The Failings of Originalism: The Federal Courts and the Power of Precedent

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The past thirty years have witnessed a dramatic change in the process of appellate review in the United States Court of Appeals. Oral argument occurs in only a select handful of appeals;[1] the time available for collective deliberation has dwindled;[2] and, the published written opinion — the hallmark of American appellate justice — is now the exception rather than the rule.[3] The cause for these phenomena is well known: caseloads have ballooned, swamping the resources (time and otherwise) of the judges on the courts of appeals.[4]

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[1] In 2001, the Court of Appeals held oral argument in only 32% of the cases decided on the merits. 2001 ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. OF THE DIR. 38 tbl.S-1 [hereinafter 2001 ANN. REP.]. That figure is down from 37% in 1999. 1999 ADMIN. OFFICE OF THE U.S. COURTS ANN. REP. OF THE DIR. 47 tbl.S-1 [hereinafter 1999 ANN. REP.]. Moreover, that figure conceals a significant disparity among the circuits regarding the availability of oral argument for litigants. The Fourth Circuit granted oral argument in only 19% of its cases (the lowest percentage of any circuit), while the Second Circuit granted oral argument in 53% of its cases (the highest). 2001 ANN. REP., *supra*, at 38. The Second Circuit was the only circuit to grant oral argument in more than half of its cases. *Id.*

[2] In 2001, 28,840 cases were decided on the merits in the various circuits (excluding the Federal Circuit). 2001 ANN. REP., *supra* note 1, at 38 tbl.S-1. According to the Administrative Office of the United States Courts, each active judge on the court of appeals in 2001 participated on average in 498 cases decided on the merits and was responsible for 168 written decisions. *See* Administrative Office of the United States Courts, *U.S. Court of Appeals — Judicial Caseload Profile, available at* http://www.uscourts.gov/cgi-bin/cmsa2001.pl. Even assuming a 60-hour workweek, there were only 6.27 hours available to devote on average to each case, and that includes the time spent reading the briefs, listening to oral argument (if there was such), deliberating at conference, and preparing a written decision (once again, if there was such). If one assumes a 40-hour workweek, the time available drops to 4.18 hours per case.

To be sure, one should be cautious about attributing too much significance to these figures. For example, the presence of senior judges and district court judges sitting by designation provides some additional manpower to assist active judges adjudicate the large number of cases. Nevertheless, active judges still carry the brunt of the workload of each circuit: 79% on average and up to 98.5% in the District of Columbia Circuit. 2001 ANN. REP., *supra* note 1, at 39 tbl.S-2. Moreover, adjudicating cases on the merits comprises only a portion of each judge's judicial responsibilities. In addition to the nearly 29,000 cases adjudicated on the merits, the federal court of appeals resolved 11,761 cases on procedural grounds, adjudicated untold (but numerous) motions related to the appeals, and (of course) administered the court itself. *Id.* at 75 tbl.B-1. In short, while one may quibble about the actual number of hours each judge devotes on average to each case, the underlying point — that the burgeoning caseload has diminished the time available to focus on each case — remains incontestable.

[3] Of the 28,840 cases decided on the merits in 2001, fewer than 6,000 resulted in a published, written opinion. 2001 ANN. REP., *supra* note 1, at 40 tbl.S-3.

[4] In the period between 1960 and 1990, the number of federal appeals increased ten-fold. THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 19 (1994). In 2001 alone, there were 57,464 filings in the Court of Appeals — an increase of over 5% from 2000. *See* 2001 ANN. REP., *supra* note 1, at 74 tbl.B. The cause for this increase is hotly contested. A recent study by the Federal Judicial Center suggested that the increase in appeals resulted primarily from an increase in civil appeals — criminal

Of all the changes in the appellate process fostered by the rise in caseload, perhaps the most dramatic has been the decision by the courts of appeals to refrain from publishing each and every decision. Today, more than 80% of all decisions rendered on the merits by the U.S. Court of Appeals — more than four out of five decisions — are unpublished.[5] Moreover, by local rule, each court of appeals limits the jurisprudential value of these unpublished decisions, declaring that they have little or no precedential value and, in some circuits, forbidding litigants to cite to these decisions in their briefs.

Not surprisingly, this practice of issuing unpublished, non-precedential opinions has engendered a firestorm of debate. Soon after the various circuits adopted rules providing for the issuance of unpublished opinions in the early 1970s, commentators questioned the desirability of these rules and raised concerns about the practical consequences for appellate decision making.[6] Some — but far from all[7] — judges leapt to the rules' defense, asserting that the rules were a necessary response to the burgeoning caseload.[8] By and large, the debate

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appeals grew only "modestly" during the appellate litigation explosion of the 1980s. *See* FEDERAL JUDICIAL CENTER, STALKING THE INCREASE IN THE RATE OF FEDERAL CIVIL APPEALS 2 (1995). Moreover, the study concluded that the increase in civil appeals resulted "mainly" from an increase in lawsuits being filed in the district courts and not from a generalized increase in the propensity of litigants to appeal. *Id.* at 3-4.

[5] 2001 ANN. REP., *supra* note 1, at 40 tbl.S-3.

[6] *See, e.g.*, William L. Reynolds & William M. Richman, *The Non-Precedential Precedent — Limited Publication and No-Citation Rules in the United States Courts of Appeal*, 78 COLUM. L. REV. 1167 (1978) [hereinafter Reynolds & Richman, *Non-Precedential Precedent*]; William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981) [hereinafter Reynolds & Richman, *The Price of Reform*]; 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, 959-62 (1989).

[7] *See In re* Rules of the United States Court of Appeals for the Tenth Circuit, Adopted Nov. 18, 1986, 955 F.2d 36, 36 (10th Cir. 1992) (Holloway, C.J., concurring and dissenting) (dissenting from circuit's adoption of provision barring citation of unpublished decisions and declaring that such decisions possess "no precedential value"). In addition, presaging his later decision, Judge Richard Arnold wrote an article in 1999 that was highly critical of the no-precedent rules. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219 (1999).

