UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEX KOZINSKI
U S CIRCUIT JUDGE

(626) 229-7140
FAX: 229-7444
kozinski@usc.edu

January 16, 2004

The Honorable Samuel A. Alito, Jr.
United States Court of Appeals
for the Third Circuit
357 United States Courthouse
Post Office Box 999
Newark, NJ 07101-0999

Re: Proposed Federal Rule of Appellate Procedure 32.1

Dear Sam:

I write in opposition to proposed Federal Rule of Appellate Procedure 32.1. The proposed rule would make more difficult our job of keeping the law of the circuit clear and consistent, increase the burden on the judges of our lower courts, make law practice more difficult and expensive, and impose colossal disadvantages on weak and poor litigants. None of the reasons the Advisory Committee Note advances in support of this rule is remotely persuasive. Circuits differ widely in size and legal culture, and the current situation—where the matter is left to the informed discretion of the court of appeals issuing the dispositions in question—has caused no demonstrable problems. I urge the Committee to abandon this ill-advised proposal and move on to more pressing matters.

1. The Proposed Rule Will Undermine Our Mission of Maintaining Uniformity and Clarity in the Law of the Circuit.

The Ninth Circuit has adopted Ninth Circuit Rule 36-3—which would be preempted by proposed FRAP 32.1—in a sincere and considered effort to maintain the consistency and uniformity of our circuit case law. We are aware of complaints by a small but vociferous group of lawyers and litigants about the rule,

and we have considered and debated their objections on numerous occasions over the years. Nevertheless, the judges of our court have consistently voted to retain the rule, in the firm belief that the rule's benefits far outweigh its disadvantages. We are convinced, moreover, that the great majority of lawyers practicing in the courts of our circuit strongly support our noncitation rule.

The Advisory Committee Note, which provides the only public insight into the Committee's thinking, gives surprisingly short shrift to the carefully considered policy judgment of the very judges whose names appear on the dispositions in question. When the people making the sausage tell you it's not safe for human consumption, it seems strange indeed to have a committee in Washington tell people to go ahead and eat it anyway. The Advisory Committee Note observes that all manner of sources may be cited in court papers, including "opinions of federal district courts, state courts, and foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearian sonnets, and advertising jingles," and finds no persuasive reason to prohibit the citation of unpublished dispositions of the courts of appeals. Proposed Fed. R. App. P. 32.1 advisory committee note, at 35 [hereinafter Advisory Committee Note]. Our judges, however, find very persuasive and obvious reasons for drawing that distinction: Shakespearian sonnets, advertising jingles and newspaper columns are not, and cannot be mistaken for, expressions of the law of the circuit. Thus, there is no risk that they will be given weight far disproportionate to their intrinsic value.

Dispositions bearing the names of three court of appeals judges are very different in that regard. Published opinions set the law of the circuit, and even unpublished dispositions tend to be viewed with fear and awe, simply because they, too, appear to have been written (but most likely were not) by three circuit judges. This is not so much of a problem in the court of appeals, where we are well aware of the distinction between opinions and unpublished dispositions. But it is a serious and ongoing problem in the lower courts of the circuit, where the distinction is much less well understood or respected, and a poorly phrased memorandum disposition can cause endless delay and confusion for the lawyers and the court.

This is no mere speculation. Despite our rule, parties do on occasion cite unpublished dispositions to the district, bankruptcy and magistrate judges of our

circuit, and I have read a number of transcripts in which an unpublished disposition was the subject of discussion. The judge and opposing counsel often spent endless pages of transcript debating what Judges X, Y and Z might have meant when they used a particular phrase in an unpublished disposition—a phrase slightly different from that in a published opinion on the same point. Why did the judges use these particular words rather than other ones? What exactly did they mean by that slight change in wording? The fact of the matter is, Judges X, Y and Z almost certainly meant nothing at all, because they had little or nothing to do with the drafting of the disposition, which in all probability was drafted by a law clerk or central staff attorney. Nevertheless, lower court judges, whose rulings will be appealed to the circuit, are extremely reluctant to ignore fine nuances of wording that they believe reflect the views of three court of appeals judges. Unlike law review articles, opinions of district courts and other nonbinding authorities, unpublished dispositions of the circuit are seldom dismissed as inconsequential, yet they should be.

What the Advisory Committee Note fails to appreciate is that our noncitation rule, like that of many other courts, applies not only to the parties, but also to the courts of our circuit. See 9th Cir. R. 36-3 ("Unpublished dispositions and orders of this Court may not be cited to or by the courts of this circuit . . . .") (emphasis added). This is quite significant and explains the rationale of the rule. By prohibiting judges of this circuit—district judges, bankruptcy judges, Bankruptcy Appellate Panel judges, magistrate judges—from relying on unpublished dispositions, we are giving important instructions as to how they are to conduct their business. Their responsibility in applying the law is to analyze and apply the published opinions of this court and opinions of the Supreme Court. They are not relieved of this duty just because there is an unpublished circuit disposition where three judges have applied the relevant rule of law to what appears to be a similar factual situation. The tendency of lower court judges, of course, is to follow the guidance of the court of appeals, and the message we communicate through our noncitation rule is that relying on an unpublished disposition, rather than extrapolating from published binding authorities, is not a permissible shortcut. We help ensure that judges faithfully discharge this duty by prohibiting lawyers from putting such authorities before them, and thereby distracting the judges from their responsibility of analyzing and reasoning from our published precedents.

The Advisory Committee Note naively claims that "[a]n opinion cited for its 'persuasive value' is cited not because it is binding on the court . . . . [but because] the party hopes that it will influence the court as, say, a law review article might—that is, simply by virtue of the thoroughness of its research or the persuasiveness of its reasoning." Advisory Committee Note, supra, at 34. Of course, nothing prevents a party from copying wholesale the thorough research or persuasive reasoning of an unpublished disposition—without citation. But that's not what the party seeking to actually cite the disposition wants to do at all; rather, it wants the added boost of claiming that three court of appeals judges endorse that reasoning. The Advisory Committee's persistent failure to even acknowledge this important point undermines its conclusions.

The same error underlies the Advisory Committee's spurious attempt to draw a distinction between citability and precedential value. No such distinction is possible. Unlike other authorities, cases are cited almost exclusively for their precedential value. In other words, by citing what a court has done on a previous occasion, a party is saying: This is what that court did in very similar circumstances, and therefore, under the doctrine of stare decisis, this court ought to do the same. (Of course, a party distinguishing an earlier case would do the converse—argue that, because the facts are different here, this court ought to reach a different result than the earlier court.) By saying that certain of its dispositions are not citable, a court of appeals is saying that they have zero precedential value—no inference may be drawn from the fact that the court appears to have acted in a certain way in a prior, seemingly similar case. By requiring that all cases be citable, proposed FRAP 32.1 is of necessity saying that all prior decisions have some precedential effect. If the Committee persists in going forward with its ill-advised rule, one would hope that the Advisory Committee Note will be revised to candidly recognize this inescapable reality.

A few years back, my colleague Judge Stephen Reinhardt and I wrote an article in California Lawyer titled Please Don't Cite This! I attach a copy at **Tab 1**. In that article we discuss in some detail the practices within our court and explain why it is folly for lawyers and lower court judges to spend time researching, analyzing and debating the fine points of our unpublished dispositions. As we explain, unpublished dispositions—unlike opinions—are often drafted entirely by law clerks and staff attorneys. See Alex Kozinski & Stephen Reinhardt, Please Don't Cite This!, Cal. Law., June 2000, at 43, 44 **[Tab**

1]. A good 40 percent of our unpublished dispositions—some 1520—were issued as part of our screening program in 1999. Id. That number increased to 1800 in 2002 and to 1998 in 2003. This means that these dispositions were drafted by our central staff and presented to a panel of three judges in camera, with an average of five or ten minutes devoted to each case. During a two- or three-day monthly session, a panel of three judges may issue 100 to 150 such rulings. Id. We are very careful to ensure that the result we reach in every case is right, and I believe we succeed. But there is simply no time or opportunity for the judges to fine-tune the language of the disposition, which is presented as a final draft by staff attorneys.

As the Committee must surely be aware, the precedential effect of an opinion turns on the exposition of the relevant facts (and the omission of irrelevant ones), and the precise phrasing of propositions of law. Yet, given the press of our cases, especially screening cases, we simply do not have the time to shape and edit unpublished dispositions to make them safe as precedent. In other words, we can make sure that a disposition reaches the correct result and adequately explains to the parties why they won or lost, but we don't have the time to consider how the language of the disposition might be construed (or misconstrued) when applied to future cases. That process—the process of anticipating how the language of the disposition will be read by future litigants and courts, and how small variations in wording might be imbued with meanings never intended—takes exponentially more time and must be reserved, given our caseload, to the cases we designate for publication.

The remaining portion of our unpublished dispositions is produced in chambers and so may get somewhat more judicial attention. However, these dispositions suffer from a very different problem. It is an open secret that law clerks prepare bench memos for cases handled in chambers and, after the judges vote on the outcome, clerks frequently convert their bench memos into dispositions by adding a caption and changing the beginning and the ending. Such converted bench memos often contain protracted discussion of the facts—some relevant, some not—and discussion of such noncontroversial matters as the standard of review. To paraphrase Mark Twain, if we had more time, we'd write a shorter memdispo, but all too frequently the judges will (for the reason already explained) not have the time to cut a converted bench memo to its bare essentials, or to check the language for latent ambiguities or misinterpretations.

As a letter to the parties letting them know that the court thought about their case and understands the issues, not much harm is done, even if every proposition of law is not stated with surgical precision. But as a citable precedent, it's a time bomb. The lawyers' art is to analyze precedent and to exploit every ambiguity of language in support of their clients' cases; language that is lifted from a bench memo and pasted wholesale into a disposition can provide a veritable gold mine of ambiguity and misdirection. Yet, with the names of three circuit judges attached, lawyers and lower court judges are often reluctant to assign to it the insignificance it deserves.

Nor is every case suitable for preparation of a precedential opinion. Many cases are badly briefed; many others have poorly developed records. Quite often, there is a severe disparity in the quality of lawyering between the parties. A party may lose simply because its lawyer has not done an adequate job of making a record or developing the best arguments for its position. It is often quite apparent that, with better lawyering, the rationale and perhaps even the result of our disposition might be different—yet we must decide the case on the record and arguments before us. At the same time, however, it's important not to foreclose prematurely a particular line of legal analysis. Issuing a precedent that rejects outright a party's argument may signal the death of a promising legal theory, simply because it was poorly presented in the first case that happens to come along.

There is another important reason why we believe unpublished dispositions are highly misleading as a source of authority. We reach our decisions in three-judge panels, but each panel speaks for the entire court of appeals. In a sense this is something of a fiction because it is impossible for the court as a whole, at least a court of our size, to review and consider all actions by three-judge panels in the thousands of cases we decide every year—over 5000 in 2002. It is difficult enough to do so as to the 700–800 published opinions, yet our judges make an effort to read all slip sheets and consider the various petitions for rehearing in published cases. Indeed, we often provide feedback to each other, and changes are made as a result of such internal deliberations, without actually going en banc. It is thus possible to assert truthfully that our published opinions <u>do</u> represent the view of the full court.

No such claim can possibly be made as to unpublished dispositions. Only in the rarest of instances—fewer than a dozen that I can recall in my time here—did an unpublished disposition become the subject of input from judges outside the panel. Quite simply, unpublished dispositions do not get any meaningful en banc review—and couldn't possibly—and thus cannot fairly be said to represent the view of the whole court. Any nuances in language, any apparent departures from published precedent, may or may not reflect the view of the three judges on the panel—most likely not—but they cannot conceivably be presented as the view of the Ninth Circuit Court of Appeals. To cite them as if they were—as if they represented more than the bare result as explicated by some law clerk or staff attorney—is a particularly subtle and insidious form of fraud.

Much of the criticism of the noncitation rule seems to be based on some dark suspicion that appellate judges are creating a body of "secret" law, or that they are using the noncitation rule as a means of ignoring or contravening the law of the circuit, or giving certain parties a special exemption from the law generally applicable to everyone else. My colleagues and I are well aware of these concerns, and we are, frankly, baffled by them. To begin with, there is nothing secret about unpublished dispositions. Though they may not be cited by or to the courts of our circuit, 9th Cir. R. 36-3, they are public records and are widely available through Westlaw, Lexis and other databases. They can be read, examined, discussed, criticized and, on occasion, overturned by the Supreme Court on certiorari. See, e.g., Twentieth Century Fox Film Corp. v. Entm't Distrib., 2002 WL 649087 (9th Cir. Apr. 19, 2002), rev'd by Dastar Corp. v. Twentieth Century Fox Film Corp., 123 S. Ct. 2041 (2003).

That the Supreme Court sometimes reviews unpublished cases is not, as the Advisory Committee Note suggests, inconsistent with our noncitation rule. Twentieth Century Fox Film Corp. is a perfect case on point. The issue on which the Supreme Court granted certiorari had been previously decided by a published Ninth Circuit opinion that was directly on point. See Cleary v. News Corp., 30 F.3d 1255 (9th Cir. 1994). There was no reason whatever for adding yet another layer of circuit precedent for exactly the same proposition. What Twentieth Century Fox Film Corp. shows, however, is that failing to publish a disposition in no way buries the case; rather, the Supreme Court readily considers whether to review it on cert, and will do so when the unpublished disposition reflects a rule of law about which the Court has doubts.

Moreover, there is no evidence at all that unpublished dispositions are frequently inconsistent with the law of the circuit. We occasionally get complaints about this from lawyers, but never with reference to any particular case. Nevertheless, my colleagues and I were sufficiently concerned about the issue that, several years ago, we undertook a sustained and concerted effort to identify conflicts among unpublished dispositions, or between unpublished dispositions and opinions. I discussed this effort in some detail in my written statement before the House Judiciary Committee on June 27, 2002. I attach a copy of that statement at **Tab 2**, and respectfully request that the members of this Committee read it, as it discusses many of the concerns raised by the Advisory Committee Note to the proposed rule.

The bottom line is that, despite this effort to identify conflicts, despite numerous calls on members of our bar to bring such conflicts to our attention, despite careful scrutiny of anything at all that might look like a submerged conflict among our unpublished cases, nothing whatever has turned up. We are continuing the effort, and are constantly vigilant to the force of this criticism, but we can say with some confidence that if a problem really did exist—if our unpublished dispositions were being used by the judges in the abusive way that critics suggest—it would surely have turned up by now.

In my Judiciary Committee statement, I discuss the process by which we divide cases into those we prepare as citable, precedential opinions, and those we do not. As I explain there, the preparation of an opinion is a difficult and exacting task. It involves not only explicating the result in the case immediately before us, but also taking into account the numerous ways the same legal issue might arise in future cases:

> To someone not accustomed to writing opinions, the process may seem simple or easy. But those of us who have actually done it know that it's very difficult and delicate business indeed.
>
> A published opinion must set forth the facts in sufficient detail so lawyers and judges unfamiliar with the case can understand the question presented. At the same time, it must omit irrelevant facts that could form a spurious ground for distinguishing the opinion. The legal discussion must be focused enough to dispose of the case at hand, yet

broad enough to provide useful guidance in future cases. Because we normally write opinions where the law is unclear, we must explain why we are adopting one rule while rejecting others. We must also make sure that the new rule does not conflict with precedent, or sweep beyond the questions fairly presented.

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

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

Unpublished Judicial Opinions: Hearing Before the House Subcomm. on Courts, the Internet, and Intellectual Property of the Comm. on the Judiciary, 107th Cong. 12–13 (2002) (prepared statement of Hon. Alex Kozinski, Judge, U.S. Court of Appeals for the Ninth Circuit) **[Tab 2]**. We simply do not have the time to engage in this process as to each of the 450 or so cases each judge in our circuit is responsible for every year.

The Advisory Committee Note blithely suggests that judges need not spend extra time on unpublished dispositions, even if they become citable; just draft

them as you do now, it says, and let the lawyers make what they will of them. But that, precisely, is the problem. Restating the same rule of law in slightly different language—language that has no particular significance to the drafters—often raises new and unintended implications. The very fact that different language is used itself raises the inference that something else must have been meant; at least, lawyers are trained and paid to so argue, if it's in their clients' interest.

My colleagues and I thus feel that we could not, in good conscience and consistent with our sworn duty, continue doing what we have been and let things sort themselves out. In my statement before the Judiciary Committee, I described the consequences for our work if unpublished dispositions were to become citable:

> If unpublished dispositions could be cited as precedent, conscientious judges would have to pay much closer attention to their precise wording. Language that might be adequate when applied to a particular case might well be unacceptable if applied to future cases raising different fact patterns. And while three judges might all agree on the outcome of the case before them, they might not agree on the precise reasoning or the rule that would be binding in future cases if the decision were published. Unpublished concurrences and dissents would become much more common, as individual judges would feel obligated to clarify their differences with the majority, even where those differences had no bearing on the case before them. In short, we would have to start treating the 130 unpublished dispositions for which we are each responsible and the 260 unpublished dispositions we receive from other judges as mini-opinions. We would also have to pay much closer attention to the unpublished dispositions written by judges on other panels—at the rate of ten per day.
>
> Obviously, it would be impossible to do this without neglecting our other responsibilities. We write opinions in only 15% of the cases already and may well have to reduce that number. Or, we could write opinions that are less carefully reasoned. Or, spend less time keeping the law of the circuit consistent through the en banc process. Or, reduce our unpublished dispositions to one-word judgment orders, as have

other circuits. None of these is a palatable alternative, yet something would have to give.

Id. at 13 **[Tab 2]**.

The Advisory Committee Note dismisses these concerns by quoting Professor Barnett's glib comment that other circuits have changed their rules as to citability, yet "the sky has not fallen in those circuits." Stephen R. Barnett, From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules, 4 J. App. Prac. & Process 1, 20 (2002). This is not a serious response. Many of the rule changes have been recent, and most impose some limitations—such as the requirement that there be no published authority directly on point. Moreover, it's much too early to tell the effects of these changes; certainly no comprehensive study has been done. We do know that some circuits have resorted to frequent use of judgment orders, which eliminates the problem, but also gives parties far less information than we do in our unpublished dispositions. I rather doubt that this is a desirable trade-off.

Moreover, circuits differ in size, legal culture and approach to precedent. Our judges, who are well aware of the situation in our circuit, firmly believe that the noncitation rule is an important tool for managing our court's case law and maintaining control over the law of the circuit. Reasonable minds might differ on this, but the Committee should think long and hard—and be convinced that it has very good reasons indeed—before banning a rule that the judges of the court consider to be essential to performing their judicial functions. No such compelling justifications are presented in the Advisory Committee Note.

2. The Proposed Rule Would Increase the Burden on Lawyers and the Cost to Their Clients, and Impose Severe Disadvantages on Poor and Weak Litigants.

Taking its cue from the few but vociferous critics of noncitation rules, the Advisory Committee Note seems to assume that these rules are supported only by a few judges, and that lawyers universally oppose them. This is simply not so. Noncitation rules, in fact, enjoy widespread support among members of the bar because many lawyers recognize significant benefits to them and their clients,

though the critics of noncitation rules tend to be very vocal, thus creating the illusion that theirs is the prevailing view.

I say this based on my own experience, having discussed the rule with countless lawyers who appear in the Ninth Circuit and elsewhere, and this is consistent with the experience of most of my colleagues. For example, the Appellate Process Task Force set up by the California Judicial Council, which consists of a distinguished group of judges and practitioners, issued a White Paper in March 2001, concluding that California's noncitation rule ought to be retained. See J. Clark Kelso & Joshua Weinstein, Appellate Process Task Force, A White Paper on Unpublished Opinions of the Court of Appeal (2001) **[Tab 3]**. Among the chief reasons for its conclusion was the widespread support the rule enjoyed among California judges and lawyers. The Task Force noted the reaction to an earlier suggestion made by Professor Kelso that all court of appeal opinions be citable: "This tentative suggestion triggered a chorus of protests from around the state, from both judges and practitioners, who asserted that 'the nonpublication and noncitation rules are critically important to the court of appeal in preparing and processing its cases and to the practicing bar in litigating appeals.'" Id. at 3 (footnote omitted) (emphases added).

The reasons for the bar's concern are best expressed by Professor Kelso in his later article cited by the Task Force:

> [B]oth bench and bar agree the overwhelming majority of unpublished opinions are actually useless for future litigation because they involve no new law and no new, applicable factual situations. Yet if these opinions were published and citable, lawyers would have to search them to confirm that nothing useful was in them, thereby increasing the cost of legal research.

J. Clark Kelso, A Report on the California Appellate System, 45 Hastings L.J. 433, 492 (1994).

Much the same concern is applicable in federal court. The simple fact is that nearly 85 percent of Ninth Circuit cases are decided by unpublished disposition, which means that memdispos outnumber published cases by a factor of 7 to 1. See Kozinski & Reinhardt, supra, at 44 **[Tab 1]**. Once all of these cases

become citable authority, lawyers will be required as a matter of professional responsibility to read them, analyze them and figure out a way they might be helpful to their clients. All of this will take time and money, contributing greatly to the appalling rise in the cost of litigation.

But research alone is only the tip of the iceberg. Because unpublished dispositions constitute a particularly watery form of precedent, allowing their citation will generate a large number of costly and time-consuming disputes about the precise meaning of these authorities. Time and money will be spent trying to derive some advantage from words and phrases that lack the precision of a published opinion. As noted, this will be a fruitless task, because little or no judicial time will have been spent in drafting that language, and thus the perceived nuances of phrasing will mean nothing at all. Yet no lawyer wanting to preserve his reputation—and to avoid being sued for malpractice—will be willing to bypass this source of precedent once it becomes citable.

Nor will the burden fall equally on all litigants. As persuasively discussed in a Yale Law Journal case note analyzing the likely effects of an Anastasoff-like rule, it will be the poor and weak litigants who will be most adversely affected by opening the floodgates to citation of unpublished dispositions:

> Although precedent plays a crucial institutional role in the judicial system, the Anastasoff rule, by unleashing a flood of new precedent, will disproportionately disadvantage litigants with the fewest resources. Because even important institutional concerns should give way when they impinge on individuals' rights to fair treatment, courts should not abandon the practice of limiting the precedential effect of unpublished opinions.
>
> . . . .
>
> . . . Allowing citation of unpublished opinions will have a tremendous ripple effect for both litigants and judges. Because precedent is worthless without reasoning, judges will need to make their logic and reasoning transparent even in unpublished opinions, increasing the amount of time required to dispose of each case. Litigants with the resources to track down these opinions will have a

richer body of precedent from which to draw their arguments, putting them at a systematic advantage over litigants with fewer resources.

. . . .

. . . While precedent protects important institutional concerns of the justice system, too much of a good thing may pose a danger. The question is not whether precedent is good, but what the optimal amount of precedent is. Abolishing noncitation rules for unpublished opinions would systematically and unfairly disadvantage individual litigants with limited resources (including pro se and public-interest litigants and public defenders) by making it harder for them to present their cases.

. . . .

. . . Noncitation rules for unpublished opinions not only make the judicial system more efficient, they protect the individual right of litigants, particularly the most disadvantaged litigants, to a measure of fairness in the judicial system. The Anastasoff rule would affect litigants at the bottom of the economic spectrum in two ways: First, it would increase delays in adjudication, delays from which the poorest litigants are likely to suffer the most, and second, it would create a less accessible class of precedents.

The literature on unpublished opinions suggests some of the efficiency concerns that motivated the federal courts to limit publication and adopt no-precedent rules for those opinions. The high volume of cases makes the production of fully reasoned opinions enormously costly. In order for federal appellate courts to hear and decide all the cases before them, judges require some mechanism for expeditiously disposing of cases that offer no complicated or new legal question. Unpublished opinions serve this purpose.

These seemingly mundane efficiency concerns raised by defenders of noncitation rules, such as Judges Kozinski and Reinhardt, implicate individual fairness concerns. Giving all cases precedential effect will intensify the caseload pressure on judges and increase delays

in adjudication (a fact Judge Arnold is ready to accept). Clogged dockets will not affect all litigants equally. Poor litigants will be less able to weather the inevitable delays than wealthier litigants. For example, tort plaintiffs unable to pay mounting medical bills will suffer especially badly from busier dockets. This will likely push these poorer litigants into less advantageous settlements in civil cases. In addition, prisoners bringing habeas claims who rely on the efficient adjudication of their cases will suffer particularly from clogged dockets. While all litigants may take some solace in the system-wide utility that a universal principle of precedent might offer, the costs of implementing this system, in terms of justice delayed, will be felt most strongly by those at the bottom of the economic spectrum.

In addition to the problems posed for the poorest litigants by clogged dockets, the Anastasoff rule presents a second problem for these litigants: unequal access to precedent. Limiting the precedential effect of unpublished opinions through noncitation rules ensures that litigants will have equal access to precedent, and thus a fair shot at litigating their cases. Though unpublished opinions are available on commercial databases or through court clerks' offices (and, in four circuits, for free through court websites), finding these precedents, even when they are available for free, requires time, energy, and money, and places those litigants with greater resources at an advantage over those with fewer (including pro se litigants, public defenders, and public-interest litigants). Judge Arnold worries that litigants may be unable to invoke a previous decision of the court as precedent, even if the case is directly on point, because a previous panel has designated the opinion unpublished and therefore uncitable. A full precedent system would avoid this situation. But even if this proverbial needle in the haystack were available to litigants, only those with the resources to search for it could benefit from it. By putting impecunious litigants at a systematic disadvantage, throwing the vast opus of unpublished opinions into the body of precedent would violate these individuals' right to equal concern and respect.

. . . The Anastasoff rule . . . would not only threaten the efficiency of judicial administration, it would harm the ability of individuals at the

> bottom of the economic spectrum to bring their cases. Making all opinions carry full precedential effect will not optimize the amount of precedent. The benefits precedent brings to the judicial system, in terms of predictability, stability, and fairness in adjudication, are distributed among all participants in the system. Likewise, the marginal benefit of the Anastasoff rule would be distributed among all participants in the judicial system. But the costs of the vast increase in precedents are likely to be borne by those litigants on the lowest rungs of the economic ladder. This systematic unfairness to the poorest individuals in the justice system, impinging on their right to present their cases, should prevent courts from mandating that all unpublished opinions carry precedential weight.

Daniel B. Levin, Fairness and Precedent, 110 Yale L.J. 1295, 1295–1302 (2001) (footnotes omitted). I attach a copy of the case note at **Tab 4**.

I respectfully suggest to the Advisory Committee that these fairness concerns are neither exaggerated nor misplaced. They reflect the harsh realities of a costly and overburdened legal system. Lawyers who represent poor and weak litigants overwhelmingly agree. The Committee must not overlook the allocative effects of the rule it proposes to adopt.

3. The Proposed Rule Will Cause Inconsistency Between Federal and State Procedures, Leading to Confusion Among Lawyers Who Practice in Both State and Federal Court.

The proposed rule purports to alleviate confusion among bar members due to differing practices in the various federal circuits. As noted below, this concern is misplaced. It is far more likely that a different confusion problem will be created, particularly in our circuit, because state practice commonly prohibits or limits the citation of unpublished appellate opinions. Given this consistency of practice, neither we nor the state courts have noted widespread violations of these rules. However, if the federal rule were to change, practitioners who appear in both federal and state court would be confronted with inconsistent rules. If one worries about confusion on the part of the practicing bar, this is a far more likely source.

All but one of the states in our circuit (Alaska) now have some sort of noncitation rule. The rule is particularly well accepted in California, where more than half of our lawyers reside. California, moreover, is firmly committed to its noncitation rule, despite occasional suggestions to the contrary. See generally Kelso & Weinstein, Appellate Process Task Force, supra **[Tab 3]**. And last year, the California legislature refused to adopt a law overruling the noncitation rule in the state courts—largely based on widespread opposition by the bench and bar in the state.

We believe that consistency of practice between the federal and state courts is highly desirable because it saves lawyers the need to look up the precise rules of practice when they move from state court to federal court and back again. Changing the federal rule in this important area will make practice more difficult, and will increase the likelihood of error for the many thousands of lawyers in the Ninth Circuit who practice both in federal and state court. The Ninth Circuit's noncitation rule is consistent with the legal culture in California and the other Western states, and should stay that way. Creating an inconsistency is yet another reason militating against adoption of the proposed rule.

4. The Advisory Committee Note Offers No Persuasive Justification for a National Rule.

Most of the Advisory Committee Note is dedicated to ridiculing or dismissing the arguments supporting noncitation rules, providing virtually no discussion of whether a uniform national rule is advisable or necessary. The Note offers a single sentence: "These conflicting rules have created a hardship for practitioners, especially those who practice in more than one circuit." Advisory Committee Note, supra, at 34. The Advisory Committee Note does not reveal what the hardship is, but there is an explanation of sorts four pages later—a sentence followed by two citations:

> Attorneys will no longer have to pick through the conflicting no-citation rules of the circuits in which they practice, nor worry about being sanctioned or accused of unethical conduct for improperly citing an "unpublished" opinion. See Hart [v. Massanari, 266 F.3d 1155, 1159 (9th Cir. 2001)] (attorney ordered to show cause why he should not be

> disciplined for violating no-citation rule); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386R (1995) ("It is ethically improper for a lawyer to cite to a court an 'unpublished' opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to ['unpublished' opinions].").

Id. at 38.

That's it! The whole justification for a national rule—for seriously interfering with the authority and autonomy of the federal courts of appeals on a matter that they consider vital to their mission—is that lawyers have to suffer "hardship" because they have difficulty "pick[ing]" their way "through the conflicting no-citation rules."

With all due respect to the Committee, this is just not a serious argument. First, and most important, lawyers do not have to pick their way through anything. Every single unpublished disposition that appears online has a reference to the local rule limiting its citability. The Westlaw version refers to the applicable circuit rule by number, while the Lexis version merely makes reference to the circuit rules in general. See Case Appendix **[Tab 5]**. Both Westlaw and Lexis have up-to-date versions of the rules online. Unpublished dispositions from the Ninth and Tenth Circuits actually include a footnote with the substance of the rule. See, e.g., United States v. Housel, 2003 WL 22854676, at n.* (10th Cir. Dec. 2, 2003); United States v. Baker, 2003 WL 22852157, at n.** (9th Cir. Dec. 1, 2003) **[Tab 5]**. The argument that lawyers have difficulty figuring out the applicable rule doesn't pass the straight-face test.

Second, it is wrong to say that noncitation rules are "conflicting." The Committee Note points to no conflict at all, nor can it. Our Ninth Circuit rule deals only with citation of our memoranda dispositions to the courts of our circuit. It does not prohibit their citation to the courts of other circuits, nor does it prohibit the citation of unpublished dispositions of other courts. The rules of other courts vary somewhat, but there is no conflict between them in the sense that a lawyer would have to violate the rule of one circuit in order to comply with the rule of another. The differences in citation rules simply mean that lawyers will have to read the local rules in whatever circuit they happen to be appearing, but this is true

of all local rules, not merely those pertaining to citation. If that rationale were sufficient to preempt local rules, we would have no local rules at all.

The Advisory Committee Note makes reference to ABA Ethical Opinion 94-386R, apparently to support the proposition that lawyers are confused by conflicting rules. The advisory opinion happens to be referring to a situation where "the forum court has a specific rule prohibiting any reference in briefs to an opinion that has been marked, by the issuing court, 'not for publication.'" ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386R (Rev. 1995), reprinted in [1990–2000 Ethics Opinions] Laws. Manual on Prof. Conduct (ABA/BNA) 1001:233, at :234 (Nov. 15, 1995). That one court chooses to respect another court's noncitation policy hardly seems like a conflict between the rules; rather, it's more akin to the rule of renvoi in choice-of-law. The Advisory Committee Note fails to explain why or how such a rule causes confusion.

ABA Opinion 94-386R does explain that "there is no violation if a lawyer cites an unpublished opinion . . . in a jurisdiction that does not have such a rule, even if the opinion itself has been stamped by the issuing court 'Not For Publication,' so long as the lawyer informs the court . . . that that limitation has been placed on the opinion by the issuing court." Id. In short, if lawyers simply follow the local citation rules of the court where they are appearing, they will have no difficulty staying out of trouble. The Advisory Committee Note's reliance on this ABA opinion is either a mistake or a makeweight.

Third, I find it remarkable that the Advisory Committee Note cites not a single opinion or order in which a lawyer has been sanctioned because he was somehow confused and couldn't pick his way through conflicting local rules on this subject. I have been a judge of the Ninth Circuit—which has one of the strictest rules—for over eighteen years, and I remember no such instance, nor can a number of my most senior colleagues whom I have asked. In fact, in my time here, the number of infractions of the rule have been so few that I could probably count them on the fingers of one hand. Why? Because the rule is crystal clear, and no one—absolutely no one—has any difficulty understanding or applying it.

Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001), which the Advisory Committee Note does cite, involved a long-time Ninth Circuit practitioner admitted to the California bar, who was intimately familiar with the rule but was

emboldened by the heady aroma of Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), vacated as moot on reh'g en banc by 235 F.3d 1054 (8th Cir. 2000), to try his luck with that argument in our court. Now that we have rejected Anastasoff, the rule is clear once again, and we have had no further infractions.

At page 38, the Committee Note also drops a veiled hint that noncitation rules might violate the First Amendment. Not surprisingly, the Note provides no authority for this proposition, and doesn't actually come out and claim that there is such a violation—perhaps out of fear of looking foolish.

Briefs and other court papers are not public fora; we apply all manner of restrictions to what lawyers may argue in their briefs—restrictions that could never be applied to other types of speech. We do this because we can and must limit advocacy in order to ensure the fair administration of justice—allowing each side to have its say without undue expense, delay or distraction. The rule prohibiting the citation of a particular kind of authority that the judges of the courts of appeals themselves create, and that they believe would be misleading if used in briefs, cannot conceivably be viewed as a First Amendment violation. Given that numerous states and federal circuits have had citation bans for many years, it is inconceivable that the issue would not have been litigated and resolved by now—if there were really a colorable First Amendment claim to be made.

The Advisory Committee Note also makes some reference to the fact that noncitation rules put lawyers in "a regrettable position," Advisory Committee Note, supra, at 38, because they can't provide information that might help their clients, but the same argument could be made against page limitations or against the rule prohibiting the citation of overruled authority. The rules of advocacy put limits on the kinds of arguments that both sides may make and, so long as the rules are symmetrically applied, no lawyer or client can claim to be disadvantaged. For every instance where one lawyer is put in the "regrettable position" of not being able to cite an unpublished disposition, another lawyer is being spared having to defend against it. Whether a rule is a good or bad idea cannot be decided by reference to whether some lawyers in some instances will not like it; if that were the test, we'd have no rules or procedures at all.

Equally flimsy is the Advisory Committee Note's suggestion that noncitation rules encourage "game-playing," id., which the proposed rule will

somehow avoid. I can assure the Committee that there is no game-playing going on now; no one "hints" about what might be in an unpublished disposition. Parties can, of course, lift the rationale of an unpublished disposition, if they choose, and pass it off as their own, but that's perfectly OK. Adopt FRAP 32.1 and you'll then see some serious game-playing. Because unpublished dispositions tend to be thin on the facts, and written in loose, sloppy language—and because there's about a zillion of them out there—they will create a veritable amusement park for lawyers fond of playing games.

Once again, the Advisory Committee Note betrays a serious lack of understanding of how litigation works. Indeed, what I find most remarkable about the Note is how often it uses phrases such as "it is difficult to understand," "it is difficult to justify" or "it is difficult to believe." The Note makes no serious effort to justify—or even understand—the noncitation rules it criticizes. Rather, it appears to be a poorly drafted apologia for a conclusion reached on some other basis. I urge the Committee to reconsider its position in light of the serious arguments raised in support of circuit noncitation rules.

Conclusion

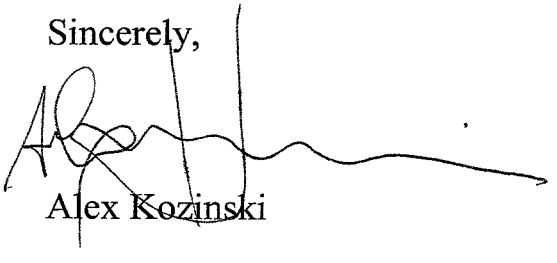
The Appellate Rules Advisory Committee should propose a uniform rule only where lack of uniformity has created genuine hardships among practitioners, or where the proposed rule reflects the widespread consensus of the bench and bar. Proposed FRAP 32.1 meets neither of these criteria. There is no need for it—at least none has been offered by the Committee—and it certainly does not reflect a national consensus. The judges of our court, and of other courts of appeals, believe that the noncitation rule is an important tool in the fair administration of justice within their jurisdictions, and its removal will have serious adverse consequences for the court and the parties appearing before it. Many members of our bar—a substantial majority, we believe—agree. The proposed rule will make litigation more costly, will cause far greater delays, will make life more difficult for lawyers and will further choke off access to justice to the poorest and most disadvantaged of our litigants. The rule may, in fact, have perverse effects, as courts of appeals judges, wary of having their words misused, will tell the parties less and less in cases where they do not publish a precedential opinion.

The Advisory Committee should simply withdraw the proposed rule and move on to other issues. If, however, the Committee believes a uniform federal rule is needed, I can suggest three. First, it may adopt a rule like Ninth Circuit Rule 36-3 as the national rule. That will certainly ensure consistency among the federal circuits, and also with state practice, where the substantial majority of states have some sort of citation ban. Second, the Committee might consider alleviating confusion among lawyers who practice in different circuits—if it really believes there is such a problem—by adopting a rule clarifying that the prohibitions on citation apply only to the courts of the circuit issuing the unpublished disposition, and nowhere else. Third, the Committee might require all circuits to place the precise limits on citability of unpublished dispositions on the front page of such dispositions, as is already the case in the Ninth and Tenth Circuits.

But under no circumstances should the Advisory Committee advance the rule it has proposed. It is a terrible idea and should not be adopted as part of the Federal Rules of Appellate Procedure over the strenuous objection of the bench and bar in those courts where noncitation rules are widely accepted.

I apologize for the length of these comments. They reflect, I hope, my depth of feeling on this subject. I trust the Committee will give them serious consideration.

Sincerely,



Alex Kozinski

AK:kd

cc: Honorable David F. Levi
Peter McCabe

Attachments

Index

Tab	Title
1	Alex Kozinski & Stephen Reinhardt, Please Don't Cite This!, Cal. Law., June 2000, at 43.
2	Unpublished Judicial Opinions: Hearing Before the House Subcomm. on Courts, the Internet, and Intellectual Property of the Comm. on the Judiciary, 107th Cong. (2002) (prepared statement of Hon. Alex Kozinski, Judge, U.S. Court of Appeals for the Ninth Circuit).
3	J. Clark Kelso & Joshua Weinstein, Appellate Process Task Force, A White Paper on Unpublished Opinions of the Court of Appeal (2001).
4	Daniel B. Levin, Fairness and Precedent, 110 Yale L.J. 1295 (2001).
5	Case Appendix

PLEASE DON'T CITE THIS!

WHY WE DON'T ALLOW CITATION TO UNPUBLISHED DISPOSITIONS

By Alex Kozinski and Stephen Reinhardt

Like other courts of appeals, the Ninth Circuit issues two types of merits decisions: opinions and memorandum dispositions, the latter affectionately known as memdispos. Opinions contain a full-blown discussion of legal issues and are certified for publication in the Federal Reporter. Once final, they are binding on all federal judges in the circuit—district, bankruptcy, magistrate, administrative, and appellate. Until superseded by an en banc or Supreme Court opinion, they are the law of the circuit and may be cited freely; indeed, if they are directly on point, they *must* be cited.

The rule is different for memdispos. Pursuant to Ninth Circuit Rule 36-3, memdispos are not published in the Federal Reporter, nor do they have precedential value. Although memdispos can be found on Westlaw and Lexis, they may not be cited. So far as Ninth Circuit law is concerned, memdispos are a nullity.

Few procedural rules have generated as much controversy as the rule prohibiting citation of memdispos. At bench and bar meetings, lawyers complain at length about being denied this fertile source of authority. Our Advisory Committee on Rules of Practice and Procedure, which is composed mostly of lawyers who practice before the court, regularly proposes that memdispos be citable. When we refuse, lawyers grumble that we just don't understand their problems.

In fact, it's the lawyers who don't understand *our* problems. Court of appeals judges perform two related but separate tasks. The first is error-correction: We review several thousand cases every year to ensure that the law is applied correctly by the lower courts, as well as by the many administrative agencies whose decisions we review. The second is development of the circuit's law: We write opinions that announce new rules of law or extensions of existing rules.

Writing a memdispo is straightforward. After carefully reviewing the briefs and record, we can succinctly explain who won, who lost, and why. We need not state the facts, as the parties already know them; nor need we announce a rule general enough to apply to future cases. This can often be accomplished in a few sentences with citations to two or three key cases.

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

While a memdispo can often be prepared in a few hours, an opinion generally takes many days (often weeks, sometimes months) of drafting, editing, polishing, revising. Frequently, this process brings to light new issues, calling for further research, which, in turn, may send the author back to square one. In short, writing an opinion is a tough, delicate, exacting, time-consuming process. Circuit judges devote something like half their time, and their clerks' time, to cases in which they write opinions, dissents, or concurrences.

Judge Reinhardt has served on the Ninth U.S. Circuit Court of Appeals since 1980, Judge Kozinski since 1985.

Once an opinion is circulated, the other judges on the panel and their clerks scrutinize it very closely. Often they suggest modifications, deletions, or additions. It is quite common for judges to exchange lengthy memoranda about a proposed opinion. Sometimes, differences can't be ironed out, precipitating a concurrence or dissent. By contrast, the phrasing (as opposed to the result) of a memdispo is given relatively little scrutiny by the other chambers; dissents and concurrences are rare.

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

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

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

Now consider the numbers. During calendar year 1999, the Ninth Circuit decided some 4,500 cases on the merits, approximately 700 by opinion and 3,800 by memdispo. Each active judge heard 450 cases as part of a three-judge panel and had writing responsibility in a third of those cases. That works out to an average of 150 dispositions—20 opinions and 130 memdispos—per judge. In addition, each of us was required to review, comment on, and eventually join or dissent from 40 opinions and 260 memdispos circulated by other judges with whom we sat.

Writing 20 opinions a year is like writing a law review article every two and a half weeks; joining 40 opinions is akin to commenting extensively once a week or so on articles written by others. Just from the numbers, it's obvious that memdispos get written a lot faster than opinions—about one every other day. It is also obvious that explaining to the parties who wins, who loses, and why takes far less time than preparing an opinion that will serve as precedent throughout the circuit and beyond. Moreover, we seldom review the memdispos of other panels or take them en banc. Not worrying about making law in 3,800 memdispos frees us to concentrate on those dispositions that affect others besides the parties to the appeal—the published opinions.

If memdispos could be cited as precedent, conscientious judges would have to pay much closer attention to their precise wording. Language that might be adequate when applied to a particular case might well be unacceptable if applied to future cases raising different fact patterns. And, though three judges might all agree on the outcome of the case before them, they might not agree on the precise reasoning or the rule to be applied in future cases. Unpublished concurrences and dissents would become much more common, as individual judges would feel obligated to clarify their differences with the majority, even when those differences had no bearing on the case before them. In short, we would have to start treating the 130 memdispos for which we are each responsible, and the 260 memdispos we receive from other judges, as mini-opinions. We would also have to pay much closer attention to the memdispos written by judges on other panels—at the rate of 10 a day.

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

Lawyers argue that we need not change our internal practices, that we should just keep doing what we're doing but let the memdispos be cited as precedent. But what does *precedent* mean? Surely it suggests that the three judges on a panel subscribe not merely to the result but also to the phrasing of the disposition.

With memdispos, this is simply not true. Most are drafted by law clerks with relatively few edits from the judges. Fully 40 percent of our memdispos are in screening cases, which are prepared by our central staff. Every month, three judges meet with the staff attorneys who present us with the briefs, records, and proposed memdispos in 100 to 150 screening cases. If we unanimously agree that a case can be resolved without oral argument, we make sure the result is correct, but we seldom edit the memdispo, much less rewrite it from scratch. Is it because the memdispos could not be improved by further judicial attention? No, it's because the result is what matters in those cases, not the precise wording of the disposition. Any refinements in language would cost valuable time yet make little difference to the parties. Using the language of the memdispo to predict how the court would decide a different case would be highly misleading.

We are a large court with many judges. Keeping the law of the circuit clear and consistent is a full-time job,

Continued on page 81

DON'T CITE THIS!

Continued from page 44

even without having to worry about the thousands of unpublished dispositions we issue every year. Trying to extract from memdispos a precedential value that we didn't put into them may give some lawyers an undeserved advantage in a few cases, but it would also damage the court in important and permanent ways. Based on our combined three decades of experience as Ninth Circuit judges, we can say with confidence that citation of memdispos is an uncommonly bad idea. We urge lawyers to drop it once and for all. ❑

afford him sufficient time to comment on and review pertinent documents prior to his final appeal to the Administrative Committee. Under 29 C.F.R. § 2560.503–1(g)(1), an ERISA plan must allow a claimant to "[r]eview pertinent documents" and "[s]ubmit issues and comments in writing." *Id.* This requirement means that a benefit plan must "provide claimants with access to 'the evidence the decisionmaker relied upon' in denying their claim." *Wilczynski v. Lumbermens Mutual Cas. Co.*, 93 F.3d 397, 402 (7th Cir.1996). A benefit plan does not need to allow a claimant to review every document in his administrative file, but only those documents that are influential in the plan's decision. *See id.* By Regula's own admission, his attorney was able to review and comment upon the reports provided by Drs. Kumar and O'Brien, which the Plan relied on exclusively in denying Regula's claim. Therefore, although Regula may not have inspected all the information in his administrative file, he was able to examine and comment upon all the information that formed the basis for the denial of his claim.

The Plan did not deny Regula a full and fair review of his claim because the Plan substantially complied with the procedural requirements found in ERISA's implementing regulations. *See* 29 C.F.R. § 2560.503–1.

IV.

For these reasons, I respectfully dissent. The judgment of the district court should be affirmed.

* Larry G. Massanari is substituted for his predecessor, Kenneth Apfel, as Acting Commissioner of the Social Security Administration. Fed. R.App. P. 43(c)(2).

Patricia HART, Plaintiff–Appellant,

v.

Larry G. MASSANARI, Acting Commissioner of Social Security Administration,* Defendant–Appellee.

No. 99–56472

United States Court of Appeals,
Ninth Circuit.

Sept. 24, 2001.

Submitted March 5, 2001 **

Filed Sept. 24, 2001

Action was brought against Acting Commissioner of Social Security Administration (SSA). The United States District Court for the Central District of California, Arthur Nakazato, United States Magistrate Judge, found for Acting Commissioner, and appeal was taken. After ordering appellant's counsel to show cause why he should not be disciplined for citing unpublished opinion in his opening brief, the Court of Appeals, Kozinski, Circuit Judge, held that: (1) Ninth Circuit rule generally prohibiting citation to unpublished dispositions and orders did not violate constitutional article governing judiciary, but (2) counsel's violation of such rule was not willful so as to warrant sanctions.

Order to show cause discharged.

1. Courts ⇐96(1)

When ruling on a novel issue of law, federal courts will generally consider how

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R.App. P. 34(a)(2).

other courts have ruled on the same issue; this consideration will not be limited to courts at the same or higher level, or even to courts within the same system of sovereignty.

2. Courts ⇐96(1)

While the Court of Appeals would consider it bad form to ignore contrary authority from other courts by failing even to acknowledge its existence, courts may, in the absence of binding precedent, forge a different path than suggested by prior authorities that have considered the issue; so long as the earlier authority is acknowledged and considered, courts are deemed to have complied with their common law responsibilities.

3. Courts ⇐96(3, 4)

Binding authority, in the form of a ruling by a Court of Appeals on a controlling legal issue, or Supreme Court Justices writing for a majority of the Court, cannot be considered by a district judge and cast aside, for it is not merely evidence of what the law is; rather, caselaw on point is the law.

4. Courts ⇐96(1)

If a federal court must decide an issue governed by a prior opinion that constitutes binding authority, the later court is bound to reach the same result, even if it considers the rule unwise or incorrect; binding authority must be followed unless and until overruled by a body competent to do so.

5. Courts ⇐89

In determining whether it is bound by an earlier decision, a court considers not merely the reason and spirit of cases, but also the letter of particular precedents, and this includes not only the rule announced, but also the facts giving rise to the dispute, other rules considered and rejected, and the views expressed in response to any dissent or concurrence; thus, when crafting binding authority, the precise language employed is often crucial to the contours and scope of the rule announced.

6. Courts ⇐96(3, 4)

A decision of the Supreme Court will control that corner of the law unless and until the Supreme Court itself overrules or modifies it, and judges of the inferior courts may voice their criticisms, but follow it they must; the same is true as to circuit authority.

7. Courts ⇐90(2), 96(4)

Circuit law binds all courts within a particular circuit, including the court of appeals itself; thus, the first panel to consider an issue sets the law not only for all the inferior courts in the circuit, but also future panels of the court of appeals.

8. Courts ⇐90(2)

Once a circuit court panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court, or unless Congress changes the law.

9. Courts ⇐90(2)

A later three-judge circuit court panel considering a case that is controlled by the rule announced in an earlier panel's opinion has no choice but to apply the earlier-adopted rule; it may not any more disregard the earlier panel's opinion than it may disregard a ruling of the Supreme Court.

10. Courts ⇐90(2)

Designating an opinion as binding circuit authority is a weighty decision that cannot be taken lightly, because its effects are not easily reversed.

11. Courts ⇐90(2)

Because en banc procedures are cumbersome, and are seldom used merely to correct errors of individual panels, it is very important that three-judge panel opinions be decided correctly and that they state their holdings in a way that is easily understood and applied in future cases.

12. Courts ⇐96(1)

Using the techniques developed at common law, a federal court confronted with apparently controlling authority must parse the precedent in light of the facts presented and the rule announced; insofar as there may be factual differences between the current case and the earlier one, the court must determine whether those differences are material to the application of the rule or allow the precedent to be distinguished on a principled basis.

13. Courts ⇐96(5)

The decision of a newly-created circuit whether to adopt wholesale the circuit law of another court is a matter of judicial policy, not a constitutional command.

14. Courts ⇐96(1)

The first district judge to decide an issue within a district or within a circuit does not bind all similarly situated district judges.

15. Courts ⇐90(7), 91(2)

Under California law, an opinion by one of the courts of appeal is binding on all trial courts in the state, not merely those in the same district; however, court of appeal panels are not bound by the opinions of other panels, even those within the same district.

16. Courts ⇐107

The California Supreme Court may "depublish" a court of appeal opinion, that is, strip a published decision of its precedential effect. Cal.Rules of Court 976(c)(2).

17. Courts ⇐96(4)

A district court bound by circuit authority has no choice but to follow it, even if convinced that such authority was wrongly decided.

18. Courts ⇐96(4), 107

Courts of Appeals may decide which of their opinions will be deemed binding on themselves and the courts below them, inasmuch as the principle of strict binding authority is not constitutional, but is a matter of judicial policy. U.S.C.A. Const. Art. 3, § 1 et seq.

19. Courts ⇐106

In writing a precedential opinion, a federal court must be careful to recite all facts that are relevant to its ruling, while omitting facts that it considers irrelevant; omitting relevant facts will make the ruling unintelligible to those not already familiar with the case, while including inconsequential facts can provide a spurious basis for distinguishing the case in the future.

20. Courts ⇐103

In a precedential opinion of a federal court, the rule of decision cannot simply be announced, but must be selected after due consideration of the relevant legal and policy considerations.

21. Courts ⇐106

Where more than one rule could be followed in a precedential federal judicial opinion, the court must explain why it is selecting one and rejecting the others; moreover, the rule must be phrased with precision and with due regard to how it will be applied in future cases.

22. Courts ⇐106

A federal judge drafting a precedential opinion must not only consider the

facts of the immediate case, but must also envision the countless permutations of facts that might arise in the universe of future cases; modern opinions generally call for the most precise drafting and redrafting to ensure that the rule announced sweeps neither too broadly nor too narrowly, and that it does not collide with other binding precedent that bears on the issue.

23. Courts ⇐87, 103

Federal judges have a responsibility to keep the body of law cohesive and understandable, and not muddy the water with a needless torrent of published opinions.

24. Courts ⇐87

All courts must follow the law.

25. Constitutional Law ⇐67
Courts ⇐107

Ninth Circuit rule, stating that unpublished dispositions and orders of Court of Appeals were not binding precedent and generally could not be cited to or by courts of Circuit, did not violate constitutional article governing judiciary, inasmuch as such article did not require that all case dispositions and orders issued by appellate courts be binding authority, and an inherent aspect of function of judges appointed under such article was managing precedent to develop coherent body of circuit law to govern litigation in Court of Appeals and other courts of Ninth Circuit. U.S.C.A. Const. Art. 3, § 1 et seq.; U.S.Ct. of App. 9th Cir.Rule 36–3, 28 U.S.C.A.

26. Attorney and Client ⇐37.1

Counsel's violation of Ninth Circuit rule generally prohibiting citation to Court of Appeals' unpublished dispositions and orders was not willful, and Court of Appeals would not exercise its discretion to impose sanctions, inasmuch as Eighth Circuit's opinion in *Anastasoff v. United States*, holding that similar Eighth Circuit rule violated constitutional article governing judiciary, may have cast doubt on Ninth Circuit rule's constitutional validity. U.S.C.A. Const. Art. 3, § 1 et seq.; U.S.Ct. of App. 8th Cir.Rule 28A(i), 28 U.S.C.A.; U.S.Ct. of App. 9th Cir.Rule 36–3, 28 U.S.C.A.

27. Attorney and Client ⇐37.1

The Ninth Circuit's rules providing for sanctions are not meant to punish attorneys who, in good faith, seek to test a rule's constitutionality.

Lawrence D. Rohlfing, Esq., Rohlfing Law Firm, Santa Fe Springs, California, for the plaintiff-appellant.

Kaladharan M.G. Nayar, Office of the Regional Attorney, Social Security Administration, San Francisco, California, for the defendant-appellant.

Appeal from the United States District Court for the Central District of California Arthur Nakazato, Magistrate Judge, Presiding. D.C. No. CV–97–02082–TJH(ANx).

Before: KOZINSKI and TALLMAN, Circuit Judges, and ZAPATA, District Judge.***

KOZINSKI, Circuit Judge.

Appellant's opening brief cites *Rice v. Chater*, No. 95–35604, 1996 WL 583605 (9th Cir. Oct.9, 1996). *Rice* is an unpub-

*** The Honorable Frank Zapata, United States District Judge for the District of Arizona, sitting by designation.

lished disposition, not reported in the Federal Reporter except as a one-line entry in a long table of cases. *See* Decisions Without Published Opinions, 98 F.3d 1345, 1346 tbl. (9th Cir.1996). The full text of the disposition can be obtained from our clerk's office, and is available on Westlaw® and LEXIS®. However, it is marked with the following notice: "This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir.R. 36–3." Our local rules are to the same effect: "Unpublished dispositions and orders of this Court are not binding precedent ... [and generally] may not be cited to or by the courts of this circuit ...." 9th Cir. R. 36–3.

We ordered counsel to show cause as to why he should not be disciplined for violating Ninth Circuit Rule 36–3. Counsel responds by arguing that Rule 36–3 may be unconstitutional. He relies on the Eighth Circuit's opinion in *Anastasoff v. United States*, 223 F.3d 898, *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000). *Anastasoff*, while vacated, continues to have persuasive force. *See, e.g., Williams v. Dallas Area Rapid Transit*, 256 F.3d 260 (5th Cir.2001) (Smith, J., dissenting from denial of reh'g en banc).[1] It may seduce members of our bar into violating our Rule 36–3 under the mistaken impression that it is unconstitutional. We write to lay these speculations to rest.

I

A. *Anastasoff* held that Eighth Circuit Rule 28A(i), which provides that unpublished dispositions are not precedential—and hence not binding on future panels of that court[2]—violates Article III of the Constitution. *See* 223 F.3d at 899. According to *Anastasoff*, exercise of the "judicial Power" precludes federal courts

1. *See also* Coleen M. Barger, *Anastasoff, Unpublished Opinions, and "No–Citation" Rules*, 3 J.App. Prac. & Process 169, 169–70 (2001). Barger notes that "[t]he chief judge of the District of Massachusetts seems determined to force the issue in the First Circuit," citing 1st Cir. R. 36(b)(2)(F) ("Unpublished opinions may be cited only in related cases ...."), "as he has begun to routinely insert the following footnote in his opinions whenever he cites unpublished opinions to support his reasoning":

> For the propriety of citing unpublished decisions, see *Anastasoff v. United States*, 223 F.3d 898, 899–905 (8th Cir.) (R. Arnold, J.) (holding that unpublished opinions have precedential effect), *vacated as moot*, No. 99–3917, 2000 WL 1863092 (8th Cir. Dec. 18, 2000); *Giese v. Pierce Chem. Co.*, 43 F.Supp.2d 98, 103 (D.Mass.1999) (relying on unpublished opinions' persuasive authority), and Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J.App. Prac. & Process 219 (1999).

See, e.g., Suboh v. City of Revere, 141 F.Supp.2d 124, 144 n. 18 (D.Mass.2001) (Young, C.J.).

2. Our rule operates somewhat differently from that of the Eighth Circuit, though it is in essential respects the same. While Eighth Circuit Rule 28A(i) says that "[u]npublished decisions are not precedent," we say that unpublished dispositions are "not binding precedent." Our rule, unlike that of the Eighth Circuit, prohibits citation of an unpublished disposition to any of the courts of our circuit. The Eighth Circuit's rule allows citation in some circumstances, but provides that the authority is persuasive rather than binding. *See* 8th Cir. R. 28A(i) ("Parties may ... cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well."). The difference is not material to the rationale of *Anastasoff* because both rules free later panels of the court, as well as lower courts within the circuit, to disregard earlier rulings that are designated as nonprecedential.

For a comprehensive table of nonpublication and noncitation rules across all circuits and states, see Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J.App. Prac. & Process 251, 253–85 tbl. 1 (2001).

from making rulings that are not binding in future cases. Or, to put it differently, federal judges are not merely required to follow the law, they are also required to *make* law in every case. To do otherwise, *Anastasoff* argues, would invite judicial tyranny by freeing courts from the doctrine of precedent: "'A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.'" *Id.* at 904 (quoting Joseph Story, *Commentaries on the Constitution of the United States* § 377 (1833)).[3]

We believe that *Anastasoff* overstates the case. Rules that empower courts of appeals to issue nonprecedential decisions do not cut those courts free from all legal rules and precedents; if they did, we might find cause for alarm. But such rules have a much more limited effect: They allow panels of the courts of appeals to determine whether future panels, as well as judges of the inferior courts of the circuit, will be bound by particular rulings. This is hardly the same as turning our back on all precedents, or on the concept of precedent altogether. Rather, it is an effort to deal with precedent in the context of a modern legal system, which has evolved considerably since the early days of common law, and even since the time the Constitution was adopted.

The only constitutional provision on which *Anastasoff* relies is that portion of Article III that vests the "judicial Power" of the United States in the federal courts. U.S. Const. art. III, § 1, cl. 1. *Anastasoff* may be the first case in the history of the Republic to hold that the phrase "judicial Power" encompasses a specific command that limits the power of the federal courts. There are, of course, other provisions of Article III that have received judicial enforcement, such as the requirement that the courts rule only in "Cases" or "Controversies," *see, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), and that the pay of federal judges not be diminished during their good behavior. *See, e.g., United States v. Hatter*, 532 U.S. 557, ——, 121 S.Ct. 1782, 1790–91, 149 L.Ed.2d 820 (2001). The judicial power clause, by contrast, has never before been thought to encompass a constitutional limitation on how courts conduct their business.

There are many practices that are common or even universal in the federal courts. Some are set by statute, such as the courts' basic organization. *See, e.g.*, 28 U.S.C. § 43 (creating a court of appeals for each circuit); 28 U.S.C. § 127 (dividing Virginia into two judicial districts); 28 U.S.C. § 2101 (setting time for direct appeals to the Supreme Court and for applications to the Supreme Court for writs of certiorari). *See generally* David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 Geo. J. Legal Ethics 509, 509–10 (2001). Others are the result of tradition, some dating from the days of the common law, others of more recent origin. Among them are the practices of issuing written opinions that speak for the court rather than for individual judges, adherence to the adversarial (rather than inquisitorial) model of developing cases, limits on the exercise of equitable relief,

3. In the passage cited by *Anastasoff*, Justice Story argued only that the judicial decisions of the Supreme Court were "conclusive and binding," and that inferior courts were not free to disregard the "decisions of the highest tribunal." He said nothing to suggest that the principle of binding authority constrained the "judicial Power," as *Anastasoff* does; rather, he recognized that the decisions of the Supreme Court were binding upon the states because they were the "supreme law of the land." Story, *supra*, §§ 376–78.

hearing appeals with panels of three or more judges and countless others that are so much a part of the way we do business that few would think to question them. While well established, it is unclear that any of these practices have a constitutional foundation; indeed, Hart (no relation so far as we know), in his famous Dialogue, concluded that Congress could abolish the inferior federal courts altogether. *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L.Rev. 1362, 1363–64 (1953). While the greater power does not always include the lesser, the Dialogue does suggest that much of what the federal courts do could be modified or eliminated without offending the Constitution.

Anastasoff focused on one aspect of the way federal courts do business—the way they issue opinions—and held that they are subject to a constitutional limitation derived from the Framers' conception of what it means to exercise the judicial power. Given that no other aspect of the way courts exercise their power has ever been held subject to this limitation,[4] we question whether the "judicial Power" clause contains any limitation at all, separate from the specific limitations of Article III and other parts of the Constitution. The more plausible view is that when the federal courts rule on cases or controversies assigned to them by Congress, comply with due process, accord trial by jury where commanded by the Seventh Amendment and generally comply with the specific constitutional commands applicable to judicial proceedings, they have ipso facto exercised the judicial power of the United States. In other words, the term "judicial Power" in Article III is more likely descriptive than prescriptive.[5]

4. To be sure, exercise of the judicial power is subject to a number of explicit constraints, such as the requirements of due process, trial by jury, the availability of counsel in criminal cases, the ex post facto clause and the prohibition against bills of attainder—to name just a few.

5. Because the matter arises so seldom, there is little authority on this point, but the authority that does exist supports the view that the text of the judicial power clause is merely descriptive. For example, *United States v. Ferreira*, 54 U.S. (13 How.) 40, 14 L.Ed. 40 (1851), considered whether decisions of district courts as to whether certain Spanish citizens were entitled to compensation pursuant to a treaty between Spain and the United States were an exercise of the judicial power. If the district judges found the claimants entitled to compensation, they were to recommend that the Secretary of the Treasury make such payments, and the latter could (but was not required to) pay the claim. In concluding that such recommendations did not constitute an exercise of the judicial power (and hence were not reviewable by the Supreme Court), the opinion noted the ways in which the procedures for establishing these claims differed from "the ordinary forms of a court of justice":

> For there is to be no suit; no parties in the legal acceptance of the term, are to be made—no process to issue; and no one is authorized to appear on behalf of the United States, or to summon witnesses in the case. The proceeding is altogether *ex parte;* and all that the judge is required to do, is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain. But neither the evidence, nor his award, are to be filed in the court in which he presides, nor recorded there; but he is required to transmit, both the decision and the evidence upon which he decided, to the Secretary of the Treasury; and the claim is to be paid if the Secretary thinks it just and equitable, but not otherwise. It is to be a debt from the United States upon the decision of the Secretary, but not upon that of the judge.

See also Missouri v. Jenkins, 515 U.S. 70, 130–33, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995) (Thomas, J., concurring) (listing various functional limitations on the exercise of the judicial power, including federalism, separation of powers and the prohibition against decid-

If we nevertheless were to accept *Anastasoff*'s premise that the phrase "judicial Power" contains limitations separate from those contained elsewhere in the Constitution, we should exercise considerable caution in recognizing those limitations, lest we freeze the law into the mold cast in the eighteenth century. The law has changed in many respects since the time of the Framing, some superficial, others quite fundamental. For example, as Professor William Nelson has convincingly demonstrated, colonial juries "usually possessed the power to find both law and fact in the cases in which they sat," and were not bound to follow the instructions given to them by judges. *See* William E. Nelson, *Marbury v. Madison: The Origins and Legacy of Judicial Review* 16–17 (2000). Today, of course, we would consider it unfair—probably unconstitutional—to allow juries to make up the law as they go along.

Another example: At the time of the Framing, and for some time thereafter, the practice that prevailed both in the United States and England was for judges of appellate courts to express separate opinions, rather than speak with a single (or at least majority) voice. The practice changed around the turn of the nineteenth century, under the leadership of Chief Justice Marshall. *See* George L. Haskins & Herbert A. Johnson, *Foundations of Power: John Marshall, 1801–15, in* 2 The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States 382–89 (Paul A. Freund ed., 1981).

And yet another example: At the time of the Framing, and for some time thereafter, it was considered entirely appropriate for a judge to participate in the appeal of his own decision; indeed, before the creation of the Circuit Courts of Appeals, appeals from district court decisions were often taken to a panel consisting of a Supreme Court Justice riding circuit, and the district judge from whom the decision was taken. Act of March 2, 1793, ch. 22, § 1, 1 Stat. 333; *see also* Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3504 (2d ed.1984). Today, of course, it is widely recognized that a judge may not hear the appeal from his own decision. There are doubtless many more such examples.[6]

ing political questions); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 815–18, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987) (Scalia, J., concurring) (discussing the functional limitation of separation of powers on the exercise of the judicial power).

6. The three examples we have given, though apparently disparate, actually bear on the question of what weight was given to precedent at the time of the Framing. In a regime where juries have power to decide the law, the concept of "binding" precedent has a very different, and much more diluted, meaning than in the current regime where jury verdicts are routinely reversed if they are not supported by the evidence in light of the applicable law. Similarly, binding precedent means something different altogether when a court speaks with seven or nine voices than with a single voice. Nine judges speaking separately may well agree on the outcome of a case, but they cannot give the kind of specific guidance as to the conduct of future cases that can be found in a single opinion speaking for the court. Finally, during the time when appeals were conducted by two-judge panels consisting of the circuit justice flanked by the district judge whose ruling was being appealed produced remarkably few—if any—written rulings. The precedential value of rulings from such panels was, for obvious reasons, not particularly valuable guidance in future cases. *Anastasoff*'s view that the judicial process underwent such fundamental changes, yet the process of producing precedential opinions remained essentially unchanged, strikes us as inherently doubtful. *Anastasoff*'s historical analysis has been called into question even by academics who generally agree with the result. *See, e.g.*, Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L.Rev. 81, 84, 90–93 (2000); Salem M. Katsh & Alex V. Chachkes, *Constitutionality of "No-Citation" Rules*, 3

One danger of giving constitutional status to practices that existed at common law, but have changed over time, is that it tends to freeze certain aspects of the law into place, even as other aspects change significantly. *See* note 6 *supra*. This is a particularly dangerous practice when the constitutional rule in question is not explicitly written into the Constitution, but rather is discovered for the first time in a vague, two-centuries-old provision. The risk that this will allow judges to pick and choose those ancient practices they find salutary as a matter of policy, and give them constitutional status, is manifest. *Compare* Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J.App. Prac. & Process 219 (1999) (suggesting that all opinions be published and given precedential value), *with Anastasoff*, 223 F.3d 898 (holding that the Eighth Circuit's rule barring citation to unpublished opinions violates Article III). Thus, in order to follow the path forged by *Anastasoff*, we would have to be convinced that the practice in question was one the Framers considered so integral and well-understood that they did not have to bother stating it, even though they spelled out many other limitations in considerable detail. Specifically, to adopt *Anastasoff*'s position, we would have to be satisfied that the Framers had a very rigid conception of precedent, namely that all judicial decisions necessarily served as binding authority on later courts.

This is, in fact, a much more rigid view of precedent than we hold today. As we explain below, most decisions of the federal courts are not viewed as binding precedent. No trial court decisions are; almost four-fifths of the merits decisions of courts of appeals are not. *See* p. 1177 *infra*.[7] To be sure, *Anastasoff* challenges the latter practice. We find it significant, however, that the practice has been in place for a long time, yet no case prior to *Anastasoff* has challenged its constitutional legitimacy. The overwhelming consensus in the legal community has been that having appellate courts issue nonprecedential decisions is not inconsistent with the exercise of the judicial power.

To accept *Anastasoff*'s argument, we would have to conclude that the generation of the Framers had a much stronger view of precedent than we do. In fact, as we explain below, our concept of precedent today is far stricter than that which prevailed at the time of the Framing. The Constitution does not contain an express prohibition against issuing nonprecedential opinions because the Framers would have seen nothing wrong with the practice.

B. Modern federal courts are the successors of the English courts that developed the common law, but they are in many ways quite different, including how they understand the concept of precedent. Common law judges did not make law as we understand that concept; rather, they "found" the law with the help of earlier cases that had considered similar matters. An opinion was evidence of what the law

J.App. Prac. & Process 287, 288 & n. 5 (2001).

7. Rules limiting the precedential effect of unpublished decisions exist in every federal circuit and all but four states (Connecticut, Delaware, New York and North Dakota). *See* Serfass & Cranford, note 2 *supra*, at 260–61 tbl. 1, 273–74 tbl. 1. *But see Eaton v. Chahal*, 146 Misc.2d 977, 553 N.Y.S.2d 642, 646 (N.Y.Sup.Ct.1990) ("[U]nreported decisions issued by judges of coordinate jurisdiction ... are not binding precedent upon this court....") The near-universal adoption of the practice illustrates not only that the practice is consistent with the prevailing conception of the judicial power, but also that it reflects sound judicial policy.

is, but it was not an independent source of law. *See* Theodore F.T. Plucknett, *A Concise History of the Common Law* 343–44 (5th ed.1956).[8] The law was seen as something that had an existence independent of what judges said: "a miraculous something made by nobody ... and merely declared from time to time by the judges." 2 John Austin, *Lectures on Jurisprudence or The Philosophy of Positive Law* 655 (4th ed. 1873) (emphasis omitted). Opinions were merely judges' efforts to ascertain the law, much like scientific experiments were efforts to ascertain natural laws. If an eighteenth-century judge believed that a prior case was wrongly decided, he could say that the prior judge had erred in his attempt to discern the law. *See Bole v. Horton*, 124 Eng. Rep. 1113, 1124 (C.P. 1673). Neither judges nor lawyers understood precedent to be binding in *Anastasoff*'s strict sense.[9]

One impediment to establishing a system of strict binding precedent was the absence at common law of a distinct hierarchy of courts. *See* Plucknett, *supra*, at 350.[10] Only towards the end of the nineteenth century, after England had reorganized its courts, was the position of the House of Lords at the head of its judicial hierarchy confirmed. Before that, there

8. As Hale described it, judicial decisions "do not make a Law properly so-called," but "they have a great Weight and Authority in Expounding, Declaring, and Publishing what the Law of this Kingdom is, [and] are a greater Evidence [of a law] than the Opinion of any private Persons, as such, whatsoever." Sir Matthew Hale, *The History of the Common Law of England* 68 (London, Nutt & Gosling 1739). In Lord Mansfield's view, "[t]he reason and spirit of cases make law; not the letter of particular precedents." *Fisher v. Prince*, 97 Eng. Rep. 876, 876 (K.B.1762).

9. As Holdsworth put it:

> The general rule is clear. Decided cases which lay down a rule of law are authoritative and must be followed. But in very many of the statements of this general rule there are reservations of different kinds.... The fundamental principle, upon which all these reservations ultimately rest, is the principle stated by Coke, Hale and Blackstone, that these cases do not make law, but are only the best evidence of what the law is. They are not, as Hale said, "law properly so called," but only very strong evidence of the law. They are evidence, as Coke said, of the existence of those usages which go to make up the common law; and, conversely, the fact that no case can be produced to prove the existence of an alleged usage is evidence that there is no such usage. This principle is the natural, though undesigned, result of the unofficial character of the reports; and it is clear that its adoption gives the courts power to mould as they please the conditions in which they will accept a decided case or a series of decided cases as authoritative. If the cases are only evidence of what the law is the courts must decide what weight is to be attached to this evidence in different sets of circumstances. *The manner in which they have decided this question has left them many means of escape from the necessity of literal obedience to the general rule that decided cases must always be followed.* They have allowed many exceptions to, and modifications of, this rule if, in their opinion, a literal obedience to it would produce either technical departures from established principles, or substantial inconveniences which would be contrary to public policy.

Sir William Holdsworth, 12 *A History of English Law* 150–51 (1938) (footnotes omitted) (emphasis added).

10. As one commentator has noted:

> [T]wo conditions had to be satisfied before the doctrine of *stare decisis* could be established. (1) There had to exist reliable reports of cases. It is obvious that if cases are to be binding, there should be precise records of what they lay down. (2) There had also to be a settled judicial hierarchy. Equally obvious is it that until this was settled it could not be known which decisions were binding. Not until roughly the middle of the last century were these conditions fulfilled, and it is from about then that the modern doctrine [of stare decisis] emerges.

R.W.M. Dias, *Jurisprudence* 30–31 (2d ed.1964).

was no single high court that could definitively say what the law was. Thus, as late as the middle of the nineteenth century, an English judge might ignore decisions of the House of Lords,[11] and the Exchequer and Queen's Bench held different views on the same point as late as 1842.[12] *See id.* at 350. Common law judges looked to earlier cases only as examples of policy or practice, and a single case was generally not binding authority.[13] Eighteenth-century judges did not feel bound to follow most decisions that might lead to inconvenient results, and judges would even blame reporters for cases they disliked. *See* Plucknett, *supra*, at 349.

The idea that judges declared rather than made the law remained firmly entrenched in English jurisprudence until the early nineteenth century. David M. Walker, *The Oxford Companion to Law* 977 (1980). Blackstone, who wrote his Commentaries only two decades before the Constitutional Convention and was greatly respected and followed by the generation of the Framers, noted that "the 'law,' and the 'opinion of the judge' are not . . . one and the same thing; since it sometimes may happen that the judge may mistake the law"; in such cases, the precedent simply "was not law." 1 William Blackstone, *Commentaries* *70–71 (1765).

For centuries, the most important sources of law were not judicial opinions themselves, but treatises that restated the law, such as the commentaries of Coke and Blackstone. Because published opinions were relatively few, lawyers and judges

11. One reason that House of Lords decisions commanded little respect was that as late as 1844, judicial deliberations could be conducted by lay peers, who brought far less training and experience to bear on legal issues than did the judges of the Exchequer Chamber. Dias, note 10 *supra*, at 32–33.

12. The three common law courts of first instance—the King's (or Queen's) Bench, Common Pleas and Exchequer—had overlapping jurisdiction in many common classes of cases. *See* Plucknett, *supra*, at 210.

13. The absence of an appellate hierarchy that could definitively settle legal issues was a continuing problem until the nineteenth century. The need for such definitive resolution nevertheless existed and the common law judges invented a substitute: the Exchequer Chamber. When a particularly vexing legal issue arose that was common to two or more of the courts, all the judges would meet, sometimes including the Lord Chancellor, the barons of the Exchequer, the members of the Council and the serjeants. *See* Plucknett, *supra*, at 151 (the Council consisted of the King's closest advisers); *id.* at 224 (serjeants were, essentially, lawyers known for wearing the coif, "a close-fitting cap of white silk or linen fastened under the chin; hence the term 'order of the coif.' ")

The Exchequer Chamber debated particular legal issues and came up with a definitive ruling, which was then announced in the court where the case raising the issue originated. *Id.* at 162–63. The Exchequer Chamber was not a separate court; it was referred to by that name because these meetings were held in the court of the Exchequer, which "had ample office accommodation" to allow all the judges to meet in one place. Plucknett, *supra*, at 162 n. 7. The Exchequer Chamber might best be viewed as a super-en banc court including all of England's judicial officers.

Unlike other decisions at common law, decisions reached by the Exchequer Chamber were considered binding precedent and, according to Plucknett, this is the first time we find "the principle that a single case may be precedent." *Id.* at 348. The Exchequer Chamber is significant for our analysis because it clearly suggests common law judges knew the distinction between binding and persuasive precedent. The vast majority of precedents at common law were considered more or less persuasive; only the few decisions agreed-to by all English judges sitting together were afforded the status that the *Anastasoff* court would now afford to every decision of a three-judge court of appeals as a matter of constitutional imperative.

relied on commentators' synthesis of decisions rather than the verbatim text of opinions.[14]

Case reporters were entrepreneurs who scribbled down jury charges as they were delivered by judges, then printed and sold them. Or, reporters might cobble together case reports from secondhand sources and notes found in estates, sometimes years after the cases were decided. *See* Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 Cal. L.Rev. 15, 18–19 (1987). For example, *Heydon's Case* was decided in 1584, but Lord Coke did not publish his account of it until 1602. *See* Allen Dillard Boyer, *"Understanding, Authority, and Will": Sir Edward Coke and the Elizabethan Origins of Judicial Review*, 39 B.C. L.Rev. 43, 79 (1997). Not surprisingly, case reports often contradicted each other in describing the reasoning, and even the names, of particular cases. *See* Berring, *supra*, at 18.[15] The value of case reports turned not on the accuracy of the report but on the acuity of their authors. *See id.* at 18–19.[16]

Coke's intellectual reputation made him the most valued, and the most famous, of the private reporters. His reports were not verbatim transcriptions of what the judges actually said, but vehicles for Coke's own jurisprudential and political agenda. *See* Boyer, *supra*, at 80 ("In the name of judicial reason, Coke was willing to rewrite the law.... In 1602, his chief way of shaping the law was in the way he reported it."). Like other reporters, Coke often distorted the language and meaning of prior decisions that were inconsistent with what he considered the correct legal principle. *See* Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 Emory L.J. 437, 447 (1996). "There was no clear boundary in his mind between what a case said and what he thought it ought to say, between the reasons which actually prompted the decision, and the elaborate commentary which he could easily weave around any question."

