhaps one of the best suggestions for resolving the undeniably high volume of federal appeals. Somewhere between a full, dissertational opinion and a summary disposition lies an abbreviated opinion that is signed by specific judges and gives: (1) the holding relevant to the case; (2) a statement of the prior authority that governs; and (3) a brief statement of the reasoning or facts that clearly bring this case within the ambit of the prior authority. This shortened opinion need not set forth the history of the rule, its prior applications, the full chain of reasoning, or other information that would be included when the court is consciously expanding or retracting the scope of the rule (or changing the governing rule). If, indeed, cases disposed of by abbreviated opinions are the easy

reasoning entirely: “I believe a court of appeals should never release a result without any stated reason.”<sup>354</sup> The reasoning she would require “need not be elaborate,” and a simple statement of agreement with the reasoning below or citation to the circuit or Supreme Court authority would suffice.<sup>355</sup> Regarding limited publication rules specifically, she again expressed concern, stating “[a] limited publication rule, however sensible its purpose, is susceptible of misuse.”<sup>356</sup> The abuse she had in mind was that a judge or panel might “resort to an unpublished, abbreviated disposition to conceal or avoid a troublesome issue.”<sup>357</sup> Her proposed solution to this would be a system that defaults to publication as well as greater reproduction, indexing, and citation of unpublished opinions by third parties.<sup>358</sup> In this regard, Justice Ginsburg’s preferred model has come to pass; “unpublished” appeals court decisions are now both widely published and citable. Though it cuts against the grain of her overall concerns with the use of unpublished opinions, she twice in that article suggested that when a court labels something as “lacking general precedential value,” it ought to respect that by not citing to such cases itself.<sup>359</sup> She did not say whether decisions so labeled can actually be stripped of their precedential value or whether simply, having labeled them as of lesser value, the court ought to respect that. She did call for “a sensible, even-handed, uniform system for all of the circuits.”<sup>360</sup> While we now have such a rule regarding citation, there is still no rule regarding the form and nature of dispositions nor the precedential value of those opinions.

Finally, in 1990, when writing on the issue of authoring separate opinions, Justice Ginsburg again noted that publication of opinions provides judicial accountability and requires judges to test their own thoughts before making them law.<sup>361</sup> Though the discussion of unpublished opinions is not central to her essay, she emphasized the accountability point:

I betray no confidence when I tell you that unsigned work products, more often than signed opinions, are fully composed by hands other than a judge’s own—by staff attorneys or law clerks—and let out with scant editing by the

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cases, such a statement ought to be feasible. Cf. CARRINGTON ET AL., *supra* note 186, at 33–35.

354. Ginsburg, *supra* note 348, at 221.

355. *Id.* at 222.

356. *Id.*

357. *Id.*

358. *Id.* at 222–23.

359. *Id.* at 223.

360. *Id.*

361. Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 139 (1990).

supervising panel. Judges generally do not labor over unpublished judgments and memoranda, or even published per curiam opinions, with the same intensity they devote to signed opinions. As a bright commentator observed in a related context: “When anonymity of pronouncement is combined with security in office, it is all too easy for the politically insulated officials to lapse into arrogant *ipse dixits*.”<sup>362</sup>

Justice Ginsburg’s writings evince serious concerns about the issuance of unpublished opinions, particularly in the high percentage of cases left unpublished. But her concern is more about accountability, thoughtfulness, and communication by the federal appellate judiciary than about the problem of nonprecedential precedents or the alleged constitutional infirmities of the unpublication system. Still, her clear concerns with the system seem to bode well for those seeking certiorari on the issue of unpublished opinions.