[8] *E.g.*, Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1494-95 (1995); Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 189-93 (1999); Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909, 916-19, 928 (1986); David S. Tatel, *Some Thoughts on Unpublished Decisions*, 64 GEO. WASH. L. REV. 815, 816 (1996); *see also* JONATHAN M. COHEN, INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS 74-75 (2002) (discussing anonymous interview with circuit judges defending need

between opponents and defenders of the rules was policy driven.[9]

In 2000, the controversy surrounding these rules took a decided, constitutional turn. That year, a panel of the U.S. Court of Appeals for the Eighth Circuit struck down as unconstitutional the Eighth Circuit's no-precedent rule in *Anastasoff v. United States*.[10] Although the Eighth Circuit en banc subsequently vacated the panel's decision,[11] thereby restoring (for the time being) the circuit's no-precedent rule, the panel's decision unleashed a torrent of commentary.[12] *Anastasoff* was soon followed by decisions in the Ninth Circuit and Federal Circuit, both of which expressly disagreed with the *Anastasoff* decision and upheld their circuits' no-precedent rules against constitutional challenge.[13]

Recent events have only increased the interest in the constitutionality of the no-precedent rules. In August 2003, the United States Judicial Conference's Standing Committee on Rules of Practice and Procedure published for public comment a proposed Rule 32.1 of the Federal Rules of Appellate Procedure to govern the citation of unpublished opinions.

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to issue unpublished opinions).

[9] *See* Salem M. Katesh & Alex V. Chachkes, *Constitutionality of 'No-Citation' Rules*, 3 J. APP. PRAC. & PROCESS 287, 295-96 (2001) (observing that debate about rules has rested "almost exclusively" on policy grounds).

[10] Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000).

[11] Anastasoff v. United States, 235 F.3d 1054 (8th Cir. 2000) (en banc).

[12] *E.g.*, Kenneth A. Laretto, Note, *Precedent, Judicial Power, and the Constitutionality of "No-Citation" Rules in the Federal Courts of Appeals*, 54 STAN. L. REV. 1037 (2002); Sheree L. K. Nitta, Note, *The Price of Precedent:* Anastasoff v. United States, 23 U. HAW. L. REV. 795 (2001); Christian F. Southwick, Note, *Unprecedented: The Eighth Circuit Repaves* Antiquas Vias *with a New Constitutional Doctrine*, 21 REV. LITIG. 191 (2002).

In addition, the Journal of Appellate Practice and Process, which is published by the University of Arkansas at Little Rock School of Law, devoted almost an entire issue to articles on the Eighth Circuit's decision. *See* R. Ben Brown, *Judging in the Days of the Early Republic: A Critique of Judge Richard Arnold's Use of History in* Anastasoff v. United States, 3 J. APP. PRAC. & PROCESS 355 (2001); K. K. DuVivier, *Are Some Words Better Left Unpublished?: Precedent and the Role of Unpublished Opinions*, 3 J. APP. PRAC. & PROCESS 397 (2001); Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199 (2001); Daniel N. Hoffman, *Publicity and the Judicial Power*, 3 J. APP. PRAC. & PROCESS 343 (2001); Katesh & Chachkes, *supra* note 9, at 287; Charles G. Mills, Anastasoff v. United States *and Appeals in Veterans' Cases*, 3 J. APP. PRAC. & PROCESS 419 (2001); Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. APP. PRAC. & PROCESS 251 (2001); J. Thomas Sullivan, *Concluding Thoughts on the Practical and Collateral Consequences of* Anastasoff, 3 J. APP. PRAC. & PROCESS 425 (2001); Stephen L. Wasby, *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J. APP. PRAC. & PROCESS 325 (2001); Melissa H. Weresh, *The Unpublished, Non-Precedential Decision: An Uncomfortable Legality*, 3 J. APP. PRAC. & PROCESS 175 (2001).

[13] Symbol Techs., Inc. v. Lemelson Med., Educ. & Research Found., L.P., 277 F.3d 1361 (Fed. Cir. 2002); Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001).

The rule forbids the citation of unpublished opinions except in related cases or in cases in which there is no published opinion that "adequately addresses" the issue.[14] Despite the professed need for a uniform, national rule for unpublished opinions, the accompanying advisory note makes clear that the various circuits retain the power to determine the precedential value of their unpublished decisions, thereby leaving in place the local rules designating unpublished opinions as non-precedential.[15] Public comments regarding the rule are due by February 16, 2004; and, if the rule is approved, it will take effect in late 2005.

Although there is great interest in the constitutionality of these rules, there is little consensus regarding how to frame the constitutional question, much less how to answer it. *Anastasoff* and *Hart v. Massanari* focus on the Vesting Clause of Article III, Section 1 of the U.S. Constitution[16] and debate whether the Framers viewed the doctrine of precedent as a constituent part of the "judicial Power" granted to the federal courts.[17] Commentators have also invoked the First Amendment,[18] due process (both substantive and procedural),[19] and equal protection.[20]

In my view, *Anastasoff* and *Hart* correctly identify Article III as the touchstone of the constitutional inquiry, but their constitutional analysis goes astray, focusing on the historical pedigree of the doctrine of precedent. The Eighth Circuit concluded that its no-precedent rule was

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[14] *See* Letter from Seth Waxman, Solicitor General of the United States, to Hon. Will Garwood, Chair of the Advisory Committee for the Federal Rules of Appellate Procedure, at app. (Jan. 16, 2001) (copy on file with author).

[15] *See id.; see also id.* at 1 ("All circuits agree that unpublished decisions are not binding precedent, and this proposed amendment would not alter that practice.").

[16] U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

[17] *Hart*, 266 F.3d at 1160-62; Anastasoff v. United States, 223 F.3d 898, 900 (8th Cir. 2000).

[18] *See* Katesh & Chachkes, *supra* note 9, at 313-15.

[19] *See* Southwick, *supra* note 12, at 214; Sullivan, *supra* note 12, at 432-33; Weresh, *supra* note 12, at 193-95; David Dunn, Note, *Unreported Decisions in the United States Courts of Appeals*, 63 CORNELL L. REV. 128, 143-45 (1977); William J. Miller, Note, *Chipping Away at the Dam:* Anastasoff v. United States *and the Future of Unpublished Opinions in the United States Courts of Appeals and Beyond*, 50 DRAKE L. REV. 181, 204 (2001); Jon A. Strongman, Comment, *Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value is Unconstitutional*, 50 U. KAN. L. REV. 195, 211-15 (2001); Lance A. Wade, Note, *Honda Meets Anastasoff: The Procedural Due Process Argument Against Rules Prohibiting Citation to Unpublished Judicial Decisions*, 42 B.C. L. REV. 695, 722-31 (2001).

[20] *See* Southwick, *supra* note 12, at 214; Sullivan, *supra* note 12, at 433; Strongman, *supra* note 19, at 215-22.

unconstitutional because, according to the court, "[t]he Framers thought that, under the Constitution, judicial decisions would become binding precedents in subsequent cases."[21] In contrast, the Ninth Circuit ruled that the Framers "would have reacted with alarm" at the prospect of "rigid" adherence to precedent.[22] In short, both implicitly assume that the constitutional question turns upon an originalist-oriented, historical inquiry — whether the doctrine of precedent was sufficiently established at the time of the Founding to conclude that the Framers intended to incorporate it into the "judicial Power" vested by Article III in the federal courts.

