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MISSING THE FOREST FOR A TREE: UNPUBLISHED OPINIONS AND NEW FEDERAL RULE OF APPELLATE PROCEDURE 32.1

SCOTT E. GANT*

Abstract: On December 1, 2006, Federal Rule of Appellate Procedure 32.1 will take effect, allowing citation to all opinions issued on or after January 1, 2007 that have been designated “unpublished” or “non-precedential.” The new Rule, under consideration by the Judicial Conference of the United States since the 1990s, seemingly puts an end to the long and sometimes contentious debate over whether citation to unpublished opinions should be permitted. But the Rule does not address a more important issue: whether the federal courts of appeals should designate some of their opinions as nonprecedential. This Article argues the notion that judges can and should determine an opinion’s precedential value at the time they issue it is based upon a flawed and outdated view of how the law develops. Whether an opinion has made “new law” or is otherwise significant is a judgment best made with the benefit of time, and with input from lawyers, litigants, and other judges.

INTRODUCTION

On December 1, 2006, new Federal Rule of Appellate Procedure 32.1 will take effect, displacing the array of rules in the individual federal appeals courts governing citation to “unpublished” opinions and other case dispositions designated as nonprecedential, and imposing in their place a uniform rule allowing citation to such decisions.¹ The Rule’s enactment (in which both Chief Justice Roberts and Justice Alito played significant roles) follows several years of vigorous debate not ordinarily associated with consideration of a

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¹ FED. R. APP. P. 32.1 (proposed); see Order Amending the Fed. Rules of Appellate Procedure (2006) [hereinafter Order], available at <http://www.supremecourtus.gov/orders/courtorders/frap06p.pdf>.

rule of procedure, let alone the typically quiet rulemaking process for the federal courts of appeals.²

Unfortunately, the furor over the new citation rule has overshadowed a more important and divisive issue—whether it is appropriate for appeals courts to designate some (in fact, most) of their decisions as nonprecedential.³ The sponsors of Rule 32.1 were aware of the controversy that has emerged during the past decade regarding the wisdom and constitutionality of this practice, but they steered clear of it, emphasizing early on that the Rule is “extremely limited” and avoids taking any position on this highly-charged question.⁴

Supporters of unpublished opinions principally contend that the opinions enable appeals courts to conserve and sensibly allocate scarce judicial resources, and promote clarity, uniformity, and cohesiveness of the law. Critics of unpublished opinions charge that they permit appeals courts to suppress precedent, lead to the dedication of insufficient attention to unpublished dispositions, and are inconsistent with principles of judicial accountability.⁵ These arguments

² See *infra* notes 67–100 and accompanying text.

³ District courts are not faced with the challenge of deciding which, if any, of their opinions should be designated as unpublished because, as a formal matter, no district court opinions are “precedential.” See *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1124 (7th Cir. 1987) (“[D]istrict judges in this circuit must not treat decisions by other district judges, in this and *a fortiori* in other circuits, as controlling, unless of course the doctrine of res judicata or of collateral estoppel applies. . . . [T]he responsibility for maintaining the law’s uniformity is a responsibility of appellate rather than trial judges”); *Nat’l Union Fire Ins. Co. v. Allfirst Bank*, 282 F. Supp. 2d 339, 351 (D. Md. 2003) (“Of course, no decision of a district court judge is technically binding on another district court judge, even within the same district.”) (citation omitted); *In re Oxford Health Plans, Inc.*, 191 F.R.D. 369, 377 (S.D.N.Y. 2000) (“Principles of *stare decisis* do not require this Court to give any deference to decisions of another district judge.”) (citation omitted).

⁴ FED. R. APP. P. 32.1 (proposed) advisory committee’s note (“Rule 32.1 is extremely limited. It takes no position on whether refusing to treat an ‘unpublished’ opinion as binding precedent is constitutional. It does not require any court to issue an ‘unpublished’ opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as ‘unpublished’ or specify the procedure that a court must follow in making that decision. It says nothing about what effect a court must give to one of its ‘unpublished’ opinions or to the ‘unpublished’ opinions of another court.”) (citations omitted); Letter from Seth P. Waxman, U.S. Solicitor General, to Judge Will Garwood, U.S. Court of Appeals for the Fifth Circuit 1 (Jan. 16, 2001) (on file with author) (“Although this is a sensitive topic, I believe that [proposed Rule 32.1] is narrowly framed and focused solely on citation rules that, by their nature, are an appropriate topic for national rule-making.”).

⁵ Most of the arguments for and against unpublished opinions are well covered in other articles and will not be repeated here. See generally Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219 (1999); Stephen R. Barnett, *From*

were featured in the wrangling over whether to enact a uniform rule governing citation to unpublished opinions, which culminated in adoption of the new Rule.⁶

What has been missing from the debate over unpublished opinions, however, is an examination of its conceptual foundation. Underpinning the practice of designating certain opinions “unpublished” is the notion that appeals court judges themselves *can and should* determine an opinion’s precedential authority at the time they issue the opinion, based on their view about whether that opinion has made “new law” or is otherwise significant.⁷ That idea is predicated upon a flawed and outdated view of judicial decisionmaking and development of the law, and should be abandoned.⁸ Stripped of its anachronistic foundation, it becomes difficult to justify the existing

Anastasoff to Hart to West’s Federal Appendix: *The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1 (2002); Douglas A. Berman & Jeffrey O. Cooper, *In Defense of Less Precedential Opinions: A Reply to Chief Judge Martin*, 60 OHIO ST. L.J. 2025 (1999); Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG 2D 17 (2000); Richard B. Cappalli, *The Common Law’s Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755 (2003); Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C. L. REV. 235 (1998); Jeffrey O. Cooper, *Citability and the Nature of Precedent in the Courts of Appeals: A Response to Dean Robel*, 35 IND. L. REV. 423 (2002); Daniel N. Hoffman, *Publicity and the Judicial Power*, 3 J. APP. PRAC. & PROCESS 343 (2001); Salem M. Katsh & Alex V. Chachkes, *Constitutionality of “No-Citation” Rules*, 3 J. APP. PRAC. & PROCESS 287 (2001); Thomas R. Lee & Lance S. Lehnhof, *The Anastasoff Case and the Judicial Power to “Unpublish” Opinions*, 77 NOTRE DAME L. REV. 135 (2001); Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399 (2002); David S. Tatel, *Some Thoughts on Unpublished Decisions*, 64 GEO. WASH. L. REV. 815 (1996); Carl Tobias, *Anastasoff, Unpublished Opinions, and Federal Appellate Justice*, 25 HARV. J.L. & PUB. POL’Y 1171 (2002); Melissa H. Weresh, *The Unpublished, Non-Precedential Decision: An Uncomfortable Legality?*, 3 J. APP. PRAC. & PROCESS 175 (2001); Elizabeth M. Horton, Comment, *Selective Publication and the Authority of Precedent in the United States Courts of Appeals*, 42 UCLA L. REV. 1691 (1995); Kenneth Anthony Laretto, Note, *Precedent, Judicial Power, and the Constitutionality of “No-Citation” Rules in the Federal Courts of Appeals*, 54 STAN. L. REV. 1037 (2002); Kirt Shuldberg, Comment, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541 (1997); Suzanne O. Snowden, Note, *“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 (2001); 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 (2001).

⁶ See Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23, 30–57 (2005) (summarizing arguments advanced for and against Rule 32.1 during the rulemaking process).

⁷ See *infra* notes 101–26 and accompanying text.

⁸ See *infra* notes 127–30 and accompanying text.

system of unpublished opinions, which is desperately in need of re-consideration.

I. UNPUBLISHED OPINIONS AND PUBLICATION RULES

A. *The History of Unpublished Opinions*

Today the designation of an opinion as “unpublished” refers to its status as nonprecedential. But when the rules regarding unpublished opinions emerged several decades ago, the designation of a decision as published or unpublished actually bore some relationship to its availability to lawyers and the public, as the label would suggest.

Commentators expressed concerns about the growing number of judicial opinions as early as the 1800s.⁹ The movement towards formal limitations on the publication of, and citation to, appellate rulings did not emerge until 1964, however, when the Judicial Conference of the United States¹⁰ (the “Judicial Conference”) resolved that courts of appeals should publish “only those opinions which are of general precedential value.”¹¹ Seven years later, in 1971, the Federal Judicial Center (the “FJC”)¹² observed in its annual report there was “widespread consensus that too many opinions are being printed or published or otherwise disseminated.”¹³ The following

⁹ See Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119, 121 & n.3 (1994). Some American commentators voiced concerns about the proliferation of judicial decisions as early as the first half of the nineteenth century, and British commentators voiced concerns as early as the late 1700s. See David Greenwald & Frederick A. O. Schwarz, Jr., *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133, 1144-45 (2002).

¹⁰ The Judicial Conference was created by Congress to make policy with regard to the administration of the U.S. courts. See 28 U.S.C. § 331 (2000 & Supp. III 2003). It is comprised of the chief judge of each circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit chosen by appellate and district judges from that circuit, with the Chief Justice of the United States as its presiding officer. See *id.*

¹¹ JUDICIAL CONFERENCE OF THE U.S., REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964).

¹² The Federal Judicial Center is the research and education agency of the federal judicial system. 28 U.S.C. § 620(b) (2000). It was established by Congress in 1967 on the recommendation of the Judicial Conference of the United States. Act of Dec. 20, 1967, Pub. L. No. 90-219, § 101, 81 Stat. 664, 664 (codified at 28 U.S.C. § 620 (2000)). By statute, the Chief Justice of the United States chairs the FJC’s Board; other members include the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference. 28 U.S.C. § 621 (2000).

¹³ FED. JUDICIAL CTR., ANNUAL REPORT 7-8 (1971).

year, the FJC's Board recommended that the Judicial Conference instruct the courts of appeals to adopt procedures for publishing only some of their opinions and adopt rules limiting citation to unpublished opinions.¹⁴ Heeding that recommendation, in October 1972 the Judicial Conference directed the courts of appeals to develop their own plans for selective publication of opinions.¹⁵ By 1974 each court had developed its own plan, and the courts implemented them over the next several years.¹⁶

Initially, opinions designated as unpublished were available to anyone who wished to pay a visit to the clerk's office at each court of appeals, but were not otherwise disseminated to the public or to legal publishers. Over time, however, more and more "unpublished" opinions became widely available, primarily through private publishers such as West and Lexis.¹⁷ Today, most unpublished opinions (which comprise approximately 80% of all appeals court dispositions)¹⁸ are accessible through electronic legal databases, or in

¹⁴ See JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 33 (1972); see also 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, 1170 (1978) (discussing the FJC Board's recommendation).