14. In the first century of American jurisprudence, Blackstone's "Commentaries were not merely an approach to the study of law; for most lawyers they constituted all there was of the law." Daniel J. Boorstin, *The Mysterious Science of the Law* 3 (1941).

15. For example, "*Clerk v. Day* was reported in four different books, and in not one of them correctly—not even as to name.... Arbitrary spelling of the names of cases is a bibliographical irritation, and sometimes a difficulty. *Fetter v. Beal* ... is a pretty good disguise for *Fitter v. Veal* ...." Percy H. Winfield, *The Chief Sources of English Legal History* 185 n. 3 (1925) (citations omitted).

16. As Holdsworth wrote:

> [I]n the eighteenth century, because the reports were made by private reporters, the reports of decided cases possessed, as we have seen, very different degrees of authority. It was always possible for a judge who was trying a case to decry the authority of a report which laid down a rule with which he disagreed. We have seen that Lord Mansfield, when he was pressed by a case which laid down a rule with which he did not like, was rather too apt to take this line. It is no doubt a line which it became less possible to take as the reports improved in quality, and as reporting became more standardized and more stereotyped. But within limits this censorship of reports is both legitimate and necessary.... Thus in the case of *Chillingworth v. Esche* [1924] 1 Ch. at pp. 112–113 Warrington L.J. said, "there are one or two points raised by Mr. Micklem with which I think I ought to deal. He relies on *Moeser v. Wisker* ((1871) L.R. 6 C.P. 120). In my opinion that is a case which never ought to have been reported. It was an *ex parte* application. The judges seized on a single fact, and decided on that fact. The purchaser in that case had no opportunity of stating his view."

Holdsworth, note 9 *supra*, at 154 & 154 n. 3 (footnotes omitted).

Plucknett, *supra*, at 281.[17] Contrary to *Anastasoff*'s view, it was emphatically not the case that all decisions of common law courts were treated as precedent binding on future courts unless distinguished or rejected. Rather, case reporters routinely suppressed or altered cases they considered wrongly decided. Indeed, sorting out the decisions that deserved reporting from those that did not became one of their primary functions.[18]

A survey of the legal landscape as it might have been viewed by the generation of the Framers casts serious doubt on the proposition—so readily accepted by *Anastasoff*—that the Framers viewed precedent in the rigid form that we view it today. Indeed, it is unclear that the Framers would have considered our view of precedent desirable.[19] The common law, at its core, was a reflection of custom, and custom had a built-in flexibility that allowed it to change with circumstance. Thus, "when Lord Mansfield incorporated the custom of merchants into the common law, it was a living flexible custom, responding to the growth and change of mercantile habits." Plucknett, *supra*, at 350. Embodying that custom into a binding decision raised the danger of ossifying the custom: "[I]f perchance a court has given a decision on a point of that custom, it loses for ever its flexibility and is fixed by the rule of precedent at the point where the court touched it." *Id.* It is entirely possible that lawyers of the eighteenth century, had they been confronted with the regime of rigid precedent that is in common use today, would have reacted with alarm.[20]

17. Coke was not alone in this practice:

> [B]arristers have sometimes exercised some kind of censorship over the cases which they have reported.... For instance ... Atlay, The Victorian Chancellors ii 138, says, "Campbell was no mere stenographer; he exercised an absolute discretion as to what decisions he reported and what he suppressed, and sternly rejected any which appeared to him inconsistent with former rulings or recognised principles. He jocularly took credit for helping to establish the Chief Justice's reputation as a lawyer, and he used to boast that he had, in one of his drawers, material for an additional volume in the shape of 'bad Ellenborough law'."

Holdsworth, note 9 *supra*, at 158 & 158 n. 1.

18. As one commentator has noted:

> It would appear also that from about 1785 judges were beginning to favour particular reporters chosen for each court and to prefer citation from them and no other.... The question what cases should be reported bristles with problems. The decision rests ultimately with the individual reporter.

Dias, note 10 *supra*, at 33.

19. As another commentator has noted:

> The Framers were familiar with the idea of precedent. But ... [t]he whole idea of just what precedent entailed was unclear. The relative uncertainty over precedent in 1789 also reflects the fact that "many state courts were manned by laymen, and state law and procedure were frequently in unsettled condition. The colonial and state courts did not enjoy high prestige, and their opinions were not even deemed worthy of publication."

Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L.Rev. 723, 770 n. 267 (1988) (citations omitted). *See also* Melissa H. Weresh, *The Unpublished, Non-Precedential Decision: An Uncomfortable Legality?*, 3 J.App. Prac. & Process 175, 186 (2001) ("Stare decisis and the American common law system have never required the publication of all decisions.")

20. Far from being the strict and uncontroverted doctrine that *Anastasoff* attempts to portray, the concept of precedent at the time of the Framers was the subject of lively debate. Adherence to the common law was not "inevitable and unopposed." Robert H. Jackson, *The Supreme Court in the American System of Government* 29 (1955). "[T]he parameters of judicial power were highly contested in the late colonial and early Republic periods.... [N]o one knew the exact role that judges would have in the new experiment in government that formed the United States." R. Ben Brown, *Judging in the Days of the Early Republic: A Critique of Judge Richard*

The modern concept of binding precedent—where a single opinion sets the course on a particular point of law and must be followed by courts at the same level and lower within a pyramidal judicial hierarchy—came about only gradually over the nineteenth and early twentieth centuries. Lawyers began to believe that judges made, not found, the law. This coincided with monumental improvements in the collection and reporting of case authorities. As the concept of law changed and a more comprehensive reporting system began to take hold, it became possible for judicial decisions to serve as binding authority.[21]

Early American reporters resembled their English ancestors—disorganized and meager[22]—but the character of the report-

Arnold's Use of History in Anastasoff v. United States, 3 J.App. Prac. & Process 355, 375, 383 (2001). Therefore, "lawyers, judges and legal commentators contested the question of just what body of law judges should use to decide cases in the early Republic." *Id.* at 358.

On one side of the debate was Blackstone himself. "Far from providing support for Judge Arnold's claim that the colonial judiciary was bound by common law precedent, Blackstone's thesis was just the opposite": that American courts were not bound by English precedent. *Id.* at 357 (footnotes omitted). St. George Tucker, a prominent nineteenth-century American scholar, disagreed. *Id.* at 358.

Amidst this disagreement, American judges not only routinely picked and chose which English precedents to follow, but also felt free to ignore their *own* decisions. *Id.* at 359, 360–63 (discussing *Fitch v. Brainerd*, 2 Day 163 (Conn.1805) (available at 1805 WL 203), in which the Connecticut Supreme Court declared, without explanation, that its prior decision adopting an English precedent authored by Lord Mansfield, "was not law.") Such cavalier treatment of precedent—the *Fitch* court did not acknowledge the precedent as binding and distinguish or reject it, but simply declared it "was not law"—illustrates that precedent at the time of the Framers was a far more fluid concept than it is today, and certainly more so than the strict form advocated by *Anastasoff*.

21. As Plucknett notes, "[t]he nineteenth century produced the changes which were necessary for the establishment of the rigid and symmetrical theory [of case precedent] as it exists today." Plucknett, *supra*, at 350. Among the changes he points to was the establishment of a strict appellate hierarchy and the standardization of case law reporting. *Id.*

22. The first volumes of the United States Reports reveal the idiosyncratic and sometimes unreliable character of the early reporters. The first volume contains not a single decision of the United States Supreme Court. *See* Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 Mich. L.Rev. 1291, 1296 (1985). The reporter, Alexander James Dallas, began his career by publishing decisions of the Pennsylvania and Delaware courts, but not until 1806 were Pennsylvania judges required to reduce their opinions to writing (and then only at the parties' request). Dallas's first volume therefore contains only brief descriptions of the earliest decisions, based on notes preserved by judges and lawyers. *See id.* at 1295–98. And, while his second volume does contain decisions of the United States Supreme Court, Dallas could not always rely on a written opinion as the basis of his report because the Court did not invariably reduce its opinions to writing:

> Not a single formal manuscript opinion is known to have survived from the Court's first decade; and few, if any, may ever have existed for Dallas to draw upon. Nor may it be confidently assumed that in all instances Dallas was present in court to take down what the Justices said, or that he was able afterwards to consult any notes they may have kept of the opinions they announced.... Delay, expense, omission and inaccuracy: these were among the hallmarks of Dallas' work.

Id. at 1305 (footnotes omitted).

At that time, the Supreme Court had no official reporter and cases were never printed. *United States v. Yale Todd*, decided by the Supreme Court in 1784, is a typical example. Because "[t]here was no official reporter at that time, [the] case has not been printed." *United States v. Ferreira*, 54 U.S. (13 How.) 40, 52, 14 L.Ed. 40 (1851). So said Chief Justice Taney in a note added following *Ferreira*, describing *Yale Todd*. "[A]s the subject is one of much interest, and concerns the nature and extent of judicial power, the sub-

ing process began to change, after the Constitution was adopted, with the emergence of official reporters in the late eighteenth century and the early nineteenth century. *See* Berring, *supra*, at 20–21. And, later in the nineteenth century, the West Company began to publish standardized case reporters, which were both accurate and comprehensive, making "it possible to publish in written form all of the decisions of courts." *Id.* at 21. Case reports grew thicker, and the weight of precedent began to increase—weight, that is, in terms of volume.

The more cases were reported, the harder became the task of searching for relevant decisions. At common law, circuit-riding judges often decided cases without referring to any reporters at all, *see Fentum v. Pocock*, 5 Taunt. 192, 195, 128 Eng. Rep. 660, 662 (C.P.1813) (Mansfield, C.J.) ("It [was] utterly impossible for any Judge, whatever his learning and abilities may be, to decide at once rightly upon every point which [came] before him at Nisi Prius ...."), and reporters simply left out decisions they considered wrong or those that merely repeated what had come before. Sir Francis Bacon recommended that cases "merely of iteration and repetition" be omitted from the case reports altogether, and Coke warned judges against reporting all of their decisions for fear of weighing down the law. *See* Kirt Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 Cal. L.Rev. 541, 545 & n. 8 (1997). Indeed, the English opinion-reporting system has never published, and does not today publish, every opinion of English appellate courts, even though the total number of opinions issued each year in both the English Court of Appeal and House of Lords combined is little more than 1000—less than a quarter of the number of dispositions issued annually by the Ninth Circuit in recent years, *see* note 37 *infra*. Robert J. Martineau, *Appellate Justice in England and the United States: A Comparative Analysis* 107, 150 (1990); Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. Mich. J.L. Ref. 119, 136 (1995).[23]

II

[1] Federal courts today do follow some common law traditions. When ruling on a novel issue of law, they will generally consider how other courts have ruled on the same issue. This consideration will not be limited to courts at the same or higher level, or even to courts within the same system of sovereignty. Federal courts of appeals will cite decisions of district courts, even those in other circuits; the Supreme Court may cite the decisions of the inferior courts, *see, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (citing *Associated Gen. Contractors of Cal. v. City & County of San Francisco*, 813 F.2d 922, 929 (9th Cir.1987)), or those of the state courts, *see, e.g., Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 121 S.Ct. 1446, 1452, 149 L.Ed.2d 391 (2001)

stance of the decision in *Yale Todd's case* is inserted here, in order that it may not be overlooked, if similar questions should hereafter arise." *Id.*

23. In 1986, only 39% of the 884 opinions of the English Court of Appeal were reported. Martineau, *Appellate Justice, supra*, at 107, 150. "Although technically a judgment need not be reported to be cited as precedent [in England] ... the reality is that unless a judgment is reported it is not likely to be used as precedent." *Id.* at 104. Nevertheless, "[t]here does not appear to be among the judges and the bar any current dissatisfaction with the system except that some believe too many, not too few, judgments are reported." *Id.* at 107.

(citing *J & K Painting Co. v. Bradshaw*, 45 Cal.App.4th 1394, 1402, 53 Cal.Rptr.2d 496 (Cal.Ct.App.1996)). It is not unusual to cite the decision of courts in foreign jurisdictions, so long as they speak to a matter relevant to the issue before us. *See, e.g., Mozes v. Mozes*, 239 F.3d 1067, 1071 (9th Cir.2001). The process even extends to non-case authorities, such as treatises and law review articles. *See id.* at 1071 & n. 7.

[2] Citing a precedent is, of course, not the same as following it; "respectfully disagree" within five words of "learned colleagues" is almost a cliche. After carefully considering and digesting the views of other courts and commentators—often giving conflicting guidance on a novel legal issue—courts will then proceed to follow one line of authority or another, or sometimes strike out in a completely different direction. While we would consider it bad form to ignore contrary authority by failing even to acknowledge its existence, it is well understood that—in the absence of binding precedent—courts may forge a different path than suggested by prior authorities that have considered the issue. So long as the earlier authority is acknowledged and considered, courts are deemed to have complied with their common law responsibilities.

[3, 4] But precedent also serves a very different function in the federal courts today, one related to the horizontal and vertical organization of those courts. *See* John Harrison, *The Power of Congress Over The Rules of Precedent*, 50 Duke L.J. 503 (2000). A district judge may not respectfully (or disrespectfully) disagree with his learned colleagues on his own court of appeals who have ruled on a controlling legal issue, or with Supreme Court Justices writing for a majority of the Court.[24] Binding authority within this regime cannot be considered and cast aside; it is not merely evidence of what the law is. Rather, caselaw on point *is* the law. If a court must decide an issue governed by a prior opinion that constitutes binding authority, the later court is bound to reach the same result, even if it considers the rule unwise or incorrect. Binding authority must be followed unless and until overruled by a body competent to do so.

[5] In determining whether it is bound by an earlier decision, a court considers not merely the "reason and spirit of cases" but also "the letter of particular precedents." *Fisher v. Prince*, 97 Eng. Rep. 876, 876 (K.B.1762). This includes not only the rule announced, but also the facts giving rise to the dispute, other rules considered and rejected and the views expressed in response to any dissent or concurrence.[25] Thus, when crafting binding

24. The same practice is followed in the state courts as well. *See, e.g., Auto Equity Sales, Inc. v. Superior Court of Santa Clara County*, 57 Cal.2d 450, 20 Cal.Rptr. 321, 369 P.2d 937, 940 (Cal.1962) ("Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court.").

25. For example, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985), a majority held that the rule announced in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) (plaintiff must show "actual malice" to obtain punitive damages for false and defamatory statements), applies only to statements involving matters of public concern. Relying on the language and context of *Gertz*, the Court rejected the dissenters' claim that the *Gertz* rule applied to all defamatory statements, and instead concluded that *Gertz* left it an open question whether the rule applied to statements not of public concern. *Compare Dun & Bradstreet*, 472 U.S. at 757 n. 4, 105 S.Ct. 2939 ("The dissent states that '[a]t several points the Court in *Gertz* makes perfectly clear [that] the restrictions of presumed and punitive damages were to apply in

authority, the precise language employed is often crucial to the contours and scope of the rule announced.[26]

[6, 7] Obviously, binding authority is very powerful medicine. A decision of the Supreme Court will control that corner of the law unless and until the Supreme Court itself overrules or modifies it. Judges of the inferior courts may voice their criticisms, but follow it they must. *See, e.g., Ortega v. United States*, 861 F.2d 600, 603 & n. 4 (9th Cir.1988) ("This case is squarely controlled by the Supreme Court's recent decision.... [We] agree[ ] with the dissent that [appellant] deserves better treatment from our Government. Unfortunately, legal precedent deprives us of discretion to do equity."). The same is true as to circuit authority, although it usually covers a much smaller geographic area.[27] Circuit law, a concept wholly unknown at the time of the Framing, *see* Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 Green Bag 2d 17, 22 (2000), binds all courts within a particular circuit, including the court of appeals itself. Thus, the first panel to consider an issue sets the law not only for all the inferior courts in the circuit, but also future panels of the court of appeals.

[8–11] Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court.[28] As *Anastasoff* itself states, a later three-judge panel considering a case that is controlled by the rule announced in an earlier panel's opinion has no choice but to apply the earlier-adopted rule; it may not any more disregard the earlier panel's opinion than it may disregard a ruling of the Supreme Court. *Anastasoff*, 223 F.3d at 904; *see also Santamaria v. Horsley*, 110 F.3d 1352, 1355 (9th Cir.1997) ("It is settled law that one three-judge panel of this court cannot ordinarily reconsider or overrule the decision of a prior panel."), *rev'd*, 133 F.3d 1242 (9th Cir.) (en banc), *amended by* 138 F.3d 1280 (9th Cir.), *cert. denied*, 525 U.S. 823–24, 119 S.Ct. 68, 142 L.Ed.2d 53 (1998); *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 425–26 (5th Cir.1987) (A "purpose of institutional orderliness [is served] by our insistence that, in the absence of intervening Supreme Court precedent, one panel cannot overturn another panel, regardless of how

all cases.' Given the context of *Gertz*, however, the Court could have made 'perfectly clear' only that these restrictions applied in cases involving *public speech.*" (citations omitted)), *with id.* at 785 n. 11, 105 S.Ct. 2939 ("Distrust of placing in the courts the power to decide what speech was of public concern was precisely the rationale *Gertz* offered for rejecting [an alternative] approach. It would have been incongruous for the Court to go on to circumscribe the protection against presumed and punitive damages by reference to a judicial judgment as to whether the speech at issue involved matters of public concern." (citation omitted)).

26. This is consistent with the practice in our court—and all other collegial courts of which we are aware—in which the judges who join an opinion authored by another judge make substantive suggestions, often conditioning their votes on reaching agreement on mutually acceptable language.

27. The exception is the Federal Circuit, which has a geographic area precisely the same as the Supreme Court, but much narrower subject-matter jurisdiction. *See* 28 U.S.C. § 1295(a).

28. Or, unless Congress changes the law. *See, e.g., Van Tran v. Lindsey*, 212 F.3d 1143, 1149 (9th Cir.) (earlier caselaw established that mixed questions in habeas petitions were reviewed de novo, but under the Anti-Terrorism and Effective Death Penalty Act of 1996, the standard of review is governed by 28 U.S.C. § 2254(d)), *cert. denied*, 531 U.S. 944, 121 S.Ct. 340, 148 L.Ed.2d 274 (2000).

wrong the earlier panel decision may seem to be."). Designating an opinion as binding circuit authority is a weighty decision that cannot be taken lightly, because its effects are not easily reversed. Whether done by the Supreme Court or the court of appeals through its "unwieldy" and time-consuming en banc procedures, Richard A. Posner, *The Federal Courts: Crisis and Reform* 101 (1985),[29] overruling such authority requires a substantial amount of courts' time and attention—two commodities already in very short supply.

[12] Controlling authority has much in common with persuasive authority. Using the techniques developed at common law, a court confronted with apparently controlling authority must parse the precedent in light of the facts presented and the rule announced. Insofar as there may be factual differences between the current case and the earlier one, the court must determine whether those differences are material to the application of the rule or allow the precedent to be distinguished on a principled basis. Courts occasionally must reconcile seemingly inconsistent precedents and determine whether the current case is closer to one or the other of the earlier opinions. *See, e.g., Mont. Chamber of Commerce v. Argenbright,* 226 F.3d 1049, 1057 (9th Cir.2000).

But there are also very important differences between controlling and persuasive authority. As noted, one of these is that, if a controlling precedent is determined to be on point, it must be followed. Another important distinction concerns the scope of controlling authority. Thus, an opinion of our court is binding within our circuit, not

29. An impressive array of judges and academics have noted the rigors of en banc procedures. *See* Richard S. Arnold, *Why Judges Don't Like Petitions for Rehearing,* 3 J.App. Prac. & Process 29, 37 (2001) ("[O]n many days, I confess, I find myself wishing that there were no such thing [as en banc rehearing]."); Pamela Ann Rymer, *How Big Is Too Big?,* 15 J.L. & Pol. 383, 392 (1999) ("expensive and time consuming"); Joseph T. Sneed, *The Judging Cycle: Federal Circuit Court Style,* 57 Ohio St. L.J. 939, 942 (1996) ("time consuming and complex"); James Oakes, *Personal Reflections on Learned Hand and the Second Circuit,* 47 Stan. L.Rev. 387, 393 (1995) ("enormously time-consuming and expensive"); Deanell Reece Tacha, *The "C" Word: On Collegiality,* 56 Ohio St. L.J. 585, 590 (1995) ("time-consuming and expensive"); Irving R. Kaufman, *Do the Costs of the En Banc Proceeding Outweigh Its Advantages?,* 69 Judicature 7, 7 (1985) ("the most time consuming and inefficient device in the appellate judiciary's repertoire"); J. Woodford Howard, Jr., *Courts of Appeals in the Federal Judicial System: A Study of the Second, Fifth, and District of Columbia Circuits* 217 (1981) ("most circuit judges regard en bancs as a 'damned nuisance' ").

Because they are so cumbersome, en banc procedures are seldom used merely to correct the errors of individual panels: "[W]e do not take cases en banc merely because of disagreement with a panel's decision, or rather a piece of a decision.... We take cases en banc to answer questions of general importance likely to recur, or to resolve intracircuit conflicts, or to address issues of transcendent public significance—perhaps even to curb a 'runaway' panel—but not just to review a panel opinion for error, even in cases that particularly agitate judges...." *EEOC v. Ind. Bell Tel. Co.,* 256 F.3d 516, 86 Fair Empl. Prac. Cas. (BNA) 1, 2001 WL 717685, at *11 (7th Cir.2001) (en banc) (Posner, J., concurring). *See also* Fed. R.App. P. 35(a) ("An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance."); Arnold, *supra,* at 36 ("Petitions for rehearing are generally denied unless something of unusual importance—such as a life—is at stake, or a real and significant error was made by the original panel, or there is conflict within the circuit on a point of law.") It is therefore very important that three-judge panel opinions be decided correctly and that they state their holdings in a way that is easily understood and applied in future cases.

elsewhere in the country. The courts of appeals, and even the lower courts of other circuits, may decline to follow the rule we announce—and often do. This ability to develop different interpretations of the law among the circuits is considered a strength of our system. It allows experimentation with different approaches to the same legal problem, so that when the Supreme Court eventually reviews the issue it has the benefit of "percolation" within the lower courts. *See* Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L.Rev. 681, 716 (1984). Indeed, the Supreme Court sometimes chooses not to grant certiorari on an issue, even though it might deserve definitive resolution, so it will have the benefit of a variety of views from the inferior courts before it chooses an approach to a legal problem. *See McCray v. New York*, 461 U.S. 961, 963, 103 S.Ct. 2438, 77 L.Ed.2d 1322 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari) ("[I]t is a sound exercise of discretion for the Court to allow [other courts] to serve as laboratories in which the issue receives further study before it is addressed by this Court.").

[13] The various rules pertaining to the development and application of binding authority do not reflect the developments of the English common law. They reflect, rather, the organization and structure of the federal courts and certain policy judgments about the effective administration of justice. *See Payne v. Tennessee*, 501 U.S. 808, 828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (stare decisis is a "principle of policy," and "not an inexorable command"); *see, e.g., Textile Mills Secs. Corp. v. Comm'r*, 314 U.S. 326, 334–35, 62 S.Ct. 272, 86 L.Ed. 249 (1941) (en banc rehearing "makes for more effective judicial administration"). Circuit boundaries are set by statute and can be changed by statute. When that happens, and a new circuit is created, it starts without any circuit law and must make an affirmative decision whether to create its circuit law from scratch or to adopt the law of another circuit—generally the circuit from which it was carved—as its own. *Compare Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc) (adopting as binding precedent all decisions issued by the former Fifth Circuit before its split into the Fifth and Eleventh Circuits), *and South Corp. v. United States*, 690 F.2d 1368, 1370–71 (Fed.Cir.1982) (en banc) (adopting as binding precedent all decisions of the Federal Circuit's predecessor courts, the Court of Claims and the Court of Customs and Patent Appeals), *with Estate of McMorris v. Comm'r*, 243 F.3d 1254, 1258 (10th Cir.2001) ("[W]e have never held that the decisions of our predecessor circuit [the former Eighth Circuit] are controlling in this court."). The decision whether to adopt wholesale the circuit law of another court is a matter of judicial policy, not a constitutional command.

How binding authority is overruled is another question that was resolved by trial and error with due regard to principles of sound judicial administration. Early in the last century, when the courts of appeals first grew beyond three judges, the question arose whether the courts could sit en banc to rehear cases already decided by a three-judge panel. The lower courts disagreed, but in *Textile Mills Securities Corporation v. Commissioner*, the Supreme Court sustained the authority of the courts of appeals to sit en banc. *Textile Mills Secs. Corp. v. Comm'r*, 314 U.S. 326, 335, 62 S.Ct. 272, 86 L.Ed. 249 (1943) ("Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted. Those considerations are especially important in view of the fact that in our federal judicial system

these courts are the courts of last resort in the run of ordinary cases."). En banc rehearing would give all active judges an opportunity to hear a case "[w]here ... there is a difference in view among the judges upon a question of fundamental importance, and especially in a case where two of the three judges sitting in a case may have a view contrary to that of the other ... judges of the court." *Comm'r v. Textile Mills Secs. Corp.*, 117 F.2d 62, 70 (3d Cir.1940), *aff'd*, 314 U.S. 326, 62 S.Ct. 272, 86 L.Ed. 249 (1943). Congress codified the *Textile Mills* decision just five years later in 28 U.S.C. § 46(c), leaving the courts of appeals "free to devise [their] own administrative machinery to provide the means whereby a majority may order such a hearing." *W. Pac. R.R. v. W. Pac. R.R.*, 345 U.S. 247, 250, 73 S.Ct. 656, 97 L.Ed. 986 (1953).

[14–16] That the binding authority principle applies only to appellate decisions, and not to trial court decisions, is yet another policy choice. There is nothing inevitable about this; the rule could just as easily operate so that the first district judge to decide an issue within a district, or even within a circuit, would bind all similarly situated district judges, but it does not. The very existence of the binding authority principle is not inevitable. The federal courts could operate, though much less efficiently, if judges of inferior courts had discretion to consider the opinions of higher courts, but "respectfully disagree" with them for good and sufficient reasons.[30]

III

While we agree with *Anastasoff* that the principle of precedent was well established in the common law courts by the time Article III of the Constitution was written, we do not agree that it was known and applied in the strict sense in which we apply binding authority today. It may be true, as *Anastasoff* notes, that "judges and lawyers of the day recognized the authority of unpublished decisions even when they were established only by memory or by a lawyer's unpublished memorandum," 223 F.3d at 903, but precedents brought to the attention of the court in that fashion obviously could not serve as the kind of rigid constraint that binding authority provides today. Unlike our practice today, a single

30. Some state court systems apply the binding authority principle differently than do the federal courts. In California, for example, an opinion by one of the courts of appeal is binding on all trial courts in the state, not merely those in the same district. Judicial Council of California, *Report of the Appellate Process Task Force* 59 (2000); Jon B. Eisenberg, Ellis J. Horvitz & Justice Howard B. Wiener, *California Practice Guide: Civil Appeals and Writs* § 14:193 (2000) ("A court of appeal decision must be followed by *all* superior and municipal courts, regardless of which appellate district rendered the opinion.") However, court of appeal panels are not bound by the opinions of other panels, even those within the same district. *In re Marriage of Shaban*, 88 Cal.App.4th 398, 105 Cal.Rptr.2d 863, 870–71 (2001) ("[B]ecause there is no 'horizontal stare decisis' within the Court of Appeal, intermediate appellate court precedent that might otherwise be binding on a trial court ... is not absolutely binding on a different panel of the appellate court." (citations omitted)). *See also Report of the Appellate Process Task Force, supra*, at 60–61; Eisenberg, Horvitz & Wiener, *supra*, § 14:193.1 ("In contrast, a decision by one court of appeal is *not* binding on other courts of appeal.")

California's management of precedent differs from that of the federal courts in another important respect: The California Supreme Court may "depublish" a court of appeal opinion—i.e., strip a published decision of its precedential effect. *See* Cal. R. Ct. 976(c)(2); Steven B. Katz, *California's Curious Practice of "Pocket Review"*, 3 J.App. Prac. & Process 385 (2001). California's depublication practice shows that it is possible to adopt more aggressive methods of managing precedent than those used by the federal courts.

case was not sufficient to establish a particular rule of law, and case reporters often filtered out cases that they considered wrong, or inconsistent with their view of how the law *should* develop. *See* pp. 1166–67 *supra*. The concept of binding case precedent, though it was known at common law, *see* note 13 *supra*, was used exceedingly sparingly. For the most part, common law courts felt free to depart from precedent where they considered the earlier-adopted rule to be no longer workable or appropriate.

Case precedent at common law thus resembled much more what we call persuasive authority than the binding authority which is the backbone of much of the federal judicial system today. The concept of binding precedent could only develop once two conditions were met: The development of a hierarchical system of appellate courts with clear lines of authority, and a case reporting system that enabled later courts to know precisely what was said in earlier opinions. *See* note 21 *supra*. As we have seen, these developments did not come about—either here or in England—until the nineteenth century, long after Article III of the Constitution was written.

[17] While many consider the principle of binding authority indispensable—perhaps even inevitable—it is important to note that it is not an unalloyed good. While bringing to the law important values such as predictability and consistency, it also (for the very same reason) deprives the law of flexibility and adaptability. *See Planned Parenthood v. Casey*, 505 U.S. 833, 868, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) ("The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete.").[31] A district court bound by circuit authority, for example, has no choice but to follow it, even if convinced that such authority was wrongly decided. Appellate courts often tolerate errors in their caselaw because the rigors of the en banc process make it impossible to correct all errors. *See* note 29 *supra*.

A system of strict binding precedent also suffers from the defect that it gives undue weight to the first case to raise a particular issue. This is especially true in the circuit courts, where the first panel to consider an issue and publish a precedential opinion occupies the field, whether or not the lawyers have done an adequate job of developing and arguing the issue.

[18] The question raised by *Anastasoff* is whether one particular aspect of the binding authority principle—the decision of which rulings of an appellate court are binding—is a matter of judicial policy or constitutional imperative. We believe *Anastasoff* erred in holding that, as a constitutional matter, courts of appeals may not decide which of their opinions will be deemed binding on themselves and the courts below them. For the reasons explained, the principle of strict binding authority is itself not constitutional, but rather a matter of judicial policy. Were it otherwise, it would cast doubt on the federal court practice of limiting the binding effect of appellate decisions to the courts of a particular circuit. Circuit bound-

31. It also forces judges in certain instances to act in ways they may consider to be contrary to the Constitution. Some have argued that the duty of judges to follow the Constitution stands on a higher footing than the rule requiring adherence to precedent, and judges should not follow precedent when they believe that to do so would violate the Constitution. *See* Gary Lawson, *The Constitutional Case Against Precedent*, 17 Harv. J.L. & Pub. Pol'y 23, 27–28 (1994).

aries—and the very system of circuit courts—are a matter of judicial administration, not constitutional law. If, as *Anastasoff* suggests, the Constitution dictates that every "declaration of law ... must be applied in subsequent cases to similarly situated parties," 223 F.3d at 900, then the Second Circuit would have no authority to disagree with a ruling of the Eighth Circuit that is directly on point, and the first circuit to rule on a legal issue would then bind not only itself and the courts within its own circuit, but all inferior federal courts.

Another consequence of *Anastasoff*'s reasoning would be to cast doubt on the authority of courts of appeals to adopt a body of circuit law on a wholesale basis, as did the Eleventh Circuit in *Bonner*, and the Federal Circuit in *South Corp.* See p. 1173 *supra*. Circuits could, of course, adopt individual cases from other circuits as binding in a case raising a particular legal issue. *See, e.g., Charles v. Lundgren & Assocs., P.C.*, 119 F.3d 739, 742 (9th Cir.) ("Because we have the benefit of the Seventh Circuit's cogent analysis, we will not replow plowed ground. Instead, we adopt the reasoning of the Seventh Circuit ....") *cert. denied*, 522 U.S. 1028, 118 S.Ct. 627, 139 L.Ed.2d 607 (1997). But adopting a whole body of law, encompassing countless rules on matters wholly unrelated to the issues raised in a particular case, is a very different matter. If binding authority were a constitutional imperative, it could only be created through individual case adjudication, not by a decision unconstrained by the facts before the court or its prior caselaw.

Nor is it clear, under the reasoning of *Anastasoff*, how courts could limit the binding effect of their rulings to appellate decisions. Under *Anastasoff*'s reasoning, district court opinions should bind district courts, at least in the same district, or even nationwide. After all, the Constitution vests the same "judicial Power" in all federal courts, so *Anastasoff*'s conclusion that judicial decisions must have precedential effect would apply equally to the thousands of unpublished decisions of the district courts.

No doubt the most serious implication of *Anastasoff*'s constitutional rule is that it would preclude appellate courts from developing a coherent and internally consistent body of caselaw to serve as binding authority for themselves and the courts below them. Writing an opinion is not simply a matter of laying out the facts and announcing a rule of decision. Precedential opinions are meant to govern not merely the cases for which they are written, but future cases as well.

[19–22] In writing an opinion, the court must be careful to recite all facts that are relevant to its ruling, while omitting facts that it considers irrelevant. Omitting relevant facts will make the ruling unintelligible to those not already familiar with the case; including inconsequential facts can provide a spurious basis for distinguishing the case in the future. The rule of decision cannot simply be announced, it must be selected after due consideration of the relevant legal and policy considerations. Where more than one rule could be followed—which is often the case—the court must explain why it is selecting one, and rejecting the others. Moreover, the rule must be phrased with precision and with due regard to how it will be applied in future cases. A judge drafting a precedential opinion must not only consider the facts of the immediate case, but must also envision the countless permutations of facts that might arise in the universe of future cases. Modern opinions generally call for the most precise drafting and re-drafting to ensure that the rule announced sweeps neither too broadly nor too narrowly, and that it does not

collide with other binding precedent that bears on the issue. *See* Fred A. Bernstein, *How to Write it Right*, Cal. Lawyer, at 42 (June 2000). Writing a precedential opinion, thus, involves much more than deciding who wins and who loses in a particular case. It is a solemn judicial act that sets the course of the law for hundreds or thousands of litigants and potential litigants. When properly done, it is an exacting and extremely time-consuming task.[32]

It goes without saying that few, if any, appellate courts have the resources to write precedential opinions in every case that comes before them.[33] The Supreme Court certainly does not. Rather, it uses its discretionary review authority to limit its merits docket to a handful of opinions per justice, from the approximately 9000 cases that seek review every Term.[34] While federal courts of appeals generally lack discretionary review authority, they use their authority to decide cases by unpublished—and nonprecedential—dispositions to achieve the same end: They select a manageable number of cases in which to publish precedential opinions, and leave the rest to be decided by unpublished dispositions or judgment orders. In our circuit, published dispositions make up approximately 16 percent of decided cases; in other circuits, the percentage ranges from 10 to 44, the national average being 20 percent. Administrative Office of the United States Courts, *Judicial Business of the United States Courts* 44 tbl. S–3 (2000).

That a case is decided without a precedential opinion does not mean it is not fully considered, or that the disposition does not reflect a reasoned analysis of the issues presented.[35] What it does mean is that

32. Opinion writing is a "reflective art," an absolute necessity of which is "fully adequate time to contemplate, think, write and rewrite." Howard T. Markey, *On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand*, 33 S.D. L.Rev. 371, 379, 384 (1988). Judge Markey rightly mourns the age when a judge could, as Judge Hand did, talk at length about each case, "with his feet on the desk and hands behind his head," and "having reached his decision, ... wr[i]te the entire opinion in longhand." *Id.* at 380. Today, "[t]here simply isn't time" to engage in such "reflective personal craftsmanship." *Id.* at 379–80.

33. As Judge Posner has noted:

> Given the workload of the federal courts of appeals today, the realistic choice is not between limited publication, on the one hand, and, on the other, improving and then publishing all the opinions that are not published today; it is between preparing but not publishing opinions in many cases and preparing no opinions in those cases. It is a choice, in other words, between giving the parties reasons for the decision of their appeal and not giving them reasons even though the appeal is not frivolous.

Richard A. Posner, *The Federal Courts: Challenge and Reform* 168–69 (1996).

34. The United States Supreme Court decided seventy-seven cases in October Term 1999, which represents less than nine opinions per justice. *Statistics for the Supreme Court's October Term 1999*, 69 U.S.L.W. 3076 (BNA 2000). By comparison, in 1999, each active judge in our court heard an average of 450 cases and had writing responsibility for an average of twenty opinions and 130 unpublished dispositions. *See infra* note 37.

35. Sufficient restrictions on judicial decision-making exist to allay fears of irresponsible and unaccountable practices such as "burying" inconvenient decisions through nonpublication. In *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J.App. Prac. & Process 325 (2001), Professor Stephen L. Wasby concludes, after "extended observation of the ... Ninth Circuit," *id.* at 331, that formal publication guidelines and judges' enforcement of them through their interactions with each other, keep judges honest in deciding whether or not to publish. *See also* Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, *supra*, at 132

the disposition is not written in a way that will be fully intelligible to those unfamiliar with the case, and the rule of law is not announced in a way that makes it suitable for governing future cases. As the Federal Judicial Center recognized, "the judicial time and effort essential for the development of an opinion to be published for posterity and widely distributed is necessarily greater than that sufficient to enable the judge to provide a statement so that the parties can understand the reasons for the decision." Federal Judicial Center, *Standards for Publication of Judicial Opinions* 3 (1973). An unpublished disposition is, more or less, a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the court's decision. Deciding a large portion of our cases in this fashion frees us to spend the requisite time drafting precedential opinions in the remaining cases.

Should courts allow parties to cite to these dispositions, however, much of the time gained would likely vanish. Without comprehensive factual accounts and precisely crafted holdings to guide them, zealous counsel would be tempted to seize upon superficial similarities between their clients' cases and unpublished dispositions. Faced with the prospect of parties citing these dispositions as precedent, conscientious judges would have to pay much closer attention to the way they word their unpublished rulings. Language adequate to inform the parties how their case has been decided might well be inadequate if applied to future cases arising from different facts. And, although three judges might agree on the outcome of the case before them, they might not agree on the precise reasoning or the rule to be applied to future cases. Unpublished concurrences and dissents would become much more common, as individual judges would feel obligated to clarify their differences with the majority, even when those differences had no bearing on the case before them. In short, judges would have to start treating unpublished dispositions—those they write, those written by other judges on their panels, and those written by judges on other panels—as mini-opinions.[36] This new responsibility would cut severely into the time judges need to fulfill their paramount duties: producing well-reasoned published opinions and keeping the law of the circuit consistent through the en banc process. The quality of published opinions would sink as judges were forced to devote less and less time to each opinion.[37]

("American appellate systems ... have many built-in protections to prevent against [judicial] irresponsibility without mandatory publication of opinions.")

36. *See* Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 Ohio St. L.J. 177, 196 ("[I]t will not save us any time if [unpublished opinions] are being cited back to us. We will have to prepare unpublished opinions as we do published opinions—as if they were creating precedent.").

37. Recent figures tell a striking story. In 1999, our court decided some 4500 cases on the merits, about 700 by opinion and 3800 by unpublished disposition. Each active judge heard an average of 450 cases as part of a three-judge panel and had writing responsibility in a third of those cases. That works out to an average of 150 dispositions—20 opinions and 130 unpublished dispositions—per judge. In addition, each judge had to review, comment on, and eventually join or dissent from 40 opinions and 260 unpublished dispositions circulated by other judges with whom he sat. *See* Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, Cal. Law., June 2000, at 44; *see also Report of the Federal Courts Study Committee* 109 (Apr. 2, 1990) (noting the federal appellate courts' "crisis of volume").

[23] Increasing the number of opinions by a factor of five, as *Anastasoff* suggests, doesn't seem to us a sensible idea, even if we had the resources to do so. Adding endlessly to the body of precedent—especially binding precedent—can lead to confusion and unnecessary conflict. Judges have a responsibility to keep the body of law "cohesive and understandable, and not muddy[ ] the water with a needless torrent of published opinions." Martin, note 36 *supra*, at 192. Cases decided by nonprecedential disposition generally involve facts that are materially indistinguishable from those of prior published opinions. Writing a second, third or tenth opinion in the same area of the law, based on materially indistinguishable facts will, at best, clutter up the law books and databases with redundant and thus unhelpful authority. Yet once they are designated as precedent, they will have to be read and analyzed by lawyers researching the issue, materially increasing the costs to the client for absolutely no legitimate reason. Worse still, publishing redundant opinions will multiply significantly the number of inadvertent and unnecessary conflicts, because different opinion writers may use slightly different language to express the same idea. As lawyers well know, even small differences in language can have significantly different implications when read in light of future fact patterns, so differences in phrasing that seem trivial when written can later take on a substantive significance.

The risk that this may happen vastly increases if judges are required to write many more precedential opinions than they do now, leaving much less time to devote to each.[38] Because conflicts—even inadvertent ones—can only be resolved by the exceedingly time-consuming and inefficient process of en banc review, *see Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1478–79 (9th Cir.1987) (en banc) (conflict in panel opinions must be resolved by en banc court), *cert. denied*, 485 U.S. 989, 108 S.Ct. 1293, 99 L.Ed.2d 503 (1988), an increase in intracircuit conflicts would leave much less time for us to devote to normal panel opinions. Maintaining a coherent, consistent and intelligible body of caselaw is not served by writing more opinions; it is served by taking the time to make the precedential opinions we do write as lucid and consistent as humanly possible.[39]

38. Concerned that judges spend too little time writing (as opposed to editing) precedential opinions, commentators have suggested that judges should do the preliminary drafting of all published opinions. *See, e.g.*, David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 Geo. J. Legal Ethics 509, 514, 555–56 (2001). Adoption of such proposals would, however, "produce fewer published opinions [and] more unpublished dispositions." *Id.* at 593. By preventing judges from determining which of their opinions will be citable as precedent, *Anastasoff* would have precisely the opposite effect, forcing judges to spread their resources more thinly, resulting in even less judicial involvement in precedential opinions.

39. *Anastasoff* suggests that the appointment of more judges would enable courts to write binding opinions in every case. *See* 223 F.3d at 904. We take no position as to whether there should be more federal judges, that being a policy question for Congress to decide. We note, however, that Congress would have to increase the number of judges by something like a factor of five to allocate to each judge a manageable number of opinions each year. But adding more judges, and more binding precedents, creates its own set of problems by significantly increasing the possibility of conflict within the same circuit as each judge will have an increased body of binding caselaw to consider and reconcile.

That problem, in turn, could be ameliorated by increasing the number of circuits, but that would increase the number of inter-circuit conflicts, moving the problem up the chain of command to the Supreme Court, which likewise does not have the capacity to significantly increase the number of opinions it issues each year. *See Wisniewski v. United States*, 353 U.S. 901, 901–02, 77 S.Ct. 633, 1 L.Ed.2d

IV

[24] Unlike the *Anastasoff* court, we are unable to find within Article III of the Constitution a requirement that all case dispositions and orders issued by appellate courts be binding authority. On the contrary, we believe that an inherent aspect of our function as Article III judges is managing precedent to develop a coherent body of circuit law to govern litigation in our court and the other courts of this circuit. We agree with *Anastasoff* that we—and all courts—must follow the law. But we do not think that this means we must also make binding law every time we issue a merits decision. The common law has long recognized that certain types of cases do not deserve to be authorities, and that one important aspect of the judicial function is separating the cases that should be precedent from those that should not.[40] Without clearer guidance than that offered in *Anastasoff*, we see no constitutional basis for abdicating this important aspect of our judicial responsibility.

[25–27] Contrary to counsel's contention, then, we conclude that Rule 36–3 is constitutional. We also find that counsel violated the rule. Nevertheless, we are aware that *Anastasoff* may have cast doubt on our rule's constitutional validity. Our rules are obviously not meant to punish attorneys who, in good faith, seek to test a rule's constitutionality. We therefore conclude that the violation was not willful and exercise our discretion not to impose sanctions.

The order to show cause is **DISCHARGED.**

UNITED STATES of America, Plaintiff–Appellee,

v.

Tommy Lee GILBERT, Defendant–Appellant.

No. 00–10314.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted June 14, 2001

Filed Sept. 24, 2001

Following a jury trial, defendant was convicted in the United States District Court for the Northern District of California, D. Lowell Jensen, J., on three counts of willful failure to collect and pay over tax. The Court of Appeals, Lay, Circuit Judge, sitting by designation, held that: (1) as a matter of first impression, individual could be guilty under statute criminalizing willful failure to collect or to pay over tax by failing to perform either obligation; (2) sufficient evidence supported defendant's conviction for willful failure to collect or pay over tax; (3) six-year limitations period applied to offense; (4) purported motiva-

658 (1957) (per curiam) (noting the problems of intra-circuit consistency raised by the growing number of circuit judgeships). In the end, we do not believe that more law makes for better law.

40. This is hardly a novel view:

> [C]ertain types of cases do not deserve to be authorities. One type, already alluded to, is that in which there is no discoverable *ratio decidendi*. Others are cases turning purely on fact, those involving the exercise of discretion, and those which judges themselves do not think worthy of being precedents.

Dias, note 10 *supra*, at 55 (footnotes omitted) (citing *R. v. Stokesley* (Yorkshire) Justices, Ex parte Bartram [1956] 1 All E.R. 563 at 565).

HOW TO WRITE IT RIGHT

THE ART ISN'T IN THE WRITING. IT'S IN THE REWRITING.

By Fred A. Bernstein

You are reading the eleventh version of this sentence. (Trust me: The first ten weren't nearly as good.)

Anyone can write; rewriting takes talent. There may be a wordsmith somewhere who gets it right the first time—moving down a page with the sureness of Johnnie Cochran examining a friendly witness—but I'm not him. He. It.

My first drafts invariably present seemingly insurmountable problems. Reading my disjointed sentences and flabby paragraphs, I can't imagine where I'm going, much less how to get there. At first, all I can do is tinker—change a word or two, substitute a comma for a dash—while consciously avoiding the real issues.

Yet, as I've learned as a journalist and teacher of legal writing, the small changes add up. Make enough of them, day after day and week after week, and, eventually, order emerges from the chaos. A sentence here, a paragraph there, each slowly coming into focus, and then suddenly the whole thing works. And when it does, you know it.

It was while clerking for Judge Alex Kozinski, on the Ninth U.S. Circuit Court of Appeals, that I really came to understand the magic of rewriting. Judge Kozinski is known as one of the best writers on the federal bench. His clear, forcefully stated opinions seem to flow as if he dictated them without stopping for breath. In reality, the judge may go through 70 or 80 drafts of an opinion, usually over a period of months.

As the judge's law clerk, one of my duties was to manage the drafts, a task that left me feeling like a '90s version of the sorcerer's apprentice. If I left an opinion on his desk, then stopped by the chambers kitchen to pour myself a cup of coffee, the pages might be back in my office before I was—their once-white spaces filled with instructions, corrections, and queries. (I considered making the margins smaller, so there'd be less room for the judge's meddling, but I knew he'd just write on the back.)

My job, turning around three or four drafts a day, might sound tedious, but I was much more than a typist: I had the judge's permission to make changes, large or small, up to and including a new legal theory that had come to me during the night. There was no danger that something he didn't like would find its way into the finished opinion because he reread all of it whenever he reviewed the latest changes. In his view (which I share), the only way to tell whether a word, sentence, or paragraph is working is to consider it in context. To him, rereading only part of a draft would have been like working on half of a painting with the other half obscured.

Thanks to the miracle of faxing, drafts kept arriving long after the judge went home—sometimes until 2 or 3 A.M. Often, my co-clerks would join me at the fax machine, where we would struggle to decipher the judge's EKG-like writing, knowing he was waiting by his machine for a typed draft. Like contestants on *Wheel of Fortune,* we would have happily paid for a vowel.

Eventually, the judge would write OK on the first page of a draft. That meant I could begin preparing the opinion for circulation to the other judges on the appellate panel (with emphasis on *begin*); Judge Kozinski might still want to see the opinion another dozen times.

Until that OK appeared, there was no telling whether an opinion was in its infancy or its dotage. There might be a period of days or weeks in which the judge requested only small changes—a word substitution here or there, a transposition of phrases—leading me to think the worst was over.

Continued on page 81

Fred A. Bernstein is a New York–based writer.

How to Write It Right

Continued from page 42

Then, suddenly, without warning, a torrent of major alterations occurs, including whole sections pounded out by the judge on his manual typewriter to be retyped by me on my computer. "If it was okay last week," I'd ask myself of the opinion, "why does it need rewriting this week?" But revision is a mysterious, nonlinear process. Small changes can get a piece of writing to the point where, suddenly, big changes are required.

What's the lesson of all this? You might be thinking: Judges are lucky; they can afford to rewrite endlessly because they have clerks to manage the flow of words and paper. That's true, but it's beside the point. In the ways that really matter, judges aren't all that different from the rest of us. What judges have—the ability to write and rewrite—is something we all have, though it may take some of us a little longer. We should all treat writing as a continuous process, making whatever changes we can make whenever we can make them. A computer, which makes it possible to revise almost effortlessly, is a godsend. And technology is getting better all the time. Lately, I've been doing all my writing by e-mail, sending drafts to myself so I can pick them up anywhere there's a modem, anytime I have a few minutes to tinker.

Make yourself your own law clerk—that's what I do, and I'd like to think my writing is the better for it. Trust me: If you'd read the first ten versions of this sentence, you'd agree. ❑

FEDERAL AND STATE COURT RULES GOVERNING PUBLICATION AND CITATION OF OPINIONS

Melissa M. Serfass* and Jessie L. Cranford**

Since publication of last summer's *Anastasoff*[1] decision by a panel of the Eighth Circuit, there has been renewed interest in and debate over the issue of unpublished appellate court opinions and their precedential value. However, this controversy is certainly not new. Many articles have analyzed the practice of using unpublished opinions and the rationale behind their limited precedential value.[2] Other works have surveyed or compiled court publication and citation rules.[3]

Many jurisdictions have publication standards similar to those proposed in the *Model Rules on Publication of Judicial*

---

*Electronic Resources and Reference Librarian, Associate Professor of Law Librarianship, University of Arkansas at Little Rock William H. Bowen School of Law, UALR/Pulaski County Law Library. This article is dedicated to the memory of Athalene Lierly Crook, Melissa's mom. Her support was unwavering, as always.

**Circulation Librarian and Assistant Professor of Law Librarianship, University of Arkansas at Little Rock William H. Bowen School of Law, UALR/Pulaski County Law Library.

1. *Anastasoff v. U.S.*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot,* 235 F.3d 1054 (8th Cir. 2000) (en banc).

2. *See e.g.* Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions and the Nature of Precedent*, 4 Green Bag 2d 17 (2000); Martha J. Dragich, *Will the Federal Courts of Appeal Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?* 44 Am. U. L. Rev. 757 (1995); Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the Untied States Courts of Appeals*, 54 Vand. L. Rev. 71 (2001); Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. Mich. J.L. Reform 119 (1994) (see n. 39 for extensive compilation of articles discussing issue).

3. Carol R. Flango & David B. Rottman, *Appellate Court Procedures* 139 tbl. 3.7 (National Ctrs. for State Cts. 1998); Jane Williams, *Survey of State Court Opinion Writing and Publication Practices*, 83 Law. Lib. J. 21 (1991); Fed. Proc. L.Ed. vol. 2A §§ 3:826-3:827 (1994).

Opinions.[4] Some jurisdictions have no publication criteria at all, while others fall somewhere between the two extremes. Most publication guidelines are contained in court rules, which also often provide that unpublished opinions cannot be cited as precedent.

This article provides updated information in chart form for ease of accessibility and comparison. It focuses on the basic guidelines for publishing opinions and citing unpublished opinions in the federal courts of appeal and the appellate courts of the fifty states and the District of Columbia. We have sought to convey the essence of the rules; however, the format and scope of this piece does not allow for extensive analysis or procedural detail. In most instances, we have provided rules or standard practices for the court of last resort and the intermediate appellate court.[5] When we found a court rule, we cited it. When no court rule governed, we looked to internal operating procedures, statutes, and cases. When we found no criteria for full published opinions, we cited standards for disposition by summary order or memorandum opinions. In listing publication criteria, we have used the term "affects" to encompass the terms "alter," "modify," "clarify," "explain," or "call attention to" existing law. When a phrase such as "criteria include" introduces a list, it may be illustrative, rather than all-inclusive.

4. Comm. on Use of Appellate Court Energies, Advisory Council on Appellate Justice, *Standards for Publication of Judicial Opinions* 22-23 (1973). The model rule proposes that an opinion should not be published unless it establishes a new rule of law, alters, modifies or criticizes an existing rule, involves a legal issue of continuing public interest or resolves an apparent conflict of authority.

5. Delaware, the District of Columbia, Maine, Montana, Nevada, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming do not have intermediate appellate courts. *Directory of State and Federal Courts, Judges, and Clerks*, xi-xiv (Catherine A. Kitchell, comp., 2001 ed., BNA 2000).

TABLE 1: PUBLICATION RULES IN FEDERAL COURTS

Circuit	*Publication Standards*	*Citation Rule*
First	1st Cir. R. 36(b) The general policy is that opinions be published and available for citation. An exception may be made if an opinion would not articulate a new rule of law, modify an established rule, apply an established rule to novel facts or would "serve otherwise as a significant guide to future litigants."	1st Cir. R. 36(b)(2)(F) "Unpublished opinions may be cited only in related cases . . . Unpublished means the opinion is not published in the printed West reporter."
Second	2d Cir. R. 0.23 "[I]n those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order."	2d Cir. R. 0.23 The court may append a brief written statement to dispositions by summary order. These statements shall not be cited or otherwise used in unrelated cases before this or any other court.
Third	3d Cir. I.O.P. 5.2 "An opinion, whether signed or per curiam, is published when it has precedential or institutional value." 3d Cir. I.O.P. 5.3 Opinions which appear to have value only to the trial court or the parties are designated as unreported and are not sent for publication.	3d Cir. I.O.P. 5.3 Unreported opinions are not precedential. 3d Cir. I.O.P. 5.8 "Because the court historically has not regarded unreported opinions as precedents that bind the court, as such opinions do not circulate to the full court before filing, the court by tradition does not cite to its unreported opinions as authority."
Fourth	4th Cir. R. 36(a) An opinion will be published if it establishes or affects a rule of law within the circuit, involves a legal issue of continuing public interest, criticizes existing law, contains an original historical review of a legal rule or resolves a conflict between panels of the court, or creates a conflict with a decision in another circuit.	4th Cir. R. 36(c) "Citation of this Court's unpublished dispositions. . . in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case." If counsel believes that an unpublished disposition of any court has precedential value and that there is no published opinion that would serve as well, such disposition may be cited.

Circuit	*Publication Standards*	*Citation Rule*
Fifth	5th Cir. R. 47.5.1 "[O]pinions that may in any way interest persons other than the parties to a case should be published." Criteria include establishing a new rule of law, affecting an existing rule, applying an established rule to significantly different facts from those in published opinions, creating or resolving a conflict within the circuit or between circuits, or discussing a factual or legal issue of significant public interest.	5th Cir. R. 47.5.3 Unpublished opinions issued before January 1, 1996 are precedent. Because opinions believed to have precedential value are published, unpublished opinions should normally be cited only in the limited circumstances of res judicata, collateral estoppel or law of the case. 5th Cir. R. 47.5.4 Unpublished opinions issued on or after January 1, 1996 are not precedent except in limited circumstances of res judicata, collateral estoppel or law of the case. Unpublished opinions may be cited as persuasive authority.
Sixth	6th Cir. R. 206(a) Criteria considered by panels in determining publication include whether a new rule of law is established, an existing rule is affected or applied to a novel fact situation, a conflict is created or resolved within the circuit or between circuits, or a legal or factual issue of continuing public interested is discussed.	6th Cir. R. 28(g) "Citation of unpublished decisions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case." If a party believes that an unpublished disposition has precedential value and that no published opinion would serve as well, it may be cited.
Seventh	7th Cir. R. 53(b) The court may dispose of an appeal by unpublished order or published opinion. 7th Cir. R. 53(c)(1) Criteria for publication include establishing a new rule of law or affecting an existing rule, involving an issue of continuing public interest, criticizing or questioning existing law, or constituting a significant and non-duplicative contribution to legal literature.	7th Cir. R. 53(b)(2)(iv) Unpublished orders shall not be cited or used as precedent except to support a claim of res judicata, collateral estoppel, or law of the case.

Circuit	*Publication Standards*	*Citation Rule*
Eighth	8th Cir. R. App. I(4) An opinion should be published when it establishes a new rule of law or affects an existing rule, newly interprets or conflicts with a decision of a federal or state appellate court, applies an established rule of law to facts significantly differing from those in published opinions, involves a legal or factual issue of continuing public or legal interest, rejects the rationale of a previously published opinion in the same case, or is a significant contribution to legal literature.	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."
Ninth	9th Cir. R. 36-1 Written dispositions of the court are designated as opinions, memoranda, or orders. All opinions are published; no memoranda are published; orders are not published except by order of the court. 9th Cir. R. 36-2 Criteria for designating dispositions as opinions include establishing or affecting a rule of law, criticizing existing law, or involving a legal or factual issue of unique or substantial public interest.	9th Cir. R. 36-3 Unpublished opinions are not binding precedent except when relevant under the doctrines of law of the case, res judicata and collateral estoppel and they may only be cited in those circumstances or for factual purposes[6]

6. This rule has been adopted for a limited 30-month period, beginning July 1, 2000. Litigants are invited to submit comments, after which the Circuit Advisory Committee on Rules will report to the court not only the frequency of citation of unpublished dispositions, but also any problems or concerns, and will issue its recommendation whether the rule should be permanent. Unless the court extends the rule by December 31, 2002, it will automatically expire on that date, and its former version, prohibiting citation of unpublished dispositions, will be reinstated.

Circuit	*Publication Standards*	*Citation Rule*
Tenth	10th Cir. R. 36.1-.2 The court writes opinions only in cases requiring application of new points of law that would make the decision a valuable precedent. When the opinion below has been published, the court ordinarily designates its disposition for publication. If the disposition is by order and judgment, the court will publish only the result of the appeal.	10th Cir. R. 36.3 Unpublished orders and judgments are not binding precedents, except under the doctrines of law of the case, res judicata, and collateral estoppel. While citation of unpublished decisions is disfavored, an unpublished decision may be cited if it has persuasive value regarding a material issue not addressed in a published opinion and its use would assist the court in its disposition of the present case.
Eleventh	11th Cir. R. 36-1, 36-2 When the court determines that an opinion would have no precedential value and the record below supports affirmance, the judgment or order may be affirmed or enforced without opinion. An opinion is unpublished unless a majority of the panel decides to publish it.	11th Cir. R. 36-2 Unpublished opinions are not considered binding precedent; however they may be cited as persuasive authority. 11th Cir. R. 36-3, I.O.P. 5 The court does not favor reliance on unpublished opinions.
District of Columbia	D.C. Cir. R. 36(a) The policy of the court is to publish opinions of general public interest. Publication criteria include whether it is a case of first impression; whether it alters, affects, criticizes, or questions existing law; or whether it resolves an apparent conflict within the circuit or creates a conflict between circuits.	D.C. Cir. R. 28(c) Unpublished orders or judgments of the court may not be cited as precedent. Counsel may refer to an unpublished disposition when its binding or preclusive effect, rather than its quality as precedent, is relevant.

Circuit	*Publication Standards*	*Citation Rule*
Federal	Fed. Cir. R. 47.6(a) Disposition of an appeal may be announced in an opinion or in a judgment of affirmance without opinion. Dispositions not to be cited as precedent are issued specifically stating that fact. Fed. Cir. R. App. V I.O.P. 10 The court's policy is to limit precedential opinions. Criteria for publication include issues of first impression; cases that establish a new rule of law, affect, or criticize existing law; cases that apply existing rules to novel fact situations; cases that create or resolve conflicts in the circuit or between circuits; or cases treating legal issues of substantial public interest, a new constitutional or statutory issue, or a previously overlooked rule of law.	Fed. Cir. R. 47.6(b) An opinion designated as nonprecedential may not be cited except in relation to a claim of res judicata, collateral estoppel or law of the case.

TABLE 2: PUBLICATION RULES IN STATE COURTS

State	*Publication Standards*	*Citation Rule*
Alabama	Ala. R. App. P. 53, 54 All supreme court, court of civil appeals and court of criminal appeals opinions are published in the official reports of Alabama decisions. Trial court judgments or orders may be affirmed without opinion when the court determines that an opinion would serve no significant precedential purpose (such dispositions are designated as "No Opinion" cases and are not published).	Ala. R. App. P. 53(d) , 54(d) Unpublished decisions of the supreme court, court of civil appeals and court of criminal appeals "have no precedential value and shall not be cited in arguments or briefs and shall not be used by any court within this state, except for . . . establishing the application of the doctrines of law of the case, res judicata, collateral estoppel, double jeopardy, or procedural bar."
Alaska	Alaska R. App. P. 214(a) "The court may determine that an appeal shall be disposed of by summary order and without formal written opinion. To assist the court in making this determination, the parties may request in writing that an appeal be so decided." This rule applies to both the supreme court and the court of appeals. Alaska R. App. P. 201.	Alaska R. App. P. 214(d) "Summary decisions under this rule are without precedential effect and may not be cited in the courts of this state."
Arizona	Ariz. Sup. Ct. R. 111(a)-(b); Ariz. R. Civ. App. P. 28(a)-(b) An opinion is a written disposition intended for publication. A memorandum decision is a written disposition not intended for publication. Publication standards include establishing, criticizing, or affecting existing law; calling attention to rules of law which appear to have been generally overlooked, or involving issues of unique interest or substantial public importance.	Ariz. Sup. Ct. R. 111(c); Ariz. R. Civ. App. P. 28(c) Memorandum decisions are neither regarded as precedent nor cited in any court except to establish defenses of res judicata, collateral estoppel, or law of the case. Cases may be cited to inform the appellate court of other memorandum decisions so that the court can decide whether to issue a published opinion, grant a motion for reconsideration, or grant a petition for review.

State	*Publication Standards*	*Citation Rule*
Arkansas	Ark. S. Ct. & Ct. App. R. 5-2(a), (c) All signed opinions of the supreme court are published. Court of appeals opinions may be in conventional or memorandum form. Court of appeals opinions resolving novel or unusual issues will be published. Unpublished opinions are marked "Not Designated for Publication." See *In Re Memorandum Opinions*, 700 S.W.2d 63 (Ark. 1985) (per curiam) for standards governing issuance of memorandum opinions.	Ark. S. Ct. & Ct. App. R. 5-2(d) Court of appeals opinions not designated for publication are not published in the official reporter and "shall not be cited, quoted or referred to by any court or in any argument, brief, or other materials presented to any court (except in continuing or related litigation upon an issue such as res judicata, collateral estoppel, or law of the case)."
California	Cal. R. Ct. 976(a) All opinions of the supreme court are published in the official reports. Cal. R. Ct. 976(b) Opinions of the court of appeals or appellate departments of the superior court are not published unless the opinion establishes a new rule of law, applies an existing rule to novel facts, criticizes or affects an existing rule, resolves or creates a conflict in the law, involves a legal issue of continuing public interest, or makes a significant contribution to legal literature. California has a rule on partial publication, Cal. R. Ct. 976.1, and a rule on depublication, Cal. R. Ct. 979.	Cal. R. Ct. 977 Opinions of a court of appeal or appellate departments of the superior court that are not certified for publication or ordered published may not be cited or relied on by a court or a party in any other action or proceeding except when it is relevant under the doctrines of law of the case, res judicata or collateral estoppel or it affects the same defendant in another criminal or disciplinary proceeding.

State	*Publication Standards*	*Citation Rule*
Colorado	Although all supreme court opinions are published, the court does dispose of some issues by unpublished order.[7] Colo. App. R. 35(f) A court of appeals opinion is not published unless it establishes a new rule of law, affects an existing rule, applies an established rule to a novel fact situation, involves a legal issue of continuing public interest, "directs attention to the shortcomings of existing common law or inadequacies in statutes," or resolves an apparent conflict of authority. Unpublished opinions bear the legend, "Not Selected for Publication."	Unpublished orders of the supreme court may not be cited.[8] Colo. App. R. 35(f) "Those opinions selected for official publication shall be followed as precedent by the trial judges of the State of Colorado."
Connecticut	Conn. Gen. Stat. § 51-212(b) "The reporter or the person appointed to perform his duties shall make reports of [all] the cases argued and determined in the Supreme Court, [and] prepare the reports for publication." Conn. Gen. Stat. § 51-215a(b) The clerk of the appellate court files copies of memoranda of decisions in appellate court cases with the reporter of judicial decisions. The reporter prepares all of the decisions for publication.	Conn. R. App. P. 67-9 Unreported decisions from other jurisdictions may be cited before the court if the person making reference to the decision provides the court and opposing counsel with copies.

7. Telephone interview with Susan Festag, Chief Deputy Clerk, Colo. Sup. Ct. (May 11, 2001).

8. *Id.*

State	*Publication Standards*	*Citation Rule*
Delaware	Del. Sup. Ct. R. 17(a) "All decisions finally determining or terminating a case shall be made by written opinion, or by written order, as determined by the Court." See Del. Sup. Ct. I.O.P. XI(2) for criteria on disposition by order. Del. Sup. Ct. R. 93(b)(i) Each opinion of the supreme court is reported for official publication in full text. All final orders of the supreme court are reported for publication only in table form.	Del. Sup. Ct. R. 14(b)(vi)(4) Unreported opinions or orders may be cited, but a copy must be provided. Del. Sup. Ct. R. I.O.P. X(8) "Supreme Court Rule 17 has been amended to permit orders of the Delaware Supreme Court to be cited as precedent[9]. . . . Even though both published opinions and case dispositive judgment orders have precedential value, the Court avoids citing to its orders as authority."
District of Columbia	D.C. Ct. App. R. 36(c) "An opinion may be either published or unpublished. Any party or other interested person may request that an unpublished opinion be published by filing a motion . . . stating why publication is merited. Publication shall be granted by a vote of two or more members . . . but a motion filed by a nonparty shall not be granted except on a showing of good cause. The court sua sponte may also publish at any time a previously issued but unpublished opinion."	D.C. Ct. App. R. 28(h) "Any published opinion or order of this court may be cited in any brief. Unpublished opinions or orders of this court shall not be cited in any brief, except when they are relevant under the doctrines of the law of the case, res judicata, or collateral estoppel, or in a criminal action or proceeding involving the same defendant."
Florida	All Supreme Court opinions are published unless the file is sealed. Disposition orders are published in table form. In the District Courts of Appeal, full opinions are generally published; many cases are disposed of as per curiam affirmances without written opinion.[10]	*Dept. of Legal Affairs v. Dist. Ct. of App., Fifth Cir.*, 434 S.2d 310 (Fla. 1983): Per curiam affirmances without written opinion have no precedential value and should not be cited.

9. *See New Castle County v. Goodman*, 461 A.2d 1012, 1013 (Del. 1983) (citing rule change).

10. Telephone interview with James Logue, Florida Reporter of Decisions (Apr. 16, 2001).

State	*Publication Standards*	*Citation Rule*
Georgia	Ga. Sup. Ct. R. 59 The supreme court may affirm without opinion when one or more of the following circumstances exists and is dispositive of the appeal: the judgment is supported by the evidence; there is no harmful error of law requiring reversal; or an opinion would have no precedential value because the judgment below contains an adequate explanation of the decision. Ga. Ct. App. R. 34 "Opinions are reported except as otherwise designated by the court." Ga. Ct. App. R. 36 Court of appeals cases may be affirmed without opinion when the evidence supports the judgment; there is no reversible error of law and an opinion would have no precedential value; the judgment below contains an adequate explanation of the decision; and/or "the issues are controlled adversely to the appellant for the reasons and authority given in the appellee's brief."	Unpublished supreme court opinions may not be cited.[11] Ga. Ct. App. R. 36 "Rule 36 cases have no precedential value." Ga. Ct. App. R. 33(a) A judgment fully concurred in by all judges in a division, or a full concurrence by a majority in an appeal decided by a seven- or twelve-judge court is a binding precedent. Ga. Ct. App. R. 33(b) An unreported opinion establishes the law of the case, but is neither a "physical" nor binding precedent. Under Ga. Ct. App. R. 33(a), a "physical precedent" is: [a] judgment which is fully concurred in by all judges of the Division is a binding precedent; if there is a special concurrence without a statement of agreement with all that is said in the opinion or a concurrence in the judgment only, the opinion is a physical precedent only. If the appeal is decided by a seven or twelve judge Court, a full concurrence by a majority of judges is a binding precedent, but if the judgment is made only by special concurrences without a statement of agreement with all that is said in the opinion or by concurrence in the judgment only, there being general concurrence by less than a majority of the Judges, it is a physical precedent only.

11. Telephone interview with Ginger Wade, Editor of Supreme Court Advance Sheets, Ga. Sup. Ct. (May 18, 2001).

State	*Publication Standards*	*Citation Rule*
Hawaii	Haw. R. App. P. 35 (a)-(b) Dispositions may take the form of published, per curiam or memorandum opinions or dispositional orders. Memorandum opinions and dispositional orders are not published except when ordered by the court. Haw. Intermediate Ct. App. R. 2(a) "A full opinion of the intermediate court of appeals shall be published in a manner authorized by the supreme court. The supreme court, however, may order that a full opinion be changed to a memorandum opinion." The Hawaii Rules of Appellate Procedure govern all proceedings in the Hawaii appellate courts unless otherwise provided by statute or supreme court rules. Haw. R. App. P. 1.	Haw. R. App. P. 35(c); Haw. Intermediate Ct. App. R. 2(b) A memorandum opinion or unpublished dispositional order may not be cited except to establish the law of the pending case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same respondent.
Idaho	Idaho Sup. Ct. Internal R. 13(f) "At or after the oral conference following the presentation of oral argument or the submission of the case to the Court on the briefs, the Court, by unanimous consent of all justices, may determine not to publish the final opinion of the Court."[12]	Idaho Sup. Ct. Internal R. 13(f) "If an opinion is not published, it may not be cited as authority or precedent in any court."

12. The Idaho Court of Appeals follows this rule as well. E-mail from Fred Lyon, Reporter of Judicial Decisions, Idaho Sup. Ct., to Melissa Serfass (Mar. 26, 2001).

State	*Publication Standards*	*Citation Rule*
Illinois	All Supreme Court opinions are published.[13] Ill. Sup. Ct. R. 23 Decisions of the Appellate Court may be in the form of a full opinion, a written order or a summary order.[14] Only opinions will be published. Opinions are issued only when the decision establishes a new rule of law, criticizes or affects an existing rule, or resolves, creates, or avoids an apparent conflict within the Appellate Court. Publication of opinions is subject to limitations contained in Supreme Court Administrative Order MR No. 10343 (1994). This order limits the total number of opinions each district appellate court may file annually.	Ill. Sup. Ct. R. 23(e) "An unpublished order is not precedential and may not be cited by any party except to support contentions of double jeopardy, res judicata, collateral estoppel or law of the case."
Indiana	Ind. R. App. P. 65(A) All supreme court opinions are published. Court of appeals opinions are published if the case establishes, affects or criticizes a rule of law or discusses "a legal or factual issue of unique interest or substantial public importance." Other court of appeals cases are decided by memorandum decisions designated as not-for-publication.	Ind. R. App. P. 65(D) "Unless later designated for publication, a not-for-publication memorandum decision shall not be regarded as precedent and shall not be cited to any court except by the parties to the case to establish res judicata, collateral estoppel, or law of the case."
Iowa	Iowa Code Ann. § 602.4106 All supreme court decisions and opinions shall be in writing. Only those decisions deemed of sufficient general importance by the court are published. Iowa Sup. Ct. R. 10 The court of appeals writes full opinions only in those cases that do not meet the criteria for disposition by memorandum opinion. For criteria, see Iowa Sup. Ct. R. 9.	Iowa R. App. P. R. 14(e) "Unpublished opinions of the Iowa appellate courts or any other court may not be cited as authority." Iowa Sup. Ct. R. 10(f) Unpublished court of appeals decisions may not be cited except when establishing the law of the case, res judicata or collateral estoppel, or in a criminal action involving the same defendant.

13. Telephone interview with Brian Ervin, Reporter of Judicial Decisions, Illinois Supreme Court (May 11, 2001).

14. Specific publication criteria for Illinois Supreme Court opinions were not found.

State	*Publication Standards*	*Citation Rule*
Kansas	Kan. Sup. Ct. R. 7.04 Opinions of the appellate courts may be memorandum opinions or formal opinions. Memorandum opinions are normally marked "Not Designated for Publication." Opinions are published in the official reports only when they meet certain standards such as establishing a new rule of law, affecting or criticizing existing law, involving a legal issue of continuing public interest, applying an established rule of law to a novel fact situation, resolving an apparent conflict of authority, or contributing significantly to legal literature. A memorandum opinion may be prepared when a case decides no new question of law or is otherwise considered to have no precedential value. Kan. Stat. Ann. § 60-2106(a).	Kan. Sup. Ct. R. 7.04 Unpublished opinions are deemed to be without value as precedent and are not uniformly available to all parties. Opinions marked "Not Designated for Publication" shall not be cited as precedent, except to support a claim of res judicata, collateral estoppel, or law of the case.
Kentucky	Ky. Rev. Stat. § 21A.070 All supreme court opinions are published. The supreme court determines which opinions of the court of appeals and lower courts are published. Ky. R. Civ. P. 76.28(4)(a) Opinions of the appellate courts will be published as directed by the court issuing the opinion. Every opinion shall be marked either "To Be Published" or "Not To Be Published." Rule 76 also applies in criminal actions. Ky. R. Crim. P. 12.02.	Ky. R. Civ. P. 76.28(4)(c) Unpublished opinions shall not be cited or used as authority in any other case in any court of this state.

State	*Publication Standards*	*Citation Rule*
Louisiana	The types of opinions issued by the Louisiana Supreme Court include signed opinions, per curiam opinions and summary orders. All opinions are public record and are published in the Southern Reporter.[15] La. Unif. R. Ct. App. 2-16.2 Court of appeals opinions are published when a majority of the panel decide that the opinion establishes a new rule of law or affects an existing rule; involves a legal issue of continuing public interest; criticizes existing law; resolves an apparent conflict of authority; or will serve as a useful reference, such as one reviewing case law or legislative history. See La. Unif. R. Ct. App. 12-16.1 for the standards for issuance of memorandum and per curiam opinions as well as full opinions.	All supreme court opinions may be cited.[16] La. Unif. R. Ct. App. 2-16.3 "Opinions marked 'Not Designated for Publication' shall not be cited, quoted, or referred to by any counsel, or in any argument, brief, or other materials presented to any Court, except in continuing or related litigation."
Maine	4 Me. Rev. Stat. Ann. § 702 The reporter of decisions reports cases at his discretion, under the supervision of the chief justice of the supreme judicial court.	Admin. Orders Sup. Jud. Ct.—New Citation Form, 8/20/1996 "Memorandum Decisions and Summary Orders shall not be published in the Atlantic Reporter and shall not be cited as precedent for a matter addressed therein."
Maryland	Md. Cts. & Jud. Proceedings Code Ann. § 13-203 (2000) The state reporter prepares reports of cases designated for publication by the court of appeals and the court of special appeals. Md. R. App. Rev. 8-113 The court of special appeals designates for publication only those opinions that have substantial general interest as precedent.	Md. R. App. Rev. 8-114 An unreported opinion of the court of appeals or court of special appeals is neither precedent nor persuasive authority, but may be cited in either court for other purposes. In any other court, an unreported opinion of either court may be cited only when relevant under the doctrine of the law of the case, res judicata, or collateral estoppel, in a criminal action or related proceeding involving the same defendant, or in a disciplinary action involving the same respondent.

15. E-mail from John Tarlton Olivier, Clerk of La. Sup. Ct., to Melissa Serfass (May 4, 2001).

16. *Id.*

State	*Publication Standards*	*Citation Rule*
Massachusetts	Mass. Ann. Laws ch. 221 § 64 The reporter of the supreme judicial court has discretion to report the cases more or less at large according to their relative importance. Mass. Ann. Laws ch. 211A § 9 All decisions of the appeals court shall be in writing, except that in appropriate cases an order, direction, judgment, or decree may be entered without stating reasons. The reporter of decisions publishes opinions of the appeals court. Mass. App. Ct. R. 1:28 The court may affirm, modify or reverse the lower court's action by written order upon determination that no substantial question of law is presented by the appeal or that no clear error of law was committed.	*Lyons v. Labor Relations Commn.*, 476 N.E.2d 243 (Mass. App. 1985). "This court's summary decisions pursuant to Rule 1:28 of the Appeals Court . . . are without precedential value and may not be relied upon or cited as authority in unrelated cases. . . [T]he so called summary decisions, while binding on the parties, may not disclose fully the facts of the case or the rationale of the panel's decision. . . . Summary decisions, although open to public examination, are directed to the parties and to the tribunal which decided the case, that is, only to persons who are cognizant of the entire record." A recent case, *Horner v.Boston Edison Co.*, 695 N.E.2d 1093 (Mass. App. 1998) affirms this principle, stating, "We have never suggested that summary decisions of this court issued pursuant to rule 1:28 . . . may be relied upon or cited as authority in other cases. In fact, we reached the opposite conclusion in at least two other cases." *Id.* n. 7.