In my view, both courts ask the wrong question. While history is, of course, important to constitutional interpretation, the historical materials are too opaque and the views of the Framers regarding the role of precedent in judicial decision-making are too ill-formed to justify the conclusion that the no-precedent rules are unconstitutional or, conversely, that they are constitutional. The Framers never engaged in a focused discussion of the role of precedent in federal court adjudication, much less whether the Vesting Clause of Article III required some respect for precedent and, if so, in what form. Rather, the Framers made only infrequent and cursory references to the doctrine of precedent, usually as part of a discussion regarding an entirely different topic such as the life tenure of federal judges or the equitable jurisdiction of the Supreme Court.

Critically, however, this opacity in the historical materials does not cut in favor of the constitutionality of the no-precedent rules. Rather, as I explain, when it comes to the constitutionality of challenged practices of the federal courts, originalist-oriented inquiries cannot fall back on a adjudicatory default rule that instructs courts, when in doubt, to uphold the questioned practice's constitutionality. Originalists defend such a default rule on the ground that it respects the democratic process by restraining unelected federal judges and requiring them to uphold a practice unless it is clear that the Constitution as understood by the Framers would condemn the practice.[23] Most of the practices of the federal courts, such as the no-precedent rules, however, are not the product of a democratic process; rather, they were adopted by the same unelected judges who would determine their constitutionality. Thus, a

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[21] *Anastasoff*, 223 F.3d at 902.

[22] *Hart*, 266 F.3d at 1167.

[23] *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 153 (1990); *see also infra* text accompanying notes 306-11.

respect for democratic governance does not require the federal courts to assume that the rules are constitutional, as they might with legislation or administrative action. The implication of this insight for originalist-oriented inquiries into the power of the federal courts — for which the historical record offers very little guidance — is manifest: The absence of a clear indication of the Framers' views does not cut in favor of the constitutionality of a practice; it demonstrates the irrelevance of originalism as an interpretive methodology in these cases.

In Part I, I briefly describe the origins of the development of the court rules that designate the courts' unpublished opinions as possessing limited or no precedential value. I then turn in Part II to the *Anastasoff* and *Hart* decisions and identify both the ground on which they agree — that Article III provides the proper framework for evaluating the rules' constitutionality and that the meaning of Article III is to be determined in accordance with the views of the Framers — and the ground on which they disagree — that the Framers viewed the doctrine of precedent as an essential component of the "judicial Power" vested in the federal courts by Article III. In particular, I identify the historical sources from before the Framing, during the Framing, and after the Framing to which the two courts turn to support their widely divergent views of the Framers' intent. In Part III, I then assess whether the courts were correct to focus on Article III, rather than due process or some other constitutional provision, in assessing the rules' constitutionality. In Part IV, I evaluate the two courts' historical claims, demonstrating that the historical materials regarding Article III and the federal courts are too opaque to provide any definitive sense of the Framers' views of the role of precedent in federal court adjudication. Finally, in Part V, I demonstrate that the opacity of the historical materials regarding Article III does not militate in favor of the rules' constitutionality but rather demonstrates the irrelevance of originalism to questions involving the constitutionality of federal court practices and procedures.

My argument proceeds on two levels. On a narrower level, my specific concern is with the constitutionality of the no-precedent rules. As I demonstrate, that issue cannot be resolved by an originalist-oriented inquiry into the Framers' understanding of the "judicial Power." Rather, some other analytical framework must be used to determine whether these rules are constitutional.

On a second, broader level, my concern is with the use of history to resolve the constitutional status of various practices and procedures adopted by the federal courts. The no-precedent rules are but one example of federal court practices subject to constitutional challenge.

The decline in the availability of oral argument, the growing popularity of issuing summary, one-line decisions, and the increasing influence of non-judicial staff in screening cases (to name just a few) are likely to come under constitutional fire in the years ahead as those practices become more prevalent. As my analysis shows, history will not provide the conclusive answer to the constitutionality of these practices. Rather, that answer must be found elsewhere, and, in the meantime, it will not do to uphold these practices simply because the historical records are unclear.

I. THE RISE OF THE NO-PRECEDENT RULES

There are three different types of rules that are often lumped together in the discussion regarding the selective publication of opinions in the courts of appeals: the selective publication rule itself, which authorizes the court to issue unpublished opinions and specifies the criteria the court is to use to determine whether to publish a particular opinion;[24] the no-citation rule, which bars or limits counsel from citing unpublished decisions in materials filed with the court;[25] and the no-precedent rule,

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[24] *See* D.C. CIR. R. 36(c); 1ST CIR. R. 36(a) & IOP IX(b); 2D CIR. R. 0.23; 3D CIR. IOP 5.3; 4TH CIR. R. 36(a); 5TH CIR. R. 47.5.1; 6TH CIR. R. 206(a); 7TH CIR. R. 53(c)(1); 8th Cir. Plan for Publication of Opinions ¶ 1; 9TH CIR. R. 36-1 & 36-2; 10TH CIR. R. 36.2; 11TH CIR. R. 36-2 & IOP 5; FED. CIR. R. 47.6(a) & IOP 10.3.

A majority of the circuits have adopted detailed rules or guidelines for judges to use in determining whether a particular opinion should be published. *See* D.C. CIR. R. 36(a)(2); 4TH CIR. R. 36(a); 5TH CIR. R. 47.5.1; 6TH CIR. R. 206(a); 7TH CIR. R. 53(c)(1); 8th Cir. Plan for Publication of Opinions ¶ 4; 9TH CIR. R. 36-2; FED. CIR. IOP 10.4. The other circuits provide only general, vague guidance to their judges. For example, the Second Circuit advises judges that, where "no jurisprudential purpose would be served by a written opinion," the panel's decision should be made in open court or by unpublished summary order. 2D CIR. R. 0.23. The Third Circuit advises judges that opinions "which appear to have value only to the trial court or the parties" should be unpublished. 3D CIR. IOP 5.3. For an insightful explanation of the internal application of these rules, see Wasby, *supra* note 12, at 332-36 (providing overview of publication decision-making process).

