Freeing Unpublished Opinions from Exile: Going Beyond the Citation Permitted by Proposed Federal Rule of Appellate Procedure 32.1

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> *[I]t is difficult to justify a system that permits parties to bring to a court's attention virtually every written or spoken word in existence* except *those contained in the court's own "unpublished" opinions.*[1]

I. Introduction

Imagine that you are an attorney who successfully defended a client in a federal circuit court. Fast forward two years to another lawsuit, in the same federal circuit court, with the same client. You present the court with the identical theory of defense you presented just two years before, only to be told by the court that it is not bound by its previous decision, and that your theory of defense is no longer good. Is this possible? Yes, if the opinion in the first case was not published and you are in a circuit court that does not allow the use of unpublished opinions. This scenario seems like a nightmare, but is a reality in today's appellate court system.[2]

The United States appellate courts have erected a barrier around a large number of opinions by creating rules that allow courts to issue unpublished opinions and then limiting or eliminating the citation of these opinions. For years, some judges and lawyers have been attempting to eliminate the issuance of unpublished opinions. At the very least, these judges and lawyers advocate for unpublished opinions to be freely cited in briefs and arguments to the courts. The most recent attempt to remove the barrier surrounding unpublished opinions is Proposed Federal Rule of Appellate Procedure 32.1 (PFRAP 32.1). The barrier may be weakening, but effecting change and restoring order to the appellate judicial system will require a much stronger effort.

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1. Memorandum from Judge Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules, to Judge Anthony J. Scirica, Chair, Standing Comm. on Rules of Practice and Procedure 33 (May 22, 2003), *available at* http://www.uscourts.gov/rules/app0803.pdf (last visited Oct. 23, 2004) [hereinafter Memorandum].

2. *See* Williams v. Dallas Area Rapid Transit, 256 F.3d 260, 260-61 (5th Cir. 2001) (Smith, J., dissenting).

Beginning in 1974, each federal circuit court began implementing rules that enabled the courts to issue unpublished opinions.[3] Since implementing these rules, the federal circuit courts produce more unpublished opinions than published opinions.[4] Each year, the federal appellate courts label a vast majority of the opinions they issue "unpublished."[5] The state appellate courts also engage in the practice at the same rate as the federal circuit courts.[6]

The negative impact of unpublished opinions is becoming increasingly evident each year. The lack of uniformity in the practices of the federal circuit courts and the state appellate courts creates a conundrum.[7] There is a lack of uniformity, not only as to when an opinion will be published, but also as to how an opinion that is labeled "unpublished" is treated.[8]

Implementing PFRAP 32.1 does not resolve the problems inherent in unpublished opinions. The root of the problem is federal and state court of appeals' inconsistent treatment of some judicial opinions as binding precedent and others as non-binding. A consistent approach requiring that all judicial opinions be treated equally as binding precedent in both the federal and state courts of appeals would benefit the United States court system. This approach to all appellate opinions is based on sound legal, procedural, and policy grounds.

This note presents the arguments on both sides of the ongoing debate surrounding PFRAP 32.1 and its treatment of some appellate opinions as unpublished and non-binding. This note further suggests an alternate approach that is different from that in PFRAP 32.1. Additionally, this note supports the conclusion that only allowing unpublished opinions to be cited to the courts will not resolve the true problem created by the inconsistent treatment of judicial opinions.[9] Part II of this note sets forth the history and development of unpublished opinions.[10] Part III presents an analysis of the arguments both in favor of and against issuing unpublished opinions in either the Fed-

3. William R. Mills, *The Shape of the Universe: The Impact of Unpublished Opinions on the Process of Legal Research*, 22 N.Y.L. SCH. J. INT'L & COMP. L. 59, 61 (2003).

4. *Id.* at 62. "According to current statistics, nearly 80% of federal circuit court cases are now decided without a published opinion." *Id*.

5. *Id.*

6. *See* Jeffrey O. Cooper, *Citability and the Nature of Precedent in the Courts of Appeals: A Response to Dean Robel*, 33 IND. L. REV. 423, 432 (2002).

7. Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefied Report and Analysis*, 5 J. APP. PRAC. & PROCESS 473, 480-85 (2003); Linda L. Morkan, *Free the Unpublished from their Banishment!; Free the Unpublished from their Banishment!*, CONNECTICUT LAW TRIBUNE, Oct. 20, 2003, at 9; Memorandum, *supra* note 1.

8. *See* Dean A. Morande, *Publication Plans in the United States Courts of Appeals: The Unattainable Paradigm*, 31 FLA. ST. U. L. REV. 751, 778 (2004); *see* Barnett, *supra* note 7, at 473-84.

9. *See infra* notes 184-217.

10. *See infra* notes 13-123.

eral or state courts.[11] Finally, Part IV offers an approach that may improve that taken by PFRAP 32.1 by ensuring that all opinions issued by an appellate court, in whatever form, are given binding precedential value in that appellate court.[12]

II. THE HISTORY AND DEVELOPMENT OF UNPUBLISHED OPINIONS

The development of the concept of unpublished opinions lends clues to the controversy. The courts introduced unpublished opinions to improve the efficiency of the judicial system.[13] A simple thought produced the original idea: eliminate mundane and unnoticed appellate opinions from those that are published, thereby relieving the appellate system of the extra pressures created by publishing every opinion.[14] Since that original idea, case law, appellate judges, developing technology, and public policy changed the way the utility of unpublished opinions is viewed.[15]

It is necessary to put the term "unpublished" into perspective. The term appears to ring of inaccessibility, but when used in the context of appellate court opinions, "unpublished" simply indicates that a court's opinion will not be placed in an official reporter.[16] For example, the official reporter for the federal circuit courts is the *Federal Reporter*; thus, an "unpublished" opinion of a federal circuit court is an opinion that does not appear in the *Federal Reporter*.[17] Although an "unpublished" opinion cannot be found in an official reporter, there are several other sources where such an opinion can be obtained.[18] Copies of all opinions are always available with the clerk of the court, and most circuits are now providing their "unpublished" opinions to different internet databases, most notably Lexis and Westlaw.[19] Further, the E-Government Act of 2002 requires that each federal circuit court maintain a website containing their judicial opinions.[20]

Prior to the 1970s, the federal courts of appeals uniformly published all opinions.[21] This changed, however, as the tide of growing

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11. *See infra* notes 124-83.
12. *See infra* notes 184-217.
13. *See* Christian F. Southwick, *Unprecedented: The Eighth Circuit Repaves Antiquas Vias with a New Constitutional Doctrine*, 21 REV. LITIG. 191, 198 (2002).
14. *See id.*
15. Morande, *supra* note 8, at 754.
16. *Id.*
17. *See id.*
18. *Id.*
19. *Id.*
20. E-Government Act of 2002, Pub. L. No. 107-347 § 205(a), 1116 Stat. 2899 (2004).
21. *See* Jon A. Strongman, *Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value is Unconstitutional*, 50 U. KAN. L. REV. 195, 197 (2001).