State	*Publication Standards*	*Citation Rule*
Michigan	All supreme court opinions and orders are published.[17] Mich. Ct. R. 7.215(A)-(B) Court of appeals opinions must be written in the form of a signed opinion, a per curiam opinion, or a memorandum opinion. Memorandum opinions are not published; per curiam opinions are not published unless one of the deciding judges directs the reporter to do so. Circumstances when an opinion must be published include if it establishes a new rule of law, construes a constitutional or statutory provision or court rule, affects or criticizes existing law, extends existing law in a new factual context, reaffirms a legal principle or creates or resolves an apparent conflict of authority. Rule 7.215(A) was amended by Mich. Sup. Ct. Order 99-35, 99-56 issued December 13, 2000, and effective April 1, 2001. Prior to this amendment, publication of a per curiam or memorandum opinion required a majority of the judges to direct its publication.	Mich. Ct. R. 7.215(C) An unpublished opinion is not binding precedent under the rule of stare decisis, but may be cited if a copy is provided to the court and to opposing parties. A published opinion of the court of appeals has precedential effect under the rule of stare decisis.

17. Telephone interview with Brian Draper, Assistant to the Reporter of Decisions, Mich. Sup. Ct. (May 11, 2001).

State	*Publication Standards*	*Citation Rule*
Minnesota	All supreme court opinions are published.[18] Minn. R. Civ. App. P. 136.01 Court of Appeals dispositions may be in the form of published, unpublished or order opinions. Minn. Stat. Ann. § 480A.08(3)(c) The court of appeals publishes only those decisions that establish a new rule of law, overrule a previous court of appeals' decision not reviewed by the supreme court, provide important procedural guidelines in interpreting statutes or administrative rules, involve a significant legal issue, or that would significantly aid in the administration of justice. This rule is restated in Minn. Ct. App. Spec. R. of Prac. 4.	Minn. R. Civ. App 136.01(b) "Unpublished opinions and order opinions are not precedential except as law of the case, res judicata or collateral estoppel, and may be cited only as provided in Minn. Stat. § 480A.08, subd. 3." Minn. Stat. Ann. §480A.08(3) Unpublished opinions are not precedential except as law of the case, res judicata or collateral estoppel. Unpublished opinions may be cited if copies are provided to all parties. This rule is restated in Minn. Ct. App. Spec. R. of Prac. 4.
Mississippi	Miss. R. App. P. 35-A(a); Miss. R. App. P. 35-B(a) The supreme court or court of appeals "may write opinions on all cases heard by that Court and shall publish all such written opinions. In cases where the judgment of the trial court is affirmed, an opinion will be written in all cases where the . . . Court assesses damages for a frivolous appeal and in other cases if a majority of the justices deciding the case determine that a written opinion will add to the value of the jurisprudence of this state or be useful to the parties or to the trial court." See Miss. R. App. P. 35-A(c) and Miss. R. App. P. 35-B(d) for standards on per curiam affirmance without formal opinion when an opinion would have no precedential value.	Miss. R. App. P. 35-A(b); Miss. R. App. P. 35-B(b) "Opinions in cases decided prior to the effective date of this rule [Nov. 1, 1998] which have not been designated for publication shall not be cited, quoted or referred to by any court or in any argument, brief or other materials presented to any court except in continuing or related litigation upon an issue such as res judicata, collateral estoppel or law of the case."

18. Telephone interview with Janet Chapdelaine, Reporter of Judical Decisions, Minn. Sup. Ct. (May 11, 2001).

State	*Publication Standards*	*Citation Rule*
Missouri	Mo. Sup. Ct. R. 84.16(b) In the supreme court and the court of appeals, when all judges in a case agree to affirm and believe that an opinion would have no precedential value, disposition may be by memorandum decision or written order. A memorandum decision or written order may be entered when the appellate court unanimously determines that any of the following circumstances exists and is dispositive: the trial court judgment is supported by substantial evidence and is based on findings that are not clearly erroneous, the evidence sufficiently supports a jury verdict, an administrative agency order is supported by the evidence, or no error of law appears. See Mo. Sup. Ct. R. 30.25 for the rule governing summary orders in criminal cases.	Mo. Sup. Ct. R. 84.16(b) "A written statement may be attached to the memorandum decision or written order setting out the basis for the court's decision. The statement shall be unanimous, shall not constitute a formal opinion of the court, shall not be reported, and shall not be cited or otherwise used in any case before any court."
Montana	Mont. Code Ann. § 3-2-601 All decisions of the supreme court must be in writing, stating the grounds of the decision. Mont. Internal Op. R. § I(c) Appeals that present no constitutional issues or issues of first impression, or do not establish new precedent, modify existing precedent, or, in the opinion of the court, will not provide future guidance for citation purposes, may be classified by the court as noncitable opinions. Such decisions will not include a detailed statement of facts or law.	Mont. Internal Op. R. § I(c) Appeals disposed of under this section shall not be citeable as precedent but shall be filed as a public document with the clerk, and shall be reported by result only.

State	*Publication Standards*	*Citation Rule*
Nebraska	Neb. Sup. Ct. R. 2(E)(1); Neb. Sup. Ct. R. 12 The supreme court and court of appeals prepare written opinions in cases believed to require explanation or believed to have precedential value. Neb. Rev. Stat. § 24-208 The supreme court reports decisions which reverse or modify a district court judgment, and other decisions which determine or modify any previously unsettled or new and important question of law, or construe any provision of the constitution or a statute not construed before, and other decisions deemed interesting or important. Neb. Rev. Stat. § 24-1104(1) Court of appeals decisions are issued in the form of an order that may be accompanied by a memorandum opinion. Memorandum opinions are not published unless ordered by the court. Neb. Rev. Stat. § 24-1104(2) provides criteria for determining when memorandum opinions are appropriate.	Neb. Sup. Ct. R. 9(C)(4) "Nebraska cases shall be cited by the state reports, but may include citation to such other reports as may contain such cases." The implication is that only reported cases may be cited. Some Nebraska Supreme Court cases may be disposed of by summary disposition under Neb. Sup. Ct. R. 7. Neb. Sup. Ct. R. 2(E)(4)-(5) Court of appeals opinions which have been designated "For Permanent Publication" are precedential and may be cited in any court; other opinions and memorandum opinions may be cited only when related by identity between the parties or the causes of action.
Nevada	There are no established rules governing when an opinion is written. Opinions are published; dispositions that are not published are framed as orders.[19] Nev. Rev. Stat. § 2.160 "All opinions and decisions rendered by the supreme court shall be in writing . . . ."	Nev. Sup. Ct. R. 123 Unpublished opinions are not precedential and may not be cited as legal authority except when relevant under the doctrines of law of the case, res judicata or collateral estoppel or relevant in a criminal or disciplinary proceeding affecting the same individual.

19. Telephone interview with Janette Bloom, Clerk of the Court, Nev. Sup. Ct. (May 11, 2001).

State	*Publication Standards*	*Citation Rule*
New Hampshire	N.H. Sup. Ct. R. 25(1) The supreme court may dispose of cases summarily. An order of summary affirmance may be entered in those circumstances when no substantial question of law exists and the court does not disagree with the result below, the opinion of the lower court identifies and discusses the issues presented and the supreme court does not disagree with them, or no substantial question of law is presented in an administrative agency appeal and the court does not find the decision unjust or unreasonable, or for other just cause, in which case a succinct statement of the reason for affirmance must be included. An order of summary dismissal or summary reversal for just cause must also contain a succinct statement of the reason for dismissal or reversal.	N.H. Sup. Ct. R. 25(5) "Cases summarily disposed of under this rule shall not be regarded as establishing precedent or be cited as authority."
New Jersey	N.J. R. Gen. App. 1:36-2 All opinions of the supreme court are published unless the court directs otherwise. Appellate division opinions are published only when the issuing panel directs their publication. Publication guidelines for opinions include whether the decision involves a substantial question of U.S. or N.J. constitutional law, determines a new and important question of law, affects or criticizes existing law, determines a substantial question with no N.J. case law after Sept. 15, 1948, is of continuing public interest, resolves an apparent conflict or authority, or contributes significantly to legal literature. N.J. Ct. R. 2:11-3(e)(1)-(2) sets out the guidelines for affirmance without opinion in civil, criminal, quasi-criminal, and juvenile appeals.	N.J. R. Gen. App. 1:36-3 Unpublished opinions do not constitute precedent and are not binding on any court. Unpublished opinions may be cited for purposes of res judicata, collateral estoppel, the single controversy doctrine, or any other similar principle of law only.

State	*Publication Standards*	*Citation Rule*
New Mexico	N.M. R. App. P. 12-405 All formal opinions of the appellate court are published. A formal opinion is not always necessary. An order, decision, or memorandum opinion is appropriate when the issues have previously been decided by the supreme court or court of appeals; the issue is disposed of by the presence or absence of substantial evidence; a statute or court rule is controlling; the asserted error is not prejudicial; or the issues are manifestly without merit. This rule applies to both the supreme court and the court of appeals. N.M. R. App. P. 12-101.	N.M. R. App. P. 12-405(C) "An order, decision, or memorandum opinion, because it is unreported and not uniformly available to all parties, shall not be published nor shall it be cited as precedent in any court."
New York	N.Y. CLS Jud. § 431 The Law Reporting Bureau is required to publish every opinion, memorandum, and motion transmitted to it by the court of appeals and the appellate divisions. The state reporter also selectively publishes appellate term and trial court opinions in the Miscellaneous Reports.[20]	There is no official court rule or statute prohibiting citation of unpublished opinions.[21]
North Carolina	All supreme court opinions are published, some as per curiam orders.[22] N.C. R. App. P. 30(e)(1) The Court of Appeals is not required to publish an opinion in every decision. If the deciding panel determines that the appeal involves no new legal principles and that a published opinion would have no precedential value, it may direct that no opinion be published.	N.C. R. App. P. 30(e)(3) "A decision without a published opinion is authority only in the case in which such decision is rendered and should not be cited in any other case in any court for any purpose, nor should any court consider any such decision for any purpose except in the case in which such decision is rendered."

20. Telephone interview with Gary Spivey, State Reporter, N.Y. Ct. App. (Apr. 27, 2001). For details on selection criteria for the Miscellaneous Reports, see the New York State Law Reporting Bureau web site at <http://www.courts.state.ny.us/reporter/Selection.htm> (visited Apr. 27, 2001).

21. Spivey interview, *supra* n. 20. Regarding the precedential value of unpublished New York Supreme Court opinions, in *Eaton v. Chahal*, 553 N.Y.S.2d 642, 646 (Sup. Ct. 1990), the court commented upon "the practice of citing to this court unreported decisions issued by Judges of coordinate jurisdiction. Such decisions, although entitled to respectful consideration, are not binding precedent upon this court."

22. Telephone interview with Ralph A. White, Jr., Reporter of Judicial Decisions, N.C. Sup. Ct.

State	*Publication Standards*	*Citation Rule*
North Dakota	N.D. R. App. P. 35.1 The supreme court may affirm by summary opinion in any case in which no reversible error of law occurred and one of the following situations exists: the appeal is frivolous and completely without merit, the judgment of the trial court is based on findings of facts that are not clearly erroneous, the jury verdict is substantially supported by evidence, the trial court did not abuse its discretion, the administrative agency order is supported by a preponderance of the evidence, the summary judgment, directed verdict, or judgment on the pleadings is supported by the record, or a previous controlling appellate decision is dispositive of the appeal. The court may also reverse by summary opinion when a previous controlling appellate is dispositive.[23]	Rule 35.1 summary dispositions may be cited as precedent.[24]

23. The North Dakota Court of Appeals is not a permanent sitting court. It receives assignments from the supreme court mainly to alleviate the supreme court's workload. Although the rules establishing the court of appeals allow for discretionary publication, court of appeals opinions have not been numerous, and all opinions are published in a manner similar to the supreme court. E-mail from Penny Miller, Clerk of N.D. Sup. Ct., to Melissa Serfass (May 14, 2001).

24. Telephone interview with Penny Miller, Clerk of N.D. Sup. Ct. (Apr. 20, 2001).

State	*Publication Standards*	*Citation Rule*
Ohio	Ohio Sup. Ct. R. for Reporting Op. 1(A) All supreme court opinions are reported in the Ohio official reports. Ohio Sup. Ct. R. for Reporting Op. 2(F) A court of appeals opinion may be selected for official reporting if the supreme court reporter determines that the case contributes significantly to Ohio case law, and the court which heard the case certifies that it meets certain standards, which include establishing a new rule of law; affecting an existing rule; applying an established rule to significantly different facts; explaining, criticizing, or reviewing the history of an existing rule; creating or resolving a conflict of authority; or discussing factual or legal issues of significant public interest.	Ohio Sup. Ct. R. for Reporting Op. 2(G) Unofficially published opinions and unpublished opinions of the courts of appeals may be cited as controlling authority in the judicial district in which they were decided when relevant under the doctrines of the law of the case, res judicata or collateral estoppel or in a criminal proceeding involving the same defendant. In all other situations, such opinions shall be considered persuasive authority. Opinions reported in the Ohio official reports are controlling authority for all purposes in the judicial district in which they were rendered unless and until each such opinion is reversed or modified by a court of competent jurisdiction.

State	*Publication Standards*	*Citation Rule*
Oklahoma	Okla. Sup. Ct. R. 1.200(a) Supreme court and court of civil appeals opinions are issued in memorandum form unless they establish, criticize or affect a rule of law, involve a legal issue of continuing public interest, apply an established rule to a novel fact situation, resolve an apparent conflict, or contribute significantly with a historical legal review or description of legislative history. Okla. Ct. Crim. App. R. 3.13(A) "Opinions may be by Summary Opinion form, memorandum or of such length and detail as the Court determines."[25]	Okla. Sup. Ct. R. 1.200(b)(5) Memorandum opinions, unless otherwise required to be published, are marked: "Not for Official Publication." These opinions shall not be considered as precedent by any court or cited in any brief or other, except for purposes of res judicata, collateral estoppel, or law of the case. They shall neither be published in the unofficial or official reporter, nor on the Supreme Court World Wide Web site. Okla. Sup. Ct. R. 1.200(b)(6)-(8) governs reporting of opinions and dispositions in the unofficial reporter, *Oklahoma Bar Journal*. Opinions designated "For Publication in O.B.J. Only" are not precedential. Okla. Ct. Crim. App. R. 3.5(C)(3) "In all instances, an unpublished opinion is not binding on this Court. However, parties may cite and bring to the Court's attention the unpublished opinions of this Court provided counsel states that no published case would serve as well the purpose of which counsel cites it . . . ."

25. Specific publication standards for the Court of Criminal Appeals were not found. Standards for the Emergency Appellate Division of the Court of Criminal Appeals are found at Okla. Ct. Crim. App. R. 12.12(C). For a discussion of issues raised by use of summary opinions in the court, see *Johnson v. State*, 1993 OK CR 11, 847 P.2d 810 (Okla. Crim. App. 1993).

State	*Publication Standards*	*Citation Rule*
Oregon	Or. Rev. Stat. § 19.435 The Supreme Court and the Court of Appeals may decide cases by memorandum decision. Full opinions are prepared only in those cases deemed proper by the court. All opinions, memorandum decisions, and orders are published.[26] Or. Ct. App. Internal Practices Forms of Decisions When the deciding judges agree on the result and agree that an opinion would have no precedential value, a case may be decided without opinion. Per curiam opinions are issued when the judges agree on the analysis and the result, the law is clear, and an extensive opinion is not needed. The court generally decides cases by signed opinion when an opinion would have precedential value because it involves a previously undecided issue of law or because it applies established law to new or "exceptionally illustrative" facts, issues of unusual public concern exist, or a summary statement of the reasons for reversal or modification would not suffice.	Supreme Court affirmances without opinion may be cited, but have no authority.[27] Or. R. App. P. 5.20(5) "Cases affirmed without opinion by the Court of Appeals should not be cited as authority."

26. Telephone interview with Mary Bauman, Reporter of Judicial Decisions, Oregon Supreme Court (May 18, 2001).

27. *Id.*

State	*Publication Standards*	*Citation Rule*
Pennsylvania	Pa. R. Sup. Ct. I.O.P. III (Notes) A per curiam order may be used when the Court's decision does not establish a new rule of law, does not affect or criticize an existing rule, does not apply an established rule to novel facts, does not constitute the only, or only recent binding precedent on an issue, does not involve a legal issue of continuing public interest, or whenever the Court decides it is appropriate. Pa. R. Cmmw. Ct. I.O.P. §412 The author of a commonwealth court opinion of a panel or the court en banc recommends whether it is reported. This recommendation is followed unless a majority of the court disagrees. Pa. R. Cmmw. Ct. I.O.P. §413 Each reported opinion is designated as an "opinion." An unreported opinion is designated as a "memorandum opinion." Pa. R. Super. Ct. I.O.P. 65.37(C) Publication of decisions is within the panel's discretion, but generally a decision should be published when any of the following apply: it is by a court en banc; it establishes a new rule of law, applies an existing rule to novel facts, affects or criticizes an existing rule, or resolves an apparent conflict of authority; it involves a legal issue of continuing public interest; or it constitutes a significant, non-duplicative contribution to law by way of an historical legal review, a review of legislative history, or a review of conflicting decisions among the courts or other jurisdictions.	*Commonwealth v. Tilghman*, 673 A.2d 898 (Pa. 1996). The court in *Tilghman* attempted to clear up the "confusion within the Bar of this Commonwealth regarding the precedential value of orders of this Court affirming (or reversing) per curiam an order of a lower court." *Id.* "If a majority of the Justices of this Court, after reviewing an appeal before us . . . join in issuing an opinion, our opinion becomes binding precedent on the courts of this Commonwealth." *Id.* (citing *Commonwealth v. Mason*, 456 Pa. 602, 322 A.2d 357 (1974)). When a per curiam opinion of the supreme court affirms on the basis of the opinion of the lower court, the holding and reasoning of that opinion become supreme court precedent. When a per curiam supreme court affirmance says nothing more, the lower court rationale is not adopted and is not precedential.[28] Pa. R. Cmmw. Ct. I.O.P. §414 "Unreported opinions of the court shall not be cited in any opinion of this court or in any brief or argument addressed to it, except that any opinion filed in the same case may be cited as representing the law of the case. A one-judge opinion, even if reported, shall be cited only for its persuasive value, not as a binding precedent."

28. Richard B. Cappalli, *What Is Authority? Creation and Use of Case Law by Pennsylvania's Appellate Courts*, 72 Temple L. Rev. 303, 362-365 (1999). This article provides an outline of the "rules" set forth in *Tilghman* and a discussion of each rule's precedential value.

State	*Publication Standards*	*Citation Rule*
Pennsylvania, *cont'd*	Pa. R. Super. Ct. I.O.P. 65.37(D) An appeal may be decided by a judgment order without separate memorandum decision when the decision is unanimous and requires minimal explanation because it is based on established law or is clearly supported by the evidence.	Pa. R. Super. Ct. I.O.P. 65.37(A) An unpublished memorandum decision may not be relied upon or cited except when relevant under the doctrine of law of the case, res judicata, or collateral estoppel, or when it is relevant to a criminal action or proceeding involving the same defendant.
Rhode Island	R.I. Gen. Laws § 8-1-3 "The supreme court shall render written opinions in all cases decided by it wherein points of law, pleading, or practice have arisen which are novel or of sufficient importance to warrant written opinions." R.I. Gen. Laws § 8-1-6 "The reporter shall make true reports of all cases in which written opinions have been rendered, and of all decisions and rescripts of the court which he or she may deem to be important and useful, and also all such matters as the court may order to be reported."	R.I. Sup. Ct. R. 16(h) "Unpublished orders will not be cited by the Court in its opinions and such orders will not be cited by counsel in their briefs. Unpublished orders shall have no precedential effect."

State	*Publication Standards*	*Citation Rule*
South Carolina	S. C. App. Ct. R. 220 The appellate court may make its decisions in writing either by published or memorandum opinion. The supreme court may file a memorandum opinion when the court unanimously decides that a published opinion would have no precedential value and any one or more of the following circumstances exists: The judgment of the trial court is based on findings of fact which either are or are not clearly erroneous; the evidence to support a jury verdict is or is not insufficient; an administrative agency order meets or does not meet the standard of review; or no error of law appears. "The Court of Appeals need not address a point which is manifestly without merit." This rule governs both the South Carolina Supreme Court and the South Carolina Court of Appeals. S.C. App. Ct. R. 101.	S. C. App. Ct. R. 220(a) Memorandum opinions are not published in the official reports and have no precedential value. S. C. App. Ct. R. 239(d)(2) "Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved."
South Dakota	S.D. R. App. P. 15-26A-87.1 The supreme court may affirm or reverse a judgment or order of a trial court by order or memorandum opinion when it is clear from the record that the issues are clearly controlled by settled law, findings of fact or jury verdict are clearly supported by sufficient evidence, an issue of material fact made summary judgment inappropriate, or the issue was one of judicial discretion and abuse is clearly present or absent.	S.D. R. App. P. 15-26A-87.1(E) Orders or memorandum opinions issued under this section shall not be cited or relied on as authority in any court except when they establish the law of the case, res judicata, collateral estoppel, or involve the same defendant in a criminal action, or the same person in a disciplinary action.

State	*Publication Standards*	*Citation Rule*
Tennessee	Tenn. R. Sup. Ct. 4(A)(2) All opinions of the supreme court are published in the official reporter unless explicitly designated "Not for Publication." Tenn. Ct. App. R. 11; Tenn. Ct. Crim. App. R. 19 General criteria for publication of opinions of the court of appeals or the court of criminal appeals include whether the opinion establishes a new rule of law, affects or criticizes an existing rule or legal principle, applies an existing rule to novel facts, involves a legal issue of continuing public interest, resolves an apparent conflict, or makes a significant contribution to legal literature. Publication of intermediate appellate court opinions does not go forward until the issue of appeal to the supreme court has been resolved. The individual rules provide specific publication guidelines when application for permission to appeal has been filed, granted, or denied. Tenn. Ct. App. R. 10 sets out the guidelines for affirmances without opinion and memorandum opinions in the court of appeals.	Tenn. R. Sup. Ct. 4(F)(1)-(2) "If an application for permission to appeal is hereafter denied by the Court with a 'Not for Citation' designation, the opinion of the intermediate appellate court has no precedential value." These opinions are not published in any official reporter and may not be cited by any judge or by any litigant except in the circumstance of res judicata, collateral estoppel, law of the case, or a criminal action involving the same defendant. Tenn. R. Sup. Ct. 4(H)(1) Unpublished opinions are controlling authority for purposes of res judicata, collateral estoppel, or law of the case. Unless designated "Not for Citation" under subsection (F) of this rule, unpublished opinions are persuasive authority in all other circumstances. Tenn. Ct. App. R. 12; Tenn. Ct. Crim. App. R. 19(4) When unpublished opinions are cited, copies must be provided.
Texas	Tex. R. App. P. 67 The supreme court hands down a written opinion in every case in which it renders a judgment. Tex. R. App. P. 47.4 A court of appeals opinion should be published only when it establishes, affects, or criticizes a rule of law, applies an existing rule to a new fact situation, involves a legal issue of continuing public interest, or resolves an apparent conflict of authority. Tex. R. App. P. 77.2 Court of criminal appeals opinions will be published upon the determination of a majority of the judges.	Tex. R. App. P. 47.7 Court of appeals opinions that are not designated for publication have no precedential value and may not be cited as authority. Tex. R. App. P. 77.3 Unpublished opinions of the court of criminal appeals have no value as precedent and may not be cited as authority.

State	*Publication Standards*	*Citation Rule*
Utah	Utah R. App. P. 30(c),(d) When a judgment, decree or order is reversed or modified, the reasons shall be given in writing. The court may dispose of a case by expedited decision without written opinion if it satisfies the criteria of Rule 31(b). The Utah Rules of Appellate Procedure apply to the supreme court and the court of appeals. Utah R. App. P. 1. Utah R. App. P. 31(b), (d) Types of cases qualifying for expedited decision without opinion include appeals that involve uncomplicated factual issues primarily based on documents; summary judgments; dismissals for failure to state a claim or for lack of jurisdiction; and cases based on uncomplicated issues of law. Expedited appeal will not be granted when a case raises a substantial constitutional issue, an issue of significant public interest, an issue of first impression or a complicated issue of fact or law.	Utah R. App. P. 31(f) "Appeals decided under this rule will not stand as precedent, but, in other respects, will have the same force and effect as other decisions of the court." Utah Code Jud. Admin. R. 4-508, 4-605 "Unpublished opinions, orders and judgments have no precedential value and shall not be cited or used in the courts of this state, except for purposes of applying the doctrine of the law of the case, res judicata, or collateral estoppel. Unpublished opinions are "any memorandum decision, per curiam opinion, or other disposition of the Court designated 'not for official publication.'" The stated intent of Rule 4-508, governing civil practice, and Rule 4-605, governing criminal practice, is to establish a uniform standard for the citation of unpublished opinions.

State	*Publication Standards*	*Citation Rule*
Vermont	Vt. R. App. P. 33.2 A full opinion may be appropriate when the court is establishing a new rule of law, affecting or criticizing an existing rule, or applying an established rule to a novel fact situation; the appeal involves a legal issue of substantial public interest; or the court may be resolving a conflict or apparent conflict between panels of the court. In other instances, an entry order or per curiam opinion may be appropriate.	Vt. R. App. P. 33.1(c) An entry order decision issued by a three-justice panel under the guidelines set forth in Rule 33.2 that is not published in the Vermont reports may be cited as persuasive authority but is not considered controlling precedent. These decisions may be cited as controlling authority with respect to issues of claim preclusion, law of the case, and similar issues involving the parties or facts of the case in which the decision was issued.
Virginia	The supreme court determines by judicial discretion during conference which cases will be decided by order and which will be decided by a published opinion.[29] Va. Sup. Ct. R 5:42(i) "A written opinion of the Supreme Court stating the law governing each question certified will be rendered as soon as practicable after the submission of briefs and after any oral argument. The opinion will be sent by the clerk under the seal of the Supreme Court to the certifying court and to counsel for the parties and shall be published in the Virginia Reports." Va. Code Ann. § 17.1-413(A) The court of appeals in its discretion may render its decision by order or memorandum opinion. All orders and opinions of the court are preserved with the record of the case. Opinions that the court designates as having precedential value or other legal significance are reported in separate court of appeals reports in the same manner as the decisions and opinions of the supreme court.	There is no prohibition against citing unpublished orders of the supreme court, though their value is probably just as persuasive authority.[30] In *Grajales v. Commonwealth*, 353 S.E.2d 789, 790 n.1 (Va. App. 1987), the court wrote: "Unpublished memorandum opinions of [the Court of Appeals] are not to be cited or relied upon as precedent except for the purpose of establishing res judicata, estoppel or the law of the case." Later, in *Fairfax County Sch. Bd. v. Rose*, 509 S.E.2d 525, 528 n. 3 (Va. App. 1999), the court wrote: "Although an unpublished opinion of the Court has no precedential value [citing *Grajales*], a court or the commission does not err by considering the rationale and adopting it to the extent it is persuasive."

29. Telephone interview with David Beach, Clerk of the Virginia Supreme Court (Apr. 27, 2001).

30. *Id.*

State	*Publication Standards*	*Citation Rule*
Washington	All Washington Supreme Court opinions are published.[31] Wash. R. App. P. 12.3(d) Whether an opinion will be printed in the Washington appellate reports or be filed for public record only will be determined by a majority of the issuing panel pursuant to RCW 2.06.040. In making this determination the panel will use at least the following criteria: whether a case decides an unsettled or new question of law or constitutional principle; affects or reverses an established principle of law; is of general public interest or importance or is in conflict with a prior opinion of the court of appeals.[32]	Wash. R. App. P. 10.4(h) An unpublished opinion of the court of appeals may not be cited as authority. Unpublished opinions are defined as those not published in the Washington appellate reports.
West Virginia	W. Va. Const. Art. VIII, § 4 The state constitution requires the court "to prepare a syllabus of the points adjudicated in each case in which an opinion is written . . . which shall be prefixed to the published report of the case." Thus, all opinions are published. However, memorandum orders in administrative appeals and certain per curiam orders are not published.[33]	Only signed, justice-authored opinions have precedential value.[34] "Per curiam opinions . . . are used to decide only the specific case before the Court; everything in a per curiam opinion beyond the syllabus point is merely obiter dicta. A per curiam opinion that appears to deviate from generally accepted rules of law is not binding on the circuit courts, and should be relied upon only with great caution. [I]f rules of law or accepted ways of doing things are to be changed, then this Court will do so in a signed opinion, not a per curiam opinion." *Lieving v. Hadley*, 423 S.E.2d 600, 604 n. 4 (W. Va. 1992).

31. Telephone interview with Truman Fuller, Editorial Coordinator, Washington Supreme Court Reporter of Decisions (May 11, 2001).

32. Specific publication standards for Supreme Court of Washington opinions were not found.

33. Facsimile from Rory L. Perry II, Clerk, and Blake Westfall, Deputy Clerk, W. Va. Sup. Ct., to Melissa Serfass (May 8, 2001).

34. *Id.*

State	*Publication Standards*	*Citation Rule*
Wisconsin	All supreme court opinions are published; the court disposes of some issues by unpublished order.[35] Wis. Stat. § 809.23(1)(a) In the court of appeals, criteria for publication in the official reports include whether the opinion states a new rule of law or affects or criticizes an existing rule; applies an established rule to a novel fact situation; resolves or identifies a conflict of authority; contributes to the legal literature by reviewing case law or legislative history; or decides a case of substantial and continuing public interest.	Per curiam orders and authored opinions may be cited as precedent; unpublished orders may not.[36] Wis. Stat. § 809.23(3) An unpublished opinion is of no precedential value and may not be cited as precedent or authority, except to support a claim of res judicata, collateral estoppel, or law of the case.
Wyoming	Wyo. R. App. P. 9.01 Appellate court decisions are set forth in a written opinion or order. Wyo. R. App. P. 9.06 The appellate court may issue a ruling without a published decision when all parties to an appeal stipulate in writing that they so desire. Such abbreviated opinions provide the ultimate disposition without a detailed statement of facts or law.	Wyo. R. App. P. 9.06 Abbreviated opinions are not published or generally disseminated and do not constitute precedent of the appellate court.

[redacted]

35. Telephone interview with Cornelia Clark, Reporter of Judicial Decisions, Wis. Sup. Ct. (May 11, 2001).

36. *Id.*

WEST VIRGINIA LAW REVIEW

STARE DECISIS AS A CONSTITUTIONAL REQUIREMENT

Thomas Healy

Volume 104 Fall 2001 Number 1

STARE DECISIS AS A CONSTITUTIONAL REQUIREMENT

Thomas Healy[*]

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

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

---

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

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

INTRODUCTION

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

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

---

1 *See infra* notes 41-42 and accompanying text.

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

sion can be overruled.[3] However, these debates have concerned the strength of the presumption that precedent is binding, not whether the presumption itself is a constitutional requirement.[4] The academic literature has been similarly silent. Although a few scholars have touched on the issue casually, no one has seriously examined whether stare decisis is dictated by the Constitution.[5]

In the wake of a recent court decision, however, this question has become vitally important. In *Anastasoff v. United States*,[6] a panel of the United States Court of Appeals for the Eighth Circuit ruled that the court's practice of issuing unpublished opinions that cannot be cited as precedent violates Article III of the United States Constitution.[7] The decision, written by Judge Richard S. Arnold, argues that stare decisis was such an established and integral feature of the common law that it was implicit in the founding generation's understanding of what it meant to exercise judicial power.[8] Therefore, Judge Arnold argues, when the Constitution vested "the judicial Power of the United States"[9] in the federal courts, it necessarily limited them to a decision-making process in which precedent is binding.[10] Judge Arnold does not claim that courts can never overrule past cases,[11] but when they do, he asserts, they must justify their actions

---

3 *See infra* notes 56-59 and accompanying text.

4 For instance, the Court has stated on several occasions that stare decisis is not "an inexorable command." *E.g.*, Agostini v. Felton, 521 U.S. 203, 235-36 (1997). However, this does not necessarily imply that courts are free to abandon the presumption that precedent is binding. It could mean only that the presumption itself is not inexorable. In other words, although the Court has concluded that stare decisis does not require absolute adherence to precedent, it has left open the question of whether this less-than-absolute doctrine of stare decisis is nonetheless constitutionally required.

5 One of the first scholars to broach the issue was Henry Monaghan, who speculated in 1988 that perhaps "the principle of stare decisis inheres in the 'judicial power' of article III." Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 754-55 (1988). Six years later, another professor argued that stare decisis is in fact unconstitutional, at least in cases raising constitutional issues. *See* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994). Most recently, a third writer asserted that stare decisis is a "judicial policy" that is "not grounded in the Constitution." Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1548 (2000). This conclusion was based on the Court's statements that "stare decisis is not an inexorable command." *Id.* However, as I have explained, these statements leave open the possibility that a less-than-absolute doctrine of stare decisis is constitutionally required. *See supra* note 4.

6 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, Anastasoff v. United States, 235 F.3d 1054 (8th Cir. 2000) (en banc).

7 *See id.* at 905.

8 *See id.* at 900-904.

9 U.S. CONST. art. III., § 1, cl. 1.

10 *See Anastasoff*, 223 F.3d at 904-05.

11 *See id.*

through reasons that are "convincingly clear."[12] And because the Eighth Circuit's practice stripped unpublished opinions of even presumptive authority, the court had exceeded the judicial power delegated to it by Article III.[13]

Judge Arnold's argument is quite original.[14] Although many lawyers have expressed concerns about the circuit courts' practice of issuing non-precedential decisions,[15] no one has ever claimed that it is unconstitutional.[16] The argument also has profound theoretical and practical implications. For the past half-century, scholarship and litigation concerning Article III has focused primarily on jurisdictional issues, such as what types of disputes the judicial power extends to and what control Congress has over that question.[17] Judge Arnold's analysis shifts attention away from the issue of *what* the courts can hear and asserts that Article III is also relevant to the issue of *how* the courts must decide the cases they do hear. Although a few scholars have anticipated this move,[18] the Eighth Circuit panel is the first court to explicitly locate jurispruden-

---

12 *Id.* at 905.

13 *See id.*

14 *See* Jerome I. Braun, *Eighth Circuit Decision Intensifies Debate Over Publication and Citation of Appellate Opinions*, 84 JUDICATURE 90, 92 (2000) (describing the opinion as "a wholly original pronouncement . . . . quite unexampled in the law of any other circuit"). I refer to the argument as "Judge Arnold's" because he was clearly the dominant force behind it. A year earlier, he had written a journal article that strongly criticized non-precedential opinions and questioned whether they were constitutional. At the time, however, he did not answer his own question. *See* Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 226 (1999).

15 *See, e.g.*, Charles E. Carpenter, Jr., *The No-Citation Rule For Unpublished Opinions: Do the Ends of Expediency For Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C. L. REV. 235, 247-256 (1998) (arguing that no-citation rules lower the quality of appellate opinions, create a body of shadow law, and foster mistrust of the courts); Martha J. Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 785-800 (1995) (arguing that non-precedential opinions generate a secret body of law, undermine certainty and stability, and fail to offer guidance for future judges).

16 Indeed, not even the parties in *Anastasoff* challenged the practice as unconstitutional. The case involved a dispute over a tax refund and the plaintiff argued merely that the court was not bound by an unpublished decision unfavorable to her. *See Anastasoff*, 223 F.3d at 899. Judge Arnold raised the constitutional issue on his own. *See id.*

17 *See* Evan Caminker, *Allocating the Judicial Power in a "Unified Judiciary,"* 78 TEX. L. REV. 1513, 1513 (2000); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 1998 (1994).

18 *See* Caminker, *supra* note 17, at 1514 (noting that congressional actions have invited a shift from the question of "when and where" judicial power must be exercised to the question of "how" it must be exercised); James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696 (1998) (arguing that Article III is relevant to the quality of judicial power, not just the quantity); Dorf, *supra* note 17, at 1998 (stating that Article III raises jurisprudential issues).

tial norms in Article III. And if other courts follow the panel's lead, a vast new area of federal courts litigation could open up.

The panel's conclusion could also disrupt the operation of the federal courts. Three-quarters of the opinions issued by the courts of appeals are unpublished,[19] and nearly all the circuits deny precedential effect to these opinions.[20] This practice, which has been in place for roughly thirty years,[21] has enabled the courts to keep pace with a caseload that has increased by four-hundred percent over the same period.[22] By issuing non-precedential opinions, judges save time both in the writing process (because non-precedential decisions are short and not intended for future reference) and in the researching process (because the body of case law is substantially reduced).[23] If the practice was struck down nationwide, the smooth functioning of the appellate courts would be in serious jeopardy.

Moreover, because Judge Arnold's analysis is based on an interpretation of the judicial power vested by Article III, it would presumably apply to the federal district courts as well.[24] Most of these courts currently have no rules governing the precedential status of their opinions, but it is generally understood that district court judges are not bound by their own decisions or those of other

---

[19] *See* Administrative Office of the United States Courts, *1999 Judicial Business of the United States Courts* 49, Table S-3 (2000), *available at* http://www.uscourts.gov/judbus1999/s03sep99.pdf (reporting that seventy-eight percent of opinions or orders in the courts of appeals were unpublished in the twelve-month period ending in September 1999). By unpublished, I mean they do not appear in the federal reporters, though they usually appear in Lexis and Westlaw and are available on the circuit court web pages.

[20] The First, Second, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits explicitly deny precedential effect to unpublished decisions. *See* 1st CIR. R. 36(b)(2)(F); 2nd CIR. R. 0.23; 5th CIR. R. 47.5.4; 7th CIR. R. 53(b)(2)(iv); 8th CIR. R. 28A(i); 9th CIR. R. 36-3; 10th CIR. R. 36.3(A); 11th CIR. R. 36-2; D.C. CIR. R. 28(c). The Fourth and Sixth Circuits disfavor the citation of unpublished opinions, but allow it when the opinion has precedential value and there is no published opinion that would serve as well. *See* 4th CIR. R. 36(c); 6th CIR. R. 28(g). The Third Circuit rules make no mention of unpublished opinions, but imply that only published opinions are binding. *See* 3d CIR. R. 28.3(b).

[21] *See* The Honorable Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO S. L.J. 177, 184-86 (1999).

[22] The number of cases disposed of by the courts of appeals rose from 10,669 in 1970 to 51,194 in 1997. *See* Dragich, *supra* note 15, at 758 n.48; Administrative Office of the United States Courts, *1997 Judicial Business of the United States Courts*, Report of the Director, at Table B-1 (1997), *available at* http://www.uscourts.gov/judicial_business/b01sep97.pdf. This increase has been offset somewhat by an increase in judgeships from 97 to 167 over the same period. *See* Arnold, *supra* note 14, at 222. However, the number of cases per judge has still increased two-hundred percent. For anecdotal evidence of the increasing workload of circuit court judges, see Martin, *supra* note 21, at 181-83.

[23] *See* Martin, *supra* note 21, at 190.

[24] *See* Braun, *supra* note 14, at 92 (noting that the Eighth Circuit's opinion "arguably extends to all Article III courts, making every district court order binding precedent within the district").

judges in their district.[25] Thus, if the panel's opinion was taken to its logical conclusion, it would require an overhaul of district court practice.[26]

These potential consequences may be reason enough for other courts to reject Judge Arnold's analysis. Indeed, the Eighth Circuit itself has already stripped the opinion of legal effect.[27] On en banc review, the court vacated the decision because subsequent actions of the parties had rendered the case moot.[28] Judge Arnold also authored the en banc opinion and explained that as a result of the court's action, the constitutionality of non-precedential opinions is once again an open question in the Eighth Circuit.[29] He did not retreat from his analysis in the panel opinion, however, and given his adamant opposition to non-precedential opinions, it seems likely that he would reach the same conclusion if faced with the question again.[30] More importantly, his analysis has generated considerable debate in other circuits and is sure to be seized on by litigants and judges who share his views.[31] For these reasons, and because there is so little

---

[25] *See, e.g.*, United States v. Cerceda, 172 F.3d 806, 812 n.6 (11th Cir. 1999) ("The opinion of a district court carries no precedential weight, even within the same district."); Anderson v. Romero, 72 F.3d 518, 525 (7th Cir. 1995) ("District court decisions have no weight as precedents, no authority.").

[26] Supreme Court practice might also be affected. Although the Court generally gives precedential effect to all its written opinions, the court has suggested that its summary dispositions are not entitled to full deference. *See* Caban v. Mohammed, 441 U.S. 380, 390 n.9 (1979).

[27] *See* Anastasoff v. United States, 235 F.3d 1054, 1055 (8th Cir. 2000).

[28] *See id.* at 1056.

[29] *See id.*

[30] In a recent journal article, Judge Arnold stated: "This practice disturbs me so much that it is hard to know where to begin in discussing it." Arnold, *supra* note 14, at 222. He described the practice as "startling" and argued that it "is creating a vast underground body of law." *Id.* at 221, 225. He also revealed that he has voted to change the circuit's rule on several occasions and that other members of the court have joined him. *See id.* at 225-26.

[31] The Ninth Circuit is already dealing with the issue. The circuit's Judicial Conference and Rules Advisory Committee recently recommended that the court allow citation to unpublished opinions. *See* Braun, *supra* note 14, at 94. The court rejected the recommendation, but the issue will remain on the table during a two-year public comment period. *See id.* In addition, a lawsuit was filed challenging the Ninth Circuit's prohibition against citing unpublished opinions. A district court dismissed the suit for lack of standing. *See* Schmier v. United States Court of Appeals for the Ninth Circuit, 136 F. Supp. 1048 (N.D. Cal. 2001). Several other courts have also responded to *Anastasoff*. *See* Williams v. Dallas Area Rapid Transit, 256 F.3d 260, 260-64 (5th Cir. 2001) (Smith J., dissenting) (recommending that en banc court address the constitutionality of non-precedential opinions); McGuinness v. Pepe, 150 F. Supp. 227, 234 (D. Mass. 2001) (citing *Anastasoff* for the propriety of discussing unpublished opinions); Community Visual Communications, Inc. v. City of San Antonio, 148 F. Supp. 2d 764, 774-75 (W.D. Tex. 2000) (discussing *Anastasoff* and requesting that the 5th Circuit reconsider its rule barring citation to unpublished opinions). For an analysis of Judge Arnold's argument by a sitting judge, see Danny J. Boggs & Brian Brooks, *Unpublished Opinions & The Nature of Precedent*, 4 GREEN BAG 2d 17 (2000). For a recently published "mini-symposium" on the issue, see *Anastasoff, Unpublished Opinions, and 'No-Citation' Rules*, 3 J. APP. PRAC. & PROCESS 169 (2001). For more general commentary on the practice of issuing non-precedential

scholarship on point, this Article examines the merits of Judge Arnold's claim that stare decisis is constitutionally required and that the practice of issuing non-precedential decisions violates this requirement.

Part I explores Judge Arnold's primary argument—that stare decisis is dictated by the founding generation's background assumptions about the authority of precedent and the nature of judicial power. According to Judge Arnold, the obligation to follow precedent was regarded in the late eighteenth century as "an immemorial custom, the way judging had always been carried out, part of the course of the law."[32] In addition, he claims, the "duty of the courts to follow their prior decisions was understood to derive from the nature of the judicial power itself"[33] and was viewed as essential to curtail the discretion of the judiciary and "to separate it from a dangerous union with the legislative power."[34] Judge Arnold concedes that opinions were seldom published in eighteenth-century America, but argues that this was no "impediment to the precedential authority of a judicial decision."[35] "Judges and lawyers of the day," he asserts, "recognized the authority of unpublished decisions even when they were established only by memory or by a lawyer's unpublished memorandum."[36]

Judge Arnold's reliance on the background assumptions of the founding generation is unobjectionable in itself. The Constitution is largely silent as to the "intrinsic nature and scope" of the judicial power,[37] and one way to establish the limits of that power is by reference to the common law tradition.[38] However, his

---

opinions, see, e.g., In re Rules of the United States Court of Appeals for the Tenth Circuit, 955 F.2d 36, 38 (10th Cir. 1992) (Holloway, J., dissenting) (criticizing the practice); National Classification Comm'n v. United States, 765 F.2d 164, 173 n.2 (D.C. Cir. 1985) (Wald, J., concurring) (same); Alex Kozinski & Stephen Reinhardt, Please Don't Cite This! Why We Don't Allow Citation to Unpublished Decisions, CALIFORNIA LAWYER, June 2000 (defending the practice); RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 170-71 (1996) (same); Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909 (1986) (same).

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

33 *Id.* at 903.

34 *Id.*

35 *Id.*

36 *Id.*

37 *See* EDWARD S. CORBIN, THE DOCTRINE OF JUDICIAL REVIEW 16 (1914).

38 *See* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia J., concurring) (stating that "the judicial Power of the United States . . . must be deemed to be the judicial power as understood by our common-law tradition"); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150 (1951) (Frankfurter J., concurring) (noting that the judicial power was modeled on the "business of the Colonial courts and the courts of Westminister when the Constitution was framed"); David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU. L. REV. 75, 84 (asserting that constitutional terms such as "judicial" should be given the meaning associated with them "through centuries of Anglo-American practice"). By accepting this premise, I am not endorsing originalism as an exclusive approach to constitutional interpretation. I support a pluralistic method that looks not

claim about the substance of that tradition is overstated. By tracing the development of precedent from the middle ages to the early years of the Republic, Part I demonstrates that stare decisis is not an immemorial custom, but developed slowly over hundreds of years and was still unsettled even in eighteenth-century England. Moreover, the doctrine did not result from deeply held beliefs about the nature of judicial power, but emerged out of a practice of following the past for the sake of convenience and stability. Only later did judges develop a theory to justify that practice, and the theory they settled on – that past decisions were evidence of the law, but not the law itself – was rooted in a natural law perspective that is at odds with the concept of binding precedent. This theory also limited the practical significance of precedent. Because judges viewed decisions only as evidence of the law, they looked to a line of opinions for guidance rather than to a single case. Judges also felt free to ignore decisions not published in credible law reports because those decisions could not be considered reliable evidence of the law. Finally, American adherence to precedent in the seventeenth and eighteenth centuries was especially weak. Many colonial courts never recognized an obligation to follow past decisions, and in the decades after independence, state courts abandoned large numbers of English and domestic precedents. The early Supreme Court also paid little attention to case law.

This history casts considerable doubt on the claim that the founding generation viewed stare decisis as an inherent limit on the exercise of judicial power. Moreover, it demonstrates that even if courts were expected to follow precedents generally, they were not expected to give precedential effect to every one of their decisions. As Judge Arnold acknowledges, many decisions in the eighteenth century were not published. Contrary to his assertion, however, these decisions were not considered binding. A judge could rely on an unpublished decision to support his independent judgment, but he could also reject that decision as unreliable evidence of the law. In fact, the lack of reliable law reports was a major impediment to acceptance of the idea that precedent is binding. Thus, the founding generation would not have been surprised by a system in which only some decisions were given precedential effect; they were already familiar with just such a system.

In Part II, I examine a related argument that is suggested, though not stated explicitly, by Judge Arnold. Even if stare decisis is not dictated by the founding generation's background assumptions, did the Framers nonetheless intend for the courts to be bound by precedent as part of the separation of powers and checks and balances implicit in the Constitution's structure? The ques-

---

only to original understanding and intent but also to structural, doctrinal, ethical, and prudential concerns. *See, e.g.*, Philip Bobbitt, *Constitutional Fate*, 58 TEX. L. REV. 695, 700-751 (1980) (describing a pluralistic approach to interpretation that includes six forms of constitutional argument). Nevertheless, I recognize that originalist claims carry considerable weight with many judges and scholars, which is why I spend so much energy challenging Judge Arnold's historical assertions.

tion here is not whether the founding generation thought the mere exercise of "judicial power" implied an obligation to follow precedent, but whether the Framers viewed stare decisis as a necessary check on the power of the courts.

Apart from an isolated statement by Hamilton, there is little evidence to support this theory and several reasons to reject it. First, the Framers expressed few concerns about the potential abuse of judicial power. Indeed, they thought the judiciary was a weak and feeble branch and worried that it would be overpowered by the other branches. Second, the Framers addressed whatever concerns they had about the courts by instituting several checks apart from stare decisis, including congressional control over jurisdiction. The Framers thought these checks were sufficient to restrain the judiciary, especially in light of its limited power. Finally, stare decisis is not the kind of mechanism the Framers relied on to prevent overreaching. The Framers did not trust officials to limit their own authority, so they designed *inter*-branch checks that pitted the ambitions of each branch against the ambitions of the others. Stare decisis is an *intra*-branch check that relies on the self-restraint of the very officials it is meant to constrain. It was precisely such self-policing that the Framers regarded as inadequate to prevent abuses of power.

In Part III, I acknowledge that even if stare decisis is not dictated by the founding generation's assumptions or by the system of checks and balances, it might nonetheless be essential to the legitimacy of the courts. By following the doctrine consistently for the better part of two centuries, the courts may have created an expectation that they will continue to do so. And to the extent that their legitimacy now rides on this expectation, they may no longer be free to abandon the doctrine. Even if this is true, however, it does not necessarily follow that non-precedential decisions threaten the courts' legitimacy. Stare decisis is not an end in itself, but a means to promote certain values, such as certainty, equality, efficiency, and judicial integrity. Although a complete abandonment of stare decisis might undermine these values, the discrete practice of issuing non-precedential opinions does not. Because a court must still follow past decisions even when it issues a non-precedential opinion, problems arise only when the non-precedential opinion differs in a meaningful way from the precedents upon which it is based (or when it is based on no precedents at all, as in cases of first impression). Therefore, as long as courts adopt a narrow rule for determining when non-precedential opinions will be issued, along with mechanisms to ensure compliance with that rule, the underlying values of stare decisis will be preserved.

Before laying out these arguments in detail, I should make clear exactly what I mean when I refer to stare decisis or the doctrine of precedent, two terms I use interchangeably throughout this Article.[39] I am not referring to a doctrine under which courts can never overrule past decisions. English courts have fol-

[39] In doing so, I follow the example of Professor Wasserstrom. *See* RICHARD A. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 39 (1961).

lowed such an absolute form of stare decisis for roughly the past century (with some recent exceptions), but American courts have never taken such a rigid view.[40] Instead, in this country stare decisis is generally understood to mean that precedent is presumptively binding. In other words, courts cannot depart from previous decisions simply because they disagree with them.[41] However, they can disregard precedent if they offer some special justification for doing so.[42]

One writer has argued that Judge Arnold did not have this formulation of stare decisis in mind when he wrote his opinion in *Anastasoff*. According to Professor Polly Price, Judge Arnold meant only that courts are required to begin their analysis with, and explain any departure from, past cases, not that they are bound by past decisions they disagree with.[43] Furthermore, Professor Price argues, because the evidence shows that most eighteenth-century courts at least used past cases as a starting point even if they did not always adhere to them, Judge Arnold's historical claim is defensible.[44]

Some of Judge Arnold's language supports Professor Price's interpretation. Near the end of the opinion, he writes that he "is not creating some rigid doctrine of eternal adherence to precedents"[45] and that "[i]f the reasoning of a case is exposed as faulty, or if other exigent circumstances justify it, precedents can be changed."[46] He also writes that when a court rejects a prior decision, it must make its reason "convincingly clear," yet does not state that a court must provide some reason other than its mere disagreement with the earlier decision.[47]

---

[40] *See* RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 5, 19, 135 (Clarendon Press 4th ed., 1991).

[41] *See* WASSERSTROM, *supra* note 39, at 52 (1961) ("For, if the doctrine of precedent has any significant meaning, it would seem necessary to imply that rules are to be followed because they are rules and not because they are 'correct' rules."); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 8 (2001) (noting that "[t]he doctrine of stare decisis would indeed be no doctrine at all if courts were free to overrule a past decision simply because they would have reached a different decision as an original matter").

[42] *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 443-44 (2000) (stating that stare decisis requires that a "departure from precedent . . . be supported by some special justification"); Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring) (stating that the decision to overrule must be supported by "reasons that go beyond mere demonstration that the overruled opinion was wrong"); Planned Parenthood v. Casey, 505 U.S. 833, 863 (1992) (O'Connor, Kennedy, and Souter, JJ., plurality opinion) (stating that "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided").

[43] *See* Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 84-85 (2000).

[44] *See id.*

[45] Anastasoff v. United States, 223 F.3d 898, 904-05 (8th Cir. 2000).

[46] *Id.*

[47] *See id.* at 905.

The majority of the language in *Anastasoff*, however, undermines Professor Price's reading. Judge Arnold writes that rules of law declared by courts "must be applied in subsequent cases to similarly situated parties,"[48] that it is the "judge's duty to follow precedent,"[49] that "in determining the law in one case, judges bind those in subsequent cases,"[50] and that "the Framers thought that, under the Constitution, judicial decisions would become binding precedents."[51] He also makes clear that he understands the difference between a requirement that courts begin their analysis with past decisions and a requirement that they adhere to those decisions, and that he believes Article III includes both.[52] For this reason, I will analyze his claim under the widely accepted definition of stare decisis articulated above.

I should also make clear that this Article does not address the important question of what circumstances justify the overruling of prior decisions.[53] As already stated, the essence of stare decisis is that courts cannot disregard precedents simply because they disagree with them.[54] For the doctrine to mean anything, decisions must be followed because they are precedent, not because they are correct. The latter is just a decision on the merits.[55] Beyond this baseline principle, however, there is much disagreement about precisely what qualifies as special justification. Some Supreme Court justices have suggested that a decision can be overruled if it is "egregiously incorrect"[56] or "inconsistent with the

---

48 *Id.* at 900.

49 *Id.* at 901.

50 *Id.*

51 *Id.* at 900-02.

52 In describing the practice of issuing non-precedential opinions, Judge Arnold writes that courts are saying to the bar: "We may have decided this question the opposite way yesterday, but this does not bind us today, and, what's more, you cannot even tell us what we did yesterday." *Id.* He then writes, "As we have tried to explain in this opinion, such a statement exceeds the judicial power, which is based on reason, not fiat." *Id.* at 904. If Judge Arnold believed that courts must only begin their analysis with past decisions, he would have found only the second part of his imagined statement problematic – the part where the courts tell the bar that it cannot remind them of past decisions. That he also objects to the courts' message that they are not bound by past decisions indicates that he thinks courts must not only start their analysis with precedent, but must adhere to it as well.

53 The Article also does not address the obligation of lower courts to follow the decisions of higher courts, which is sometimes misleadingly referred to as vertical stare decisis. This obligation does not derive from the mere existence of the decisions, but from the hierarchical relationship of the courts and is therefore fundamentally different from horizontal stare decisis. For a complete discussion of the constitutional and pragmatic aspects of vertical stare decisis, see Evan H. Caminker, *Why Must Inferior Courts Obey Supreme Court Precedents?*, 46 STAN. L. REV. 817 (1994).

54 *See* WASSERSTROM, *supra* note 39, at 52; Nelson, *supra* note 41, at 8.

55 *See* WASSERSTROM, *supra* note 39, at 52.

56 Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 304 (1985) (Stevens, J., dissenting).

sense of justice or with the social welfare"[57] or "insusceptible of principled application."[58] The Court has also indicated that other factors may be relevant, such as whether a decision has proved unworkable, has previously been questioned, has induced significant reliance, or rests on outdated facts.[59] At bottom, the answer a court gives to this problem depends upon how much it values the competing interests of finality and accuracy. This, in turn, is dictated largely by its views about the possibility of objectively right answers.[60] As two scholars have observed, "[T]he less we believe in legal truth, the more we will value legal finality."[61]

This Article does not attempt to resolve the problem. Instead, it considers whether the principle underlying this debate – that prior decisions cannot be overruled without special justification – is constitutionally mandated, and if so, whether the practice of issuing non-precedential decisions violates that principle. Though largely unexplored, this inquiry is central to our understanding of the federal courts and the power they possess, and it provides important context for the debate over just how far the courts should go in adhering to precedent.

I. STARE DECISIS AND THE COMMON LAW TRADITION

The impulse to look to the past when shaping the present has always been powerful. Whether out of self-doubt, humility, or respect for prior generations, judges throughout history have often sought guidance from those who came before them. In ancient Greece, judges relied on past cases to settle commercial disputes, while early Egyptian judges prepared a rudimentary system of law reports to help guide their decisions.[62] Roman judges also displayed a tendency to follow the example of their predecessors, especially in procedural matters.[63]

A willingness to consult past decisions for their wisdom or insight, however, is far different from an obligation to follow precedent simply because it exists.[64] And only common law judges have recognized an obligation to fol-

---

[57] Patterson v. McLean Credit Union, 491 U.S. 164, 174 (1989); Johnson v. Transp. Agency, 480 U.S. 616, 644-45 & n.4 (1987) (Stevens, J., concurring).

[58] BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 599 (1996) (Scalia J., dissenting).

[59] *See* Planned Parenthood v. Casey, 505 U.S. 833, 854-64 (1992) (O'Connor, Kennedy, and Souter, JJ., plurality opinion).

[60] *See* Nelson, *supra* note 41, at 48-52.

[61] CROSS & HARRIS, *supra* note 40, at 221.

[62] *See* CARLETON KEMP ALLEN, LAW IN THE MAKING 170, 177 n.1 (Clarendon Press 7th ed., 1964).

[63] *See id.* at 171, 175-76.

[64] *See* Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 30, 41 (1959).

low even those decisions they disagree with.[65] Though courts in Greece, Egypt, or Rome may have consulted past decisions for guidance, they were never bound, even presumptively, by those decisions, and they did not view precedent as a restraint on their power.[66] In fact, Justinian believed that the judicial practice of consulting past decisions threatened *his* power because it established the courts as the final arbiter of the law, a role he wanted for himself.[67] "No judge or arbitrator," he declared, "is to deem himself bound by juristic opinions which he considers wrong: still less by the decisions of learned prefects or other judges. . . . Decisions should be based on laws, not on precedents."[68]

The history of stare decisis, then, begins in the common law.[69] In this Part, I trace that history in an effort to establish the assumptions of the founding generation concerning the authority of decided cases and the nature of judicial power. The discussion unfolds in six sections. The first three sections explore the development and growth of case law in England from the middle ages to the early nineteenth century. Although this story has been told by a number of English historians, from whom the bulk of my material comes, I construct a narrative that pays special attention to the slow, organic evolution of stare decisis and the forces that propelled and hindered its progress. In the next two sections, I follow the story to America, beginning with the status of case law in the early colonies and continuing on to the Revolution and the decades immediately afterward. This territory is less well-traveled, and my account seeks to illustrate how the needs of the colonies created a distinctly American approach to precedent. The final section synthesizes the historical evidence, identifies important themes, draws conclusions, and addresses potential counter-arguments.

The history that follows is long and detailed, but with good reason. The rule that courts are bound by past decisions did not emerge all at once as a result of explicit premises about the authority of case law.[70] It developed slowly, almost imperceptibly over several hundred years, assuming its modern form only in the late eighteenth and early nineteenth centuries.[71] Indeed, as this history

---

65 *See* Harold J. Berman & Charles J. Reid Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 444-45 (1996).

66 *See* ALLEN, *supra* note 62, at 170.

67 *See id.* at 172-73.

68 *Id.*

69 Berman & Reid, *supra* note 65, at 444-45.

70 *See* Jim Evans, *Precedent in the Nineteenth Century*, *in* PRECEDENT IN LAW 35, 35-36 (Laurence Goldstein, ed., 1987); W. S. Holdsworth, *Case Law*, 50 L.Q. REV. 180, 190 (1934); Albert Kocourek & Harold Koven, *Renovation of the Common Law Through Stare Decisis*, 29 ILL. B.J. 971, 973-74 (1935).

71 There is some dispute about precisely when the modern doctrine of precedent took shape. Carleton Kemp Allen argued that although the doctrine was well-advanced in the late eighteenth century, the final touches were not added until the nineteenth century. *See* ALLEN, *supra* note 62, at 219, 219 n.1. Other scholars agree. *See* THEODORE F.T. PLUCKNETT, A CONCISE

makes clear, for most of its life the common law operated without a doctrine of stare decisis.[72]

A. *Case Law in Medieval England*

The earliest records of English law reveal little about the role of decided cases. Although court judgments were occasionally recorded during the Anglo-Saxon and Norman periods, they throw little light on the attitude toward judicial precedent.[73] Early legal texts are also unhelpful. The first treatise on the common law, written in 1187, refers to only one case and offers no explanation of the way in which courts reached decisions.[74] It was not until the mid-thirteenth century that a legal writer showed a discernible interest in the work of the courts.[75] In a treatise written around 1256, a judge named Henry de Bracton attempted to explain the principles and procedures of English law.[76] To illustrate his points, he included discussions of some five hundred cases decided by the Court of Common Pleas, the general trial court of the day.[77] He also expressed a strong belief in the value of precedents, stating that "[i]f any new and unusual matters arise, which have not before been seen in the realm, if like matters arise let them be decided by like since the decision is a good one for proceeding a

---

HISTORY OF THE COMMON LAW 308 (1929) (stating that "it is only in the nineteenth century that the present system of case law with its hierarchy of authorities was established"); CROSS & HARRIS, *supra* note 40, at 24 (noting that "the strict rules [of precedent] are the creature of the nineteenth and twentieth centuries"). William Holdsworth, however, maintained that the modern theory was substantially in place by the end of the eighteenth century. *See* Holdsworth, *supra* note 70, at 180. The dispute seems minor, given that Holdsworth did not rule out the possibility of additional refinements in the nineteenth century. *See* Kempin, *supra* note 64, at 30 n.4. In any case, these scholars all focused on the doctrine of precedent in English courts, and there is strong evidence that American courts did not accept the modern doctrine of precedent until the early nineteenth century. *See id.* at 36, 50-51 ("It can be established that American cases, up to the year 1800, had no firm doctrine of stare decisis."); *See also* Caminker, *supra* note 53, at 661 ("There is no consensus as to precisely when the notion of case law precedent gained currency in English common law. But most legal historians have agreed that the eighteenth and nineteenth centuries marked an important point of transition.").

72 TUBBS, *supra* note 2, at 18.

73 *See* T. Ellis Lewis, *The History of Judicial Precedent I*, 46 L.Q. REV. 207 (1930) [cited hereinafter as Lewis, *The History of Judicial Precedent I*]; PERCY H. WINFIELD, THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY 146 (1925) ("There is practically no trace of law reporting under the Norman kings.").

74 *See* ALLEN, *supra* note 62, at 187; Lewis, *The History of Judicial Precedent I*, *supra* note 73, at 209.

75 *See* Lewis, *The History of Judicial Precedent I*, *supra* note 73, at 212.

76 *See* TUBBS, *supra* note 2, at 7-20.

77 *See* Lewis, *The History of Judicial Precedent I*, *supra* note 73, at 209-212. Bracton also kept a private notebook that contained references to roughly 2,000 cases. *See id.* at 209.

similibus ad similia."[78]

Despite his regard for precedent, however, Bracton did not view past decisions as a binding source of authority. He carefully selected the cases in his treatise to reflect what he thought the law was, not simply to show what the courts had done.[79] Indeed, most of the cases he cited were older and conflicted with more recent opinions he disliked.[80] Bracton conceded that these older cases were no longer followed, but he believed that his contemporaries had perverted the law and he wanted to restore the custom that had existed a generation before.[81] Thus, it is clear that Bracton did not cite cases because he thought they were authoritative sources of law, but rather because he respected the judges who had decided them and because they helped to illustrate his views.[82]

It is also clear that Bracton's use of cases was unique in thirteenth-century England.[83] No other judge or lawyer collected court decisions for the simple reason that none of them had access to the Plea Rolls on which these judgments were recorded.[84] Bracton was well placed, however, and he used his influence to obtain access to the only set of Plea Rolls in existence, from which he copied selected decisions.[85] This was a difficult task. The rolls were immense and lacked any index to their contents; a lawyer interested in a given topic would have had to read straight through to locate a case on point.[86] So even if other lawyers had been granted access to the rolls, the difficulty of sorting through them would have made any use of cases by the profession at large "manifestly impossible."[87]

Still, Bracton's treatise was a significant step in the development of stare decisis because he familiarized lawyers with the use of cases to support

---

78 TUBBS, *supra* note 2, at 18-19.

79 *See id.* at 19; Lewis, *The History of Judicial Precedent I*, *supra* note 73, at 209-212.

80 *See* PLUCKNETT, *supra* note 71, at 304; TUBBS, *supra* note 2, at 19.

81 *See* PLUCKNETT, *supra* note 71, at 304.

82 *See id.* at 180 (stating that Bracton's use of cases was "not based upon their authority as sources of law, but upon his personal respect for the judges who decided them, and his belief that they raise and discuss questions upon lines which he considers sound"); TUBBS, *supra* note 2, at 20 (declaring that "Bracton's cases are carefully selected to show what the law ought to be, not because he thinks they have any binding authority"); Lewis, *The History of Judicial Precedent I*, *supra* note 73, at 210-12 (stating that Bracton's "cases were not authorities in the modern sense, but merely apposite illustrations of the point at issue").

83 *See* PLUCKNETT, *supra* note 71, at 303 (noting that Bracton was "undertaking research into the present and former condition of the law by a novel method which he had devised").

84 *See id.*

85 *See* HAROLD POTTER, POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 282 (A.K.R. Kiralfy ed., 4th ed., 1958); PLUCKNETT, *supra* note 71, at 181.

86 *See* PLUCKNETT, *supra* note 71, at 303.

87 *Id.* at 303.

arguments about the law.[88] It is also possible that his example inspired the creation of the Year Books, a digest of court cases that first appeared around 1283 and ran until the mid-sixteenth century.[89] Much has been written about the Year Books and it is sometimes assumed that they mark the beginning of the English doctrine of precedent. Yet although the Year Books contributed to the influence of cases in the common law, their development and content make clear that they "were not intended to collect precedents whose authority should be binding in later cases"[90] and were ill-suited to this purpose.

The precise origin of the Year Books is not known.[91] Some historians initially claimed that they were produced by official reporters paid by the king.[92] Modern scholars, however, believe the Year Books were begun by students or young lawyers who took notes of court proceedings and then distributed them to the bar.[93] The basis for this conclusion is the content of the books themselves. Unlike modern law reports, which include only the opinion of the court, the Year Books included everything but the opinion. They recounted the arguments, the form of pleading, some commentary on the case, even remarks about the weather, all in the gossipy tone of a professional newspaper.[94] However, they rarely reported the decision or the reasons behind it.[95] "What the judgment was nobody knew and nobody cared."[96] Such a record would have been valuable to students and young lawyers navigating the courts for the first time because the world of pleading was complex and tangled.[97] But it would have had little value for someone who wanted to know the content of the law or the ways in which courts reached decisions. It is for this reason that students are credited with creation of the Year Books.[98] It is for this same reason that scholars agree the Year Books were neither the result of an emerging belief in the binding force of precedent, nor were they the catalyst for such a doctrine.[99] The Year Books

---

88 *See id.* at 181; TUBBS, *supra* note 2, at 20.

89 *See* PLUCKNETT, *supra* note 71, at 182, 304.

90 *Id.*

91 *See* WINFIELD, *supra* note 73, at 158.

92 *See* POTTER, *supra* note 85, at 270.

93 *See id.* at 269; TUBBS, *supra* note 2, at 42.

94 *See* WINFIELD, *supra* note 73, at 159.

95 *See* ALLEN, *supra* note 62, at 200-01; POTTER, *supra* note 85, at 270; Lewis, *The History of Judicial Precedent I*, *supra* note 73, at 217-18.

96 THEODORE F.T. PLUCKNETT, EARLY ENGLISH LEGAL LITERATURE 103-04 (Cambridge 1958).

97 *See* POTTER, *supra* note 85, at 269-70; TUBBS, *supra* note 2, at 42.

98 *See* TUBBS, *supra* note 2, at 42, 180.

99 *See id.*

"were never adduced as actual authorities in court,"[100] and the absence of actual decisions made their use "as legal authority nearly impossible."[101]

If the Year Books could not support a system of binding precedent, however, they do document the emerging role of cases in the courts. Even in the early Year Books, judges and lawyers occasionally discuss past decisions.[102] And though such discussions are relatively rare – precedent is cited in roughly one of every twenty cases[103] – their presence demonstrates that reference to the past was at least considered a relevant legal argument.[104] In a 1310 case, for example, Chief Justice Bereford referred to a case "in the time of the late King Edward"[105] in which a woman was summoned to Parliament and then arraigned on numerous charges when she arrived. Noting that the King had refused to hear the case because the woman had not been warned of the charges, Bereford concluded with the words, "So say I here."[106] In other cases, Bereford used such phrases as "I have seen a case of"[107] or "Do you not remember the case of?"[108]

The Year Books also reveal other points about the use of precedent. Judges and lawyers who referred to past cases rarely cited them by name, relying instead on descriptions of the facts and general assertions about the year and court in which the case was decided.[109] This raised problems of credibility and accuracy.[110] Further complicating the picture, most lawyers and judges could not produce the records of past cases and were forced to recite the facts from memory or private notes.[111] Judges, of course, could get away with unsupported claims about past decisions, and many of them referred to cases ten, fifteen, and twenty years old without documentation.[112] On the other hand, if a lawyer cited

---

100 ALLEN, *supra* note 62, at 202.

101 TUBBS, *supra* note 2, at 42. *See also* ALLEN, *supra* note 62, at 201 ("To speak of a 'system of precedents' in connexion with the Year Books would be a complete anachronism."); PLUCKNETT, *supra* note 71, at 306 (noting that "the Year Books themselves . . . were not regarded as collections of authoritative or binding decisions").

102 *See* TUBBS, *supra* note 2, at 42-43.

103 *See id.* at 181.

104 *See* ALLEN, *supra* note 62, at 190.

105 *Id.* at 194.

106 *Id.* 194-95.

107 *Id.*

108 *Id.* at 194.

109 *See id.* at 191; TUBBS, *supra* note 2, at 43.

110 *See* TUBBS, *supra* note 2, at 43-44.

111 *See* T. Ellis Lewis, *The History of Judicial Precedent II*, 46 L.Q. REV. 341, 342 (1930) [cited hereinafter as Lewis, *The History of Judicial Precedent II*].

112 *See* ALLEN, *supra* note 62, at 193-95. Often, it appears, they were remembering their own years as practitioners. *See id.* at 196.

a case and could not support his account of the decision, he was likely to be called on it.[113] In one early fourteenth century case, a lawyer named Miggeley was asked where he had seen a certain practice. "Sir, in Trinity term last past, and of that I vouch the record," replied the lawyer, to which the judge shot back, "If you find it, I will give you my hat."[114]

When written pleadings replaced oral pleadings in the mid-fifteenth century, the content of the Year Books changed slightly. Under the old system, case reports focused on tactical and procedural issues.[115] Now, however, attention shifted to the substantive issues in a case, and the Year Book writers began to provide fuller accounts of cases, often discussing decisions at length.[116] This, in turn, made the Year Books a more fertile source of case law, and judges and lawyers began to cite precedents more frequently.[117] Judges also became increasingly conscious of the way their decisions would shape the law. In 1469, a judge named Yelverton acknowledged the future implications of a decision by stating, "[F]or this case has never been seen before, and therefore our present judgement will be taken for a [precedent] hereafter."[118] Yelverton's statement is the first recorded use of the term precedent, and it was echoed over the next few decades by other judges.[119]

Despite the increasing role of precedents, however, at no point during the Year Book period did judges think they were bound, even presumptively, by prior decisions.[120] They looked to these cases because they respected the opinions of their predecessors, because it seemed prudent to maintain consistency, and because they wanted to "save trouble."[121] But they did not think their power as judges was restrained by precedent. When faced with a prior decision they disliked, most judges simply dismissed it without reasons or ignored it altogether.[122] "[I]t was not incumbent upon them to say how the cases differed, or

---

113 *See* TUBBS, *supra* note 2, at 44.

114 *See* ALLEN, *supra* note 62, at 193.

115 *See* Lewis, *The History of Judicial Precedent II*, *supra* note 111, at 357.

116 *See* POTTER, *supra* note 85, at 271; TUBBS, *supra* note 2, at 181.

117 *See* ALLEN, *supra* note 62, at 190 n.3; POTTER, *supra* note 85, at 277; TUBBS, *supra* note 2, at 64; T. Ellis Lewis, *The History of Judicial Precedent III*, 47 L.Q. REV. 411 (1931) [cited hereinafter as Lewis, *The History of Judicial Precedent III*].

118 ALLEN, *supra* note 62, at 198-99.

119 *See id.*

120 *See id.* at 200; Lewis, *The History of Judicial Precedent I*, *supra* note 73, at 215; Lewis, *The History of Judicial Precedent III*, *supra* note 117, at 421-23.

121 PLUCKNETT, *supra* note 71, at 302; *See* Lewis, *The History of Judicial Precedent II*, *supra* note 111, at 354-55; Lewis, *The History of Judicial Precedent III*, *supra* note 117, at 416, 421-22.

122 *See* ALLEN, *supra* note 62, at 200.

why the decision was wrong."[123] In one case, Chief Justice Bereford responded to a claim that an earlier court had followed a certain procedure by declaring, "That was a mistake. We will not do so."[124] When urged in another case to award a type of damages that had been allowed previously, he replied, "You will never see them so long as I am here."[125] Even in later Year Books, judges often dismissed precedents outright. One judge in 1536, when told that his decision contradicted an earlier case, said simply, "Put this case out of your books for it is certainly not law."[126]

When judges did offer reasons for disregarding precedent, they usually invoked the nebulous principles of justice or reason. For instance, Bereford responded to an argument based on precedent by stating, "[J]udgments are founded not on examples, but on reason."[127] Several years later, Justice Sharshulle acknowledged a previous decision on the point before the court, but insisted that "no precedent is of such force as justice or that which is right."[128] When a lawyer responded that judges should follow the example of prior courts "for otherwise we do not know what the law is," one of Sharshulle's colleagues declared, "Law is the Will of the Justices."[129] He was quickly corrected by another judge, who said, "No; Law is Justice, or that which is right."[130]

The resort to justice or "that which is right" sheds light on the prevailing belief about the nature of law in medieval England. Although judges and lawyers frequently claimed that the common law was the custom that had always existed in England, they believed this custom was ultimately grounded in reason.[131] As a result, if a previous decision was consistent with the judge's view of reason, it might be considered for its instructive value. But if it conflicted with reason – in other words, if the judge disagreed with it – it could have no value. This is why judges "were not for a moment 'bound' by previous decisions of which they did not approve; justice stood above all precedent."[132] It also explains why, when judges later began to build a doctrine of precedent, they would need a theory to justify it.

---

123 Lewis, *The History of Judicial Precedent II*, *supra* note 111, at 348.

124 ALLEN, *supra* note 62, at 200.

125 *Id.*

126 Lewis, *The History of Judicial Precedent III*, *supra* note 117, at 414.

127 Lewis, *The History of Judicial Precedent II*, *supra* note 73, at 220.

128 POTTER, *supra* note 85, at 275.

129 *Id.*

130 *Id.*

131 *See* TUBBS, *supra* note 2, at 187-88.

132 ALLEN, *supra* note 62, at 200.

B. *The Growing Role of Precedent and the Influence of Sir Edward Coke*

In the middle of the sixteenth century, the Year Books abruptly ended and were replaced by a series of law reports named after their authors.[133] These reports, which continued until the nineteenth century, varied widely in quality and format; often they were compiled for the use of the author and his friends and published only upon later request.[134] But they continued the trend of the later Year Books in providing important information: the arguments of lawyers, the pleadings, and, usually, the decisions.[135] They also document the gradual emergence over the next two centuries of the view that precedents are not only instructive guides that help maintain consistency, but are authoritative statements of the law that should be followed in most cases.

The first step in this direction came in the late sixteenth and early seventeenth centuries when some judges began to follow precedents on procedural matters even when they disagreed with them.[136] In *Virley v. Gunstone*, for example, a pleading in the court below had been insufficient, but the appellate court did not reverse the judgment because similar pleadings had been allowed by other courts.[137] Further progress was brought about by the influence of Sir Edward Coke, who served as Chief Justice of the Court of Common Pleas from 1606-1613 and Chief Justice of the King's Bench from 1613-16.[138] Coke believed strongly that example and tradition should be followed, that the common law was ancient custom dating from time immemorial, and that the best way to learn that custom was to study the decisions of earlier courts.[139] "Our book cases" he said, in an early expression of the declaratory theory of law, "are the best proof [of] what the law is."[140] Consequently, Coke spent years poring over the Year Books and private reports, mastering the details of hundreds of cases.[141] When he had finished, he was the leading expert on the decisions of English courts.[142]

Coke helped secure a central role for precedent in two ways. First, he produced a thirteen-volume treatise known as "The Reports," which was the

---

133 *See id.* at 203.

134 *See* T. Ellis Lewis, *The History of Judicial Precedent IV*, 48 L.Q. REV. 230, 230-31 (1932) [cited hereinafter as Lewis, *The History of Judicial Precedent IV*].

135 *See id.* at 230-34.

136 *See* ALLEN, *supra* note 62, at 205-06.

137 *See id.* at 206.

138 *See* PLUCKNETT, *supra* note 71, at 163-65.

139 *See* ALLEN, *supra* note 62, at 207.