¹⁵ See JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 33 (1972). In 1973, the Advisory Council for Appellate Justice issued a report urging appellate courts to adopt publication rules to reduce the number of published opinions. See COMM. ON USE OF APPELLATE COURT ENERGIES OF THE ADVISORY COUNCIL ON APPELLATE JUSTICE, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS 5 (1973). The Council was jointly sponsored by the Federal Judicial Center and the National Center for State Courts. See Martineau, *supra* note 9, at 122 n.5.

¹⁶ See Greenwald & Schwarz, *supra* note 9, at 1142; Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1443–44 (2004); Reynolds & Richman, *supra* note 14, at 1171; see also FED. R. APP. P. 47(a) (authorizing courts of appeals to enact local rules).

¹⁷ See Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CAL. L. REV. 15, 17–20 (1987) (discussing the history of reporting on judicial decisions); William R. Mills, *The Shape of the Universe: The Impact of Unpublished Opinions on the Process of Legal Research*, 46 N.Y.L. SCH. L. REV. 429, 440 (2002–03) (noting that "[c]ourts' limited publication regimes have never completely prevented researchers from finding unpublished opinions, any more than their no-cite rules have prevented lawyers and judges from using them"). See generally Francine Biscardi, *The Historical Development of the Law Concerning Judicial Report Publication*, 85 LAW LIBR. J. 531 (1993) (discussing the history of judicial opinion compilation and publication).

¹⁸ ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS 42 tbl.S-3 (2005), available at <http://www.uscourts.gov/judbus2005/tables/s3.pdf> (showing that approximately 82% of dispositions on the merits during the 12-month period ending September 30, 2005 were "unpublished"). The Administrative Office of the U.S. Courts compiles annual statistics on the operation of the federal courts, including data

West's *Federal Appendix*, established in 2001, which includes every "unpublished" decision sent to it by courts of appeals.¹⁹ Moreover, the E-Government Act of 2002 requires that all opinions, published and unpublished, be posted on every federal court's own website.²⁰

B. *Publication and Citation Rules in the U.S. Courts of Appeals*

For the past three decades, each federal appeals court has maintained, and occasionally revised, its own rules governing publication and citation.²¹ Among them, only the U.S. Court of Appeals for the D.C. Circuit has dispensed with the practice of designating some of its dispositions as nonprecedential.²² Although that court retains the distinction between "published" and "unpublished" opinions, both forms of opinions rendered after January 1, 2002 may be cited "as precedent."²³ Each of the other courts of appeals currently has rules under which it relegates certain dispositions to nonprecedential status.²⁴

on the types of opinions or orders entered in cases terminated on the merits in the courts of appeals. *See id.*; *see also* Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 200-05 (2001) (tracing the rise in unpublished opinions in the federal appeals courts using statistics from the Administrative Office of the U.S. Courts).

¹⁹ See 1 WEST'S FEDERAL APPENDIX, at iii (2001).

²⁰ E-Government Act of 2002, Pub. L. No. 107-347, § 205(a)(5), 116 Stat. 2899, 2913.

²¹ *See supra* notes 15-16 and accompanying text.

²² *See* D.C. CIR. R. 28(c)(1)(B).

²³ *Id.* *But see* D.C. CIR. R. 36(c)(2) ("While unpublished orders and judgments may be cited to the court in accordance with Circuit Rule 28(c)(1)(B), a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition.").

²⁴ *See, e.g.*, 1ST CIR. R. 36(a) ("[W]here opinions are likely not to break new legal ground or contribute otherwise to legal development, they are issued in unpublished form."); 1ST CIR. R. 36(b)(1) ("In general, the court thinks it desirable that opinions be published and thus be available for citation. The policy may be overcome in some situations where an opinion does not articulate a new rule of law, modify an established rule, apply an established rule to novel facts or serve otherwise as a significant guide to future litigants."); 2D CIR. R. § 0.23 ("[W]hen no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order. . . . Where disposition is by summary order, the court may append a brief written statement to that order. . . . [But] these statements do not constitute formal opinions of the court . . ."); 4TH CIR. R. 36(a) ("Opinions delivered by the Court will be published only if the opinion satisfies one or more of the standards for publication: (i) It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or (ii) It involves a legal issue of continuing public interest; or (iii) It criticizes existing law; or (iv) It contains a historical review of a legal rule that is not duplicative; or (v) It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit."); 5TH

CIR. R. 47.5.1 ("The publication of opinions that merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession. However, opinions that may in any way interest persons other than the parties to a case should be published. Therefore, an opinion is published if it: (a) Establishes a new rule of law, alters, or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked; (b) Applies an established rule of law to facts significantly different from those in previous published opinions applying the rule; (c) Explains, criticizes, or reviews the history of existing decisional or enacted law; (d) Creates or resolves a conflict of authority either within the circuit or between this circuit and another; (e) Concerns or discusses a factual or legal issue of significant public interest; or (f) Is rendered in a case that has been reviewed previously and its merits addressed by an opinion of the United States Supreme Court. An opinion may also be published if it: Is accompanied by a concurring or dissenting opinion; or reverses the decision below or affirms it upon different grounds."); 6TH CIR. R. 206(a) ("The following criteria shall be considered by panels in determining whether a decision will be designated for publication . . . : (1) whether it establishes a new rule of law, or alters or modifies an existing rule of law, or applies an established rule to a novel fact situation; (2) whether it creates or resolves a conflict or [sic] authority either within the circuit or between this circuit and another; (3) whether it discusses a legal or factual issue of continuing public interest; (4) whether it is accompanied by a concurring or dissenting opinion; (5) whether it reverses the decision below . . . ; (6) whether it addresses a lower court or administrative agency decision that has been published; or (7) whether it is a decision that has been reviewed by the United States Supreme Court."); 7TH CIR. R. 53(c)(1) ("A published opinion will be filed when the decision (i) establishes a new, or changes an existing rule of law; (ii) involves an issue of continuing public interest; (iii) criticizes or questions existing law; (iv) constitutes a significant and non-duplicative contribution to legal literature (A) by a historical review of law, (B) by describing legislative history, or (C) by resolving or creating a conflict in the law; (v) reverses a judgment or denies enforcement of an order when the lower court or agency has published an opinion supporting the judgment or order; or (vi) is pursuant to an order of remand from the Supreme Court and is not rendered merely in ministerial obedience to specific directions of that Court."); 7TH CIR. R. 53(c)(2) ("When the decision does not satisfy the criteria for publication [as set out in Seventh Circuit Rule 53(c)(1)] it will be filed as an unpublished order."); 9TH CIR. R. 36-2 ("A written, reasoned disposition shall be designated as an OPINION only if it: (a) Establishes, alters, modifies or clarifies a rule of law, or (b) Calls attention to a rule of law which appears to have been generally overlooked, or (c) Criticizes existing law, or (d) Involves a legal or factual issue of unique interest or substantial public importance, or (e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or (f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or (g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression."); 11TH CIR. R. 36-3, I.O.P. 6 ("Opinions that the panel believes to have no precedential value are not published."); D.C. CIR. R. 36(a)(2) ("An opinion, memorandum, or other statement explaining the basis for the court's action in issuing an order or judgment will be published if it meets one or more of the following criteria: (A) with regard to a substantial issue it resolves, it is a case of first impression or the first case to present the issue in this court; (B) it alters, modifies, or significantly clarifies a rule of law previously announced by the court; (C) it calls attention to an existing rule of law that appears to have been generally overlooked; (D) it criticizes or questions existing law; (E) it resolves

Some courts have dispensed with the term "unpublished" and simply refer to decisions as precedential or nonprecedential.²⁵ Others specifically address the precedential or binding effect of an unpublished opinion.²⁶ The Eighth and Tenth Circuits have no criteria

an apparent conflict in decisions within the circuit or creates a conflict with another circuit; (F) it reverses a published agency or district court decision, or affirms a decision of the district court upon grounds different from those set forth in the district court's published opinion; (G) it warrants publication in light of other factors that give it general public interest." See generally Stephen L. Wasby, *Publication (or Not) of Appellate Rulings: An Evaluation of Guidelines*, 2 SETON HALL CIR. REV. 41 (2005) (discussing nonpublication rules and norms, and how judges enforce them).

²⁵ See 3D CIR. INTERNAL OPERATING P. 5.2 ("An opinion, whether signed or per curiam, is designated as precedential . . . when it has precedential or institutional value."); 3D CIR. INTERNAL OPERATING P. 5.3 ("An opinion, whether signed or per curiam, that appears to have value only to the trial court or the parties is designated as not precedential A not precedential opinion may be issued without regard to whether the panel's decision is unanimous and without regard to whether the panel affirms, reverses, or grants other relief."); FED. CIR. R. 47.6(b) ("An opinion or order which is designated as not to be cited as precedent is one determined by the panel issuing it as not adding significantly to the body of law."); FED. CIR. INTERNAL OPERATING P. 10.3 ("Disposition by nonprecedential opinion or order [means] that a precedential opinion would not add significantly to the body of law"); FED. CIR. INTERNAL OPERATING P. 10.4 ("The court's policy is to limit precedent to dispositions meeting one or more of these criteria: (a) The case is a test case. (b) An issue of first impression is treated. (c) A new rule of law is established. (d) An existing rule of law is criticized, clarified, altered, or modified. (e) An existing rule of law is applied to facts significantly different from those to which that rule has previously been applied. (f) An actual or apparent conflict in or with past holdings of this court or other courts is created, resolved, or continued. (g) A legal issue of substantial public interest, which the court has not sufficiently treated recently, is resolved. (h) A significantly new factual situation, likely to be of interest to a wide spectrum of persons other than the parties to a case, is set forth. (i) A new interpretation of a Supreme Court decision, or of a statute, is set forth. (j) A new constitutional or statutory issue is treated. (k) A previously overlooked rule of law is treated. (l) Procedural errors, or errors in the conduct of the judicial process, are corrected, whether by remand with instructions or otherwise. (m) The case has been returned by the U.S. Supreme Court for disposition by action of this court other than ministerial obedience to directions of the Court. (n) A panel desires to adopt as precedent in this court an opinion of a lower tribunal, in whole or in part.").