case loads in the appellate courts caused many to rethink the system.[22] In 1964, the Judicial Conference of the United States issued a report formally recommending that, at the circuit court level, only cases with "general precedential import[ance]" should have published opinions.[23] This recommendation was not warmly received by the federal courts, until the 1970s brought an onslaught of growing case loads upon the federal circuit courts.[24] In 1972, the Board of the Federal Judicial Center recommended that the federal circuits create plans to limit the publication of judicial opinions and further limit the citation of unpublished opinions.[25]

The Advisory Council for Appellate Justice issued a 1973 report which also supported limiting the publication of federal circuit court opinions.[26] The report based its support of limited publication on the rationale that the time it takes for a judge to write and develop an opinion for publication is greater than the time it takes for a judge to informally make the parties aware of the reasons for the judge's decision.[27] By 1974, every federal circuit had created and implemented a publication plan, as recommended.[28] Although the Board of the Federal Judicial Center recommended that the federal circuits collectively adopt a uniform rule, each circuit created individual rules.[29] Through 2003, the federal circuit courts continue to operate with independent publication rules.[30]

The problem with the lack of consistent publication and citation rules throughout appellate courts in the United States is painfully clear.[31] Nine of the thirteen federal circuits permit the citation of unpublished opinions.[32] Of those nine, the D.C., Fourth, and Sixth Cir-

22. *Id.* In 1950, 2,678 cases were filed in the federal circuit courts. *Id.* In 1970, that number had grown to 11,440. *Id.* In the same twenty-year span, 1950 to 1970, the number of federal circuit court judges grew from sixty-four to ninety. *Id.* When analyzed, these numbers illustrate that in 1950, each judge handled forty-two case filings, and by 1970, each federal circuit judge was handling 127 case filings. *Id*.

23. Southwick, *supra* note 13, at 203. The Judicial Conference of the United States was created in 1922 as the Conference of Senior Circuit Judges. JUDICIAL CONFERENCE OF THE UNITED STATES, *at* http://www.uscourts.gov/judconf.html (last visited Oct. 23, 2004). The name was changed to the Judicial Conference of the United States by Congress in 1948. *Id.* The purpose of the Judicial Conference is "to make policy with regard to the administration of the United States courts." *Id.*

24. Strongman, *supra* note 21, at 197.

25. Southwick, *supra* note 13, at 203. The Federal Judicial Center was created by Congress in 1967. THE FEDERAL JUDICIAL CENTER, *at* http://www.fjc.gov (last visited Oct. 23, 2004). It is the education and research agency for the federal courts and was created to "promote improvements in judicial administration in the courts of the United States." *Id.*

26. Strongman, *supra* note 21, at 198.

27. *Id*.

28. Mills, *supra* note 3, at 61.

29. Southwick, *supra* note 13, at 203-04.

30. *Id.* at 204.

31. *See* Barnett, *supra* note 7, at 474-76, 480-84.

32. *See id.* at 474-76. The nine circuits that permit citation of unpublished opinions in one way or another are the First, Third, Fourth, Fifth, Sixth, Eighth, Tenth, Eleventh, and D.C. Circuits. *Id.*

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cuits allow the citation of unpublished opinions for full precedential value.[33] The First, Fifth, Eighth, Tenth, and Eleventh Circuits allow the citation of unpublished opinions for persuasive value only.[34] The Third Circuit permits the citation of unpublished opinions but does not clarify the specific value assigned to unpublished opinions.[35] On the other hand, the Second, Seventh, Ninth, and Federal Circuits do not allow the citation of unpublished opinions for any purpose.[36]

In state appellate courts, the plague of inconsistency continues in the same fashion.[37] There are five identifiable categories into which all fifty states and the District of Columbia fall.[38] The first category contains states that do not have restrictions involving unpublished opinions.[39] States are included in this category because they do not have unpublished opinions or do not have rules against the citation of unpublished opinions.[40] The second category includes the states that allow the citation of unpublished opinions as binding precedent.[41] The next category consists of states that allow the citation of unpublished opinions for persuasive value only.[42] The fourth category is comprised of states that prohibit citation of unpublished opinions.[43]

33. D.C. CIR. R. 28(c)(1)(B); 4TH CIR. R. 36(c); 6TH CIR. R. 28(g); Johnathan Groner, *Circuit's New Citation Rule: Few Takers in 2002, D.C. Lawyers Made Little Use of Unpublished Cases*, LEGAL TIMES, Jan. 6, 2003, Court Watch, at 1.

34. 1ST CIR. R. 32.3(a)(2); 5TH CIR. R. 47.5.3; 5TH CIR. R. 47.5.4; 8TH CIR. R. 28A(i); 10TH CIR. R. 36.3; 11TH CIR. R. 36-2; 11TH CIR. R. 36-3; *see also* Groner, *supra* note 33; Barnett, *supra* note 7, at 474.

35. Groner, *supra* note 33; Barnett, supra note 7, at 474 n.8.

36. 2D CIR. R. § 0.23; 7TH CIR. R. 53(b)(2)(iv); 9TH CIR. R. 36-3; FED. CIR. R. 47.6(b); Groner, *supra* note 33.

37. Barnett, *supra* note 7, at 480-84.

38. *Id.*

39. *Id.* at 481.

40. *Id*. These states include Connecticut, Mississippi, New York, and North Dakota. CONN. GEN. STAT. §§ 51-212(b), 51-215a(b) (Supp. 2004), CONN. R. APP. P. § 67-9; MISS. R. APP. P. 35-A(b), 35-B(b). New York does not have a rule regarding unpublished opinions. Barnett, *supra* note 7, at 481 n.49. The North Dakota Supreme Court issues summary dispositions; however, North Dakota does not have a rule that prohibits the summary dispositions from being cited. N.D. R. APP. P. 35.1; Barnett, *supra* note 7, at 481 n.50.

41. Barnett, *supra* note 7, at 481. These states include Delaware, North Carolina, Ohio, Texas, Utah, and West Virginia. New Castle County v. Goodman, 461 A.2d 1012, 1013 (Del. 1983) (discussing the citation rules of unpublished opinions); N.C. R. APP. P. 30(e)(3); OHIO SUP. CT. R. REPORTING OPS. 4(A)-(B); TEX. R. APP. P. 47.1, 47.2(b), 47.7; Grand County v. Rogers, 44 P.3d 734, 738 (Utah 2002); Walker v. Doe, 558 S.E.2d 290, 296 (W. Va. 2001).