140 *Id.*

141 *See* PLUCKNETT, *supra* note 71, at 200, 203.

142 *See id.* at 202-04.

most thorough collection of cases that had ever appeared.[143] His primary goal in writing The Reports was to explain the principles of English law through cases handed down over the years.[144] His secondary objective was to improve the quality of law reports. Coke thought inaccurate and unreliable reporting had undermined the usefulness of precedents.[145] Often, he complained, various reporters described the same case so differently that "the true parts of the case have been disordered and disjointed, and most commonly the right reason and rule of the Judge utterly mistaken."[146] Coke hoped to remedy the situation by providing a model law report.[147] His model, it turned out, was less than ideal; Coke's report of a case was often a "rambling disquisition," "an uncertain mingling of genuine report, commentary, criticism, elementary instruction, and recondite legal history."[148] Yet due to the force of his personality and the sheer bulk of cases he cited, his reports had a tremendous influence.[149] As a result, lawyers could no longer afford to ignore precedent, and citations to past decisions multiplied.[150]

The second way in which Coke solidified the role of precedent was by citing Year Book cases to challenge the King's authority. During his ten years on the bench, Coke repeatedly cited ancient precedents to limit the jurisdiction of the ecclesiastical courts and the Chancery, both of which were controlled by the King.[151] He also relied on precedents to deny the King power to make arrests or to alter the common law and to argue that acts of Parliament "against common right and reason" were void.[152] His battle with the King intensified in the Case of Prohibitions, which involved a dispute over the jurisdiction of ecclesiastical courts.[153] Arguing on behalf of James I, the Archbishop of Canterbury

---

143 *See id.* at 200.

144 *See* ALLEN, *supra* note 62, at 208; Lewis, *The History of Judicial Precedent IV*, *supra* note 134, at 235.

145 *See* ALLEN, *supra* note 62, at 208.

146 *Id.*

147 *See id.*

148 PLUCKNETT, *supra* note 71, at 200-01; *see also* WINFIELD, *supra* note 73, at 188.

149 *See* ALLEN, *supra* note 62, at 208; PLUCKNETT, *supra* note 71, at 200-01; WINFIELD, *supra* note 73, at 189. In his report of Calvin's Case alone, Coke cited 140 decisions. One analysis of his reports found that he cited sixteen times the number of precedents that appeared in the next most prolific reporter of his day. *See* Lewis, *The History of Judicial Precedent IV*, *supra* note 134, at 236.

150 *See* Lewis, *The History of Judicial Precedent IV*, *supra* note 134, at 235.

151 *See* JOHN HOSTETTLER, SIR EDWARD COKE: A FORCE FOR FREEDOM, 63, 66-69 (Barry Rose Law Publishers Ltd. 1997).

152 *Id.* at 70, 73-75. Coke later conceded in his Institutes that statutes could not be struck down by reference to the common law. *See id.* at 75.

153 *See id.* at 69.

claimed that judges were merely agents of the King and that what could be done by an agent could be done by the principal.[154] When Coke responded that the King had no right to hear cases, James argued that "the Law was founded upon Reason, and that he and others had Reason as well as the Judges."[155] Coke replied that what was needed to decide cases was not natural reason, which anyone could possess, but an "artificial Reason and Judgment of Law, which requires long Study and Experience before that a man can attain to the cognizance of it."[156] That, he claimed, the King did not have.[157]

Coke's invocation of "artificial reason" had two implications. It asserted a special place for precedent in the decision-making process because the long study and experience he spoke of was essentially the learning of cases. It also claimed for the judiciary the sole power to determine what the law was because judges were the only officials with the requisite knowledge of prior cases. This was a bold move. Prior to this moment, the power to decide cases had been exercised not only by the judiciary, but also by the King and Parliament.[158] Now, by putting precedent at the center of the common law, Coke claimed for the judiciary exclusive competence to decide cases. This was precisely what Justinian had feared more than a thousand years earlier when he forbade judges to build the law by following each other's decisions.[159] It also illustrates that Coke's commitment to precedent did not limit judicial power, but the power of the King.[160]

Of course, if Coke and other judges had followed precedents strictly, their power would have been diminished also. However, "[w]ith the victory of the common-law courts, the judges were unwilling to restrict their freedom so far as to bind themselves absolutely to previous decisions."[161] Coke often distorted precedents to suit his own purposes and claimed that inconvenience alone

---

154 *See id.*

155 CATHERINE DRINKER BOWEN, THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE 304-05 (1957).

156 *Id.* at 305.

157 *See id.* His point was proved shortly afterward when the King attempted to hear a case but became so confused he was forced to give up. "I could get by well hearing one side only," he said, "but when both sides have been heard, by my soul I know not what is right." HOSTETTLER, *supra* note 151, at 71.

158 *See* ALLEN, *supra* note 62, at 245; PLUCKNETT, *supra* note 71, at 86.

159 *See supra* notes 67-68 and accompanying text.

160 *See* JOHN GREVILLE AGARD POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW 46-51 (1987); *see also* H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1537, & n.91 (1987) (discussing the way in which the use of precedent by Coke and later judges has been viewed as expanding the power of the common law courts).

161 Berman & Reid, *supra* note 65, at 450.

was reason enough to depart from past decisions.[162] He also believed that precedents were frequently emphasized at the expense of principles.[163] In the Year Book period, he wrote, lawyers cited general principles without reference to particular cases.[164] In his day, he complained, lawyers cited precedents indiscriminately. "[I]n so long arguments with such a farrago of authorities, it cannot be but there is much refuse, which ever doth weaken or lessen the weight of the argument."[165]

Judges not only feared that excessive reliance on precedent would obscure principles, but also that strict adherence to past decisions would undermine one of the common law's most important features – its flexibility. Especially in the seventeenth century, as European nations adopted codes based on Roman civil law, English lawyers regarded the adaptability of the common law as its great strength.[166] In an eloquent essay, a lawyer named John Davies argued that the common law was superior to civil law because its customs grew up slowly to meet the people's needs and became binding only after long use and acceptance:

> For the *written Laws* which are made either by the Edicts of Princes, or by Councils of Estates, are imposed upon the Subject before any Trial or Probation made, whether the same be fit and agreeable to the nature and disposition of the people or whether they will breed any inconvenience or no. But a Custome doth never become a Law to bind the people, until it hath been tried and approved time out of mind, during all which time there did hereby arise no inconvenience: for if it had been found inconvenient at any time, it had been used no longer, but had been interrupted, and consequently it had lost the virtue of a Law.[167]

Davies' argument provided a strong reason for following customs that

---

162 *See id.* at 446-47; Holdsworth, *supra* note 70, at 185 ("Coke is never tired of insisting that the fact that a rule would lead to inconvenient results – inconvenient either technically or substantially – is a good argument to prove that the rule is not law.").

163 *See* ALLEN, *supra* note 62, at 207-08.

164 *See id.*

165 *Id.*

166 *See* Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 186-87 (1998).

167 POCOCK, *supra* note 160, at 33. Matthew Hale similarly praised the adaptability of the common law, writing that "'long experience and use,' had successfully 'wrought out' the 'errors, distempers or iniquities of men or times.'" DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED 44 (1989) (quoting MATHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 30 (Charles M. Gray ed., Univ. of Chi. Press 1971)).

withstood the test of time: their very survival attested to their suitability for the English people. But this argument necessarily implied that until a custom became fixed by long usage, judges were not bound to follow it. To the contrary, they were obligated to test the usefulness of unfixed customs and to discard those that were unjust or inconvenient.[168] This is why, in Davies' opinion, the common law was superior to civil law. A rule announced in the civil law became fixed at once. In the common law, however, a rule only became fixed after its wisdom was proved by long experience.[169]

Coke expressed a similar view. In a famous passage from Calvin's Case, he declared that the law had been "fined and refined" by "long and continual experience" and "the trial of light and truth," and that as a result "no man ought to take it on himself to be wiser than the laws."[170] Although this statement urged adherence to fixed customs, it also suggested that the law was constantly changing to meet the needs of the people.[171] Indeed, Coke believed that judges should constantly refine the law, "declaring its principles with even greater precision and renewing it by application to the matter at hand."[172] He also believed that each decision should be "based on the experience of those before and tested by the experience of those after."[173] Under his view, therefore, attention to precedent was vital because it facilitated the continual accretion of knowledge. But a rigid approach to precedent would halt this process and fix the law in place, with no hope of further improvement.

C. *Blackstonian Conservatism v. Mansfield's Reformism*

Coke died in 1633, and for the next century and a half, "the whole theory and practice of precedent was in a highly fluctuating condition."[174] On the one hand, judges paid greater attention to past decisions than before and often expressed an obligation to follow decisions they disliked. In a 1706 case, Justice

---

168 *See* POCOCK, *supra* note 160, at 34 (explaining Davies's view that law enacted by a prince or parliament would grow obsolete, while the common law would adapt because it was constantly put to the test by judges).

169 *See id.* at 34. When the doctrine of precedent hardened in the nineteenth century, it was the common law that came to be seen as rigid and the civil law that appeared flexible. *See* Holdsworth, *supra* note 70, at 192-93.

170 POCOCK, *supra* note 160, at 35 (quoting SIR EDWARD COKE, SEVENTH REPORTS, CALVIN'S CASE (Thomas & Fraser (London 1826), vol. iv, page 6.)).

171 *See* POCOCK, *supra* note 160, at 36.

172 *Id.* at 35.

173 *Id.*

174 ALLEN, *supra* note 62, at 209; *see also* Lewis, *The History of Judicial Precedent IV*, *supra* note 134, at 247 (stating that "there were conflicting notions as to the authority of judicial decisions" during the seventeenth and eighteenth centuries and that "this conflict was not finally settled until late in the nineteenth century").

Powell explained that as long as precedent pointed in one direction, "he had to judge so, but had it been out of the way, he might have been of another opinion."[175] Reporters also placed greater emphasis on precedents, and some began to produce reports expressly for the purpose of being cited.[176] On the other hand, many judges continued to assert the right to disregard precedents they thought incorrect. In the 1673 case of *Bole v. Horton*, Chief Justice Vaughan stated that "if a Court give judgement judicially, another Court is not bound to give like judgement, unless it think that judgement first given was according to law."[177] Any court could make a mistake, Vaughan explained, "else errors in judgement would not be admitted, nor a reversal of them."[178]

> Therefore, if a judge conceives a judgement given in another Court to be erroneous, he being sworn to judge according to law, that is, in his conscience, ought not to give the like judgement, for that were to wrong every man having a like cause, because another was wronged before . . . .[179]

This mixed attitude toward precedent resulted largely from two factors. First, judges during this period still believed in natural law, which was at odds with the idea of binding precedent. As long as judges accepted the existence of universal and unchangeable principles, they could never be bound by precedents that conflicted with those principles.[180] Moreover, the belief in natural law raised a troubling question: if the law was separate and apart from judicial decisions, what authority could precedents ever have? The answer agreed upon was that although decided cases were not actually the law, they were good evidence of the law because they resulted from a long tradition of common law judging. Coke had subscribed to this declaratory theory of law when he wrote that "our booke cases are the best proof of what the law is."[181] Matthew Hale endorsed the view in 1713, stating that although cases "do not make a law properly so-called . . . yet they have a great weight and authority in expounding, declaring and pub-

---

175 Lewis, *The History of Judicial Precedent IV*, *supra* note 134, at 244.

176 *See id.* at 240-44.

177 ALLEN, *supra* note 62, at 209.

178 *Id.*

179 *Id.* at 209-10.

180 *See* CROSS & HARRIS, *supra* note 40, at 30 ("If a previous decision is only evidence of what the law is, no judge could ever be absolutely bound to follow it, and it could never be effectively overruled because a subsequent judge might always treat it as having some evidential value."); Peter Wesley-Smith, *Theories of Adjudication and the Status of Stare Decisis*, *in* PRECEDENT IN LAW 79 (Laurence Goldstein, ed., 1987) (noting that "[t]he law, unchanging and unchangeable in essential content, is formally independent of its judicial expression").

181 *See* ALLEN *supra* note 62, at 207.

lishing what the law of this kingdom is."[182] Blackstone also put his stamp on it in 1765: "[J]udicial decisions," he wrote, "are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law."[183]

The declaratory theory was a tidy compromise between the dictates of natural law and the growing pressure to follow precedent. Because judges regarded decisions as evidence of the law, they could justify their adherence to precedent by pointing to the weight of the authorities on a given issue. At the same time, they could evaluate past decisions as they would any other evidence.[184] Thus, they frequently claimed that a decision was bad evidence of the law because it was unjust, inconvenient, or absurd.[185] They also gave little weight to a single decision, or even two decisions, looking instead to "the current of authorities" or to a "strong and uniform . . . train of decisions."[186]

The second factor that contributed to the fluctuating state of precedent was the poor quality of reports for most of the seventeenth and eighteenth centuries. Because judges issued their decisions orally, the bar depended upon reporters for an accurate account of the court's judgment and reasoning.[187] Yet the reporters were notoriously unreliable and made numerous mistakes.[188] Chief Justice Holt complained in 1704 that "these scrambling reports . . . will make us to appear to posterity for a parcel of blockheads."[189] Reporters also omitted many cases that seemed unimportant or wrongly decided.[190] In their view, "a

---

182 *Id.* at 210.

183 WILLIAM BLACKSTONE, COMMENTARIES *69.

184 *See* Holdsworth, *supra* note 70, at 184-85; *see also* CROSS & HARRIS, *supra* note 40, at 35 ("The declaratory theory was beneficial in at least one respect. It provided a court with an excellent reason not to follow or apply a case of which it strongly disapproved.").

185 *See* Holdsworth, *supra* note 70, at 185-87.

186 James Ram, *The Science of Legal Judgments*, in 9 LAW LIBR. 76 (John S. Littell 1835); *see also* Berman & Reid, *supra* note 65, at 514; Holdsworth, *supra* note 70, at 188-89; Kempin, *supra* note 64, at 30.

187 *See* Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1, 5-9 (1986).

188 *See* ALLEN, *supra* note 62, at 221-28; Lewis, *The History of Judicial Precedent IV*, *supra* note 134, at 244.

189 ALLEN, *supra* note 62, at 228.

190 *See* WILLIAM DOMNARSKI, IN THE OPINION OF THE COURT 13 (1996). This practice was so pervasive that one reporter confessed to having "a drawer marked 'Bad Law' into which I threw all cases which seemed to me to be improperly ruled." *Id.* at 14. The reporters not only omitted many cases, but also supplemented their accounts of cases with their own opinions. *See id.* Because they did not distinguish their contributions from the official opinion, this extra-judicial commentary was hard to separate from the judicial pronouncement that was intended to serve as evidence of the law. *See id.* As a result, "[t]he common law of England . . . was fashioned as much by the reporters . . . as by the judges and their decisions." *Id.* at 13; *See also* ALLEN, *supra* note 62, at 231 (noting that "by 'editing,' some learned reporters formulated better law than

case was precedential and worth reporting only when it significantly interpreted existing law. Cases turning only on their facts or involving only slight variations of existing law were not reported."[191]

Judges did not object to the omission of cases; to the contrary, they worried that an excess of precedents would threaten the stability of the law, and they requested even thinner reports.[192] However, the inaccuracies of the reports substantially undermined the evidentiary value of many decisions. As one writer has explained, "The first and most important problem of evidence is its credibility, and the eighteenth-century judge . . . had to decide whether the witness (i.e. the reporter, or the particular report) was both competent and credible."[193] This explains why judges often refused to follow precedents they could not verify in a reliable report and usually looked to a line of decisions rather than to a single case.[194] It also explains why a theory of binding precedent could not take hold until the quality of reporting improved significantly.[195]

That began to occur in the mid-eighteenth century when a lawyer named James Burrows produced his first volume of reports.[196] Burrows' reports were the most useful and accurate yet to appear, and they encouraged an increased adherence to precedent.[197] Though a judge could still declare in 1760 that "erroneous points of practice . . . may be altered at pleasure when found to be absurd or inconvenient,"[198] most judges agreed that precedent should be followed in cases involving property or contracts, where certainty was essential. In *Morecock v. Dickins*,[199] a 1768 case, Lord Camden deferred to the authority of precedent, declaring that "[m]uch property has been settled, and conveyances have

---

the judges whom they were reporting").

191 DOMNARSKI, *supra* note 190, at 13. The practice of reporting only select English decisions continued into the twentieth century. *See* ARTHUR L. GOODHART, CASE LAW IN ENGLAND AND AMERICA IN ESSAYS IN JURISPRUDENCE AND COMMON LAW 57 (1931) (stating that "unless a case deals with a novel point of law – and novelty is strictly construed – it will rarely find its way into the Reports").

192 Coke "warned the judges, when there were not more than thirty books on the common law, against reporting all cases." Alden I. Rosbrook, *The Art of Judicial Reporting* 10 CORNELL L.Q. 103 (1925). Hale also argued for fewer reports, describing the growing body of precedents as "the rolling of a snowball [that] increaseth in bulk in every age, until it become utterly unmanageable." Braun, *supra* note 14, at 91.

193 ALLEN, *supra* note 62, at 230.

194 *See* Holdsworth, *supra* note 70, at 187-88.

195 *See* ALLEN, *supra* note 62, 219-222; Holdsworth, *supra* note 70, at 187-88; Kempin, *supra* note 64, at 31; TUBBS, *supra* note 2, at 181-82.

196 *See* ALLEN, *supra* note 62, at 209; WINFIELD, *supra* note 73, at 190.

197 *See* TUBBS, *supra* note 2, at 181; WINFIELD, *supra* note 73, at 190.

198 Robinson v. Bland, 96 Eng. Rep. 141, 142 (K.B. 1760).

199 27 Eng. Rep. 440 (Ch. 1768).

proceeded upon the ground of that determination . . . . and therefore I cannot take upon me to alter it."[200]

Yet conflicting views about the force of precedent persisted and were reflected in the two most prominent judges of the day, Blackstone and Lord Mansfield.[201] Blackstone, an avowed conservative, was a leading proponent of stare decisis in the second half of the eighteenth century.[202] In his *Commentaries on the Laws of England*, published in 1765, he argued that adherence to precedent not only promoted certainty and stability in the law, but also flowed from the judge's duty to find the law rather than make it.

> For it is an established rule to abide by former precedents where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.[203]

Blackstone qualified his statement by asserting that judges were not bound by precedents that were "flatly absurd or unjust," or "evidently contrary to reason."[204] Such decisions, he explained, were not good evidence of the law because "[w]hat is not reason is not law."[205] However, he was one of the first writers to speak of the rule of precedent as one of general obligation, and he left far less room for discretion than his predecessors.[206]

Mansfield, by contrast, was a reformer who often strayed outside the re-

---

200 *Id.* at 441.

201 *See* LIEBERMAN, *supra* note 167, at 86-87 (stating that precedents were viewed "in two lights" in the eighteenth century); Lewis, *The History of Judicial Precedent IV*, *supra* note 134, at 247 (noting that in the eighteenth century, "there were conflicting notions as to the authority of judicial decisions, and this conflict was not finally settled until late in the nineteenth century").

202 *See* LIEBERMAN, *supra* note 167, at 86; Lewis, *The History of Judicial Precedent IV*, *supra* note 134, at 246-47.

203 BLACKSTONE, *supra* note 183, at *69.

204 *Id.* at *70.

205 *Id.*

206 *See* MAX RADIN, STABILITY IN LAW 18 (Brandeis Lawyers Soc'y Publ'g., vol. 1, 1942-46).

straints of precedents.[207] During his thirty years as Chief Justice of the King's Bench, he rewrote large sections of the commercial law and appealed to "law's rational principles . . . even on occasion at the expense of established precedents."[208] "The law would be a strange science if it rested solely upon cases, and if after so large an increase of Commerce, Arts and Circumstances accruing, we must go to the time of Richard I to find a case and see what is Law," he wrote in a 1774 case.[209] "[P]recedent, though it be Evidence of law, is not Law itself, much less the whole of the Law."[210]

Mansfield "never entirely ignored precedents."[211] He occasionally followed rules he did not agree with because "the authorities are too strong," or "the cases cannot be got over."[212] But he did so because he believed the law should be stable, not because he thought he lacked the power to do otherwise. "Certainty," he wrote, "is one great object of all legal determinations."[213] Thus, if an established rule provided certainty, Mansfield would accept it.[214] If, however, the rule created confusion or if another rule would work better, Mansfield was quick to innovate.[215]

The conflict between "Blackstonian conservatism and Mansfield's reformism"[216] reached its climax in *Perrin v. Blake*. The case centered on a property rule laid down by Coke (known as the Rule in Shelley's Case) that prevented an individual from placing certain limits on his heirs unless he used a specific formula, even if his will otherwise clearly expressed his intent.[217] Ruling for the King's Bench, Mansfield declined to follow the rule, arguing that it defied reason to subvert the intention of a clearly written will.[218] He and his col-

---

207 *See* ALLEN, *supra* note 62, at 211; LIEBERMAN, *supra* note 167, at 122-133.

208 LIEBERMAN, *supra* note 167, at 124.

209 Jones v. Randall (1774) Cowp. 37.

210 *Id.* at 39. Mansfield expressed similar sentiments in other cases. *See, e.g.*, Rust v. Cooper, (1777) Cowper 629, 632 ("The law does not consist in particular cases, but in general principles which run through cases and govern the decision of them."); James v. Price, (1773) Lofft 219, 221 (the law is founded "in equity, reason, and good sense").

211 LIEBERMAN, *supra* note 167, at 126.

212 ALLEN, *supra* note 62, at 212.

213 *Id.* at 212.

214 *See* Daniel R. Coquillette, *Legal Ideology and Incorporation IV: The Nature of Civilian Influence on Modern Anglo-American Commercial Law*, 67 B.U. L. REV. 877, 957 (1987); Evans, *supra* note 70, at 36-37.

215 *See* ALLEN, *supra* note 62, at 216 n.1; Coquillette, *supra* note 214, at 958-62; Evans *supra* note 70, at 37.

216 LIEBERMAN, *supra* note 167, at 142.

217 *See id.* at 135.

218 *See id.*

leagues also attacked the pedigree of the rule, describing it as a feudal anachronism that "must not be extended one jot."[219] On appeal to the Exchequer Chamber, however, Mansfield's decision was reversed by Blackstone. Though he acknowledged that the rule was outdated, Blackstone argued that the courts were powerless to change it.[220]

> There is hardly an ancient rule of real property but what has in it more or less of a feudal tincture. . . . [B]ut whatever their parentage was, they are now adopted by the common law of England, incorporated into its body, and so interwoven with its policy, that no court of justice in this kingdom has either the *power* or (I trust) the *inclination* to disturb them . . . ."[221]

The decision in *Perrin v. Blake* can be seen as a "straightforward triumph of precedents over the reforming enterprises of" Mansfield.[222] Though Mansfield continued to press his innovations until he left the bench in 1788, in the years following his retirement the English doctrine of precedent hardened.[223] By the beginning of the nineteenth century, courts began to regard a line of decisions as absolutely binding, though they could still depart from a single decision, or even two decisions, for sufficient reasons.[224] Gradually that exception also disappeared and by the latter half of the nineteenth century, courts asserted an obligation to follow all prior cases, no matter how incorrect.[225] Even the House of Lords, which had never regarded its own precedents as binding, declared in 1861 that it was absolutely bound by its past decisions.[226]

These changes, however, were still many years off in the late eighteenth century and they were made possible by two developments: the gradual replacement of the declaratory theory with a positivist view of law and the emergence of a reliable system of law reports.[227] Until these things occurred, "the doctrine of *stare decisis* was a *principle* of adhering to decisions, not a set of rules. It did not identify any class of case as strictly binding, irrespective of cir-

---

219 *See id.* at 139.

220 *See id.*

221 *Id.* at 139-40.

222 *Id.* at 140.

223 *See* Evans, *supra* note 70, at 35.

224 *See id.* at 46-53; Ram, *supra* note 186, at 72-74.

225 *See* Evans, *supra* note 70, at 57-63.

226 *See* Beamish v. Beamish, 11 Eng. Rep. 7359 H.L. Cas. 273 (1861); *See also* Evans, *supra* note 70, at 55-58.

227 *See* Kempin, *supra* note 64, at 31-33.

cumstance."[228] Moreover, eighteenth-century English judges were not obligated to blindly accept precedents, but could argue for reason in the law, even at the expense of certainty and predictability.[229] "It was left to the nineteenth century finally to establish the rule that judges are absolutely bound by decisions."[230]

D. Precedent in Colonial America: A New Land and New Values

If the English adherence to precedent was qualified in the seventeenth and eighteenth centuries, the American commitment was even more attenuated. The defining characteristic of law in colonial America was its mutability. Struggling to survive on a strange continent, the colonists had little use for strict, formal rules applied by an exacting judiciary. They needed a legal system that could be molded to meet the challenges of a developing society.[231] As a result, from their earliest years they demonstrated a marked preference for adaptability over certainty, for latitude over restraint.

One of the first questions they faced was what law would govern. The colonists brought with them no set of rules and little knowledge of the common law.[232] They also had few of the resources – books, law schools, trained judges – needed for the development of a case law system. So instead the colonists improvised, adopting simple codes to govern their lives.[233] These codes covered crimes, torts, and contracts and often departed significantly from common law rules.[234] They also left many matters to the discretion of popularly elected magistrates or appointed judges.[235] In Massachusetts, magistrates were instructed to decide all cases according to the established laws of the colonies, but when the law is silent, to decide "as near the law of God as they can."[236] In Maryland, judges were authorized to fill in the gaps of the law by resorting to "equity and good conscience 'not neglecting (so far as the judge shall be informed therof

---

228 Evans, *supra* note 70, at 45.

229 *See id.*

230 POTTER, *supra* note 85, at 279.

231 *See* Paul Samuel Reinsch, *The English Common Law in the Early American Colonies, in* 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367, 369, 411, 414 (1907).

232 *See* Kempin, *supra* note 64, at 52 n.75. One exception seems to be Virginia, which was initially governed by a code that was printed in London in 1612 and enforced by the first governor, Sir Thomas Smith. *See* Reinsch, *supra* note 231, at 404. The code was exceedingly severe, however, and was later replaced by a set of laws passed by Virginia's first legislative assembly. *See id.*

233 *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 90-91 (Simon & Schuster, 1973 2nd ed.); Reinsch, *supra* note 231, at 410.

234 *See* Reinsch, *supra* note 231, at 410.

235 *See id.* at 369, 411.

236 *Id.* at 372.

and shall find no inconvenience in the application of this province) the rules by which right and justice useth and ought to be determined in England.'"[237]

Some colonists objected to the broad discretion of judges and argued for the adoption of "a settled rule of adjudicature from which the magistrates cannot swerve."[238] But two factors stood in their way. First, most settlers believed that the law of God or of nature was supreme and that statutes and precedents were binding only if consistent with this law.[239] To impose strict rules on judges was therefore pointless because they were bound to follow those rules only if they reflected divine or natural law. As one Massachusetts official told his constituents, "[t]he covenant between you and us is that we shall judge you and your causes by the rules of God's law and our own."[240]

Second, colonial courts were highly informal and unrefined. Due to a strong dislike for lawyers in nearly every colony, most of the judges had little or no legal training.[241] In addition, court records were rare, and the few that existed provided little information, usually noting only the verdict, not the facts or reasoning.[242] The result was that even had judges been inclined to follow strict rules and precedents, they lacked the resources and legal skills to do so.[243] Instead, they had to rely on their own judgment and "the pretense that the word of God is sufficient to rule us."[244]

Over time, the administration of law in the colonies evolved. The number of lawyers increased, the training of the legal profession improved, and the courts began to follow more refined methods of legal reasoning.[245] Lawyers also

---

237 *Id.* at 401. In Pennsylvania, "The administration of justice was rather founded upon the ideas of the magistrate than on any rules of positive law." *Id.* at 398. In New York, judgments were given "according to law and good conscience." *Id.* at 393.

238 *Id.* at 380.

239 *See id.* at 413.

240 *Id.* at 376.

241 *See id.* at 370, 382, 390, 412. In Delaware, no professionally trained lawyer sat as a judge until after the revolution. *See id.* at 396. In Massachusetts, only four of the 30 justices who sat between 1701 and 1776 were lawyers. *See* PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA 28 (1997).

242 *See* WILLIAM HAMILTON BRYSON, LAW REPORTING AND LEGAL RECORDS IN VIRGINIA 329; Kempin, *supra* note 64, at 34-35; Reinsch, *supra* note 231, at 382.

243 *See* Reinsch, *supra* note 231, at 410.

244 *Id.* at 382; *see also* OLIVER P. CHITWOOD, JUSTICE IN COLONIAL VIRGINIA 51 (De Capo Press NY 1971) (Originally published by Johns Hopkins Press 1905); GEORGE LEWIS CHUMBLEY, COLONIAL JUSTICE IN VIRGINIA: THE DEVELOPMENT OF A JUDICIAL SYSTEM, TYPICAL LAWS AND CASES OF THE PERIOD 156 (orig. published The Dietz Press, Richmond, 1938) (reprint Gaunt, Inc. 1997).

245 *See* Reinsch, *supra* note 231, at 370. The colonies also began to appoint professional lawyers to the bench. *See id.* In New York, a professional English lawyer was named Chief Justice in 1700 and resolved to introduce the common law and the practices of the English courts. *See id.* at 393-94. His approach was too aggressive, however, and after complaining

began to push for the adoption of common law rules and practices. Their hope was that as a case law system developed, the courts would gain even greater influence.[246] Some colonies had already taken steps to embrace the common law. Maryland, which alone among the colonies did not establish a code, had declared in 1642 that it would be governed by the common law, in so far as it was applicable to the needs of the colony.[247] Now, at the beginning of the eighteenth century, other colonies followed suit.[248] And, by the time of the revolution, most had either formally or informally adopted the common law.[249]

This "transfer" of English law to the colonies was not absolute, however. Lawyers supported the move because it made their technical expertise more valuable, whereas the public hoped to benefit from English liberties such as habeas corpus.[250] Both groups, however, agreed that not all common law rules and practices were suited for the colonies.[251] Therefore, as Maryland had done in 1642, most colonies reserved the right to depart from common law rules when necessary.[252] In South Carolina, for example, the common law was to be followed "except where it may be found inconsistent with the customs and laws of the province"[253] and in North Carolina, the common law governed "so far as shall be compatible with our way of living and trade."[254]

One result of this qualified adoption of the common law was a willingness by colonial legislatures to innovate.[255] Another result was that some judges,

---

that some colonists were unwilling to accept English laws, his popularity diminished. *See id.* Massachusetts appointed its first professional lawyer to the post of Chief Justice in 1712 and New Hampshire did the same in 1754. *See id.* at 385, 388.

246 *See id.* at 370.

247 *See id.* at 400, 410. Virginia had also expressed an early allegiance to the common law, using it as the model for its statutory scheme. *See id.* at 405.

248 *See id.* at 408.

249 *See id.* at 371; *See also* Morton J. Horwitz, *The Emergence of an Instrumental Conception of American Law: 1780-1820, in* 5 PERSPECTIVES IN AMERICAN HISTORY 294 (1971) [cited hereinafter as Horwitz, *The Emergence of an Instrumental Conception of American Law*]. The question of whether the colonies desired to adopt the common law was, of course, only one part of the debate. The other question was whether they were entitled to the common law. Although some English scholars, most notably Blackstone, claimed the colonies had no right to the common law until the King decided otherwise, the predominant view was to the contrary. *See id.* at 294.

250 *See* Reinsch, *supra* note 231, at 370, 384, 415.

251 *See id.* at 414-15.

252 *See* Horwitz, *The Emergence of an Instrumental Conception of American Law*, *supra* note 249, at 293; ROBERT VON MOSCHZISKER, STARE DECISIS, RES JUDICATA AND OTHER SELECTED ESSAYS 108 (Cyrus M. Dixon Publ'g. 1929).

253 Reinsch, *supra* note 231, at 408.

254 *Id.*

255 *See* CRAIG EVAN KLAFTER, REASON OVER PRECEDENTS: ORIGINS OF AMERICAN LEGAL

left free to choose among common law principles, never acquired a devotion to precedents and analogical reasoning.[256] In New Hampshire, one writer observes, "no man acknowledging a regular development of the law by precedents and finding an authoritative guidance in the adjudications of the common law judges, held judicial power . . . during the entire eighteenth century."[257] Samuel Livermore, the colony's Chief Justice in the 1780s, "paid little attention to precedent," and when reminded once of his previous decision in a similar case declared that "[e]very tub must stand on its own bottom."[258] John Dudley, an associate justice in the 1790s, took an equally dim view of precedents, describing Coke and Blackstone as "books that I never read and never will."[259]

Other judges, although not disdaining precedent, focused on principles rather than cases. James Otis, a Massachusetts lawyer and judge, argued in a 1761 case that it is "[b]etter to observe the known Principles of Law than any one Precedent."[260] The Provincial Court of Maryland agreed, stating in a 1772 case that a judge should begin with general principles and apply them to the case at hand.[261] When the Maryland court did cite a particular case, it often did so out of respect for the author, not out of an obligation to follow precedent.[262] Indeed, the court seemed influenced as much by extra-judicial authority as by actual cases. In the 1772 case of *Nicholson v. Sligh*,[263] the court sought the opinions of distinguished lawyers in the community, and in the 1771 case of *Belt v. Belt*,[264] it disregarded the decision in a previous case and instead followed the teachings of Mansfield.[265]

There is also some evidence that judges assumed the power to issue decisions that could not be cited in the future. In a 1764 Pennsylvania case, a cler-

---

THOUGHT 42 (1993). For instance, Massachusetts rejected the common law rule of primogeniture in favor of more progressive inheritance laws; Rhode Island and Pennsylvania passed laws fostering religious freedom; and Virginia offered creditors relief against fraudulent devices. *See id.*

256 *See* Reinsch, *supra* note 231, at 370-71.

257 *Id.* at 388.

258 King v. Hopkins, 57 N.H. 334, *7 (1876) (giving an account of Livermore's statement).

259 *Id.* at *9.

260 John Adams, *Minutes of the Argument*, in 2 LEGAL PAPERS OF JOHN ADAMS 127 (L. Kinvin Wroth & Hiller B. Zobel, eds., 1965).

261 *See* Kempin, *supra* note 64, at 37 (citing 1 Har. & M' Hen. 452, 453.).

262 *See id.* at 38.

263 1 H. & McH. 434, *2 (Md. 1772).

264 1 H. & McH. 409, *16 (Md. 1771).

265 *See* Kempin, *supra* note 64, at 37-38 ("[I]t should be noticed that Mansfield is cited, rather than his case. It appears that the case merely provides a medium for the expression of the opinion of that eminent jurist.").

gyman had been charged with performing a marriage in which the woman already had another husband.[266] The clergyman moved to delay the trial so that he could obtain an affidavit from a witness, but the government opposed his request. On appeal, the Supreme Court of Pennsylvania granted the delay, pointing out that the defendant's livelihood was at stake. But the court explicitly precluded citation of the case, declaring that its opinion was "not to be a Precedent."[267]

Some judges, of course, did stress the importance of following rules and precedents. Thomas Hutchinson, Chief Justice of Massachusetts, wrote in 1767 that "laws should be established, else Judges and Juries must go according to their Reason, that is, their Will."[268] Two years earlier, the Massachusetts Supreme Court declared that when a "Usage had been uninterrupted . . . the Construction of the Law [is] thereby established" and the court "therefore would make no Innovation."[269] At least one historian has read such statements as evidence that precedents were strictly followed by colonial judges.[270] Little additional proof is offered to support this conclusion, however, and it seems untenable in light of the examples above and the exceptional degree of discretion enjoyed by colonial courts. Moreover, any adherence to precedent would have been necessarily selective: few reliable reports of American cases were produced before the late eighteenth and early nineteenth centuries, and access to English reports was limited.[271] And although some lawyers and judges may have cited cases from memory, there is no evidence that anyone regarded these cases as binding.[272] As in England, the only cases that were viewed as authoritative

---

266 *See* King v. Rapp, 1 Dall. 11 (Pa. 1764).

267 *Id.*

268 Horwitz, *The Emergence of an Instrumental Conception of American Law*, *supra* note 249, at 292. According to John Adams, however, Hutchinson himself "wriggled to evade" cases that were cited as authority. *See* KARSTEN, *supra* note 241, at 28.

269 Horwitz, *The Emergence of an Instrumental Conception of American Law*, *supra* note 249, at 292.

270 *See id.* at 297; MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780-1860 8-9 (1977). Perhaps one reason Horwitz jumps so quickly to this conclusion is that his focus is on the status of stare decisis during the years after the Revolution, not in colonial America. Horwitz concludes that during this later period judges regularly disregarded precedent, and it is only by way of contrast that he makes any claims about pre-war attitudes toward precedent. *Id.* at 30.

271 *See* Kempin, *supra* note 64, at 34-35; KARSTEN, *supra* note 241, at 28 (noting that "[a]s late as 1783 only about 1 in every 5 of the nearly 150 volumes of published reports of the opinions of English courts were, in fact, available in America"); John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 571-78 (1993).

272 *See* KARSTEN, *supra* note 241, at 30. In his *Anastasoff* opinion, Judge Arnold cites Karsten for the proposition that judges and lawyers of the founding era "recognized the authority of unpublished decisions even when they were established only by memory or by a lawyer's unpublished memorandum." Anastasoff v. United States, 223 F.3d 898, 903 (8th Cir. 2000). Karsten says only that lawyers and judges sometimes used these decisions to help decide later

were those appearing in reliable law reports.[273] Thus, the more supportable conclusion is that despite some fidelity to past cases, colonial courts did not feel bound by precedents and were more likely to search for principles in the law than for a decision on all fours with the case at hand.[274]

E. The Post-Revolutionary Attitude Toward Precedent

The attitude of colonial courts toward precedent may be open to dispute, but there is little disagreement about the view that prevailed after the revolution. Although the majority of states adopted the common law as a rule of decision,[275] in the decades following the war the courts embarked on one of the most creative periods in American judicial history, shaping the law to meet the needs of the new nation and abandoning large numbers of precedents, both English and domestic. Judges during this period adopted an instrumental view of the law. They regularly considered the economic and social consequences of legal rules and did not hesitate to alter those they saw as impractical, illogical, or unjust.[276] Many of their actions "would have been regarded earlier as entirely within the powers of the legislature."[277] Indeed, by 1820, "the process of common-law decisionmaking had taken on many of the qualities of legislation."[278]

Early signs of this approach appeared in two 1786 cases. In *Wilford v. Grant*,[279] the Superior Court of Connecticut reviewed the convictions of two minors who had failed to appear at their trial because they were legally incapable of arranging for their defense.[280] The court concluded that the minors should have been represented by guardians and that their convictions should thus be reversed. The minors, however, had been convicted along with four adult co-defendants who were not entitled to a new trial, and common law precedents

---

cases. He does not suggest that judges felt bound by unpublished decisions that were cited from memory or from a lawyer's notes of a case. *See* KARSTEN, *supra* note 241, at 30. And given that English and American judges felt free to disregard decisions that did not appear in reliable law reports, it seems highly unlikely that they would have felt bound by decisions that were not reported at all.

273 *See* FRIEDMAN, *supra* note 233, at 322 ("What was not reported was barely law.").

274 *See* Kempin, *supra* note 64, at 36-37, 50 (stating that "it can be established that American cases, up to the year 1800, had no firm doctrine of stare decisis").

275 Between 1776 and 1884, eleven of the original 13 states adopted the common law. *See* Horwitz, *The Emergence of an Instrumental Conception of American Law*, *supra* note 249, at 291-92. The other two states, Rhode Island and Connecticut, followed suit in 1798 and 1818, respectively. *See id.* at 292 n.18.

276 *See id.* at 287-89.

277 *Id.* at 288.

278 *Id.*

279 1 Kirby 114 (Conn. 1786).

280 *See id.* at 114-15.

prohibited a partial reversal in such cases. The question before the court, therefore, was whether to follow precedent or its own sense of justice. The court's answer was unequivocal:

> The common law of England we are to pay great deference to, as being a general system of improved reason, and a source from whence our principles of jurisprudence have been mostly drawn: The rules, however, which have not been made our own by adoption, we are to examine, and so far vary from them as they may appear contrary to reason or unadapted to our local circumstances, the policy of our law, or simplicity of our practice; which for the reasons above suggested, we do in this case, and reverse the judgement as to the minors only.[281]

The Pennsylvania Supreme Court also articulated a liberal view of precedent in the 1786 case of *Kerlin's Lessee v. Bull*.[282] "A court is not bound to give a like judgment which had been given by a former court, unless they are of opinion that the first judgment was according to law," the court wrote, echoing Chief Justice Vaughan's statements from a century earlier.[283] "[F]or any court may err, and if a judge conceives that a judgment given by a former court is erroneous, he ought not in conscience to give the like judgment, he being sworn to judge according to law."[284]

Over the next several decades, courts offered numerous reasons for departing from common law precedents. Often, they asserted that a rule established in past cases was illogical, unreasonable, or inconsistent with public policy.[285] In *Silva v. Low*,[286] for instance, the New York Supreme Court departed from an English rule it considered unjust and irrational,[287] and in *Starr v. Starr*,[288] the Connecticut Supreme Court refused to follow precedent it viewed as incompatible with state law.[289]

The most frequent justification, however, was that common law rules

---

281 *Id.* at 116-17.

282 1 Dall. 175 (Pa. 1786).

283 *Id.* at 178.

284 *Id.* The court did follow precedent in *Kerlin's Lessee*, but primarily to maintain consistency. In addition, the court did not indicate that it thought the earlier case had been wrongly decided. *See id.* at 178-79.

285 *See* KLAFTER, *supra* note 255, at 57-58, 78-93.

286 1 Johns. Cas. 184, 190 (N.Y. Sup. Ct. 1799).

287 *See id.*

288 2 Root 303 (Conn. 1795).

289 *See id.* at *7-*8.

were inapplicable to American circumstances.[290] In the 1791 case of *Downman v. Downman's Executors*,[291] the Supreme Court of Virginia Court expressed its willingness to depart from English precedents requiring certain kinds of appeals to be filed immediately upon entry of a judgment.[292] The court noted that in a large country like the United States, attorneys and their clients lived far apart and could not communicate quickly about litigation. As a result, it concluded, "justice seems to require a relaxation of" the common law rule.[293] The Supreme Court of Judicature of New York also took into account American circumstances in the 1806 case of *Jackson, ex dem. Benton v. Laughhead*.[294] The question was whether a mortgagor who had fallen behind on his payments was entitled to notice before being ejected. Lord Mansfield had held in a 1778 case that such a mortgagor was not entitled to notice, but the New York court ruled otherwise.[295] The requirement of notice, it argued, would create "no hardship on the mortgagee, while a contrary practice may be much abused, in a country where so many thousand estates are held in this way."[296]

The *Benton* decision reflects the particular reluctance of courts to follow English decisions handed down after 1776. Most of the state provisions adopting the common law were limited expressly to English opinions issued prior to the revolution.[297] That qualification alone gave courts significant discretion; if an issue had not been settled by the English courts before that time, American judges had virtually legislative power to select the applicable rule.

But the courts not only disregarded post-1776 decisions; they also frequently departed from long-standing English precedents. In *Douglas v. Satterlee*,[298] an 1814 New York case, the plaintiff attempted to collect on a promissory note made by a man who had since died. The administrators of the man's estate responded that they would not have sufficient funds to pay off the note after settling previously submitted claims. Under an English rule followed since 1701, the administrators' response would have been taken as an admission that

---

290 *See* KLAFTER, *supra* note 255, at 78.

291 1 Va. (1 Wash.) 26 (1791).

292 *See id.*

293 *Id.* at *6.

294 2 Johns. 75 (N.Y. Sup. Ct. 1806).

295 *See id.* at 76.

296 *Id.* at 75-76. For other examples of courts adapting common law rules to meet American circumstances, see Jackson v. Brownson, 7 Johns. 227, 237 (N.Y. Sup. Ct. 1810) (opinion of Spencer, J.) (dismissing English law of waste as "inapplicable to a new, unsettled country" because it inhibited the improvement of land); Findlay v. Smith, 20 Va. (6 Munf.) 134, 142, 148 (Va. 1818) (same); Ross v. Poythress, 1 Va. (1 Wash.) 120 (1792) (rejecting English rule requiring that judgments be paid in cash because of the lack of currency in the United States).

297 *See* FRIEDMAN, *supra* note 233, at 110-12.

298 11 Johns. 16 (N.Y. Sup. Ct. 1814).

they *did* have sufficient funds because they had not yet paid off the other claims.[299] But Chief Justice Kent discarded the rule and found for the defendants. "If the conclusion was just, the rule would be applicable,"[300] Kent ruled. But because the administrators made clear that the estate's money was already accounted for, "it would be illogical and unjust," to interpret their response as an admission that they had sufficient funds to pay the note.[301] The New York court also departed from a long-standing rule in *Palmer v. Mulligan*,[302] an 1805 case in which a downstream mill owner sued an upstream mill owner for obstructing the flow of water. Under the common law, a downstream plaintiff could always recover damages for obstruction of the natural flow.[303] However, the New York court relied on a functional analysis, asking which outcome would most benefit the public. Its answer was that under the common law rule, the public "would be deprived of the benefit which always attends competition and rivalry."[304] Therefore, it ruled for the defendant.[305]

Courts also overturned a number of domestic precedents. In the 1804 case of *Duncanson v. M'Lure*,[306] the Pennsylvania Supreme Court was asked to rule upon the validity of a transaction between a British trader and an American citizen concerning the sale of a ship. In a decision five years earlier, the court had ruled that the transaction was valid.[307] But when the issue arose again in a related case, the court overruled the decision. "The charge delivered in the [earlier] case . . . was erroneous and untenable," the court said, because the transaction conflicted with the laws and policies of the United States.[308] The Supreme Court of Judicature of New York also overruled domestic precedent in *Cunningham v. Morrell*.[309] The case involved a construction contract that provided

---

299 *See id.*

300 *Id.*

301 *See id.* at 20.

302 3 Cai. R. 307 (N.Y. Sup. Ct. 1805).

303 *See* Horwitz, *The Emergence of an Instrumental Conception of American Law*, *supra* note 249, at 289.

304 *Palmer*, 3 Cai. R. at 314.

305 *See id.* Other cases in which courts disregarded English decisions issued before 1776 include Naylor v. Fosdick, 4 Day 146 (Conn. 1810) (overruling early eighteenth century English precedents allowing a debtor to assign his estate to a trustee without the consent of all his creditors); Chappel v. Brewster, 1 Kirby 175 (Conn. 1786); Wilford v Grant, 1 Kirby 114 (Conn. 1786) (ignoring established common law rule against partial reversals); Downman v. Downman's Executors, 1 Va. (1 Wash.) 26 (1791) (setting aside pleading requirement followed in England since 1705).

306 4 Dall. 308 (Pa. 1804).

307 *See* Murgatoyd v. Crawford, 3 Dall. 491 (Pa. 1799).

308 *See Duncanson*, 4. Dall. at *16.

309 10 Johns. 203 (N.Y. Sup. Ct. 1813).

for the builder to be paid in installments as work progressed. After completing part of the work and receiving one installment, the builder demanded the entire payment. Two prior New York cases held that the builder in such a situation could receive full payment even though the work was incomplete.[310] Chief Justice Kent, however, thought that outcome would subvert the understanding of the parties.[311] Instead of following precedent, he invoked "the good sense and justice of the case" to rule that the builder could not receive full payment until the project was finished.[312]

Kent's approach in *Cunningham* was typical of his attitude toward precedent. Although he believed, like Blackstone, that decided cases were "the highest evidence" of the law, he did not speak of the obligation to follow precedent as a question of judicial power.[313] Instead, he considered stare decisis to be a functional doctrine, writing that it would "be extremely inconvenient to the public if precedents were not duly followed . . . . If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property."[314]

Kent also believed that not every case should be included in the law reports that served as the source of precedents. "The evils resulting from an indigestible heap of laws and legal authorities are great and manifest," he wrote, echoing a common concern of the day.[315] "They destroy the certainty of the law, and promote litigation, delay, and subtilty . . . . The spirit of the present age, and the cause of truth and justice, require more simplicity in the system and that the text authorities should be reduced within manageable limits."[316]

Finally, Kent made clear that judges were not bound by a previous decision if it could "be shown that the law was misunderstood or misapplied."[317] And to dispel any doubt that judges were bound by erroneous precedents, he

---

310 *See id.* at 204.

311 *See id.* at 205.

312 *See id.* at 205-06. For other cases in which state courts overruled domestic precedents, see Bevan v. Taylor, 7 Serg. & Rawle 397 (Pa. 1821) (overruling Walker v. Smith, 3 Yeates 480 (Pa. 1803)); Girard v. Taggart, 5 Serg. & Rawle 19 (Pa. 1818) (overruling Willing v. Rowland, 4 Dall. 106 (Pa. 1791)); Conner v. Shepherd, 15 Mass. 164 (1818) (overruling Nash v. Boltwood (Mass. 1783)); Coffin v. Coffin, 2 Mass. 358, 366 (1807) (overruling Holbrook v. Pratt, 1 Mass. 96 (1805)); Fitch v. Brainerd, 2 Day 163 (Conn. 1805) (overruling Kellogg v. Adams (1788)).

313 JAMES KENT, I COMMENTARIES ON AMERICAN LAW 474 (14th ed., John M. Gould, ed. 1896) (1826).

314 *Id.* at 475.

315 *Id*; *see also* DOMNARSKI, *supra* note 190, at 11 (noting that Daniel Webster thought reporters should "omit those cases that turned merely on evidence, while others suggested that cases should be omitted if they covered the same ground as already published cases").

316 KENT, *supra* note 313, at 475.

317 *Id.* at 474.

offered the following extensive qualification:

> I wish not to be understood to press too strongly the doctrine of stare decisis when I recollect that there are more than one thousand cases to be pointed out in the English and American books of reports, which have been overruled, doubted, or limited in their application. It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and *such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error.* Even a series of decisions are not always conclusive evidence of what is law; and *the revision of a decision very often resolves itself into a mere question of expediency*, depending upon the consideration of the importance of certainty in the rule, and the extent of the property to be affected by a change in it.[318]

Other influential judges expressed similar views. James Wilson, the preeminent legal scholar of his day and the second most influential member at the Constitutional Convention, wrote that precedents were strong evidence of the common law because they were decided by wise judges whose opinions should be respected.[319] Like Kent, however, Wilson did not suggest that following prior decisions was a function of judicial power. Instead, he wrote that "every *prudent* and *cautious* judge will appreciate them."[320] In addition, he warned that because the authority of the law rests on common consent, not on decided cases, judges should not follow precedents automatically.[321] English precedents, especially, "must be rejected or adopted very cautiously," he wrote. "[W]e must have in this country an American common law drawing its doctrines from American wants and needs."[322]

Even the conservative judge Nathaniel Chipman agreed that past cases should be discarded if inapplicable to present circumstances. Many precedents, he wrote in 1792, "were made at a time, when the state of society, and of property were very different, from what they are at present."[323] Therefore, judges

---

318 *Id.* at 477 (emphasis added).

319 *See* JAMES WILSON, THE WORKS OF JAMES WILSON 2, 37, 501-02 (Harvard Univ. Press 1967) (Robert Green McCloskey ed.) (1804).

320 *Id.* at 501-02 (emphasis added).

321 *See id.*

322 *Id.* at 40.

323 Nathaniel Chipman, *A Dissertation on the Act Adopting the Common and Statute Laws of England*, in N. CHIP. 124-26 (1793).

should not "entertain[] a blind veneration for ancient rules, maxims, and precedents" but should "distinguish between those, which are founded on the principles of human nature in society, which are permanent and universal, and those which are dictated by the circumstances, policy, manners, morals, and religion of the age."[324]

The post-colonial attitude toward precedent can be seen most clearly through the eyes of state judges like Kent and Chipman because state courts were the main forum for litigating common law issues. The U.S. Supreme Court primarily heard cases involving federal statutes and the Constitution.[325] Even so, several factors suggest that the early Supreme Court was equally ambivalent about the authority of decided cases.

First, when the court was established in 1789, it made no provision for the reporting of its opinions, most of which were issued orally.[326] Not until a Philadelphia lawyer named Dallas took on the task upon his own initiative in 1791 was there a system in place for circulating the opinions of the nation's highest court.[327] Even then, the opinions were not readily available. Dallas occasionally took five or six years to finish a term's decisions.[328] He also made numerous errors and omitted many cases he did not think important.[329] Dallas finally quit in 1800 when the Court moved to Washington, but his successor, a Boston lawyer named William Cranch, was not much better.[330] It was only in the 1830's, when the Court began to file written opinions, that the reports improved.[331] Thus, for the first few decades of the Supreme Court's history, the substance of its decisions was unknown to large segments of the bar.[332] Although not proof of the justices' attitude toward precedent, the lack of reliable reporters at least demonstrates that adherence to decided cases would have been difficult in the Court's early years.[333]

Second, until 1800, when Marshall was appointed Chief Justice, the Court issued its decisions seriatim, meaning that each justice gave his own opin-

---

324 *Id.* at 129, 137-38.

325 *See* David Currie, *The Constitution in the Supreme Court, 1789-1801*, 48 U. CHI. L. REV 819 (1981).

326 *See* DOMNARSKI, *supra* note 190, at 7.

327 *See id.* at 6-7; Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1294-95 (1985).

328 *See* DOMNARSKI, *supra* note 190, at 7; Joyce, *supra* note 327, at 1301.

329 *See* DOMNARSKI, *supra* note 190, at 7; Joyce, *supra* note 327, at 1303-05.

330 *See* DOMNARSKI, *supra* note 190, at 7.

331 *See id.* at 8-9.

332 *See id.* at 9.

333 *See* Caminker, *supra* note 53, at 833 n.69.

ion.[334] This made it difficult for lawyers to rely on even those precedents they were familiar with, because although the decision was usually clear, the underlying reasons varied depending upon which opinion one read.[335]

Third, the content of the Court's opinions showed little concern for precedent. Many early justices wrote page after page without citing authority.[336] For them, the "law had to be chiseled out of basic principle; the traditions of the past were merely evidence of principle and rebuttable."[337] Marshall, in particular, wasted little ink citing cases even when they supported his conclusion, relying instead on the force of his own arguments.[338] As one scholar has observed, Marshall had a "marked disdain for reliance on precedent"[339] so that "precedent, while not wholly foreign to [his] opinions, was seldom prominent there."[340]

The Court did rely on past decisions in some cases. In *Ex Parte Bollman*,[341] the Court faced the question of whether it had jurisdiction to issue a writ of habeas corpus. Although the Court had issued habeas writs in two previous cases, the jurisdictional question had never been raised. Nonetheless, Marshall relied in part on the earlier cases to conclude that "the question is long since

---

334 *See* FRIEDMAN, *supra* note 233, at 134.

335 *See* Caminker, *supra* note 53, at 833 n.64.

336 *See* FRIEDMAN, *supra* note 233, at 135.

337 *Id.* at 119; *See also* David E. Engdahl, *What's In a Name? The Constitutionality of Multiple "Supreme" Courts*, 66 IND. L.J. 457, 502 n.225 (1991) (stating that "[i]n its earliest years, the Supreme Court cited its own prior holdings not as precedents in the common law sense, but to spare the trouble of reiterating sound analyses to which the Justices still subscribed. It was a kind of shorthand, not an ascription of authoritativeness.").

338 *See* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 667 (1999). The lack of reliable law reports and the fact that the court often addressed issues of first impression may explain Marshall's inattention to precedent in some cases. In others cases, however, he apparently was well aware that precedents supported his opinion, yet did not rely on them for his conclusion. *See id.*

339 David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646, 661, 674, 701 (1982). Marshall's lack of regard for precedent was apparent even during his years as a practicing attorney. In Ross v. Poythress, 1 Va. (1 Wash.) 155 (1792), for example, he argued successfully that the English rule requiring judgments to be paid in cash should be abandoned because of the lack of currency in the United States.

340 Currie, *supra* note 339, at 680. On the other hand, the Marshall Court only overruled three opinions during its thirty-five-year span, the lowest number of any Supreme Court since. *See* DAVID M. O'BRIEN, 1 CONSTITUTIONAL LAW & POLITICS 118 (W.W. Norton & Co. 1997). This statistic, however, is misleading. The Marshall Court frequently addressed questions of first impression, while later courts have been faced with "an ever-expanding target of 'settled decisions.'" Lee, *supra* note 338, at 649. In addition, the Marshall court was dominated by one justice – Marshall. *See id.* He wrote the majority of opinions and encountered little dissent from associate justices. It is not surprising, therefore, that his Court did not overrule many of its opinions. *See id.*

341 8 U.S. (4 Cranch) 75 (1807).

decided."[342] In *Ogden v. Saunders*,[343] an 1827 case dealing with the constitutionality of state bankruptcy laws, Justice Washington even followed a precedent he disagreed with:

> To the decision of this Court, made in the case of Sturges v. Crowninshield, and to the reasoning of the learned Judge who delivered that opinion, I entirely submit; although I did not then, nor can I now bring my mind to concur in that part of it which admits the constitutional power of the State legislatures to pass bankrupt laws.[344]

Other important writers also emphasized the importance of following precedent. William Cranch, the second reporter of the Court's opinions, wrote in the preface to his reports that adherence to precedent was necessary to limit the discretion of judges.[345] "Every case decided," he wrote, "is a check upon the judge. He can not decide a similar case differently, without strong reasons, which, for his own justification, he will wish to make public."[346] Alexander Hamilton wrote in *Federalist No. 78* that in order "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents."[347] James Madison also wrote about the role of precedent on two occasions. In a 1789 letter to Samuel Johnson, he explained that "the exposition of the Constitution is frequently a copious source, and must continue so until its meaning on all great points shall have been settled by precedents."[348] Forty-two years later, he wrote to another friend that "judicial precedents, when formed on due discussion and consideration, and deliberately sanctioned by reviews and repetitions, [are] regarded as of binding influence, or rather, of authoritative force in settling the meaning of a law."[349]

These statements, however, do not outweigh the evidence presented above. Indeed, the second letter from Madison supports the proposition that the

---

342 *See id.* at 100. Marshall also relied on precedent in *Hampton v. McConnell*, 16 U.S. (3 (Wheat.) 234 (1818) (writing that the case was covered by a doctrine announced in an earlier decision).

343 25 U.S. (12 Wheat.) 213 (1827).

344 *Id.* at 263-64.

345 *See* William Cranch, *Preface of* 5 U.S. (1 Cranch) iii-iv (1804).

346 *Id.*

347 THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

348 Letter from James Madison to Samuel Johnson (June 21, 1789), *reprinted in* 12 PAPERS OF JAMES MADISON 250 (1979).

349 Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), *reprinted in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 391 (Marvin Meyers, ed. 1981).

founding generation had not adopted the rule of stare decisis. Madison does not claim that an individual decision is binding on subsequent judges. Instead, like English judges stretching back to Coke, he writes that only when a decision is "deliberately sanctioned by reviews and repetitions" does it have "binding influence."[350] Although left unstated, the implication is that until a decision has been reviewed and repeated, judges are free to evaluate its merits.

This same idea was expressed in even stronger terms by Justice Johnson in the 1807 case of *Ex Parte Bollman*. Dissenting from Justice Marshall's majority opinion, Justice Johnson argued that incorrectly decided cases could never bind the Court:

> Uniformity in decisions is often as important as their abstract justice. But I deny that a court is precluded from the right or exempted from the necessity of examining into the correctness or consistency of its own decisions, or those of any other tribunal. . . . Strange indeed would be the doctrine, that an inadvertency once committed by a court shall ever after impose on it the necessity of persisting in its error. A case that cannot be tested by principle is not law, and in a thousand instances have such cases been declared so by courts of justice.[351]

The American commitment to stare decisis gradually strengthened during the nineteenth century, due mainly to the emergence of reliable law reports and a positivist conception of law.[352] In 1833, Justice Story maintained that adherence to precedent was a central feature of American jurisprudence.[353] "A more alarming doctrine could not be promulgated by any American court," he wrote, "than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles."[354] State courts also began to recognize the binding effect of precedent.[355] "By 1851 . . . Maryland was prepared to accept a prior decision even though it was distasteful," and "[b]y 1853 . . . Pennsylvania was in the camp of the ardent

---

350 *Id.*

351 *Ex Parte* Bollman, 8 U.S. (4 Cranch) 75, 103-04 (Johnson J., dissenting).

352 *See* Kempin, *supra* note 64, at 31-36.

353 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 377, at 349-50 (Rothman & Co. 1991). Story, of course, greatly increased the power of the federal courts by expanding their admiralty jurisdiction and by ruling in *Swift v. Tyson* that diversity cases would be governed by federal common law. *See* GRANT GILMORE, THE AGES OF AMERICAN LAW 30-35 (1977). In addition, some scholars have suggested that his statement about the importance of precedent was directed toward the practice of vertical, not horizontal, stare decisis. *See* Lee, *supra* note 338, at 664 n.84.

354 STORY, *supra* note 353, § 377 at 349.

355 *See* Kempin, *supra* note 64, at 36-51.

followers of stare decisis."[356] American courts never adopted the nineteenth century English rule that precedents are absolutely binding in all circumstances. They instead reserved the right to overrule decisions that were absurd or egregiously incorrect.[357] However, during the "formative period of the doctrine . . . from 1800 to 1850," they accepted that prior decisions were presumptively binding and that mere disagreement alone is not sufficient to justify departure from the past.[358]

F. The Historical Evidence Summarized

This long and complex history demonstrates that the role of precedent has passed through many stages that are not marked by clear and definite boundaries. As a result, it is difficult to determine with precision what a given generation assumed about the authority of decided cases. Nonetheless, certain themes have emerged that cast considerable doubt on the claim that the founding generation viewed stare decisis as an inherent limit on judicial power.

First, the obligation to follow precedent is not an immemorial custom, nor was it likely regarded as one in the late eighteenth century. For hundreds of years, precedent played only a minor role in the decision-making process of English courts. Although judges sometimes looked to prior decisions for guidance, they did not feel bound to follow those decisions or even to explain their departure from them. It was not until the latter half of the eighteenth century that judges recognized a general obligation to follow decisions they disagreed with, and even then they were divided on the matter. As late as 1760, an English judge could state that "erroneous points of practice . . . may be altered at pleasure when found to be absurd or inconvenient,"[359] and Mansfield rewrote entire areas of established doctrine, asserting that the law is founded not in cases, but "in equity, reason, and good sense."[360] In America, many colonial courts never recognized an obligation to follow precedent. And during the decades after independence, state courts discarded English and American precedents wholesale, while the Supreme Court paid little attention to decided cases, choosing instead to reason from principle. The founding generation may not have been familiar with the entire history of precedent, but it was familiar with the work of eighteenth century courts. And it would have been difficult to assume from that evidence that stare decisis was an established doctrine, let alone immemorial.

Second, the practice of adhering to prior decisions did not emerge from

---

356 *Id.* at 39, 41.

357 FRIEDMAN, *supra* note 233, at 21; Kempin, *supra* note 64, at 41.

358 Kempin, *supra* note 64, at 50-52.

359 Robinson v. Bland, 96 Eng. Rep. 141, 144 (K.B. 1760).

360 LIEBERMAN, *supra* note 167, at 86, 122-32; *see also supra* notes 207-10 and accompanying text.

explicit theories about the nature of judicial power. Judges began to follow precedent for the sake of convenience and stability, not because they felt powerless to do otherwise. Even in the late eighteenth century, adherence to precedent was justified chiefly in instrumental terms. Although Blackstone argued that the obligation to follow precedent flowed from the judge's duty to find law rather than make it, judges such as Mansfield, Camden, and Kent viewed the practice primarily as a way to promote certainty, and Wilson spoke of it in terms of prudence and caution.[361] Therefore, even if the founding generation assumed that courts would adhere to precedent, it did not necessarily regard that adherence as a question of judicial power. Like many judges of the time, the founding generation could have assumed that courts were empowered to ignore precedent, but that they chose not to for instrumental reasons. Indeed, given the frequent departure from precedent in late eighteenth-century America, this is the more plausible conclusion.

Third, the history of stare decisis "is intimately bound up with the history of law reporting."[362] Until judges had a reliable record of prior cases, they were not willing to bind themselves to decisions with which they disagreed. Mansfield, for one, often "'blam[ed] the reporter' when he did not like an inconvenient decision."[363] English reports significantly improved in the mid-eighteenth century, and consequently judges displayed increased adherence to precedent. But thorough and accurate law reports were virtually nonexistent in colonial America. Not until the very end of the eighteenth century and the beginning of the nineteenth century did reliable reports begin to appear, and then only in the older states.[364] This explains why the American commitment to precedent strengthened in the first half of the nineteenth century, and it suggests that stare decisis was not an established doctrine in this country by 1789.[365]

Of course, this conclusion is not indisputable. There is some evidence that American lawyers prior to and shortly after the framing of the Constitution recognized an obligation to follow precedents they disagreed with. William Cranch believed that courts could not depart from past cases without "strong reasons"[366] and Alexander Hamilton thought it was "indispensable that they should be bound down by strict rules and precedents."[367] In addition, although post-revolutionary courts showed little deference to precedents, many of the

---

361 *See supra* notes 199-200, 211-215, 313-14, 319-20 and accompanying text.

362 Lewis, *The History of Judicial Precedent I*, *supra* note 73, at 207; *see also* TUBBS, *supra* note 2, at 180.

363 ALLEN, *supra* note 62, at 222.

364 *See* Kempin, *supra* note 64, at 34-35, 34 n.21.

365 *See id.* at 50 (stating that "it can be established that American cases, up to the year 1800, had no firm doctrine of stare decisis").

366 *See supra* note 346 and accompanying text.

367 *See supra* note 347 and accompanying text.

cases they refused to follow were handed down by English courts after the Declaration of Independence. Many others were older English decisions that were inapplicable to American circumstances. One could argue that these two categories of cases were no more entitled to deference than the decisions of French or Italian courts and that American departure from them is therefore beside the point.[368] As long as American courts did not readily overrule domestic precedents, it might be possible to reconcile their approach to precedent with modern views of stare decisis.

However, American courts did freely overrule domestic precedents[369] and the leading judges of the day fully encouraged this practice. As late as 1826, Kent wrote that "hasty and crude decisions" should "be examined without fear, and revised without reluctance," rather than have the "beauty and harmony of the system destroyed by the perpetuity of *error*."[370] He also acknowledged that the "revision of a decision very often resolves itself into a mere question of expediency."[371] These are not the statements of a judge who considered courts bound by decisions with which they disagreed. And taken together with similar statements by other judges and the Supreme Court's lack of attention to precedent, they make it difficult to conclude that the founding generation had adopted the principle of stare decisis.

Even if it had, however, the historical evidence strongly indicates that courts were not expected to give precedential effect to *every* decision they issued. Under the declaratory theory, which was embraced throughout the eighteenth century, courts paid little attention to individual cases and looked instead to the "current of authorities" or a "strong and uniform train of decisions."[372] As a result, a single decision had little importance and could only exert precedential force when combined with other similar decisions. This differs substantially from modern practice, in which even one decision is viewed as authoritative, and it suggests that the founding generation would not have been troubled by the omission of individual decisions from the body of case law.

In fact, many decisions were omitted during the eighteenth century. Reporters had complete control over which decisions to report and often discarded those they disagreed with or thought unimportant. And because judges only recognized an obligation to follow decisions that appeared in reliable reports, omitted cases were essentially lost forever. Judges did not object to this situation, however, as one would expect if they viewed themselves bound by every deci-

---

368 It is harder to make this case for pre-revolutionary English decisions than for later cases, because most colonies expressly adopted the common law as it existed prior to 1776. However, as pointed out above, most colonies left room for the courts to depart from common law rules when local conditions made it necessary. *See supra* notes 252-54 and accompanying text.

369 *See supra* notes 306-12 and accompanying text.

370 KENT, *supra* note 313, at 477 (emphasis added).

371 *Id.*

372 *See supra* note 186 and accompanying text.

sion they issued. Instead, they encouraged reporters to ignore decisions that turned only on the facts or involved only slight variations of existing law.[373] Coke "warned the judges, when there were not more than thirty books on the common law, against reporting all cases"[374] and Kent believed that "an indigestible heap of laws and legal authorities" would "destroy the certainty of the law, and promote litigation, delay, and subtilty."[375] Given this evidence, it seems doubtful that the practice of issuing non-precedential opinions conflicts with the background assumptions of the founding generation. In 1789, such decisions were already an accepted fact.

There is one final point I should make. One defender of *Anastasoff* argues that although critics might "quibble" with the historical record presented by Judge Arnold, his claim fares well under a preponderance of the evidence standard.[376] I hope I have shown that one might do more than quibble with Judge Arnold's historical record and that his claim does not survive even a preponderance of the evidence test. I would also argue that judges and scholars should be required to meet a higher burden than this when making novel assertions about the content of constitutional terms on the basis of original understanding. Especially when an established and valuable practice is being questioned, we should demand greater certainty that the proposed interpretation reflects the meaning of the Constitution as the founding generation understood it.

II. STARE DECISIS AS A STRUCTURAL CHECK

The historical evidence examined in Part I significantly undermines the claim that stare decisis is constitutionally required and that the practice of issuing non-precedential decisions violates that requirement. But even if stare decisis is not dictated by the founding generation's assumptions about the nature of judicial power, one might argue that the Framers nonetheless intended for the courts to be bound by precedent as part of the separation of powers and checks and balances implicit in the Constitution's structure. Though the Framers generally modeled the courts after the common law, they were not opposed to innovation.[377] The complete segregation of the courts from the legislature was itself a departure from an English tradition in which the House of Lords both wrote the laws and served as the supreme appellate court.[378] The Framers also declined to

---

373 *See supra* notes 192, 315-16 and accompanying text.

374 Rosbrook, *supra* note 192, at 131.

375 KENT, *supra* note 313, at 475.

376 *See* Price, *supra* note 43, at 92-93.

377 *See* Robert J. Pushaw, Jr., *Article III's Case / Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 467 (1994) (noting that "the Framers broke with English legal principles in significant ways.").

378 *See* SOTIRIOS A. BARBER, THE CONSTITUTION OF JUDICIAL POWER 50 (1993).

follow the English division between law and equity, choosing instead to extend the jurisdiction of federal courts to both areas.[379] It is possible, then, that regardless of how precedent was viewed by English and colonial courts, the Framers might have intended for the courts of the United States to follow a different practice. In fact, one might argue that it was precisely because of other deviations from the common law that strict adherence to precedent would have been regarded as necessary. Federal courts were given far greater power and independence than English courts. Not only do they have the power of judicial review, but their decisions cannot be reversed by the legislature.[380] In light of these enlargements of the judicial power, it is certainly reasonable to ask whether the Framers contemplated a new mechanism to check that power.

One response to the question is that if the Framers did intend for the doctrine of precedent to limit judicial power, that intention was not reflected in the work of the early Supreme Court. As demonstrated above, the Supreme Court paid little attention to the force of precedent in its first several decades. The Court made no arrangement for its decisions to be reported, an undertaking that was essential to the practice of stare decisis, especially in an era when opinions were issued orally and seriatim; without reports, even the justices would have had trouble keeping track of past decisions and the reasoning behind them.[381] When a lawyer did begin reporting the Court's decisions upon his own initiative, the Court showed little concern for the way in which his inaccuracies and omissions undermined the usefulness of his reports.[382] Finally, even when they were aware of prior cases, the justices spent little time discussing them. Marshall put more stock in his own arguments than in past cases, and he and other justices often displayed an indifferent attitude toward precedent.[383]

This pattern of conduct is strong evidence that the Framers did not intend for stare decisis to operate as a check on judicial power. Five of the first ten justices appointed to the Court had attended the Constitutional Convention and one of them, James Wilson, played a major role in writing Article III.[384] Most other early justices had participated in the ratification debates, either writing

---

379 *See* U.S. CONST. art. III, § 2, cl. 1 (stating that "[t]he judicial Power shall extend to all Cases, in Law and Equity").

380 *See* Dickerson v. United States, 530 U.S. 428, 443-44 (2000); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

381 *See* Caminker, *supra* note 53, at 833 n.69.

382 *See* Joyce, *supra* note 327, at 1298 (noting that the Court provided little assistance to early reporters, declining to reduce even its most important opinions to writing).

383 *See* Currie, *supra* note 339, at 656, 661, 680, 694, 701; Lee, *supra* note 338, at 669-671.

384 Apart from Wilson, the justices who had attended the Convention were John Blair Jr., John Rutledge, William Patterson, and Oliver Ellsworth. *See* THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 25, 155, 347, 389, 535 (Melvin I. Urofsky, ed., Garland Publ'g, Inc., 1994).

essays or attending the ratifying conventions of their respective states.[385] If the doctrine of precedent was intended to function as a constitutional check, these justices would have known. Yet their early attitude toward decided cases does not reveal any awareness of a constitutional obligation to follow precedent.

Of course, relying on the attitude of the early Supreme Court to determine the Framers' intent is potentially hazardous. The Court had (and still has) a deep self-interest in the extent of its power and likely would have been reluctant to explain how that power was limited. In addition, despite its early inattention to precedent, by the mid-nineteenth century the Court had adopted a more rigorous approach to decided cases that is arguably consistent with the claim that stare decisis is constitutionally required.[386] It is unclear why the later Supreme Court would have been more attuned to the Framers' intentions or more willing to assert the limits of its own power. But the danger of relying exclusively on early Supreme Court practice is sufficient to justify a more thorough response to the claim that the Framers intended stare decisis to serve as a check on judicial power.

In this Part, I offer three additional arguments to rebut this claim. First, the Framers expressed few concerns about the potential abuse of judicial power. They viewed the judiciary as the least dangerous branch of government and felt little need to impose extensive checks on its power. To the contrary, they worried that the courts would be overwhelmed by the other branches. Second, the Framers addressed whatever concerns they had about the potential abuse of judicial power by instituting several checks apart from stare decisis, most notably congressional control over jurisdiction. The Framers thought these checks were sufficient to restrain the judiciary, especially in light of its limited power. Finally, stare decisis is not the sort of mechanism the Framers relied on to prevent overreaching. Because the Framers did not trust government officials to control their own appetite for power, they utilized *inter*-branch checks that pitted the ambition of each branch against the ambitions of the others. Stare decisis is an *intra*-branch check that depends upon the self-restraint of the very branch it is meant to constrain. It was precisely such self-policing that the Framers rejected as inadequate to prevent abuses of power.

A. *The Least Dangerous Branch*

One of the glaring defects of the Articles of Confederation was its lack of a national judiciary.[387] The Articles authorized Congress to appoint tribunals with limited jurisdiction over admiralty cases and interstate disputes, but these

---

385 John Jay, the first Chief Justice, wrote five of the Federalist Papers, while William Cushing and James Iredell attended their states' ratifying conventions. *See id.*

386 *See supra* note 353 and accompanying text.

387 *See* Pushaw, *supra* note 377, at 468.

courts served an advisory role and had little power.[388] There was no central court to ensure the supremacy and uniformity of national laws.[389] Only state courts had jurisdiction to interpret those laws, and they were notoriously biased toward state interests.[390]

The Framers recognized this problem. Hamilton argued in *Federalist No. 22* that "the circumstance that crowns the defects of the confederation . . . [is] the want of a judiciary power. . . . Laws are a dead letter without courts to expound and define their true meaning and operation."[391] Madison expressed related complaints in a letter to Thomas Jefferson, arguing that the lack of restraints on state governments was a "serious evil."[392] To address these concerns, the Constitution vested the judicial power of the United States in "one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[393] It then extended that power to a broad range of matters, including all cases arising under federal law, treaties, and the Constitution.[394]

The Framers also thought it was vital to ensure the strength and independence of the federal judiciary. Indeed, the delegates to the Constitutional Convention exhibited more agreement on this point "than on all other aspects of the judiciary article."[395] They believed that the judiciary was in danger of being "overpowered, awed, or influenced by its co-ordinate branches"[396] and that the only way to prevent this was by insulating it from political pressure.[397] Therefore, they provided that federal judges "shall hold their Offices during good behavior,"[398] a phrase modeled on an English statute that effectively guaranteed life tenure.[399] They also provided that the salary of federal judges could not be

---

388 *See id.* at 469.

389 *See* BARBER, *supra* note 378, at 34.

390 *See id.*; Pushaw, *supra* note 377, at 469.

391 THE FEDERALIST NO. 22, at 130 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Elsewhere, Hamilton called it a "striking absurdity" that the government lacked "even . . . the shadow of constitutional power to enforce the execution of its own laws." THE FEDERALIST NO. 21, at 130 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

392 Liebman & Ryan, *supra* note 18, at 709-10.

393 U.S. CONST. art. III, § 1.

394 *See id.* at § 2, cl. 1.

395 Liebman & Ryan, *supra* note 18, at 747. The only disagreement was over "how best to insure [that] independence." *Id.* at 713.