²⁶ See 1ST CIR. R. 36(c) ("[A] panel's decision to issue an unpublished opinion means that the panel sees no precedential value in that opinion."); 5TH CIR. R. 47.5.4 ("All 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"); 6TH CIR. R. 206(c) ("Published Opinions Binding. Reported panel opinions are binding on subsequent panels."); 8TH CIR. R. 28A(i) ("[Unpublished opinions] are not precedent"); 9TH CIR. R. 36-3(a) ("Unpublished dispositions and orders of this Court are not binding precedent, except when relevant under the doctrine of law of the case, res judicata, and collateral estoppel."); 10TH CIR. R. 36.3(A) ("Unpublished orders and judgments of this court are not binding precedents, except under the doctrines of law of the case, res judicata, and collateral estoppel."); 11TH CIR. R. 36-2 ("Unpublished opinions are not considered binding precedent"); D.C. CIR. R. 28(c)(1)(B) ("All unpub-

for publication or assignment of precedential value, even though they designate some opinions as unpublished and do not treat those opinions as precedential.²⁷

Many of the courts' citation rules address only citation of unpublished decisions to *that court*,²⁸ or do not specify the reach of their rule.²⁹ Some courts also address citation of their unpublished decisions to other courts,³⁰ and/or by other courts.³¹ A few courts

lished orders or judgments of this court . . . entered on or after January 1, 2002 may be cited as precedent.”).

²⁷ See 8TH CIR. INTERNAL OPERATING P. IV.B; 10TH CIR. R. 36.1; 10TH CIR. R. 36.2.

²⁸ E.g., 1ST CIR. R. 32.3(a) (“An unpublished opinion of this court may be cited in this court only in the following circumstances . . .”).

²⁹ See 3D CIR. R. 28.3 (“Citations to federal decisions that have not been formally reported shall identify the court, docket number and date, and refer to the electronically transmitted decision.”); 5TH CIR. R. 47.5.4 (“An unpublished opinion may . . . be persuasive [and can be cited].”); 8TH CIR. R. 28A(i) (“[Unpublished opinions] are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well.”); 10TH CIR. R. 36.3(B) (“Citation of an unpublished decision is disfavored. But an unpublished decision may be cited if: (1) it has persuasive value with respect to a material issue that has not been addressed in a published opinion; and (2) it would assist the court in its disposition.”); 11TH CIR. R. 36-2 (“Unpublished opinions . . . may be cited as persuasive authority.”); D.C. CIR. R. 28(c)(1)(B) (“All unpublished orders or judgments of this court . . . entered on or after January 1, 2002, may be cited as precedent.”); FED. CIR. R. 47.6(b) (“Any opinion or order [designated as nonprecedential] must not be employed or cited as precedent. [But t]his rule does not preclude assertion of claim preclusion, issue preclusion, judicial estoppel, law of the case, or the like . . .”).

³⁰ See 2D CIR. R. § 0.23 (“Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported or not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before *this or any other court*.”) (emphasis added); 4TH CIR. R. 36(c) (“Citation of this Court’s unpublished dispositions in briefs and oral arguments *in this Court and in the district courts within this Circuit* is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case. If counsel believes, nevertheless, that an unpublished disposition of this Court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court.”) (emphasis added); 6TH CIR. R. 28(g) (“Citation of unpublished decisions in briefs and oral arguments *in this Court and in the district courts within this Circuit* is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.”) (emphasis added); 7TH CIR. R. 53(b)(2) (“Unpublished orders: . . . (iv) Except to support a claim of res judicata, collateral estoppel or law of the case, shall not be cited or used as precedent (A) in any federal court within the circuit in any written document or in oral argument . . .”). The authority of a court to prohibit citation of one of its decisions to a court in another circuit is unclear.

³¹ See 7TH CIR. R. 53(b)(2) (“Unpublished orders: . . . (iv) Except to support a claim of res judicata, collateral estoppel or law of the case, shall not be cited or used as prece-

also have rules governing citation of *other courts'* unpublished or nonprecedential opinions.³² Others have rules or internal operating procedures describing their own citation of unpublished opinions.³³ Most describe their procedures for determining the publication status of an opinion.³⁴

dent . . . (B) by any [federal court within the circuit] for any purpose."); 9TH CIR. R. 36-3(b) ("Unpublished dispositions and order [sic] of this Court may not be cited *to or by the courts of this circuit* except (1) [W]hen relevant under the doctrine [sic] of law of the case, res judicata, or collateral estoppel. (2) [F]or factual purposes [O]r (3) in a request to publish a disposition or in a petition for panel rehearing or rehearing en banc") (emphasis added). The Ninth Circuit has criticized at least one district court in its circuit for citing an unpublished opinion. See *Thomas v. Newton Int'l Enters.*, 42 F.3d 1266, 1272 (9th Cir. 1994) (observing that the district court "violated" the Ninth Circuit rule by citing extensively to an unpublished opinion, and reminding "the parties and the district court that the terms of Circuit Rule 36-3 must be strictly followed").

³² See 1ST CIR. R. 32.3(b) ("Unpublished or non-precedential opinions of *other courts* as defined or understood by those courts, may be cited [according to the First Circuit Rules].") (emphasis added); 7TH CIR. R. 53(e) ("Except to [sic] the purposes set forth in Circuit Rule 53(b)(2)(iv) [to support a claim of res judicata, collateral estoppel or law of the case], no unpublished opinion or order of *any court* may be cited in the Seventh Circuit if citation is prohibited in the rendering court.") (emphasis added); D.C. CIR. R. 28(c)(2) ("Unpublished dispositions of *other courts of appeals* and district courts may be cited when the binding . . . or preclusive effect of the disposition is relevant. Otherwise, unpublished opinions by other courts of appeals may be cited only under the circumstances and for the purposes permitted by the court issuing the disposition") (emphasis added).

³³ See 3D CIR. INTERNAL OPERATING P. 5.7 ("The court by tradition does not cite to its not precedential opinions as authority. Such opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing."); 4TH CIR. R. 36(c) ("In the absence of unusual circumstances, this Court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions.")

³⁴ See 1ST CIR. R. 36(b)(2)(C) ("When a panel decides a case with a dissent, or with more than one opinion, the opinion or opinions shall be published unless all the participating judges decide against publication. In any case decided by the court en banc the opinion or opinions shall be published."); 3D CIR. INTERNAL OPERATING P. 5.1 ("A majority of the panel determines whether an opinion is designated as precedential or not precedential, unless a majority of the active judges of the court decides otherwise."); 4TH CIR. R. 36(a) ("Opinions . . . will be published if the author or a majority of the joining judges believes the opinion satisfies one or more of the standards for publication, and all members of the Court have acknowledged in writing their receipt of the proposed opinion. A judge may file a published opinion without obtaining all acknowledgements only if the opinion has been in circulation for ten calendar days."); 5TH CIR. R. 47.5.2 ("An opinion shall be published unless each member of the panel deciding the case determines that its publication is neither required nor justified under the criteria for publication."); 6TH CIR. R. 206(b) ("An opinion or order shall be designated for publication upon the request of any member of the panel."); 7TH CIR. R. 53(d)(1) ("The determination to dispose of an appeal by unpublished order shall be made by a majority of the panel rendering the decision."); 8TH CIR. INTERNAL OPERATING P. IV.B ("The panel determines whether the opinion is to be published or unpublished."); 9TH CIR. R. 36-5 ("An order may be specially designated for publication by a majority of the

II. ANASTASOFF V. UNITED STATES: A SHOT ACROSS THE BOW

Much of the current debate over unpublished opinions can be traced to an Eighth Circuit decision issued in August 2000.³⁵ In *Anastasoff v. United States*, the court considered an appeal by a taxpayer whose claim for a refund of overpaid taxes had been deemed untimely by the district court.³⁶ Ms. Anastasoff argued to the Eighth Circuit panel that it was not bound by one of the court's prior unpublished decisions, in which it had considered and rejected the "same legal argument" advanced in her case.³⁷ In response, the panel issued a (published) opinion, authored by Judge Richard Arnold, which deemed unconstitutional the portion of the Eighth Circuit's rule declaring unpublished opinions nonprecedential.³⁸ Focusing on Article III of the Constitution—in particular, its reference to the "judicial power"³⁹—the panel concluded that the court's rule "expands the judicial power beyond the limits set by Article III by allowing us complete discretion to determine which judicial decisions will bind us and which will not. Insofar as it limits the precedential effect of our prior decisions, the Rule is therefore unconstitutional."⁴⁰ The panel accordingly viewed itself bound by the court's prior unpublished opinion on the issue, ruling against Ms. Anastasoff by finding her refund claim untimely.⁴¹

While the Eighth Circuit was deciding *Anastasoff*, the Second Circuit issued an opinion reaching the opposite conclusion about the underlying legal question.⁴² In light of this conflict, as well as her view that the panel's constitutional ruling regarding unpub-

judges acting and when so published may be used for any purpose for which an opinion may be used."); 11TH CIR. R. 36-2 ("An opinion shall be unpublished unless a majority of the panel decides to publish it."); D.C. CIR. R. 36(c)(2) ("[A] panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition."); FED. CIR. INTERNAL OPERATING P. 10.5 ("The election to [issue a judgment without opinion] shall be unanimous among the judges of the panel.").

³⁵ See, e.g., Barnett, *supra* note 5, at 1, 8; Lee & Lehnhof, *supra* note 5, at 135-38; Robel, *supra* note 5, at 409-11.

³⁶ 223 F.3d 898, 899 (8th Cir.), *vacated as moot on reh'g*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

³⁷ *Id.*

³⁸ *Id.*; see 8TH CIR. R. 28A(i).

³⁹ U.S. CONST. art. III, § 1, cl. 1.

⁴⁰ *Anastasoff*, 223 F.3d at 905.

⁴¹ See *id.* at 899, 905. One year before *Anastasoff*, Judge Arnold had posed the same question presented by the case in an article. See Arnold, *supra* note 5, at 226 (asking, but not examining, whether "the assertion that unpublished opinions are not precedent and cannot be cited [is] a violation of Article III").

⁴² See *Weisbart v. U.S. Dep't of Treasury*, 222 F.3d 93, 96-97 (2d Cir. 2000).

lished opinions was erroneous, Ms. Anastasoff petitioned the Eighth Circuit for rehearing en banc.⁴³ The government responded to the petition for rehearing en banc by informing the court that it intended to pay Ms. Anastasoff in full, and contending that the appeal should be dismissed as moot.⁴⁴ After learning that Ms. Anastasoff's claim had been paid, in December 2000 the Eighth Circuit issued an en banc decision finding that the case was moot.⁴⁵ The court's decision also explained that, in accordance with "the appropriate and customary treatment" when a case becomes moot, the court would vacate the panel's opinion and judgment in the case.⁴⁶ As for its rule on unpublished opinions, the en banc court observed: "The constitutionality of that portion of [our rule] which says that unpublished opinions have no precedential effect remains an open question in this Circuit."⁴⁷

Although the Eighth Circuit pulled back its ruling on the constitutionality of unpublished opinions, its effects have lingered, and the panel's decision prompted responses from two other circuit courts. In 2001, the Ninth Circuit ordered an attorney to show cause why he should not be sanctioned for violating the court's rule barring citation of unpublished opinions.⁴⁸ Although the court ultimately exercised its discretion not to sanction the lawyer, it extensively refuted the *Anastasoff* panel's conclusion that declaring some decisions nonprecedential violates Article III.⁴⁹ Writing for the court, Judge Alex Kozinski, one of the most ardent defenders of unpublished opinions, explained:

[W]e are unable to find within Article III of the Constitution a requirement that all case dispositions and orders issued by appellate courts be binding authority. On the con-

⁴³ *Anastasoff v. United States*, 235 F.3d 1054, 1055 (8th Cir. 2000) (en banc).