42. Barnett, *supra* note 7, at 482. These states are Alaska, Georgia, Iowa, Kansas, Michigan, Minnesota, New Jersey, New Mexico, Tennessee, Vermont, Virginia and Wyoming. McCoy v. State, 80 P.3d 751, 753 (Alaska Ct. App. 2002) (interpreting Alaska Appellate Rule 214(d)); GA APP. C. R. 33(b); IOWA APP. R. 6.14 (5)(b); KAN. SUP. CT. R. 7.04(f)(2)(ii); MICH. CT. R. 7.215(C)(1); MINN. R. CIV. APP. P. 136.01(b), MINN. STAT. ANN. § 480A.08(3) (West Supp. 2004); N.J. CT. R. GEN. APPLICATION. R. 1:36-3 (2004); N.M. APP. R. 12-405(C), State v. Gonzales, 794 P.2d 361, 370-71 (N.M. Ct. App. 1990); R. SUP. CT. TENN. 4(H)(1); VT. R. APP. P. 33.1(c); Fairfax County Sch. Bd. v. Rose, 509 S.E.2d 525, 528 n.3 (Va. Ct. App. 1999); *see* WYO. R. APP. P. 9.06.

43. Barnett, *supra* note 7, at 484. These states are Alabama, Arizona, Arkansas, California, Colorado, the District of Columbia, Florida, Idaho, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, Montana, Nebraska, Nevada, New Hampshire, Pennsylvania, Rhode Island, South Carolina, South Dakota, Washington, and Wisconsin. ALA. R. APP. P. 53(d); ARIZ. SUP. CT. R. 111(c), ARIZ. R. CIV. APP. P. 28(c); ARK. SUP. CT. & CT. APP. R. 5-2(d); CAL. R. CT. 977(a); COLORADO COURT OF APPEALS, POLICY OF THE COURT CONCERNING CITATION

Finally, some states have conflicting approaches which sometimes allow citation, and sometimes prohibit it.[44] Oklahoma, for example, prohibits unpublished opinions issued by its supreme court to be cited for any reason, but permits unpublished opinions of the court of criminal appeals to be cited in some circumstances.[45]

Thus, while twenty-two states allow the citation of unpublished opinions, twenty-three states and the District of Columbia do not.[46] The remaining five states are too close to call to fit cleanly into either category.[47] Although the slim majority of states still do not allow the citation of unpublished opinions, within the last two years at least six states have changed from prohibiting the citation of unpublished opinions, to permitting the citation of these opinions.[48] Therefore, there seems to be a trend in favor of allowing the citation of unpublished opinions.[49]

The debate surrounding unpublished opinions created significant case law across the country.[50] *Anastasoff v. United States*[51] originated much of the controversy. *Anastasoff* involved a tax dispute between a taxpayer and the Internal Revenue Service.[52] The case was before the Eighth Circuit Court of Appeals on the appeal of the taxpayer.[53] In *Anastasoff,* the taxpayer made an argument that had been rejected in a previous Eighth Circuit case, *Christie v. United States*.[54] The taxpayer argued that the court did not need to follow its holding in *Christie*.[55] Controversy ensued because *Christie* was an unpublished opinion, and in the Eighth Circuit, "[u]npublished opinions are not precedent" but may be cited if "the opinion has persuasive value on a material issue and no published opinion . . . would serve as well

OF UNPUBLISHED OPINIONS, *at* http://www.courts.state.co.us/coa/opinion/unpublished.htm (last visited Oct. 23, 2004); R. D.C. CT. APP. 28(g); Dep't of Legal Affairs v. Dist. Court of Appeals, 434 So. 2d 310, 312 (Fla. 1983); INTERNAL R. IDAHO SUP. CT. 15(f); IND. R. APP. P. 65(D); KY. R. CIV. P. 76.28(4)(c); UNIF. R. LA.CT. APP. 2-16.3C; MD. R. APP. REV. 1-104; Horner v. Boston Edison Co., 695 N.E.2d 1093, 1094 (Mass. App. Ct. 1998); MO. SUP. CT. R. 84.16(b); MONT. SUP. CT. INTERNAL OP. R. (3)(c); NEB. SUP. CT. R. 2(E)(4); NEV. SUP. CT. R. 123; N.H. SUP. CT. R. 12-D(3), 25(5); PA. R. SUP. CT. I.O.P. 65.37(A); R.I. SUP. CT. R. 16(h); S.C. R. APP. P. 220(a), 239(d)(2); S.D. CODIFIED LAWS § 15-26A-87.1(E) (Michie 2004); WASH. R. APP. P. 10.4(h) (2004); WIS. STAT. ANN. § 809.23(3) (West Supp. 2004).

44. Barnett, *supra* note 7, at 483. The states that are "too close to call" are Hawaii, Illinois, Maine, Oklahoma, and Oregon. *Id.*

45. *Id.* at 483 n.71.

46. *See Id.* at 485 (discussing North Carolina switching from a no-citation state to allowing citation of unpublished opinions as precedent in 2004, following the publication of the Barnett article, thus the numbers changed by one).

47. *Id.* at 483.

48. *Id.* at 487.

49. *See id*.

50. *See infra* notes 50-85.

51. 223 F.3d 898 (8th Cir. 2000).

52. *Id.* at 899.

53. *Id.*

54. No. 91-2375MN, 1992 U.S. App. LEXIS 38446 (8th Cir. 1992) (per curiam).

55. *See Anastasoff*, 223 F.3d at 899.

. . . ."[56] The fact that *Christie* was the only case directly on point further complicated the situation.[57] As a result, in *Anastasoff*, the Eighth Circuit held that the rule prohibiting the use of unpublished opinions as precedent was unconstitutional.[58]

The rule unconstitutionally gave power to the federal courts which exceeded the judicial power granted in Article III of the United States Constitution.[59] Writing for the Eighth Circuit, Judge Richard S. Arnold based the holding in *Anastasoff* upon the doctrine of precedent.[60] He argued that the principle of precedent was well established and well understood by the Framers of the Constitution when they drafted Article III.[61] Judge Arnold explained that within every judicial opinion is an interpretation and declaration of a "general principle or rule of law," and that these declarations of law "must be applied in subsequent cases to similarly situated parties."[62] Thus, when the Framers created the judicial power in Article III, this power was defined by the doctrine of precedent.[63] In other words, judges are not empowered by the Constitution to make rulings outside of the bounds of rules of law created in prior opinions.[64] Judge Arnold concluded that to allow unpublished court opinions to be non-precedential violates the doctrine of precedent and Article III.[65]

The position Judge Arnold took in *Anastasoff* was not a complete surprise, because he had previously expressed his apprehension with the appellate courts' approach to unpublished opinions.[66] In 1999, Judge Arnold authored an article that expressed his discomfort with issuing unpublished opinions which have no precedential value.[67] Judge Arnold stated that any system which offers a judge the option to grant a case precedential value is a system that would always be subject to human error and influence.[68] The Eighth Circuit's stance in *Anastasoff* startled many and caught the attention of all of the other circuits and the legal community.[69] Four months later, the Eighth Circuit reheard the case *en banc* and ruled that the case was moot because the Internal Revenue Service had decided to reward the