[25] *See* 1ST CIR. R. 36(a), (b)(2)(F); 2D CIR. R. 0.23; 7TH CIR. R. 53(b)(2)(iv); 9TH CIR. R. 36-3(b); FED. CIR. R. 47.6(b); FED. CIR. IOP 9.9. These circuits have carved a narrow exception to their no-citation rules to permit citation to unpublished opinions for the purpose of establishing res judicata, collateral estoppel, or law of the case. *See* 1ST CIR. R. 36(b)(2)(F) (unpublished opinions may be cited "only in related cases"); 2D CIR. R. 0.23 (unpublished opinions may not be cited "in unrelated cases"); 7TH CIR. R. 53(b)(iv) (unpublished order shall not be cited "[e]xcept to support a claim of res judicata, collateral estoppel or law of the case"); 9TH CIR. R. 36-3(b) (unpublished opinions may be cited "when relevant under the doctrine of law of the case, res judicata, or collateral estoppel"). In addition, the Ninth Circuit has expanded its exception to its no-citation rule to include circumstances in which the citation is "for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case." 9TH CIR.

which declares that unpublished decisions have no or limited precedential value.[26] My concern is with the last of these rules, which has been the subject of the most fierce constitutional challenge in the federal courts.

Though the circuits have incorporated the no-precedent rules into their selective publication rules, the no-precedent rules are not an original component of the latter. The selective publication and no-

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R. 36-3(b)(ii). In any event, the "res judicata" exception to the no-citation rule offers little hope to counsel since an unpublished decision will be relevant under those doctrines only when the unpublished decision involves one of the parties to the current lawsuit — an extremely rare circumstance.

In addition to the foregoing circuits, the D.C. Circuit forbids citation to its unpublished decisions rendered before January 1, 2002, though it permits citation to its unpublished decision rendered after that date. *See* D.C. CIR. R. 28(c)(1).

Lastly, of the circuits that allow parties to cite unpublished decisions, most expressly declare that citation to unpublished opinions is "disfavored" and should be done only if "there is no published opinion that would serve as well." 4TH CIR. R. 36(c) (providing that citation is "disfavored" but permitted where counsel believes that an unpublished decision "has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well"); 6TH CIR. R. 28(g) (providing that citation is "disfavored" but permitted where a party believes that an unpublished decision "has precedential value in relation to a material issue in a case, and that there is no published opinion that would serve as well"); 8TH CIR. R. 28A(i) ("[P]arties generally should not cite [unpublished opinions]" but may do so "if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well."); 10TH CIR. R. 36.3(b) (providing that citation is "disfavored" but unpublished opinion may be cited if "(1) it has persuasive value with respect to a material issue that has not been addressed in a published opinion and (2) it would assist the court in its disposition"); 11TH CIR. R. 36-3 IOP ¶ 5 (providing that reliance on unpublished opinions "is not favored" but they may be cited "as persuasive authority").

[26] *See* D.C. CIR. R. 28(c)(1)(A) (providing that unpublished decision issued before Jan. 1, 2002 may not be "cited as precedent"); 3D CIR. IOP 5.3; 5TH CIR. R. 47.5.4 (providing that unpublished opinions issued after Jan. 1, 1996 "are not precedent, except under the doctrine of res judicata, collateral estoppel, or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorneys' fees, or the like)"); 4TH CIR. IOP 36.3 (providing that court may decide appeal by summary opinion if all judges on panel agree that opinion "would have no precedential value"); 5TH CIR. R. 47.5.4 (providing that unpublished decisions issued on or after Jan. 1, 1996 "are not precedent"); 6TH CIR. IOP 205(c) ("Reported panel opinions are binding on subsequent panels."); 7TH CIR. R. 53(b)(2)(iv) (providing that unpublished orders shall not be "used as precedent"); 8TH CIR. R. 28A(i) (providing that unpublished opinions "are not precedent"); 9TH CIR. R. 36-3(a) (providing that unpublished opinions "are not binding precedent, except when relevant under the doctrine of law of the case, res judicata, and collateral estoppel"); 10TH CIR. R. 36.3(a) (providing that unpublished opinions "are not binding precedents, except under the doctrines of law of the case, res judicata, and collateral estoppel"); 11TH CIR. R. 36-2 & IOP 5 (providing that unpublished opinions "are not considered binding precedent"); FED. CIR. R. 47.6(b) (providing that unpublished opinions must not be "cited as precedent"); *see also* FED. CIR. R. 47.6(c) (referring to unpublished opinions as "nonprecedential").

citation rules emerged in the early 1970s in response to a mandate issued by the Judicial Conference of the United States to the various courts of appeals directing them to develop "opinion publication plans" providing for the selective publication of appellate decisions.[27] Significantly, however, the Judicial Conference did not mandate that the circuits include a no-precedent rule in their publication plan. Indeed, at the time, no serious attention was given to the notion that the ensuing unpublished opinions would lack precedential status. The Board of the Federal Judicial Center, whose 1972 recommendation and report endorsing selective publication had prompted the Judicial Conference's directive, recommended only that unpublished opinions "not be cited" but took no position on whether these opinions would lack precedential value.[28] Similarly, the Advisory Council on Appellate Justice — a group of lawyers, academics, and judges convened by the Federal Judicial Center to study the appellate justice system — endorsed the need for a selective publication plan and drafted a model rule, which included a no-citation provision but which omitted a no-precedent provision.[29] In

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[27] REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 33 (1972); *see also* Reynolds & Richman, *Non-Precedential Precedent*, *supra* note 6, at 1170-71 (summarizing history of development of selective publication and no-citation rules).

[28] BD. OF THE FED. JUDICIAL CTR., RECOMMENDATIONS AND REPORT TO THE APRIL MEETING OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 2 (Mar. 21, 1972) (copy on file with author). Although the Center in its accompanying report had observed that unpublished opinions would not require the work necessary for an opinion "intended to enter the body of precedent," *id.* at 7, that oblique reference to the precedential value of opinions was not understood as a prescriptive point — that unpublished opinions should be assigned no precedential value — but rather as a descriptive one — that unpublished opinions in fact lack precedential value.

[29] STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS: A REP. OF THE COMMITTEE ON USE OF APPELLATE COURT ENERGIES OF THE ADVISORY COUNCIL FOR APPELLATE JUSTICE 5 (Aug. 1973) (recommending adoption of rules restricting the publication of opinions). Although the report was issued in the name of the full Advisory Council, the report was apparently drafted by a seven-person committee (the "Committee on Use of Appellate Court Energies") chaired by Charles W. Joiner. *See id.* at 21. The Model Rule provides:

> 1. Standard for Publication
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> An opinion of the (highest court) or of the (intermediate court) shall not be designated for publication unless:
>
> a. The opinion establishes a new rule or law or alters or modifies an existing rule; or
>
> b. The opinion involves a legal issue of continuing public interest; or
>
> c. The opinion criticizes existing law; or

fact, the Advisory Council expressly considered a provision assigning unpublished opinions no precedential value, but — critically — the Council concluded that such a provision was inadvisable.[30] As the Council explained, a no-precedent provision would "take[] us into a morass of jurisprudence."[31]

All of the circuits responded to the Judicial Conference's directive, but, given the absence of an express directive to consider a no-precedent provision, most of the circuits adopted limited publication plans that did not mandate any different or lessened precedential status for unpublished decisions. The Second Circuit omitted any mention of the matter,[32] while other circuits linked the publication decision to the judges' view whether an opinion would have precedential value but did not, strictly speaking, declare the resulting opinion to be non-precedential.[33] Only three circuits directly suggested that their

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d. The opinion resolves an apparent conflict of authority.