⁴⁴ *Id.*

⁴⁵ *Id.* at 1056.

⁴⁶ *See id.*

⁴⁷ *Id.* The court continues to leave undecided whether its rule prohibiting the use of unpublished opinions for precedential value is constitutional. *See Lederman v. Cragun's Pine Beach Resort*, 247 F.3d 812, 816 n.3 (8th Cir. 2001).

⁴⁸ *Hart v. Massanari*, 266 F.3d 1155, 1159 (9th Cir. 2001); *see* 9TH CIR. R. 36-3.

⁴⁹ *Hart*, 266 F.3d at 1175 ("The question raised by *Anastasoff* is whether one particular aspect of the binding authority principle—the decision of which rulings of an appellate court are binding—is a matter of judicial policy or constitutional imperative. We believe *Anastasoff* erred in holding that, as a constitutional matter, courts of appeals may not decide which of their opinions will be deemed binding on themselves and the courts below them.").

trary, we believe that an inherent aspect of our function as Article III judges is managing precedent to develop a coherent body of circuit law to govern litigation in our court and the other courts of this circuit.⁵⁰

A few months later the Federal Circuit echoed the Ninth Circuit's view when it rejected a party's contention that the court was bound by two of its prior nonprecedential opinions under the reasoning of *Anastasoff*.⁵¹

Although several academic articles published since *Anastasoff* have analyzed constitutional objections to unpublished opinions,⁵² to date no other court of appeals has weighed in on the constitutionality of unpublished opinions.⁵³ Nonetheless, *Anastasoff* sparked

⁵⁰ *Id.* at 1180. The Ninth Circuit also affirmed a district court decision dismissing a lawsuit brought by a practicing attorney who contended that the Ninth Circuit's rules prohibiting citation to unpublished opinions violated his constitutional rights, on the grounds that the attorney lacked standing. See *Schmier v. U.S. Court of Appeals for the Ninth Circuit*, 279 F.3d 817, 820–21 (9th Cir. 2002). Because all of the Ninth Circuit judges recused themselves from the case, the panel was comprised of judges from other courts. *Id.* at 819 n.**. Although the court did not reach the merits of the constitutional claim presented, it did note that “[g]iven the wide range of interest shown in the debate about unpublished opinions . . . , we think it is only a matter of time before the theoretical questions raised by *Schmier*'s complaint are all properly presented and resolved.” *Id.* at 825.

⁵¹ *Symbol Techs., Inc. v. Lemelson Med.*, 277 F.3d 1361, 1367 (Fed. Cir. 2002) (“Article III of the Constitution does not contain an express prohibition on issuing nonprecedential opinions, nor can we discern one from the existence of the state of the law when the Framers drafted it.”).

⁵² See, e.g., Jessie Allen, *Just Words? The Effects of No-Citation Rules in Federal Courts of Appeals*, 29 VT. L. REV. 555, 574–91 (2005) (no-citation rules violate litigants' due process rights); Greenwald & Schwarz, *supra* note 9, at 1161–66 (no-citation rules violate the First Amendment guarantees of free speech and the right to petition); Hoffman, *supra* note 5, at 347–52 (no-citation rules violate Article III); Katsh & Chachkes, *supra* note 5, at 315–23 (no-citation rules violate separation of powers because they are not within courts' Article III powers); Strongman, *supra* note 5, at 211–22 (no-citation rules violate procedural due process and equal protection under the Fifth Amendment); Marla Brooke Tusk, Note, *No-Citations Rules as a Prior Restraint on Attorney Speech*, 103 COLUM. L. REV. 1202, 1221–34 (2003) (no-citation rules violate the First Amendment's rule against prior restraints); 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, 722–31 (2001) (no-citation rules violate procedural due process); see also Amy E. Sloan, *A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule*, 79 IND. L.J. 711, 745–65 (2004) (arguing that a national procedural rule or federal statute prohibiting the federal appellate courts from prospectively designating selected opinions as nonprecedential would be constitutional).

⁵³ Several judges in the Fifth Circuit did, however, urge that court to “revisit the questionable practice of denying precedential status to unpublished opinions.” See Wil-

considerable debate over the wisdom and propriety of courts declaring certain opinions nonprecedential, and about the rules regarding citation to such opinions.⁵⁴

liams v. Dallas Area Rapid Transit, 256 F.3d 260, 260 (5th Cir. 2001) (Smith, J., dissenting from denial of rehearing en banc).

The Supreme Court has been presented with several petitions for certiorari raising questions about the propriety of unpublished opinions and/or citation to them. *See, e.g.*, Petition for Writ of Certiorari at i, *Lewin v. Cooke*, 537 U.S. 881 (2002) (No. 02-49) ("When an appellant asserts that the circuit court's unpublished opinion in his case disobeys this Court's controlling precedent, and that publication would help to deter the disobedience, is there a due process right to publication?"); Petition for Writ of Certiorari at i, *Culp v. Hood*, 519 U.S. 1042 (1996) (No. 96-696) ("Whether rules and customs regarding the issuance by United States Courts of Appeal of unpublished decisions are out of date and subject to abuse where computer retrieval of Courts of Appeal decisions has alleviated the problems that the rules and customs regarding unpublished opinions sought to correct."); *see also* Motion for Leave to File Petition for Writs of Mandamus and Prohibition at 2, *Do-Right Auto Sales v. U.S. Court of Appeals for the Seventh Circuit*, 429 U.S. 917 (1976) (No. 75-1404) ("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?"). The Court has denied these petitions. *See Lewin*, 537 U.S. 881; *Culp*, 519 U.S. 1042; *Do-Right Auto Sales*, 429 U.S. 917; *see also* *Browder v. Director, Dep't of Corr. of Ill.*, 434 U.S. 257, 259 n.1 (1978) ("leav[ing for] . . . another day" petitioner's question about the validity of the Seventh Circuit's "unpublished opinion" rule). Of course, one cannot infer anything about the Supreme Court's views on unpublished opinions from its denial of certiorari in these cases. Nevertheless, that a court of appeals disposition was "published" has been cited by the Supreme Court as a factor in determining whether the disposition involved a "case" in the courts of appeals, subject to review under 28 U.S.C. § 1254(1). *See Hohn v. United States*, 524 U.S. 236, 242 (1998).

⁵⁴ Although I take no position here regarding the constitutionality of unpublished opinions, it is worth observing that the courts' practice of sorting out which of their opinions will have precedential effect and which will not is somewhat incongruous with (and tangential to) their constitutional assignment: the resolution of discrete cases and controversies. *See* U.S. CONST. art. III, § 2. When judges decide cases, they consider the present and the past—they consider the case before them and how it fits with the trends in the law and pertinent court decisions. When judges select decisions as nonprecedential they do more—they look *forward* as well as backward. They predict and shape the course of the law. This is a task distinct from those tasks that judges traditionally perform. I do not mean to adopt a formalistic view of the judges' responsibilities. Quite clearly, they look forward when deciding cases in the here and now. In writing opinions, they attempt to anticipate how the fortuities unleashed by the passage of time will push and pull their opinions. But there is a qualitative difference between this look forward and the gaze ahead judges must undertake to differentiate between precedential and nonprecedential opinions.

III. CITATION RULES AND THE ORIGINS OF FEDERAL RULE OF APPELLATE PROCEDURE 32.1

The Judicial Conference, amongst other things, prescribes rules of practice, procedure and evidence for the federal courts, subject to the ultimate right of Congress to reject, modify, or defer any of the rules.⁵⁵ The Judicial Conference's rule-prescribing responsibilities are coordinated by its Committee on Rules of Practice and Procedure, commonly referred to as the "Standing Committee."⁵⁶ The Judicial Conference has five advisory committees to assist the Standing Committee, including one addressing appellate issues—the Judicial Conference Advisory Committee on Appellate Rules, often referred to as the "Appellate Rules Committee."⁵⁷ The Standing Committee reviews and coordinates the recommendations of the five advisory committees, and proposes rule changes to the Judicial Conference "as may be necessary to maintain consistency and otherwise promote the interest of justice."⁵⁸ Given its role in establishing federal court rules and in judicial administration, the Judicial Conference, too, has struggled with the issue of unpublished opinions from time to time and found itself a central player in the recent debate.⁵⁹

The controversy within the Judicial Conference traces back to 1990, when the Federal Courts Study Committee of the Judicial Conference recommended that the Judicial Conference appoint an ad hoc committee to develop uniform guidelines regarding the courts of appeals' practice of designating certain opinions as unpublished.⁶⁰ The Judicial Conference considered the issue in 1991 but elected to take no action at that time.⁶¹

⁵⁵ See 28 U.S.C. §§ 2071–2074 (2000). Amendments to federal rules are adopted by the Supreme Court after approval by the Judicial Conference. See *id.* §§ 2072–2074. Congress may act upon any rules adopted by the Supreme Court during a period prescribed by statute. See *id.* § 2074. If Congress does not enact legislation to reject or modify any proposed rules adopted by the Court, the rules take effect. See *id.*; see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress.") (citation omitted).

⁵⁶ See 28 U.S.C. § 2073(b).

⁵⁷ *Id.* § 2074(a)(2), (b).

⁵⁸ *Id.* § 2073(b).

⁵⁹ See *infra* notes 60–98 and accompanying text.