Justice Breyer has not addressed the issue of unpublished opinions but has discussed the underlying problem of volume in the federal courts. The volume explosion that gave rise to the unpublication system was also a driving force behind a reevaluation of the circuit system generally. Various potential remedies for dealing with growing case loads were examined, including splitting some of the larger, busier circuits; adding another tier of appellate review in the federal system; creating a single unified appellate system; and removing certain classes of cases from general federal (or federal appellate) jurisdiction.<sup>363</sup> Justice Breyer, then Chief Judge of the First Circuit Court of Appeals, delivered a lecture on court administration in 1990.<sup>364</sup> In it, Justice Breyer seemed generally satisfied with the process of tracking cases, but not into the published/unpublished bins the unpublication system requires. Instead, he viewed as less important only the cases that were likely to settle, fail on procedural grounds, be obviated by intervening factual or legal development, or involve only simple factual questions.<sup>365</sup> He also expressed concern with any greater tracking of cases or relegation of any additional cases to the lesser track;<sup>366</sup> unfortunately, that is exactly what has happened in the years since 1990.<sup>367</sup> And, while Justice Breyer identified the abundance of

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362. *Id.* (internal citations omitted).

363. *See generally* FED. CTS. STUDY COMM., *supra* note 88.

364. Stephen Breyer, *Administering Justice in the First Circuit*, 24 SUFFOLK U. L. REV. 29 (1990).

365. *Id.* at 32–33.

366. *Id.* at 43.

367. JUDICIAL BUSINESS, *supra* note 11, at 52 tbl.S-3 (showing the percent unpublished in the twelve-month period ending September 30, 2006, to be 84.1%).

precedents as a problem, as opposed to a lack of precedents that unpublication opponents would complain of, his predicted solution was not to bar or suppress some precedents but to create an intermediate tier of appellate courts to speak with a more unified legal voice.<sup>368</sup> In this regard, Justice Breyer did not advocate such a structural change, but predicted it: “I am not advocating a major structural change at present. . . . Yet, . . . this approach presents a possible long-range solution to a significantly increased caseload and, unless the caseload stops growing, this is what will happen *eventually*.”<sup>369</sup>

Justice Breyer’s thoughtful discussion prefers some means to address the volume issue over others, specifically greater case management, promotion of alternative dispute resolution, and efficient case management, but he ultimately concluded that “a circuit court of appeals can do very little on its own.”<sup>370</sup> Whether the recognition of the need for both local and global solutions to the volume problem translates into a willingness to hear and strike down the present unpublication system seems uncertain. This focus on administration and pragmatism suggests an unwillingness to strike down the present system without an adequate replacement, but perhaps now that he is Justice Breyer, he would be willing to issue a constitutional interpretation without regard to the administrative concern that was his focus as Chief Judge of the First Circuit. This single comment by Justice Breyer seems too little to support much reasoned prediction about his opinion on the unpublication system.

#### *E. Justices Kennedy and Souter: Silent on the Issue*

Finally, Justices Anthony Kennedy and David Souter seem to have remained almost entirely silent on the issue of unpublished opinions. Not a single comment has been found in any separate concurrence or dissent nor any piece of scholarship or even any media comment.

The only public comment tying Justice Kennedy to the issue of the recent citation discussion is a hearsay comment recounted by noncitation opponent Michael Schmier: “‘When Justice Anthony Kennedy was here for a speech, my brother and I went up to him to talk about this and he got very angry at us,’ Mr. Schmier said, quoting the former Californian as replying, ‘If you guys want us to do it right, we’d need 1,000 more judges.’”<sup>371</sup> Given the

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368. Breyer, *supra* note 364, at 40–42.

369. *Id.* at 42.

370. *Id.* at 48.

371. Frank J. Murray, *Justices to Review Access to Opinions*, WASH. TIMES, Oct. 27, 2000, at A8, available at <http://famguardian.org/Subjects/LawAndGovt/LegalEthics/Nonpublication/Press/MURRAY.htm> (quoting Michael Schmier, advocate of lifting nonpublication rules, specifically in California, and petitioner in *Schmier v. Supreme Court of California*, 531 U.S. 958 (2000) (denying certiorari), which despite the title of the article was not reviewed—the high Court denied certiorari).

second-hand nature of this comment as well as the lack of context as to the system being discussed little can be inferred about Justice Kennedy's opinion on the issue of precedent of unpublished opinions.