396 THE FEDERALIST NO. 78, *supra* note 347, at 523 (Alexander Hamilton).

397 *Id.*

398 U.S. CONST. art. III, § 1.

399 *See* Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 47 (1995). Life tenure for judges was considered so essential that the colonists listed the lack of tenure as one of their complaints against King George III in the Declaration of Independence. *See* THE DECLARATION OF INDEPENDENCE

diminished during their time in office.[400]

The Framers expressed little concern that judges would abuse this independence. Writing in *Federalist No. 78*, Hamilton maintained that the judicial branch was the "least dangerous to the political rights of the Constitution"[401] and "beyond comparison the weakest of the three departments of power."[402] The executive branch "dispenses the honors" and holds the "sword of the community,"[403] he stated, while the legislative branch controls the purse and makes "the rules by which the duties and rights of every citizen are to be regulated."[404] The judiciary "has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment . . . ."[405]

The Framers also thought that because the judiciary had been largely insulated from politics, it would be the least susceptible to partisan passions. Madison claimed that judges, due to the method of their appointment and their life tenure, "are too far removed from the people to share much in their prepossessions."[406] According to Hamilton, the judiciary's independence would be "the citadel of the public justice and the public security."[407]

The Framers did acknowledge the potential danger of a combination of judicial and legislative power.[408] However, this was because they worried that the legislature would usurp the power of the courts, not the other way around. In *Federalist No. 48*, Madison warned that legislative power must be checked because that "department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."[409] To illustrate his point, he noted that in Virginia, an unchecked legislature had "'in many instances, decided rights which should have been left to judiciary controversy'"[410] and in Pennsyl-

---

para. 10 (U.S. 1776) (stating that "[h]e has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries").

400 *See* U.S. CONST. art. III, § 1.

401 THE FEDERALIST NO. 78, *supra* note 347, at 522 (Alexander Hamilton).

402 *Id.* at 522-23.

403 *Id.* at 522.

404 *Id.*

405 *Id.* at 523.

406 THE FEDERALIST NO. 49, at 341 (James Madison) (Jacob E. Cooke ed., 1961).

407 THE FEDERALIST NO. 78, *supra* note 347, at 524 (Alexander Hamilton).

408 *See id.* at 523 ("For I agree, that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'") (quoting MONTESQUIEU, SPIRIT OF THE LAWS, vol. 1 at 181).

409 THE FEDERALIST NO. 48, at 333 (James Madison) (Jacob E. Cooke ed., 1961).

410 *Id.* at 336 (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 195).

vania "cases belonging to the judiciary department [had been] frequently drawn within legislative cognizance and determination."[411]

The Anti-Federalists, it is true, raised numerous concerns about the independence of the judiciary. They argued against life tenure and urged that the legislature be given power to overrule judicial decisions.[412] According to Brutus, the Constitution would make

> judges independent in the full sense of the word. There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.[413]

The Anti-Federalist fear, however, related primarily to concerns of federalism, not separation of powers. In his main essay on the judiciary, Brutus complained that the federal courts would use their discretion not to limit Congressional power, but to expand that power at the expense of the states.[414] In cases pitting the federal government against the states, he claimed, judges would favor the former in the hopes of increasing their influence and salaries.[415] In the process, he argued, they would silently and imperceptibly subvert the legislative, executive, and judicial powers of the states.[416]

In addition, some Anti-Federalist rhetoric indicates that they thought adherence to precedent would exacerbate this problem rather than remedy it. In connection with his earlier complaint, Brutus predicted that the courts would seize upon expansive precedents, first to enlarge their own power and then to enlarge the power of the national legislature.[417] Brutus did not suggest that the courts would be bound by these precedents, only that they would use them to justify their actions.[418] Another opponent of the Constitution argued that strict judicial rules could ultimately result in judicial tyranny.[419] Over time, he argued,

---

411 *Id.* at 337. Hamilton also made clear that the legislature was more likely to assume judicial power than the courts were to encroach on legislative turf. *See* THE FEDERALIST NO. 78, *supra* note 347, at 522-23 (Alexander Hamilton).

412 THE ANTI-FEDERALIST 183 (Herbert J. Storing ed., 1985).

413 *Id.*

414 *See id.* at 165-66.

415 *See id.* at 166-67.

416 *See id.*

417 *See id.* at 186.

418 *See* Paulsen, *supra* note 5, at 1575-76.

419 *See* THE FEDERAL FARMER XV, *reprinted in* 2 THE COMPLETE ANTI FEDERALIST 315, 316

"the rigid systems of the law courts naturally become more severe and arbitrary, if not carefully tempered and guarded by the constitution, and by laws, from time to time."[420] This echoed the refrain of English judges who feared that strict adherence to precedent would lead to inflexible and unreasonable rules,[421] and it suggests that at least some Anti-Federalists would have opposed a constitutional requirement of stare decisis.

B. "All the Usual and Most Effectual Precautions"

Despite the general lack of concern that the judiciary would overreach its authority – especially vis a vis the other branches of the federal government – the Framers did not leave the judiciary entirely unchecked. The Constitution includes a number of mechanisms, both direct and indirect, that the Framers thought were sufficient to prevent any abuses of power.

First, the political branches were given control over the appointment and removal process. Judges must be nominated by the president and confirmed by a majority of the Senate, a double hurdle that ensures they enjoy widespread support and confidence.[422] The Senate's involvement in this process was especially important to the Framers because it allowed the states to block the appointment of judges hostile to state interests.[423] History has proven the potency of this check. Of the 148 nominations to the Supreme Court, twenty-nine have been rejected and many others have been influenced by the threat of rejection.[424] Still, because the Framers recognized that judges might become overzealous once in office, they also gave Congress the power to impeach judges for "Treason, Bribery or other high Crimes and Misdemeanors."[425] This power has rarely been used,[426] and some Anti-Federalists complained that it provided little secu-

---

(Herbert J. Storing ed., 1981).

420 *Id.*

421 *See supra* notes 167-73, 207-20 and accompanying text.

422 *See* U.S. CONST. art. II, § 2, cl. 2 (declaring that "[the president] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law").

423 *See* THE FEDERALIST NO. 76, at 513 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (noting that the involvement of the Senate "would tend greatly to prevent the appointment of unfit characters from State prejudice").

424 *See* Michael J. Gerhardt, *Putting Presidential Performance in the Federal Appointments Process in Perspective*, 47 CASE W. RES. L. REV. 1359, 1366 n.10 (1997) (predicting that "the possibility of rejection" would motivate the president to nominate acceptable candidates for civil offices); *see also* THE FEDERALIST NO. 76, *supra* note 423, at 513 (Alexander Hamilton).

425 U.S. CONST. art. II, § 4.

426 Thirteen federal judges have been impeached by the House of Representatives. Of those, seven have been convicted by the Senate and removed from office. *See* Sambhav N. Sanker, *Disciplining the Professional Judge*, 88 CAL. L. REV. 1233, 1249 (2000).

rity because the process of impeachment and conviction would be too difficult.[427] But the Framers put great faith in this measure. Hamilton claimed that the power to impeach judges "is alone a complete security" against the threat of judicial overreaching.[428] "There never can be a danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with [the power of impeachment] . . . ."[429] That few judges have actually been impeached does not necessarily undermine his claim; it could demonstrate that the threat of impeachment has effectively deterred judicial excess.

The second way the Framers restrained the judiciary was by withholding the power to enforce its own judgments. Although this is a negative, not a positive, restraint, it operates in much the same way. In order for the judiciary to effectuate its decisions, it must win the cooperation of the executive branch, in the same way that Congress must solicit the aid of the president to enforce the laws it makes.[430] As Hamilton wrote in *Federalist No. 78*, the judiciary is so weak it "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[431]

Finally, the Framers gave Congress control over the establishment of lower federal courts and the jurisdiction of both those courts and the Supreme Court.[432] Although Article III invites the creation of lower federal courts,[433] Congress ultimately has discretion over the size and shape of the federal judiciary.[434] In addition, although the Supreme Court's original jurisdiction is Constitutionally guaranteed, its appellate jurisdiction is subject to the exceptions and regulations made by Congress.[435] Congress also has latitude over the jurisdiction of the lower federal courts it chooses to create.[436] The extent of that latitude has

---

427 *See* THE ANTI-FEDERALIST, *supra* note 412, at 185.

428 THE FEDERALIST NO. 81, at 546 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

429 *Id.*

430 *See* U.S. CONST. art. II; § 3 (stating that the president "shall take Care that the Laws be faithfully executed").

431 THE FEDERALIST NO. 78, *supra* note 347, at 523 (Alexander Hamilton).

432 *See* Liebman & Ryan, *supra* note 18, at 703.

433 *See* U.S. CONST. art. III, § 1 (declaring that "[t]he judicial Power shall be vested in on supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish").

434 *See* Liebman & Ryan, *supra* note 18, at 716-718, 765.

435 *See* U.S. Const. art. III, § 2.

436 *See* Henry M. Hart Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Court: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1370 (1953); Liebman & Ryan, *supra* note 18, at 700 n.9 (describing the "majority view" that Congress has control over federal court jurisdiction).

been hotly debated.[437] Some scholars have argued that Congress may not entirely eliminate the jurisdiction of federal courts over special categories of cases, such as those involving federal questions, admiralty, and ambassadors.[438] In a recent article, Professors Liebman and Ryan offer a convincing rebuttal to this view, arguing that although Article III includes a presumption that federal courts will have appellate jurisdiction in these cases, the choice is up to Congress.[439] Under either scenario, however, Congress exercises significant control over the makeup and influence of the federal judiciary.

The Framers thought these limits on the courts were sufficient and rejected proposals for additional checks, including congressional review of judicial decisions. In *Federalist No. 81*, Hamilton argued that congressional oversight was unnecessary because "the supposed danger of judiciary encroachments on the legislative authority which has been upon many occasions reiterated is in reality a phantom."[440] Although the courts may sometimes misconstrue the will of Congress, Hamilton argued, these instances "can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system."[441]

Madison also thought the power of the judiciary had been sufficiently circumscribed. Responding to Anti-Federalist fears that the courts would favor the federal government in cases against the states, he wrote, "The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality."[442] What were those precautions? Madison elaborated in an 1823 letter to Thomas Jefferson concerning Supreme Court review of state court decisions. "The impartiality of the judiciary," he argued, was guaranteed by "the concurrence of the Senate, chosen by the State Legislatures, in appointing the Judges, and the oaths and official tenures of these, with the surveillance of public opinion."[443] Thus, Madison thought the discretion of the courts would be kept in check even without a constitutional requirement of stare decisis.

The only indication that the Framers thought stare decisis was necessary

---

437 *See* Liebman & Ryan, *supra* note 18, at 705-07.

438 *See, e.g.*, Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 229-30, 238-59 (1985); Lawrence Gene Sager, *The Supreme Court, 1980 Term – Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 42-68 (1981); Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 522, 527 (1974).

439 *See* Liebman & Ryan, *supra* note 18, at 767-773.

440 THE FEDERALIST NO. 81, *supra* note 428, at 545 (Alexander Hamilton).

441 *Id.*

442 THE FEDERALIST NO. 39, at 256 (James Madison) (Jacob E. Cooke ed., 1961).

443 Letter from James Madison to Thomas Jefferson (June 27, 1823), *reprinted in* 4 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 83-84 (Max Farrand ed., 1911).

to restrain the courts is a statement by Hamilton in *Federalist No. 78*. Responding to complaints that life tenure would give judges too much power, Hamilton first argued that tenure would provide judges with the independence they needed to resist political pressure.[444] He then offered a secondary justification:

> To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them.[445]

Judge Arnold cites this statement as evidence that the Framers intended for stare decisis to operate as a constitutional check.[446] Yet although Hamilton's statement provides some support for this view, there are several reasons why it might be discounted. First, as several scholars have pointed out, Hamilton's "side-bar on precedent" was "hardly conceived as a comprehensive exposition of the doctrine of stare decisis."[447] He was responding to criticisms of life tenure, and he mentioned the role of precedent only to illustrate that judges would need many years to become familiar with the materials of their craft.[448] Had he wished to announce the Framers' intention that stare decisis would serve as a constitutional check, it seems likely he would have chosen a more direct way to make the point.

Second, Hamilton's statement is inconsistent with other arguments he made in *Federalist No. 78* concerning the power of judicial review. Responding to claims that this power would elevate the courts above the legislature and lead to judicial supremacy, Hamilton argued that judicial review would instead lead to constitutional supremacy: "[W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former."[449] This argument was necessary to allay anti-federalist fears about judicial review, but it is arguably undermined by his statements about binding precedent. For "a strict regime of precedent suggests that constitutional meaning is a product of the in-

---

444 *See* THE FEDERALIST NO. 78, *supra* note 347, at 528-29 (Alexander Hamilton).

445 *Id.* at 529.

446 *See* Anastasoff v. United States, 223 F.3d 898, 902 (8th Cir. 2000).

447 Lee, *supra* note 338, at 663; *see also* Paulsen, *supra* note 5, at 1573-74.

448 *See* Paulsen, *supra* note 5, at 1573-74.

449 THE FEDERALIST NO. 78, *supra* note 347, at 525 (Alexander Hamilton).

terpretative power of the courts," a suggestion that would have deepened, not lessened, the fears of judicial supremacy.[450] Consequently, one scholar has argued that Hamilton's "statement about precedent should be treated as a mistake."[451]

Finally, Hamilton made no attempt to connect his discussion of precedent with either the text or the structure of the Constitution. He simply declared that because judges would be bound down by strict rules and precedents, they would need life tenure. This suggests that he was not announcing a constitutional requirement, but was only expressing his own expectations. In other words, "Hamilton is not explaining what the Constitution means about the judicial power, but describing what he expects judges will do – study and consider precedents . . . ."[452] This expectation might be relevant to the background assumptions of the founding generation (although it is outweighed by the bulk of the evidence examined in Part I), but it does not establish that the Framers intended for stare decisis to operate as a constitutional check on judicial power.[453]

C. *The Wrong Kind of Check*

Not only does the evidence fail to establish a clear intent by the Framers to impose a constitutional requirement of stare decisis, but such a requirement cannot be inferred from the system of checks and balances they designed because stare decisis is not the type of mechanism the Framers relied on to prevent overreaching. Stare decisis is an internal check that depends for its effectiveness on the self-restraint of the very officials it is intended to check. Yet the Framers explicitly declined to rely on such self-policing and instead created a system in which each branch was given the means and the motive to frustrate the excesses of the other branches.

The workings of this system were spelled out by Madison in a series of Federalist Papers discussing the structural benefits of the Constitution. He began by responding to complaints that the Constitution did not conform to the principle of separation of powers because the duties of the three branches often overlapped.[454] These complaints, Madison argued, were based on a misunderstanding of Montesquieu's statement that liberty cannot exist where the legislative,

---

450 *See* BARBER, *supra* note 378, at 49; *see also* Paulsen, *supra* note 5, at 1576 (arguing that any claims about the binding effect of precedent would have provided Anti-Federalists with additional weapons in their attack on the judiciary).

451 BARBER, *supra* note 378, at 111.

452 Paulsen, *supra* note 5, at 1574.

453 *See id.*

454 THE FEDERALIST NO. 47, at 323 (James Madison) (Jacob E. Cooke ed., 1961) ("One of the principal objections inculcated by the more respectable adversaries of the constitution is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct.").

executive, and judicial powers are not separated.[455] By this statement, he claimed, Montesquieu "did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other."[456] He meant only "that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted."[457]

Madison then considered ways to ensure that no single branch would usurp the whole power of another branch. One possibility was to "mark, with precision, the boundaries of these departments in the constitution of the government, and to trust these parchment barriers against the encroaching spirit of power."[458] Most state constitutions relied on this approach, Madison noted. "But experience assures us, that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary for the more feeble against the more powerful members of the government."[459] In particular, he maintained, the judiciary and the executive needed protection from the legislature, "which is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."[460]

Another possibility was to provide that whenever two of the three branches were dissatisfied with the third, they could call a convention for altering, or correcting breaches of, the Constitution.[461] This suggestion had been made by Thomas Jefferson in his Notes on the State of Virginia, and Madison agreed that it had some merit.[462] Because no branch had "an exclusive or superior right of settling the boundaries" of power, he argued, it made sense that disputes should be resolved by the "people themselves, who, as the grantors of the commission, can alone declare its true meaning, and enforce its observance."[463] Madison, however, ultimately rejected this solution. He argued that frequent appeals to the people would shake their faith in the Constitution.[464] He also maintained that such appeals would be futile. Most conventions, he believed, would be called by the executive and the judiciary to restrain the legislature. But because legislators would outnumber judges and the president and have more influence with the people, they would win most public battles over

---

455 *See id.* at 325.

456 *Id.*

457 *Id.* at 325-26.

458 THE FEDERALIST NO. 48, *supra* note 409, at 332-33 (James Madison).

459 *Id.* at 333.

460 *Id.*

461 *See* THE FEDERALIST NO. 49, *supra* note 406, at 339 (James Madison).

462 *See id.* at 338-39.

463 *Id.* at 339.

464 *Id.*

the distribution of power.[465]

Having rejected the "mere demarcation on parchment of the constitutional limits of the several departments,"[466] as well as recurring conventions to clarify those limits, Madison turned to the only approach he thought likely to prevent the concentration of power. The interior structure of government, he argued, must be arranged so "that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."[467] How could this be done? Not by relying on the self-restraint of each branch. For "[i]f men were angels, no government would be necessary," and "[i]f angels were to govern men, neither external nor internal controls on government would be necessary."[468] Instead, Madison argued, the Constitution must rely on the ambitions of each department to check the ambitions of the others.[469] It must ensure that each branch, by pursuing its own desire for power, would thereby frustrate the efforts of the other two branches to augment their power.

> [T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department *the necessary constitutional means and personal motives to resist encroachments* of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.[470]

Madison's theory is reflected in numerous aspects of the Constitution. Congress is given broad authority to lay taxes, regulate foreign and interstate commerce, and make laws concerning a variety of subjects,[471] but these powers are checked by the president's right to veto legislation[472] and his obligation to

---

465 *See id.* at 339-40. In *Federalist No. 50*, Madison argued that similar concerns mitigated against a provision calling for conventions at fixed intervals. If the intervals were too short, he argued, the same passions that led to the dispute would govern its resolution, with the legislature being better placed to influence the public's decision. If the intervals were too long, the damage would be done before the distribution of powers could be clarified. *See* THE FEDERALIST No. 50, at 343-46 (James Madison) (Jacob E. Cooke ed., 1961).

466 THE FEDERALIST NO. 48, *supra* note 409, at 338 (James Madison).

467 THE FEDERALIST No. 51, at 347-48 (James Madison) (Jacob E. Cooke ed., 1961).

468 *Id.* at 349.

469 *See id.*

470 *Id.* (emphasis added).

471 *See* U.S. CONST. art. I, § 8.

472 *See* U.S. CONST. art. I, § 7, cl. 2.

"take Care that the Laws be faithfully executed."[473] The president, in turn, is given the power to make treaties and appoint ambassadors, judges, and officers, but these powers are checked by the requirement that he obtain the advice and consent of two-thirds of the Senate.[474] In addition, although the president has the power to veto bills, the full Congress can override his veto with a two-thirds vote.[475] The two houses of Congress can also join forces to impeach and convict the president for treason, bribery or other high crimes and misdemeanors.[476] And should the president and Congress conspire to violate the Constitution, the courts can exercise the power of judicial review to strike such actions down.[477]

The structural checks on the judiciary also conform to this approach. The president and Senate have initial control over the appointment of judges and can use that authority to appoint individuals with a reputation for self-restraint.[478] Once in office, judges have the power to hear and resolve cases and controversies over which they have jurisdiction. But if they overstep their authority, the executive and legislative branches have "the necessary constitutional means and personal motives" to reign them in.[479] The president can refuse or delay enforcement of judicial orders,[480] and Congress can impeach renegade judges[481] or exercise its control over the size and jurisdiction of the judiciary.[482] Thus, any effort by the judiciary to aggrandize its power will be met by "opposite and rival interests," and "the private interest of every individual may be a sentinel over the public rights."[483]

Stare decisis does not operate like these inter-branch checks. It is not

---

473 U.S. CONST. art. II, § 3.

474 *See* U.S. CONST. art. II, § 2, cl. 2.

475 *See* U.S. CONST. art. I, § 7, cl. 2.

476 *See* U.S. CONST. art. I, § 2, cl. 5 (providing for the power of the House to impeach); *Id. at* art. I, § 3, cl. 6 (providing for the power of the Senate to convict); *Id. at* art. II, § 4 (providing for the impeachment of the president).

477 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). The Chief Justice of the United States also presides over any trial of conviction in the Senate. *See* U.S. CONST. art. I, § 3, cl. 6.

478 *See* U.S. CONST. art. II, § 2, cl. 2.

479 THE FEDERALIST NO. 51, *supra* note 467, at 349 (James Madison).

480 *See* THE FEDERALIST NO. 78, *supra* note 347, at 523 (Alexander Hamilton) (explaining that the judiciary "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments").

481 *See* U.S. CONST. art. I, § 2, cl. 5 (the power of the House to impeach); art. I, § 3, cl. 6 (the power of the Senate to convict); art. II, § 4 (providing for the impeachment of all civil officers of the United States).

482 *See* U.S. CONST. art. III, § 1 (stating that Congress "may from time to time ordain and establish" lower federal courts); art. III, § 2, cl. 2 (giving Congress the power to make "Exceptions" and "Regulations" to the appellate jurisdiction of the Supreme Court).

483 THE FEDERALIST NO. 51, *supra* note 467, at 349 (James Madison).

something the other branches *do* to prevent the judiciary from overreaching, but is instead an intra-branch doctrine of self-restraint. As a result, it is no more effective as a check on judicial overreaching than is a "mere demarcation" of the boundaries of judicial power.[484] And the Framers expressly declined to rely on such "parchment barriers against the encroaching spirit of power."[485]

One might argue that stare decisis is an effective check on judicial power because a failure to adhere to precedent could lead the other branches to exercise their leverage over the courts. This is certainly possible. If Congress regards adherence to precedent as critical to judicial decision-making, it can penalize an inattention to precedent by restricting the courts' jurisdiction. Under this scenario, however, stare decisis does not function as a check on judicial power. The check is congressional control over jurisdiction. Stare decisis is simply a policy by which the courts can forestall the imposition of that check.[486] To offer an analogy, the Senate would likely reject the president's cabinet nominees if they were unqualified. But this does not mean that the president's internal obligation to choose qualified cabinet members functions as a check on his power. The check is the Senate's power to reject the president's nominees. The policy of choosing qualified nominees is simply a way for the president to avoid the imposition of that check.

Of course, the mere fact that stare decisis is not the kind of check the Framers relied on does not mean they would have rejected it outright. As Madison stated in his letter to Jefferson, he thought the judges' oath to uphold the Constitution would contribute to their impartiality.[487] The oath, like stare decisis, is not something the other branches do to the courts, but is instead a self-policing mechanism. And it would be absurd to suggest that the oath is only binding to the extent that the other branches punish judges for violating it. But, the oath, unlike stare decisis, is explicitly required by the text of the Constitution.[488] And though Madison argued that such "parchment barriers" were inade-

---

484 *But see* Peterson, *supra* note 399, at 52-56 (arguing that the obligation to follow precedent restrains judicial power). Peterson does not explain how stare decisis can check judicial power if judges decline to police themselves. *See id.*

485 THE FEDERALIST NO. 48, *supra* note 409, at 332-33 (James Madison). It is true that the Framers relied on intra-branch checks to restrain legislative power. They divided Congress into two houses, with different modes of election and terms of office, and ensured that neither house could accomplish anything without the cooperation of the other. However, as Madison explained in *Federalist No. 51*, this intra-branch checking mechanism was necessary to prevent legislative dominance over the other two branches. And it operates on the same principles underlying the larger system of checks and balances – that is, it pits the ambition of the two houses against each other instead of relying on the self-restraint of Congress as a whole.

486 *Cf.* Liebman & Ryan, *supra* note 18, at 772 (pointing out that judicial compliance with internal obligations "confers a kind of *power* – i.e., the neutrality and integrity needed to command the respect and acquiescence of states and federal branches disadvantaged by the judges' decisions").

487 *See supra* note 443 and accompanying text.

488 *See* U.S. CONST. art. VI, cl. 2.

quate to prevent overreaching, the Framers nonetheless expressed a clear intent that the oath be honored. Stare decisis is not mentioned in the text, and there is little direct or indirect evidence that the Framers intended for it to serve as a check. Thus, in order to assert that it is constitutionally required, we must establish not only that it does not conflict with other checking mechanisms; numerous provisions that were never considered by the Framers could meet this test. Instead, we must establish that the Framers regarded stare decisis as necessary to the system of checks and balances. Yet as Madison's discussion makes clear, the Framers could not have regarded stare decisis as necessary to that system because it was precisely the kind of check they viewed as inadequate to guard against "the encroaching spirit of power."[489]

III. NON-PRECEDENTIAL DECISIONS AND THE VALUES OF STARE DECISIS

To conclude that stare decisis is not dictated by the background assumptions of the founding generation or by the Framers' intent does not resolve the matter entirely. Regardless of what the Constitution required in 1789, it is possible that our expectations about the exercise of judicial power have changed sufficiently over time so that what was once simply a prudential concern has now assumed constitutional significance. The conduct of the courts alone may have altered the equation. By consistently following stare decisis for nearly a century and a half, the courts may have staked their legitimacy upon adherence to precedent. If so, could they really abandon the practice now? The Constitution may or may not require a specific procedure for deciding cases, but surely it requires a legitimate judiciary.[490] And if stare decisis has become indispensable to judicial legitimacy, then for all intents and purposes it has become a constitutional requirement as well.

The question remains, of course, whether stare decisis is in fact essential to judicial legitimacy. Some scholars and judges clearly believe that it is. More than a half-century ago, Justice Roberts wrote that "[r]espect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy."[491] More recently, the plurality in *Planned Parenthood v. Casey* wrote that "to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question."[492] Some, on the other hand, question whether stare decisis can even be defended. One pro-

---

489 *See* THE FEDERALIST NO. 48, *supra* note 409, at 332-33 (James Madison).

490 *Cf.* Planned Parenthood v. Casey, 505 U.S 833, 868 (1992) ("The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.").

491 Mahnich v. Southern S.S. Co., 321 U.S. 96, 113 (1944) (Roberts, J., dissenting).

492 *Casey*, 505 U.S. at 867. *See also* Monaghan, *supra* note 5, at 748-762 (discussing the role of stare decisis in promoting system legitimacy).

fessor has argued that adherence to erroneous decisions, at least in the constitutional arena, violates the courts' duty "to say what the law is."[493] Others have suggested that a system ostensibly committed to justice cannot justify a decision-making process that necessarily produces unjust results.[494]

Part of the problem in answering the question is that legitimacy is subjective: it depends upon the perception of those who are empowered to confer acceptance – in a democracy, the people. Yet without abandoning the practice of stare decisis altogether, it is difficult to know whether the public would accept a judiciary that did not decide cases based on precedent. Even an opinion poll might not provide a conclusive answer because legitimacy is also a functional concept. One can speculate about what practices would or would not be legitimate, but the only real test is to put them into play and see what happens.[495]

A definitive answer to the problem of legitimacy is beyond the scope of this article, and is probably unnecessary in any case. The courts are unlikely to abandon stare decisis completely and deviations within a certain range have always been accepted.[496] More importantly, even if stare decisis is necessary for judicial legitimacy, it does not automatically follow that the discrete practice of issuing non-precedential opinions threatens that legitimacy. Stare decisis is not an end in itself, but a means to serve important values of the legal system.[497] Therefore, as long as non-precedential opinions do not undermine those values, the legitimacy of the courts will be preserved.

In this Part, I describe the values that are said to be served by adherence to precedent and consider the degree to which those values actually are promoted by the current practice of stare decisis. I then argue that non-precedential decisions do not significantly undermine these values. As long as courts adopt narrow rules for determining whether a decision should have precedential force, along with mechanisms to ensure compliance with those rules, non-precedential opinions pose little danger to the underlying values of stare decisis.

---

493 Lawson, *supra* note 5, at 28 ("At least as a prima facie matter, the reasoning of *Marbury* thoroughly de-legitimizes precedent.").

494 *See* WASSERSTROM, *supra* note 39, at 42-53.

495 *See* Bobbitt, *supra* note 38, at 751-75 (arguing that the legitimacy of judicial practices is guaranteed solely by their use and acceptance).

496 By one count, the Supreme Court overruled 212 decisions between 1801 and 1986, yet the Court's legitimacy is not seriously in doubt. *See* O'BRIEN, *supra* note 340, at 118. Some departures from precedent, such as the Court's decision in Brown v. Board of Education, 347 U.S. 483 (1954), have even bolstered its legitimacy.

497 *See* Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2037-40 (1996). A few scholars have offered deontological justifications for stare decisis, but as Professor Peters demonstrates, those accounts are difficult to defend. *See id.* at 2065-112. The far more common claim is that stare decisis is worthwhile because of the ends it serves. *See id.* at 2039-40.

A. *The Values Served by Adherence to Precedent*

The most frequent claim made on behalf of stare decisis is that it fosters certainty in the law.[498] By agreeing to follow established rules, the courts enable individuals to predict the legal consequences of their actions.[499] A person who writes a will according to accepted procedures can be confident that the courts will enforce that will after his or her death. Likewise, a corporation developing a new product can anticipate its liability for potential defects. This certainty is desirable in its own right: it satisfies a basic human need for security and stability.[500] Certainty also has instrumental worth. When individuals and businesses are able to predict the circumstances under which courts will enforce contracts, impose tort liability, or extend the protection of bankruptcy laws, they are more likely to engage in the kinds of activities that lead to a prosperous and productive society. By contrast, if courts routinely change legal rules, people will hesitate to risk their time and money in pursuit of goals that might ultimately be thwarted.

An equally important value said to be served by stare decisis is equality.[501] When the courts decide today's cases in accordance with yesterday's cases, they ensure that legal rules are applied consistently and fairly.[502] As Karl Llewellyn observed, there is an "almost universal sense of justice which urges that all men are properly to be treated alike in like circumstances."[503] This sense of justice is especially strong in our society. From the Declaration of Independence's claim that "all men are created equal"[504] to the Fourteenth Amendment's guarantee of "equal protection of the laws,"[505] our democracy has displayed a deep commitment to the principle of equal treatment. By adhering strictly to their own precedents, the courts help to strengthen that commitment.

The third value served by stare decisis is judicial efficiency.[506] Though less lofty than equality, efficiency is vital to our legal system. If individuals with legitimate grievances cannot have their complaints heard within a reasonable time, the courts will have failed in their role as a protector of rights. Stare de-

---

498 *See* GOODHART, *supra* note 191, at 61-62; WASSERSTROM, *supra* note 39, at 60-66; Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 368 (1988); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 597 (1987).

499 *See* WASSERSTROM, *supra* note 39, at 61-66.

500 *See id.*; Maltz, *supra* note 498, at 368.

501 *See* WASSERSTROM, *supra* note 39, at 69-72; Maltz *supra* note 498, at 369.

502 *See* WASSERSTROM, *supra* note 39, at 66-72.

503 Karl Llewellyn, *Case Law*, *in* 3 ENCYCLOPEDIA OF SOCIAL SCIENCES 249 (Macmillan Co. 1930).

504 THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

505 U.S. CONST. amend. XIV, § 1.

506 *See* WASSERSTROM, *supra* note 39, at 72-73.

cisis helps prevents this from happening. By basing their decisions on precedent, courts avoid the need to reexamine all legal principles from scratch.[507] They can take for granted a certain number of principles and focus their energy on issues that are truly in dispute. "[T]he labors of judges would be increased almost to the breaking point if every past decision could be reopened in every case," wrote Justice Cardozo.[508] By following precedent, a judge can lay his "own course of bricks on the secure foundation of the courses laid by others who ha[ve] gone before him."[509]

Finally, proponents of stare decisis claim that it promotes judicial restraint and impartiality.[510] When judges are required to base their decisions primarily on precedent, they have less room to exercise discretion or bias.[511] This, in turn, reinforces the perception that we live under a government of laws and not of men. In the words of the second Justice Harlan, adherence to prior decisions, even those that are incorrect, is justified by "the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments."[512]

These four values provide strong support for a doctrine of precedent. Yet some scholars question the extent to which the actual practice of stare decisis serves these values. For instance, because American courts do not regard precedent as absolutely binding, some writers argue that the value of certainty is not significantly realized.[513] How, they ask, can individuals predict the legal consequences of their actions if courts are free to overrule precedents they find sufficiently disagreeable?[514] A non-absolute policy of stare decisis also impairs

---

507 *See id.*

508 BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1925).

509 *Id. See also* Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992) ("[N]o judicial system could do society's work if it eyed each issue afresh in every case.").

510 *See* WASSERSTROM, *supra* note 39, at 75-78; Maltz, *supra* note 498, at 371.

511 *See* WASSERSTROM, *supra* note 39, at 78; Maltz, *supra* note 498, at 371.

512 Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970). Justice Thurgood Marshall expressed similar sentiments in Vasquez v. Hillery, 474 U.S. 254, 265-56 (1986) (stating that adherence to precedent "contributes to the integrity of our constitutional system of government both in appearance and in fact" and ensures "that bedrock principles are founded in law rather than in the proclivities of individuals.").

513 *See* WASSERSTROM, *supra* note 39, at 64.

514 *See id.* One scholar has gone so far as to suggest that stare decisis has not contributed at all to legal certainty:

> Our judicial law is as uncertain as any law could well be. We possess all the detriment of uncertainty, which stare decisis was supposed to avoid, and also all the detriment of ancient law-lumber, which stare decisis concededly involves – the government of the living by the dead, as Herbert Spencer has called it.

JOHN H. WIGMORE, PROBLEMS OF LAW 79 (1920).

judicial efficiency.[515] When the courts are not absolutely bound by prior decisions, they must evaluate precedents for their merit as well as their applicability.[516] They also must apply the standard for determining whether a particular decision can be overruled. This creates additional work for the courts, especially as the number of precedents increases. In *Planned Parenthood v. Casey* alone, the Court devoted fifteen pages to a discussion of stare decisis.[517] Thus, it is unclear how much efficiency is created by adherence to precedent.[518]

Another writer argues that even if stare decisis were strictly followed, it could never achieve the goal of equality.[519] When a court treats one party unjustly, this argument goes, stare decisis dictates that the court also treat a similarly situated party unjustly.[520] But although the court thereby ensures equal treatment among those two parties, it necessarily treats them differently from all other parties who are treated justly.[521] And because "every person in the world is situated identically with respect to his or her entitlement to be treated justly," this differential treatment violates the principle of equality.[522]

Finally, some scholars question whether stare decisis actually ensures judicial impartiality.[523] This claim is valid, they argue, "if and only if it can be assumed that the judge who laid down the original rule was himself free from bias or prejudice."[524] If he was not, "the doctrine of precedent surely runs the risk of inexorably perpetuating that bias or prejudice in every subsequent decision . . ."[525] Other scholars argue that stare decisis is not even needed to ensure judicial integrity.[526] The civil law expressly forbids reliance on precedent, they argue. Yet, "there is no complaint on the Continent that the judges are not sufficiently bound, as impartiality may be obtained by requiring a statement of the reasons on which a judgment is based even though no prior cases are cited."[527]

These arguments raise valid questions about the extent to which the cur-

---

515 *See* Maltz, *supra* note 498, at 370.

516 *See* WASSERSTROM, *supra* note 39, at 72-73.

517 Planned Parenthood v. Casey, 505 U.S. 833, 854-69.

518 *See* Paulsen, *supra* note 5, at 1545 ("It is not clear at all that the 'obligation to follow precedent' . . . creates any true judicial efficiency gains at all.").

519 *See* Peters, *supra* note 497, at 2065-73.

520 *See id.*

521 *See id.*

522 *Id.* at 2068.

523 *See* WASSERSTROM, *supra* note 39, at 75-79.

524 *Id.* at 78.

525 *Id.* at 78-79.

526 *See* Lawson, *supra* note 5, at 24.

527 GOODHART, *supra* note 191, at 56.

rent practice of stare decisis promotes the values it is thought to serve. However, even if the current practice has not been fully successful, it also has not been entirely unsuccessful. Individuals may not always be able to predict the legal consequences of their actions, but vast areas of the law remain fixed and unchanged. Likewise, although absolute equality may be unobtainable, the practice of treating like cases alike assures a measure of equal treatment that would be difficult to obtain if judges were free to apply different substantive rules in every case. And though the efficiency benefits of stare decisis may diminish as precedents pile up, a system in which the courts "eyed each issue afresh in every case"[528] would certainly be more unwieldy. Thus, any attempt to eliminate stare decisis, even in its non-absolute form, would threaten values that are important to the legal system.

B. Non-Precedential Opinions and the Rule of Disposition

But although a complete abandonment of stare decisis might undermine these values, the practice of issuing non-precedential decisions does not necessarily have the same effect. For one thing, the practice likely increases judicial efficiency instead of reducing it. According to one empirical study, "selective publication significantly enhances the courts' productivity."[529] Judges save time writing non-precedential opinions because they need not include the facts or worry about how their words will be scrutinized in the future.[530] They also save time researching legal issues, because the body of case law is substantially reduced.[531]

More fundamentally, non-precedential opinions do not eliminate the restraining force of stare decisis. As Professor Frederick Schauer has demonstrated, the doctrine of precedent restrains courts in two ways.[532] First, it requires a court to decide today's case in conformance with yesterday's decision.[533] This is the backward-looking aspect of stare decisis. Second, because

---

528 Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992).

529 Keith H. Beyler, *Selective Publication Rules: An Empirical Study*, 21 LOY. U. CHI. L.J. 1, 12 (1989). Another study found "no support for the hypothesis that limited publication enhances productivity." William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Circuit Court of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 596 (1981). However, the authors did find that unpublished opinions are usually much shorter than published opinions, which they said suggests that the practice may save judges time. *See id.* at 600. In any event, there is no evidence that writing non-precedential opinions reduces productivity.

530 *See* Martin, *supra* note 21, at 190 (estimating that he and his clerks spend half the time working on unpublished opinions that they spend on published opinions).

531 *See id.*

532 Schauer, *supra* note 498, at 572-573.

533 *See id.*

tomorrow's court must treat today's decision as presumptively binding, a court must also consider the implications of its decision for any case that might arise in the future.[534] This is the forward-looking aspect of stare decisis. A court issuing a non-precedential decision is relieved of this latter responsibility, but still has an obligation to follow past decisions. And it is this obligation that preserves the force of stare decisis. In other words, if Tuesday's court is bound by Monday's decision, and Wednesday's court is also bound by Monday's decision, why should it matter that Tuesday's decision is non-precedential? As long as both the Tuesday and Wednesday courts follow Monday's decision, there will be no difference between the two opinions, and certainty, equality, and judicial integrity will be maintained.

The primary objection to this argument is that although both the Tuesday and Wednesday courts must adhere to the same decision, few cases are identical. The facts of Tuesday's case will likely differ in some way from the facts of both Monday's and Wednesday's cases. As a result, Tuesday's decision will carve out a rule that was not encompassed by Monday's decision. And because Wednesday's court will not be bound by that rule – and may not even be aware of it – there will be less certainty and equality in the law and a greater potential for judicial bias.

The objection does not refute the argument, however; it merely demonstrates that the key consideration is the scope of the rule that determines how a case must be disposed – what I will call the rule of disposition. If the rule is broad, allowing courts to issue non-precedential decisions whenever a case is remotely similar to an earlier case, the deviation between precedential and non-precedential decisions will be significant and a body of underground law will develop. However, if the rule is sufficiently narrow, the deviation between Monday's and Tuesday's decisions will be practically non-existent, and the values of certainty, equality, and judicial impartiality will be preserved.

In many circuits, the rule of disposition is already narrow. The Seventh Circuit provides that an opinion shall be published – and therefore precedential – if it does any one of the following: 1) establishes or changes a rule of law; 2) involves an issue of continuing public interest; 3) criticizes or questions existing law; 4) constitutes a significant and non-duplicative contribution to legal literature; 5) reverses a lower court opinion that was published; or 6) disposes of a case on remand from the Supreme Court.[535] The Fourth, Fifth, Sixth, Ninth, and D.C. Circuits also have fairly extensive rules.[536] Other circuits, by contrast, pro-

---

534 *See id.* at 589.

535 *See* 7TH CIR. R. 53(c)(1).

536 *See* 4TH CIR. R. 36(a) (an opinion will be published only if it establishes, alters, modifies, clarifies, or explains a rule of law within the circuit; involves a legal issue of continuing public importance; criticizes existing law; contains an historical review of a legal rule that is not duplicative; or resolves an intra-circuit conflict, or creates a conflict with another circuit); 5TH CIR. R. 47.5.1 (an opinion is published if it establishes, alters, or modifies a rule of law, or calls into question a rule of law that has been generally overlooked; applies an established rule to

vide almost no guidance as to when a decision should be given precedential effect. The Eighth Circuit rules state that unpublished opinions are not precedent, but do not specify how judges should decide whether or not to publish.[537] The Tenth and Eleventh Circuits are similarly silent on this matter.[538] Apparently, in these circuits the decision is left to the discretion of the panel issuing the opinion. It is no surprise, therefore, that Judge Arnold complains about the growth of an underground body of case law.[539] Without a detailed rule of disposition, such a development is inevitable.[540]

What exactly should the rule of disposition provide? The goal is to en-

---

facts significantly different from those in prior published opinions; explains, criticizes, or reviews the history of existing case law or statutes; creates or resolves an intra-circuit or inter-circuit conflict; concerns or discusses a factual or legal issue of significant public interest; or is rendered in a case that has been reviewed by, and had its merits addressed by, the U.S. Supreme Court); 6TH CIR. R. 206(a) (in deciding whether to publish, court shall consider whether the opinion establishes, alters, or modifies a rule of law or applies an established rule to novel facts; creates or resolves an intra-circuit or inter-circuit conflict; discusses a legal or factual issue of continuing public interest; is accompanied by a concurrence or dissent; reverses the decision below; addresses a lower court or agency decision that was published; or is a decision that has been reviewed by the Supreme Court); 9TH CIR. R. 36-2 (a disposition should be published only if it establishes, alters, modifies, or clarifies a rule of law; calls attention to a rule generally overlooked; criticizes existing law; involves a legal or factual issue of unique interest or substantial public importance; addresses a lower court or agency decision that was published; disposes of a case following reversal or remand by the Supreme Court; is accompanied by a concurrence or dissent written by a judge who requests publication); D.C. CIR. R. 36(a)(2) (opinion should be published if it resolves an issue of first impression; alters, modifies, or significantly clarifies a rule of law previously announced by the court; calls attention to a rule of law generally overlooked; criticizes or questions existing law; resolves an intra-circuit conflict or creates an inter-circuit conflict; reverses a published agency or district court decision, or affirms on different grounds; or warrants publication in light of other factors that give it general public interest).

[537] The Eighth Circuit does list criteria by which judges should decide whether to affirm or enforce a lower court decision without an opinion. The court may forego a written opinion if the judgement of the district court is based on findings of fact that are not clearly erroneous; the evidence in support of a jury verdict is not insufficient; the order of an agency is supported by substantial evidence on the record as a whole; or no error of law appears. *See* 8TH CIR. R. 47B. The Circuit provides no separate guidelines for when a written opinion should be published. *See generally* 8TH CIR. R. 47.

[538] The Tenth Circuit rules state only that issuance of an unpublished opinion means that "the case does not require application of new points of law that would make the decision a valuable precedent." 10TH CIR. R. 36.1. An advisory note to the Eleventh Circuit rules explains that "[o]pinions that the panel believes to have no precedential value are not published." 11TH CIR. R. 36-1, Advisory Note 5.

[539] *See* Arnold, *supra* note 14, at 224-25.

[540] *See* Reynolds & Reichman, *supra* note 529, at 629 ("[T]he publication decision will be made in a more intelligent and consistent manner if the judges have detailed criteria to guide them."); Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 313 (1990) (explaining how a lack of precise, detailed publication rules leads to inconsistent behavior among judges).

sure that non-precedential opinions offer nothing that cannot already be found in the case law. Therefore, the rule should be narrow enough to ensure that all non-precedential opinions are merely mechanical and rote applications of existing doctrine. Although the Seventh Circuit rule is a promising start, the courts should adopt an even more detailed rule that combines aspects of the current practice in all the circuits and in some state courts. I recommend that an opinion be given precedential effect if it:[541]

1) establishes, alters, modifies or clarifies a rule of law;
2) calls attention to a rule of law that appears to have been generally overlooked;
3) applies an established rule to facts significantly different from those in previous published opinions applying the rule;
4) contains an historical review of a legal rule that is not duplicative, or explains, criticizes, or reviews the history of existing decisional law or enacted law;
5) criticizes or questions the existing rule;
6) disposes of a case in which the lower court or agency decision was published;
7) reverses a decision by a lower court or agency, or affirms the decision on grounds different from those set forth below;
8) involves a case that has been reviewed by the Supreme Court and had its merits addressed by a Supreme Court opinion;
9) resolves, identifies, or creates an apparent conflict within the circuit or between the circuit and other circuits;
10) interprets state law in a way conflicting with state or federal precedent interpreting the state rule;
11) is accompanied by a concurring or dissenting opinion;
12) is an en banc opinion; or
13) involves a legal or factual issue of unique interest or substantial public importance.

This rule is admittedly complex at first glance, but it can be broken down into several categories that make it easier to understand. Sections 1 through 5 concern the substantive legal rule in the case and direct the court to issue a precedential opinion if it has done anything other than routinely apply an established rule to facts highly similar to those of previous precedential opinions. Sections 6 through 8 relate to the actions of lower and higher courts in the same case. The point here is to flag cases that have been addressed in a meaningful way by either a lower or a higher court or that have been the subject of disagreement along the hierarchical ladder. Sections 9 and 10 focus on potential conflicts both within a circuit and between circuits, and on conflicting interpre-

---

[541] For a similar recommendation, see Braun, *supra* note 14, at 93 (2000).

tations of state law. Sections 11 and 12 concern the status of the court deciding the case: if the court is divided or is en banc, there is good reason for giving the opinion precedential effect. Finally, section 13 focuses on the subject matter of the case and requires a precedential opinion if the topic is of unique public interest or importance. The reasoning here is that such cases will usually raise new and significant legal issues even if they appear to be squarely covered by an existing legal rule.

Categorized in this way, the rule can be easily grasped and applied. If judges follow these guidelines, an opinion adding anything even remotely new to the law would become binding precedent. And any opinion not given precedential effect would be so redundant and routine that its absence from the body of case law would in no way undermine the values served by stare decisis.

Of course, this leads to another objection, which is that even if courts adopt a narrow rule of disposition, there is no guarantee that it will be followed. Judges are faced with many pressures when deciding a case and may be tempted to issue a non-precedential opinion even though the rules direct otherwise. They may hope to bury a decision that is unsupported by case law or that fails to adequately address arguments by one party.[542] Whatever the reason, if judges wish to circumvent the requirements of the rule, there is nothing to prevent them from doing so.

This argument proves too much, however. Judges are free to ignore and distort not only the rule of disposition, but any rule of law. Even in a precedential opinion, they can rely on false distinctions, shoddy reasoning, or incomplete statements of the law to avoid the force of precedent. So if the lack of assurance that judges will follow a given rule renders stare decisis ineffective, we are in trouble even without non-precedential decisions. Yet most of us do not believe that simply because judges can get away with ignoring rules of law they will necessarily do so. We recognize that judges are restrained by the very methods and practices that constitute the activity of judging – what Karl Llewellyn called "operating technique."[543] In addition, Stanley Fish has emphasized the way in which people are constrained by membership in a "community of interpretation."[544] Because judges are socialized members of a profession with similar training and practice, Fish argues, they internalize ways of reading and understanding legal texts that limit their discretion.[545] If such constraints give us confidence that judges will follow ordinary rules of law, they should also provide assurance that judges will follow a rule of disposition. "We are trusted suffi-

---

542 *See* Arnold, *supra* note 14, at 223 (describing ways in which judges can abuse the practice of issuing non-published decisions).

543 KARL N. LLEWELLYN, *Introduction* to THE CASE LAW SYSTEM IN AMERICA xviii (Univ. of Chi. Press 1989).

544 STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES 147-48 (1980).

545 *See id.*

ciently to decide a case[,]" one judge has noted. "Why can't [sic] we be trusted enough to then make the ancillary decision whether it should be published?"[546]

Two potential responses might be offered. The first is that a rule concerning the *manner* of disposition is less likely to command respect and adherence than a rule concerning the *content* of the disposition. It is one thing for a judge to disregard a rule that protects the vague and indefinite values of certainty and equality; it is far different to ignore a rule that protects the legitimate expectations of a party immediately at hand. The injustice of the latter situation is more palpable and therefore more of a restraint on the judge. Although this argument initially seems appealing, it has several flaws. For one thing, it assumes that judges care more about the interests of the parties before them than about the overall integrity of the law, an assumption that is questionable in light of the frequency with which courts apply precedents they believe to be unjust. Moreover, the most likely reason a judge would disregard a rule of disposition is to cover up her manipulation of a rule affecting the outcome of the case. Therefore, it makes little difference whether judges are more inclined to disregard rules of disposition than rules of decision. Their fidelity to the former will usually be tested only after they have already decided to ignore the latter.

The more formidable response is that although judges are trusted to apply rules of law generally, their work is policed by Supreme Court and en banc review. Even if only a small fraction of cases are ultimately reversed through this process, the mere possibility of being caught keeps judges from intentionally distorting rules of law. Non-precedential decisions are also subject to reversal. But because of limited time and resources, the Supreme Court and en banc courts are less likely to review decisions that affect only the immediate parties and will not become binding precedent.[547] Judges realize this, and thus feel less constrained to follow not only the rule of disposition, but any rule of law, because by issuing non-precedential decisions they can keep deviations from precedent off the radar screen.

The strength of this argument depends upon the validity of the premise that the Supreme Court and the en banc courts care more about the long-term effects of bad decisions than about whether the parties receive justice – or at least that given two equally unjust decisions, the courts would first review the one likely to be perpetuated. With regard to the Supreme Court, this premise seems mostly accurate. The Court follows a general policy of using its certiorari discretion to resolve important issues of law, not to correct case-specific errors.[548] And although the justices occasionally grant certiorari to review non-

---

546 Martin, *supra* note 21, at 192.

547 *See* William L. Reynolds & William L. Richman, *The Non-Precedential Precedent: Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1203 (1978) (speculating that the Supreme Court would be less likely to review unpublished opinions than published opinions).

548 *See* SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of

precedential opinions,[549] it seems a safe bet that they are more likely to review opinions that have precedential effect. The circuit courts use varying criteria for deciding whether to hear a case en banc,[550] and they may be more inclined than the Supreme Court to review non-precedential opinions that deviate from circuit precedent. Unfortunately, there appears to be no way of testing this empirically. Even if the majority of decisions reviewed en banc are precedential, this could simply be evidence that judges are in fact following the rule of disposition. It could also be evidence that non-precedential opinions, true to design, rarely involve important issues worthy of review (in which case, they would not attract en banc attention even if they were precedential).

That said, I am willing to accept the proposition that, other things being equal, the en banc courts, like the Supreme Court, are more likely to review precedential opinions than non-precedential opinions. Even so, that is not a sufficient reason to eliminate non-precedential opinions. For although these modes of review cannot be relied upon to keep judges in line, there are other mechanisms available to guard against potential abuses.

The first mechanism is a requirement that even when a court issues a non-precedential opinion it must give reasons for its decision. Surprisingly, Judge Arnold's opinion does not mention this requirement; it leaves courts free to issue one-line summary dispositions that simply state "affirmed" or "reversed" – as long as the disposition can be cited as precedent in later cases.[551] But surely courts will be more constrained under a regime in which they must explain their decisions, however briefly, than under a regime in which they need not give reasons but must allow citation to one-line summary dispositions. Setting aside the problem of how a court could possibly be held to a one-line disposition that gives no details of the case, the requirement of a written opinion has

---

law."); ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE 113 (7th ed. 1993).

[549] *See* Johnson v. United States, 529 U.S. 694 (2000); Sims v. Apfel, 530 U.S. 103 (2000); Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994); Houston v. Lack, 487 U.S. 266 (1988); Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147 (1984); Connick v. Myers, 461 U.S. 138 (1983); Moore v. Illinois, 434 U.S. 220 (1977).

[550] The Tenth Circuit rules, for instance, state that en banc review "is an extraordinary procedure intended to focus the entire court on an issue of exceptional public importance or on a panel decision that conflicts with a decision of the United States Supreme Court or of this court." 10TH CIR. R. 35.1(A). The Federal Rules of Appellate Procedure, which many circuits follow in the absence of a local rule on point, state that en banc review should be used to maintain the uniformity of the circuit's decisions or to resolve a question of exceptional importance. *See* FED. R. APP. P. 35(a). The Sixth Circuit disapproves of en banc review for errors in non-precedential opinions, but appears to leave open the possibility of en banc review for non-precedential opinions that "directly conflict" with Supreme Court or Sixth Circuit precedent. *See* 6TH CIR. R: 35(c).

[551] Judge Arnold does argue that courts should be required to justify deviations from precedent. *See* 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, Anastasoff v. United States, 235 F.3d 1054 (8th Cir. 2000) (en banc). But he makes no mention of a general requirement that they explain the reasons for their decisions. *See id.*

at least two advantages. First, the process of justification itself has a restraining effect for it forces a court to confront the weaknesses of its conclusion.[552] This is a familiar phenomenon: nearly everyone has had the experience of making a snap judgment, only to find that it cannot be justified on paper. Judges face this same difficulty and often talk about decisions that just "won't write" no matter how appealing they seemed during conference.[553] Second, a written opinion provides a basis for evaluation by the parties in a case, by the bar at large, and by the academy. Judges pride themselves on their independence, and rightly so. However, they are still part of the legal community, and when forced to write an opinion that will be read and scrutinized by others within this community, they are less likely to deviate from rules of law.

One might respond that the requirement of a written opinion will only encourage compliance with substantive rules of law, not with the rule of disposition. After all, how many lawyers and scholars will examine whether a particular opinion was properly labeled as non-precedential; they are more likely to focus on the outcome of the case. However, this response misses the point. As noted above, the most likely reason a judge would circumvent the rule of disposition is to cover up her manipulation of substantive rules of law. So any measure that increases compliance with substantive rules of law will also increase compliance with the rule of disposition by eliminating the incentive to depart from it.[554]

In addition to this external scrutiny of court decisions, there are also several internal mechanisms that can be employed to guard against judicial noncompliance. First, the circuits can require that decisions be given precedential effect unless all three judges on the panel agree otherwise. Although a few circuits already have adopted this rule, most either leave the decision to a majority of judges on the panel or provide no guidelines.[555] Some judges claim that, in

---

552 *See* Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1447-48 (1995); Reynolds & Richman, *supra* note 529, at 603.

553 *See* Nichols, *supra* note 31, at 915 (describing how the process of writing an opinion often clarifies whether it should be precedential or non-precedential); Peter M. Shane, *Federalism's "Old Deal": What's Right and Wrong With Conservative Judicial Activism*, 45 VILL. L. REV. 201, 225 (2000). It is true that the process of justification is most likely to encourage compliance with substantive rules of law, but it can also promote adherence to the rule of disposition. In other words, judges may find that a particular decision just "won't write" as a non-precedential opinion.

554 Nor should the fact that non-precedential opinions are not published in the federal reporters make any difference. Non-precedential opinions, like published opinions, are searchable in the Westlaw and Lexis databases. *See* Martin, *supra* note 21, at 185-86. Additionally, few lawyers today spend their time combing through the federal reporters.

555 The First, Fifth, and Sixth Circuits require all three judges to agree on whether a decision will be published (and thus precedential). *See* 1ST CIR. R. 36(b)(2)(B); 5TH CIR. R. 47.5.2; 6TH CIR. R. 206(b). The Seventh, Ninth, and Eleventh Circuits require only a majority vote to determine the issue of publication. *See* 7TH CIR. R. 53(d)(1); 9TH CIR. R. 36-5; 11TH CIR. R. 36-2. The Fourth Circuit states that either the author or a majority of joining judges can decide whether to publish. *See* 4TH CIR. R. 36(a). The Eighth, Tenth, and D.C. Circuits provide for

practice, the decision is nearly always left to the author, which would suggest that it makes no difference what the rule specifies.[556] However, it seems probable that at least sometimes judges defer to the author's preference because they cannot insist on publication alone and do not want to appear difficult. A formal requirement of unanimity may lessen the reluctance of judges to express their true beliefs on the matter and thus provide a front-line defense against manipulation of the practice.[557]

Second, because it is possible that an entire panel may agree to circumvent the rule of disposition, the staff of each circuit could distribute summaries of non-precedential opinions before they are issued. Several circuits currently distribute pre-publication reports of precedential opinions so that judges can quickly scan for decisions that appear erroneous. If non-precedential decisions were added to this list, judges would be more aware of the opinions that are being omitted from the body of case law. The D.C. Circuit has already adopted this approach.[558] As a further check, the circuits could adopt rules allowing any judge on the court to request, within a certain time frame, that a decision previously designated as non-precedential be given precedential effect. The panel could then be given an opportunity to explain its reasons for issuing a non-precedential decision. But if the judge was unsatisfied with the explanation and could persuade a limited number of other judges that the opinion should be given precedential effect, the panel would be required to change the form of disposition.[559]

Other safeguards could also be implemented. Circuits could require that each non-precedential decision explain not only the reasons for the outcome but also the panel's reason for not issuing a precedential opinion. They could also assign staff members to scrutinize recently issued non-precedential opinions and distribute lists of those that potentially deviate from the circuit's rules. Judges

---

unpublished opinions, but do not specify how many judges on a panel must agree to this form of disposition. The Third Circuit rules do not address the topic of unpublished opinions at all.

556 *See* Arnold, *supra* note 14, at 221.

557 *See* Nichols, *supra* note 31, at 924 (stating that a requirement of unanimity is a "safeguard against injudicious failure to publish"). Indeed, there is some empirical evidence that merely specifying the number of judges on a panel who must vote on the issue of publication tends to result in a higher number of published opinions. *See* Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 89 (2001) (finding that cases are more likely to be published in circuits requiring a majority vote for publication than in those circuits that do not specify how many judges are needed to vote on publication).

558 *See* D.C. CIR. R. 36(c).

559 I do not think it should require a majority vote to change the form of disposition. I also do not think one judge should have this power. The reason is that if an individual judge objected to the practice of issuing non-precedential decisions, she could single-handedly eliminate the practice. A requirement that one-fourth of the judges agree before the form of disposition is changed seems like a reasonable compromise.

could then examine the opinions on these lists and request that any non-precedential opinions be re-designated as precedential.

A likely objection to these internal mechanisms is that they would be expensive and time-consuming. Judges already have enough work without monitoring the flood of non-precedential opinions that are issued each week. But although these procedures might increase the workload somewhat, the complete elimination of non-precedential opinions would certainly increase it more. Moreover, if courts are able to assign some of the oversight duties to staff members, the burden on judges would be minimal.

The point of this discussion is not to provide a detailed framework that the circuits can implement wholesale. Each circuit has different needs and must develop a monitoring system that suits those needs. The point is to demonstrate that there are ways to guard against the use of non-precedential opinions to deviate from rules of law, and that those methods are every bit as effective as the potential for Supreme Court and en banc review. If non-precedential opinions are undermining the values that are served by stare decisis, it is not because they necessarily must do so. It is only because adequate safeguards have not been implemented to assure the same degree of conscientiousness that is expected of judges generally.

CONCLUSION

After being ignored for more than two centuries, the constitutional status of stare decisis is poised to emerge as a central topic in federal courts litigation and scholarship. Judge Arnold's analysis in *Anastasoff v. United States* has opened up a provocative line of inquiry that lawyers and judges will likely mine for years to come. This is unquestionably a positive development. For decades, most scholars have focused exclusively on the jurisdictional aspects of Article III, asking how far the judicial power extends. Now, the academic community can begin to focus on the equally important question of what the judicial power entails.

But although Judge Arnold's analysis points out a valuable new area of research, his conclusions about the history of stare decisis are contestable. Far from being an immemorial custom, the obligation to follow precedent developed over hundreds of years in response to the changing needs and conditions of the legal system. It was not finally accepted in England until the late eighteenth century and was widely disregarded by judges in this country until the beginning of the nineteenth. It is therefore doubtful that the founding generation would have viewed stare decisis as an inherent limit on judicial power. It is also doubtful that the Framers intended for stare decisis to operate as part of the checks and balances implicit in the Constitution's structure. The Framers expressed few concerns about the potential abuse of judicial power and thought the courts would be sufficiently restrained by other checks, such as impeachment and congressional control over jurisdiction. Moreover, stare decisis is an intra-branch check that depends upon the self-restraint of the very officials it is meant to con-

strain. The Framers, however, eschewed such self-policing in favor of a system in which each branch was given "the necessary constitutional means and personal motives" to frustrate the ambitions of the other branches.

If stare decisis is constitutionally required, it is not because of original understanding, intent, or the structure of the constitution. Instead, it is simply because the courts have staked their legitimacy upon adherence to precedent. Even if this is true, however, it does not follow that non-precedential opinions are also unconstitutional. Stare decisis is not an end in itself, but a means to serve important values in the legal system. And as this Article demonstrates, the practice of issuing non-precedential opinions does not necessarily undermine those values. As long as courts adopt a narrow rule of disposition and mechanisms to assure compliance with that rule, the values of stare decisis will be preserved and the legitimacy of the courts will be maintained.

A White Paper on Unpublished Opinions of the Court of Appeal

Authored by Professor J. Clark Kelso and Joshua Weinstein

Appellate Process Task Force

March, 2001

Task Force Membership

Hon. Gary E. Strankman (Chair)
Ms. Mary Carlos
Mr. Peter Davis
Mr. Donald Davio
Mr. Jon Eisenberg
Mr. Dennis Fischer
Ms. Laura Geffen
Hon. Margaret M. Grignon
Hon. Judith L. Haller
Mr. Edward Horowitz
Hon. Arthur W. McKinster
Hon. Nathan D. Mihara
Professor John Oakley
Mr. Arnold O. Overoye
Mr. Daniel Potter
Hon. Robert K. Puglia (Ret.)
Hon. William F. Rylaarsdam
Hon. Ronald Sabraw
Mr. Jonathan Steiner
Hon. Steven J. Stone (Ret.)
Hon. James Thaxter

Judicial Council Liaison

Hon. Marvin R. Baxter

Committee Staff

Ms. Marcia Taylor
Mr. Joshua Weinstein

Reporter

Professor J. Clark Kelso
University of the Pacific
McGeorge School of Law

A White Paper on Unpublished Opinions of the Court of Appeal

Background

At its inception the Appellate Process Task Force – created in 1997 by the Judicial Council of California – identified issues affecting California's intermediate appellate courts that should be studied. One issue was public access to unpublished appellate court opinions. In the task force's Interim Report (released in March 1999) and in its Report of August 2000, the issue was listed as one that was still being contemplated. (See *Report of the Appellate Process Task Force* (August 2000) page 4.)

When the task force took up the study last year, it observed that unpublished court of appeal opinions are available to any member of the public from the court clerk's office. (See *McGuire v. Superior Court* (1993) 12 Cal.App.4th 1685 [court records generally available to public] and *People v. Ford* (1981) 30 Cal.3d 209, 216 [unpublished opinions are "available in the public records of … the Court of Appeal"].) However, in practice, unpublished opinions have limited exposure; they are often only read by litigants and institutional practitioners. The task force focused on whether and how to improve public access to unpublished opinions of the courts of appeal.

During the time the task force took up the topic, the issue was provoking interest in other circles as well. Several commentators and scholars weighed in,[1] an appellate court published an opinion on the issue (see *Schmier v. Supreme Court of California* (2000) 78 Cal.App.4th 703), and legislation was proposed that would have required all appellate opinions to be published and citable as precedent.[2] (Assem. Bill 2404 (Papan) 1999-2000 Reg. Sess., § 1.)

---

[1] A. Kozinski and S. Reinhardt, "Please Don't Cite This!" (June 2000) *California Lawyer*, 43; R. Arnold, *Unpublished Opinions: A Comment* (1999) 1 J. App. Prac. & Process 219 (1999); B. Martin, Jr., *In Defense of Unpublished Opinions* (1999) 60 Ohio St. L.J. 177; C. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?* (1998) 50 S.C. L. Rev. 235; K. Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeal* (1997) 85 Calif. L. Rev. 541; and D. Merritt and J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Court of Appeals* (2001) 54 Vand. L. Rev. 71.

[2] Additionally, for a few brief months last year, there was a federal appellate decision from the Eighth Circuit declaring as a matter of federal constitutional law that unpublished opinions were required to be treated as binding precedents (the decision was

The issue is not new. In fact, several years earlier in a report commissioner by the Appellate Courts Committee of the 2020 Vision Project, Professor J. Clark Kelso made the following recommendation:

> Make all unpublished opinions available electronically (which would give the public, scholars and the court of appeal easy access) but retain the no-citation rule (which would address the practical concerns expressed by appellate lawyers and judges). As appellate courts become paperless, provision should be made for giving the public access to unpublished as well as published opinions.[3]

That recommendation was a compromise position. In widely circulated drafts of his report, Professor Kelso argued that all appellate opinions should be published and citable as precedent and that the increasing use of unpublished opinions was contrary to fundamental principles of good appellate practice. This tentative suggestion triggered a chorus of protests from around the state, from both judges and practitioners, who asserted that "the nonpublication and noncitation rules are critically important to the court of appeal in preparing and processing its cases and to the practicing bar in litigating appeals."[4] Critics argued that publication of all opinions would overburden the appellate courts and practitioners, that publication and citability of all appellate opinions would substantially increase the workload of an already overburdened appellate court system and that practitioners would have to wade through an "overwhelming" amount of unpublished opinions that are "useless for future litigation because they involve no new law and no new, applicable factual situations."[5]

---

subsequently vacated as moot by an en banc panel of the circuit after the United States agreed to pay the disputed $6,000 tax claim made by the taxpayer). (*Anastasoff v. United States* (8th Cir. 2000) 223 F.3d 898, vacated on reh'g en banc, (8th Cir. 2000) 235 F.3d 1054.) For a critique of the constitutional analysis in *Anastasoff*, see Case Note, *Constitutional Law C Article III Judicial Power C Eighth Circuit Holds That Unpublished Opinions Must Be Accorded Precedential Effect* (2001) 114 Harv.L.Rev. 940.

[3] C. Kelso, *A Report on the California Appellate System* (1994) 45 Hastings L.J. 433, 492.

[4] *Ibid.*

[5] *Ibid.*

Although Professor Kelso's compromise position was not formally adopted by the full Commission on the Future of the California Courts, the Commission's final report endorsed the general proposition that "[s]implified, electronic access to the appellate courts, their records, and their proceedings will have a salutary effect on the public's comprehension of and trust in justice."[6] Moreover, the Commission formally recommended that "[a]ppellate justice should accelerate its adoption of and adaptation to new technology."[7]

Everything old is new again

The arguments for and against publication and citability of appellate court opinions have not changed much over the years. The dispute remains largely, but not entirely, between those who believe that all appellate court opinions should be published and citable and others who argue that the publication and citability of all unpublished opinions would overburden the courts and counsel, increasing the costs to clients and causing delays. For the reasons given below, the Appellate Process Task Force has decided after thorough consideration of the issue to make the following recommendation:

> Unpublished opinions should be posted on the Judicial Council's Web site for a reasonable period of time (e.g., 60 days), but the general proscription against citation of unpublished opinions (i.e., rule 977) should remain in place without change.

A. Electronic access

The Web site for California's appellate courts already makes published opinions available on the Web with commendable speed. Access to court opinions on the Web is often the preferred method of access for reviewing recently issued decisions. With the development of these widely available electronic portals to government information, there is no longer any convincing justification for not facilitating greater public access to the written work product of the appellate courts by taking advantage of existing information technologies. We live in an open, democratic society where the accountability of public servants is secured in large part by public access to government activity and output. Of course, openness and public access have their limits. Other important interests such as privacy, the attorney-client privilege, national security, and

---

[6] Commission on the Future of the California Courts, *Justice in the Balance B 2020* (1993) 166.

[7] *Id*., at p. 167 (Recommendation 10.1).

the deliberative process privilege, may dictate limited or no access to some types of information in certain circumstances. But no one claims that unpublished opinions fall into any of these categories. Indeed, as noted above unpublished opinions are already publicly available.

Those who argue that unpublished appellate opinions in California are some form of "secret" law have seriously overstated their case.[8] Nevertheless, it is true that unpublished opinions are not as widely and easily available as published opinions. Further, if the difference in availability can be eliminated at reasonable expense, the courts, no less than any other branch of government, should make unpublished opinions more accessible. The task force recognized that many institutional litigants – the insurance industry, the Attorney General, and the appellate projects, for example – to varying degrees review a large percentage of court of appeal opinions in their area of interest, whether published or not. Given the changes in technology and the apparent wide-spread interest in unpublished opinions, the task force recommends that the public have the same ease of access that is already afforded institutional practitioners.

In California, all published appellate opinions are now made available for a period of time on the judicial branch's Web site. Cost permitting, there is no compelling reason for not expanding the existing system so that *all* California appellate opinions, whether published or unpublished, are made available on the Web site for a reasonable period of time.

B. Citability

The remaining question is whether unpublished opinions should, once made available electronically, be citable as precedent. The task force is convinced that allowing all opinions to be citable as precedent would do substantial damage to the appellate system in California. If all appellate court opinions were citable, there would be increased potential for conflict and confusion in the law, which would, in turn, increase the cost of legal representation, as well as appellate workload and appellate delay. This damage would not be offset by any practical advantages gained through making unpublished opinions fully citable as precedent.

Under rule 977 of the California Rules of Court, unpublished opinions may not be "cited or relied on by a court or a party" except (1) "when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel," or (2) "when the

[8] See, e.g., Carpenter, p. 236, fn. 7 ("What else, but a secret, is an unpublished opinion wrapped in a no-citation rule?").

opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding." (Calif. Rules of Court, rule 977(a) & (b).)

It has been argued that a non-citation rule allows the courts to "hide" precedent setting decisions. Proponents suggest that an appellate court simply issues an unpublished opinion that is not citable, and the law that court "created" is not subject to public scrutiny and thus "hidden" from view. That argument fails on its face because, as noted above, all appellate court opinions are public records available from the clerk's office. Moreover, the California Supreme Court may review any court of appeal opinion – whether published or unpublished – to "secure uniformity of decision or the settlement of important questions of law." (Rule 29(a).)

One would have to assume that three justices of the court of appeal decided to violate rule 976 in a particular case in order to accept the notion that uncitable opinions are used to "hide" new law. Indeed, rule 976 provides that publication is appropriate for court of appeal opinions that establish new law, apply existing law to new facts, or modify or criticize existing law. (See rule 976(b)(1); see also rule 976(b)(2) & (3) for other criteria for publication.) The task force declined to accept that premise. Rather, the task force's combined experience is that unpublished opinions, considered as a whole, generally recite well-established law and do not apply it to new fact scenarios. As such, there is no justification to impose upon the public, the bar and the bench more than a ten-fold annual increase in the number of citable opinions by the Court of Appeal. [9]

The task force also considered suggesting that the California Supreme Court amend rule 977 to permit citation of unpublished opinions in cases where there is no other precedent or in cases where no other precedent would serve as well. This approach is taken in some other jurisdictions. But the task force declined to endorse this recommendation because of the likelihood that the exceptions would swallow the general rule and would engage the court and counsel in costly, tangential disputes over collateral issues regarding the weight or value of an unpublished opinion. Every citation of an unpublished opinion would trigger from opposing counsel an argument that the cited opinion actually does not satisfy the criteria for citation, and the court would be forced to do precisely what the proscription is designed to guard against: determine the weight as precedent of an unpublished opinion. The efficiencies that lie at the heart of the proscription against citation of unpublished opinions would be

[9] In fiscal year 1997-1998, 7% of court of appeal opinions were published. (Judicial Council of Cal., Ann. Court Statistics Rep. (1999) p. 31.)

largely lost if counsel were required to search all unpublished opinions to determine whether an unpublished opinion was more closely on point than a published opinion and the court was required to resolve a dispute involving that question. Moreover, the constitutional provisions on which the whole scheme is based would be undermined.

For the reasons given above, the task force recommends that rule 977 be retained without change.

Fairness and Precedent

Anastasoff v. United States, 223 F.3d 898 (8th Cir.), *vacated on other grounds*, 235 F.3d 1054 (8th Cir. 2000).

In *Anastasoff v. United States*,[1] the Eighth Circuit invalidated a court rule that prevents litigants from citing unpublished opinions as precedent. More than three-quarters of cases resolved on the merits in the federal courts of appeals result in unpublished opinions[2] and have limited precedential effect. Although precedent plays a crucial institutional role in the judicial system, the *Anastasoff* rule, by unleashing a flood of new precedent, will disproportionately disadvantage litigants with the fewest resources. Because even important institutional concerns should give way when they impinge on individuals' rights to fair treatment, courts should not abandon the practice of limiting the precedential effect of unpublished opinions.

I

Faye Anastasoff paid income taxes on April 15, 1993. On April 13, 1996, she mailed in a refund claim for overpayment of her 1993 income taxes. The IRS received her claim on April 16, 1996, three years and one day after the original payment, and one day late. Anastasoff argued before the Eighth Circuit that the mailbox rule saved the claim. Another Eighth Circuit panel had rejected precisely the same argument in *Christie v. United States*,[3] an earlier unpublished opinion. But rather than distinguish *Christie*, Anastasoff simply told the court it was not bound by the holding because, under Eighth Circuit Rule 28A(i), unpublished opinions do not count as binding precedent.[4]

In a sweeping opinion, the court declared itself bound by *Christie* and held that Rule 28A(i) unconstitutionally exceeded the boundaries of Article

1. 223 F.3d 898 (8th Cir.), *vacated on other grounds*, 235 F.3d 1054 (8th Cir. 2000).

2. In 1999, 78.1% of cases in the U.S. Courts of Appeals were disposed of by unpublished opinions. STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1999 ANNUAL REPORT OF THE DIRECTOR, tbl.S-3 (1999), *at* http://www.uscourts.gov/judbus1999/s03sep99.pdf [hereinafter JUDICIAL BUSINESS].

3. No. 91-2375MN, 1992 U.S. App. LEXIS 38446 (8th Cir. Mar. 20, 1992) (per curiam) (unpublished opinion).

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

III by allowing the court to avoid the precedential effect of its own decisions. Writing for the unanimous panel, Judge Richard Arnold explained that a declaration and interpretation of general principles of law is "inherent in every judicial decision."[5] This declaration is authoritative and must be applied in subsequent cases. These principles underlay the Framers' conception of judicial power, and, according to Arnold, they limit the power delegated to the courts by Article III.[6]

Arnold briefly addressed and dismissed the practical ramifications of the ruling. First, Arnold emphasized that not all opinions need be published, but they must all carry precedential weight. Second, Arnold rejected the argument that the high volume of appeals faced by the court renders ascribing precedential effect to all decisions unrealistic. Rather, Arnold stated that the remedy should be simply "to create enough judgeships to handle the volume," or to allow a larger backlog of cases.[7]

On December 18, 2000, the Eighth Circuit, sitting en banc, vacated the holding in *Anastasoff*.[8] The court held that the tax issue became moot when the government decided to pay Anastasoff's claim and declared its acquiescence to the interpretation of the tax statute announced by the Second Circuit in *Weisbert v. United States*,[9] which was in direct conflict with *Christie*. Noting that courts decide cases, not issues, the court held that "the constitutionality of that portion of Rule 28A(i) which says that unpublished opinions have no precedential effect remains an open question in this Circuit."[10]

II

Although the *Anastasoff* holding was short-lived, the case raises a vital issue. Unpublished opinions are a relatively recent phenomenon in the federal courts. The Judicial Conference resolved only in 1964 to give the courts of appeals discretion whether to publish opinions.[11] The movement toward limited publication did not pick up until the early 1970s, when the Federal Judicial Center disseminated a set of recommended standards for publication.[12] By 1974, all the circuits had some sort of limited publication

5. 223 F.3d at 899.
6. *Id.* at 901.
7. *Id.* at 904.
8. Anastasoff v. United States, 235 F.3d 1054 (8th Cir. 2000) (en banc).
9. 222 F.3d 93 (2d Cir. 2000).
10. *Anastasoff*, 235 F.3d at 1056.
11. JUDICIAL CONFERENCE OF THE U.S., REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964).
12. ADVISORY COUNCIL ON APPELLATE JUSTICE, FJC RESEARCH SERIES NO. 73-2, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS 3 (1973).

plan.[13] In 1999, the circuit courts disposed of 78.1% of their cases in unpublished opinions.[14] Under the *Anastasoff* rule, all these cases would carry precedential weight.

Eighth Circuit Rule 28A(i) limits the precedential value of unpublished opinions by barring citation to them. Allowing citation of unpublished opinions will have a tremendous ripple effect for both litigants and judges. Because precedent is worthless without reasoning,[15] judges will need to make their logic and reasoning transparent even in unpublished opinions, increasing the amount of time required to dispose of each case. Litigants with the resources to track down these opinions will have a richer body of precedent from which to draw their arguments, putting them at a systematic advantage over litigants with fewer resources.