⁶⁰ FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 130–31 (1990), reprinted in 22 CONN. L. REV. 733, 871–72 (1990). The Federal Courts Study Committee was created by Congress in 1988. See *Judicial Improvements and Access*

The topic then rested dormant on the "study agenda" of the Appellate Rules Committee (the "Committee") for six years until September 1997, when the Committee debated the issue and concluded that it should be "retained on the study agenda with high priority."⁶² At the Committee's next meeting in April 1998 (the first attended by then-Judge Alito as a Committee member), however, its Chair, Judge Will Garwood of the Fifth Circuit, reported that he had communicated with the chief judges of all of the circuits and that they were "adamant that they did not want national rulemaking on the topic of unpublished decisions."⁶³ Because it was clear to him based on those discussions that "rules regarding unpublished decisions have no chance of clearing the Judicial Conference in the foreseeable future," Judge Garwood recommended, and the Committee unanimously agreed, to remove the issue from the Committee's study agenda without prejudice to any specific proposals that might be made in the future.⁶⁴ Although the Committee backed away from the issue at that meeting, U.S. Deputy Assistant Attorney General Stephen W. Preston, attending on behalf of U.S. Solicitor General Seth Waxman, asked the Committee whether, "notwithstanding the strong reaction of the chief judges, it might still be worthwhile to pursue rulemaking on the isolated question of the citation of unpublished opinions."⁶⁵ He also indicated that the Solicitor General would support a rule allowing the citation of unpublished opinions.⁶⁶

Neither the Solicitor General nor the Committee took any further action on the issue until the Eighth Circuit panel decided *Anastasoff v. United States* in August 2000.⁶⁷ Perhaps prompted by the attention the Eighth Circuit had brought to unpublished opinions,

to Justice Act, Pub. L. No. 100-702, § 102, 102 Stat. 4642, 4644 (1988) (codified at 28 U.S.C. § 331 note (2000)).

⁶¹ See Minutes of the September 29, 1997 Meeting of the Advisory Committee on Rules of Appellate Procedure 9 (Sept. 29, 1997), available at <http://www.uscourts.gov/rules/Minutes/ap9-97.htm> (noting the Judicial Conference's inaction on this issue in 1991).

⁶² *Id.* at 12.

⁶³ See Minutes of the April 16, 1998 Meeting of the Advisory Committee on Rules of Appellate Procedure 25-26 (Apr. 16, 1998), available at <http://www.uscourts.gov/rules/Minutes/0498appellateminutes.htm>.

⁶⁴ *Id.* at 26, 29.

⁶⁵ *Id.* at 26.

⁶⁶ *Id.*

⁶⁷ See 223 F.3d 898, 899-905 (8th Cir.), vacated as moot on reh'g, 235 F.3d 1054 (8th Cir. 2000) (en banc); *supra* notes 36-41 and accompanying text.

on January 16, 2001, in the waning days of the Clinton Administration, Solicitor General Waxman, on behalf of the U.S. Department of Justice (the "Justice Department"), proposed that a new rule, 32.1, be added to the Federal Rules of Appellate Procedure that would allow citation to unpublished opinions in all federal courts of appeals.⁶⁸ The Committee took up the issue at its next meeting in April 2001, by which point now-Chief Justice Roberts had joined the Committee as one of its members from private practice.⁶⁹ Although members recalled the chief judges' vehement resistance to the idea when Judge Garwood polled them in 1998, the Committee briefly discussed whether attitudes may have changed in the intervening three years given the turnover of chief judges and the controversy brewing over *Anastasoff*.⁷⁰ By consensus, the Committee agreed to postpone further discussion of the proposed Rule for another meeting.⁷¹

By the time the Committee next met in April 2002, then-Judge Alito had become the Committee's new Chair.⁷² At the meeting, he reported that he had surveyed the chief judges about the Justice Department's proposal that the Federal Rules of Appellate Procedure be amended to permit citation to unpublished opinions, and that the response was mixed, with three expressing support, five opposing, and the others expressing varied views or not conveying a view.⁷³ The Committee debated at length whether it should propose a national rule governing the citation of unpublished opinions, ultimately voting 6–3 in support of the idea and 6–3 in favor of the Justice Department's proposed Rule 32.1, with minor revisions.⁷⁴

The Committee next met in November 2002.⁷⁵ At that session, the members discussed three alternative versions of proposed Rule

⁶⁸ Letter from Seth P. Waxman to Judge Will Garwood, *supra* note 4, at 1.

⁶⁹ See Minutes of the April 11, 2001 Meeting of the Advisory Committee on Rules of Appellate Procedure 64–65 (Apr. 11, 2001), available at <http://www.uscourts.gov/rules/Minutes/app0401.pdf>.

⁷⁰ *Id.*

⁷¹ *Id.* at 65.

⁷² See Minutes of the April 22, 2002 Meeting of the Advisory Committee on Rules of Appellate Procedure 1 (Apr. 22, 2002), available at <http://www.uscourts.gov/rules/Minutes/app0402.pdf>.

⁷³ See *id.* at 23. The Minutes of the meeting specify each chief judge's response. See *id.*

⁷⁴ See *id.* at 24–27. One of the revisions was to change any references to "unpublished" decisions to "non-precedential," as one committee member noted that the word "unpublished" had become a "misnomer" and observed that many "unpublished" opinions were being published in the *Federal Appendix*. *Id.* at 26–27.

⁷⁵ See Minutes of the November 18, 2002 Meeting of the Advisory Committee on Rules of Appellate Procedure 1 (Nov. 18, 2002) [hereinafter Minutes of the November 2002 Meet-

32.1, all of which had been drafted by the Committee's Reporter, Professor Patrick Schiltz (now a federal district court judge in Minnesota).⁷⁶ "Alternative A"—the broadest version of the proposed Rule—both authorized courts to issue nonprecedential opinions and allowed unqualified citation to those opinions.⁷⁷ "Alternative B" was silent about whether courts can or should issue nonprecedential opinions, but permitted unlimited citation to any such opinions.⁷⁸ "Alternative C" was the narrowest version, merely authorizing citation to nonprecedential opinions in limited circumstances.⁷⁹

The Committee quickly rejected Alternative A by consensus, with members expressing concern about adopting a procedural rule that appeared to take a side in the debate over the constitutionality of nonprecedential opinions.⁸⁰ Members of the Committee were unanimous in wanting to limit any new rule to the issue of citation.⁸¹ After extended discussion,⁸² the Committee approved Alternative B

ing of the Appellate Rules Advisory Committee], available at <http://www.uscourts.gov/rules/Minutes/app1102.pdf>. In the midst of this process, in June 2002 the Subcommittee on Courts, the Internet, and Intellectual Property of the U.S. House of Representatives Committee on the Judiciary conducted hearings on the topic of "unpublished judicial opinions." See *Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong. 1 (2002) [hereinafter *Hearing*]. The Subcommittee heard testimony from several witnesses: Judge (now Justice) Alito, then a member of the Third Circuit and Chair of the Advisory Committee on Appellate Rules, *id.* at 5–9, 55–65; Judge Alex Kozinski of the Ninth Circuit, *id.* at 9–20, 55–65; Kenneth Schmier, Chairman of a group called Committee for the Rule of Law, and brother of Michael Schmier, who challenged the Ninth Circuit's rules against citation to unpublished opinions on constitutional grounds, *see id.* at 20–41, 55–65; *supra* note 50; and Professor Arthur Hellman of the University of Pittsburgh School of Law, *Hearing, supra*, at 42–55, 55–65. In 1996, the Subcommittee on Administrative Oversight and the Courts of the U.S. Senate Committee on the Judiciary wrote a letter to federal appeals court and district court judges soliciting their views about unpublished opinions. See generally Tatel, *supra* note 5 (noting the Subcommittee's letter and stating his views in response).

⁷⁶ Minutes of the November 2002 Meeting of the Appellate Rules Advisory Committee, *supra* note 75, at 22–35.

⁷⁷ See *id.* at 23.

⁷⁸ See *id.* at 28.

⁷⁹ See *id.* at 31–32.

⁸⁰ See *id.* at 35.

⁸¹ See Minutes of the November 2002 Meeting of the Appellate Rules Advisory Committee, *supra* note 75, at 35.

⁸² During the discussion, Douglas Letter, representing U.S. Solicitor General Ted Olson, said that although the Justice Department had originally asked the Committee to approve a citation rule and continued to favor one, based on discussions with Judge Alex Kozinski of the Ninth Circuit and other opponents of the Rule, the Solicitor General had become troubled by some of the concerns that they raised. *Id.* at 35. Later in the discussion, Letter stated that if the Committee decided to proceed with a proposed Rule, the Justice Department would favor Alternative B over Alternative C. *Id.*

with a number of relatively minor changes by a vote of 7–1, with one abstention, and asked the Reporter to revise the draft Rule for the next meeting.⁸³

At that meeting in May 2003, the Committee (on which now-Chief Justice Roberts remained a member after his May 8, 2003 confirmation by the Senate as a judge on the U.S. Court of Appeals for the D.C. Circuit) reviewed the draft Rule 32.1 and approved a slightly modified version by a 7–1 vote, with one abstention.⁸⁴ The approved version of the Rule provided:

Rule 32.1. Citation of Judicial Dispositions

(a) Citation Permitted. No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like, unless that prohibition or restriction is generally imposed upon the citation of all sources.⁸⁵

After Judge Alito, as Chair, reported the proposed Rule to the Standing Committee,⁸⁶ the Judicial Conference solicited public comment on the proposed Rule.⁸⁷ It received more than 500 submissions in late 2003 and early 2004 (the second highest number of submissions in the history of federal rulemaking and an unprecedented number for a proposed appellate rule), including dozens

⁸³ See *id.* at 35–39. One revision the Committee made was to change the title of the proposal from “Citation of Non-Precedential Opinions” to “Citation of Opinions Designated As Non-Precedential”—wanting to stay as clear as possible from implying a view about the jurisprudential impact of “nonprecedential” opinions. *Id.* at 39.

⁸⁴ Minutes of the May 15, 2003 Meeting of the Advisory Committee on Rules of Appellate Procedure 11–17 (May 15, 2003), available at <http://www.uscourts.gov/rules/Minutes/app0503.pdf>.

⁸⁵ *Id.* at 11, 17. Subsection (b) of the proposed Rule required that copies of written dispositions “not available in a publicly accessible electronic database” be filed with any brief or other paper in which it is cited. *Id.* at 11.

⁸⁶ See Memorandum from Judge Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules, to Judge Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure 27–36 (May 22, 2003), available at <http://www.uscourts.gov/rules/app0803.pdf>. By the time Judge Alito reported Rule 32.1 to the Standing Committee, the end of subsection (a) had been amended slightly to read “unless that prohibition is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.” *Id.* at 29.

⁸⁷ Federal Rule of Appellate Procedure 32.1, 68 Fed. Reg. 53392 (proposed Sept. 10, 2003).

from federal appeals court judges, individually or in groups.⁸⁸ The Judicial Conference also conducted public hearings on April 13, 2004, during which fifteen witnesses testified.⁸⁹ The following day, the Appellate Rules Committee voted in favor of proposed Rule 32.1.⁹⁰

The Standing Committee considered proposed Rule 32.1 at its June 2004 meeting.⁹¹ After Judge Alito reported on the proposed rule—noting that it would “merely prevent a court of appeals from prohibiting the citation of unpublished opinions” but would not “require a court to give unpublished opinions any weight or precedential value”⁹²—the Standing Committee voted to take no action on the proposed Rule and returned it to the Appellate Rules Committee, with the expectation that the Appellate Rules Committee would work with the FJC to conduct empirical research on unpublished opinions.⁹³ At its November 2004 meeting, the Appellate Rules Committee noted the June 2004 decision by the Standing Committee, and announced that the FJC had designed a study and was considering proposed Rule 32.1 with the assistance of the Administrative Office of the U.S. Courts.⁹⁴

⁸⁸ See Schiltz, *supra* note 6, at 23–24, 29 (“Proposed Rule 32.1 is, without question, one of the most controversial proposals in the history of federal rulemaking.”)