56. *Id.*
57. *Id*.
58. *Id.*
59. *Id.*
60. *Id.* at 900.
61. *Id.*
62. *Id.* at 899-900.
63. *Id.* at 903.
64. *Id.*
65. *Id.* at 900.
66. Mills, *supra* note 3, at 66.
67. *Id.*
68. *Id.*
69. *Id.* at 67.

taxpayer as she had requested.[70] Although the previous decision was vacated, Judge Arnold did not disregard the argument he presented: "The constitutionality of that portion of Rule 28A(i) which says that unpublished opinions have no precedential effect remains an open question in this [c]ircuit."[71]

In the year following *Anastasoff*, the Ninth Circuit Court of Appeals addressed the issue of unpublished opinions and non-citation rules in *Hart v. Massanari*.[72] In *Hart*, Judge Alex Kozinski directly defended the Ninth Circuit's rule that prohibited the citation of unpublished opinions.[73] Judge Kozinski addressed the rationale articulated by Judge Arnold in *Anastasoff* and found it to be flawed.[74] The Ninth Circuit held that the non-citation rule was proper on two bases: a historical and constitutional basis; and a current policy basis.[75]

On the constitutional front, Judge Kozinski stated that *Anastasoff* was incorrect in concluding that the Framers had the same concept of precedent because "our concept of precedent today is far stricter than that which prevailed at the time of the Framing."[76] The opinion continued that "[t]he Constitution does not contain an express prohibition against issuing non precedential opinions because the Framers would have seen nothing wrong with the practice."[77]

Addressing current policy, Judge Kozinski argued that although making all opinions binding authority may appear to be a good idea, to do so would eliminate any flexibility in the law.[78] In addition, Judge Kozinski stressed that although binding authority creates predictability and consistency, a court should not be bound by judicial opinions it believes were wrongly decided.[79] Further, he contended that several other practical considerations, most notably the court's lack of resources and time, made the idea of universal precedential value a poor one.[80]

There was also an attempt in the Federal Circuit to convince the court to adopt the rationale in *Anastasoff*.[81] In *Symbol Technologies, Inc. v. Lemelson Medical*,[82] the Federal Circuit Court of Appeals re-

70. Anastasoff v. U.S., 235 F.3d 1054, 1055-56 (8th Cir. 2000) *vacating as moot* Anastasoff v. U.S., 223 F.3d 898 (8th Cir. 2000).
71. *Anastasoff,* 235 F.3d at 1056.
72. 266 F.3d 1155 (9th Cir. 2001).
73. *See generally id*. The Ninth Circuit's rule on the use of unpublished opinions is 9th Cir. R. 36-3 which says, "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 . . . ." *Id.* at 1159.
74. *Id.* at 1159-61.
75. *See id*. at 1174-77.
76. *Id*. at 1163.
77. *Id*.
78. *Id.* at 1175.
79. *Id*.
80. *Id*. at 1177.
81. *See* Symbol Tech., Inc. v. Lemelson Med., 277 F.3d 1361 (Fed. Cir. 2002).
82. *Id*.

fused to accept Judge Arnold's position on unpublished opinions.[83] The court rejected *Anastasoff* and accepted the approach taken by the Ninth Circuit in *Hart*.[84] The court added that "nonprecedential decisions do not give the judiciary free will to reinvent the law; they merely permit a judgment about whether a case contributes significantly to the body of law."[85]

The controversy raised by recent court cases and the recent visibility of the differences in which the federal circuit courts treat unpublished opinions led to proposed federal reform.[86] On November 18, 2002, the Federal Advisory Committee on the Rules of Appellate Procedure announced that it would consider a rule that would uniformly require all of the circuit courts to allow the citation of unpublished opinions.[87] Six months later, the Advisory Committee released the proposed language of PFRAP 32.1.[88] The proposed rule read as follows:

> Rule 32.1 Citation of Judicial Dispositions
>
> (a) Citation Permitted. No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.
>
> (b) Copies Required. A party who cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database must file and serve a copy of that opinion, order, judgment, or other written disposition with the brief or other paper in which it is cited.[89]

Judge Samuel A. Alito, Jr., the Chair of the Advisory Committee on Appellate Rules, issued the proposed rule in a May 22, 2003 memorandum.[90] The Advisory Committee proposed the rule for two reasons.[91] First, "the local rules of the circuits differ dramatically in their treatment of the citation of 'unpublished' or 'non-precedential' opinions for their persuasive value. . . . These conflicting rules create a hardship for practitioners, especially those who practice in more than one circuit."[92] Second, rules that place restrictions upon the citation of unpublished opinions are erroneous on a public policy basis.[93] The

83. *See id.* at 1367.
84. *Id*.
85. *Id*. at 1368.
86. Morande, *supra* note 8, at 756.
87. *Id.*
88. *Id*. at 755.
89. Memorandum, *supra* note 1, 28-29.
90. *Id*. at 1.
91. *Id*. at 27.
92. *Id*.
93. *Id*.

committee note attached to the memorandum stressed that "[i]t is difficult to justify a system under which the 'unpublished' opinions of the D.C. Circuit can be cited to the Seventh Circuit, but the 'unpublished' opinions of the Seventh Circuit cannot be cited to the Seventh Circuit."[94] The committee reasoned that parties in the courts of appeals could always cite to the court from various sources including other lower courts, news publications, and even classic playwrights; thus, it seems illogical to treat unpublished opinions differently than other sources.[95]

On its face, the language of PFRAP 32.1 appears quite broad.[96] The Standing Committee, aware that the possible broad interpretation of PFRAP 32.1 could scare away supporters, explained the narrow impact of the proposed rule:

> Rule 32.1 is extremely limited. It takes no position on whether refusing to treat an "unpublished" opinion as binding precedent is constitutional. It does not require any court to issue an "unpublished" opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that decision. It says nothing about what effect a court must give to one of its "unpublished" opinions or to the "unpublished" opinions of another court. The one and only issued addressed by Rule 32.1 is the *citation* of judicial dispositions that have been *designated* as "unpublished" or "non-precedential" by a federal or state court—whether or not those dispositions have been published in some way or are precedential in some sense.[97]

Thus, PFRAP 32.1 requires that circuit courts allow the citation of unpublished opinions.[98] Nevertheless, the proposed rule does not require that all opinions be given binding precedential value.[99]

On April 14, 2004, PFRAP 32.1 took a step toward becoming a rule of procedure in the federal circuit courts.[100] The Advisory Committee on Appellate Rules recorded a 7-2 vote in favor of endorsing the proposed rule.[101] After its endorsement, the Committee received hundreds of letters both actively supporting and vigorously arguing against the proposed rule.[102]

It was, however, one step forward, one step back.[103] The proposed rule traveled to the Standing Rules Committee of the Judicial

94. *Id*. at 32-33.
95. *Id*. at 32.
96. *See id*. at 30-31.
97. *Id*. (citations omitted).
98. *Id*. at 30.
99. *Id*.
100. Tony Mauro, *Green Light to Cite Unpublished Opinions*, LEGAL TIMES, Apr. 18, 2004, at 8.
101. *Id.*
102. *Id*.
103. Brent Kendall, *Citation-Rule Change Hits Obstacle*, LOS ANGELES DAILY JOURNAL, June 18, 2004.