Although the *Anastasoff* court grounded its reasoning in principles of originalism, Judge Arnold gave an earlier clue to his motivations in a piece published one year before his court handed down *Anastasoff*. In that essay, Arnold acknowledges that tremendous caseload pressure has driven the unpublished opinion movement, but he cites a number of detrimental effects of the practice.[16] First, unpublished opinions may allow judges to reach decisions without bothering to justify them.[17] Second, many cases "with obvious legal importance" are decided by unpublished opinions.[18] Finally, the unpublished opinion rule creates a vast body of "underground law" accessible to the public at a reasonable cost,[19] but the very judges who

---

13. Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 184 (1999). Today every circuit has a rule governing the precedential value of unpublished opinions. Although the rules vary slightly from circuit to circuit, in general the rules prevent parties from citing unpublished dispositions as precedent. Most circuits bar citation to unpublished opinions or orders as precedent, but make an exception for purposes of finding res judicata and collateral estoppel, and determining the law of the case—that is, those instances where the preclusive effect of the disposition, rather than its quality as precedent, is relevant. *See* 1ST CIR. R. 36(b)(2)(F); 4TH CIR. R. 36(c); 5TH CIR. R. 47.5.3, 47.5.4; 6TH CIR. R. 28(g); 7TH CIR. R. 53(b)(2)(iv), 53(e); 8TH CIR. R. 28A(i); 9TH CIR. R. 36-3; 10TH CIR. R. 36.3; D.C. CIR. R. 28(c); FED. CIR. R. 47.6(b). The Second, Third, and Eleventh Circuits also limit the precedential effect of unpublished opinions, but do not make explicit exceptions for preclusive effects. *See* 2D CIR. R. 0.23 (prohibiting citation to dispositions in open court or by summary order); 3D CIR. R. 28.3(b) (stating that only published opinions are binding on the court); 11TH CIR. R. 36-2 (stating that unpublished opinions are not considered binding precedent but may be cited as persuasive authority if the opinion is attached to a brief).

14. JUDICIAL BUSINESS, *supra* note 2, tbl.S-3.

15. Rule 28A(i) already made an exception for res judicata, collateral estoppel, and law-of-the-case questions—that is, those questions that turn on the decision itself, not the reasoning behind the decision.

16. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 221-22 (1999).

17. *Id.* at 223.

18. *Id.* at 224.

19. Many, but not all, unpublished opinions are available on commercial databases such as Lexis and Westlaw. For instance, *Christie*, the unpublished opinion that gave rise to the problem in *Anastasoff*, is available on Lexis but not Westlaw. Christie v. United States, No. 91-2375MN, 1992 U.S. App. LEXIS 38446 (8th Cir. Mar. 20, 1992) (per curiam) (unpublished opinion).

produce the opinions then disavow them by limiting their precedential value.[20]

III

Anastasoff would have opened the floodgates to a vast new body of precedent in federal courts. Yet the court failed to consider any principled justification for a no-precedent rule. There is more to the argument for no-precedent rules than simply judicial efficiency. While precedent protects important institutional concerns of the justice system, too much of a good thing may pose a danger. The question is not whether precedent is good, but what the optimal amount of precedent is. Abolishing noncitation rules for unpublished opinions would systematically and unfairly disadvantage individual litigants with limited resources (including pro se and public-interest litigants and public defenders) by making it harder for them to present their cases.

The *Anastasoff* court held the Eighth Circuit's noncitation rule unconstitutional. If the Constitution clearly mandates that all opinions, published or not, must carry precedential value, then there is no room for debate. But as several commentators have pointed out, responsible historical inquiry could lead to different conclusions about the Framers' intent.[21] By emphasizing a constitutional finding, the court may have been attempting to preempt debate over the merits of the no-precedent rule. But as long as proponents of the rule (or like rules in other circuits) can advance a competing historical claim, the originalist argument will not end the debate.

Although the *Anastasoff* court based its decision in constitutional interpretation, there is clearly an independent case to be made for all opinions to carry equal precedential weight. As Judge Arnold constructs the argument, the invalidity of Rule 28A(i) flows from the principles that (1) the judicial system rests on precedent, and (2) all cases should be treated equally (that is, there should not be a body of underground law, nor should judges have even the temptation to "punt" on some cases).[22] Precedent does legitimize judicial decisionmaking. But the *Anastasoff* court does not evoke any fundamental right of individual litigants that may be violated if courts limit the precedential value of some opinions. As long as litigants continue

---

20. Arnold, *supra* note 16, at 225.

21. *Compare* Recent Case, Anastasoff v. United States, *223 F.3d 898 (8th Cir. 2000)*, 114 HARV. L. REV. 940, 943-44 (2001) (arguing that the court failed to consider the full body of historical evidence, which suggests that the Framers might not have condemned a departure from precedent), *with* Evan P. Schultz, *Gone Hunting: Judge Richard Arnold of the 8th Circuit Has Taken Aim at Unpublished Opinions, but Missed His Mark*, LEGAL TIMES, Sept. 11, 2000, at 78 (pointing out that English courts of equity were not formally bound by precedent).

22. *Anastasoff*, 223 F.3d at 903-05.

to have the right to cite unpublished opinions to make law-of-the-case, res judicata, or collateral estoppel arguments, noncitation rules will not contravene individual litigants' rights. The notion behind the attack on noncitation rules is that they lead to institutional erosion.

Before addressing the reasons to support limiting the precedential value of unpublished opinions, it is important to remember that precedent plays a vital role in the judicial system. Frederick Schauer suggests three virtues of precedent: fairness (or justice), predictability, and strengthened decisionmaking.[23] First, adhering to precedent, by treating like cases alike, makes the judicial system more fair or just. Second, if litigants know ahead of time that judges are bound to follow precedent closely, the system becomes more predictable. And third, by allowing judges to rely on earlier decisions, a precedential system leads to more efficient decisionmaking.[24] But it is equally important to note that a noncitation rule for unpublished opinions does not mean the abandonment of precedent. It merely says that some cases (in which the result itself should derive from sound precedent) may not themselves be cited as precedent in future cases.

Because the Supreme Court grants certiorari in few cases, the task of constraining appellate judges falls heavily on precedent. But precedent works to constrain judges in two ways: First, judges must base decisions on precedent; and second, when judges know that an opinion will serve as binding precedent in the future, they will presumably pay careful attention to the decision. In the first case, whether a decision carries precedential weight itself should have little bearing. That is, even if an appellate panel decides not to publish an opinion, thereby depriving it of precedential effect, the panel must still rely on precedent to reach its result.[25]

Precedent plays a central role in the judicial system, but banning noncitation rules for unpublished opinions poses not just the obvious threat to efficiency of adjudication, but a threat to the right of litigants to equal concern and respect from their government.[26] This basic right to individual

---

23. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595-602 (1987).

24. *Id.*

25. One could argue that if the case is not citable in the future, judges will have less incentive to do a careful job and are thus more likely to get the case wrong. Surely, more time spent on a case decreases the risk of error, but most opponents of no-precedent rules for unpublished opinions do not suggest that all opinions should be as long or as carefully constructed as published opinions. Rather, they suggest that even shorter unpublished opinions should have precedential effect. *See* Arnold, *supra* note 16, at 223. If a court fails to follow precedent properly, the losing party may be able to appeal. But the fact that the case may be cited as precedent (and thus some future judge may take the time to point out the error) does not particularly help the losing party.

26. Ronald Dworkin argues that the most fundamental of rights is the right of individuals to equal concern and respect. Justice, understood as fairness, rests upon the assumption of the existence of this axiomatic right. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180-83 (1978). The Supreme Court has recognized individual fairness as a linchpin of the justice system. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 319 n.53 (1978) ("[A]n underlying

fairness trumps competing institutional claims. That is, if a principle that may promote justice in some systematic way begins to erode individuals' rights in a predictable manner, that principle should then give way to the individual rights concerns. In its application, the *Anastasoff* rule is likely, in the name of institutional utility, to violate the basic right to fairness of the poorest litigants in the justice system.

The debate is too often cast as one of grand principles of justice on the side of giving all opinions precedential effect versus base economic concerns on the other side.[27] This juxtaposition is a mistake. Noncitation rules for unpublished opinions not only make the judicial system more efficient, they protect the individual right of litigants, particularly the most disadvantaged litigants, to a measure of fairness in the judicial system. The *Anastasoff* rule would affect litigants at the bottom of the economic spectrum in two ways: First, it would increase delays in adjudication, delays from which the poorest litigants are likely to suffer the most, and second, it would create a less accessible class of precedents.

The literature on unpublished opinions suggests some of the efficiency concerns that motivated the federal courts to limit publication and adopt no-precedent rules for those opinions.[28] The high volume of cases makes the production of fully reasoned opinions enormously costly. In order for federal appellate courts to hear and decide all the cases before them, judges require some mechanism for expeditiously disposing of cases that offer no complicated or new legal question. Unpublished opinions serve this purpose.

These seemingly mundane efficiency concerns raised by defenders of noncitation rules, such as Judges Kozinski and Reinhardt,[29] implicate individual fairness concerns. Giving all cases precedential effect will intensify the caseload pressure on judges and increase delays in adjudication (a fact Judge Arnold is ready to accept[30]). Clogged dockets will not affect all litigants equally. Poor litigants will be less able to weather the inevitable delays than wealthier litigants. For example, tort plaintiffs unable to pay mounting medical bills will suffer especially badly from busier dockets. This will likely push these poorer litigants into less

---

assumption of the rule of law is the worthiness of a system of justice based on fairness to the individual.").

27. *See, e.g.*, Arnold, *supra* note 16, at 221-22.

28. *See, e.g.*, Martin, *supra* note 13, at 177-83; Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909, 911-16 (1986); George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477, 477-49 (1988); Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, CAL. LAW., June 2000, at 43-44.

29. Kozinski & Reinhardt, *supra* note 28, at 43-44.

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

advantageous settlements in civil cases.[31] In addition, prisoners bringing habeas claims who rely on the efficient adjudication of their cases will suffer particularly from clogged dockets. While all litigants may take some solace in the system-wide utility that a universal principle of precedent might offer, the costs of implementing this system, in terms of justice delayed, will be felt most strongly by those at the bottom of the economic spectrum.[32]

In addition to the problems posed for the poorest litigants by clogged dockets, the *Anastasoff* rule presents a second problem for these litigants: unequal access to precedent. Limiting the precedential effect of unpublished opinions through noncitation rules ensures that litigants will have equal access to precedent, and thus a fair shot at litigating their cases.[33] Though unpublished opinions are available on commercial databases or through court clerks' offices (and, in four circuits, for free through court websites),[34] finding these precedents, even when they are available for free, requires time, energy, and money, and places those litigants with greater resources at an advantage over those with fewer (including pro se litigants, public defenders, and public-interest litigants).[35] Judge Arnold worries that litigants may be unable to invoke a previous decision of the court as precedent, even if the case is directly on point, because a previous panel has designated the opinion unpublished and therefore uncitable.[36] A full precedent system would avoid this situation. But even if this proverbial

---

31. For a discussion of the economic incentives in settlement considerations, see, for example, Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 238 (1982), which shows that the more steeply plaintiffs discount future payoffs, the greater the premium the litigant will place on settlement; and Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 417-18 (1973), which proposes a general economic model of settlement.

32. I do not want to argue that individual fairness never favors mandating the precedential effect of unpublished opinions. Certainly, individual litigants denied the ability to cite a case directly on point find themselves individually less happy. This will happen in a limited-citation regime (as, in fact, it did in *Anastasoff*). But there is no reason to think the burden will fall disproportionately on a certain group of litigants.

33. Lauren K. Robel argues that not publishing opinions leads to unequal access. She claims that frequent litigants are more likely to be privy to unpublished opinions and thus more likely to be able to spot trends invisible to one-shot litigants. *See* Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 946, 955 (1989). This is more of an argument for publication than for giving all opinions precedential effect. Simply allowing citation to unpublished opinions might exacerbate the frequent litigant's advantage.

34. The First, Second, Fourth, and Eighth Circuits make all opinions, whether published or not, available for free on their webpages. The Third, Sixth, Seventh, Ninth, Tenth, Eleventh, D.C., and Federal Circuits make only published or precedential opinions available on their webpages. *See* http://www.uscourts.gov. Free legal research services, such as Findlaw, do not post unpublished opinions of the circuit courts. *See* http://www.findlaw.com.

35. Needless to say, litigants with the resources to hire more experienced lawyers (or simply more lawyers) will always have an advantage, but that does not make an institutional change that further tips the balance towards these parties fair.

36. Arnold, *supra* note 16, at 221.

needle in the haystack were available to litigants, only those with the resources to search for it could benefit from it. By putting impecunious litigants at a systematic disadvantage, throwing the vast opus of unpublished opinions into the body of precedent would violate these individuals' right to equal concern and respect.[37]

IV

Anastasoff rests on the proposition that the system would be on the whole more fair or just if all cases counted equally as precedent. The *Anastasoff* rule, however, would not only threaten the efficiency of judicial administration, it would harm the ability of individuals at the bottom of the economic spectrum to bring their cases. Making all opinions carry full precedential effect will not optimize the amount of precedent. The benefits precedent brings to the judicial system, in terms of predictability, stability, and fairness in adjudication,[38] are distributed among all participants in the system. Likewise, the marginal benefit of the *Anastasoff* rule would be distributed among all participants in the judicial system. But the costs of the vast increase in precedents are likely to be borne by those litigants on the lowest rungs of the economic ladder. This systematic unfairness to the poorest individuals in the justice system, impinging on their right to present their cases, should prevent courts from mandating that all unpublished opinions carry precedential weight.

—*Daniel B. Levin*

37. Judge Boggs of the Sixth Circuit and Brian P. Brooks take issue with a fairness rationale, arguing that "this 'fairness' rationale cannot mean that the courts ought to adopt *Harrison Bergeron*-like rules that level the playing field by imposing artificial impediments on lawyers smart enough to follow developments in their field of specialty." Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG 2D 17, 21-22 (2000). The authors worry that limiting the quantity of precedent on fairness grounds is equivalent to dumbing down the system. But pointing out that increasing the body of precedent threefold might be unfair to some litigants is hardly a call to dumb down the system. Rather, it is a call to consider the ramifications carefully before deviating from the status quo.

38. *See supra* note 15 and accompanying text.

LEXSEE 2003 U.S. APP. LEXIS 24328

UNITED STATES OF AMERICA, Plaintiff–Appellee, v. JOHN RICHARD HOUSEL, Sr., Defendant–Appellant.

No. 03–3042

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

2003 U.S. App. LEXIS 24328

December 2, 2003, Filed

NOTICE: [*1] RULES OF THE TENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: (D. Ct. No. 02–CV–3089–JAR). (D. Kan.) *United States v. Housel, 2003 U.S. Dist. LEXIS 283 (D. Kan., Jan. 6, 2003)*

DISPOSITION: Affirmed in part and dismissed in part. Certificate of appealability granted in part.

LexisNexis (TM) HEADNOTES– Core Concepts:

COUNSEL: For United States of America, Plaintiff – Appellee: Anthony W. Mattivi, James A. Brown, Asst. U.S. Attorney, Office of the United States Attorney, Topeka, KS.

For John Richard Housel, Sr., Defendant – Appellant: Ronald E. Wurtz, Office of the Federal Public Defender, For the District of Kansas, Topeka, KS.

JUDGES: Before TACHA, Chief Circuit Judge, PORFILIO, Circuit Judge, and BRORBY, Senior Circuit Judge.

OPINIONBY: WADE BRORBY

OPINION:

ORDER AND JUDGMENT *

* This order and judgment is not binding precedent except under the doctrines of law of the case, *res judicata* and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of *10th Cir. R. 36.3*.

After examining [*2] the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See Fed. R. App. P. 34(a)(2)*; *10th Cir. R. 34.1(G)*. The case is therefore ordered submitted without oral argument.

Appellant John Richard Housel, a federal inmate appearing *pro se*, seeks a certificate of appealability to appeal the district court's order dismissing his motion to vacate, set aside or correct his sentence pursuant to *28 U.S.C. § 2255*. His claims center on allegations of ineffective assistance of counsel during sentencing. We deny his request for a certificate of appealability on all, but one issue, and dismiss his appeal with respect to those issues. Pursuant to *28 U.S.C. § 2253(c)*, we grant a certificate of appealability on the issue regarding the amount of pseudoephedrine to be applied in calculating his sentence, but nevertheless affirm the district court's decision on other grounds.

Mr. Housel was charged in a six–count indictment, including offenses relating to distribution of marijuana, conspiracy to manufacture methamphetamine, [*3] and possession of pseudoephedrine and iodine with intent to manufacture methamphetamine. In exchange for dismissal of four counts, Mr. Housel pled guilty to one count of distributing marijuana in violation of *21 U.S.C. § 841(a)(1)* and one count of attempted distribution of marijuana in violation of *21 U.S.C. § 846*. In order to understand Mr. Housel's ineffective assistance of counsel claims, it is necessary to explain the types and amount of contraband involved in calculating his sentence.

The specific contraband used in determining Mr. Housel's sentence included the 1,128 grams (or 1.13 kilograms) of marijuana to which he pled guilty, and the "related conduct" contraband consisting of multiple chemicals he intended to use to manufacture methamphetamine,

but for which he received no conviction. According to the presentencing report, Mr. Housel was attempting to use those chemicals to manufacture methamphetamine, and therefore, the base offense level in United States Sentencing Guidelines Manual § 2D1.1 applied in calculating his sentence, rather than § 2D1.11. *See* U.S.S.G. § 2D1.11(c) (stating if an offense involves an attempt to [*4] manufacture controlled substances, § 2D1.1 is applied.) According to the presentencing report, the chemicals involved included an amount of iodine capable of producing 708 grams of methamphetamine, phosphorus capable of producing 1,043 grams of methamphetamine, and pseudoephedrine capable of producing 178 grams of methamphetamine.

Because Mr. Housel's sentence calculation involved both marijuana and chemicals used for producing methamphetamine, the probation officer who prepared the presentencing report converted a portion of the total amount of producible methamphetamine for which Mr. Housel was responsible into a total volume of marijuana. In so doing, the probation officer converted only the most abundant chemical – phosphorus – which laboratory analysis indicated could produce 1,043 grams of methamphetamine. Once the 1,043 grams was converted into marijuana, the total conversion amount consisted of 10,430 kilograms of marijuana. When added to the 1.13 kilograms of actual marijuana he possessed, the total amount of marijuana attributable to Mr. Housel in the presentencing report totaled 10,431 kilograms of marijuana.

The presentencing report concluded that 10,431 kilograms of [*5] marijuana results in a base offense level of 36, which together with Mr. Housel's criminal history category of III, placed him in a sentencing range of 235–293 months imprisonment. *See* U.S.S.G. § 2D1.1(c)(2) and ch. 5, pt. A (1998 Sentencing Table). However, the presentencing report also pointed out that the offenses and statutes to which Mr. Housel pled guilty provided a maximum of only sixty months or five years imprisonment, and that the terms of imprisonment must run consecutively if the highest statutory maximum, as in this case, is less than the guideline range. *Compare 21 U.S.C. § 841(b)(1)(D)* and U.S.S.G. § 5G1.2(d). As a result, the presentencing report calculated the appropriate sentence range at 120 months. Mr. Housel's counsel initially filed several objections to the presentencing report, but withdrew them at sentencing, stating they would not affect Mr. Housel's sentence. *See United States v. Housel, 9 Fed. Appx. 874, No. 00–3252, 2001 WL 557977 at *1 (10th Cir. May 24, 2001)* (unpublished decision). The district court relied on the presentencing report, and on August 23, 2000, sentenced Mr. Housel to two sixty–month terms of imprisonment [*6] to run consecutively. *Id.*

Mr. Housel filed a direct appeal challenging the calculation in the presentencing report attributing 10,431 kilograms of marijuana to him. *Id.* Because he did not raise this argument prior to sentencing, this court reviewed his claim for "plain error." *Id.* In so doing, we rejected Mr. Housel's contention his conduct should have been treated as possession of a listed chemical under U.S.S.G. § 2D1.11, which would result in a lesser sentencing range, rather than an attempt to manufacture a controlled substance under § 2D1.1. *9 Fed. Appx. 874 at 1–2*. Our ruling was based on a factual determination in the presentencing report that Mr. Housel intended to manufacture methamphetamine – conduct for which U.S.S.G. § 2D1.1 is applied, and for which no plain error was shown. *Id.* In addition, this court noted Mr. Housel's appeal seemed to suggest his counsel acted ineffectively in failing to raise objections to the Presentencing Report, and directed him to file a collateral proceeding if he wished to pursue those claims. *9 Fed. Appx. 874 at 2*.

Mr. Housel filed the instant *§ 2255* motion, raising the following ineffective assistance of counsel issues: 1) counsel failed [*7] to raise the argument his sentence should have been calculated under sentencing guideline § 2D1.11 instead of § 2D1.1; 2) counsel failed to object to the use of phosphorus, an unlisted chemical, as the basis for the converted quantity of methamphetamine used to calculate the base offense level; and 3) counsel failed to otherwise function as an effective advocate for his client.

Following the government's response and opposition to Mr. Housel's motion, the district court issued a "Memorandum and Order Denying Motion to Vacate Sentence" (Memorandum), in which it rejected Mr. Housel's arguments in support of his ineffective assistance of counsel claims and dismissed his motion. Specifically, the district court determined that the sentencing judge properly applied U.S.S.G. § 2D1.1 because the preponderance of the evidence demonstrated Mr. Housel intended to use the chemicals at issue to manufacture methamphetamine.

Next, the district court examined Mr. Housel's related claim that the sentencing court, in calculating the amount of methamphetamine attributable to him, improperly applied an unlisted chemical under U.S.S.G. § 2D1.1 – *i.e.*, phosphorus, rather than one of the listed [*8] chemicals – iodine or pseudoephedrine. The government did not dispute Mr. Housel's contention that phosphorus should not have been used to calculate his sentence, but reasoned pseudoephedrine, as a listed chemical, could be used instead. The district court agreed and explained that if pseudoephedrine had been applied, instead of phosphorus, "there is no reasonable probability that the outcome of the proceedings would have been different." In sup-

port, the district court relied on the presentencing report to point out that 388.8 grams of pseudoephedrine would result in 178 grams of methamphetamine, which when converted into marijuana and added to the 1.13 kilograms of marijuana, would place the base offense level at 32, resulting in a sentencing range far exceeding the 120–month statutory maximum term of imprisonment imposed. *See* U.S.S.G. ch. 5, pt. A (1998 Sentencing Table) (showing applicable guideline sentencing range at 151–188 months of imprisonment).

The district court also considered Mr. Housel's argument his counsel failed to argue Mr. Housel should only be responsible for the 250 grams of pseudoephedrine he agreed to purchase from agents, and not the 388.8 grams that agents [*9] delivered. n1 Mr. Housel asserted that 250 grams of pseudoephedrine would produce only 95 grams of methamphetamine, placing him in a sentencing range substantially below 120 months imprisonment. The district court determined Mr. Housel's failure to challenge the presentencing report's calculation of either iodine or pseudoephedrine at trial or on direct appeal imposed a procedural bar to this ineffective assistance of counsel claim. In so concluding, the district court noted that Mr. Housel retained different counsel at trial and on appeal, and his appellate counsel failed to raise this issue on direct appeal.

> n1 In support of his argument, Mr. Housel relied on *United States v. Perez de Dios*, in which this circuit held that, under U.S.S.G. § 2D1.1, a defendant is responsible for the quantity of cocaine he agrees to buy and not the amount the government delivers. *See 237 F.3d 1192, 1195 (10th Cir. 2001)*.

Finally, the district court determined counsel did not fail to function as an effective [*10] advocate based on his statements made at sentencing or his failure to move for a downward departure. After careful analysis, the district court concluded counsel's conduct, under the circumstances in the case, did not constitute ineffective performance under *Strickland v. Washington, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984.)* Accordingly, the district court dismissed Mr. Housel's *§ 2255* motion and denied his request for a certificate of appealability.

On appeal, Mr. Housel renews his request for a certificate of appealability, and raises the same issues asserted in his motion and rejected by the district court. Mr. Housel contends the district court erred in determining his ineffective assistance of counsel claim, on the proper amount of pseudoephedrine used in calculating his sentence, was procedurally barred. In support, Mr. Housel relies on *Massaro v. United States*, which holds that failure to raise ineffective assistance of counsel claims on direct appeal does not bar review in a later collateral proceeding. *See __ U.S. ___, ___, 155 L. Ed. 2d 714, 123 S. Ct. 1690, 1694, 1696 (2003)*. Finally, he contends the district court erred in failing [*11] to grant an evidentiary hearing on the merits of his claims. The government filed a brief opposing both Mr. Housel's appeal and request for a certificate of appealability.

An appeal may not be taken from a final order in a *§ 2255* proceeding without a certificate of appealability. *28 U.S.C. § 2253(c)(1)*. In order for a movant to be entitled a certificate of appealability, he must make a "substantial showing of the denial of a constitutional right." *28 U.S.C. § 2253(c)(2)*. "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy *§ 2253(c)* is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller–El v. Cockrell, 537 U.S. 322, 338, 154 L. Ed. 2d 931, 123 S. Ct. 1029(2003)* (quotation marks, alteration, and citation omitted). When the district court dismisses a habeas motion "on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows, at least, that jurists [*12] of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel, 529 U.S. 473, 484, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000)*.

These are threshold inquiries we apply to determine whether we may entertain an appeal. *See Miller–El, 123 S. Ct. at 1039*. We may perform these inquiries with "a preliminary, though not definitive," analysis of the claims raised. *Id. at 1040*. In reviewing a district court's dismissal of a motion for post conviction relief, we are free to affirm a district court decision on any grounds for which there is a sufficient record, including grounds not relied on by the district court. *See United States v. Alvarez, 137 F.3d 1249, 1251 (10th Cir. 1998)*. We review the denial of an evidentiary hearing on a *§ 2255* motion for abuse of discretion. *See United States v. Whalen, 976 F.2d 1346, 1348 (10th Cir. 1992)*.

Applying these principles, we have conducted a thorough review of the pleadings, record on appeal, and [*13] the district court's decision. Under the circumstances and record presented in this case, we conclude no hearing was warranted, and therefore, the district court did not abuse its discretion by denying a hearing on any of Mr. Housel's claims. For the purpose of judicial economy, we decline to duplicate the district court's analysis on those issues on

which it addressed the merits, other than to conclude Mr. Housel clearly fails to make a substantial showing of the denial of a constitutional right as required by *28 U.S.C. § 2253(c)*. Thus, for substantially the same reasons set forth in the district court's January 6, 2003 Memorandum, we deny Mr. Housel's request for a certificate of appealability as to those issues and dismiss his appeal with respect to them.

We grant a certificate of appealability on Mr. Housel's claim of ineffective assistance of counsel concerning the amount of pseudoephedrine to be applied in calculating his sentence, which the district court determined was procedurally barred. Because we can easily resolve the issue on other grounds, we decline to remand the issue to the district court and instead directly address the merits of his claim. [*14] n2

> n2 Given our agreement with the district court on Mr. Housel's ineffective assistance of counsel claim with respect to any "downward departure," we decline to entertain his assertion that any calculation of his sentence should include a three–point reduction for acceptance of responsibility.

This circuit has held that "when a defendant fails to raise a claim on direct appeal, he is barred from pursuing that claim in a later *§ 2255* proceeding, absent a showing of cause and actual prejudice or a fundamental miscarriage of justice," but that "this bar does not apply to an ineffective assistance of counsel claim." *United States v. Mora, 293 F.3d 1213, 1216 (10th Cir.)* (quotation marks and citation omitted), *cert. denied, 537 U.S. 961, 154 L. Ed. 2d 315, 123 S. Ct. 388 (2002)*. This is in accord with *Massaro v. United States*, which holds that failure to raise an ineffective assistance of counsel claim on direct appeal does not bar review in a later collateral proceeding. [*15] *See 123 S. Ct. at 1694, 1696*. Under the circumstances presented here, it is likely that jurists of reason would find it debatable whether the district court was correct in its procedural ruling with respect to Mr. House's claim. *See Slack, 529 U.S. at 484*. However, in this case, even assuming Mr. Housel's ineffective assistance of counsel claim is not barred, we can easily resolve his claim on the merits and conclude he is not entitled to relief.

In addressing Mr. Housel's claim on the merits, we must determine whether the failure of Mr. Housel's counsel to raise an objection to the amount of pseudoephedrine requested was deficient and if it was deficient, whether it prejudiced Mr. Housel. *See Strickland, 466 U.S. at 687*. To succeed, Mr. Housel must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id. at 694*.

We begin by noting that even if Mr. Housel agreed to only purchase 250 grams of pseudoephedrine, and not a total of 388.8 grams, it is unclear how he arrives at his calculation that 250 grams would produce only 95 grams [*16] of methamphetamine. Similarly, if 388.8 grams is used, it is unclear how he arrives at his calculation that 388.8 grams would, at the most, produce only 142 grams of methamphetamine, and not the 178 grams of methamphetamine calculated in the presentencing report. n3 In so doing, he incorrectly asserts that 142 grams converted into marijuana would result in an offense level of 30, and a sentence less than the one imposed. Instead, the accurate offense level for 142 grams of methamphetamine converted to 1,420 kilograms of marijuana is 32, resulting in a sentencing range of 151–188 – well above the 120–month sentence imposed. *See* U.S.S.G. § 2D1.1(c)(4) and ch. 5, pt. A (1998 Sentencing Table). We find Mr. Housel's incorrect calculation of the base offense level, and his unsupported pseudoephedrine computations, together with his failure to provide an adequate record or references to support them, insufficient in this case to support his claim. *See United States v. Rodriguez–Aguirre, 108 F.3d 1228, 1237 n.8 (10th Cir.), cert. denied, 522 U.S. 847, 139 L. Ed. 2d 81, 118 S. Ct. 132 (1997)*.

> n3 On appeal, Mr. Housel provides the following equation, without any explanation of how he arrived at its components: "250 grams of pseudoephedrine x .5 x .76 = 95 grams [methamphetamine] x 10kg marijuana = 950 kg." Apparently, ".5" refers to a fifty percent yield rate and ".76" to a twenty–four percent HCL salt removal rate referenced in one of his district court pleadings. But neither his appeal brief nor record references explain why these percentages are appropriate or correct. To show the possible fallacy of Mr. Housel's computations, if the above equation is applied to 388.8 grams, it results in 147.75 grams of methamphetamine, and not the 178 grams used in the presentencing report or the 142 grams Mr. Housel claims would result.

[*17]

Even if the record supported Mr. Housel's claim with respect to the amount of pseudoephedrine applied, Mr. Housel's sentence would be unaffected because the methamphetamine conversion for iodine would result in the same sentence he received. Mr. Housel claims iodine is not a listed chemical under the sentencing guidelines and cannot be used to calculate his sentence. We disagree. In 1996, iodine was explicitly designated as a List II chemical in the Comprehensive Methamphetamine

Control Act, Pub. L. No. 104–237, § 204, 110 Stat. 3099 (codified at *21 U.S.C. § 802(35)(I)*). The current sentencing guidelines manual expressly categorizes iodine as a List II chemical under § 2D1.11(e)(2). Admittedly, iodine was not expressly listed in § 2D1.11 of the 1998 Sentencing Guidelines Manual – the version in effect at the time of Mr. Housel's sentencing. In such a case, "if the offense is a felony or Class A misdemeanor for which no guideline expressly has been promulgated, [the court must] apply the most analogous offense guideline." *See* U.S.S.G. § 2X5.1 (1997). In this case, the probation officer determined the analogous offense guideline for iodine was methamphetamine, [*18] resulting in conversion of the iodine into 708 grams of methamphetamine and then a conversion to 7,080 kilograms of marijuana.

Similarly, under the sentencing guidelines applicable to Mr. Housel, it is also appropriate to use 708 grams of methamphetamine to calculate his sentence, rather than the amounts of methamphetamine attributed to pseudoephedrine. This is because U.S.S.G. § 2D1.11 indicates that if more than one chemical is involved, regardless of whether it is Class I or II, the court should use the one which results in the greater offense level, which in this case is 708 grams of Class II iodine rather than 250 grams of Class I pseudoephedrine. *See* U.S.S.G. § 2D1.11(d) n.(A)–(D) (1998); *see also* § 2D1.11(e) n.(A) (2003) (providing same result).

In this case, the base offense level for 7,080 grams of marijuana is 34, placing Mr. Housel in a sentencing guideline range of 188–235 months imprisonment. *See* U.S.S.G. § 2D1.1(c)(3) and ch.5, pt. A (1998 Sentencing Table). Thus, it is logical to conclude that if Mr. Housel's counsel had successfully objected to the use of phosphorus and the amount of pseudoephedrine to calculate his sentence, the probation officer [*19] and the sentencing court would have simply applied the most abundant statutory listed chemical – iodine – to calculate his sentence, which would have resulted in an offense level higher than the offense level for the 250 grams of pseudoephedrine Mr. Housel claims is the appropriate amount. For these reasons, even if Mr. Housel's counsel had raised these objections, the sentencing range would have far exceeded the 120–month statutory maximum imposed. Given the circumstances of this case, Mr. Housel's counsel's failure to raise an objection was not deficient, or if it was deficient, it did not prejudice Mr. Housel. *See Strickland, 466 U.S. at 687*. Accordingly, Mr. Housel has failed to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id. at 694*.

For these reasons, Mr. Housel's request for a certificate of appealability is granted on his ineffective assistance of counsel claim concerning the use of pseudoephedrine to calculate his sentence, but for the reasons delineated here, the district court's judgment is nevertheless **AFFIRMED**. As to all other issues [*20] raised, we conclude Mr. Housel fails to make a substantial showing of the denial of a constitutional right as required by *28 U.S.C. § 2253(c)*. Thus, for substantially the same reasons set forth in the district court's January 6, 2003 Memorandum, we deny Mr. Housel's request for a certificate of appealability on those issues and **DISMISS** his appeal with respect to those issues.

Entered by the Court:

WADE BRORBY

United States Circuit Judge

82 Fed.Appx. 18
(Cite as: 82 Fed.Appx. 18, 2003 WL 22854676 (10th Cir.(Kan.)))

H

This case was not selected for publication in the Federal Reporter.

Please use FIND to look at the applicable circuit court rule before citing this opinion. Tenth Circuit Rule 36.3. (FIND CTA10 Rule 36.3.)

United States Court of Appeals,
Tenth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
John Richard HOUSEL, Sr., Defendant-Appellant.

No. 03-3042.

Dec. 2, 2003.

Defendant pled guilty and conviction was entered in the United States District Court for the District of Kansas of distributing marijuana and attempted distribution of marijuana. Defendant appealed. The Court of Appeals, Ebel, Circuit Judge, 9 Fed.Appx. 874, 2001 WL 557977, affirmed. Defendant then moved to vacate his sentence alleging ineffective assistance of counsel. The District Court, 2003 WL 84408, denied the motion. Defendant appealed. The Court of Appeals, Brorby, Circuit Judge, held that failure of defendant's counsel to object to amount of pseudoephedrine involved in his conviction for sentencing purposes was not deficient and did not prejudice defendant.

Affirmed.

West Headnotes

Criminal Law ⚿ **641.13(7)**
110k641.13(7) Most Cited Cases

Failure of defendant's counsel to object to amount of pseudoephedrine involved in his distributing marijuana conviction for sentencing purposes was not deficient and did not prejudice defendant and thus defendant was not entitled to vacate his sentence for ineffective assistance of counsel; defendant did not produce evidence to support his computations, and if counsel had successfully objected to pseudoephedrine calculation, methamphetamine conversion for iodine would have been used which would have resulted in a higher offense level. U.S.C.A. Const.Amend. 8; U.S.S.G. § 2D1.11, 18 U.S.C.A.

***18** Anthony W. Mattivi, James A. Brown, Asst. U.S. Attorney, Office of the United States Attorney, Topeka, KS, for Plaintiff-Appellee.

Ronald E. Wurtz, Office of the Federal Public Defender For the District of Kansas, Topeka, KS, for Defendant-Appellant.

Before TACHA, Chief Circuit Judge, PORFILIO, Circuit Judge, and BRORBY, Senior Circuit Judge.

ORDER AND JUDGMENT [FN*]

FN* This order and judgment is not binding precedent except under the doctrines of law of the case, *res judicata* and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

BRORBY, Circuit Judge.

****1** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Appellant John Richard Housel, a federal inmate appearing *pro se,* seeks a certificate of appealability to appeal the district court's order dismissing his motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. His claims center on allegations of ineffective assistance ***19** of counsel during sentencing. We deny his request for a certificate of appealability on all, but one issue, and dismiss his appeal with respect to those issues. Pursuant to 28 U.S.C. § 2253(c), we grant a certificate of appealability on the issue regarding the amount of pseudoephedrine to be applied in calculating his sentence, but nevertheless affirm the

district court's decision on other grounds.

Mr. Housel was charged in a six-count indictment, including offenses relating to distribution of marijuana, conspiracy to manufacture methamphetamine, and possession of pseudoephedrine and iodine with intent to manufacture methamphetamine. In exchange for dismissal of four counts, Mr. Housel pled guilty to one count of distributing marijuana in violation of 21 U.S.C. § 841(a)(1) and one count of attempted distribution of marijuana in violation of 21 U.S.C. § 846. In order to understand Mr. Housel's ineffective assistance of counsel claims, it is necessary to explain the types and amount of contraband involved in calculating his sentence.

The specific contraband used in determining Mr. Housel's sentence included the 1,128 grams (or 1.13 kilograms) of marijuana to which he pled guilty, and the "related conduct" contraband consisting of multiple chemicals he intended to use to manufacture methamphetamine, but for which he received no conviction. According to the presentencing report, Mr. Housel was attempting to use those chemicals to manufacture methamphetamine, and therefore, the base offense level in United States Sentencing Guidelines Manual § 2D1.1 applied in calculating his sentence, rather than § 2D1.11. *See* U.S.S.G. § 2D1.11(c) (stating if an offense involves an attempt to manufacture controlled substances, § 2D1.1 is applied.) According to the presentencing report, the chemicals involved included an amount of iodine capable of producing 708 grams of methamphetamine, phosphorus capable of producing 1,043 grams of methamphetamine, and pseudoephedrine capable of producing 178 grams of methamphetamine.

Because Mr. Housel's sentence calculation involved both marijuana and chemicals used for producing methamphetamine, the probation officer who prepared the presentencing report converted a portion of the total amount of producible methamphetamine for which Mr. Housel was responsible into a total volume of marijuana. In so doing, the probation officer converted only the most abundant chemical--phosphorus--which laboratory analysis indicated could produce 1,043 grams of methamphetamine. Once the 1,043 grams was converted into marijuana, the total conversion amount consisted of 10,430 kilograms of marijuana. When added to the 1.13 kilograms of actual marijuana he possessed, the total amount of marijuana attributable to Mr. Housel in the presentencing report totaled 10,431 kilograms of marijuana.

2 The presentencing report concluded that 10,431 kilograms of marijuana results in a base offense level of 36, which together with Mr. Housel's criminal history category of III, placed him in a sentencing range of 235-293 months imprisonment. *See* U.S.S.G. § 2D1.1(c)(2) and ch. 5, pt. A (1998 Sentencing Table). However, the presentencing report also pointed out that the offenses and statutes to which Mr. Housel pled guilty provided a maximum of only sixty months or five years imprisonment, and that the terms of imprisonment must run consecutively if the highest statutory maximum, as in this case, is less than the guideline range. *Compare* 21 U.S.C. § 841(b)(1)(D) and U.S.S.G. § 5G1.2(d). As a result, the presentencing report calculated the appropriate sentence range at 120 months. Mr. Housel's counsel initially filed several objections to the **20 presentencing report, but withdrew them at sentencing, stating they would not affect Mr. Housel's sentence. *See United States v. Housel*, No. 00-3252, 2001 WL 557977 at *1, 9 Fed.Appx. 874 (10th Cir. May 24, 2001) (unpublished decision). The district court relied on the presentencing report, and on August 23, 2000, sentenced Mr. Housel to two sixty-month terms of imprisonment to run consecutively. *Id.*

Mr. Housel filed a direct appeal challenging the calculation in the presentencing report attributing 10,431 kilograms of marijuana to him. *Id.* Because he did not raise this argument prior to sentencing, this court reviewed his claim for "plain error." *Id.* In so doing, we rejected Mr. Housel's contention his conduct should have been treated as possession of a listed chemical under U.S.S.G. § 2D1.11, which would result in a lesser sentencing range, rather than an attempt to manufacture a controlled substance under § 2D1.1. *Id.* at 1-2. Our ruling was based on a factual determination in the presentencing report that Mr. Housel intended to manufacture methamphetamine--conduct for which U.S.S.G. § 2D1.1 is applied, and for which no plain error was shown. *Id.* In addition, this court noted Mr. Housel's appeal seemed to suggest his counsel acted ineffectively in failing to raise objections to the Presentencing Report, and directed him to file a collateral proceeding if he wished to pursue those claims. *Id.* at 2.

Mr. Housel filed the instant § 2255 motion, raising the following ineffective assistance of counsel issues: 1) counsel failed to raise the argument his sentence should have been calculated under sentencing guideline § 2D1.11 instead of § 2D1.1; 2) counsel failed to object to the use of phosphorus, an unlisted chemical, as the basis for the converted quantity of methamphetamine used to calculate the base offense level; and 3) counsel failed to otherwise function as an

effective advocate for his client.

Following the government's response and opposition to Mr. Housel's motion, the district court issued a "Memorandum and Order Denying Motion to Vacate Sentence" (Memorandum), in which it rejected Mr. Housel's arguments in support of his ineffective assistance of counsel claims and dismissed his motion. Specifically, the district court determined that the sentencing judge properly applied U.S.S.G. § 2D1.1 because the preponderance of the evidence demonstrated Mr. Housel intended to use the chemicals at issue to manufacture methamphetamine.

3 Next, the district court examined Mr. Housel's related claim that the sentencing court, in calculating the amount of methamphetamine attributable to him, improperly applied an unlisted chemical under U.S.S.G. § 2D1.1-- *i.e.,* phosphorus, rather than one of the listed chemicals--iodine or pseudoephedrine. The government did not dispute Mr. Housel's contention that phosphorus should not have been used to calculate his sentence, but reasoned pseudoephedrine, as a listed chemical, could be used instead. The district court agreed and explained that if pseudoephedrine had been applied, instead of phosphorus, "there is no reasonable probability that the outcome of the proceedings would have been different." In support, the district court relied on the presentencing report to point out that 388.8 grams of pseudoephedrine would result in 178 grams of methamphetamine, which when converted into marijuana and added to the 1.13 kilograms of marijuana, would place the base offense level at 32, resulting in a sentencing range far exceeding the 120-month statutory maximum term of imprisonment imposed. *See* U.S.S.G. ch. 5, pt. A (1998 Sentencing Table) (showing applicable guideline sentencing21** range at 151-188 months of imprisonment).

The district court also considered Mr. Housel's argument his counsel failed to argue Mr. Housel should only be responsible for the 250 grams of pseudoephedrine he agreed to purchase from agents, and not the 388.8 grams that agents delivered. [FN1] Mr. Housel asserted that 250 grams of pseudoephedrine would produce only 95 grams of methamphetamine, placing him in a sentencing range substantially below 120 months imprisonment. The district court determined Mr. Housel's failure to challenge the presentencing report's calculation of either iodine or pseudoephedrine at trial or on direct appeal imposed a procedural bar to this ineffective assistance of counsel claim. In so concluding, the district court noted that Mr. Housel retained different counsel at trial and on appeal, and his appellate counsel failed to raise this issue on direct appeal.

FN1. In support of his argument, Mr. Housel relied on *United States v. Perez de Dios,* in which this circuit held that, under U.S.S.G. § 2D1.1, a defendant is responsible for the quantity of cocaine he agrees to buy and not the amount the government delivers. *See* 237 F.3d 1192, 1195 (10th Cir.2001).

Finally, the district court determined counsel did not fail to function as an effective advocate based on his statements made at sentencing or his failure to move for a downward departure. After careful analysis, the district court concluded counsel's conduct, under the circumstances in the case, did not constitute ineffective performance under *Strickland v. Washington,* 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984.) Accordingly, the district court dismissed Mr. Housel's § 2255 motion and denied his request for a certificate of appealability.

On appeal, Mr. Housel renews his request for a certificate of appealability, and raises the same issues asserted in his motion and rejected by the district court. Mr. Housel contends the district court erred in determining his ineffective assistance of counsel claim, on the proper amount of pseudoephedrine used in calculating his sentence, was procedurally barred. In support, Mr. Housel relies on *Massaro v. United States,* which holds that failure to raise ineffective assistance of counsel claims on direct appeal does not bar review in a later collateral proceeding. *See* 538 U.S. 500, 123 S.Ct. 1690, 1694, 1696, 155 L.Ed.2d 714 (2003). Finally, he contends the district court erred in failing to grant an evidentiary hearing on the merits of his claims. The government filed a brief opposing both Mr. Housel's appeal and request for a certificate of appealability.

**4 An appeal may not be taken from a final order in a § 2255 proceeding without a certificate of appealability. 28 U.S.C. § 2253(c)(1). In order for a movant to be entitled a certificate of appealability, he must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell,* 537 U.S. 322, 338, 123 S.Ct. 1029, 154 L.Ed.2d 931(2003) (quotation marks,

alteration, and citation omitted). When the district court dismisses a habeas motion "on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of ***22** a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

These are threshold inquiries we apply to determine whether we may entertain an appeal. *See Miller-El*, 123 S.Ct. at 1039. We may perform these inquiries with "a preliminary, though not definitive," analysis of the claims raised. *Id.* at 1040. In reviewing a district court's dismissal of a motion for post conviction relief, we are free to affirm a district court decision on any grounds for which there is a sufficient record, including grounds not relied on by the district court. *See United States v. Alvarez*, 137 F.3d 1249, 1251 (10th Cir.1998). We review the denial of an evidentiary hearing on a § 2255 motion for abuse of discretion. *See United States v. Whalen*, 976 F.2d 1346, 1348 (10th Cir.1992).

Applying these principles, we have conducted a thorough review of the pleadings, record on appeal, and the district court's decision. Under the circumstances and record presented in this case, we conclude no hearing was warranted, and therefore, the district court did not abuse its discretion by denying a hearing on any of Mr. Housel's claims. For the purpose of judicial economy, we decline to duplicate the district court's analysis on those issues on which it addressed the merits, other than to conclude Mr. Housel clearly fails to make a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c). Thus, for substantially the same reasons set forth in the district court's January 6, 2003 Memorandum, we deny Mr. Housel's request for a certificate of appealability as to those issues and dismiss his appeal with respect to them.

We grant a certificate of appealability on Mr. Housel's claim of ineffective assistance of counsel concerning the amount of pseudoephedrine to be applied in calculating his sentence, which the district court determined was procedurally barred. Because we can easily resolve the issue on other grounds, we decline to remand the issue to the district court and instead directly address the merits of his claim. [FN2]

FN2. Given our agreement with the district court on Mr. Housel's ineffective assistance of counsel claim with respect to any "downward departure," we decline to entertain his assertion that any calculation of his sentence should include a three-point reduction for acceptance of responsibility.

****5** This circuit has held that "[w]hen a defendant fails to raise a claim on direct appeal, he is barred from pursuing that claim in a later § 2255 proceeding, absent a showing of cause and actual prejudice or a fundamental miscarriage of justice," but that "[t]his bar does not apply to an ineffective assistance of counsel claim." *United States v. Mora*, 293 F.3d 1213, 1216 (10th Cir.) (quotation marks and citation omitted), *cert. denied*, 537 U.S. 961, 123 S.Ct. 388, 154 L.Ed.2d 315 (2002). This is in accord with *Massaro v. United States*, which holds that failure to raise an ineffective assistance of counsel claim on direct appeal does not bar review in a later collateral proceeding. *See* 123 S.Ct. at 1694, 1696. Under the circumstances presented here, it is likely that jurists of reason would find it debatable whether the district court was correct in its procedural ruling with respect to Mr. House's claim. *See Slack*, 529 U.S. at 484. However, in this case, even assuming Mr. Housel's ineffective assistance of counsel claim is not barred, we can easily resolve his claim on the merits and conclude he is not entitled to relief.

In addressing Mr. Housel's claim on the merits, we must determine whether the ***23** failure of Mr. Housel's counsel to raise an objection to the amount of pseudoephedrine requested was deficient and if it was deficient, whether it prejudiced Mr. Housel. *See Strickland*, 466 U.S. at 687. To succeed, Mr. Housel must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

We begin by noting that even if Mr. Housel agreed to only purchase 250 grams of pseudoephedrine, and not a total of 388.8 grams, it is unclear how he arrives at his calculation that 250 grams would produce only 95 grams of methamphetamine. Similarly, if 388.8 grams is used, it is unclear how he arrives at his calculation that 388.8 grams would, at the most, produce only 142 grams of methamphetamine, and not the 178 grams of methamphetamine calculated in the presentencing report. [FN3] In so doing, he incorrectly asserts that 142 grams converted into marijuana would result in an offense level of 30, and a sentence less than the one imposed. Instead, the accurate offense level for 142

grams of methamphetamine converted to 1,420 kilograms of marijuana is 32, resulting in a sentencing range of 151-188--well above the 120-month sentence imposed. *See* U.S.S.G. § 2D1.1(c)(4) and ch. 5, pt. A (1998 Sentencing Table). We find Mr. Housel's incorrect calculation of the base offense level, and his unsupported pseudoephedrine computations, together with his failure to provide an adequate record or references to support them, insufficient in this case to support his claim. *See United States v. Rodriguez-Aguirre*, 108 F.3d 1228, 1237 n. 8 (10th Cir.), *cert. denied*, 522 U.S. 847, 118 S.Ct. 132, 139 L.Ed.2d 81 (1997).

> FN3. On appeal, Mr. Housel provides the following equation, without any explanation of how he arrived at its components: "250 grams of [pseudo]ephedrine x .5 x .76 = 95 grams [methamphetamine] x 10kg marijuana = 950 kg." Apparently, ".5" refers to a fifty percent yield rate and ".76" to a twenty-four percent HCL salt removal rate referenced in one of his district court pleadings. But neither his appeal brief nor record references explain why these percentages are appropriate or correct. To show the possible fallacy of Mr. Housel's computations, if the above equation is applied to 388.8 grams, it results in 147.75 grams of methamphetamine, and not the 178 grams used in the presentencing report or the 142 grams Mr. Housel claims would result.

Even if the record supported Mr. Housel's claim with respect to the amount of pseudoephedrine applied, Mr. Housel's sentence would be unaffected because the methamphetamine conversion for iodine would result in the same sentence he received. Mr. Housel claims iodine is not a listed chemical under the sentencing guidelines and cannot be used to calculate his sentence. We disagree. In 1996, iodine was explicitly designated as a List II chemical in the Comprehensive Methamphetamine Control Act, Pub. L. No. 104-237, § 204, 110 Stat. 3099 (codified at 21 U.S.C. § 802(35)(I)). The current sentencing guidelines manual expressly categorizes iodine as a List II chemical under § 2D1.11(e)(2). Admittedly, iodine was not expressly listed in § 2D1.11 of the 1998 Sentencing Guidelines Manual--the version in effect at the time of Mr. Housel's sentencing. In such a case, "[i]f the offense is a felony or Class A misdemeanor for which no guideline expressly has been promulgated, [the court must] apply the most analogous offense guideline." *See* U.S.S.G. § 2X5.1 (1997). In this case, the probation officer determined the analogous offense guideline for iodine was methamphetamine, resulting in conversion of the iodine into 708 grams of methamphetamine and then a conversion to 7,080 kilograms of marijuana.

***24 **6** Similarly, under the sentencing guidelines applicable to Mr. Housel, it is also appropriate to use 708 grams of methamphetamine to calculate his sentence, rather than the amounts of methamphetamine attributed to pseudoephedrine. This is because U.S.S.G. § 2D1.11 indicates that if more than one chemical is involved, regardless of whether it is Class I or II, the court should use the one which results in the greater offense level, which in this case is 708 grams of Class II iodine rather than 250 grams of Class I pseudoephedrine. *See* U.S.S.G. § 2D1.11(d) n.(A)-(D) (1998); *see also* § 2D1.11(e) n.(A) (2003) (providing same result).

In this case, the base offense level for 7,080 grams of marijuana is 34, placing Mr. Housel in a sentencing guideline range of 188-235 months imprisonment. *See* U.S.S.G. § 2D1.1(c)(3) and ch.5, pt. A (1998 Sentencing Table). Thus, it is logical to conclude that if Mr. Housel's counsel had successfully objected to the use of phosphorus and the amount of pseudoephedrine to calculate his sentence, the probation officer and the sentencing court would have simply applied the most abundant statutory listed chemical--iodine--to calculate his sentence, which would have resulted in an offense level higher than the offense level for the 250 grams of pseudoephedrine Mr. Housel claims is the appropriate amount. For these reasons, even if Mr. Housel's counsel had raised these objections, the sentencing range would have far exceeded the 120-month statutory maximum imposed. Given the circumstances of this case, Mr. Housel's counsel's failure to raise an objection was not deficient, or if it was deficient, it did not prejudice Mr. Housel. *See Strickland*, 466 U.S. at 687. Accordingly, Mr. Housel has failed to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

For these reasons, Mr. Housel's request for a certificate of appealability is granted on his ineffective assistance of counsel claim concerning the use of pseudoephedrine to calculate his sentence, but for the reasons delineated here, the district court's judgment is nevertheless **AFFIRMED.** As to all other issues raised, we conclude Mr. Housel fails to make a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c). Thus, for substantially the same reasons set forth in the district

court's January 6, 2003 Memorandum, we deny Mr. Housel's request for a certificate of appealability on those issues and **DISMISS** his appeal with respect to those issues.

82 Fed.Appx. 18, 2003 WL 22854676 (10th Cir.(Kan.))

END OF DOCUMENT

LEXSEE 2003 U.S. APP. LEXIS 21404

Martin Gray v. ODS Technologies

02–12813

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

77 Fed. Appx. 507; 2003 U.S. App. LEXIS 21404

August 8, 2003, Decided

NOTICE: [*1] DECISION WITHOUT PUBLISHED OPINION

OPINION:

Reversed in part, Vacated in part

PRIOR HISTORY: Appeal from: S.D.Fla.

77 Fed.Appx. 507 (Table)
(Cite as: 77 Fed.Appx. 507, 2003 WL 21946231 (11th Cir.(Fla.)))

United States Court of Appeals,
Eleventh Circuit.

Martin Gray
v.
ODS Technologies

NO. 02-12813

August 08, 2003

Appeal From: S.D.Fla., No. 99-02808-CV-AJ

Reversed in part, Vacated in part.

END OF DOCUMENT

LEXSEE 2003 US APP LEXIS 24221

UNITED STATES, Appellee, v. DAVID SANCHEZ-BADILLO, Defendant, Appellant.
UNITED STATES, Appellee, v. FRANCISCO TOMAS MURIEL-CASTILLO, Defendant, Appellant.

No. 03-1944, No. 03-1945

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

2003 U.S. App. LEXIS 24221

December 2, 2003, Decided

NOTICE: [*1] RULES OF THE FIRST CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO. Hon. Daniel R. Dominguez, U.S. District Judge.

DISPOSITION: Affirmed.

COUNSEL: Jose R. Franco on brief for appellants.

H.S. Garcia, United States Attorney, Sonia I. Torres-Pabon, Assistant United States Attorney, and Nelson Perez-Sosa, Assistant United States Attorney, on brief for appellee.

JUDGES: Before Lynch, Lipez and Howard, Circuit Judges.

OPINION:

Per Curiam. After carefully considering the briefs and record in these consolidated appeals, we affirm the pre-trial detention orders for substantially the reasons stated by the district court.

Our review is independent, tempered by a degree of deference to the determination below. *United States v. Tortora, 922 F.2d 880 (1st Cir. 1990)*. The appellants essentially argue that since the government's case rested upon hearsay, it failed to prove the need for detention by a preponderance of the evidence. However, the rules of admissibility for criminal trials do not apply to detention hearings. [*2] *18 U.S.C. § 3142(f)*; *United States v. Acevedo-Ramos, 755 F.2d 203 (1st Cir. 1985)*. More importantly, the appellants' indictments sufficed to trigger a rebuttable presumption in favor of detention. *18 U.S.C. § 3142(e)*; *United States v. Vargas, 804 F.2d 157 (1st Cir. 1986)*. As the district court ruled, the appellants failed to satisfy their burden of production by presenting some evidence that they do not endanger the community. Finally, even if they had discharged their burden, the weight of the incriminating evidence is just one factor in the analysis. *18 U.S.C. § 3142(g)*; *United States v. Palmer-Contreras, 835 F.2d 15 (1st Cir. 1987)*. The appellants are charged with serious crimes involving large amounts of drugs, and the record shows that they have the contacts and resources to flee.

Affirmed. *Loc. R. 27(c)*.

81 Fed.Appx. 360
(Cite as: 81 Fed.Appx. 360, 2003 WL 22848946 (1st Cir.(Puerto Rico)))

United States Court of Appeals,
First Circuit.

UNITED STATES, Appellee,
v.
David SANCHEZ-BADILLO, Defendant, Appellant.
United States, Appellee,
v.
Francisco Tomas Muriel-Castillo, Defendant, Appellant.

Nos. 03-1944, 03-1945.

Dec. 2, 2003.

Appeals from the United States District Court for the District of Puerto Rico, Daniel R. Domínguez, U.S. District Judge.

Jose R. Franco on brief, for appellants.

H.S. Garcia, United States Attorney, Sonia I. Torres-Pabon, Assistant United States Attorney, and Nelson Perez-Sosa, Assistant United States Attorney, on brief, for appellee.

Before LYNCH, LIPEZ AND HOWARD, Circuit Judges.

PER CURIAM.

****1** After carefully considering the briefs and record in these consolidated appeals, we *affirm* the pre-trial detention orders for substantially the reasons stated by the district court.

Our review is independent, tempered by a degree of deference to the determination below. *United States v. Tortora*, 922 F.2d 880 (1st Cir.1990). The appellants essentially argue that since the government's case rested upon hearsay, it failed to prove the need for detention by a preponderance of the evidence. However, the rules of admissibility for criminal trials do not apply to detention hearings. 18 U.S.C. § 3142(f); *United States v. Acevedo-Ramos*, 755 F.2d 203 (1st Cir.1985). More importantly, the appellants' indictments sufficed to trigger a rebuttable presumption in favor of detention. 18 U.S.C. § 3142(e); *United States v. Vargas*, 804 F.2d 157 (1st Cir.1986). As the district court ruled, the appellants failed to satisfy their burden of production by presenting some evidence that they do not endanger the community. Finally, even if they had discharged their burden, the weight of the incriminating evidence is just one factor in the analysis. 18 U.S.C. § 3142(g); *United States v. Palmer- Contreras*, 835 F.2d 15 (1st Cir.1987). The appellants are charged with serious crimes involving large amounts of drugs, and the record shows that they have the contacts and resources to flee.

Affirmed. Loc. R. 27(c).

81 Fed.Appx. 360, 2003 WL 22848946 (1st Cir.(Puerto Rico))

END OF DOCUMENT

LEXSEE 2003 US APP LEXIS 24238

UNITED STATES OF AMERICA, Appellee, – v. – FRANKLIN VILLAFANA, also known as Domingo Guava; PATRICIA PIEDRAHITA, also known as Patricia; HERNANDO MORENO, also known as Pedro Rafael Rodriguez, also known as El Gordo; ANTONIO BERRIOS, also known as Tony, also known as Tony; JOSE ROBERTO ENCARNACION, also known as Roberto; JOSE NUNEZ, also known as Jose Rodriguez Nunez; RUBEN DIAZ, also known as Ruben, JUNIOR GRULLON, also known as Junior; JUNIOR LANTIGUA, also known as Jay; ROMER VALENZUELA, also known as Romel LNU; DOMINGO GOMEZ-FERMIN, also known as Mingo; ARELIS DIAZ; APOLINAR GOMEZ-TORRES, also known as Polo; SERGIO RODRIGUEZ, also known as Camarada; CARLOS TAVAREZ-FERNANDEZ, also known as Carlos Manuel; KAI XU CHEN, RAFAEL NUNEZ, also known as Rafael, also known as "Doctor", Defendants, TOMAS LOUIS, also known as Tomas, Defendant-Appellant.

No. 02-1107

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

2003 U.S. App. LEXIS 24238

December 2, 2003, Decided

NOTICE: [*1] RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Southern District of New York. (Kimba M. Wood, Judge). *United States v. Villafana, 36 Fed. Appx. 464, 2002 U.S. App. LEXIS 11395 (2002)*

DISPOSITION: Affirmed.

LexisNexis (TM) HEADNOTES- Core Concepts:

COUNSEL: FOR APPELLANT: STEVEN K. FRANKEL (Robert L. Moore, on the brief), Frankel Rudder & Lowery LLP, New York, NY.

FOR APPELLEE: DANIEL W. LEVY, Assistant United States Attorney (James B. Comey, United States Attorney for the Southern District of New York, and Gary Stein, Assistant United States Attorney, on the brief), New York, NY.

JUDGES: PRESENT: Hon. John M. Walker, Jr., Chief Judge, Hon. Dennis Jacobs, Hon. Chester J. Straub, Circuit Judges.

OPINION:

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said district court be and it hereby is **AFFIRMED**.

Defendant-appellant Tomas Louis appeals from his conviction by a jury in the United States District Court for the Southern District of New York (Kimba M. Wood, Judge) of conspiracy to distribute and to possess with intent to distribute cocaine and heroin, in violation of *21 U.S.C. § 846*. [*2] On appeal, Louis argues that: (1) his trial counsel labored under a conflict of interest and otherwise failed to provide effective assistance; and (2) the district court erred in allowing a co-defendant to testify about his understanding of certain conversations between himself and Louis. We affirm.

With respect to Louis's claims of ineffective assistance of counsel, this court has expressed a "baseline aversion to resolving ineffectiveness claims on direct review." *United States v. Williams, 205 F.3d 23, 35 (2d Cir.)*, cert. denied, *531 U.S. 885, 148 L. Ed. 2d 142, 121 S. Ct. 203 (2000)*. As the Supreme Court recently explained, "in most cases a motion brought under *28 U.S.C. § 2255* is preferable to direct appeal for deciding claims of ineffective-assistance," because the district court is the forum best suited to develop the facts necessary to evaluate such claims. *Massaro v. United States, 155 L. Ed. 2d 714, 123 S. Ct. 1690, 1694 (2003)*. Following Massaro, we recently observed that ineffectiveness claims should

only be resolved on direct appeal "when their resolution is beyond any doubt or to do so would [*3] be in the interest of justice." *United States v. Khedr, 343 F.3d 96, 100 (2d Cir. 2003)*(internal quotation marks omitted). Because we believe that Louis's claims of ineffective assistance would benefit from further development of the record, we decline to review them on direct appeal and dismiss them without prejudice to Louis's right to pursue them in a collateral proceeding.

Turning to Louis's second ground for appeal, we find that he has not met the heavy burden of showing that admission of the impugned testimony constituted plain error — a showing that must be made where, as here, the appellant failed to object to admission of the evidence at trial. See *United States v. Dukagjini, 326 F.3d 45, 61 (2d Cir. 2003)*. At the very least, the testimony of Louis's co-defendant concerning certain taped conversations was not plainly inadmissible. See *United States v. Urlacher, 979 F.2d 935, 939 (2d Cir. 1992)* (holding that witness's interpretation of comments made by defendant during taped conversations was admissible).

For the reasons set forth above, the judgment of the district court is hereby **AFFIRMED**.

81 Fed.Appx. 752
(Cite as: 81 Fed.Appx. 752, 2003 WL 22849907 (2nd Cir.(N.Y.)))

H

This case was not selected for publication in the Federal Reporter.

United States Court of Appeals,
Second Circuit.

UNITED STATES of America, Appellee,
v.
Franklin VILLAFANA, also known as Domingo Guava; Patricia Piedrahita, also known as Patricia; Hernando Moreno, also known as Pedro Rafael Rodriguez, also known as El Gordo; Antonio Berrios, also known as Tony, also known as Tony; Jose Roberto Encarnacion, also known as Roberto; Jose Nunez, also known as Jose Rodriguez Nunez; Ruben Diaz, also known as Ruben, Junior Grullon, also known as Junior; Junior Lantigua, also known as Jay; Romer Valenzuela, also known as Romel LNU; Domingo Gomez-Fermin, also known as Mingo; Arelis Diaz; Apolinar Gomez-Torres, also known as Polo; Sergio Rodriguez, also known as Camarada; Carlos Tavarez-Fernandez, also known as Carlos Manuel; Kai Xu Chen, Rafael Nunez, also known as Rafael, also known as "Doctor", Defendants,
Tomas LOUIS, also known as Tomas, Defendant-Appellant.

No. 02-1107.

Dec. 2, 2003.

Defendant was convicted in the United States District Court for the Southern District of New York, Kimba M. Wood, J., for conspiracy to distribute and to possess with intent to distribute cocaine. Defendant appealed. The Court of Appeals held that: admission of testimony of co-defendant did not constitute plain error.

Affirmed.

West Headnotes

[1] **Criminal Law** 1119(1)
110k1119(1) Most Cited Cases

The Court of Appeals would decline to review ineffective assistance of counsel claim of defendant convicted of drug conspiracy on direct appeal, where further development of the record was required to properly decide claim. U.S.C.A. Const.Amend. 6.

[2] **Criminal Law** 1036.2
110k1036.2 Most Cited Cases

Admission of testimony of co-defendant concerning his understanding of certain taped conversations between himself and the defendant did not constitute plain error, in drug conspiracy prosecution.

[3] **Criminal Law** 1036.2
110k1036.2 Most Cited Cases

On appeal, defendant convicted for drug conspiracy was required to establish that admission of co-defendant's testimony concerning his understanding of taped conversations between himself and the defendant constituted plain error, where defendant failed to object to admission of the testimony at trial.

***753** Appeal from the United States District Court for the Southern District of New York (Kimba M. Wood, Judge).

Steven K. Frankel (Robert L. Moore, on the brief), Frankel Rudder & Lowery LLP, New York, NY, for Appellant.

Daniel W. Levy, Assistant United States Attorney (James B. Comey, United States Attorney for the

Southern District of New York, and Gary Stein, Assistant United States Attorney, on the brief), New York, NY, for Appellee.

Present: WALKER, Chief Judge, JACOBS, and STRAUB, Circuit Judges.

SUMMARY ORDER

****1 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the judgment of said district court be and it hereby is **AFFIRMED.**

Defendant-appellant Tomas Louis appeals from his conviction by a jury in the United States District Court for the Southern District of New York (Kimba M. Wood, *Judge*) of conspiracy to distribute and to possess with intent to distribute ***754** cocaine and heroin, in violation of 21 U.S.C. § 846. On appeal, Louis argues that: (1) his trial counsel labored under a conflict of interest and otherwise failed to provide effective assistance; and (2) the district court erred in allowing a co-defendant to testify about his understanding of certain conversations between himself and Louis. We affirm.

[1] With respect to Louis's claims of ineffective assistance of counsel, this court has expressed a "baseline aversion to resolving ineffectiveness claims on direct review." *United States v. Williams,* 205 F.3d 23, 35 (2d Cir.), *cert. denied,* 531 U.S. 885, 121 S.Ct. 203, 148 L.Ed.2d 142 (2000). As the Supreme Court recently explained, "in most cases a motion brought under [28 U.S.C.] § 2255 is preferable to direct appeal for deciding claims of ineffective-assistance," because the district court is the forum best suited to develop the facts necessary to evaluate such claims. *Massaro v. United States,* 538 U.S. 500, 123 S.Ct. 1690, 1694, 155 L.Ed.2d 714 (2003). Following *Massaro,* we recently observed that ineffectiveness claims should only be resolved on direct appeal "when their resolution is beyond any doubt or to do so would be in the interest of justice." *United States v. Khedr,* 343 F.3d 96, 100 (2d Cir.2003) (internal quotation marks omitted). Because we believe that Louis's claims of ineffective assistance would benefit from further development of the record, we decline to review them on direct appeal and dismiss them without prejudice to Louis's right to pursue them in a collateral proceeding.

[2][3] Turning to Louis's second ground for appeal, we find that he has not met the heavy burden of showing that admission of the impugned testimony constituted plain error--a showing that must be made where, as here, the appellant failed to object to admission of the evidence at trial. *See United States v. Dukagjini,* 326 F.3d 45, 61 (2d Cir.2003). At the very least, the testimony of Louis's co-defendant concerning certain taped conversations was not plainly inadmissible. *See United States v. Urlacher,* 979 F.2d 935, 939 (2d Cir.1992) (holding that witness's interpretation of comments made by defendant during taped conversations was admissible).

****2** For the reasons set forth above, the judgment of the district court is hereby **AFFIRMED.**

81 Fed.Appx. 752, 2003 WL 22849907 (2nd Cir.(N.Y.))

END OF DOCUMENT

81 Fed.Appx. 752
(Cite as: 81 Fed.Appx. 752, 2003 WL 22849907 (2nd Cir.(N.Y.)))

H

This case was not selected for publication in the Federal Reporter.

United States Court of Appeals,
Second Circuit.

UNITED STATES of America, Appellee,
v.
Franklin VILLAFANA, also known as Domingo Guava; Patricia Piedrahita, also known as Patricia; Hernando Moreno, also known as Pedro Rafael Rodriguez, also known as El Gordo; Antonio Berrios, also known as Tony, also known as Tony; Jose Roberto Encarnacion, also known as Roberto; Jose Nunez, also known as Jose Rodriguez Nunez; Ruben Diaz, also known as Ruben, Junior Grullon, also known as Junior; Junior Lantigua, also known as Jay; Romer Valenzuela, also known as Romel LNU; Domingo Gomez-Fermin, also known as Mingo; Arelis Diaz; Apolinar Gomez-Torres, also known as Polo; Sergio Rodriguez, also known as Camarada; Carlos Tavarez-Fernandez, also known as Carlos Manuel; Kai Xu Chen, Rafael Nunez, also known as Rafael, also known as "Doctor", Defendants,
Tomas LOUIS, also known as Tomas, Defendant-Appellant.

No. 02-1107.

Dec. 2, 2003.

Defendant was convicted in the United States District Court for the Southern District of New York, Kimba M. Wood, J., for conspiracy to distribute and to possess with intent to distribute cocaine. Defendant appealed. The Court of Appeals held that: admission of testimony of co-defendant did not constitute plain error.

Affirmed.

West Headnotes

[1] **Criminal Law** 1119(1)
110k1119(1) Most Cited Cases

The Court of Appeals would decline to review ineffective assistance of counsel claim of defendant convicted of drug conspiracy on direct appeal, where further development of the record was required to properly decide claim. U.S.C.A. Const.Amend. 6.

[2] **Criminal Law** 1036.2
110k1036.2 Most Cited Cases

Admission of testimony of co-defendant concerning his understanding of certain taped conversations between himself and the defendant did not constitute plain error, in drug conspiracy prosecution.

[3] **Criminal Law** 1036.2
110k1036.2 Most Cited Cases

On appeal, defendant convicted for drug conspiracy was required to establish that admission of co-defendant's testimony concerning his understanding of taped conversations between himself and the defendant constituted plain error, where defendant failed to object to admission of the testimony at trial.

***753** Appeal from the United States District Court for the Southern District of New York (Kimba M. Wood, Judge).

Steven K. Frankel (Robert L. Moore, on the brief), Frankel Rudder & Lowery LLP, New York, NY, for Appellant.

Daniel W. Levy, Assistant United States Attorney (James B. Comey, United States Attorney for the

Southern District of New York, and Gary Stein, Assistant United States Attorney, on the brief), New York, NY, for Appellee.

Present: WALKER, Chief Judge, JACOBS, and STRAUB, Circuit Judges.

SUMMARY ORDER

****1 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the judgment of said district court be and it hereby is **AFFIRMED.**

Defendant-appellant Tomas Louis appeals from his conviction by a jury in the United States District Court for the Southern District of New York (Kimba M. Wood, *Judge*) of conspiracy to distribute and to possess with intent to distribute ***754** cocaine and heroin, in violation of 21 U.S.C. § 846. On appeal, Louis argues that: (1) his trial counsel labored under a conflict of interest and otherwise failed to provide effective assistance; and (2) the district court erred in allowing a co-defendant to testify about his understanding of certain conversations between himself and Louis. We affirm.

[1] With respect to Louis's claims of ineffective assistance of counsel, this court has expressed a "baseline aversion to resolving ineffectiveness claims on direct review." *United States v. Williams,* 205 F.3d 23, 35 (2d Cir.), *cert. denied,* 531 U.S. 885, 121 S.Ct. 203, 148 L.Ed.2d 142 (2000). As the Supreme Court recently explained, "in most cases a motion brought under [28 U.S.C.] § 2255 is preferable to direct appeal for deciding claims of ineffective-assistance," because the district court is the forum best suited to develop the facts necessary to evaluate such claims. *Massaro v. United States,* 538 U.S. 500, 123 S.Ct. 1690, 1694, 155 L.Ed.2d 714 (2003). Following *Massaro,* we recently observed that ineffectiveness claims should only be resolved on direct appeal "when their resolution is beyond any doubt or to do so would be in the interest of justice." *United States v. Khedr,* 343 F.3d 96, 100 (2d Cir.2003) (internal quotation marks omitted). Because we believe that Louis's claims of ineffective assistance would benefit from further development of the record, we decline to review them on direct appeal and dismiss them without prejudice to Louis's right to pursue them in a collateral proceeding.

[2][3] Turning to Louis's second ground for appeal, we find that he has not met the heavy burden of showing that admission of the impugned testimony constituted plain error--a showing that must be made where, as here, the appellant failed to object to admission of the evidence at trial. *See United States v. Dukagjini,* 326 F.3d 45, 61 (2d Cir.2003). At the very least, the testimony of Louis's co-defendant concerning certain taped conversations was not plainly inadmissible. *See United States v. Urlacher,* 979 F.2d 935, 939 (2d Cir.1992) (holding that witness's interpretation of comments made by defendant during taped conversations was admissible).

****2** For the reasons set forth above, the judgment of the district court is hereby **AFFIRMED.**

81 Fed.Appx. 752, 2003 WL 22849907 (2nd Cir.(N.Y.))

END OF DOCUMENT

LEXSEE 2003 U.S. APP. LEXIS 24217

TYRONE BRAND, Appellant v. FRANK GILLIS, SUPERINTENDENT; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

No. 02-3494

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

2003 U.S. App. LEXIS 24217

December 1, 2003, Submitted Under Third Circuit Lar 34.1(a)
December 2, 2003, Filed

NOTICE: [*1] RULES OF THE THIRD CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: On Appeal from the United States District Court for the Eastern District of Pennsylvania (D. C. Civil No. 99-cv-05056). District Judge: Hon. Anita B. Brody.

Brand v. Gillis, 210 F. Supp. 2d 677, 2002 U.S. Dist. LEXIS 12521 (E.D. Pa., 2002)

DISPOSITION: Affirmed.

LexisNexis (TM) HEADNOTES- Core Concepts:

COUNSEL: For Tyrone Brand #As-2211, Appellant: Michael C. Schwartz, James, Jarrett & Schwartz, Philadelphia, PA.

For Frank Gillis, Superintendent, Office of District Attorney of Philadelphia, Office of Attorney General of Pennsylvania, Appellees: David C. Glebe, Office of District Attorney, Philadelphia, PA.

JUDGES: Before: SLOVITER, ALITO and FRIEDMAN, * Circuit Judges.

* Hon. Daniel M. Friedman, United States Senior Circuit Judge for the Federal Circuit, sitting by designation.

OPINIONBY: _ SLOVITER

OPINION:

OPINION OF THE COURT

SLOVITER, Circuit Judge.

Petitioner Tyrone Brand filed a petition for writ of habeas corpus in the District Court pursuant to *28 U.S.C. § 2254*. A Pennsylvania prisoner serving a life sentence, Brand claims that the assistance of his counsel was ineffective during his state court first-degree [*2] murder trial. Specifically, Brand argues that the trial counsel erroneously stipulated to a blood alcohol level that was substantially lower than the actual level, failed to dispute and disprove certain factual findings relevant to the element of specific intent, and neglected to properly impeach statements made by certain witnesses. A Magistrate Judge ("MJ") issued a report recommending denial and dismissal of Brand's petition, finding that Brand did not demonstrate any "substantial violation of any Constitutional right." The District Court, after considering Brand's objections to the MJ's findings, approved and adopted the report and recommendation, as supplemented by its memorandum, and issued an order denying and dismissing Brand's petition. For the following reasons, we will affirm the District Court's order. Because we write solely for the parties, we need not set forth a detailed recitation of the background for this appeal and will limit our discussion to resolution of the issues presented.

I.

Background

Brand was an employee of the Philadelphia Electric Company. On October 31, 1986, having already had two drinks during the workday, Brand went to a bar with decedent Robin [*3] Harris, a co-worker. According to trial testimony, Brand consumed eight vodka drinks and a beer from 5: 00 to 9: 30 pm. Harris then drove Brand, in Brand's automobile, to the Sugar Sticks Bar in Germantown to have another drink. The bartender at

the Sugar Sticks Bar, however, refused to serve Brand alcohol because Brand appeared intoxicated. Harris and Brand then left the Sugar Sticks Bar.

As Harris and Brand were conversing near Brand's automobile outside the Sugar Sticks Bar, Olious Hightower, who was a neighbor of Harris, appeared on the scene. After briefly conversing with each other, Hightower and Harris began walking together down Germantown Avenue. Brand followed them slowly in his car. According to Hightower, Brand then got out of his car, pointed a gun at Harris's face, and said "I should kill you." Hightower then knocked the gun out of Brand's hand, picked up the gun, and told Brand to get back into his car. Brand again followed Harris and Hightower in his car and asked to have his gun back. At some point, Brand's car veered onto the sidewalk in Harris and Hightower's direction, struck both Harris and Hightower, and crashed into a wall approximately 30 to 40 feet from the [*4] curb. While Hightower sustained only minor injuries, Harris died 11 days later of multiple head injuries.