⁸⁹ See generally Transcript of Hearing Before Advisory Committee on Appellate Rules (Apr. 13, 2004), available at <http://www.uscourts.gov/rules/0413APPE.DOC.pdf>.

⁹⁰ See Minutes of the April 13–14, 2004 Meeting of the Advisory Committee on Rules of Appellate Procedure 2–12 (Apr. 13–14, 2004), available at <http://www.uscourts.gov/rules/Minutes/app0404.pdf>. At the meeting Judge Roberts reported to the Appellate Rules Committee that during his appearance at the Standing Committee’s January 2004 meeting (which he attended as a replacement for Judge Alito), he had “stressed that the rule and accompanying Committee Note were drafted to take no position on the issue of whether it is lawful for a court to refuse to give binding precedential effect to one of its opinions.” *Id.* at 2. It is also reported that Roberts spoke in favor of the Rule at the April 2004 Appellate Rules Committee meeting, but the official minutes do not reflect such a statement, nor do they identify the two Committee members who did not favor the proposed Rule. See *id.* at 2–12; see also Tony Mauro, *Court Opinions No Longer Cites Unseen*, LEGAL TIMES, Sept. 26, 2005, at 8 (quoting Roberts as stating that “[a] lawyer ought to be able to tell a court what it has done”).

⁹¹ Minutes of the June 17–18, 2004 Meeting of the Committee on Rules of Practice and Procedure 8–11 (June 17–18, 2004), available at <http://www.uscourts.gov/rules/Minutes/june2004.pdf>.

⁹² *Id.* at 8.

⁹³ *Id.* at 11. The Standing Committee approved that action by a voice vote, without objection. See *id.*

⁹⁴ See Minutes of the November 9, 2004 Meeting of the Advisory Committee on Rules of Appellate Procedure 1–2 (Nov. 9, 2004), available at <http://www.uscourts.gov/rules/Minutes/app1104.pdf>.

By the Appellate Rules Committee's next meeting in April 2005, the FJC had prepared a preliminary report analyzing citations to unpublished opinions.⁹⁵ Apparently convinced that most of the concerns about permitting citation to unpublished opinions were not borne out by the FJC's investigation, the Committee voted 7–2 to approve proposed Appellate Rule 32.1, again sending it to the Standing Committee for consideration.⁹⁶

At its June 2005 meeting, the Standing Committee unanimously approved proposed Rule 32.1 and forwarded it to the Judicial Conference, with any concerns about the Rule seemingly dispelled by the studies of the FJC and Administrative Office of the U.S. Courts.⁹⁷ Three months later, the Judicial Conference approved the proposed Rule, after amending it to apply only to decisions issued on or after January 1, 2007, and forwarded it to the U.S. Supreme Court in November 2005.⁹⁸ The Supreme Court approved the new Rule on April 12, 2006.⁹⁹ The Rule is scheduled to take effect in December 2006.¹⁰⁰

⁹⁵ See generally FED. JUDICIAL CTR., CITATIONS TO UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS: PRELIMINARY REPORT (2005), available at [http://www.fjc.gov/public/pdf.nsf/lookup/citatio1.pdf/\\$file/citatio1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/citatio1.pdf/$file/citatio1.pdf). The report was later finalized. See generally FED. JUDICIAL CTR., CITATIONS TO UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS (2005) [hereinafter FJC, UNPUBLISHED OPINIONS], available at [http://www.fjc.gov/public/pdf.nsf/lookup/citatio3.pdf/\\$file/citatio3.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/citatio3.pdf/$file/citatio3.pdf) (documenting the results of a survey of federal appeals court judges and appellate attorneys, and of an examination of cases filed and resolved in federal appeals courts).

⁹⁶ See Minutes of the April 18, 2005 Meeting of the Advisory Committee on Rules of Appellate Procedure 2–18 (Apr. 18, 2005), available at <http://www.uscourts.gov/rules/Minutes/AP04-2005-min.pdf>; see also Schiltz, *supra* note 6, at 64 (observing, as Appellate Rules Committee Reporter, that all of the Committee members “agreed that the studies were well done and that they failed to support the main contentions of Rule 32.1’s opponents”).

⁹⁷ See Minutes of the June 15–16 Meeting of the Committee on Rules of Practice and Procedure 10–11 (June 15–16, 2004), available at http://www.uscourts.gov/rules/Minutes/ST_June_2005.pdf; Schiltz, *supra* note 6, at 65.

⁹⁸ See JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 36–37 (2005), available at http://www.uscourts.gov/judconf/sept05proc_final.pdf. The text of the Rule as revised by the Judicial Conference provides: “A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like; and (ii) issued on or after January 1, 2007.” Memorandum from Judge Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules, to Judge David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure 2 (May 6, 2005, revised Oct. 7, 2005), available at <http://www.uscourts.gov/rules/Reports/AP10-2005.pdf>.

⁹⁹ Order, *supra* note 1.

¹⁰⁰ See *supra* note 55 (discussing process for federal rulemaking). The Court must transmit proposed amendments to Congress by May 1 of the year in which the amend-

IV. THE FOUNDATION OF THE PRACTICE OF DESIGNATING OPINIONS AS NONPRECEDENTIAL

A. *The Underpinnings of Unpublished Opinions*

Although the specific criteria courts of appeals use in deciding which of their opinions to designate nonprecedential vary considerably, the courts' essential mission is the same: they attempt to sort out cases that do not "break new legal ground" or "alter, modify or clarify existing law."¹⁰¹ The premise that judges can and should make this determination at the moment a ruling is made, and without the benefit of input from others, is seriously flawed.¹⁰² And even though this premise rests at the foundation of the system of unpublished opinions, it has received remarkably little attention in the recent debates over the issue.¹⁰³

A report drafted for the American College of Trial Lawyers aptly describes the practice of designating certain opinions as nonprecedential: "We put the important decisions in the 'A' pile and the unimportant ones in the 'B' pile Everything you will ever need is over here in the 'A' pile. . . . [T]he 'B' pile case[s] do[] not say anything new."¹⁰⁴ The report's author (a critic of rules limiting citation to unpublished opinions) refers to the idea that cases belonging in the "B" pile can be readily and accurately identified as the "redundancy" principle.¹⁰⁵ This principle, and the entire system of bifurcating appellate dispositions into precedential and non-

ment is to take effect. See 28 U.S.C. § 2074 (2000). If Congress does not reject or modify it, the Rule will become effective on December 1, 2006. See *id.*

¹⁰¹ See *supra* notes 24–26 (setting out criteria courts use to designate decisions as nonprecedential).

¹⁰² For a discussion of the process of deciding whether a decision should be deemed "unpublished," see Stephen L. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. CAL. INTERDISC. L.J. 67, 111–23 (2004).

¹⁰³ Although a thorough discussion of precedent and its relationship to *stare decisis* is beyond the scope of this article, numerous other articles include instructive discussions of the nature of precedent. See, e.g., Boggs & Brooks, *supra* note 5, at 23–25; K.K. DuVivier, *Are Some Words Better Left Unpublished? Precedent and the Role of Unpublished Decisions*, 3 J. APP. PRAC. & PROCESS 397, 414–18 (2001); Robel, *supra* note 5, at 404–09. See generally Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989); Charles W. Collier, *Precedent and Legal Authority: A Critical History*, 1988 WIS. L. REV. 771; John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503 (2000); Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43 (2001).

¹⁰⁴ William T. Hangley, *Opinions Hidden, Citations Forbidden: A Report and Recommendations of the American College of Trial Lawyers on the Publication and Citation of Nonbinding Federal Circuit Court Opinions*, 208 F.R.D. 645, 673, 680 (2002).

¹⁰⁵ *Id.* at 680.

precedential categories at the time they are made, is based on a legal fiction.

First, this fiction has a temporal component. By assigning precedential value to opinions at the time they are issued, the rendering judges are making a *prediction* about their future value.¹⁰⁶ Like all other prognosticators, judges make mistakes.¹⁰⁷ But the problem with putting judges in the position of predicting the future value and relevance of their opinions goes beyond that posed by the fallibility of judges. It is simply an impossible task to predict future value and relevance, because the information necessary for accurate forecasting does not yet exist. An opinion's significance depends in part on future events; there are limits on judges' ability to foresee those events and all of the ways opinions may be fairly marshaled by litigants.¹⁰⁸ Although judges are as well-equipped as, or better-equipped than, anyone else to venture a guess, this undertaking is destined to fail if the objective is anything close to complete accuracy. An opinion's true precedential value can only be assessed by looking backwards after time has passed and its meaning has been debated and tested.¹⁰⁹

¹⁰⁶ See DuVivier, *supra* note 103, at 416–17 (“By designating some cases as published and others as unpublished, the judges themselves are attempting to predict which cases will have future significance.”); Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 HARV. C.R.-C.L. L. REV. 109, 125 (1995) (“The critical assumption underlying the efficiency rationale in favor of nonpublication is that judges are able to determine in advance which opinions will be valuable to future litigants.”).

¹⁰⁷ Several commentators have remarked on judges' fallibility in deciding whether their decisions are, or should be, precedential. See, e.g., Brian P. Brooks, *Publishing Unpublished Opinions: A Review of the Federal Appendix*, 5 GREEN BAG 2D 259, 260 (2002) (“A careful read of the *Federal Appendix* reveals just how imperfect is an appellate panel's ability to predict in advance which decisions are pathbreaking, interesting, or important enough to merit the ‘for publication’ designation.”); Greenwald & Schwarz, *supra* note 9, at 1153 (“There is evidence that judges are not unerring judges of the value of their own work product.”); Hangle, *supra* note 104, at 674 (“The judges and their screening clerks are not and never will be infallible in determining what is or is not a novel holding or a helpful discussion, or what will be one when considered in the context of a legal dispute that hasn't happened yet, and the functions for which past decisions may or must be cited are infinitely variable and largely unpredictable.”).

¹⁰⁸ See Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909, 921 (1986) (“Very often we find our opinions doing duty as precedents in ways quite other than we expected Our surprise may be . . . because we have failed to anticipate the problems our opinions will be used to solve.”).