Conference.[104] On June 17, 2004, the Standing Rules Committee decided to send PFRAP 32.1 back to the Advisory Committee because it desired more information and guidance.[105] The request for guidance came because the proposed rule encountered heavy opposition.[106] If PFRAP 32.1 finally gets through the Standing Rules Committee, it would go to the Judicial Conference, and then to the United States Supreme Court.[107] If the proposed rule is approved, and Congress does not veto it, it could finally take effect.[108] The proposed rule had been scheduled to take effect in late 2005, but there are many circumstances, such as the recent opposition, that could delay its implementation.[109]

The proposition of PFRAP 32.1 has not eliminated the nationwide resistance to the citation of unpublished opinions in appellate courts.[110] One of the most recent cases involving the issue of unpublished opinions is *Schaaf v. Kaufman*.[111] *Schaaf* illustrates the continued resistance of some courts and some judges to any changes in the area of unpublished opinions.[112] The court issued its opinion just nine days after the Advisory Appellate Rules Committee of the United States approved PFRAP 32.1.[113]

In *Schaaf*, the plaintiff challenged Pennsylvania's rule prohibiting the citation of unpublished opinions by arguing that the rule violated the Pennsylvania Constitution.[114] The plaintiff relied on the Eighth Circuit's decision in *Anastasoff*. The Superior Court of Pennsylvania, however, reacted as nearly every other court has when faced with *Anastasoff*.[115] The court held that the plaintiff's reliance on *Anastasoff* was misplaced because the Pennsylvania Constitution does not prohibit the issuance of non-precedential memorandum decisions.[116]

Aside from the activities of the courts, the E-Government Act of 2002 impacts the issue of unpublished opinions.[117] President George

104. *Id*.
105. *Id*.
106. *Id*.
107. Mauro, *supra* note 100.
108. *Id.*
109. Groner, *supra* note 33, at 1.
110. *See* Melissa Nann, *Still No Citing Allowed*, THE LEGAL INTELLIGENCER, Apr. 28, 2004, at 1.
111. 2004 WL 859182 (Pa. Super. Ct. 2004).
112. *See id*.
113. Howard J. Bashman, *Unpublished Opinions Should be Allowed to be Cited*, THE LEGAL INTELLIGENCER, May 10, 2004, at 5.
114. *Schaaf*, 2004 WL 859182, at *1. Pennsylvania's no-citation rule is Superior Court Internal Operating Procedure § 65.37(A): "An unpublished memorandum decision shall not be relied upon or cited by a [c]ourt or a party in any other action or proceeding . . . ." PA. R. SUP. CT. I.O.P. 65.37(A).
115. *Schaaf*, 2004 WL 859182, at *1-3.
116. *Id*. at *2.
117. E-Government Act of 2002, Pub. L. No. 107-347, 1116 Stat. 2899.

W. Bush signed the act into law on December 17, 2002.[118] The act requires that each federal court establish a website with access to "all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter . . . ."[119] As a result, although a federal court opinion may not be published in a court reporter, the opinion will be available to anyone in the public who has access to the internet. The act, however, is not completely curative because the apparent force of the act will have no effect on past unpublished court opinions.[120] Only those opinions issued following the effective date of the E-Government Act will be subject to the act.[121] This is significant because it is extremely common to cite to old judicial opinions.

As a result of numerous contemporary factors, "unpublished" has a different meaning today than it did thirty years ago, at the time of the Board of the Federal Judicial Center's recommendation. Most importantly, technology, as evidenced by the E-Government Act, is making information much more accessible and manageable.[122] Included in this increasingly accessible pool of information are judicial opinions. Further, the conflicting treatment of unpublished opinions by both the Federal and the state appellate courts makes the reasons for PFRAP 32.1 more apparent.[123]

III. Analysis of the Arguments Surrounding Proposed Federal Rule of Appellate Procedure 32.1

The arguments against citing unpublished opinions and the implementation of PFRAP 32.1 are largely based upon the reasons unpublished opinions were first used in the 1970s.[124] The appellate courts implemented the label of "unpublished" judicial opinions because of the heavy workloads falling upon them.[125] By allowing judges to issue unpublished opinions, judges would be relieved from the pressures and extra work involved in writing a quality opinion that would be published in an official reporter. This would prevent judges from publishing substandard and inconsistent opinions.[126] In addition to the

118. President Signs E-Government Act, *at* http://www.whitehouse.gov/news/releases/2002/12/20021217-5.html (last visited Oct. 23, 2004).

119. E-Government Act of 2002 § 205(a)(5).

120. *Id.* at § 205(b)(2).

121. *Id*. The Federal Courts section of the E-Government Act states that "written opinions with a date of issuance after the effective date of this section shall remain available online." *Id*.

122. *See* Howard, J. Bashman, *Harried 9th Circuit Clawing to Keep No Citation Rules*, The Legal Intelligencer, Apr. 12, 2004, at 5 [hereinafter Bashman II].

123. *See* Memorandum, *supra* note 1, at 27; Barnett, *supra* note 7, at 473-84.

124. *Compare* Tony Mauro, *Proposal to Broaden Accessibility of Quick-Hit Unpublished Opinions Brings Criticism*, Broward Daily Bus. Rev., Apr. 14, 2004, at 8 [hereinafter Mauro II] *with* Morande, *supra* note 8, at 755.

125. *See* Southwick, *supra* note 13, at 203.

126. Morande, *supra* note 8, at 755.

many policy arguments surrounding PFRAP 32.1, there are also constitutional issues with unpublished opinions.[127] Proponents argue that the United States Constitution provides a basis that allows the use of unpublished opinions, while opponents argue that unpublished opinions are unconstitutional.[128]

A. *Arguments Surrounding PFRAP 32.1*

Opponents of PFRAP 32.1 base their arguments on a few major points.[129] First, they argue that allowing unpublished opinions to be cited in any way creates more work for judges.[130] Opponents argue that appellate judges will have to craft unpublished opinions with the same care given to published opinions.[131] Further, opponents contend that this takes the judges' time away from writing opinions that are currently being published.[132] As a result, judges will stop writing unpublished opinions and begin to dispose of cases with one-line decisions which are even less helpful than unpublished opinions.[133] Finally, opponents argue that allowing the citation of unpublished opinions will also create greater costs for litigants because lawyers would have to conduct extra research.[134]

PFRAP 32.1 causes these arguments to resurface with great fervor. Judge Alex Kozinski of the Ninth Circuit is one of the most visible opponents of PFRAP 32.1.[135] He argues that allowing the courts of appeals to designate some of their opinions as non-citable serves several important purposes.[136] Circuit courts with large case loads, like the Ninth Circuit, seem most concerned that allowing the use of unpublished opinions will create an unmanageable workload for the circuit judges and law clerks.[137] This argument is based on the premise that circuit judges do not have the time to create a thorough opinion for every case that comes before the court.[138] As a result, opinions that are potentially not thorough may become binding.