2. Opinions of the court shall be published only if the majority of the judges participating in the decision find that a standard for publication as set out in section (1) of this rule is satisfied. Concurring opinions shall be published only if the majority opinion is published. Dissenting opinions may be published if the dissenting judge determines that a standard for publication as set out in section (1) of this rule is satisfied. The (highest court) may order any unpublished opinion of the (intermediate court) or a concurring or dissenting opinion in that court published.

3. If the standard for publication as set out in section (1) of the rule is satisfied as to only a part of an opinion, only that part shall be published.

4. The judges who decide the case shall consider the question of whether or not to publish an opinion in the case at the conference on the case before or at the time the writing assignment is made, and at that time, if appropriate, they shall make a tentative decision not to publish.

5. All opinions that are not found to satisfy a standard for publication as prescribed by section (1) of this rule shall be marked, Not Designated for Publication. Opinions marked, Not Designated for Publication, shall not be cited as precedent by any court or in any brief or other materials presented to any court.

Id. at app. I.

[30] *Id.* at 20.

[31] *Id.*

[32] MEMORANDUM REPORT ON SECOND CIRCUIT OPINION PUBLICATION RESOLUTION 1 (noting adoption on Oct. 31, 1973 of 2d Cir. R. 0.23) (copy on file with author).

[33] *See* PLAN OF THE THIRD CIRCUIT FOR PUBLISHING OPINIONS 3 (effective Jan. 1, 1974) (advising judges to publish opinion "only where the case has precedential or institutional

unpublished opinions lacked precedential value, and two of those did so only in the context of prohibiting counsel from citing to the provision (i.e., the no-precedent provision was not a stand-alone provision but was part of the circuit's no-citation rule).[34]

Over time, the circuits have moved toward a policy of expressly designating unpublished opinions as non-precedential. The reasons for that move are complex and are the subject of a discussion for a different day. The key point for present purposes is that, today, the vast majority of the circuits expressly limit the precedential value of their unpublished opinions. Eight of the circuits categorically declare their unpublished opinions to be non-precedential or otherwise not binding in subsequent cases,[35] and two circuits effectively adopt that same policy by banning

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value") (copy on file with author); PLAN FOR PUBLICATION OF OPINIONS OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT 2 (effective Feb. 8, 1973) (referencing Local Rule 21, which was previously adopted on Aug. 14, 1970, and which provides for issuance of order affirming lower court decision without opinion where, among other items, opinion "would have no precedential value") (copy on file with author); PLAN FOR PUBLICATION OF OPINIONS OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT 1 (adopted Dec. 6, 1972) (noting that opinion is published only if judge "considers the opinion to be of precedential value") (copy on file with author); OPINION PUBLICATION PLAN FOR THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT (noting Local Rule 17(a), which provides for issuance of order affirming without opinion where court believes that "no new points of law, making the decision of value as a precedent," are involved) (copy on file with author). For the text of the Fifth Circuit's former Local Rule 21 and a discussion of it, see *NLRB v. Amalgamated Clothing Workers of America*, 430 F.2d 966, 968 n.2, 972 (5th Cir. 1970).

[34] PLAN FOR PUBLICATION OF OPINIONS OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT 2 (adopted Dec. 22, 1972; effective Jan. 1, 1973) (providing that unpublished opinions may not be "cited as precedent") (copy on file with author); ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 2 (adopted Jan. 15, 1973; effective Feb. 1, 1973) (providing that unpublished opinions may not be "cited as precedent") (copy on file with author); OPINION PUBLICATION PLAN FOR THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT 1 (effective Mar. 1, 1973) (noting Local Rule 21, which provides that unpublished opinions "will not be regarded as precedent in this Court") (copy on file with author).

[35] 3D CIR. IOP 5.3; 5TH CIR. R. 47.5.4 (providing that unpublished opinions issued after Jan. 1, 1996 "are not precedent, except under the doctrine of res judicata, collateral estoppel, or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorneys' fees, or the like)"); 6TH CIR. IOP 205(c) ("Reported panel opinions are binding on subsequent panels."); 8TH CIR. R. 28A(i) (unpublished opinions "are not precedent"); 9TH CIR. R. 36-3(a) (providing that unpublished opinions "are not binding precedent, except when relevant under the doctrine of law of the case, res judicata, and collateral estoppel"); 10TH CIR. R. 36.3(a) (providing that unpublished opinions "are not binding precedents, except under the doctrines of law of the case, res judicata, and collateral estoppel"); 11TH CIR. R. 36-2 & IOP 5 (providing that unpublished opinions "are not considered binding precedent").

The Fourth Circuit has designated only a particular sub-class of its unpublished opinions — its summary opinions — as non-precedential. 4TH CIR. IOP 36.3 (noting that

the citation of their unpublished opinions "as precedent."[36] Only three circuits — the D.C., First, and Second Circuits — nominally accord any of their unpublished opinions precedential value,[37] and, even then, the D.C. Circuit continues to treat its unpublished decisions rendered prior to January 1, 2002, as non-precedential[38] and expressly instructs counsel that, as to unpublished opinions issued on or after January 1, 2002, the designation of the opinion as unpublished means that the panel "*sees* no precedential value in that disposition."[39]

Moreover, this policy of according no or minimal precedential value to unpublished opinions is unlikely to change any time soon. As noted above, the Judicial Conference's Advisory Committee for the Rules of Appellate Procedure is considering a new Rule 32.1, which would regulate the citation of unpublished opinions but which would not address the precedential status of those opinions.[40] The Justice Department (which proposed the rule) expressly acknowledged that "[a]ll circuits agree that unpublished decisions are not binding precedent, and this proposed amendment would not alter that practice."[41] Indeed, that choice was made intentionally so as to avoid the constitutional controversy surrounding the no-precedent rules.[42]

The circuits' no-precedent rules have given extraordinary legal significance to the otherwise insignificant determination whether to publish a decision. In most circuits, the publication decision determines

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court may decide appeal by summary opinion if all judges on panel agree that opinion "would have no precedential value").

[36] 7TH CIR. R. 53(b)(2)(iv) (providing that unpublished orders shall not be "used as precedent"); FED. CIR. R. 47.6(b) (providing that unpublished opinions must not be "cited as precedent"). Indeed, the Federal Circuit subsequently refers to these opinions as "nonprecedential." FED. CIR. R. 47.6(c).