¹⁰⁹ See Cappalli, *supra* note 5, at 773 (“The duty of determining the precedential impact of the decision-with-opinion belonged not to the precedent-setting court but to the precedent-applying court.”); Hangle, *supra* note 104, at 686 (“[A] particular opinion, holding or statement may have more persuasive merit or significance on one day than

Second, there is the fiction that the particular judges rendering a decision are the only meaningful participants in the process of deciding whether it will have future significance. The significance (and even the meaning) of judicial opinions cannot be ascertained by rendering judges alone, particularly not at the moment the decision is issued. Vesting decisions with meaning and significance is, by its nature, a process in which other judges and lawyers (and sometimes others, like the media) participate.¹¹⁰ The full meaning of a judicial opinion is, in this sense, social—it is dependent on a type of dialogue among the participants in the broader legal community.¹¹¹

Given that the system of unpublished opinions is built upon this fiction, it should be no surprise that the process of sorting decisions into the "A" and "B" piles reveals serious flaws.¹¹² There is considerable evidence that judges are deciding important and contested issues in unpublished opinions, and that they are applying the non-precedential designation more broadly than they should.¹¹³

on another day . . ."); Martineau, *supra* note 9, at 135 ("Limited publication and citation rules require judges to determine in advance the rule of law that will emerge from a case, and then to determine the effect of their decisions on the development of the law. Because our common law system emphasizes the importance of facts in each case, judges hardly can hope to predict the facts of future disputes. They cannot know today what will be crucial to litigants of tomorrow, even when they follow the standards designed to aid them in this determination."); Steve Sheppard, *The Unpublished Opinion Opinion: How Richard Arnold's Anastasoff Opinion Is Saving America's Courts from Themselves*, 2002 ARK. L. NOTES 85, 95 ("The precedential value of an opinion has historically been assessed by the later court, not by the court that decides the case.").

¹¹⁰ See Boggs & Brooks, *supra* note 5, at 25 ("One such truth is that judge-made law is a 'grown order' rather than a 'made order.' 'Made orders'—such as statutory schemes—'originate[] from the design of [their] creator,' while 'grown orders'—such as judge-made law—'arise without a plan . . . [with] orderly features [that] result from equilibrium rather than from someone's design.'" (quoting Mark F. Grady, *Positive Theories and Grown Order Conceptions of the Law*, 23 SW. U. L. REV. 461, 461 (1994))); Robel, *supra* note 5, at 410 ("The courts look . . . to the future value of opinions. However, . . . the future value of what they write is not, culturally speaking, determined by the authoring judge alone; rather, it is determined by consumers."); see also Jones v. Superintendent, Va. State Farm, 465 F.2d 1091, 1093 (4th Cir. 1972) ("No appellate court can ever be much better than its bar.").

¹¹¹ See James Boyd White, *What's an Opinion For?*, 62 U. CHI. L. REV. 1363, 1367–68 (1995) (discussing role of opinions in the "conversation that is . . . law").

¹¹² See *supra* note 104 and accompanying text. Some commentators have referred to the process of deciding whether or not a decision will be designated precedential as a "sorting device." See, e.g., Boggs & Brooks, *supra* note 5, at 19.

¹¹³ As two commentators have rightly observed, "the consequence of not publishing a useful precedent is much greater than the consequence of publishing a redundant, useless one." Greenwald & Schwarz, *supra* note 9, at 1153.

For instance, one might expect virtually all unpublished opinions to be unanimous dispositions affirming lower court rulings because the selection criteria suggest that opinions designated as unpublished should involve routine application of existing law, about which panel members presumably would agree.¹¹⁴ Yet a significant number of such opinions include dissents,¹¹⁵ and/or reverse district court rulings.¹¹⁶ One might also expect unpublished opinions rarely, if ever, to be the subject of Supreme Court review. Yet the Court has elected to review dozens of unpublished appeals court opinions,¹¹⁷ in many cases reversing the court's decision.¹¹⁸ Still other cases involve circuit splits, where at least one of the court of appeals decisions addressing the disputed issue was unpublished.¹¹⁹

¹¹⁴ See *supra* notes 24–26 and accompanying text.

¹¹⁵ See Hannon, *supra* note 18, at 221–24; see also Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 120 (2001) (“Unpublished decisions do not reflect routine applications of existing law with which all judges would agree. If they did, these decisions would not include a noticeable number of reversals, dissents, or concurrences, nor would they show significant associations between case outcome and judicial characteristics. . . . We know that at least some unpublished decisions reach results with which other judges would disagree. . . .”).

¹¹⁶ See Hannon, *supra* note 18, at 215–21.

¹¹⁷ See *id.* at 227–31, 241–50 (discussing the Supreme Court's review of unpublished federal appeals court opinions and listing cases in which the Court has, among other things, reviewed unpublished dispositions).

¹¹⁸ See, e.g., *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 175 (2004), *rev'g* 37 F. App'x 863 (9th Cir. 2002) (unpublished); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 38 (2003), *rev'g* 34 F. App'x 312 (9th Cir. 2002) (unpublished); *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 834 (2002), *rev'g* 13 F. App'x 961 (Fed. Cir. 2001) (unpublished); *Sims v. Apfel*, 530 U.S. 103, 112 (2000), *rev'g* No. 98-60126, 1998 WL 792809 (5th Cir. Nov. 6, 1998) (unpublished) (published subsequent to grant of certiorari at 200 F.3d 229); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 382 (1994), *rev'g* No. 92-16628, 1993 WL 164884 (9th Cir. May 18, 1993) (unpublished); *Houston v. Lack*, 487 U.S. 266, 276 (1988), *rev'g* No. 86-5198, 1987 WL 36042 (6th Cir. May 22, 1987) (unpublished); *Baldwin County Welcome Cir. v. Brown*, 466 U.S. 147, 152 (1984), *rev'g* No. 82-7033, 698 F.2d 1236 (11th Cir. Jan. 31, 1983) (unpublished); *Connick v. Myers*, 461 U.S. 138, 154 (1983), *rev'g* No. 81-3203, 654 F.2d 719 (5th Cir. Jul 23, 1981) (unpublished); *Moore v. Illinois*, 434 U.S. 220, 232 (1977), *rev'g* No. 75-1697, 534 F.2d 331 (7th Cir. Apr. 27, 1976) (unpublished); see also *Boggs & Brooks*, *supra* note 5, at 20–21 (noting that the Supreme Court has reversed a number of unpublished dispositions); Hannon, *supra* note 18, at 241–50 (listing cases, including more than forty in which the Supreme Court reversed or vacated an unpublished disposition).

¹¹⁹ See, e.g., *E. Associated Coal Corp. v. United Mine Workers of Am.*, Dist. 17, 531 U.S. 57, 61 (2000) (noting that the circuit court's opinion was unpublished and that the circuits were split over the underlying issue), *aff'g* No. 98-2527, 1999 WL 635632 (4th Cir. Aug. 20, 1999) (unpublished); *Carter v. United States*, 530 U.S. 255, 260 (2000) (same), *aff'g* No. 98-5491, 185 F.3d 863 (3d Cir. June 16, 1999) (unpublished); *Thompson v.*

Many judges have acknowledged it is difficult to determine accurately at the time of disposition which cases should be assigned precedential value;¹²⁰ others have gone further and acknowledged that the system does not work as it should.¹²¹ In a speech delivered nearly three decades ago, Justice John Paul Stevens observed that the practice itself "rests on a false premise" in that it "assumes that an author is a reliable judge of the quality and importance of his own work product."¹²²

The FJC's recent study, undertaken at the behest of the Standing Committee,¹²³ also calls the underpinnings of the practice of designating certain decisions as nonprecedential into question. According to a survey of all federal appeals court judges, almost 85% reported that it has at least sometimes been difficult to reconcile an

Keohane, 516 U.S. 99, 106 (1995) (same), *vacating* No. 94-35052, 1994 WL 424289 (9th Cir. Aug. 11, 1994) (unpublished).

¹²⁰ See, e.g., Boggs & Brooks, *supra* note 5, at 21 (noting that "individual panels of judges are only imperfectly able to predict future events and disputes that will influence the development of the law"); Edward A. Adams, *Increased Use of Unpublished Rulings Faulted*, N.Y. L.J., Aug. 2, 1994, at 1 (noting the Tenth Circuit's decision to allow citation to unpublished opinions and quoting then-Chief Judge of the Tenth Circuit, Stephanie K. Seymour, as stating that "limiting unpublished decisions to those with no precedential value 'is the theory, but it's not always the practice. Some turn out to have precedential value even when the panel of judges thought they didn't'"); see also Jones, 465 F.2d at 1094 ("We concede, of course, that any decision is by definition a precedent . . ."); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1376 (1995) ("In my own D.C. Circuit, the wide gap between the number of published and unpublished opinions written by different judges gives pause.").

¹²¹ See, e.g., Arnold, *supra* note 5, at 224 ("[M]any cases with obvious legal importance are being decided by unpublished opinions."); Wald, *supra* note 120, at 1374 ("In a study of the D.C. Circuit's unpublished decisions several years ago, a bar committee, applying our own written criteria, questioned the decision not to publish in 40 percent of the cases. I would guess the number would be much higher now."); see also Bruce M. Selya, *Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age*, 55 OHIO ST. L.J. 405, 414 (1994) ("Unfortunately, . . . even in circuits with strict rules on the books, the practical criterion for publication is the amount of time that the judge puts into an opinion.").

¹²² See Justice John Paul Stevens, Address to the Illinois State Bar Association's Centennial Dinner: Some Thoughts and Reflections on the Litigation Explosion and How It Has Affected the Courts' Ability to Cope with the Problem (Jan. 22, 1977), in 65 ILL. B.J. 508, 510 (1977). Justice Stevens has also directly or indirectly criticized unpublished opinions in decisions written while on the Supreme Court. See, e.g., Taylor v. United States, 493 U.S. 906, 907 (1989) (Stevens, J., dissenting from denial of certiorari); County of L.A. v. Kling, 474 U.S. 936, 938 (1985) (Stevens, J., dissenting from summary reversal) ("[The Ninth Circuit's] 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.").

¹²³ See *supra* notes 93–95 and accompanying text.

unpublished opinion of their court with one of their published opinions.¹²⁴ Presumably, most appeals court judges would not be surprised to learn that appeals courts have relied on their own unpublished opinions from time to time¹²⁵—a practice that makes no sense if the unpublished decision was not precedent and added nothing new to existing case law.¹²⁶

The premise that judges can and should determine whether they have made “new law” at the moment a ruling is made, and without the benefit of input from others, also appears to reflect certain strands of legal formalism that were displaced decades ago. Although the legacy of “legal realism” is subject to debate, it is clear that some of its lessons are firmly entrenched in mainstream con-

¹²⁴ See FJC, UNPUBLISHED OPINIONS, *supra* note 95, at 11, 40.