Furthermore, opponents note that courts of appeals are courts of mandatory jurisdiction, and cannot choose the cases that come before them.[139] The lack of discretion makes the development of a rational,

127. *See infra* notes 155-81.
128. *See infra* notes 155-81.
129. Kendall, *supra* note 103.
130. *Id*.
131. *Id*.
132. *Id.*
133. *Id.*
134. *Id*.
135. Bashman II, *supra* note 122, at 5.
136. *See id*.
137. *See* Groner, *supra* note 33, at 1.
138. Mauro II, *supra* note 124.
139. Cooper, *supra* note 6, at 430. The federal courts of appeals have jurisdiction of appeals from all final decisions of the district courts with few exceptions. 28 U.S.C. § 1291 (2004).

logical, and well-structured precedent difficult.[140] Opponents fear that allowing the use of unpublished opinions will create a situation in which the circuit courts could entangle themselves in their own ill-chosen words.[141]

All of the proponents' arguments for PFRAP 32.1 revolve around one idea: "[I]t's wrong for a court to forbid attorneys from calling to the court's attention its own prior decisions."[142] Proponents argue that there is no basis for the opponents' fears.[143] Third Circuit Judge Samuel Alito Jr. stated, "We just don't think that there is any empirical support for these contentions."[144] Proponents of the proposed rule are also concerned about the second-class treatment which unpublished decisions receive.[145]

Allowing courts of appeals to issue unpublished decisions also fosters inconsistency because courts render these decisions with little thought or accuracy.[146] A court's approach to writing unpublished, nonbinding opinions differs greatly from the approach to writing published opinions.[147] For example, in the Ninth Circuit, nonbinding opinions, or "memdispos," are produced at an average greater than one per day per panel.[148]

> 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 the 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.[149]

Stare decisis and precedent are concepts upon which the judicial system, litigants, and attorneys rely.[150] "The doctrine of precedent is like a pointillist painting with judicial opinions as the carefully placed points providing depth. The fewer opinions that are given precedential value, the less focused and detailed the picture becomes."[151] The Ninth Circuit's process of creating unpublished opinions is just one example of how the appellate courts are limiting the effect of the doctrine of precedent. If the judicial system placed equal importance

140. Cooper, *supra* note 6, at 430-31.
141. *See id.*
142. Kendall, *supra* note 103.
143. *Id*.
144. *Id*.
145. *Id*.
146. AMERICAN COLLEGE OF TRIAL LAWYERS, OPINIONS HIDDEN, CITATIONS FORBIDDEN 5 (2002).
147. *Id*.
148. *Id*. at 5-6.
149. *Id*. at 6.
150. *See* Strongman, *supra* note 21, at 195.
151. *Id*.

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upon all judicial opinions, the appellate courts would be forced to reconcile inconsistencies and uniformly apply the law. These results would have a positive impact upon the judicial system as a whole.

The incredible amount of judicial work and scholarship that goes into implementing and interpreting the rules surrounding unpublished opinions and the citation thereof is staggering.[152] Simplifying the system could be a very valuable solution to the hours of work that are put into a policy that creates inequity. For example, in *Schaaf v. Kaufman,* the Superior Court of Pennsylvania used ten pages to explain and support its no-citation rule.[153] After this lengthy portion of the opinion, the court needed only one page to explain that the court would have held the same way regardless of the no-citation rule.[154]

B. *Constitutional Arguments*

Treating some cases different than others not only seems unfair, but it may also be a violation of the Constitution. Those who oppose unpublished opinions argue that current and future litigants may be deprived of fair adjudication and due process of law. Apart from the Article III arguments presented by Judge Arnold in *Anastasoff*, the Fifth and Fourteenth Amendments to the United States Constitution provide the primary constitutional objections to non-binding, unpublished opinions.[155]

The Fifth Amendment guarantees individuals the right to due process of law.[156] The right of due process includes procedural protections.[157] Procedural due process provides that a fair procedure is used to determine the "depriv[ation] of life, liberty, or property" from any individual.[158] When an appellate court does not publish an opinion, it denies the opinion precidential value; thus, current and future litigants are prevented from relying on past actions of the court.[159] Procedural due process prevents the government from imposing arbitrary actions upon individuals.[160] If a court is not bound by its unpublished opinions, the court has the ability to arbitrarily reverse itself.[161]

152. *See* Bashman, *supra* note 113, at 5.
153. *Id*.
154. *Id*.
155. *See* Strongman, *supra* note 21, at 211-220.
156. U.S. Const. amend. V. "No person shall be . . . deprived of life, liberty, or property without due process of law." *Id.*
157. Daniel A. Farber et al., Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century 543 (2d ed. 1998). Due process consists of two categories of protection: substantive due process and procedural due process. *Id.* at 413. Substantive due process "provides some absolute limits on the deprivation of 'liberty' regardless of whether the state provides fair procedures prior to the deprivation of it." *Id.*
158. Strongman, *supra* note 21, at 211.
159. *Id.* at 212.
160. *Id.*
161. *Id.*

Such arbitrary action denies litigants fair procedure and thus violates the procedural due process guarantees of the Fifth Amendment.[162] Surrounding the concept of Fifth Amendment procedural due process is the idea of fairness within the judicial system. The United States Supreme Court stated that "[a] fair trial in a fair tribunal is a basic requirement of due process."[163] Further, the Court held that justice is most evenly administered when similarly situated parties are treated the same.[164]

Along with procedural due process, the Fifth Amendment contains protections equivalent to the Equal Protection Clause of the Fourteenth Amendment.[165] In *Bolling v. Sharpe*,[166] the United States Supreme Court created an equal protection doctrine within the Fifth Amendment similar to that of the Fourteenth Amendment. The Court limited the Federal Government when it declared that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."[167] In other words, just as states are prevented from denying individuals equal protection of the laws, so is the Federal Government.[168] Fair adjudication is a fundamental right; thus the standard of review for an equal protection analysis of non-precedential and unpublished appellate opinions is strict scrutiny.[169] If the Federal Government denies an individual's fundamental rights, strict scrutiny requires that the Federal Government promote a compelling governmental interest; otherwise, the act is unconstitutional.[170] Non-citation rules would probably not withstand a strict scrutiny analysis, and thus may be unconstitutionally enforced by the federal circuit courts.[171] Justifications for denying unpublished opinions full precedential value include the lack of judicial resources and the inability to access unpublished opinions.[172] Neither justification, however, promotes a compelling governmental interest, and therefore the federal circuit court rules are unconstitutional.[173] A similar analysis would apply to the state citation rules, but the Fourteenth Amendment would be substituted for the Fifth Amendment.[174]

162. *Id.*
163. *In re* Murchison, 349 U.S. 133, 136 (1955).
164. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).
165. U.S. Const. amend V. The Fourteenth Amendment prevents the states from depriving any person of "life, liberty, or property, without due process of law." U.S. Const. amend XIV, § 1.
166. 347 U.S. 497 (1954).
167. *Id.* at 500.
168. Strongman, *supra* note 21, at 217.
169. *Id.* at 218-220.
170. *Id.* at 220.
171. *Id.*
172. *Id.*
173. *Id.*
174. *See id*. at 215-16.