[37] *See* D.C. CIR. R. 28(c)(1)(B) (providing that unpublished decisions issued after Jan. 1, 2002 may be "cited as precedent"); 1ST CIR. R. 36(b) (omitting mention of precedential status of unpublished decisions); 2D CIR. R. 0.23 (omitting mention of precedential status of unpublished decisions).

[38] D.C. CIR. R. 28(c)(1)(A).

[39] D.C. CIR. R. 36(c)(2) (emphasis added). As the D.C. Circuit subsequently emphasized, "the Court believes its published precedents already establish and adequately explain the legal principles applied in the unpublished dispositions, and that there is accordingly no need for counsel to base their arguments on unpublished dispositions." D.C. CIRCUIT HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES 44 (2002).

[40] *See* Letter from Seth Waxman to Hon. Will Garwood, *supra* note 14, at app.

[41] *Id.* at 1; *see also id.* at app. ("Each court is entitled to dictate the precedential value of its own decisions.").

[42] *See id.* at 2 n.1 (acknowledging *Anastasoff* decision and noting that "the rule I am proposing does not address or depend upon the resolution of that constitutional question").

the precedential effect to be accorded that opinion (and, in some circuits, the ability of future litigants to cite that decision to the court). In so doing, these rules have effectively created two categories of decisions, one, superior category containing published decisions, which are accorded full precedential status, and a second, inferior category containing unpublished decisions, which have no or limited precedential status.

If the creation of two categories of decisions does not itself give one pause, the fact that this latter, inferior category of cases constitutes the bulk of the cases adjudicated by the courts of appeals should. As previously noted, more than 80% of all decisions rendered on the merits are unpublished.[43] Thus, the vast bulk of the decisions issued by the courts of appeals each year are non-precedential opinions — hardly the work product that one would expect from intermediate appellate courts that collectively serve as the court of final resort in over 99% of the cases in which an appeal is taken.[44]

More importantly, this inferior category of decisions includes many that do not warrant such inferior treatment. To begin with, the very fact that more than 80% of the decisions rendered on the merits are unpublished undermines any notion that all unpublished opinions involve frivolous appeals not worthy of attention by others. In fact, many unpublished decisions *reverse* or *vacate* the lower court's decision. One commentator calculated that, in 2000, almost 18% of the unpublished decisions of the courts of appeals involved a disposition other than an affirmance.[45] The existence of such a relatively high number of reversals and vacaturs — a percentage that corresponds to the overall percentage of such dispositions in the courts of appeals generally (10.7%)[46] — is powerful proof that this category of inferior cases includes

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[43] 2001 ANN. REP., *supra* note 1, at 40 tbl.S-3. Indeed, if one truly believed that all unpublished opinions involve frivolous appeals — that 80% of the federal circuit courts' workload is generated by unjustified appeals from unquestionably correct district court decisions — the appropriate solution would not lie in adjudicating these appeals through unpublished, non-precedential opinions but rather in finding ways to reform the appellate process to reduce the number of such appeals.

[44] During the October 2000 Term, the Supreme Court handed down eighty-seven decisions. 2001 ANN. REP., *supra* note 1, at 73 tbl.A-1. In that same period of time, the courts of appeals decided 28,840 cases on the merits, which do not include cases terminated on procedural grounds. *Id.* at 98 tbl.B-5.

[45] Hannon, *supra* note 12, at 216. In an earlier study involving the 1978-1979 time period, Professors Reynolds and Richman calculated that 14% of unpublished opinions involved a disposition other than an affirmance. Reynolds & Richman, *The Price of Reform*, *supra* note 6, at 617 tbl.13.

[46] *See* 2001 ANN. REP., *supra* note 1, at 98 tbl.B-5. One should not make too much of the

many opinions presenting non-frivolous legal claims on which reasonable judges disagree.

There are other gauges by which to judge whether the courts of appeals are including important or interesting decisions in this inferior category of cases. The U.S. Supreme Court has reviewed no less than fifty-seven cases in which the court of appeals decision was unpublished.[47] Needless to say, those cases did not involve insignificant legal issues.[48] Indeed, in one of those cases,[49] not only did the Court reverse the lower court, it expressed astonishment that the court of appeals rendered a decision of such importance via an unpublished opinion.[50] Even apart from those decisions involving legal questions worthy of Supreme Court review, there are countless other unpublished decisions that did not trigger Supreme Court review but that nevertheless present interesting and important legal questions.[51]

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data in the text, which suggests that the reversal rate is higher in unpublished opinions than published opinions. This anomaly — and I do think it is an anomaly — is most likely the result of a methodological difference between the outside commentators and the Administrative Office of the U.S. Courts. Indeed, when Professors Reynolds and Richman calculated the percentage of reversals and remands in published opinions in 1978-1979, they found that 36% of the published opinions were non-affirmances. Reynolds & Richman, *The Price of Reform*, *supra* note 6, at 617 tbl.13.

[47] Hannon, *supra* note 12, at 228 & app. A. Moreover, that figure underestimates the number of unpublished decisions involving significant legal issues worthy of Supreme Court review since it includes only those cases in which the Supreme Court reviewed the actual case decided via an unpublished opinion. That figure does not include those cases in which the Supreme Court reviewed a published decision from one circuit to consider an issue that had been adjudicated in other circuits via unpublished opinions.

[48] Several of the decisions are true landmarks. For example, in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993), the Supreme Court reviewed an unpublished decision from the Eleventh Circuit and held that a city's prohibition upon the ritual sacrifice of animals violated the free exercise rights of members of the Santaria religion. Likewise, in *City of Canton v. Harris*, 489 U.S. 378, 388 (1989), the Supreme Court reviewed an unpublished decision from the Sixth Circuit and held that municipalities were liable under 42 U.S.C. § 1983 (2000) for the deprivation of constitutional rights by municipal officials only where the failure to train those officials amounted to deliberate indifference to the rights of individuals. *See also* Hannon, *supra* note 12, at 230 (discussing importance of several Supreme Court cases reviewing decisions resolved by unpublished opinions).

[49] United States v. Edge Broad. Co., 509 U.S. 418 (1993).

[50] *Id.* at 425 n.3 ("We deem it remarkable and unusual that although the Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished *per curiam* opinion.").