¹²⁵ See Hangley, *supra* note 104, at 655 (discussing a Fifth Circuit decision in which the court relied on a prior, unpublished decision of that court and included the prior decision as an attachment to the published ruling); Hannon, *supra* note 18, at 231–35 & tbl.6 (discussing results of author’s own study of citation to unpublished opinions by federal appeals courts); see also Robel, *supra* note 5, at 406–07 (discussing Hannon’s study).

¹²⁶ Some courts entertain requests to convert nonprecedential opinions to precedential ones. See 1ST CIR. R. 36(b)(2)(D) (“Any party or other interested person may apply for good cause shown to the court for publication of an unpublished opinion.”); 4TH CIR. R. 36(b) (“Counsel may move for publication of an unpublished opinion, citing reasons. If such motion is granted, the unpublished opinion will be published without change in result.”); 7TH CIR. R. 53(d)(3) (“Any person may request by motion that a decision by unpublished order be issued as a published opinion. The request should state the reasons why the publication would be consistent with the guidelines for method of disposition set forth in [Seventh Circuit Rule 53(c)(1)].”); 8TH CIR. INTERNAL OPERATING P. IV.B (“Counsel may request, by motion, that an unpublished opinion be published.”); 9TH CIR. R. 36-4 (“Publication of any unpublished disposition may be requested by letter addressed to the Clerk, stating concisely the reasons for publication.”); 11TH CIR. R. 36-3 (“At any time before the mandate has issued, the panel, on its own motion or upon the motion of a party, may by unanimous vote order a previously unpublished opinion to be published.”); 11TH CIR. R. 36-3, I.O.P. 6 (“Parties may request publication of an unpublished opinion by filing a motion to that effect . . .”); D.C. CIR. R. 36(d) (“Any person may, by motion made within 30 days after judgment, or, if a timely petition for rehearing is made, within 30 days after action thereon, request that an unpublished opinion be published.”); FED. CIR. R. 47.6(c) (“Within 60 days after any nonprecedential opinion or order is issued, any person may request, with accompanying reasons, that the opinion or order be reissued as precedential.”). That courts appear to grant such motions often also raises questions about the rigor with which they make publication decisions. See, e.g., *Guan v. Bd. of Immigration Appeals*, 345 F.3d 47, 48 n.1 (2d Cir. 2003) (noting decision to grant motion to publish “[b]ecause we are persuaded that this decision may have some precedential value . . .”); *In re Administrative Subpoena*, 289 F.3d 843, 843 n.* (6th Cir. 2001) (noting decision to grant motion to publish); *Doty v. Ill. Cent. R.R. Co.*, 162 F.3d 460, 460 n.* (7th Cir. 1998) (same).

temporary legal thought.¹²⁷ For example, the realist insights that law is not “discovered” and that judges are required to exercise judgment are widely accepted.¹²⁸ Today it would be difficult to find someone who disagrees with Justice Oliver Wendell Holmes’s observation that “the life of the law” has been experience rather than logic.¹²⁹ It is also widely accepted that discerning the meaning and holding of cases is often difficult, and that precedents frequently are subject to multiple reasonable interpretations.¹³⁰ If nothing else, legal realism contributed significantly to freeing us from the illusion that deciding cases or understanding judicial decisions is easy.

Assessing whether a decision makes “new law” is an enormously challenging undertaking, even assuming (as some steadfast realists would not) that the endeavor makes sense at all. A system that asks judges to resolve this question at the moment they issue a decision, and without the benefit of input from others, rests upon antiquated ideas about how the law develops. It is hard enough for judges to get cases “right” without having to take on the additional task of assessing the relationship of their just-completed opinion to the entire body of case law previously decided by their court.

B. *Rethinking Unpublished Opinions*

Any discussion of the problems associated with the existing system of unpublished opinions must include an assessment of the prac-

¹²⁷ See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 193–212 (1992) (describing legal realism’s legacy as its challenge to orthodox legal thought); Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 532–42 (1988) (book review) (discussing disagreements underlying the legal realism debate).

¹²⁸ See Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 7 (1998) (discussing the “pre-realist characterization of the judicial function as one of merely finding and pronouncing extant law”).

¹²⁹ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (44th prtq. 1951).

¹³⁰ See HORWITZ, *supra* note 127, at 199 (“Late-nineteenth-century legal thought has often been called formalistic because of its aspiration to be able to render one right answer to any legal question. In attacking deductive legal reasoning, Legal Realists made more original and lasting contributions to legal thought than in any other area.”); Singer, *supra* note 127, at 470 (“The legal realists [argued] that lawyers could not use legal rules alone to predict judicial decisions. They gave at least three separate reasons for this claim. First, they argued that legal rules were often vague and therefore ambiguous. . . . Second, the realists argued that judges could not determine, in a nondiscretionary way, the holdings of decided cases. . . . Third, the realists argued that, because of the indeterminacy of abstract concepts and the manipulability of precedent, it was almost always possible to appeal to competing and contradictory rules to decide any interesting contested case.”).

tical realities about how the judiciary operates. It is impossible to deny the enormous challenges courts of appeals face in keeping up with heavy caseloads, and the considerable time and energy required to generate thoughtful, comprehensive, and clear opinions.¹³¹ Moreover, it is undeniable that dispositions short of full-blown opinions are useful to judges in meeting those challenges. It would be a mistake, however, to conclude that the only way to achieve the advantages afforded by our current system of unpublished opinions is to retain it as is. Doing away with the *ex ante* designation of opinions as precedential and nonprecedential would not require judges to write full-blown opinions in all (or even most) cases or require the highest level of attention and scrutiny by the court. Truly easy cases could be resolved with limited explanations of the court's ruling and the reasons for it.¹³² Many courts already resolve some of their cases through such vehicles.¹³³

Dispensing with the practice of classifying some opinions as nonprecedential at the time they are rendered surely would greatly expand the universe of decisions that litigants *could* bring to a court's attention as authority. But the nature and quality of those decisions will be unchanged—only the labels applied to them will

¹³¹ If courts of appeals continue to designate some of their decisions as nonprecedential at the time of decision, that process must be undertaken with rigor, not as an afterthought. Discerning whether and how a particular decision is precedential is often no easy task, and can be time-consuming. See generally Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005) (developing a model for distinguishing between holdings and dicta); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997 (1994) (discussing the holding/dictum distinction through the lens of Article III). Many supporters of unpublished opinions seem to ignore the time that should be spent carefully assessing whether a decision should be designated as nonprecedential, and how this might offset some of the efficiencies derived from writing nonprecedential opinions. See Cappalli, *supra* note 5, at 768 ("The very choice of treating an appealed case as nonprecedential, if done conscientiously, has to be preceded by thoughtful analysis of the relevant precedents.").

¹³² Some might contend that this reform merely would lead to the relabeling of heretofore "unpublished opinions"—something like "summary order" or "memorandum." There can be little doubt that many such opinions would be decided with only a cursory written disposition. But the point is that the necessary efficiencies gained by disposing of some cases with an exhaustive opinion can be retained without casting the vast majority of decisions aside as nonprecedential.

¹³³ See 1ST CIR. R. 36(a) (order or memorandum and order); 2D CIR. R. § 0.23 (summary order); 4TH CIR. INTERNAL OPERATING P. 36.3 (summary opinion); 9TH CIR. R. 36-1 (memorandum or order); 10TH CIR. R. 36.1 (disposition without opinion); 11TH CIR. R. 36-1 (affirmance without opinion); D.C. CIR. R. 36(b) (abbreviated disposition); D.C. CIR. INTERNAL OPERATING P. XII.A (judgment or order without memorandum); FED. CIR. R. 36 (affirmance without opinion).

differ. As they do now, courts would wade through lawyers' arguments about the relevance and persuasiveness of prior decisional law, and resolve cases in the ways they think appropriate.¹³⁴

CONCLUSION

At first blush, it might seem surprising that a rule of appellate procedure became the subject of heated debate within the legal community. But the rules governing publication of and citation to judicial opinions are not only central to the judiciary's self-identity—they are also critical to lawyers and the public, shaping how litigants' cases are treated by the courts and how litigants communicate with courts through their counsel.

In many respects, however, the years of effort and attention surrounding Rule 32.1 have been a diversion from the more fundamental issues regarding unpublished opinions. From the moment it was conceived, the Rule was written to be "deliberately narrow"—intended to acknowledge "that the courts of appeals designate some of their decisions as unpublished or non-precedential," but to take "no position on the ongoing debate concerning the propriety of that practice" and not "purport[ing] to dictate to courts or judges what weight should be given to unpublished decisions."¹³⁵

The deliberative process leading up to the enactment of Rule 32.1 consciously and conspicuously ignored the pink elephant in the middle of the room.¹³⁶ Now that the issue of citation to unpublished opinions is resolved and behind us, it is time to rethink the system of unpublished opinions itself. Any complete reassessment of that sys-

¹³⁴ See Panel Discussion, *The Appellate Judges Speak*, 74 *FORDHAM L. REV.* 1, 17 (2005) (First Circuit Chief Judge Michael Boudin stating, "Precedential weight, of course, is not an 'on' or 'off' switch," and "opinions get very different weight depending on all kinds of circumstances: who wrote them, how recently, how persuasive they are"); Berman & Cooper, *supra* note 5, at 2039–40 ("If a case genuinely calls only for a straightforward application of well-settled law, then it is likely to receive summary treatment whether or not the opinion is subject to publication. Moreover, since such an opinion by definition does not add or otherwise change the law, there is no real need or reason for either a litigant or a judge to cite to it."); Hangle, *supra* note 104, at 647 ("[A] court can surely decide what weight it wishes to give to the reasoning behind [a prior] holding in a particular new factual context, rather than making the a priori judgment that nothing in the holding could possibly be pertinent to any future case.").

¹³⁵ See Letter from Seth P. Waxman to Judge Will Garwood, *supra* note 4, at 5; see also *FED. R. APP. P.* 32.1 (proposed) advisory committee's note.

¹³⁶ The Reporter of the Appellate Rules Committee recently described unpublished opinions as the "crazy uncle in the attic of the federal judiciary." Schiltz, *supra* note 6, at 72.

tem must include exploration of the legal fiction upon which the current system is based.¹³⁷

Judges cannot know at the time they render a decision, with anything resembling certainty, whether their opinion has advanced the development of the law or will never again interest anyone but the parties to that case. That judgment is best made with the benefit of time, and with input from lawyers, litigants, and other judges. The legal community as a whole would be better served by a system of decision-rendering reflecting that reality.

¹³⁷ There is some question whether the rulemaking process is the appropriate forum to resolve the underlying question of whether certain opinions can be deemed non-precedential. I take no position on that issue here.