As a result of *Anastasoff*, the proponents of unpublished opinions base their constitutional arguments primarily upon the Article III "judicial power" issue.[175] These arguments are best stated in Judge Kozinski's Ninth Circuit opinion in *Hart v. Massanari*.[176] In *Hart*, Judge Kozinski addressed the argument that Judge Arnold presented in *Anastasoff*.[177] As previously discussed, Judge Arnold argued that the actions of the courts are limited by Article III's "judicial power" provision.[178] Judge Kozinski asserted that the term "judicial power" is "more likely descriptive than prescriptive."[179] In addition, he questioned whether it provided any limitation upon the courts other than those specifically provided in Article III.[180] Judge Kozinski based his argument on the fact that the Constitution does not expressly prohibit unpublished opinions because, contrary to Judge Arnold's belief, the Framers would not have disagreed with the practice of issuing unpublished opinions.[181]

Aside from the constitutional arguments, the policies of our judicial system demand equal treatment of appellate opinions.[182] Barring the citation of unpublished opinions creates "a vast body of case law that plays no active part in the legal system and does little to contribute to legal jurisprudence as a whole."[183]

IV. A Better Approach to Appellate Court Opinions

The legal system requires more of our appellate judges than a discriminatory treatment of appellate cases.[184] PFRAP 32.1 does not simplify the current system; instead, it prolongs the poor policy of the unequal treatment of appellate opinions as binding and non-binding precedent.[185] There is a simple and fair solution: treat all judicial opinions issued by federal and state appellate courts as binding precedent upon the courts that issue the opinions. The unnecessary distinctions between binding precedent, non-binding precedent, and persuasive value create needless work, debate, and uncertainty. The term "unpublished opinion" developed into an antiquated misnomer, and the non-binding status given to unpublished opinions is equally

175. *See* Hart v. Massanari, 266 F.3d 1155 (8th Cir. 2001).
176. *Id.* at 1159-61.
177. *Id*.
178. Anastasoff v. U.S., 223 F.3d 898, 903 (8th Cir. 2000).
179. *Hart*, 266 F.3d at 1161.
180. *Id.*
181. *Id.* at 1163.
182. *See* Memorandum, *supra* note 1, at 32; Morande, *supra* note 8, at 751.
183. Morande, *supra* note 8, at 752.
184. Memorandum, *supra* note 1, at 32.
185. *See id*. at 27-36.

antiquated and is a subject of judicial abuse.[186] Further, the rationale for the creation of non-binding opinions is outdated.[187]

The term "unpublished opinion" has little significance and will have even less significance in the future as a result of growing technology.[188] For example, publishing every appellate court opinion in an official reporter is unrealistic because it would create endless volumes of books. Treating all opinions as binding precedent, however, does not demand that each opinion be published in an official reporter. Those opinions with special significance would continue to be published in the official reporters, while the remaining opinions would be available through electronic media, or from the clerks of the courts. Most importantly, the opinions not published in an official reporter should be binding precedent in the same way that opinions published in an official reporter are binding upon the courts. With the technology available today, there is no need to restrict binding precedent to only those opinions available in books.[189] The development of technology provides the opportunity to dispose of paper limitations.[190] Westlaw, Lexis, and the E-Government Act enable the judicial system to move beyond these paper limitations without fear of filling law libraries to the ceiling.[191] The judicial system can now go back to the equal treatment of all appellate opinions and bind the appellate courts to all the opinions that they issue as it did before the 1970s.

An approach requiring precedential status for all appellate court opinions recognizes that bound official reporters will continue to play a very important role in the judicial system. Today, almost every lawyer is trained to do research the old fashion way, with reporters and indexes. Technology creates a divide among lawyers: those who embrace technological advances and those who do not.[192] Lawyers who choose not to use technology usually do so for several reasons including lack of access to, knowledge of, or desire to learn about computers.[193] One of the arguments against the technological expansion of legal research is that those who do not use computers will be squeezed out of the practice of law.[194] Those who do not use technology, however, will not be negatively affected because access to the

186. See Morande, *supra* note 8, at 754.
187. *See id*.
188. *Id*.
189. *Id*.
190. *Id*.
191. *See id*.
192. *See* Tracey Baetzel & Carl W. Herstein, *Virtual Memory: Looking Back at the Changing Relationship Among Lawyers, Law Firms and Technology*, 77 MICH. B.J. 422, 426 (1998).
193. *See id.* Many lawyers who learned and practiced a majority of their law during the non-technological era often find it difficult to integrate technology into their practice. *Id.*
194. Samuel A. Guiberson, *The Challenge of Technology in the New Practice of Law*, 25 OHIO N.U. L. REV. 563, 567 (1999).

non-reporter opinions will also be available through the clerks of the courts.[195]

The time it takes to research, write, and produce a final judicial opinion is a concern, but is based upon false assumptions and bad policy.[196] PFRAP 32.1 is an illogical solution because it still allows courts to treat some judicial opinions as more important than others.[197] Judicial time and resources should be equally divided among all cases and opinions. A solution that makes each opinion issued by an appellate court binding would cause the court to divide time equally when handling opinions. In fact, the Tenth Circuit's publication criteria puts such a policy into effect by stating that no case is "unimportant" regardless of whether the opinion is published.[198] Contrary to Judge Kozinski's arguments involving lack of judicial time and resources, the Ninth Circuit's publication criteria also alludes to the policy that all opinions, whether published or not, should be treated equally.[199] The Ninth Circuit defines an opinion as "[a] written, reasoned disposition of a case . . . ."[200] With the same language, the Ninth Circuit defines a "memorandum" (unpublished opinion) as "[a] written, reasoned disposition of a case . . . ."[201] In other words, published or not, the circuit courts are supposed to treat their opinions equally. Thus, the argument regarding lack of judicial time and resources is without merit because appellate court judges should already invest their time equally in every opinion.

The growing length of the average published opinion also raises the concern that some opinions are treated with greater care and thought than others.[202] In fact, because appellate courts have the luxury of issuing unpublished opinions, they can spend disproportionate amounts of time on opinions that will be published and binding. Often, published opinions are filled with needless legal background

195. *Cf.* Baetzel & Herstien, *supra* note 191, at 426. "Those who don't consider themselves computer literate should not despair. They can partner with someone who is . . . ." *Id*. The future is not completely bleak for those who do not embrace technology, as long as they maintain a level of resourcefulness.