Brand was convicted of first–degree murder, driving under the influence, simple assault, and various weapons offenses following a nonjury trial in the Pennsylvania Court of Common Pleas. Brand then filed post–verdict motions with the trial court, claiming the first–degree murder conviction was against the weight of the evidence because the trial court failed to consider Brand's severely intoxicated state. The court denied these motions and sentenced Brand to life imprisonment on the murder conviction, with concurrent terms for his other crimes. Brand's direct appeal to the Pennsylvania Superior Court was denied, and the Pennsylvania Supreme court denied allocatur.

On January 14, 1997, Brand filed a pro se Petition for Post Conviction Collateral Relief in the Pennsylvania Court of Common Pleas pursuant to changes in Pennsylvania's Post Conviction Relief Act ("PCRA"), *42 Pa. Cons. Stat. Ann. §§ 9541–9546*. Brand alleged that he was denied effective assistance of counsel during trial. Specifically, Brand argued that his trial counsel (1) failed [*5] to establish his true level of intoxication and demonstrate the effects of his head injury on his behavior immediately after the incident, (2) failed to investigate the actual circumstances of the car crash through accident reconstruction and correct erroneous facts relied upon by the trial court in its conviction, and (3) failed to cross–examine opposing witnesses on key points regarding Brand's behavior during the incident. After review, the PCRA court dismissed Brand's petition summarily on October 27, 1997, holding that Brand's claims were without merit on their face. The same court then affirmed the dismissal on June 1, 1998. The Pennsylvania Superior Court subsequently affirmed the PCRA court's order, and the Pennsylvania Supreme Court denied allocatur.

Brand filed the petition for habeas corpus in the District Court on October 13, 1999. As he did in the PCRA petition, Brand argued that his trial counsel provided ineffective assistance in (1) failing to establish that Brand's blood alcohol content was too high to form the specific intent required for first–degree murder, (2) failing to refute the evidence concerning the physical circumstances surrounding the car accident, [*6] and (3) failing to cross–examine witnesses regarding Brand's pre– and post–accident conduct. Brand also claimed that evidence discovered after the trial undermined the credibility of the prosecution's key witnesses.

Relying largely on *Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)*, a Magistrate Judge ("MJ") issued a Report and Recommendation ("R&R") recommending that Brand's ineffective assistance of counsel claims should be dismissed on the merits. The MJ also recommended that Brand's after–discovered evidence claim be dismissed because the evidence in question was trivial and merely for impeachment purposes. Brand objected to the MJ's findings, arguing that the MJ erred when s/he applied a sufficiency of the evidence standard and relied on the PCRA court's opinion in rejecting Brand's ineffective assistance of counsel claims. The District Court, in a lengthy opinion, overruled Brand's objections, adopted the R&R, and denied Brand's habeas petition in its entirety. This appeal followed.

II.

Jurisdiction

The District Court had jurisdiction under *28 U.S.C. § 2254*. This Court has jurisdiction pursuant to [*7] *28 U.S.C. §§ 1291, 2253*. Our review of the District Court's order is plenary. Pursuant to *28 U.S.C. § 2254(d)*, a state court's adverse resolution of a claim of constitutional error provides a basis for federal habeas relief only if the state adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the United States Supreme Court," or if it resulted in a decision that "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." See *Williams v. Taylor, 529 U.S. 362, 376, 386, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000)*.

III.

Discussion

In order for us to consider Brand's habeas petition, Brand must have first exhausted all available state court remedies and not have procedurally defaulted his

federal claims in state courts. *28 U.S.C. § 2254(b)(1)*; *McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999)*. The District Court determined that Brand has exhausted his state court remedies and did not procedurally default his claims, [*8] and the parties do not object to that finding. Therefore, we now consider the merits of Brand's claims under *28 U.S.C. § 2254(d)*.

In Strickland, the United States Supreme Court established a two–prong standard for adjudicating ineffective assistance of counsel claims under the federal Constitution. First, claimant must establish the counsel's deficient performance by "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the *Sixth Amendment*." *466 U.S. at 687*. Second, claimant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* In applying this standard, counsel is strongly presumed to have acted within the range of "reasonable professional assistance," and claimant bears the burden of "overcoming the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy. '" *Id. at 689* (citation omitted).

Applying *Strickland*, we find that the Pennsylvania Superior Court's denial of Brand's ineffective assistance claims was not contrary [*9] to established federal law as interpreted by the United States Supreme Court. Moreover, the Pennsylvania Superior Court's adjudication of Brand's claims was not contrary to established federal law. Nor was the Superior Court's decision an objectively unreasonable application of *Strickland*. Brand argues that the counsel acted ineffectively in pursuing his diminished capacity claim by stipulating to a blood alcohol level that was significantly lower than the actual level supported by the evidence, and by failing to present evidence on the significance of Brand's head injury to his post–incident behavior. The Superior Court concluded that the trial court had thoroughly considered Brand's diminished capacity defense and rejected it, and that the disputed blood alcohol content figure did not prejudice the trial's outcome. We find this conclusion to be a reasonable application of the *Strickland* standard. Brand's counsel clearly pursued a diminishing capacity defense, and the trial court's rejection of such defense in finding specific intent for convicting Brand of first–degree murder did not render the trial unfair or its result unreliable. See *Strickland, 466 U.S. at 687*. [*10]

Equally unpersuasive are Brand's claims that his counsel's failure to effectively dispute physical evidence offered by the prosecution to establish specific intent and to vigorously cross–examine certain witnesses constituted ineffective assistance. Brand has not demonstrated, in accordance with *Strickland*, that his counsel's conduct fell outside the range of objectively reasonable professional conduct, and that such conduct deprived Brand of a fair trial. An unfavorable trial verdict alone cannot establish an ineffective assistance of counsel claim.

IV.

Conclusion

For the foregoing reasons, we will affirm the District Court's order.

Slip Copy
(Cite as: 2003 WL 22849858 (3rd Cir.(Pa.)))

H
Only the Westlaw citation is currently available.

This case was not selected for publication in the Federal Reporter.

NOT PRECEDENTIAL

Please use FIND to look at the applicable circuit court rule before citing this opinion. Third Circuit Local Appellate Rule 28.3(a) and Internal Operating Procedure 5.3. (FIND CTA3 Rule 28.0 and CTA3 IOP APP I 5.3.)

United States Court of Appeals,
Third Circuit.

Tyrone BRAND, Appellant,
v.
Frank GILLIS, Superintendent; the District Attorney of the County of
Philadelphia; the Attorney General of the State of Pennsylvania.

No. 02-3494.

Submitted Under Third Circuit LAR 34.1(a) Dec. 1, 2003.
Decided Dec. 2, 2003.

Inmate convicted of murder petitioned for a writ of habeas corpus alleging ineffective assistance of counsel. Adopting the report and recommendation of Carol Sandra Moore Wells, United States Magistrate Judge, the United States District Court for the Eastern District of Pennsylvania, Anita B. Brody, J., 210 F.Supp.2d 677, denied petition. Inmate appealed. The Court of Appeals, Sloviter, Circuit Judge, held that state court's determination that inmate was not denied effective assistance of counsel was not contrary to or an unreasonable application of ineffectiveness standard.

Affirmed.

Habeas Corpus 486(2)

197k486(2) Most Cited Cases

Habeas Corpus 486(4)

197k486(4) Most Cited Cases

State court's determination that murder defendant was not denied effective assistance of counsel was not contrary to established federal law, as required for habeas relief, despite claim that counsel acted ineffectively in pursuing a diminished capacity defense, by stipulating to a blood alcohol level (BAC) significantly lower than actual level supported by evidence, and in failing to present evidence of the significance of defendant's head injury to his post-incident behavior; state court noted that outcome at trial would have been the same even if trial court had accepted higher BAC, counsel clearly pursued diminished capacity defense, and trial court's rejection of defense did not render trial unfair or unreliable. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254.

On Appeal from the United States District Court for the Eastern District of Pennsylvania. (D.C. Civil No. 99-cv-05056). District Judge: Hon. Anita B. Brody.

Michael C. Schwartz, James, Jarrett & Schwartz, Philadelphia, PA, for Appellant.

David C. Glebe, Office of District Attorney, Philadelphia, PA, for Appellee.

Before SLOVITER, ALITO and FRIEDMAN, [FN*] Circuit Judges.

OPINION OF THE COURT

SLOVITER, Circuit Judge.

***1** Petitioner Tyrone Brand filed a petition for writ of habeas corpus in the District Court pursuant to 28 U.S.C. § 2254. A Pennsylvania prisoner serving a life sentence, Brand claims that the assistance of his counsel was ineffective during his state court first-degree murder trial. Specifically, Brand argues that the trial counsel erroneously stipulated to a blood alcohol level that was substantially lower than the actual level, failed to dispute and disprove certain factual findings relevant to the element of specific intent, and neglected to properly impeach statements made by certain witnesses. A Magistrate Judge ("MJ") issued a report recommending denial and dismissal of Brand's petition, finding that Brand did not demonstrate any "substantial violation of any Constitutional right." The District

Court, after considering Brand's objections to the MJ's findings, approved and adopted the report and recommendation, as supplemented by its memorandum, and issued an order denying and dismissing Brand's petition. For the following reasons, we will affirm the District Court's order. Because we write solely for the parties, we need not set forth a detailed recitation of the background for this appeal and will limit our discussion to resolution of the issues presented.

I.
Background

Brand was an employee of the Philadelphia Electric Company. On October 31, 1986, having already had two drinks during the workday, Brand went to a bar with decedent Robin Harris, a co-worker. According to trial testimony, Brand consumed eight vodka drinks and a beer from 5:00 to 9:30 pm. Harris then drove Brand, in Brand's automobile, to the Sugar Sticks Bar in Germantown to have another drink. The bartender at the Sugar Sticks Bar, however, refused to serve Brand alcohol because Brand appeared intoxicated. Harris and Brand then left the Sugar Sticks Bar.

As Harris and Brand were conversing near Brand's automobile outside the Sugar Sticks Bar, Olious Hightower, who was a neighbor of Harris, appeared on the scene. After briefly conversing with each other, Hightower and Harris began walking together down Germantown Avenue. Brand followed them slowly in his car. According to Hightower, Brand then got out of his car, pointed a gun at Harris's face, and said "I should kill you." Hightower then knocked the gun out of Brand's hand, picked up the gun, and told Brand to get back into his car. Brand again followed Harris and Hightower in his car and asked to have his gun back. At some point, Brand's car veered onto the sidewalk in Harris and Hightower's direction, struck both Harris and Hightower, and crashed into a wall approximately 30 to 40 feet from the curb. While Hightower sustained only minor injuries, Harris died 11 days later of multiple head injuries.

Brand was convicted of first-degree murder, driving under the influence, simple assault, and various weapons offenses following a nonjury trial in the Pennsylvania Court of Common Pleas. Brand then filed post-verdict motions with the trial court, claiming the first-degree murder conviction was against the weight of the evidence because the trial court failed to consider Brand's severely intoxicated state. The court denied these motions and sentenced Brand to life imprisonment on the murder conviction, with concurrent terms for his other crimes. Brand's direct appeal to the Pennsylvania Superior Court was denied, and the Pennsylvania Supreme court denied *allocatur*.

***2** On January 14, 1997, Brand filed a *pro se* Petition for Post Conviction Collateral Relief in the Pennsylvania Court of Common Pleas pursuant to changes in Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons.Stat. Ann. §§ 9541-9546. Brand alleged that he was denied effective assistance of counsel during trial. Specifically, Brand argued that his trial counsel (1) failed to establish his true level of intoxication and demonstrate the effects of his head injury on his behavior immediately after the incident, (2) failed to investigate the actual circumstances of the car crash through accident reconstruction and correct erroneous facts relied upon by the trial court in its conviction, and (3) failed to cross-examine opposing witnesses on key points regarding Brand's behavior during the incident. After review, the PCRA court dismissed Brand's petition summarily on October 27, 1997, holding that Brand's claims were without merit on their face. The same court then affirmed the dismissal on June 1, 1998. The Pennsylvania Superior Court subsequently affirmed the PCRA court's order, and the Pennsylvania Supreme Court denied *allocatur*.

Brand filed the petition for habeas corpus in the District Court on October 13, 1999. As he did in the PCRA petition, Brand argued that his trial counsel provided ineffective assistance in (1) failing to establish that Brand's blood alcohol content was too high to form the specific intent required for first- degree murder, (2) failing to refute the evidence concerning the physical circumstances surrounding the car accident, and (3) failing to cross-examine witnesses regarding Brand's pre- and post-accident conduct. Brand also claimed that evidence discovered after the trial undermined the credibility of the prosecution's key witnesses.

Relying largely on *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a Magistrate Judge ("MJ") issued a Report and Recommendation ("R & R") recommending that Brand's ineffective assistance of counsel claims should be dismissed on the merits. The MJ also recommended that Brand's after-discovered evidence claim be dismissed because the evidence in question was trivial and merely for impeachment purposes. Brand objected to the MJ's findings, arguing that the MJ erred when s/he applied a sufficiency of the evidence standard and relied on the PCRA court's opinion in rejecting Brand's ineffective assistance of counsel claims. The District Court, in a lengthy opinion, overruled Brand's objections, adopted the R & R, and denied Brand's

habeas petition in its entirety. This appeal followed.

II.
Jurisdiction

The District Court had jurisdiction under 28 U.S.C. § 2254. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1291, 2253. Our review of the District Court's order is plenary. Pursuant to 28 U.S.C. § 2254(d), a state court's adverse resolution of a claim of constitutional error provides a basis for federal habeas relief only if the state adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the United States Supreme Court," or if it resulted in a decision that "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *See William v. Taylor*, 529 U.S. 362, 376, 386, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

III.
Discussion

***3** In order for us to consider Brand's habeas petition, Brand must have first exhausted all available state court remedies and not have procedurally defaulted his federal claims in state courts. 28 U.S.C. § 2254(b)(1); *McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir.1999). The District Court determined that Brand has exhausted his state court remedies and did not procedurally default his claims, and the parties do not object to that finding. Therefore, we now consider the merits of Brand's claims under 28 U.S.C. § 2254(d).

In *Strickland,* the United States Supreme Court established a two-prong standard for adjudicating ineffective assistance of counsel claims under the federal Constitution. First, claimant must establish the counsel's deficient performance by "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687. Second, claimant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* In applying this standard, counsel is strongly presumed to have acted within the range of "reasonable professional assistance," and claimant bears the burden of "overcom[ing] the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* at 689 (citation omitted).

Applying *Strickland,* we find that the Pennsylvania Superior Court's denial of Brand's ineffective assistance claims was not contrary to established federal law as interpreted by the United States Supreme Court. Moreover, the Pennsylvania Superior Court's adjudication of Brand's claims was not contrary to established federal law. Nor was the Superior Court's decision an objectively unreasonable application of *Strickland.* Brand argues that the counsel acted ineffectively in pursuing his diminished capacity claim by stipulating to a blood alcohol level that was significantly lower than the actual level supported by the evidence, and by failing to present evidence on the significance of Brand's head injury to his post-incident behavior. The Superior Court concluded that the trial court had thoroughly considered Brand's diminished capacity defense and rejected it, and that the disputed blood alcohol content figure did not prejudice the trial's outcome. We find this conclusion to be a reasonable application of the *Strickland* standard. Brand's counsel clearly pursued a diminishing capacity defense, and the trial court's rejection of such defense in finding specific intent for convicting Brand of first-degree murder did not render the trial unfair or its result unreliable. *See Strickland,* 466 U.S. at 687.

Equally unpersuasive are Brand's claims that his counsel's failure to effectively dispute physical evidence offered by the prosecution to establish specific intent and to vigorously cross-examine certain witnesses constituted ineffective assistance. Brand has not demonstrated, in accordance with *Strickland,* that his counsel's conduct fell outside the range of objectively reasonable professional conduct, and that such conduct deprived Brand of a fair trial. An unfavorable trial verdict alone cannot establish an ineffective assistance of counsel claim.

IV.
Conclusion

***4** For the foregoing reasons, we will affirm the District Court's order.

FN* Hon. Daniel M. Friedman, United States Senior Circuit Judge for the Federal Circuit, sitting by designation.

2003 WL 22849858 (3rd Cir.(Pa.))

END OF DOCUMENT

LEXSEE 2003 U.S. APP. LEXIS 24274

UNITED STATES OF AMERICA, Plaintiff–Appellee, v. ANDRE PRIEST HOLMES, Defendant–Appellant.

No. 03–4306

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

2003 U.S. App. LEXIS 24274

October 3, 2003, Submitted
December 1, 2003, Decided

NOTICE: [*1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of West Virginia, at Clarksburg. (CR–99–42). Irene M. Keeley, Chief District Judge.

DISPOSITION: Affirmed.

LexisNexis (TM) HEADNOTES– Core Concepts:

COUNSEL: Charles T. Berry, BOWLES, RICE, MCDAVID, GRAFF & LOVE, P.L.L.C., Morgantown, West Virginia, for Appellant.

Thomas E. Johnston, United States Attorney, Sherry L. Muncy, Assistant United States Attorney, Clarksburg, West Virginia, for Appellee.

JUDGES: Before WIDENER, GREGORY, and DUNCAN, Circuit Judges.

OPINION: PER CURIAM:

Andre Priest Holmes appeals the district court's imposition of a two–level sentence enhancement under *United States Sentencing Guidelines Manual* § 2D1.1(b)(1) for possession of a dangerous weapon in connection with a drug offense. We affirm.

Holmes first argues that his counsel rendered ineffective assistance by failing to elicit testimony from his girlfriend at his initial sentencing regarding the propriety of the enhancement. In order to succeed on a claim of ineffective assistance of counsel, a defendant must show [*2] that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) counsel's deficient performance was prejudicial. *Strickland v. Washington, 466 U.S. 668, 687–88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)*. Under the first prong of *Strickland*, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Id. at 689*. Further, the reviewing court must evaluate the reasonableness of counsel's performance within the context of the circumstances at the time of the alleged errors, rather than with the benefit of hindsight. *Id. at 690*. To satisfy the second prong of *Strickland*, a defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id. at 694*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id*. A defendant normally raises the issue of ineffective assistance of counsel by collateral attack. A defendant can raise the claim of ineffective assistance on direct appeal, but [*3] only if it conclusively appears on the face of the record. *United States v. DeFusco, 949 F.2d 114, 120 (4th Cir. 1991)*.

We find that Holmes's claim of ineffective assistance does not conclusively appear on the face of the record. Although Holmes correctly notes that his girlfriend was not called to testify to rebut the imposition of the gun enhancement, the district court already had the necessary information before it on which to rule on the USSG § 2D1.1 enhancement. * In particular, Holmes and his counsel proffered evidence both by way of written objections and at the initial sentencing hearing. Nonetheless, the district court ruled against Holmes, imposing the two–level enhancement. Thus, because ineffective assistance of counsel does not conclusively appear on the face of the record, this claim is not properly considered on direct appeal.

* Although Holmes contends that his girlfriend's testimony would have rebutted the propriety of the enhancement, he fails to specify what

> this testimony would have entailed or how it would have rebutted the existence of a connection between the gun and the drug offense for which he was convicted.

[*4]

Holmes's next argument, that the district court erred by imposing the USSG § 2D1.1 enhancement, also fails. We review a sentencing court's imposition of such an enhancement for clear error. *See United States v. Banks, 10 F.3d 1044, 1057 (4th Cir. 1993)*. According to USSG § 2D1.1, a defendant's base offense level may be increased by two levels for possession of a dangerous weapon, including a firearm, in connection with a drug offense. The commentary to that section provides that "the adjustment should be applied if the weapon was connected with the offense." USSG § 2D1.1, comment. (n.3); *see United States v. Harris, 128 F.3d 850, 852 (4th Cir. 1997)*.

We have upheld a district court's imposition of the enhancement where drugs and guns were found in a defendant's home. *See United States v. Nelson, 6 F.3d 1049, 1056 (4th Cir. 1993), overruled on other grounds by Bailey v. United States, 516 U.S. 137, 133 L. Ed. 2d 472, 116 S. Ct. 501 (1995)*; *see also Harris, 128 F.3d at 852–53* (upholding enhancement where unloaded gun was found in defendant's dresser with drugs); *United States v. Rusher, 966 F.2d 868, 880 (4th Cir. 1992)* [*5] (upholding enhancement where firearms and drugs were found in same briefcase); *United States v. White, 875 F.2d 427, 433 (4th Cir. 1989)* (upholding enhancement where gun was found underneath codefendant's car seat). Here, the gun was found approximately six to eight feet from half a kilogram of cocaine belonging to Holmes, in a residence where he stayed and dealt drugs when he was in the area. Thus, we find that the district court's imposition of the enhancement was not clearly erroneous.

Holmes next argues that USSG § 2D1.1 contains an improper burden–shifting and burden of proof scheme, thereby resulting in a violation of his due process rights. He argues that the "clearly improbable" language in the commentary to USSG § 2D1.1 improperly shifts an overly stringent clear and convincing burden to the defendant. Holmes contends, however, that it should be the Government that bears the burden of proving a connection between the gun and the offense by a preponderance of the evidence, and because the Government proffered no evidence to support such a connection, the standard would not have been met. We find that Holmes's argument is without merit. Commentary "that interprets [*6] or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of that guideline. " USSG § 1B1.7, comment. (quoting *Stinson v. United States, 508 U.S. 36, 38, 123 L. Ed. 2d 598, 113 S. Ct. 1913 (1993))*. The "clearly improbable" standard does not violate the Constitution or a federal statute, nor is it inconsistent with USSG § 2D1.1. Thus, Holmes's argument fails.

Lastly, Holmes argues that the district court's denial of his motion to elicit testimony at his resentencing hearing violated his due process rights. Through this motion, Holmes sought to elicit testimony from his girlfriend regarding the lack of a connection between the gun and the drug offense. Holmes relies on USSG § 6A1.3(a), which states that "parties shall be given an adequate opportunity to present information to the court" regarding disputed factors that are important to the sentencing determination. He argues that the district court should have afforded him the opportunity to "oppose and specifically address" the evidentiary basis of the sentence enhancement. We find Holmes's argument baseless.

Because [*7] Holmes raises this argument for the first time on appeal, we review it for plain error. *See United States v. Olano, 507 U.S. 725, 731–32, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993)*. To meet the plain error standard (1) there must be an error; (2) the error must be plain, meaning obvious or clear under current law, and; (3) the error must affect substantial rights. *See id. at 732–34*. If these three elements are met, the Court may exercise its discretion to notice the error only if the error seriously affects "the fairness, integrity, or public reputation of judicial proceedings." *Id. at 732*. The record confirms that the district court accorded Holmes an ample opportunity to "oppose and specifically address" the evidentiary basis of the sentence enhancement in written objections and at the initial sentencing hearing. We thus find no error in the district court's conduct of the resentencing proceeding, plain or otherwise.

For the foregoing reasons, we find that Holmes's counsel did not render ineffective assistance, the district court did not clearly err by imposing a two–level sentence enhancement under USSG § 2D1.1, the district court [*8] did not employ an improper evidentiary standard, and the district court did not err by denying Holmes's motion to elicit testimony at his resentencing hearing. Accordingly, we affirm Holmes's sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

81 Fed.Appx. 467
(Cite as: 81 Fed.Appx. 467, 2003 WL 22838866 (4th Cir.(W.Va.)))

United States Court of Appeals,
Fourth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Andre Priest HOLMES, Defendant-Appellant.

No. 03-4306.

Submitted Oct. 3, 2003.
Decided Dec. 1, 2003.

Defendant was convicted, in the United States District Court for the Northern District of West Virginia, Irene M. Keeley, Chief Judge, of drug offense, and he appealed sentence enhancement. The Court of Appeals held that imposition of enhancement for possession of dangerous weapon in connection with drug offense was not clearly erroneous.

Affirmed.

West Headnotes

[1] **Criminal Law** 1126
110k1126 Most Cited Cases

Defense counsel's alleged error in failing to call particular witness to rebut proposed sentencing enhancement did not appear on face of record, and thus defendant was precluded from asserting ineffective assistance claim on direct appeal; counsel did present evidence in opposition to enhancement, but enhancement was imposed anyway. U.S.C.A. Const.Amend. 6.

[2] **Sentencing and Punishment** 726(3)
350Hk726(3) Most Cited Cases

Imposition of two-level sentence enhancement for possession of dangerous weapon in connection with drug offense was not clearly erroneous; gun was found approximately six to eight feet from half kilogram of cocaine belonging to defendant, in residence where he stayed and dealt drugs when he was in area. U.S.S.G. § 2D1.1(b)(1), 18 U.S.C.A.

[3] **Constitutional Law** 270(2)
92k270(2) Most Cited Cases

[3] **Sentencing and Punishment** 658
350Hk658 Most Cited Cases

Sentencing guideline, authorizing two-level sentence enhancement for possession of dangerous weapon in connection with drug offense, does not improperly shift burden of proving lack of connection to defendant, in violation of due process U.S.C.A. Const.Amend. 5; U.S.S.G. § 2D1.1(b)(1), 18 U.S.C.A.

[4] **Sentencing and Punishment** 2295
350Hk2295 Most Cited Cases

Sentencing court's refusal to allow drug defendant to present additional evidence at resentencing hearing regarding his connection to firearm, which had been basis for offense level enhancement, was not clearly erroneous; defendant had been given ample opportunity to oppose enhancement at initial sentencing hearing.
***468** Appeal from the United States District Court for the Northern District of West Virginia, at Clarksburg. Irene M. Keeley, Chief District Judge. (CR- 99-42).

Charles T. Berry, Bowles, Rice, Mcdavid, Graff & Love, P.L.L.C., Morgantown, West Virginia, for Appellant. Thomas E. Johnston, United States Attorney, Sherry L. Muncy, Assistant United States Attorney, Clarksburg, West Virginia, for Appellee.

Before WIDENER, GREGORY, and DUNCAN, Circuit Judges.

Affirmed by unpublished PER CURIAM opinion.

OPINION

PER CURIAM.

**1 Andre Priest Holmes appeals the district court's imposition of a two- level sentence enhancement under *United States Sentencing Guidelines Manual* § 2D1.1(b)(1) for possession of a dangerous weapon in connection with a drug offense. We affirm.

Holmes first argues that his counsel rendered ineffective assistance by failing to elicit testimony from his girlfriend at his initial sentencing regarding the propriety of the enhancement. In order to succeed on a claim of ineffective assistance of counsel, a defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) counsel's deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under the first prong of *Strickland,* a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Id.* at 689, 104 S.Ct. 2052. Further, the reviewing court must evaluate the reasonableness of counsel's performance within the context of the circumstances at the time of the alleged errors, rather than with the benefit of **469** hindsight. *Id.* at 690, 104 S.Ct. 2052. To satisfy the second prong of *Strickland,* a defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694, 104 S.Ct. 2052. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* A defendant normally raises the issue of ineffective assistance of counsel by collateral attack. A defendant can raise the claim of ineffective assistance on direct appeal, but only if it conclusively appears on the face of the record. *United States v. DeFusco*, 949 F.2d 114, 120 (4th Cir.1991).

[1] We find that Holmes's claim of ineffective assistance does not conclusively appear on the face of the record. Although Holmes correctly notes that his girlfriend was not called to testify to rebut the imposition of the gun enhancement, the district court already had the necessary information before it on which to rule on the USSG § 2D1.1 enhancement. [FN*] In particular, Holmes and his counsel proffered evidence both by way of written objections and at the initial sentencing hearing. Nonetheless, the district court ruled against Holmes, imposing the two-level enhancement. Thus, because ineffective assistance of counsel does not conclusively appear on the face of the record, this claim is not properly considered on direct appeal.

FN* Although Holmes contends that his girlfriend's testimony would have rebutted the propriety of the enhancement, he fails to specify what this testimony would have entailed or how it would have rebutted the existence of a connection between the gun and the drug offense for which he was convicted.

[2] Holmes's next argument, that the district court erred by imposing the USSG § 2D1.1 enhancement, also fails. We review a sentencing court's imposition of such an enhancement for clear error. *See United States v. Banks*, 10 F.3d 1044, 1057 (4th Cir.1993). According to USSG § 2D1.1, a defendant's base offense level may be increased by two levels for possession of a dangerous weapon, including a firearm, in connection with a drug offense. The commentary to that section provides that "[t]he adjustment should be applied if the weapon was connected with the offense." USSG § 2D1.1, comment. (n.3); *see United States v. Harris*, 128 F.3d 850, 852 (4th Cir.1997).

**2 We have upheld a district court's imposition of the enhancement where drugs and guns were found in a defendant's home. *See United States v. Nelson*, 6 F.3d 1049, 1056 (4th Cir.1993), *overruled on other grounds by Bailey v. United States*, 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995); *see also Harris*, 128 F.3d at 852-53 (upholding enhancement where unloaded gun was found in defendant's dresser with drugs); *United States v. Rusher*, 966 F.2d 868, 880 (4th Cir.1992) (upholding enhancement where firearms and drugs were found in same briefcase); *United States v. White*, 875 F.2d 427, 433 (4th Cir.1989) (upholding enhancement where gun was found underneath codefendant's car seat). Here, the gun was found approximately six to eight feet from half a kilogram of cocaine belonging to Holmes, in a residence where he stayed and dealt drugs when he was in the area. Thus, we find that the district court's imposition of the enhancement was not clearly erroneous.

[3] Holmes next argues that USSG § 2D1.1 contains an improper burden- shifting and burden of proof scheme, thereby resulting in a violation of his due process rights. He argues that the "clearly improbable" language in the commentary to USSG § 2D1.1 improperly shifts an **470** overly stringent clear and convincing burden to the defendant. Holmes contends, however, that it should be the Government that bears the burden of proving a connection between the gun and the offense by a preponderance of the evidence, and because the Government proffered no evidence to support such a connection, the standard would not have been met. We find that Holmes's argument is without

merit. Commentary "that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of that guideline." USSG § 1B1.7, comment. (quoting *Stinson v. United States*, 508 U.S. 36, 38, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993)). The "clearly improbable" standard does not violate the Constitution or a federal statute, nor is it inconsistent with USSG § 2D1.1. Thus, Holmes's argument fails.

[4] Lastly, Holmes argues that the district court's denial of his motion to elicit testimony at his resentencing hearing violated his due process rights. Through this motion, Holmes sought to elicit testimony from his girlfriend regarding the lack of a connection between the gun and the drug offense. Holmes relies on USSG § 6A1.3(a), which states that "parties shall be given an adequate opportunity to present information to the court" regarding disputed factors that are important to the sentencing determination. He argues that the district court should have afforded him the opportunity to "oppose and specifically address" the evidentiary basis of the sentence enhancement. We find Holmes's argument baseless.

Because Holmes raises this argument for the first time on appeal, we review it for plain error. *See United States v. Olano*, 507 U.S. 725, 731-32, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). To meet the plain error standard (1) there must be an error; (2) the error must be plain, meaning obvious or clear under current law, and; (3) the error must affect substantial rights. *See id.* at 732-34, 113 S.Ct. 1770. If these three elements are met, the Court may exercise its discretion to notice the error only if the error seriously affects "the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 732, 113 S.Ct. 1770. The record confirms that the district court accorded Holmes an ample opportunity to "oppose and specifically address" the evidentiary basis of the sentence enhancement in written objections and at the initial sentencing hearing. We thus find no error in the district court's conduct of the resentencing proceeding, plain or otherwise.

**3 For the foregoing reasons, we find that Holmes's counsel did not render ineffective assistance, the district court did not clearly err by imposing a two-level sentence enhancement under USSG § 2D1.1, the district court did not employ an improper evidentiary standard, and the district court did not err by denying Holmes's motion to elicit testimony at his resentencing hearing. Accordingly, we affirm Holmes's sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED.

81 Fed.Appx. 467, 2003 WL 22838866 (4th Cir.(W.Va.))

END OF DOCUMENT

LEXSEE 2003 U.S. APP. LEXIS 24201

CHARLES R. GIBSON, JR, Plaintiff–Appellant, versus VETERAN'S ADMINISTRATION, Defendant–Appellee.

No. 03–20359 Summary Calendar

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

2003 U.S. App. LEXIS 24201

December 2, 2003, Filed

NOTICE: [*1] RULES OF THE FIFTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Southern District of Texas USDC No. H–02–CV–1491.

DISPOSITION: Affirmed.

JUDGES: Before JONES, BENAVIDES, and CLEMENT, Circuit Judges.

OPINION: PER CURIAM: *

> * Pursuant to *5TH CIR. R. 47.5*, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in *5TH CIR. R. 47.5.4*.

Charles R. Gibson, Jr., ("Gibson"), Texas prisoner # 858066, appeals from the dismissal of his civil action in which he alleged that the Veteran's Administration ("VA"): mixed up his records with the records of other veterans, causing him to be denied over 20 years of disability benefits; released confidential information in violation of the Privacy Act, *5 U.S.C. § 552a*; and conspired with certain Texas prison officials to deprive him of his VA records for two [*2] weeks. Gibson argues that the district court erred by finding that it did not have jurisdiction over his claims that the VA violated his constitutional rights and that he stated a viable claim against the VA for violating the Privacy Act by releasing his confidential records. Gibson also argues that he stated viable conspiracy claims against the Texas prison officials. Finally, Gibson contends that his claims that Texas prison officials mistreated him should have been joined with his other claims and that the documents he submitted to this court prove his conspiracy claim.

The district court correctly concluded that it did not have jurisdiction over Gibson's claims that the VA violated his constitutional rights because actions pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971)*, may not be maintained against a federal agency. See *F.D.I.C. v. Meyer, 510 U.S. 471, 484–85, 127 L. Ed. 2d 308, 114 S. Ct. 996 (1994)*. Since Gibson did not allege that the VA improperly disclosed his records to anyone, he failed to state a claim against the VA under the Privacy Act for the [*3] improper disclosure of his records. See *5 U.S.C. § 552a(b)*; see also *Quinn v. Stone, 978 F.2d 126, 131 (3d. Cir. 1992)*.

Because Gibson did not "plead the operative facts" of his conspiracy claim, he did not state a conspiracy claim upon which relief could be granted. *Lynch v. Cannatella, 810 F.2d 1363, 1369–70 (5th Cir. 1987)*. Gibson's reliance on the documents he submitted to this court to prove his conspiracy claim is misplaced, as we "may not consider new evidence furnished for the first time on appeal." *Theriot v. Parish of Jefferson, 185 F.3d 477, 491 n.26 (5th Cir. 1999)*. Similarly, we will not consider Gibson's claims that Texas prison officials mistreated him, because these claims were not raised in the district court. See *Leverette v. Louisville Ladder Co., 183 F.3d 339, 342 (5th Cir. 1999)*. Accordingly, the district court's dismissal of Gibson's civil action is AFFIRMED. Gibson's motions for appointment of counsel, for leave to file supplemental brief, and for leave to supplement the record are DENIED.

Slip Copy
(Cite as: 2003 WL 22849810 (5th Cir.(Tex.)))

United States Court of Appeals, Fifth Circuit.

Charles R. GIBSON, Jr, Plaintiff-Appellant,
v.
VETERAN'S ADMINISTRATION,
Defendant-Appellee.

No. 03-20359.

Dec. 2, 2003.

Inmate brought action against Veteran's Administration (VA) alleging the VA mixed up his records with records of other veterans causing him to be denied over 20 years of disability benefits, released confidential information in violation of the Privacy Act, and conspired with certain prison officials to deprive him of his VA records for two weeks. The United States District Court for the Southern District of Texas dismissed the action. Inmate appealed. The Court of Appeals held that: (1) district court did not have jurisdiction over action; (2) inmate failed to allege that VA improperly disclosed his records to anyone; and (3) inmate failed to allege the operative facts of his conspiracy claim.

Affirmed.

[1] Federal Courts

170Bk0 k.

District court did not have jurisdiction over inmate's action against the Veteran's Administration (VA) alleging the VA violated his constitutional rights; *Bivens* actions could not be maintained against a federal agency.

[2] Records

326k0 k.

Inmate failed to allege that the Veteran's Administration (VA) improperly disclosed his records to anyone, as required to state a claim against the VA under the Privacy Act for the improper disclosure of records. 5 U.S.C.A. § 522a(b).

[3] Conspiracy

91k0 k.

Inmate failed to allege the operative facts of his conspiracy claim, as required to state a claim that the Veteran's Administration (VA) conspired with certain prison officials to deprive him of his VA records for two weeks.

Charles R Gibson, Jr., pro se, Huntsville, TX, for Plaintiff-Appellant.

Alice Ann Burns, Assistant US Attorney, US Attorney's Office, Houston, TX, for Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas. USDC No. H-02-CV-1491.

Before JONES, BENAVIDES, and CLEMENT, Circuit Judges.

Summary Calendar

PER CURIAM. [FN*]

***1** Charles R. Gibson, Jr., ("Gibson"), Texas prisoner # 858066, appeals from the dismissal of his civil action in which he alleged that the Veteran's Administration ("VA"): mixed up his records with the records of other veterans, causing him to be denied over 20 years of disability benefits; released confidential information in violation of the Privacy Act, 5 U.S.C. § 522a; and conspired with certain Texas prison officials to deprive him of his VA records for two weeks. Gibson argues that the district court erred by finding that it did not have jurisdiction over his claims that the VA violated his constitutional rights and that he stated a viable claim against the VA for violating the Privacy Act by releasing his confidential records. Gibson also argues that he stated viable conspiracy claims against the Texas prison officials. Finally, Gibson contends that

his claims that Texas prison officials mistreated him should have been joined with his other claims and that the documents he submitted to this court prove his conspiracy claim.

[1][2] The district court correctly concluded that it did not have jurisdiction over Gibson's claims that the VA violated his constitutional rights because actions pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), may not be maintained against a federal agency. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 484-85, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994). Since Gibson did not allege that the VA improperly disclosed his records to anyone, he failed to state a claim against the VA under the Privacy Act for the improper disclosure of his records. *See* 5 U.S.C. § 522a(b); *see also Quinn v. Stone*, 978 F.2d 126, 131 (3d. Cir.1992).

[3] Because Gibson did not "plead the operative facts" of his conspiracy claim, he did not state a conspiracy claim upon which relief could be granted. *Lynch v. Cannatella*, 810 F.2d 1363, 1369-70 (5th Cir.1987). Gibson's reliance on the documents he submitted to this court to prove his conspiracy claim is misplaced, as we "may not consider new evidence furnished for the first time on appeal." *Theriot v. Parish of Jefferson*, 185 F.3d 477, 491 n . 26 (5th Cir.1999). Similarly, we will not consider Gibson's claims that Texas prison officials mistreated him, because these claims were not raised in the district court. *See Leverette v. Louisville Ladder Co.*, 183 F.3d 339, 342 (5th Cir.1999). Accordingly, the district court's dismissal of Gibson's civil action is AFFIRMED. Gibson's motions for appointment of counsel, for leave to file supplemental brief, and for leave to supplement the record are DENIED.

FN* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

2003 WL 22849810 (5th Cir.(Tex.))

END OF DOCUMENT

LEXSEE 2003 U.S. APP. LEXIS 23845

HAROLD H. THOMPSON, Plaintiff–Appellant, v. DONAL CAMPBELL, Commissioner, Tennessee Department of Correction; JIM ROSE, Assistant Commissioner; FRED RANEY, Warden, Northwest Correctional Facility; TONY MAYS, Administrative Lieutenant; Defendants–Appellees.

No. 02–5588

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

2003 U.S. App. LEXIS 23845

November 20, 2003, Filed

NOTICE: [*1] NOT RECOMMENDED FOR FULL–TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

PRIOR HISTORY: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE. 00–01351. Todd. 04–24–02.

DISPOSITION: Affirmed.

LexisNexis (TM) HEADNOTES– Core Concepts:

COUNSEL: HAROLD H. THOMPSON, Plaintiff – Appellant, Pro se, Tiptonville, TN.

For DONAL CAMPBELL, Defendant – Appellee: Kimberly J. Dean, Deputy Attorney Gen, Stephanie R. Reevers, Asst. Attorney Gen., Office of the Attorney General, Nashville, TN.

JUDGES: Before: NELSON, GIBBONS, and SUTTON, Circuit Judges.

OPINIONBY: Sutton

OPINION:

SUTTON, Circuit Judge. Harold Thompson is a Tennessee prison inmate, a self–proclaimed anarchist, and an inventive litigant. In December 2000, he sued several Tennessee prison officials under *42 U.S.C. § 1983*, challenging the validity of several prisoner–mail policies adopted by the State of Tennessee, including most notably the State's policy of withholding incoming mail from "anarchist" organizations. [*2] Thompson claims that this policy suppresses communication in violation of the First (and Fourteenth) Amendment and denies him meaningful access to the courts in violation of the *Fourteenth Amendment*. Thompson also raises a *First Amendment* challenge to a policy that prohibits inmates from receiving books, magazines, and newspapers from sources other than their publisher. Finally, Thompson raises *First Amendment* and due process challenges to a prison policy prohibiting the delivery—and in many cases requiring the destruction—of incoming standard–rate mail without notice to the inmate. The district court entered a judgment rejecting Thompson's claims as a matter of law, and we AFFIRM.

I.

Harold Thompson is serving a life sentence at the Northwest Correctional Complex in Tiptonville, Tennessee. While confined in prison, Thompson has become (perhaps understandably) a vigorous critic of government authority, embracing "anarchism" as a political philosophy.

No less understandably, the Tennessee Department of Corrections (the "Department" or "TDOC") goes to great lengths to avoid "anarchy" in its institutions, including in its Northwest Correctional Complex. To that end, the Department [*3] has adopted a policy of withholding mail that may pose a threat to institutional security, including mail that, "in the opinion of the warden," could "reasonably be considered" to "advocate, facilitate, or otherwise present a risk of lawlessness, ... anarchy, or rebellion against government authority." TDOC Policy No. 507.02(VI)(C)(3). This policy also covers, among other things, mail that could "reasonably be considered" to "contain obscene photographs, pictures, or

drawings" or "materials specifically found to be detrimental to prisoners' rehabilitation because [they] could encourage deviate criminal sexual behaviors." TDOC Policy No. 507.02(VI)(C)(3)(e) & (h).

On numerous occasions between November 1999 and October 2000, prison mail–room staff forwarded Mr. Thompson's mail to the Warden, Fred Raney, for review under this policy. In each case, Raney personally reviewed the items and determined that they posed a security threat. Each time, Thompson received a memo notifying him that prison officials had intercepted the particular piece of mail. The policy then provided Thompson an opportunity to appeal the Warden's decision to the Assistant Commissioner of the Tennessee Department [*4] of Correction, Jim Rose. The policy, however, does not allow an inmate access to the intercepted material for purposes of the appeal. Only if successful on appeal does the inmate learn anything more than the name of the intercepted publication. On several occasions, Mr. Thompson successfully invoked the appeals process and ultimately received mail that initially had been withheld.

On at least two dozen occasions, however, Thompson failed to obtain relief through these administrative appeals, and prison officials returned the mail to its sender—twenty–two times due to "anarchist" content and two times due to obscene or sexual content. According to the Warden, he based his decision to reject these items on his professional judgment that they might potentially disrupt the security of the institution. Thompson challenges the policy on its face and as applied to these particular items.

The Department has two other policies at issue in this case. One prohibits prisoners from receiving books, magazines, and newspapers unless their publisher or a recognized distributor sends them directly to the inmate. TDOC Policy No. 5702(VI)(C)(5) ("Printed materials may be received by inmates in an [*5] unlimited amount, provided they are mailed directly from the publisher(s) or recognized commercial distributor."). The other policy prohibits prisoners from receiving "standard rate mail" (also known as "bulk rate mail"). Under the policy, the prison mail room will return such items when the sender guarantees return postage, but otherwise destroys them. Exempted under this policy are "books, magazines, and newspapers received directly from the publisher or a recognized distributor" because these materials "are assumed to have been purchased." Prisoners "who want to receive other items that are normally sent bulk rate mail" must make arrangements to prepay first–class or second–class postage. TDOC Policy 5702.02(VI)(D). Prison officials, however, do not give inmates notice, whether before or after the fact, that they have received standard rate mail.

In December 2000, Thompson filed a *§ 1983* action challenging these policies and seeking declaratory and injunctive relief (but no damages). He brought the suit against four Tennessee prison officials in their official and individual capacities: Donal Campbell, the Commissioner of the Tennessee Department of Corrections; Jim Rose, the [*6] Assistant Commissioner; Fred Raney, the Warden; and Lieutenant Tony Mays, the Mailroom Supervisor (and a Correctional Officer).

Though it is by no measure a model of clarity, Thompson's complaint, fairly read, raises six distinct claims: (1) the Department's policy regarding anarchy–related mail violates the *First Amendment* on its face because it is overbroad, vague, and not reasonably related to legitimate penological interests; (2) the anarchy–related mail policy, as applied to the particular items enumerated in Thompson's complaint, violates the *First Amendment*; (3) the "publishers only" rule violates the *First Amendment*; (4) the standard–rate mail rule violates the *First Amendment*; (5) the standard–rate mail rule violates the *Fourteenth Amendment* by providing for the rejection or destruction of such mail without notice; and (6) the anarchy–related mail policy denies Thompson meaningful access to the courts in violation of the *Fourteenth Amendment.*

The prison officials moved for summary judgment, arguing that these claims all fail as a matter of law. The district court granted the motion. In upholding the facial validity of these three prison policies, the court determined that [*7] they reasonably related to legitimate penological objectives. The court, however, did not discuss Thompson's as–applied challenge to the anarchy–related mail policy. Thompson appealed.

II.

All inmate challenges to the conditions of confinement implicate two bookend principles. At one end, it is clear that incarceration does not strip inmates of all constitutional protections. *See Turner v. Safley, 482 U.S. 78, 84, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987)*. Should "a prison regulation or practice offend[] a fundamental [] guarantee" accorded Thompson by the Constitution, the federal courts stand ready to "discharge their duty to protect [his] constitutional rights." *Id.* (quotation omitted). "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Id.*

At the other end, it is clear that the constitutional rights of inmates are "more limited in scope than the constitutional rights held by individuals in society at large." *Shaw v. Murphy, 532 U.S. 223, 229, 149 L. Ed. 2d 420, 121 S. Ct. 1475 (2001)*. Recognizing that the federal judiciary is "particularly ill equipped to deal with" the "complex [*8] and intractable" problems of prison administration, we

"generally [] defer[] to the judgments of prison officials in upholding [] regulations" like those challenged here. *Id.* (citation and quotation omitted). "Where, as here, a state penal system is involved, federal courts have additional reason to accord deference to the appropriate prison authorities." *McKune v. Lile, 536 U.S. 24, 37, 153 L. Ed. 2d 47, 122 S. Ct. 2017 (2002)* (quotation omitted).

Accordingly, while inmates like Mr. Thompson may bring constitutional challenges to the conditions of their confinement, those challenges receive deferential review. So long as the prison regulation at issue "is reasonably related to legitimate penological interests," it will satisfy the Constitution. *Turner, 482 U.S. at 89*. In making this determination, *Turner* tells us to consider (1) whether the regulation advances legitimate and neutral penological interests, and whether the regulation is rationally related to those interests; (2) whether alternative means of exercising the right remain open to the inmates; (3) whether accommodation of the asserted constitutional right will have a marked [*9] impact on guards, inmates, and the allocation of prison resources; and (4) whether the regulation amounts to an "exaggerated response" to the problem. *See id. at 89–90*.

A.

Applying these measures to the Department's policy of withholding mail advocating "anarchy" or containing "obscenity," we agree with the district court that the policy on its face satisfies the Constitution. *First*, prison officials have articulated a rational connection between the policy and legitimate and neutral penological interests. Maintaining security constitutes a legitimate penological interest, *Thornburgh v. Abbott, 490 U.S. 401, 415, 104 L. Ed. 2d 459, 109 S. Ct. 1874 (1989)*, as does rehabilitating prisoners, *Pell v. Procunier, 417 U.S. 817, 823, 41 L. Ed. 2d 495, 94 S. Ct. 2800 (1974)*. And regulations are "'neutral' in the technical sense in which [the Supreme Court] meant and used that term in *Turner,"* when, as with these regulations, they "draw distinctions between publications solely on the basis of their potential implications for [a legitimate penological objective]." *Thornburgh, 490 U.S. at 415–16*. As for a "rational [*10] connection" between the policy and these interests, the issue is not whether the prohibited materials have in fact caused problems or are even "likely" to cause problems, but whether a reasonable official might think that the policy advances these interests. *See id. at 417*. Surely in this instance the relationship between the policy (prohibiting materials that advocate anarchy or contain obscenity) and the goals (security, order, and rehabilitation) is not "so remote as to render the policy arbitrary or irrational." *Turner, 482 U.S. at 89–90*. Because anarchy and obscenity are incompatible with security, order, and rehabilitation, this policy falls well within the realm of the reasonable.

Second, alternative means of exercising *First Amendment* rights remain open under the policy. According to the Supreme Court, the right in question must be read "sensibly and expansively." *Thornburgh, 490 U.S. at 417*. Here, the right in question is the right to receive and read publications. *See id. at 417–18*. And, as *Thornburgh* instructs, when the regulation permits "a broad range of publications to be sent, received, and [*11] read," as does the one here, a court must conclude that alternative means of exercising the right remain open. *See id. at 418*. *See also O'Lone v. Estate of Shabazz, 482 U.S. 342, 351–52, 96 L. Ed. 2d 282, 107 S. Ct. 2400 (1987)* (upholding a regulation restricting a Muslim practice where inmates were permitted to participate in other Muslim practices); *Turner, 482 U.S. at 92* (upholding a regulation restricting communication among inmates where other modes of expression remained open).

Third, a policy permitting prisoners to receive materials that advocate anarchy or contain obscenity would have a significant impact on prison guards, other inmates, and the allocation of prison resources. We cannot ignore "the likelihood that such material will circulate within the prison[,] raising the prospect of ... [a] 'ripple effect.'" *Thornburgh, 490 U.S. at 418*. *See also Turner, 482 U.S at 92*. While, on this record, we have no reason to believe that Mr. Thompson will rise up against his jailors or engage in deviant sexual conduct should he possess such materials, we cannot discount the possibility that [*12] other more volatile prisoners will. Nor can we discount the costs of requiring prison administrators to allow some prisoners access to such materials while ensuring that others do not gain access to them. "The courts should defer to the 'informed discretion' of corrections officials" on questions like these. *Thornburgh, 490 U.S. at 418* (quoting *Turner, 482 U.S. at 90*).

Fourth, this regulation does not represent an "exaggerated response to the problem at hand." Mr. Thompson has not met his burden of "point[ing] to an alternative that fully accommodates [his] rights at *de minimis* cost to valid penological interests." *Thornburgh, 490 U.S. at 418*. *See O'Lone, 482 U.S. at 350* ("Placing the burden on prison officials to disprove the availability of alternatives ... [would] fail[] to reflect the respect and deference that the United States Constitution allows for the judgment of prison administrators."). The only alternative proposed by Thompson—allowing him to receive these materials upon his promise not to disseminate them—would require prison officials to take him at his word or would require prison [*13] officials to devote considerable resources to verifying that he is keeping his word. Our modest role in reviewing constitutional challenges to prison rules does

not permit us to require prisons to take such measures.

Nor, contrary to Mr. Thompson's position, does it make a difference that the policy grants prison officials broad discretion and that prison officials exercise this discretion differently in different Tennessee prisons. *Thornburgh* approved similar regulations in the face of a similar challenge. "Where the regulations at issue concern the entry of materials into the prison," the Supreme Court stated, "a regulation which gives prison authorities broad discretion is appropriate." *490 U.S. at 416*. And where regulations allow for an assessment "under the conditions of a particular prison at a particular time," the Court explained, "the exercise of discretion ... may produce seeming 'inconsistencies.'" *Id. at 417* & n.15. "But what may appear to be inconsistent results," the Court added, "are not necessarily signs of arbitrariness or irrationality [because] given the likely variability within and between institutions over time, greater consistency [*14] might be attainable only at the cost of a more broadly restrictive rule against admission of incoming publications." *Id. at 417 n.15*. All things considered, this regulation does not violate the *First Amendment* on its face.

B.

Mr. Thompson alternatively argues that this policy violates the *First Amendment* as applied to specific mail sent to him that advocates "anarchism." Thompson claims that, whether or not the policy validly targets materials that advocate "anarchy," prison officials unconstitutionally applied the policy to materials that discuss "anarchism." Anarchy and anarchism, Thompson adds, are distinct. *See Webster's Third New Int'l Dictionary* 78 (2002) ("Anarchism" is "a political theory opposed to all forms of government and governmental restraint and advocating voluntary cooperation and free association of individuals and groups in order to satisfy their needs."). While anarchy assuredly represents an undesirable end, Thompson suggests, anarchism does not necessarily amount to a means to that end, because anarchism as a political philosophy opposes government, not order. *See The Oxford Companion to Philosophy* 31 (Ted Honderich ed., 1995) ("Anarchism [*15] does not preclude social organization, social order or rules, the appropriate delegation of authority, or even of certain forms of government, as long as this is distinguished from the state and as long as it is administrative and not oppressive, coercive, or bureaucratic."). *See also* Henry David Thoreau, *Civil Disobedience and Other Essays* 1 (Dover Publ'ns. 1993) ("That government is best which governs not at all' and when men are prepared for it, that will be the kind of government which they will have."); Thomas Paine, *Common Sense* 65 (Kramnick ed., 1986) ("Society is in every state a blessing, but Government, even in its best state, is but a necessary evil; in its worst state, an intolerable one.").

In addressing this distinct constitutional claim, "the question remains whether the prison regulations, *as applied* to [Thompson], are 'reasonably related to legitimate penological interests.'" *Shaw v. Murphy, 532 U.S. 223, 232, 149 L. Ed. 2d 420, 121 S. Ct. 1475 (2001)* (emphasis added). Thompson bears a "heavy burden" if he is to succeed on this claim. *Id.* He must "overcome the presumption that the prison officials acted within their 'broad discretion. [*16] '" *Id.*

Perhaps as a result of the informality of Mr. Thompson's pleadings, the district court did not separately explain why it rejected this as–applied challenge. Customarily, the absence of the district court's thinking on the point and the absence of the publications at issue in the record would be reason enough for remanding the case to allow the trial court to review the issue in the first instance. In this case, however, the Tennessee Attorney General argues that we should reject the argument as a matter of law because the State moved for summary judgment on all issues before the district court and Mr. Thompson failed to satisfy his burden of creating a fact dispute on any of them, including the as–applied challenge. We agree.

Thompson has not shown that he requested the challenged publications in discovery. He has not shown that the State improperly denied him access to the publications through discovery. And he has not shown that the district court improperly refused to order the State to produce the publications. To the extent he wished to preserve a meaningful as–applied challenge in this case, it was his duty to seek these publications in discovery, and it was his duty, [*17] to the extent discovery access to the publications improperly was denied, to ask the district court to order production of the documents. Thompson has not shown that he did any of these things. Nor has he shown that when he received the State's motion for summary judgment, he either raised the access–to–the–publications issue or otherwise created a material fact dispute about the claim. Under these circumstances, the as–applied challenge must be rejected as a matter of law.

III.

Mr. Thompson next claims that the district court erred in rejecting his *First Amendment* challenges to the Department's (1) "publishers only" policy and (2) "standard rate mail" policy. He is mistaken in both respects.

The "publishers only" policy, recall, prohibits inmates from receiving books, magazines, and newspapers from sources other than their publisher. We need not engage in a *Turner* analysis of this policy because precedent bound the district court, and binds us, in addressing this *First Amendment* challenge. In *Bell v. Wolfish, 441 U.S. 520,*

550, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979), the Supreme Court held that a "publishers only" rule for receiving hard cover books does not [*18] violate the *First Amendment.* This Court extended that rule to softcover materials in *Ward v. Washtenaw County Sheriff's Dep't., 881 F.2d 325, 330 (6th Cir. 1989)* (holding that a "publishers only" policy for receiving magazines does not violate the *First Amendment*). Nothing about the Department's policy or Thompson's challenge to it overcomes these controlling precedents.

Precedent likewise defeats Thompson's *First Amendment* challenge to the "standard rate mail" policy. In *Sheets v. Moore, 97 F.3d 164 (6th Cir. 1996)*, this Court upheld the constitutionality of a similar Michigan prohibition against what was then known as "bulk rate mail." *See id. at 168–69*. Since *Sheets,* this Court has upheld the constitutionality of the very same Tennessee policy at issue here, albeit in an unpublished opinion. *See Jones v. Campbell, 23 Fed. Appx. 458, 464 (6th Cir. 2001)* (holding that the Department's standard rate mail policy is reasonably related to legitimate penological objectives). We adhere to *Sheets* and *Jones* here.

Though the district court did not address the issue and the defendants did not brief it, we also [*19] read Thompson's *pro se* complaint and briefs to raise a due process challenge to the standard–rate mail policy. Thompson takes issue with the lack of notice to the inmate that occurs under the policy when standard–rate mail is received by the prison and either returned to its sender or destroyed. In the absence of notice that standard rate mail was rejected or destroyed, he argues that a prisoner cannot arrange to have first–class or second–class postage paid. This, he concludes, violates due process.

Thompson is wrong. He has not established a property or liberty interest in receiving non–subscription, standard–rate mail (and the policy does not affect subscription, standard rate mail). Without deprivation of a protected interest, he has no due process claim separate from his *First Amendment* claim, which we have already rejected. *See Board of Regents v. Roth, 408 U.S. 564, 571, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). Cf. Procunier v. Martinez, 416 U.S. 396, 408 n.11, 417, 40 L. Ed. 2d 224, 94 S. Ct. 1800 (1974)* (holding that the "decision to censor or withhold delivery of a particular letter must be accompanied by minimum procedural safeguards, [*20] " but noting that "different consideration may come into play in the case of mass mailings"), *overruled on other grounds by Thornburgh, 490 U.S. at 413–14*; *Prison Legal News v. Cook, 238 F.3d 1145, 1152–53 (9th Cir. 2001)* (holding that an inmate is entitled to due process guarantees when prison officials withhold *subscription* bulk–rate mail). *But see Prison Legal News v. Lehman, 272 F. Supp. 2d 1151, 1160 (W.D. Wash. 2003)* (holding that "the addressees of [non–subscription, standard rate] mail must be afforded the same procedural protections afforded to recipients of first class, second class, and subscription standard rate mail under Department regulations").

IV.

Mr. Thompson raises three other contentions. He first contends that withholding mail from the "Anarchist Prisoners Legal Aid Network" denies him access to the courts in violation of the *Fourteenth Amendment.* In bringing this claim, however, Thompson offers no explanation how it differs from his *First Amendment* challenge to the mail policy and does not identify a single case addressing an access–to–courts challenge. We accordingly reject this claim as a matter of law. [*21] *See Lewis v. Casey, 518 U.S. 343, 351, 135 L. Ed. 2d 606, 116 S. Ct. 2174 (1996)* (requiring a plaintiff to allege and prove actual injury); *Boswell v. Mayer, 169 F.3d 384, 387 (1999)* (affirming dismissal of an access–to–courts claim because plaintiff did not "allege that the incoming letter pertained to ongoing or anticipated litigation challenging either his sentence or the conditions of his confinement").

He next contends that the district court abused its discretion in not requesting an attorney to represent him. *See 28 U.S.C. § 1915(e)(1)* ("The court may request an attorney to represent any such person unable to afford counsel."). We disagree. Were this a criminal case, the law would entitle Thompson to counsel. But the district court did not abuse its discretion by declining to "request" counsel here because this is ordinary civil litigation and because Thompson has not shown that he has a compelling claim.

Thompson, finally, argues that the district court abused its discretion in granting summary judgment to the prison officials without considering some discovery documents that Thompson attempted to file prematurely. [*22] No abuse of discretion occurred, however, because the district court did nothing to prevent Thompson from filing the materials in connection with his opposition to the defendants' motion for summary judgment. The court sensibly just prohibited him from filing the materials prematurely.

V.

For the foregoing reasons, we AFFIRM.

81 Fed.Appx. 563
(Cite as: 81 Fed.Appx. 563, 2003 WL 22782321 (6th Cir.(Tenn.)))

United States Court of Appeals,
Sixth Circuit.

Harold H. THOMPSON, Plaintiff-Appellant,
v.
Donal CAMPBELL, Commissioner, Tennessee Department of Correction; Jim Rose, Assistant Commissioner; Fred Raney, Warden, Northwest Correctional Facility; Tony Mays, Administrative Lieutenant; Defendants-Appellees.

No. 02-5588.
Nov. 20, 2003.

Prisoner brought § 1983 action against prison officials challenging the validity of several prisoner mail policies alleging they violated the First and Fourteenth Amendments. The United States District Court for the Western District of Tennessee granted summary judgment in favor of defendants. Prisoner appealed. The Court of Appeals, Sutton, Circuit Judge, held that: (1) policy of withholding mail advocating anarchy or containing obscenity did not violate First Amendment on its face; (2) prisoner failed to satisfy burden of creating factual dispute as to whether policy violated the First Amendment as applied; (3) rule prohibiting prisoners from receiving books, magazines, or newspapers from sources other than their publisher did not violate the First Amendment; (4) prisoner failed to establish property or liberty interest in receiving standard rate mail; and (5) prisoner was not entitled to have district court appoint an attorney to represent him.

Affirmed.

West Headnotes

[1] **Constitutional Law** 92k90.1(1.3)
92k90.1(1.3) Most Cited Cases

[1] **Constitutional Law** 92k90.4(1)
92k90.4(1) Most Cited Cases

[1] **Prisons** 310k4(9)
310k4(9) Most Cited Cases

Prison's policy of withholding mail advocating anarchy or containing obscenity did not violate the First Amendment on its face; officials articulated rational connection between policy and legitimate penological interests of maintaining security, regulations were neutral, alternative means of exercising First Amendment rights remained open under policy, a policy allowing those materials would have significant impact on guards and resources, and regulation did not represent an exaggerated response to problem. U.S.C.A. Const.Amend. 1.

[2] **Prisons** 310k4(9)
310k4(9) Most Cited Cases

Prisoner failed to satisfy his burden of creating a factual dispute as to whether prison's policy of withholding mail advocating anarchy or containing obscenity violated the First Amendment as applied to specific mail sent to prisoner; prisoner had duty to preserve as applied challenge by obtaining publications, prisoner failed to show that he requested challenged publications in discovery, and prisoner failed to show the district court improperly refused to order prison to produce publications. U.S.C.A. Const.Amend. 1.

[3] **Constitutional Law** 92k90.1(1.3)
92k90.1(1.3) Most Cited Cases

[3] **Prisons** 310k4(9)
310k4(9) Most Cited Cases

Prison's rule prohibiting prisoners from receiving books, magazines, or newspapers from sources other than their publisher did not violate the First Amendment; regulation was content neutral and

necessary to serve legitimate and neutral objective of jail security. U.S.C.A. Const.Amend. 1.

[4] **Constitutional Law ⚿?272(2)**
92k272(2) Most Cited Cases

[4] **Constitutional Law ⚿?277(1)**
92k277(1) Most Cited Cases

[4] **Prisons ⚿?4(9)**
310k4(9) Most Cited Cases

Prisoner failed to establish a property or liberty interest in receiving nonsubscription, standard rate mail, as required to support claim that prison's policy of destroying such mail violated the due process clause. U.S.C.A. Const.Amend. 14.

[5] **Civil Rights ⚿?1445**
78k1445 Most Cited Cases

Prisoner was not entitled to have district court appoint an attorney to represent him in his § 1983 lawsuit against prison officials challenging the validity of several prisoner mail policies, where action was an ordinary civil litigation and prisoner did not show he had compelling claims. 28 U.S.C.A. § 1915(e)(1); 42 U.S.C.A. § 1983.

[6] **Federal Civil Procedure ⚿?535**
170Ak2535 Most Cited Cases

District court's ruling prohibiting plaintiff from filing discovery documents prematurely did not prevent plaintiff from filing the materials in connection with his opposition to the defendants' motion for summary judgment.

***564** On Appeal from the United States District Court for the Western District of Tennessee.

Harold H. Thompson, pro se, Tiptonville, TN, for Plaintiff-Appellant.

Kimberly J. Dean, Deputy Attorney Gen., Stephanie R. Reevers, Asst. Attorney Gen., Office of the Attorney General, Nashville, TN, for Defendant- Appellee.

Before: NELSON, GIBBONS, and SUTTON, Circuit Judges.

SUTTON, Circuit Judge.

**1 Harold Thompson is a Tennessee prison inmate, a self-proclaimed anarchist, and an inventive litigant. In December 2000, he sued several Tennessee prison officials under 42 U.S.C. § 1983, challenging the validity of several prisoner-mail policies adopted by the State of Tennessee, including most notably the State's policy of withholding incoming mail from "anarchist" organizations. Thompson claims that this policy suppresses communication in violation of the First (and Fourteenth) Amendment and denies him meaningful access to the courts in violation of the Fourteenth Amendment. Thompson also raises a First Amendment challenge to a policy that prohibits inmates from receiving books, magazines, and newspapers from sources other than their publisher. Finally, Thompson raises First Amendment and due process challenges to a prison policy prohibiting the delivery-and in many cases requiring the destruction-of incoming standard-rate mail without notice to the inmate. The district court entered a judgment rejecting Thompson's claims as a matter of law, and we AFFIRM.

I.

Harold Thompson is serving a life sentence at the Northwest Correctional Complex in Tiptonville, Tennessee. While confined in prison, Thompson has become (perhaps understandably) a vigorous critic of government authority, embracing "anarchism" as a political philosophy.

No less understandably, the Tennessee Department of Corrections (the "Department" or "TDOC") goes to great lengths to avoid "anarchy" in its institutions, including in its Northwest Correctional Complex. To that end, the Department has adopted a policy of withholding mail that may pose a threat to institutional security, including mail that, "in the opinion of the warden," ***565** could "reasonably be considered" to "[a]dvocate, facilitate, or otherwise present a risk of lawlessness, ... anarchy, or rebellion against government authority." TDOC Policy No. 507.02(VI)(C)(3). This policy also covers, among other things, mail that could "reasonably be considered" to "[c]ontain obscene photographs, pictures, or drawings" or "materials specifically found to be detrimental to prisoners' rehabilitation because [they] could encourage deviate criminal sexual behaviors." TDOC Policy No. 507.02(VI)(C)(3)(e) & (h).

On numerous occasions between November 1999 and October 2000, prison mail-room staff forwarded Mr. Thompson's mail to the Warden, Fred Raney, for

review under this policy. In each case, Raney personally reviewed the items and determined that they posed a security threat. Each time, Thompson received a memo notifying him that prison officials had intercepted the particular piece of mail. The policy then provided Thompson an opportunity to appeal the Warden's decision to the Assistant Commissioner of the Tennessee Department of Correction, Jim Rose. The policy, however, does not allow an inmate access to the intercepted material for purposes of the appeal. Only if successful on appeal does the inmate learn anything more than the name of the intercepted publication. On several occasions, Mr. Thompson successfully invoked the appeals process and ultimately received mail that initially had been withheld.

****2** On at least two dozen occasions, however, Thompson failed to obtain relief through these administrative appeals, and prison officials returned the mail to its sender-twenty-two times due to "anarchist" content and two times due to obscene or sexual content. According to the Warden, he based his decision to reject these items on his professional judgment that they might potentially disrupt the security of the institution. Thompson challenges the policy on its face and as applied to these particular items.

The Department has two other policies at issue in this case. One prohibits prisoners from receiving books, magazines, and newspapers unless their publisher or a recognized distributor sends them directly to the inmate. TDOC Policy No. 5702(VI)(C)(5) ("Printed materials may be received by inmates in an unlimited amount, provided they are mailed directly from the publisher(s) or recognized commercial distributor."). The other policy prohibits prisoners from receiving "standard rate mail" (also known as "bulk rate mail"). Under the policy, the prison mail room will return such items when the sender guarantees return postage, but otherwise destroys them. Exempted under this policy are "[b]ooks, magazines, and newspapers received directly from the publisher or a recognized distributor" because these materials "are assumed to have been purchased." Prisoners "who want to receive other items that are normally sent bulk rate mail" must make arrangements to prepay first-class or second-class postage. TDOC Policy 5702.02(VI)(D). Prison officials, however, do not give inmates notice, whether before or after the fact, that they have received standard rate mail.

In December 2000, Thompson filed a § 1983 action challenging these policies and seeking declaratory and injunctive relief (but no damages). He brought the suit against four Tennessee prison officials in their official and individual capacities: Donal Campbell, the Commissioner of the Tennessee Department of Corrections; Jim Rose, the Assistant Commissioner; Fred Raney, the Warden; and Lieutenant Tony Mays, the Mailroom Supervisor (and a Correctional Officer).

***566** Though it is by no measure a model of clarity, Thompson's complaint, fairly read, raises six distinct claims: (1) the Department's policy regarding anarchy-related mail violates the First Amendment on its face because it is overbroad, vague, and not reasonably related to legitimate penological interests; (2) the anarchy-related mail policy, as applied to the particular items enumerated in Thompson's complaint, violates the First Amendment; (3) the "publishers only" rule violates the First Amendment; (4) the standard-rate mail rule violates the First Amendment; (5) the standard-rate mail rule violates the Fourteenth Amendment by providing for the rejection or destruction of such mail without notice; and (6) the anarchy-related mail policy denies Thompson meaningful access to the courts in violation of the Fourteenth Amendment.

****3** The prison officials moved for summary judgment, arguing that these claims all fail as a matter of law. The district court granted the motion. In upholding the facial validity of these three prison policies, the court determined that they reasonably related to legitimate penological objectives. The court, however, did not discuss Thompson's as-applied challenge to the anarchy-related mail policy. Thompson appealed.

II.

All inmate challenges to the conditions of confinement implicate two bookend principles. At one end, it is clear that incarceration does not strip inmates of all constitutional protections. *See* *Turner v. Safley*, 482 U.S. 78, 84, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). Should "a prison regulation or practice offend[ ] a fundamental [ ] guarantee" accorded Thompson by the Constitution, the federal courts stand ready to "discharge their duty to protect [his] constitutional rights." *Id.* (quotation omitted). "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Id.*

At the other end, it is clear that the constitutional rights of inmates are "more limited in scope than the constitutional rights held by individuals in society at large." *Shaw v. Murphy*, 532 U.S. 223, 229, 121 S.Ct. 1475, 149 L.Ed.2d 420 (2001). Recognizing

that the federal judiciary is "particularly ill equipped to deal with" the "complex and intractable" problems of prison administration, we "generally [ ] defer[ ] to the judgments of prison officials in upholding [ ] regulations" like those challenged here. *Id.* (citation and quotation omitted). "Where, as here, a state penal system is involved, federal courts have additional reason to accord deference to the appropriate prison authorities." *McKune v. Lile*, 536 U.S. 24, 37, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002) (quotation omitted).

Accordingly, while inmates like Mr. Thompson may bring constitutional challenges to the conditions of their confinement, those challenges receive deferential review. So long as the prison regulation at issue "is reasonably related to legitimate penological interests," it will satisfy the Constitution. *Turner*, 482 U.S. at 89. In making this determination, *Turner* tells us to consider (1) whether the regulation advances legitimate and neutral penological interests, and whether the regulation is rationally related to those interests; (2) whether alternative means of exercising the right remain open to the inmates; (3) whether accommodation of the asserted constitutional right will have a marked impact on guards, inmates, and the allocation of prison resources; and (4) whether the regulation amounts to an "exaggerated response" to the problem. *See id.* at 89-90.

***567** A.

[1] Applying these measures to the Department's policy of withholding mail advocating "anarchy" or containing "obscenity," we agree with the district court that the policy on its face satisfies the Constitution. *First,* prison officials have articulated a rational connection between the policy and legitimate and neutral penological interests. Maintaining security constitutes a legitimate penological interest, *Thornburgh v. Abbott*, 490 U.S. 401, 415, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989), as does rehabilitating prisoners, *Pell v. Procunier*, 417 U.S. 817, 823, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974). And regulations are " 'neutral' in the technical sense in which [the Supreme Court] meant and used that term in *Turner,"* when, as with these regulations, they "draw distinctions between publications solely on the basis of their potential implications for [a legitimate penological objective]." *Thornburgh*, 490 U.S. at 415-16. As for a "rational connection" between the policy and these interests, the issue is not whether the prohibited materials have in fact caused problems or are even "likely" to cause problems, but whether a reasonable official might think that the policy advances these interests. *See id.* at 417. Surely in this instance the relationship between the policy (prohibiting materials that advocate anarchy or contain obscenity) and the goals (security, order, and rehabilitation) is not "so remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 89-90. Because anarchy and obscenity are incompatible with security, order, and rehabilitation, this policy falls well within the realm of the reasonable.

****4** *Second,* alternative means of exercising First Amendment rights remain open under the policy. According to the Supreme Court, the right in question must be read "sensibly and expansively." *Thornburgh*, 490 U.S. at 417. Here, the right in question is the right to receive and read publications. *See id.* at 417-18. And, as *Thornburgh* instructs, when the regulation permits "a broad range of publications to be sent, received, and read," as does the one here, a court must conclude that alternative means of exercising the right remain open. *See id.* at 418. *See also O'Lone v. Estate of Shabazz*, 482 U.S. 342, 351-52, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987) (upholding a regulation restricting a Muslim practice where inmates were permitted to participate in other Muslim practices); *Turner*, 482 U.S. at 92 (upholding a regulation restricting communication among inmates where other modes of expression remained open).

Third, a policy permitting prisoners to receive materials that advocate anarchy or contain obscenity would have a significant impact on prison guards, other inmates, and the allocation of prison resources. We cannot ignore "the likelihood that such material will circulate within the prison[,] rais[ing] the prospect of... [a] 'ripple effect.' " *Thornburgh*, 490 U.S. at 418. *See also Turner*, 482 U.S at 92. While, on this record, we have no reason to believe that Mr. Thompson will rise up against his jailors or engage in deviant sexual conduct should he possess such materials, we cannot discount the possibility that other more volatile prisoners will. Nor can we discount the costs of requiring prison administrators to allow some prisoners access to such materials while ensuring that others do not gain access to them. "[T]he courts should defer to the 'informed discretion' of corrections officials" on questions like these. *Thornburgh*, 490 U.S. at 418 (quoting *Turner*, 482 U.S. at 90).

Fourth, this regulation does not represent an "exaggerated response to the problem at hand." Mr. Thompson has not ***568** met his burden of "point[ing] to an alternative that fully accommodates [his] rights at *de minimis* cost to valid penological interests." *Thornburgh*, 490 U.S. at 418. *See O'Lone*, 482 U.S.

at 350 ("[P]lacing the burden on prison officials to disprove the availability of alternatives ... [would] fail[ ] to reflect the respect and deference that the United States Constitution allows for the judgment of prison administrators."). The only alternative proposed by Thompson-allowing him to receive these materials upon his promise not to disseminate them-would require prison officials to take him at his word or would require prison officials to devote considerable resources to verifying that he is keeping his word. Our modest role in reviewing constitutional challenges to prison rules does not permit us to require prisons to take such measures.

Nor, contrary to Mr. Thompson's position, does it make a difference that the policy grants prison officials broad discretion and that prison officials exercise this discretion differently in different Tennessee prisons. *Thornburgh* approved similar regulations in the face of a similar challenge. "Where the regulations at issue concern the entry of materials into the prison," the Supreme Court stated, "a regulation which gives prison authorities broad discretion is appropriate." 490 U.S. at 416. And where regulations allow for an assessment "under the conditions of a particular prison at a particular time," the Court explained, "[t]he exercise of discretion ... may produce seeming 'inconsistencies.' " *Id.* at 417 & n. 15. "[B]ut what may appear to be inconsistent results," the Court added, "are not necessarily signs of arbitrariness or irrationality [because] [g]iven the likely variability within and between institutions over time, greater consistency might be attainable only at the cost of a more broadly restrictive rule against admission of incoming publications." *Id.* at 417 n. 15. All things considered, this regulation does not violate the First Amendment on its face.

B.

****5** [2] Mr. Thompson alternatively argues that this policy violates the First Amendment as applied to specific mail sent to him that advocates "anarchism." Thompson claims that, whether or not the policy validly targets materials that advocate "anarchy," prison officials unconstitutionally applied the policy to materials that discuss "anarchism." Anarchy and anarchism, Thompson adds, are distinct. *See Webster's Third New Int'l Dictionary* 78 (2002) ("[A]narchism" is "a political theory opposed to all forms of government and governmental restraint and advocating voluntary cooperation and free association of individuals and groups in order to satisfy their needs."). While anarchy assuredly represents an undesirable end, Thompson suggests, anarchism does not necessarily amount to a means to that end, because anarchism as a political philosophy opposes government, not order. *See The Oxford Companion to Philosophy* 31 (Ted Honderich ed., 1995) ("[A]narchism does not preclude social organization, social order or rules, the appropriate delegation of authority, or even of certain forms of government, as long as this is distinguished from the state and as long as it is administrative and not oppressive, coercive, or bureaucratic."). *See also* Henry David Thoreau, *Civil Disobedience and Other Essays* 1 (Dover Publ'ns. 1993) (" 'That government is best which governs not at all' and when men are prepared for it, that will be the kind of government which they will have."); Thomas Paine, *Common Sense* 65 (Kramnick ed., 1986) ("Society is in every state a blessing, but Government, even in its best state, is but a necessary evil; in its worst state, an intolerable one.").