Regarding Justice Souter, there is even less. He did sign on to a dissent to denial of certiorari authored by Justice Blackmun, also signed by Justice O'Connor, stating: "The fact that the Court of Appeals' opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the Circuit and surely is as important to the parties concerned as is a published opinion."<sup>372</sup> Of course, Justice Souter has elected to step down from the Court following the 2008-2009 Term.<sup>373</sup> His recently nominated, and likely to be appointed, replacement, Judge Sonia Sotomayor, has an equally unknown opinion on the issue of unpublished opinions and precedent.<sup>374</sup> Nothing in her writings or public comments reveal an opinion on this issue. If the next Supreme Court Justice is other than Sonia Sotomayor, his or her views on unpublished opinions may be as inscrutable as those of Souter and Sotomayor or as well-established as those of Justice Stevens. Only time will tell what predisposition, if any, our new ninth Justice will have on this issue.

In sum, the separate statements by the sitting Supreme Court Justices illustrate a varying degree of interest in the issue and concern with the system. Justice Stevens is plainly and steadfastly disapproving of the entire unpublication system. Justice Ginsburg shares those grave concerns, though her writings paint her as less concerned with the precedent aspect of the debate. Justice Scalia and probably Justice Thomas support the originalist interpretation of our Framers' views on precedent inherent in Article III. Chief Justice Roberts and Justice Alito have both been outspoken advocates of the pro-citation rule, FRAP 32.1, and have expressed general concerns about the unpublication system. Justices Breyer, Souter, and Kennedy have made only passing references, if any, to the issue. While none of this evinces a clear willingness to rule, as Judge Richard Arnold did in *Anastasoff*, that circuit nonpublication rules violate the Constitution, or that such rules violate equal protection or due process, they at least suggest a willingness on the part of a majority of the Court to examine the issue.

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372. *Smith v. United States*, 502 U.S. 1017, 1020 n.\* (1991) (mem.) (Blackmun, O'Connor & Souter, JJ., dissenting).

373. Letter from Supreme Court Justice David H. Souter to President Barack H. Obama (May 1, 2009), available at <http://www.supremecourtus.gov/publicinfo/press/DHSLetter.pdf>; see also Nina Totenberg, *Supreme Court Justice Souter to Retire*, NAT'L PUBLIC RADIO, Apr. 30, 2009, available at <http://www.npr.org/templates/story/story.php?storyId=103694193>.

374. Ben Feller, *Historic Nomination: Hispanic Sotomayor as Justice*, ASSOCIATED PRESS, May 27, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/26/AR2009052600881.html>.

## VI. CONCLUSION

The tripartite unpublication system has fallen apart. Cases were unpublished to save time and costs and then declared noncitable to deny the market for them and, finally, they were declared nonprecedential by relying on “the correspondence of publication and precedential value on the one hand, and of non-publication and non-precedent value on the other hand.”<sup>375</sup> This “morass of jurisprudence”—a justification for denying precedent to cases for the first time in common law history—was never examined by the 1973 Committee nor by any authority promulgating the precedent-denying rules. Despite numerous petitions for certiorari, the Supreme Court has never reviewed the issue. Any petition for certiorari faces an uphill battle given the numerous petitions and few grants of certiorari. Still, several Justices have expressed concern with the unpublication system and support for the historical and constitutional arguments opponents of that system rely upon. While certiorari, and ultimately a constitutional ruling, are improbable, such claims ought to be pursued.<sup>376</sup> The only remaining piece of the unpublication system—denial of precedent—is unjustified and improper. Whatever adjustment the federal judiciary must make in the wake of such a decision, principle demands an end to the practice. The time has come to drain the morass of jurisprudence avoided by past policymakers and set a better foundation for the future of the American federal common law system.

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375. STANDARDS FOR PUBLICATION, *supra* note 1, at 21.

376. In the Court’s only grant of certiorari on a case raising this issue, *Browder*, it left open the question for another day. *Browder v. Dir., Dept. of Corr. of Ill.*, 434 U.S. 257, 258 n.1 (1978) (“Finally, petitioner questioned the validity of the Seventh Circuit’s ‘unpublished opinion’ rule. We leave these questions to another day.”). Hopefully, that day is not too far off.