196. Bashman II, *supra* note 122, at 5.

197. Memorandum, *supra* note 1, at 28.

198. 10TH CIR. R. 36.1. The Tenth Circuit Rules state as follows:

> The court does not write opinions in every case. The court may dispose of an appeal or petition without written opinion. Disposition without opinion does not mean that the case is unimportant. It means that the case does not require application of new points of law that would make the decision a valuable precedent. *Id.*

199. 9TH CIR. R. 36-1.

200. *Id.*

201. *Id.*

202. *See* AMERICAN COLLEGE OF TRIAL LAWYERS, *supra* note 146, at 3. Judge Alex Kozinski and Stephen Reinhardt explain that "[w]riting 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." *Id.* (citing 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).

and dicta that create more of a treatise than an appellate opinion.[203] The judicial system would benefit from the elimination of non-binding opinions because appellate courts would be forced to more efficiently divide their time among opinions, thereby ceasing to produce lengthy opinions for a fraction of cases.

Unlike the United States Supreme Court and the state supreme courts, the federal and state intermediate appellate courts have mandatory jurisdiction.[204] The federal circuit courts, for example, do not choose which cases will come before them.[205] If a party to a case in one of the federal district courts appeals an issue, the case will come before the corresponding circuit court.[206] Judge Kozinski feared that making all opinions issued by an appellate court binding upon that court would prevent a rational development of precedent. Nevertheless, this fear exists only because appellate court justices are aware of the lack of care that is used when issuing unpublished opinions. Additionally, Judge Kozinski also admits that "unpublished opinions tend to be thin on the facts and written in loose, sloppy language."[207] In other words, a circuit judge is faced with two choices at the point of the publication decision: issue an opinion that will be published and become binding precedent or issue a potential "loose" and "sloppy" unpublished opinion that will not bind the court.[208] As a result, unpublished decisions and no-citation rules empower the intermediate courts of appeals with the ability to choose which cases receive precidential value.[209]

If a circuit court does not like something about a case that has come before it upon appeal, the judges of the circuit court can minimize its impact by issuing an unpublished decision.[210] The opinion becomes useless among all other unpublished opinions and is lost.[211] This is a flaw in the judicial system. PFRAP 32.1 remedies this flaw to an extent but does not fully resolve the problem. It merely provides a method by which unpublished opinions can be presented to the courts as persuasive and non-binding precedent.[212]

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203. *Cf.* American College of Trial Lawyers, *supra* note 146, at 3 (comparing the time spent writing opinions to the time spent writing law review articles).

204. Sup. Ct. R. 10. "Review on a writ of certiorari is not a matter of right, but of judicial discretion." *Id*.

205. Cooper, *supra* note 6, at 430. The federal courts of appeals have jurisdiction to review all final decisions of the district courts with few exceptions. 28 U.S.C § 1291 (1993).

206. Cooper, *supra* note 6, at 430; 28 U.S.C § 1291.

207. Mauro II, *supra* note 124.

208. *See id.*

209. *Compare* Sup. Ct. R. 10 *with* Mauro II, *supra* note 124.

210. Mills, *supra* note 3, at 66. "[A] judge who feels that she should reach a certain result in a case, but who cannot justify that result under existing precedent, has the option of deciding the case in an unpublished opinion and thus sweeping the problem under the rug." *Id*.

211. *See id*.

212. *See* Memorandum, *supra* note 1, at 27-36.

Unpublished opinions also have some bearing on the trial courts. Occasionally, opinions issued at the trial court level are published in official reporters, but this occurs only when a trial court opinion holds particular significance.[213] Trial court opinions often cover small areas and are only self-binding. Therefore, it is conceivable that the idea that all court opinions are binding precedent could apply to the trial courts.[214] Nevertheless, this issue has caused little debate at the trial court level.[215] Because appellate courts opinions are binding precedent on other courts, their unpublished opinions have caused controversy.[216] Thus, as a starting point, the issue of unpublished opinions should be addressed at the appellate court level.

Unpublished opinions seem to serve only one purpose: to perpetuate the mistreatment of some cases as inferior to others. Courts continue to use unpublished opinions primarily because of a fear of lack of judicial time and resources.[217] This fear, however, fails to be a sufficient reason for the deterioration of the judicial system.

V. Conclusion

Even if the federal circuit courts implement PFRAP 32.1, it does not do enough to address the non-binding status placed upon the majority of opinions issued by appellate courts.[218] The proposed rule fails to stop inconsistent treatment of some judicial opinions as non-binding precedent.[219] Furthermore, it fails to have any effect upon state appellate courts because it is a federal rule, applicable only to federal appellate courts.[220] A consistent approach to the treatment of appellate opinions in both the federal and state courts of appeals is not only sound policy, but arguably constitutionally required.

The nightmare scenario, in which a lawyer relies upon the prior actions of an appellate court, only to learn that to do so is futile because of the unpublished nature of the appellate court's previous actions, does not have to continue in the appellate courts in the United States. PFRAP 32.1 does very little to resolve the predicament in this scenario, but a return to universal precedential value would create consistency and provide a solution. If the hypothetical circuit court was held to its previous opinions, it would eliminate the uncertainty

213. *See* William A. Hilyerd, *Using The Law Library: A Guide For Educators – Part I: Untangling The Legal System*, 33 J.L. & Educ. 213, 221 (2004).
214. *See id.*
215. *See generally* Anastasoff v. U.S., 223 F.3d 898 (8th Cir. 2000) (challenging unpublished opinions rule of appellate court); Hart v. Massanari, 226 F.3d 1155 (9th Cir. 2001) (challenging unpublished opinions rule of appellate court).
216. *Id.*
217. Mauro II, *supra* note 124.
218. *See* Memorandum, *supra* note 1, at 27-36.
219. *See id*.
220. *See id.*

caused by non-binding opinions among the parties and the appellate judges.

The problem caused by distinguishing unpublished opinions as non-binding cannot be solved by allowing unpublished opinions merely to be cited. Unless all opinions are treated equally as precedent of the appellate courts that issue them, the appellate judicial system will continue to be flawed. A large majority of cases are being resolved every year by judicial opinions that are tossed aside and labeled unpublished, non-precedential, and unimportant.[221] It is a practice that allows the appellate courts in the United States to deviate from the core principles of stare decisis and the doctrine of precedent. The harms resulting from rules that allow the issue of unpublished opinions now outweigh the reasons those rules were first implemented. The judicial system would be making an important self-correcting change if it went beyond the rules suggested by PFRAP 32.1; eliminated labeling opinions as unpublished and non-binding; and gave full precedential value to all opinions. For now however, the majority of opinions issued by appellate courts in the United State bind no-one.

221. *See* Mills, *supra* note 3, at 62.