[51] For example, in *Simms v. Edmonds*, 2000 WL 1648951 (4th Cir. Nov. 3, 2000) (per curiam) (unpublished), the Fourth Circuit held that, absent a legitimate penalogical interest, the Virginia prison authorities' refusal to provide a prisoner who is a member of the Rastafarian religion with a meat-free diet violates the Free Exercise Clause of the First Amendment. *See also* Katesh & Chachkes, *supra* note 9, at 309 & n.68 (noting that there are

Of course, not every unpublished decision involves a significant legal issue worthy of consideration by others, much less Supreme Court review — there are plenty of frivolous appeals to be sure. Nevertheless, it is equally true that there are many unpublished decisions that *do* present important legal questions, the resolution of which have substantial implications for individuals other than the parties involved. Indeed, the fact that courts often cite their past, unpublished opinion is perhaps the most direct and damning proof belying the suggestion that unpublished opinions invariably involve frivolous appeals presenting insignificant legal issues of no importance other than to the parties involved.[52] In light of that fact, the constitutionality of the no-precedent rules is not a minor matter with implications only for a few litigants; rather, whether these rules pass constitutional muster is an inquiry with far-reaching implications for all litigants in general and the judges of the courts of appeals in particular.

II. THE CONSTITUTIONAL CHALLENGE TO THE NO-PRECEDENT RULES

Although the constitutionality of the no-precedent rules has received considerable attention recently, the issue is not a novel one. The Eighth Circuit in *Anastasoff* was not the first court to confront the question of the constitutionality of non-precedential appellate decisions; rather, judicial concerns about the propriety and legality of issuing non-precedential opinions date back as far as the selective publication rules themselves.

The first attempt to grapple with the constitutionality of issuing non-precedential opinions took place three decades ago, while the Judicial Conference was urging the circuits to develop selective publication rules. At that time, the Fourth Circuit upheld the constitutionality of its practice of according unpublished memorandum decisions less than full precedential status.[53] The court's analysis, however, was far from a model of clarity or sophistication. The court summarily and confusingly declared that an unreported memorandum decision was "by definition a precedent" but did not constitute "precedent within the meaning of the rule of stare decisis."[54] In so characterizing its unpublished opinions' precedential status, the court suggested the existence of a new jurisprudential entity that was more than a judicial nullity but less than a

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many unpublished cases resolving questions of first impression and collecting cases).

[52] *See* Hannon, *supra* note 12, at 232 (determining that various circuits cited unpublished opinions for legal support in more than 2,000 cases).

[53] Jones v. Superintendent, Va. State Farm, 465 F.2d 1091, 1094 (4th Cir. 1972).

[54] *Id.*

full-blown judicial precedent — essentially a non-precedential precedent.[55] That the court had created this strange, oxymoronic jurisprudential category out of whole cloth and without any further discussion about its foundation or significance was bad enough. Worse still, the court then conclusorily declared that the creation of such a strange jurisprudential entity "accords with due process and our duty as Article 3 judges."[56] The court did not elaborate, much less offer a probing analysis of either the Fifth Amendment Due Process Clause or Article III. Rather, the court was content to issue its *ipse dixit* and admonish counsel not to cite the non-precedential precedents.[57]

As one might expect, confusion among the judges in the circuit quickly ensued. Some district courts within the circuit still consulted and relied upon unreported memorandum decisions, though they did so with some hesitancy.[58] Others read *Jones* as precluding any reliance on unpublished decisions.[59] The confusion created by *Jones* was subsequently eliminated in 1976, when the Fourth Circuit adopted the precursor to its current rule disfavoring citation to unpublished opinions but acknowledging that they nonetheless may have "precedential value."[60]

Though the Fourth Circuit's decision to soften its strict no-precedent rule eliminated the existence of the non-precedential precedent as a separate category of decisions in that particular circuit, *Jones* nevertheless remained the definitive decision regarding the constitutionality of no-

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[55] The term "non-precedential precedent" was coined by Judge Robert Sprecher of the Seventh Circuit in hearings before the Hruska Commission, which was created by Congress in 1972 to investigate possible reforms to the federal appellate court system and was chaired by U.S. Sen. Roman Hruska. *See Review of the Federal Court Appellate System, Second Phase: Hearing on Pub. L. No 92-489 as amended by 93-420 Before Commission on Revision of the Federal Court Appellate System*, 92d Cong. 537 (1974-1975) (statement of Hon. Robert Sprecher).

[56] *Jones*, 465 F.2d at 1094.

[57] *Id.*

[58] *See, e.g.*, Curley v. Bryan, 362 F. Supp. 48, 52 n.2 (D.S.C. 1973) (noting *Jones* but nevertheless relying upon unpublished decision that had not been overruled by any reported decision); Mohr v. Jordan, 370 F. Supp. 1149, 1154 (D. Md. 1974) (noting *Jones* but nevertheless relying upon unpublished decisions because at least one of each of active judges of circuit had participated in decisions); Herndon v. Superintendent, Va. State Farm, 351 F. Supp. 1356, 1358 (E.D. Va. 1972) (noting *Jones* but declaring that it will give "appropriate weight" to unpublished decisions so as not to exalt form of decision).

[59] *See, e.g.*, Anthony v. Luther, 383 F. Supp. 827, 827 (W.D.N.C. 1974) (noting that *Jones* prohibits citation of unpublished decisions).

[60] *See* Holsey v. Bass, 519 F. Supp. 395, 411 n.34 (D. Md. 1981) (noting that *Jones* was "superseded" by adoption in 1976 of 4TH CIR. R. 18(d)(iii), which provides that unpublished dispositions may have "precedential value"); *see also* Reynolds & Richman, *Non-Precedential Precedent*, *supra* note 6, at 1181 (quoting 4TH CIR. R. 18(d)(iii)).

precedent rules. Surprisingly, no other courts addressed the matter. For a brief period of time in the mid-1970s, it appeared that the Supreme Court might step into the fray and resolve the constitutionality of the no-precedent and no-citation rules, but the Court ducked the issue both times that it came before the Court.[61]

And so things stood for the next two-and-a-half decades. Despite some occasional hand wringing about the practice,[62] the Supreme Court refused to take up the question of the constitutionality of the no-precedent rules, and, although the number of unpublished decisions skyrocketed during this time, no circuit openly questioned the constitutionality of the no-precedent rules. In 1986, when the Tenth Circuit adopted a strict unpublished opinion rule that barred citation to unpublished opinions and provided that such opinion possessed "no precedential value," three of the circuit's active judges dissented from the adoption of the rule, contending (among other things) that the no-citation provision has "overtones of a constitutional infringement."[63] Significantly, however, their dissent was kept secret for six years and published only when the circuit undertook a review of its local appellate rules.[64] Moreover, the dissent, which did not describe the exact source of the judges' constitutional concerns, failed to trigger any searching reexamination of the rules in other circuits. Occasionally, a lone circuit

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[61] Ironically, both cases emerged from the Seventh Circuit. In one case, litigants who were reproached by the circuit court for citing an unpublished decision in a motion filed with the court sought a writ of mandamus and/or prohibition from the Supreme Court, alleging that the Seventh Circuit's no-precedent/no-citation rule violated their First Amendment rights to freedom of speech and to petition the government for redress of grievances. *See* Dunn, *supra* note 19, at 142 (describing lower court litigation and nature of arguments made by parties before Supreme Court). The Court, however, denied the litigant's motion without comment. Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit, 429 U.S. 917, 917 (1976). Just two months later, the Court granted certiorari in a case in which one of the questions presented involved the validity of the Seventh Circuit's no-precedent rule, but the Court did not reach that issue, deciding the case instead on alternative grounds. Browder v. Director, Dept. of Corrections, 434 U.S. 257, 258 n.1 (1978) (refusing to address constitutionality of Seventh Circuit's unpublished opinion rule in light of disposition of case on other grounds).