***569** In addressing this distinct constitutional claim, "the question remains whether the prison regulations, *as applied* to [Thompson], are 'reasonably related to legitimate penological interests.' " *Shaw v. Murphy*, 532 U.S. 223, 232, 121 S.Ct. 1475, 149 L.Ed.2d 420 (2001) (emphasis added). Thompson bears a "heavy burden" if he is to succeed on this claim. *Id.* He must "overcome the presumption that the prison officials acted within their 'broad discretion.' " *Id.*

Perhaps as a result of the informality of Mr. Thompson's pleadings, the district court did not separately explain why it rejected this as-applied challenge. Customarily, the absence of the district court's thinking on the point and the absence of the publications at issue in the record would be reason enough for remanding the case to allow the trial court to review the issue in the first instance. In this case, however, the Tennessee Attorney General argues that we should reject the argument as a matter of law because the State moved for summary judgment on all issues before the district court and Mr. Thompson failed to satisfy his burden of creating a fact dispute on any of them, including the as-applied challenge. We agree.

Thompson has not shown that he requested the challenged publications in discovery. He has not shown that the State improperly denied him access to the publications through discovery. And he has not shown that the district court improperly refused to order the State to produce the publications. To the extent he wished to preserve a meaningful as-applied challenge in this case, it was his duty to seek these publications in discovery, and it was his duty, to the extent discovery access to the publications improperly was denied, to

ask the district court to order production of the documents. Thompson has not shown that he did any of these things. Nor has he shown that when he received the State's motion for summary judgment, he either raised the access-to-the- publications issue or otherwise created a material fact dispute about the claim. Under these circumstances, the as-applied challenge must be rejected as a matter of law.

III.

**6 [3] Mr. Thompson next claims that the district court erred in rejecting his First Amendment challenges to the Department's (1) "publishers only" policy and (2) "standard rate mail" policy. He is mistaken in both respects.

The "publishers only" policy, recall, prohibits inmates from receiving books, magazines, and newspapers from sources other than their publisher. We need not engage in a *Turner* analysis of this policy because precedent bound the district court, and binds us, in addressing this First Amendment challenge. In *Bell v. Wolfish*, 441 U.S. 520, 550, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), the Supreme Court held that a "publishers only" rule for receiving hard cover books does not violate the First Amendment. This Court extended that rule to softcover materials in *Ward v. Washtenaw County Sheriff's Dep't.*, 881 F.2d 325, 330 (6th Cir.1989) (holding that a "publishers only" policy for receiving magazines does not violate the First Amendment). Nothing about the Department's policy or Thompson's challenge to it overcomes these controlling precedents.

Precedent likewise defeats Thompson's First Amendment challenge to the "standard rate mail" policy. In *Sheets v. Moore*, 97 F.3d 164 (6th Cir.1996), this Court upheld the constitutionality of a similar Michigan prohibition against what was then known as "bulk rate mail." *See id.* at 168-69. Since *Sheets,* this Court has upheld the constitutionality of the very same Tennessee policy at issue here, albeit in an ***570** unpublished opinion. *See Jones v. Campbell*, 23 Fed.Appx. 458, 464 (6th Cir.2001) (holding that the Department's standard rate mail policy is reasonably related to legitimate penological objectives). We adhere to *Sheets* and *Jones* here.

[4] Though the district court did not address the issue and the defendants did not brief it, we also read Thompson's *pro se* complaint and briefs to raise a due process challenge to the standard-rate mail policy. Thompson takes issue with the lack of notice to the inmate that occurs under the policy when standard-rate mail is received by the prison and either returned to its sender or destroyed. In the absence of notice that standard rate mail was rejected or destroyed, he argues that a prisoner cannot arrange to have first-class or second-class postage paid. This, he concludes, violates due process.

Thompson is wrong. He has not established a property or liberty interest in receiving non-subscription, standard-rate mail (and the policy does not affect subscription, standard rate mail). Without deprivation of a protected interest, he has no due process claim separate from his First Amendment claim, which we have already rejected. *See Board of Regents v. Roth*, 408 U.S. 564, 571, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). *Cf. Procunier v. Martinez*, 416 U.S. 396, 408 n. 11, 417, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) (holding that the "decision to censor or withhold delivery of a particular letter must be accompanied by minimum procedural safeguards," but noting that "[d]ifferent consideration may come into play in the case of mass mailings"), *overruled on other grounds by Thornburgh*, 490 U.S. at 413-14; *Prison Legal News v. Cook*, 238 F.3d 1145, 1152-53 (9th Cir.2001) (holding that an inmate is entitled to due process guarantees when prison officials withhold *subscription* bulk-rate mail). *But see Prison Legal News v. Lehman*, 272 F.Supp.2d 1151, 1160 (W.D.Wash.2003) (holding that "the addressees of [non-subscription, standard rate] mail must be afforded the same procedural protections afforded to recipients of first class, second class, and subscription standard rate mail under Department regulations").

IV.

**7 [5] Mr. Thompson raises three other contentions. He first contends that withholding mail from the "Anarchist Prisoners Legal Aid Network" denies him access to the courts in violation of the Fourteenth Amendment. In bringing this claim, however, Thompson offers no explanation how it differs from his First Amendment challenge to the mail policy and does not identify a single case addressing an access-to-courts challenge. We accordingly reject this claim as a matter of law. *See Lewis v. Casey*, 518 U.S. 343, 351, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (requiring a plaintiff to allege and prove actual injury); *Boswell v. Mayer*, 169 F.3d 384, 387 (6th Cir.1999) (affirming dismissal of an access-to-courts claim because plaintiff did not "allege that the incoming letter pertained to ongoing or anticipated litigation challenging either his sentence or the conditions of his confinement").

He next contends that the district court abused its

discretion in not requesting an attorney to represent him. *See* 28 U.S.C. § 1915(e)(1) ("The court may request an attorney to represent any such person unable to afford counsel."). We disagree. Were this a criminal case, the law would entitle Thompson to counsel. But the district court did not abuse its discretion by declining to "request" counsel here because this is ordinary civil litigation and because Thompson has not shown that he has a compelling claim.

***571** [6] Thompson, finally, argues that the district court abused its discretion in granting summary judgment to the prison officials without considering some discovery documents that Thompson attempted to file prematurely. No abuse of discretion occurred, however, because the district court did nothing to prevent Thompson from filing the materials in connection with his opposition to the defendants' motion for summary judgment. The court sensibly just prohibited him from filing the materials prematurely.

V.

For the foregoing reasons, we AFFIRM.

81 Fed.Appx. 563, 2003 WL 22782321 (6th Cir.(Tenn.))

END OF DOCUMENT

LEXSEE 2003 U.S. APP. LEXIS 24178

United States of America, Plaintiff–Appellee, v. Russell C. Sievert, Defendant–Appellant.

No. 02–3974

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

2003 U.S. App. LEXIS 24178

October 23, 2003, Argued
November 26, 2003, Decided

NOTICE: [*1] RULES OF THE SEVENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Central District of Illinois. No. 01 CR 10015. Michael M. Mihm, Judge.

DISPOSITION: AFFIRMED.

LexisNexis (TM) HEADNOTES– Core Concepts:

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff – Appellee: Bradley W. Murphy, OFFICE OF THE UNITED STATES ATTORNEY, Peoria, IL USA.

For RUSSELL C. SIEVERT, Defendant – Appellant: Michael J. Gonring, Joshua B. Fleming, QUARLES & BRADY, Milwaukee, WI USA.

JUDGES: Before Hon. Daniel A. Manion, Circuit Judge, Hon. Michael S. Kanne, Circuit Judge, Hon. Terence T. Evans, Circuit Judge.

OPINION:

ORDER

Russell S. Sievert appeals from his conviction for being a felon in possession of a firearm in violation of *18 U.S.C. § 922(g)*. Sievert requests a new trial, arguing that he was deprived of a fair proceeding because the government relied on a witness's prior inconsistent statement, purportedly made out of court, not only for the purpose of impeachment, but also for the improper purpose of substantively proving that Sievert had possessed a firearm. Because the district [*2] court properly instructed the jury regarding such prior inconsistent statements, we hold that Sievert was not deprived of a fair trial and we affirm his conviction.

I.

It is uncontroverted that Russell Sievert and Randy Downard were in the woods near Chillicothe, Illinois on January 10, 2001, that Sievert is a convicted felon for purposes of *§ 922(g)*, that the rifle he is accused of possessing traveled in interstate commerce, and that the rifle had a capacity of carrying five rounds, but was loaded only with three rounds when police seized it. The dispute at trial centered on whether, as the government contended, Sievert had possessed the rifle, or, as the defense maintained, Downard carried not only a shotgun, but also the rifle that Sievert stood accused of carrying. Among the key evidence at trial was Downard's testimony.

On direct examination by the defense, Downard testified that, when he and Sievert were stopped by Conservation Police Officer (CPO) James Byron, he (Downard) was carrying not only the shotgun that he had carried to hunt coyotes, but also the rifle that the government accused Sievert of carrying. Downard further explained that Sievert had not carried a [*3] firearm that day, and that Downard had received the rifle a short time earlier from the defendant's nephew, Michael Sievert, who had left the hunting trip early. Downard denied that he had told CPO Jeff Baile, when Baile interviewed him, that he had earlier heard Sievert "shoot a couple of times."

In rebuttal, the government called CPO Baile to the stand. Baile testified that Downard had told him, on January 10, that Downard had "heard [Sievert] shoot a couple of times but he was target shooting." Defense counsel did not object to Baile's testimony.

In the government's closing argument, the prosecution noted the discrepancy between the testimony of Downard and Baile. First, the prosecutor reminded the jury that Downard's testimony had been impeached, arguing that "although Mr. Downard in his testimony is adamant that Mr. Sievert did not fire the weapon that evening, his testimony was impeached with an earlier statement he gave

to Officer Baile in which he said he heard Russell fire a couple of shots." The government then questioned the credibility of Downard's sworn testimony.

> How does that testimony square with there being a fully loaded .222 rifle carrying five rounds? Mr. [*4] Sievert, Michael Sievert, Jr., was adamant about that, fully loaded. Witnesses observed with their own ears that evening two shots fired from the refuge and then the gun is found to carry only three rounds at the time of the stop. Five minus two is three. We all learned that in grade school I hope, but it applies right here in court. That math tells you that from the time the defendant, Russell Sievert, obtained that weapon, he exercised control over it by firing it and that is possession as is defined under federal law.
>
> And yet, the defense that has been put forward to you is based upon Randy Downard saying that Mr. Sievert had no gun that night. In a sense, you can see Mr. Downard here falling on the sword for Russell Sievert. Even though his story that evening at the hospital clearly indicated that Mr. Sievert had fired the weapon on a couple of occasions — had fired a couple of rounds, excuse me — his statement here now is different than that.
>
> Some of the instructions are going to give you some guidance in what we call credibility of witnesses because it's your decision to decide what witnesses you're going to believe and what part or parts of any given witness' testimony to [*5] believe.
>
> One of the things you should consider is a witness' interest or bias in this particular case. Remember, Mr. Downard didn't have any bones to pick with Mr. Russell Sievert that night. I mean, why would he be making up things like firing a couple of rounds? Why would he make that up on that evening?
>
> But now, you see, the defendant is charged in federal court. Mr. Downard comes into court and the question that I ask you to ask of yourselves while you're scrutinizing the testimony of Randy Downard is has his interest or bias in this case now overcome his ability to tell you folks the truth. It's called a question of credibility of witnesses. Because you can't believe Randy Downard on the one hand and find that the defendant had possession. That should be very clear to you.

(Tr. 258–59)

In his rebuttal closing, the prosecutor reiterated that

> two shots came from that refuge shortly after the hunter saw these two individuals, Mr. Downard in the white and Mr. Sievert in brown, go into the refuge. Each had a gun. The shotgun, no evidence that it was fired. It was still fully loaded just as Mike Sievert said it had been loaded. The rifle, however, was missing [*6] two shots. Two shots were heard by the hunter. Two shells missing, three left. I still submit that five minus two equals three. That shows, over and above Officer Byron, over and above John Theiler, over and above the statements made by individuals, that shows that the defendant, Russell Sievert, had in hand the .222 rifle which you have seen here and that he has been proven guilty of possessing that gun. Thank you.

(Tr.276–77)

Defense counsel did not object to the government's closing argument. In its instructions to the jury, the district court included Seventh Circuit Pattern Jury Instruction 3.09, which provides as follows:

> You have heard evidence that before the trial a witness made a statement that may be inconsistent with the witness's testimony here in court. If you find that it is inconsistent, you may consider the earlier statement only in deciding the truthfulness and accuracy of that witness's testimony in this trial. You may not use it as evidence of the truth of the matters contained in that prior statement.

II.

The only issue on appeal is whether, as Sievert argues, the district court erred "by not giving an adequate limiting instruction after [*7] the prosecutor argued, as substantive evidence, [Downard's] out of court statement that could have been admitted only for impeachment purposes." Because Sievert did not object at trial, we review this issue for plain error. *United States v. McClurge, 311 F.3d 866, 872 (7th Cir. 2002)*.

Assuming that the government used Downard's prior inconsistent statement made before trial to prove the truth of the matter asserted, which is an issue we need not decide, plain error would still not undermine Sievert's con-

viction. In *United States v. Martin, 63 F.3d 1422 (7th Cir. 1995)*, we held that, where the defense did not object to the use of a prior inconsistent statement made before trial for purposes of proving the truth of the matter asserted, it was not plain error for the district court to fail to provide a limiting instruction *sua sponte*, especially in light of the consideration that the district court had given Pattern Jury Instruction 3.09. *See id. at 1429–30*. *Martin* is closely analogous to this case and is one of numerous cases illustrating the presumption that juries follow instructions, and that instructions are generally [*8] sufficient to cure any prejudicial effect arising from an improper argument. *See, e.g., United States v. Linwood, 142 F.3d 418, 426 (7th Cir. 1998)*; *United States v. Anderson, 61 F.3d 1290, 1300 (7th Cir. 1995)*.

Sievert attempts to distinguish *Martin* by arguing that this is one of the rare cases in which the jury cannot be presumed to have followed instructions. Sievert can prevail on this point only if he shows that there is "an overwhelming probability that the jury was unable to follow the instruction that was given." *Linwood, 142 F.3d at 426* (internal quotation omitted). This is what Sievert has to say as to this issue:

> There was nothing more incriminating than the statement of the person who was with Appellant, that Appellant in fact possessed a firearm. Under normal circumstances, the limiting instruction given by the Court may have survived under the presumption. But when no instruction was given at the time the evidence came in, and when the Government was allowed to argue that the Baile testimony made his case, circumstances required judicial intervention to make sure that the jury treated the evidence properly. [*9]

(Appellant's Br. at 24)

Sievert points to no analogous case in which this court, or any other court, has held that a jury was unable to follow an instruction to a consider prior inconsistent statement made before trial only for the purpose of impeachment. Nothing in his argument, moreover, convinces us that there is an overwhelming probability that the jurors could not do what the district court told them to do in plain English: consider Downard's prior inconsistent statement only for the matter of impeachment. We therefore hold that the district court's instruction to the jury cured any prejudice that Sievert may have suffered because of the government's alleged improper use of Downard's prior inconsistent statement. *See Martin, 63 F.3d at 1429–30*.

III.

The district court provided Seventh Circuit Pattern Jury Instruction 3.09, which was sufficient to cure any prejudice that Sievert may have suffered from the government's arguable reliance on Downard's prior inconsistent statement for the truth of the matter asserted. We therefore hold that plain error does not undermine Sievert's conviction.

AFFIRMED.

Slip Copy
(Cite as: 2003 WL 22846682 (7th Cir.(Ill.)))

UNPUBLISHED ORDER

Not to be cited per Circuit Rule 53

Please use FIND to look at the applicable circuit court rule before citing this opinion. Seventh Circuit Rule 53. (FIND CTA7 Rule 53.)

United States Court of Appeals, Seventh Circuit.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
Russell C. SIEVERT, Defendant-Appellant.

No. 02-3974.

Argued Oct. 23, 2003.
Decided Nov. 26, 2003.

Defendant was convicted in the United States District Court for the Central District of Illinois, Michael M. Mihm, J., of being a felon in possession of a firearm, and he appealed. The Court of Appeals held that instruction on use of prior inconsistent statements for impeachment cured any prejudice defendant might have suffered from government's alleged improper reliance on the prior inconsistent statement for the truth of the matter asserted in the prior statement, and thus, the alleged improper use of the prior statement was not plain error.

Affirmed.

[1] Criminal Law 1038.1(5)

110k1038.1(5) Most Cited Cases

Issue whether trial court gave adequate limiting instruction concerning use of prior inconsistent statement for impeachment purposes would be reviewed for plain error where defendant did not object at trial, in prosecution for being a felon in possession of a firearm.

[2] Criminal Law 1037.1(2)

110k1037.1(2) Most Cited Cases

Comments.

Assuming that the government, in closing argument, used defense witness's alleged prior inconsistent pretrial statement, that, on the day on which defendant, a convicted felon, allegedly possessed a firearm, the witness, who was in a woods with defendant, heard defendant shoot a couple of times but that he was target shooting, to prove the truth of the matter asserted, instruction on use of prior inconsistent statements for impeachment cured any prejudice defendant might have suffered from government's alleged reliance on the prior inconsistent statement for the truth of the matter asserted in the prior statement, and thus, the alleged improper use of the prior statement was not plain error.

Appeal from the United States District Court for the Central District of Illinois. No. 01 CR 10015. Michael M. Mihm, Judge.

Bradley W. Murphy, Office of the United States Attorney, Peoria, IL, for Plaintiff-Appellee.

Michael J. Gonring, Joshua B. Fleming, Quarles & Brady, Milwaukee, WI, for Defendant-Appellant.

Before Hon. DANIEL A. MANION, Hon. MICHAEL S. KANNE, and Hon. TERENCE T. EVANS, Circuit Judges.

ORDER

***1** Russell S. Sievert appeals from his conviction for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). Sievert requests a new trial, arguing that he was deprived of a fair proceeding because the government relied on a witness's prior inconsistent statement, purportedly made out of court, not only for the purpose of impeachment, but also for the improper purpose of substantively proving that Sievert had possessed a firearm. Because the district court properly instructed the jury regarding such prior inconsistent statements, we hold that Sievert was not deprived of a fair trial and we affirm his conviction.

I.

It is uncontroverted that Russell Sievert and Randy Downard were in the woods near Chillicothe, Illinois on January 10, 2001, that Sievert is a convicted felon for purposes of § 922(g), that the rifle he is accused of possessing traveled in interstate commerce, and that the rifle had a capacity of carrying five rounds, but was loaded only with three rounds when police seized it. The dispute at trial centered on whether, as the government contended, Sievert had possessed the rifle, or, as the defense maintained, Downard carried not only a shotgun, but also the rifle that Sievert stood accused of carrying. Among the key evidence at trial was Downard's testimony.

On direct examination by the defense, Downard testified that, when he and Sievert were stopped by Conservation Police Officer (CPO) James Byron, he (Downard) was carrying not only the shotgun that he had carried to hunt coyotes, but also the rifle that the government accused Sievert of carrying. Downard further explained that Sievert had not carried a firearm that day, and that Downard had received the rifle a short time earlier from the defendant's nephew, Michael Sievert, who had left the hunting trip early. Downard denied that he had told CPO Jeff Baile, when Baile interviewed him, that he had earlier heard Sievert "shoot a couple of times."

In rebuttal, the government called CPO Baile to the stand. Baile testified that Downard had told him, on January 10, that Downard had "heard [Sievert] shoot a couple of times but he was target shooting ." Defense counsel did not object to Baile's testimony.

In the government's closing argument, the prosecution noted the discrepancy between the testimony of Downard and Baile. First, the prosecutor reminded the jury that Downard's testimony had been impeached, arguing that "[a]lthough Mr. Downard in his testimony is adamant that Mr. Sievert did not fire the weapon that evening, his testimony was impeached with an earlier statement he gave to Officer Baile in which he said he heard Russell fire a couple of shots." The government then questioned the credibility of Downard's sworn testimony.

> How does that testimony square with there being a fully loaded .222 rifle carrying five rounds? Mr. Sievert, Michael Sievert, Jr., was adamant about that, fully loaded. Witnesses observed with their own ears that evening two shots fired from the refuge and then the gun is found to carry only three rounds at the time of the stop. Five minus two is three. We all learned that in grade school I hope, but it applies right here in court. That math tells you that from the time the defendant, Russell Sievert, obtained that weapon, he exercised control over it by firing it and that is possession as is defined under federal law.
>
> ***2** And yet, the defense that has been put forward to you is based upon Randy Downard saying that Mr. Sievert had no gun that night. In a sense, you can see Mr. Downard here falling on the sword for Russell Sievert. Even though his story that evening at the hospital clearly indicated that Mr. Sievert had fired the weapon on a couple of occasions--had fired a couple of rounds, excuse me--his statement here now is different than that.
>
> Some of the instructions are going to give you some guidance in what we call credibility of witnesses because it's your decision to decide what witnesses you're going to believe and what part or parts of any given witness' testimony to believe.
>
> One of the things you should consider is a witness' interest or bias in this particular case. Remember, Mr. Downard didn't have any bones to pick with Mr. Russell Sievert that night. I mean, why would he be making up things like firing a couple of rounds? Why would he make that up on that evening?
>
> But now, you see, the defendant is charged in federal court. Mr. Downard comes into court and the question that I ask you to ask of yourselves while you're scrutinizing the testimony of Randy Downard is has his interest or bias in this case now overcome his ability to tell you folks the truth. It's called a question of credibility of witnesses. Because you can't believe Randy Downard on the one hand and find that the defendant had possession. That should be very clear to you.

(Tr.258-59)

In his rebuttal closing, the prosecutor reiterated that

> [t]wo shots came from that refuge shortly after the hunter saw these two individuals, Mr. Downard in the white and Mr. Sievert in brown, go into the refuge. Each had a gun. The shotgun, no evidence that it was fired. It was still fully loaded just as Mike Sievert said it had been loaded. The rifle, however, was missing two shots. Two shots were heard by the hunter. Two shells missing, three left. I still submit that five minus two equals three. That shows, over and above Officer Byron, over and above John Theiler, over and above the statements made by individuals, that shows that the defendant, Russell Sievert, had in hand the .222 rifle which you have seen here and that he has been proven guilty of possessing that gun. Thank you.

(Tr.276-77)

Defense counsel did not object to the government's closing argument. In its instructions to the jury, the

district court included Seventh Circuit Pattern Jury Instruction 3.09, which provides as follows:

> You have heard evidence that before the trial a witness made a statement that may be inconsistent with the witness's testimony here in court. If you find that it is inconsistent, you may consider the earlier statement only in deciding the truthfulness and accuracy of that witness's testimony in this trial. You may not use it as evidence of the truth of the matters contained in that prior statement.

II.

[1] The only issue on appeal is whether, as Sievert argues, the district court erred "by not giving an adequate limiting instruction after the prosecutor argued, as substantive evidence, [Downard's] out of court statement that could have been admitted only for impeachment purposes." Because Sievert did not object at trial, we review this issue for plain error. *United States v. McClurge*, 311 F.3d 866, 872 (7th Cir.2002).

***3** [2] Assuming that the government used Downard's prior inconsistent statement made before trial to prove the truth of the matter asserted, which is an issue we need not decide, plain error would still not undermine Sievert's conviction. In *United States v. Martin*, 63 F.3d 1422 (7th Cir.1995), we held that, where the defense did not object to the use of a prior inconsistent statement made before trial for purposes of proving the truth of the matter asserted, it was not plain error for the district court to fail to provide a limiting instruction *sua sponte,* especially in light of the consideration that the district court had given Pattern Jury Instruction 3.09. *See id.* at 1429- 30. *Martin* is closely analogous to this case and is one of numerous cases illustrating the presumption that juries follow instructions, and that instructions are generally sufficient to cure any prejudicial effect arising from an improper argument. *See, e.g.*, *United States v. Linwood*, 142 F.3d 418, 426 (7th Cir.1998); *United States v. Anderson*, 61 F.3d 1290, 1300 (7th Cir.1995).

Sievert attempts to distinguish *Martin* by arguing that this is one of the rare cases in which the jury cannot be presumed to have followed instructions. Sievert can prevail on this point only if he shows that there is "an overwhelming probability that the jury was unable to follow the instruction that was given." *Linwood,* 142 F.2d at 426 (internal quotation omitted). This is what Sievert has to say as to this issue:

> [T]here was nothing more incriminating than the statement of the person who was with Appellant, that Appellant in fact possessed a firearm. Under normal circumstances, the limiting instruction given by the Court may have survived under the presumption. But when no instruction was given at the time the evidence came in, and when the Government was allowed to argue that the Baile testimony made his case, circumstances required judicial intervention to make sure that the jury treated the evidence properly.

(Appellant's Br. at 24)

Sievert points to no analogous case in which this court, or any other court, has held that a jury was unable to follow an instruction to a consider prior inconsistent statement made before trial only for the purpose of impeachment. Nothing in his argument, moreover, convinces us that there is an overwhelming probability that the jurors could not do what the district court told them to do in plain English: consider Downard's prior inconsistent statement only for the matter of impeachment. We therefore hold that the district court's instruction to the jury cured any prejudice that Sievert may have suffered because of the government's alleged improper use of Downard's prior inconsistent statement. *See* *Martin*, 63 F.3d at 1429-30.

III.

The district court provided Seventh Circuit Pattern Jury Instruction 3.09, which was sufficient to cure any prejudice that Sievert may have suffered from the government's arguable reliance on Downard's prior inconsistent statement for the truth of the matter asserted. We therefore hold that plain error does not undermine Sievert's conviction.

***4** AFFIRMED.

2003 WL 22846682 (7th Cir.(Ill.))

END OF DOCUMENT

LEXSEE 2003 U.S. APP. LEXIS 24197

United States of America, Respondent, v. Terry E. Savage–El, Petitioner.

No. 03–2184

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

2003 U.S. App. LEXIS 24197

October 29, 2003, Submitted
December 2, 2003, Filed

PRIOR HISTORY: Appeal from the United States District Court for the Western District of Missouri. *United States v. Savage, 863 F.2d 595, 1988 U.S. App. LEXIS 17078 (8th Cir. Mo., 1988)*

DISPOSITION: Affirmed.

LexisNexis (TM) HEADNOTES– Core Concepts:

COUNSEL: For United States of America, Respondent: Lajuana M. Counts, U.S. ATTORNEY'S OFFICE, Kansas City, MO. Carla B. Oppenheimer, U.S. ATTORNEY'S OFFICE, Kansas City, MO.

Terry E. Savage–El, Petitioner, Pro se, Lompoc, CA.

JUDGES: Before MELLOY, HANSEN, and SMITH, Circuit Judges.

OPINION: PER CURIAM.

Federal prisoner Terry E. Savage–El appeals from the district court's n1 orders denying his recusal motion and dismissing as unauthorized successive *28 U.S.C. § 2255* motions, his motions requesting sentencing review and sentencing reduction. We affirm.

> n1 The Honorable Dean Whipple, Chief Judge, United States District Court for the Western District of Missouri.

Savage–El was convicted of being a felon in possession of a firearm and was [*2] sentenced to the statutory minimum, fifteen years imprisonment; his conviction and sentence were affirmed on appeal. See *United States v. Savage, 863 F.2d 595, 600 (8th Cir. 1988)*, cert denied, *490 U.S. 1082, 104 L. Ed. 2d 666, 109 S. Ct. 2105 (1989)*. Savage–El filed a *section 2255* motion challenging his sentence, but the district court denied the motion and on appeal, we declined to issue a certificate of appealability. Savage–El then filed the instant motions: a motion for review of sentence pursuant to *18 U.S.C. § 3742*, a motion for sentencing reduction pursuant to *18 U.S.C. § 3582(c)(2)*, and a motion to recuse the district court judge. The district court denied the recusal motion, and construing the sentencing–review and sentence–reduction motions as successive *section 2255* motions, dismissed them because Savage–El had not obtained authorization from this court to file a second or successive *section 2255* motion.

On appeal, Savage–El argues that the district court mischaracterized his *section 3742 and 3582(c)(2)* motions, and that the district court judge's prior adverse rulings demonstrated bias. [*3]

We find that the district court properly treated Savage–El's *section 3742 and 3582* motions as successive *section 2255* motions. *Section 3742*, which governs direct appeals, does not provide Savage–El a means to revisit his sentence now; Savage–El's direct appeal concluded when his conviction and sentence were affirmed. *Section 3582(c)(2)*, which allows modification of a sentence when the Sentencing Commission has amended a section of the Guidelines to lower the applicable sentencing range, does not help Savage–El either, because he received the statutorily required minimum sentence and there have been no amendments to U.S.S.G. § 5G1.1(b) ("Where statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutory minimum sentence shall be the guideline sentence."). Thus, neither *section 3742* nor *3582* is applicable, and Savage–El may not circumvent the statutory requirements for filing a successive *section 2255* motion by invoking these statutes to challenge his sentence. Cf. *United States v.*

Patton, 309 F.3d 1093, 1094 (8th Cir. 2002) (per curiam) (treating *Fed. R. Crim. P. 12(b)(2)* [*4] motion as successive habeas motion where inmate challenged sentence imposed, because it was apparent that inmate was attempting to bypass statutory requirements for filing successive motion).

Finally, Savage–El's recitation of the district court judge's prior adverse rulings in his case was insufficient to demonstrate bias. See *Liteky v. United States, 510 U.S. 540, 555, 127 L. Ed. 2d 474, 114 S. Ct. 1147 (1994)* ("judicial rulings alone almost never constitute a valid basis for a bias or partiality motion").

Accordingly, we affirm the district court's decision. We also find that SavageEl has not stated any grounds which would warrant the authorization of a successive *section 2255* motion, and we deny his pending motion to correct the record.

81 Fed.Appx. 626
(Cite as: 81 Fed.Appx. 626, 2003 WL 22844383 (8th Cir.(Mo.)))

H

This case was not selected for publication in the Federal Reporter.

Please use FIND to look at the applicable circuit court rule before citing this opinion. Eight Circuit Rule 28A(i). (FIND CTA8 Rule 28A.)

United States Court of Appeals,
Eighth Circuit.

UNITED STATES of America, Respondent,
v.
Terry E. SAVAGE-EL, Petitioner.

No. 03-2184.

Submitted Oct. 29, 2003.
Decided Dec. 2, 2003.

Appeal from the United States District Court for the Western District of Missouri.

Lajuana M. Counts, U.S. Attorney's Office, Kansas City, MO, for Respondent.

Terry E. Savage-El, pro se, Lompoc, CA, for Petitioner.

Before MELLOY, HANSEN, and SMITH, Circuit Judges.

[UNPUBLISHED]

PER CURIAM.

****1** Federal prisoner Terry E. Savage-El appeals from the district court's [FN1] orders denying his recusal motion and dismissing as unauthorized successive 28 U.S.C. § 2255 motions, his motions requesting sentencing review and sentencing reduction. We affirm.

FN1. The Honorable Dean Whipple, Chief Judge, United States District Court for the Western District of Missouri.

Savage-El was convicted of being a felon in possession of a firearm and was sentenced to the statutory minimum, fifteen years imprisonment; his conviction and sentence were affirmed on appeal. ***627** *See United States v. Savage*, 863 F.2d 595, 600 (8th Cir.1988), *cert denied*, 490 U.S. 1082, 109 S.Ct. 2105, 104 L.Ed.2d 666 (1989). Savage-El filed a section 2255 motion challenging his sentence, but the district court denied the motion and on appeal, we declined to issue a certificate of appealability. Savage-El then filed the instant motions: a motion for review of sentence pursuant to 18 U.S.C. § 3742, a motion for sentencing reduction pursuant to 18 U.S.C. § 3582(c)(2), and a motion to recuse the district court judge. The district court denied the recusal motion, and construing the sentencing-review and sentence-reduction motions as successive section 2255 motions, dismissed them because Savage-El had not obtained authorization from this court to file a second or successive section 2255 motion.

On appeal, Savage-El argues that the district court mischaracterized his section 3742 and 3582(c)(2) motions, and that the district court judge's prior adverse rulings demonstrated bias.

We find that the district court properly treated Savage-El's section 3742 and 3582 motions as successive section 2255 motions. Section 3742, which governs direct appeals, does not provide Savage-El a means to revisit his sentence now; Savage-El's direct appeal concluded when his conviction and sentence were affirmed. Section 3582(c)(2), which allows modification of a sentence when the Sentencing Commission has amended a section of the Guidelines to lower the applicable sentencing range, does not help Savage-El either, because he received the statutorily required minimum sentence and there have been no amendments to U.S.S.G. § 5G1.1(b) ("Where statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutory minimum sentence shall be the guideline sentence."). Thus, neither section 3742 nor 3582 is applicable, and Savage-El may not circumvent the statutory requirements for filing a successive section 2255 motion by invoking these statutes to challenge his sentence. *Cf. United States v. Patton*, 309 F.3d 1093, 1094 (8th Cir.2002) (per curiam) (treating Fed.R.Crim.P. 12(b)(2) motion as successive habeas motion where inmate challenged sentence imposed,

because it was apparent that inmate was attempting to bypass statutory requirements for filing successive motion).

Finally, Savage-El's recitation of the district court judge's prior adverse rulings in his case was insufficient to demonstrate bias. *See* *Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994) ("judicial rulings alone almost never constitute a valid basis for a bias or partiality motion").

**2 Accordingly, we affirm the district court's decision. We also find that Savage-El has not stated any grounds which would warrant the authorization of a successive section 2255 motion, and we deny his pending motion to correct the record.

81 Fed.Appx. 626, 2003 WL 22844383 (8th Cir.(Mo.))

END OF DOCUMENT

LEXSEE 2003 U.S. APP. LEXIS 24213

UNITED STATES OF AMERICA, Plaintiff – Appellee, v. DANIEL WAYNE BAKER, Defendant – Appellant.

No. 03–10111

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

2003 U.S. App. LEXIS 24213

November 6, 2003, Argued and Submitted, San Francisco, California
December 1, 2003, Filed

PRIOR HISTORY: Appeal from the United States District Court for the District of Nevada. D.C. No. CR–02–00018–1–DWH. David Warner Hagen, District Judge, Presiding.

DISPOSITION: Affirmed.

LexisNexis (TM) HEADNOTES– Core Concepts:

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff – Appellee: Sue P. Fahami, U.S. ATTORNEY OFFICE, Reno, NV.

For DANIEL WAYNE BAKER, Defendant – Appellant: Michael K. Powell, Esq., Cynthia Hahn, Esq., FPDNV – FEDERAL PUBLIC DEFENDER'S OFFICE (RENO), Reno, NV.

JUDGES: Before: FARRIS, TROTT, Circuit Judges, and Weiner **, Senior District Judge.

** Hon. Charles R. Weiner, Senior District Judge for Eastern Pennsylvania, sitting by designation.

OPINION:

MEMORANDUM *

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by *Ninth Circuit Rule 36–3*.

The appeal questions Daniel Wayne Baker's sentence.

We review [*2] the district court's factual findings in the sentencing context for clear error. *United States v. Frega, 179 F.3d 793, 811 n.22 (9th Cir. 1999)*. The pivotal question is whether the court properly treated Baker's state conviction as a prior conviction or whether it should have been considered a "related sentence" since it was committed at the same time and place as the felon–in–possession count.

Baker's argument is based on an incorrect guideline section. § 4A1.2(a)(2) was not intended to define "prior sentences" for criminal history purposes. *United States v. Garcia, 909 F.2d 389, 392 (9th Cir. 1990)*. Rather, the "related cases" provision of § 4A1.2(a)(2) deals with the relationship between multiple prior sentences, not the relationship between prior sentences and a current offense. *Id.; United States v. Ticchiarelli, 171 F.3d 24, 34 (1st Cir. 1999)*.

The government addressed the same incorrect guideline section instead of referring to the appropriate one. The relationship between a prior sentence and a current offense is governed by U.S.S.G. § 4A1.2(a)(1). *United States v. Ladum, 141 F.3d 1328, 1347 (9th Cir. 1998)*. [*3] That section defines a "prior sentence" as "any sentence previously imposed upon adjudication of guilt ... for conduct *not part of the instant offense*." U.S.S.G. § 4A1.2(a)(1) (emphasis added). Application Note 1 to this section states, "conduct that is part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions of § 1B1.3 (Relevant Conduct)." "Relevant Conduct" means:

> All acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant
>
> ...

> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.

U.S.S.G. § 1B1.3(a)(1)(A).

A state conviction resulting "from a discrete, identifiable illegal act that is not an integral part of the federal offense conduct" is not "relevant conduct" for criminal history purposes. *United States v. Buchanan, 59 F.3d 914, 918 (9th Cir. 1995)*; *Ladum, 141 F.3d at 1347*. In determining whether there is a sufficient degree of similarity between a prior conviction [*4] and a current offense, a court compares the elements of the prior offense with those of the current offense, and examines the actual conduct underlying the two crimes. *Ladum, 141 F.3d at 1348–49*. A court also considers whether there was a temporal and geographical proximity between the crimes, a common scheme or plan, or common victims. *See United States v. Weiland, 284 F.3d 878, 882 (8th Cir. 2002)*.

The court in *Ladum* used this approach to determine whether the defendant's prior city ordinance violations should count toward his federal sentence for conspiracy to defraud the United States and for filing false income tax returns. *141 F.3d at 1346–48*. The defendant operated a second–hand store as a "front–man" for the store's actual owner. He hid the owner's interest in the property and helped him skim profits by falsifying property and sales records, leading to his convictions for violating two city record–keeping ordinances. *Id.* The court held that the ordinance violations were "prior sentences" because there was an insufficient degree of similarity and connection between the prior and current crimes:

> The object of the [*5] tax conspiracy was impeding the IRS's determination of Ladum's taxes. The ordinance violations involved [the defendant's] failure to fill in certain information on police property forms and his sale of regulated second–hand property prior to the expiration of a waiting period. These violations were not pled in the indictment, nor were they used to prove the instant offense. Finally, although the ordinance violations took place during the course of the conspiracy and the offenses are somewhat similar in character because they involve record keeping, the offenses involve different victims–local authorities instead of the IRS–and different societal interests–the regulation of stolen property instead of tax collection.

Id. at 1348 (citing *Buchanan, 59 F.3d at 918*).

We have also has demonstrated that if sufficiently distinct, a state crime can count as criminal history even if committed at the same time and the same place as the federal offense. *Garcia, 909 F.2d at 392*. In *Garcia,* the defendant was found in possession of both counterfeit currency and methamphetamine following a traffic stop. He was first prosecuted in state [*6] court for possession of methamphetamine, and then prosecuted for the counterfeit currency in federal court. Applying § 4A.1.2(a)(l), the court affirmed the district court's decision to include the state conviction in his criminal history score despite the fact that the crimes occurred simultaneously. *Id.; see also, e.g., United States v. Torres–Diaz, 60 F.3d 445, 448 (8th Cir.)* (state drug convictions counted in criminal history despite their temporal and geographical proximity to federal drug "stash house" conviction), *cert. denied, 516 U.S. 971, 133 L. Ed. 2d 347, 116 S. Ct. 432 (1995)*.

Our review of the record leaves no doubt that, although Baker possessed the gun and the drugs at the same time and place, there was an "insufficient degree of similarity and connection" with the federal offense to make the state conviction "relevant conduct." *Buchanan, 59 F.3d at 918*. The two crimes share no common elements, and the conduct underlying them was distinct in nature. *Compare, 18 U. S.C. § 922(g)(l), with Nev. Rev. Stat. 453.336* (possession of a controlled substance). Knowing possession of contraband establishes [*7] possession of a controlled substance under Nevada law. *Nev. Rev. Stat. 453.336*. In contrast, *18 U.S.C. § 922(g)(1)* makes gun possession (otherwise lawful conduct) a crime based on the person's status as a convicted felon. Moreover, viewed objectively, the two offenses did not share a common purpose, nor did one crime facilitate the other.

Baker's marijuana possession was a "discrete, identifiable illegal act" that was not an integral part of having a felon in possession of a firearm, despite the temporal and geographical overlap. *Buchanan, 59 F.3d at 918*.

There was no error.

AFFIRMED.

81 Fed.Appx. 968
(Cite as: 81 Fed.Appx. 968, 2003 WL 22852157 (9th Cir.(Nev.)))

United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff--Appellee,
v.
Daniel Wayne BAKER, Defendant--Appellant.

No. 03-10111.
D.C. No. CR-02-00018-1-DWH.

Argued and Submitted Nov. 6, 2003.
Decided Dec. 1, 2003.

Appeal from the United States District Court for the District of Nevada; David Warner Hagen, District Judge, Presiding.

Sue P. Fahami, U.S. Attorney Office, Reno, NV, for Plaintiff-Appellee.

Michael K. Powell, Cynthia Hahn, Reno, NV, for Defendant-Appellant.

Before FARRIS, TROTT, Circuit Judges, and WEINER, [FN*] Senior District Judge.

FN* Hon. Charles R. Weiner, Senior District Judge for Eastern Pennsylvania, sitting by designation.

MEMORANDUM [FN**]

FN** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

****1** The appeal questions Daniel Wayne Baker's sentence.

We review the district court's factual findings in the sentencing context for clear error. *United States v. Frega*, 179 F.3d 793, 811 n. 22 (9th Cir.1999). The pivotal question is whether the court properly treated Baker's state conviction as a prior conviction or whether it should have been considered a "related sentence" since it was committed at the same time and place as the felon-in-possession count.

Baker's argument is based on an incorrect guideline section. § 4A1.2(a)(2) was not intended to define "prior sentences" for criminal history purposes. *United States v. Garcia*, 909 F.2d 389, 392 (9th Cir.1990). Rather, the "related cases" provision of § 4A1.2(a)(2) deals with the relationship between multiple prior sentences, not the relationship between prior sentences and a current offense. *Id.*; *United States v. Ticchiarelli*, 171 F.3d 24, 34 (1st Cir.1999).

The government addressed the same incorrect guideline section instead of referring to the appropriate one. The relationship between a prior sentence and a current offense is governed by U.S.S.G. § 4A1.2(a)(1). *United States v. Ladum*, 141 F.3d 1328, 1347 (9th Cir.1998). That section defines a "prior sentence" as "any sentence previously imposed upon adjudication of guilt ... for conduct *not part of the instant offense.*" U.S.S.G. § 4A1.2(a)(1) (emphasis added). Application Note 1 to this section states, "conduct that is part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions of § 1B1.3 (Relevant Conduct)." "Relevant Conduct" means:

> All acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant
> ...
> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.

U.S.S.G. § 1B1.3(a)(1)(A).

A state conviction resulting "from a discrete, identifiable illegal act that is not an integral part of the federal offense conduct" ***969** is not "relevant conduct" for criminal history purposes. *United States v. Buchanan*, 59 F.3d 914, 918 (9th Cir.1995); *Ladum*, 141 F.3d at 1347. In determining whether there is a sufficient degree of similarity between a prior conviction

and a current offense, a court compares the elements of the prior offense with those of the current offense, and examines the actual conduct underlying the two crimes. *Ladum,* 141 F.3d at 1348-49. A court also considers whether there was a temporal and geographical proximity between the crimes, a common scheme or plan, or common victims. *See United States v. Weiland,* 284 F.3d 878, 882 (8th Cir.2002).

The court in *Ladum* used this approach to determine whether the defendant's prior city ordinance violations should count toward his federal sentence for conspiracy to defraud the United States and for filing false income tax returns. 141 F.3d at 1346-48. The defendant operated a second-hand store as a "front-man" for the store's actual owner. He hid the owner's interest in the property and helped him skim profits by falsifying property and sales records, leading to his convictions for violating two city record-keeping ordinances. *Id.* The court held that the ordinance violations were "prior sentences" because there was an insufficient degree of similarity and connection between the prior and current crimes:

> ****2** The object of the tax conspiracy was impeding the IRS's determination of Ladum's taxes. The ordinance violations involved [the defendant's] failure to fill in certain information on police property forms and his sale of regulated second-hand property prior to the expiration of a waiting period. These violations were not pled in the indictment, nor were they used to prove the instant offense. Finally, although the ordinance violations took place during the course of the conspiracy and the offenses are somewhat similar in character because they involve record keeping, the offenses involve different victims-local authorities instead of the IRS-and different societal interests- the regulation of stolen property instead of tax collection.

Id. at 1348 (citing *Buchanan,* 59 F.3d at 918).

We have also has demonstrated that if sufficiently distinct, a state crime can count as criminal history even if committed at the same time and the same place as the federal offense. *Garcia,* 909 F.2d at 392. In *Garcia,* the defendant was found in possession of both counterfeit currency and methamphetamine following a traffic stop. He was first prosecuted in state court for possession of methamphetamine, and then prosecuted for the counterfeit currency in federal court. Applying § 4A.1.2(a)(1), the court affirmed the district court's decision to include the state conviction in his criminal history score despite the fact that the crimes occurred simultaneously. *Id.; see also, e.g., United States v. Torres-Diaz,* 60 F.3d 445, 448 (8th Cir.) (state drug convictions counted in criminal history despite their temporal and geographical proximity to federal drug "stash house" conviction), *cert. denied,* 516 U.S. 971, 116 S.Ct. 432, 133 L.Ed.2d 347 (1995).

Our review of the record leaves no doubt that, although Baker possessed the gun and the drugs at the same time and place, there was an "insufficient degree of similarity and connection" with the federal offense to make the state conviction "relevant conduct." *Buchanan,* 59 F.3d at 918. The two crimes share no common elements, and the conduct underlying them was distinct in nature. *Compare,* 18 U.S.C. § 922(g)(1), *with* Nev.Rev.Stat. 453.336 (possession of a controlled substance). Knowing possession of contraband establishes possession of a controlled substance under Nevada law. ***970**Nev.Rev.Stat. 453.336. In contrast, 18 U.S.C. § 922(g)(1) makes gun possession (otherwise lawful conduct) a crime based on the person's status as a convicted felon. Moreover, viewed objectively, the two offenses did not share a common purpose, nor did one crime facilitate the other.

Baker's marijuana possession was a "discrete, identifiable illegal act" that was not an integral part of having a felon in possession of a firearm, despite the temporal and geographical overlap. *Buchanan,* 59 F.3d at 918.

There was no error.

AFFIRMED.

81 Fed.Appx. 968, 2003 WL 22852157 (9th Cir.(Nev.))

END OF DOCUMENT

LEXSEE 2003 US APP LEXIS 24010

Adams Communications Corporation, Appellant v. Federal Communications Commission, Appellee, Reading Broadcasting, Inc., Intervenor

No. 02-1232 Consolidated with 02-1258

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

2003 U.S. App. LEXIS 24010

November 24, 2003, Filed

PRIOR HISTORY: Appeal of an Order of the Federal Communications Commission.

DISPOSITION: Affirmed.

COUNSEL: For ADAMS COMMUNICATIONS CORPORATION, Appellant (02-1232): Harry Fahrig Cole, Fletcher, Heald & Hildreth, Arlington, VA.

For FEDERAL COMMUNICATIONS COMMISSION, Appellee (02-1232): Jane E. Mago, Assistant General Counsel, Daniel McMullen Armstrong, Associate General Counsel, Gregory M. Christopher, Counsel, C. Grey Pash, Jr., Counse, Federal Communications Commission, Washington, DC.

For READING BROADCASTING, INC., Intervenor (02-1232): Thomas J. Hutton, Law Office of Thomas J. Hutton, Washington, DC.

JUDGES: Before: RANDOLPH and ROBERTS, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

OPINION:

JUDGMENT

These causes were considered on appeal of an order of the Federal Communications Commission and were briefed and argued by counsel. It is

ORDERED and ADJUDGED that the order of the Federal Communications Commission is affirmed.

The Commission's finding [*2] that Parker and Reading did not commit misconduct is supported by substantial evidence, and the Commissions decision to grant Reading a license renewal after assessing the relevant comparative factors was not arbitrary or capricious. It was not improper for the Commission to consider Readings local ownership as a plus when performing this comparative analysis; absent a showing to the contrary, it is reasonable to suppose that shareholders will have some indirect influence over a corporation even if they do not participate in day-to-day management decisions.

Readings objection to the Commissions failure to penalize Adams for filing an abusive petition is not justiciable. Reading rests its theory of justiciability on the potential collateral estoppel effect of the ruling, but this fails on two counts. First, the Commission's decision on the point was not necessary for the ultimate outcome, see *Sea-Land Services, Inc. v. Dep't of Transportation, 329 U.S. App. D.C. 108, 137 F.3d 640, 648-49 (D.C. Cir. 1998)*; second, an issue resolved at the administrative level which is not otherwise appealable does not have preclusive effect in future litigation, and so is not appealable on that basis, see [*3] *Alabama Mun. Distributors Group v. FERC, 354 U.S. App. D.C. 101, 312 F.3d 470, 474 (D.C. Cir. 2002)*. Reading also alleges that the Commissions failure to dismiss Adams petition on abuse of process grounds independently injured Reading by forcing it to incur additional expenses in the administrative process and in litigation. But even if this injury were cognizable, it is not redressable, as these costs have already been incurred and are not recoverable.

Pursuant to *D.C. Circuit Rule 36*, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See Fed.R.App.P. 41(b); D.C. Cir. Rule 41*.

81 Fed.Appx. 358
(Cite as: 81 Fed.Appx. 358, 2003 WL 22849898 (D.C.Cir.))

United States Court of Appeals,
District of Columbia Circuit.

ADAMS COMMUNICATIONS CORPORATION,
Appellant,
v.
FEDERAL COMMUNICATIONS COMMISSION,
Appellee,
Reading Broadcasting, Inc., Intervenor.

No. 02-1258.

Nov. 24, 2003.

Communications company sought review of order of Federal Communications Commission which determined that broadcasting competitor did not engage in misconduct, and broadcasting competitor sought review of Commission's failure to penalize communications company for filing allegedly abusive petition. The Court of Appeals held that: (1) substantial evidence supported Commission's finding that broadcasting competitor did not commit misconduct, and decision to grant competitor's application for license renewal was not arbitrary or capricious; (2) Commission's failure to penalize communications company for allegedly filing abusive petition against broadcasting competitor was not justiciable; and (3) additional and independent expenses allegedly incurred by broadcasting competitor in response to allegedly abusive petition filed by communications company before Commission were not recoverable, based on claim that Commission failed to dismiss petition on abuse of process grounds.

Affirmed.

West Headnotes

[1] **Telecommunications** 415
372k415 Most Cited Cases

Substantial evidence supported finding by Federal Communications Commission that broadcasting competitor did not commit misconduct, and decision to grant competitor's application for license renewal was not arbitrary or capricious; it was not improper for Commission to consider competitor's local ownership as a plus when performing comparative analysis, and it was reasonable to suppose that its shareholders would have some indirect influence over corporation even if they did not participate in day-to-day management decisions.

[2] **Telecommunications** 420
372k420 Most Cited Cases

Failure by Federal Communications Commission to penalize communications company for allegedly filing abusive petition against broadcasting competitor was not justiciable upon competitor's subsequent appeal; Commission's decision was not necessary to ultimate outcome, and issue was resolved at administrative level and was not otherwise appealable.

[3] **Telecommunications** 411.1
372k411.1 Most Cited Cases

Additional and independent expenses allegedly incurred by broadcasting company in administrative process in response to allegedly abusive petition filed by communications company before Federal Communications Commission were not recoverable, based on claim that Commission failed to dismiss petition on abuse of process grounds; even if injury was cognizable, it was not redressable because costs had already been incurred.

***358** Appeal of an Order of the Federal Communications Commission.

Thomas J. Hutton, Law Office of Thomas J. Hutton, Washington, DC, for Appellant.

***359** Jane E. Mago, Assistant General Counsel, Daniel McMullen Armstrong, Associate General Counsel, Gregory M. Christopher, Counsel, C. Grey Pash, Jr., Counsel, Washington, DC, for Appellee.

Before RANDOLPH and ROBERTS, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

JUDGMENT

**1 Consolidated with 02-1258

These causes were considered on appeal of an order of the Federal Communications Commission and were briefed and argued by counsel. It is

ORDERED and ADJUDGED that the order of the Federal Communications Commission is affirmed.

[1] The Commission's finding that Parker and Reading did not commit misconduct is supported by substantial evidence, and the Commission's decision to grant Reading a license renewal after assessing the relevant comparative factors was not arbitrary or capricious. It was not improper for the Commission to consider Reading's local ownership as a plus when performing this comparative analysis; absent a showing to the contrary, it is reasonable to suppose that shareholders will have some indirect influence over a corporation even if they do not participate in day-to-day management decisions.

[2][3] Reading's objection to the Commission's failure to penalize Adams for filing an abusive petition is not justiciable. Reading rests its theory of justiciability on the potential collateral estoppel effect of the ruling, but this fails on two counts. First, the Commission's decision on the point was not necessary for the ultimate outcome, see *Sea-Land Services, Inc. v. Dep't of Transportation*, 137 F.3d 640, 648-49 (D.C.Cir.1998); second, an issue resolved at the administrative level which is not otherwise appealable does not have preclusive effect in future litigation, and so is not appealable on that basis, see *Alabama Mun. Distributors Group v. FERC*, 312 F.3d 470, 474 (D.C.Cir.2002). Reading also alleges that the Commission's failure to dismiss Adams' petition on abuse of process grounds independently injured Reading by forcing it to incur additional expenses in the administrative process and in litigation. But even if this injury were cognizable, it is not redressable, as these costs have already been incurred and are not recoverable.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed.R.App.P. 41(b); D.C.Cir. Rule 41.

END OF DOCUMENT

LEXSEE 2003 U.S. APP. LEXIS 24076

RUSSELL ROBINSON, Plaintiff–Appellant, v. CANNONDALE CORPORATION, Defendant–Appellee, and MARK FARRIS, Defendant.

02–1338

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2003 U.S. App. LEXIS 24076

November 26, 2003, Decided

NOTICE: [*1] THIS DECISION WAS ISSUED AS UNPUBLISHED OR NONPRECEDENTIAL AND MAY NOT BE CITED AS PRECEDENT. PLEASE REFER TO THE RULES OF THE FEDERAL CIRCUIT COURT OF APPEALS FOR RULES GOVERNING CITATION TO UNPUBLISHED OR NONPRECEDENTIAL OPINIONS OR ORDERS.

DISPOSITION: Vacated and remanded. Costs awarded to Appellant.

LexisNexis (TM) HEADNOTES– Core Concepts:

JUDGES: Before GAJARSA, LINN, and DYK, Circuit Judges.

OPINIONBY: LINN

OPINION: LINN, Circuit Judge.

Russell Robinson ("Robinson") appeals from a decision of the United States District Court for the Central District of California, 00–CV–1236, granting summary judgment of non–infringement in favor of defendant Cannondale Corporation ("Cannondale") with respect to Robinson's *U.S. Patents Nos. 5,350,185* ("the '185 patent") and 5,380,026 ("the '026 patent"). Because the district court erred in its infringement analysis under the doctrine of equivalents for the '185 patent, and further erred in construing "rotational indexing means" in claim 1 of the '026 patent to be a means–plus–function limitation under *35 U.S.C. § 112*, paragraph 6, we vacate and remand for further proceedings consistent with this opinion.

BACKGROUND

The '185 and '026 patents are both directed to a single shock absorber suspension system located in the [*2] head tube above the front tire of a bicycle. The '026 patent is a continuation of the '185 patent.

Defendant Cannondale manufactures and sells bicycles incorporating the Delta V and HeadShok TM suspension systems that Robinson alleges infringe the patents–in–suit. In December 2000, Robinson sued Cannondale, alleging infringement of its '026 patent and state law claims of unfair competition. Cannondale responded and counterclaimed for a declaratory judgment of non–infringement and invalidity of the related '185 patent. In June 2001, Robinson moved for summary judgment that Cannondale infringed its '026 patent. Cannondale responded with summary judgment cross motions asserting invalidity and non–infringement of the '026 and '185 patents. In January 2002, the district court denied Robinson's infringement motion and Cannondale's invalidity motion, and granted Cannondale's non–infringement motion. *Robinson v. Cannondale Corp., 2002 U.S. Dist. LEXIS 6797,* No. SA–CV–00–1236–GLT (C.D. Cal. Jan. 29, 2002) ("Summary Judgment Order"). The district court entered a final judgment of non–infringement of the '026 and '185 patents in favor of Cannondale under *Federal Rule of Civil Procedure 54(b)* [*3] . Robinson v. Cannondale Corp., No. SA–CV–00–1236–GLT (C.D. Cal. Feb. 25, 2002). Robinson timely appealed. This court has jurisdiction pursuant to *28 U.S.C. § 1295(a)(1).*

ANALYSIS

I. Standard of Review

"We review the grant of summary judgment de novo, drawing all reasonable inferences in favor of the non–moving party." *Teleflex, Inc. v. Ficosa N. Am. Corp., 299 F.3d 1313, 1323 (Fed. Cir. 2002)* (citing *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986))*. Summary judgment is only appropriate if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *SRI Int'l v. Matsushita Elec. Corp., 775 F.2d 1107, 1116 (Fed. Cir. 1985)* (en banc).

II. The '185 Patent

On appeal, Robinson does not dispute the district

court's construction that "rotational indexing means" in claim 1 of the '185 patent was not a means–plus–function limitation within the meaning of *35 U.S.C. § 112*, paragraph 6. Robinson further conceded both in the briefs and at oral argument that Cannondale does not literally infringe [*4] the claims of the '185 patent.

The parties principally dispute whether the district court committed legal error in its analysis of infringement under the doctrine of equivalents. Robinson argues that the district court erred by failing to apply the doctrine of equivalents to the individual limitations of the claim, rather than the invention as a whole, as required by *Warner–Jenkinson Company, Inc. v. Hilton Davis Chemical Company, 520 U.S. 17, 29, 137 L. Ed. 2d 146, 117 S. Ct. 1040 (1997)* ("Each element contained in a patent claim is deemed material to defining the scope of the patented invention, and thus the doctrine of equivalents must be applied to individual elements of the claim, not to the invention as a whole."). Cannondale argues the district court properly recognized substantial differences between claim 1 of the '185 patent and the accused devices.

The "determination of infringement, whether literal or under the doctrine of equivalents, is a question of fact." *Hilgraeve Corp. v. Symantec Corp., 265 F.3d 1336, 1341 (Fed. Cir. 2001)*. "Infringement under the doctrine of equivalents requires that the accused product contain each limitation [*5] of the claim or its equivalent. . . . An element in the accused product is equivalent to a claim limitation if the differences between the two are 'insubstantial' to one of ordinary skill in the art." *Ecolab, Inc. v. Envirochem, Inc., 264 F.3d 1358, 1371–72 (Fed. Cir. 2001)* (citing *Warner–Jenkinson Co., Inc. v. Hilton Davis Chem. Co., 520 U.S. 17, 40, 137 L. Ed. 2d 146, 117 S. Ct. 1040 (1997))*.

The district court's entire discussion of Cannondale's infringement of the '185 patent under the doctrine of equivalents stated:

> The marked distinction in the manner in which the Cannondale suspension performs – without axial grooves on the inner wall of the outer cylinder, without aligned axial grooves in the outer wall of the outer cylinder, without bearing balls, and without a third, thin walled bearing retainer cylinder – indicates the Cannondale suspension does not achieve the suspension results in substantially the same way as the '185 patent limitations. The doctrine of equivalents therefore also does not apply.

Summary Judgment Order, slip. op. at 12. The district court's analysis is confined to an abbreviated discussion that Cannondale's [*6] accused suspension systems lack literal elements of the '185 patent. The district court failed to conduct the limitation–by–limitation analysis required by our precedent and to consider whether the elements of Cannondale's accused suspension systems are identical to or insubstantially different from the individual limitations of claim 1 of the '185 patent. Because the district court failed to consider whether each claim limitation of the '185 patent or its equivalent was present in the accused device, we vacate the district court's holding of no infringement under the doctrine of equivalents and remand to the district court for an analysis consistent with our precedent.

Cannondale argues that the district court's summary judgment of non–infringement should be affirmed on the alternate ground that its accused product does not meet the "compression spring" limitation of claim 1(f) of the '185 patent. Because the district court did not construe the "compression spring" limitation, and because the parties have not fully briefed this issue on appeal, we decline to do so now and remand this issue to the district court for determination in the first instance.

Because the district court [*7] failed to consider each limitation of claim 1 of the '185 patent in determining infringement under the doctrine of equivalents, and because the "compression spring" limitation was not construed by the district court in the first instance, we vacate the district court's summary judgment of non–infringement under the doctrine of equivalents and remand for further proceedings consistent with this opinion.

III. The '026 Patent

Concerning the '026 patent, the parties dispute the correctness of the district court's construction of "rotational indexing means" as a means–plus–function claim limitation within the meaning of *35 U.S.C. § 112*, paragraph 6. The district court reached this conclusion after noting that the claim language omitted a retainer sleeve structure needed to perform the indexing function. Summary Judgment Order, slip op. at 16. Robinson argues that "rotational indexing means" is not a means–plus–function limitation because the claim recites the structure that performs the recited function, thus overcoming the presumption arising from the use of the word "means." Cannondale responds that the district court's construction of "rotational indexing [*8] means" was proper because the district court correctly recognized that the bearing retainer structure was needed to perform the recited function and was omitted from the claim language.

Determining whether a claim limitation is a means–

plus–function limitation subject to *35 U.S.C. § 112*, paragraph 6, is a matter of claim construction we review de novo. *Personalized Media Communications v. Int'l Trade Comm'n, 161 F.3d 696, 702 (Fed. Cir. 1998)*. Claim limitations that use the word "means" create a presumption that *§ 112*, paragraph 6, applies. *Id. at 703*. However, the presumption of means–plus–function treatment is rebutted "where a claim recites a function, but then goes on to elaborate sufficient structure, material, or acts within the claim itself to perform entirely the recited function." *Sage Prods. v. Devon Indus., Inc., 126 F.3d 1420, 1427–28 (Fed. Cir. 1997)*.

In this case, the "rotational indexing means" is not a means–plus–function limitation. Rotational indexing refers to the function of having the bicycle's head tube suspension (and hence the front wheel of the bicycle) synchronously rotate with the [*9] front handlebars. Claim 1 of the '026 patent recites "a longitudinal bearing track" and "a plurality of rolling surface bearings in rolling reception in said bearing track" to accomplish this function. '026 patent, col. 5, ll. 44–47. This recitation of a bearing track and rolling surface bearings in rolling reception in the claim language provides sufficient structure to perform the function of rotational indexing and overcomes the presumption that "rotational indexing means" is a means–plus–function claim limitation. Because this inquiry focuses on the claim language, Cannondale's arguments regarding alleged admissions in the prosecution history that the bearing retainer was required are immaterial in evaluating whether the means–plus–function presumption is rebutted. Moreover, the alleged admissions in the prosecution history did not pertain to claim 1 of the '026 patent, but instead related to a claim in the parent application that recited all three structural elements, including the bearing retainer. There was no basis for granting summary judgment of non–infringement as a matter of law on the "longitudinal bearing track" limitation of element (c) or on element (d) of claim 1 of [*10] the '026 patent. At a minimum, there are disputes of material fat of infringement of these limitations.

Robinson argues that if "rotational indexing means" is not a means–plus–function claim limitation, we should find that Cannondale infringes elements (c) and (d) of claim 1 of the '026 patent as a matter of law. Robinson acknowledges that if we conclude that elements (c) and (d) were not infringed as a matter of law, the entire infringement issue should be remanded. Because it is not clear from the parties' arguments that no dispute of material fact of infringement remains under our construction of "rotational indexing means," we decline to enter judgment of infringement of elements (c) and (d) of claim 1 of the '026 patent as a matter of law. Instead, now that we have held that there is no basis for summary judgment of non–infringement as a matter of law for the "longitudinal bearing track" limitation of element (c) and for element (d), the district court may consider the parties' arguments regarding infringement of claim 1 of the '026 patent on remand.

Cannondale responds that the district court's finding of non–infringement should be affirmed on the alternate ground that it does [*11] not meet the "resilient compressive means" limitation of claim 1(e) of the '026 patent. Because the district court declined to construe "resilient compressive means" in the first instance in light of its conclusion that Cannondale did not infringe the "rotational indexing means" limitation, Summary Judgment Order, slip op. at 19 n.7, and because the issue has not been fully briefed by the parties, we decline to do so now. The district court may decide the issue in the first instance on remand.

Based on our construction that "rotational indexing means" is not a means–plus–function limitation, we vacate the district court's summary judgment of non–infringement and remand for further consideration of literal infringement and infringement under the doctrine of equivalents.

CONCLUSION

Because the district court erred in its infringement analysis under the doctrine of equivalents for the '185 patent, we vacate the district court's judgment of non–infringement of the '185 patent under the doctrine of equivalents. Because the district court erred in construing "rotational indexing means" in claim 1 of the '026 patent to be a means–plus–function limitation under *35 U.S.C. § 112*, [*12] paragraph 6, we vacate the district court's summary judgment of non–infringement of the '026 patent. The case is remanded for further proceedings consistent with this opinion.

COSTS

Costs are awarded to Robinson.

81 Fed.Appx. 725
(Cite as: 81 Fed.Appx. 725, 2003 WL 22839336 (Fed.Cir.))

H
This case was not selected for publication in the Federal Reporter.

NOTE: Pursuant to Fed.Cir.R. 47.6, this order is not citable as precedent. It is public record.

Please use FIND to look at the applicable circuit court rule before citing this opinion. Federal Circuit Rule 47.6. (FIND CTAF Rule 47.6.)

United States Court of Appeals,
Federal Circuit.

Russell ROBINSON, Plaintiff-Appellant,
v.
CANNONDALE CORPORATION,
Defendant-Appellee,
and
Mark Farris, Defendant.

No. 02-1338.

Nov. 26, 2003.

In action alleging infringement of patents directed at single shock absorber suspension system located in head tube above front tire of bicycle, the United States District Court for the Central District of California, 2002 WL 390335, granted summary judgment of non-infringement, and patentee appealed. The Court of Appeals, Linn, Circuit Judge, held that: (1) district court erred in its infringement analysis under doctrine of equivalents, and (2) term "rotational indexing means" was not means-plus-function limitation.

Vacated and remanded.

West Headnotes

[1] **Patents** 237
291k237 Most Cited Cases

In assessing claim that bicycle manufacturer infringed, under doctrine of equivalents, patents directed at single shock absorber suspension system located in head tube above front tire of bicycle, district court had to conduct limitation-by-limitation analysis and consider whether elements of manufacturer's accused suspension systems were identical to or insubstantially different from individual limitations of claim.

[2] **Patents** 101(8)
291k101(8) Most Cited Cases

Term "rotational indexing means," as used in patent directed at single shock absorber suspension system located in head tube above front tire of bicycle, was not means-plus-function limitation, where recitation of bearing track and rolling surface bearings in rolling reception in claim language provided sufficient structure to perform function of rotational indexing. 35 U.S.C.A. § 112, par. 6.

Patents 328(2)
291k328(2) Most Cited Cases

5,350,185, 5,380,026. Cited.

***725** Before GAJARSA, LINN, and DYK, Circuit Judges.

LINN, Circuit Judge.

****1** Russell Robinson ("Robinson") appeals from a decision of the United States District Court for the Central District of California, 00-CV-1236, granting summary judgment of non-infringement in favor of defendant Cannondale Corporation ("Cannondale") with respect to Robinson's U.S. Patents Nos. 5,350,185 ("the '185 patent") and 5,380,026 ("the '026 patent"). Because the district court erred in its infringement analysis under the doctrine of equivalents for the '185 patent, and further erred in construing "rotational indexing means" in claim 1 of the '026 patent to be a means-plus-function limitation under 35 U.S.C. § 112, paragraph 6, we *vacate* and *remand* for further proceedings consistent with this opinion.

BACKGROUND

The '185 and '026 patents are both directed to a single shock absorber suspension system located in the head tube above ***726** the front tire of a bicycle. The '026 patent is a continuation of the '185 patent.

Defendant Cannondale manufactures and sells bicycles

incorporating the Delta V and HeadShokTM suspension systems that Robinson alleges infringe the patents- in-suit. In December 2000, Robinson sued Cannondale, alleging infringement of its '026 patent and state law claims of unfair competition. Cannondale responded and counterclaimed for a declaratory judgment of non-infringement and invalidity of the related '185 patent. In June 2001, Robinson moved for summary judgment that Cannondale infringed its '026 patent. Cannondale responded with summary judgment cross motions asserting invalidity and non-infringement of the '026 and '185 patents. In January 2002, the district court denied Robinson's infringement motion and Cannondale's invalidity motion, and granted Cannondale's non-infringement motion. *Robinson v. Cannondale Corp.*, No. SA-CV-00-1236-GLT (C.D.Cal. Jan. 29, 2002) (*"Summary Judgment Order"*). The district court entered a final judgment of non-infringement of the '026 and '185 patents in favor of Cannondale under Federal Rule of Civil Procedure 54(b). *Robinson v. Cannondale Corp.*, No. SA-CV-00-1236-GLT (C.D.Cal. Feb. 25, 2002). Robinson timely appealed. This court has jurisdiction pursuant to 28 U.S.C. § 1295(a)(1).

ANALYSIS

I. *Standard of Review*

"We review the grant of summary judgment de novo, drawing all reasonable inferences in favor of the non-moving party." *Teleflex, Inc. v. Ficosa N. Am. Corp.*, 299 F.3d 1313, 1323 (Fed.Cir.2002) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). Summary judgment is only appropriate if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *SRI Int'l v. Matsushita Elec. Corp.*, 775 F.2d 1107, 1116 (Fed.Cir.1985) (en banc).

II. *The '185 Patent*

On appeal, Robinson does not dispute the district court's construction that "rotational indexing means" in claim 1 of the '185 patent was not a means-plus-function limitation within the meaning of 35 U.S.C. § 112, paragraph 6. Robinson further conceded both in the briefs and at oral argument that Cannondale does not literally infringe the claims of the '185 patent.

****2** The parties principally dispute whether the district court committed legal error in its analysis of infringement under the doctrine of equivalents. Robinson argues that the district court erred by failing to apply the doctrine of equivalents to the individual limitations of the claim, rather than the invention as a whole, as required by *Warner-Jenkinson Company, Inc. v. Hilton Davis Chemical Company*, 520 U.S. 17, 29, 117 S.Ct. 1040, 137 L.Ed.2d 146 (1997) ("Each element contained in a patent claim is deemed material to defining the scope of the patented invention, and thus the doctrine of equivalents must be applied to individual elements of the claim, not to the invention as a whole."). Cannondale argues the district court properly recognized substantial differences between claim 1 of the '185 patent and the accused devices.

The "[d]etermination of infringement, whether literal or under the doctrine of equivalents, is a question of fact." *Hilgraeve Corp. v. Symantec Corp.*, 265 F.3d 1336, 1341 (Fed.Cir.2001). "[I]nfringement under the doctrine of equivalents requires that the accused product contain each limitation of the claim or its equivalent.... An element in the accused product ***727** is equivalent to a claim limitation if the differences between the two are 'insubstantial' to one of ordinary skill in the art." *Ecolab, Inc. v. Envirochem, Inc.*, 264 F.3d 1358, 1371-72 (Fed.Cir.2001) (citing *Warner-Jenkinson Co., Inc. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 40, 117 S.Ct. 1040, 137 L.Ed.2d 146 (1997)).

[1] The district court's entire discussion of Cannondale's infringement of the '185 patent under the doctrine of equivalents stated:

> The marked distinction in the manner in which the Cannondale suspension performs--without axial grooves on the inner wall of the outer cylinder, without aligned axial grooves in the outer wall of the outer cylinder, without bearing balls, and without a third, thin walled bearing retainer cylinder-- indicates the Cannondale suspension does not achieve the suspension results in substantially the same way as the '185 patent limitations. The doctrine of equivalents therefore also does not apply.

Summary Judgment Order, slip. op. at 12. The district court's analysis is confined to an abbreviated discussion that Cannondale's accused suspension systems lack literal elements of the '185 patent. The district court failed to conduct the limitation-by-limitation analysis required by our precedent and to consider whether the elements of Cannondale's accused suspension systems are identical to or insubstantially different from the individual limitations of claim 1 of the '185 patent. Because the district court failed to consider whether each claim limitation of the '185 patent or its equivalent was present in the accused device, we vacate the district court's holding of no infringement under the doctrine of equivalents and remand to the district court for an

analysis consistent with our precedent.

Cannondale argues that the district court's summary judgment of non- infringement should be affirmed on the alternate ground that its accused product does not meet the "compression spring" limitation of claim 1(f) of the '185 patent. Because the district court did not construe the "compression spring" limitation, and because the parties have not fully briefed this issue on appeal, we decline to do so now and remand this issue to the district court for determination in the first instance.

**3 Because the district court failed to consider each limitation of claim 1 of the '185 patent in determining infringement under the doctrine of equivalents, and because the "compression spring" limitation was not construed by the district court in the first instance, we vacate the district court's summary judgment of non-infringement under the doctrine of equivalents and remand for further proceedings consistent with this opinion.

III. *The '026 Patent*

Concerning the '026 patent, the parties dispute the correctness of the district court's construction of "rotational indexing means" as a means-plus- function claim limitation within the meaning of 35 U.S.C. § 112, paragraph 6. The district court reached this conclusion after noting that the claim language omitted a retainer sleeve structure needed to perform the indexing function. *Summary Judgment Order,* slip op. at 16. Robinson argues that "rotational indexing means" is not a means-plus-function limitation because the claim recites the structure that performs the recited function, thus overcoming the presumption arising from the use of the word "means." Cannondale responds that the district court's construction of "rotational indexing means" was proper because the district court correctly recognized that **728** the bearing retainer structure was needed to perform the recited function and was omitted from the claim language.

Determining whether a claim limitation is a means-plus-function limitation subject to 35 U.S.C. § 112, paragraph 6, is a matter of claim construction we review de novo. *Personalized Media Communications v. Int'l Trade Comm'n,* 161 F.3d 696, 702 (Fed.Cir.1998). Claim limitations that use the word "means" create a presumption that § 112, paragraph 6, applies. *Id.* at 703. However, the presumption of means-plus-function treatment is rebutted "where a claim recites a function, but then goes on to elaborate sufficient structure, material, or acts within the claim itself to perform entirely the recited function." *Sage Prods. v. Devon Indus., Inc.,* 126 F.3d 1420, 1427-28 (Fed.Cir.1997).

[2] In this case, the "rotational indexing means" is not a means-plus- function limitation. Rotational indexing refers to the function of having the bicycle's head tube suspension (and hence the front wheel of the bicycle) synchronously rotate with the front handlebars. Claim 1 of the '026 patent recites "a longitudinal bearing track" and "a plurality of rolling surface bearings in rolling reception in said bearing track" to accomplish this function. '026 patent, col. 5, ll. 44-47. This recitation of a bearing track and rolling surface bearings in rolling reception in the claim language provides sufficient structure to perform the function of rotational indexing and overcomes the presumption that "rotational indexing means" is a means-plus- function claim limitation. Because this inquiry focuses on the claim language, Cannondale's arguments regarding alleged admissions in the prosecution history that the bearing retainer was required are immaterial in evaluating whether the means-plus-function presumption is rebutted. Moreover, the alleged admissions in the prosecution history did not pertain to claim 1 of the '026 patent, but instead related to a claim in the parent application that recited all three structural elements, including the bearing retainer. There was no basis for granting summary judgment of non-infringement as a matter of law on the "longitudinal bearing track" limitation of element (c) or on element (d) of claim 1 of the '026 patent. At a minimum, there are disputes of material fat of infringement of these limitations.

**4 Robinson argues that if "rotational indexing means" is not a means-plus- function claim limitation, we should find that Cannondale infringes elements (c) and (d) of claim 1 of the '026 patent as a matter of law. Robinson acknowledges that if we conclude that elements (c) and (d) were not infringed as a matter of law, the entire infringement issue should be remanded. Because it is not clear from the parties' arguments that no dispute of material fact of infringement remains under our construction of "rotational indexing means," we decline to enter judgment of infringement of elements (c) and (d) of claim 1 of the '026 patent as a matter of law. Instead, now that we have held that there is no basis for summary judgment of non-infringement as a matter of law for the "longitudinal bearing track" limitation of element (c) and for element (d), the district court may consider the parties' arguments regarding infringement of claim 1 of the '026 patent on remand.

Cannondale responds that the district court's finding of non-infringement should be affirmed on the alternate ground that it does not meet the "resilient compressive means" limitation of claim 1(e) of the '026 patent. Because the district court declined to construe "resilient compressive means" in the first instance in light of its conclusion that Cannondale did not infringe the "rotational indexing means" limitation, ***729** *Summary Judgment Order,* slip op. at 19 n. 7, and because the issue has not been fully briefed by the parties, we decline to do so now. The district court may decide the issue in the first instance on remand.

Based on our construction that "rotational indexing means" is not a means- plus-function limitation, we vacate the district court's summary judgment of non-infringement and remand for further consideration of literal infringement and infringement under the doctrine of equivalents.

CONCLUSION

Because the district court erred in its infringement analysis under the doctrine of equivalents for the '185 patent, we vacate the district court's judgment of non-infringement of the '185 patent under the doctrine of equivalents. Because the district court erred in construing "rotational indexing means" in claim 1 of the '026 patent to be a means-plus-function limitation under 35 U.S.C. § 112, paragraph 6, we vacate the district court's summary judgment of non-infringement of the '026 patent. The case is remanded for further proceedings consistent with this opinion.

COSTS

Costs are awarded to Robinson.

81 Fed.Appx. 725, 2003 WL 22839336 (Fed.Cir.)

END OF DOCUMENT