[62] *See, e.g., supra* notes 50-51 and accompanying text.

[63] *See In re* Rules of the United States Court of Appeals for the Tenth Circuit, Adopted Nov. 18, 1986, 955 F.2d 36, 37 (10th Cir. 1992).

[64] *Id.* at 36 (ordering publication of dissent). In 1993, the Tenth Circuit amended its no-precedent rule, allowing citation of unpublished opinions but only for their "persuasive value." *See In re* Citation of Unpublished Opinion/Orders and Judgments, 151 F.R.D. 470, 470 (10th Cir. 1993) (noting adoption of General Order, dated Nov. 29, 1993, and suspension of prior no-citation rule, effective Jan. 1, 1994). Nevertheless, the court's new rule still minimized the precedential value of unpublished opinions, declaring that they are not "binding precedents." *Id.* No reason for the change was given.

judge would question whether the no-precedent rules served any real value,[65] but such statements were truly exceptional. The controversy surrounding the rules when they were developed in the 1970s had appeared to subside by the end of the 1990s into a begrudging acceptance of the rules as a necessary and constitutionally permissible evil.

The relative calm surrounding the rules, however, was shattered in 2000 by the Eighth Circuit's decision in *Anastasoff*. That *Anastasoff*, of all cases, was the case to reopen the largely forgotten question of the constitutionality of the no-precedent rules was truly surprising. One might have expected the issue of the constitutionality of the no-precedent rules to arise in a case raising innovative or controversial legal claims. In actuality, however, the validity of the rules arose in a case involving a relatively mundane and technical legal issue of virtually no interest to the public and marginal interest even to most lawyers: whether the so-called "mailbox rule" provided by Section 7502 of the Internal Revenue Code applied to taxpayer claims for refunds of taxes previously paid, so that a refund claim mailed by a taxpayer to the IRS within the statutorily mandated three-year limitations period would be considered timely even though the IRS did not receive the claim until after the statute of limitations had expired.[66] The constitutionality of the no-precedent rule arose in the case by virtue of the fact that the Eighth Circuit had previously — in an unpublished opinion[67] — ruled that the mailbox rule did not apply to such refund claims, and Ms. Anastasoff — the late-mailing taxpayer — argued that the circuit's no-precedent rule relieved the court of the obligation to follow that prior decision.[68]

The dispute leading to the Ninth Circuit's decision in *Hart* was even more mundane; while the applicability of the mailbox rule to refund claims was a pure question of law theoretically of interest to tardy taxpayers, the *Hart* litigation focused on a question of interest primarily to Ms. Hart — whether there was sufficient evidence to support an administrative law judge's determination that Ms. Hart was not in fact disabled and could return to her job as a telemarketing supervisor.[69] In

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[65] *See, e.g.*, Tatel, *supra* note 8, at 817-18 (questioning D.C. Circuit's no-precedent rule but doubting that repeal would serve much value).

[66] Anastasoff v. United States, 223 F.3d 898, 899 (8th Cir. 2000); *see also* Southwick, *supra* note 12, at 193 (noting that *Anastasoff* raised "relatively mundane" legal issue).

[67] *See* Christie v. United States, No. 91-2375MN (8th Cir. Mar. 20, 1992) (per curiam) (unpublished).

[68] *Anastasoff*, 223 F.3d at 899.

[69] *See* Hart v. Massanari, No. 99-56472, 2001 WL 1135601, at *1 (9th Cir. Sept. 24, 2001)

aid of her appeal, Ms. Hart's counsel cited an unpublished opinion,[70] and the Ninth Circuit issued an order to show cause why counsel should not be held in contempt for violating the circuit's no-citation rule.[71] Counsel defended his actions by pointing to the *Anastasoff* decision and challenging the constitutionality of the Ninth Circuit's no-precedent/no-citation rule.[72]

Prior to the courts' decisions in each case, one would not have expected these mundane legal disputes to prompt a searching examination of the constitutionality of the no-precedent rules. Indeed, in *Anastasoff*, the United States did not urge either in its brief or at oral argument that the court was constitutionally bound to follow its earlier unpublished opinion; rather, Judge Richard Arnold, who was a member of the panel, raised the issue *sua sponte* at oral argument.[73] Nevertheless, the respective courts did enter the constitutional fray, and the reasoning of the two courts — which departed dramatically from that of the Fourth Circuit in *Jones* — deserves close examination.

In contrast to the Fourth Circuit, the Eighth Circuit in *Anastasoff* concluded that the circuit's no-precedent rule violated Article III of the U.S. Constitution because, as Judge Arnold explained for the court, the rule authorized the court to render decisions of a decidedly non-judicial character — namely, non-precedential decisions. According to Judge Arnold, the rule allowed the court to avoid the precedential status of prior judicial decisions and, thereby, expanded the court's power beyond the "judicial Power" vested by Article III.[74] Of course, the text of the Vesting Clause of Article III says absolutely nothing about the precedential status of judicial decisions;[75] consequently, any constitutional constraint on the power of the federal court to issue non-precedential decisions had to be inferred or derived from legal sources other than the text itself.

(unpublished).

[70] *See* Hart v. Massanari 266 F.3d 1155, 1158-59 (9th Cir. 2001) (stating appellant's opening brief cites unpublished decision, Rice v. Chater, 98 F.3d 1346 (9th Cir. 1996) (unpublished table decision)).

[71] *Id.* at 1159.

[72] *Id.*

[73] *See* Brief for the Appellee, Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000) (copy on file with author); *see also* Southwick, *supra* note 12, at 193 (noting that neither party addressed constitutional issue).

[74] *Anastasoff*, 223 F.3d at 900.

[75] *See* U.S. CONST. art. III, § 1, cl. 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

For Judge Arnold, the history of the federal courts authoritatively resolved the precedential status of judicial decisions. According to Judge Arnold, the principles that judicial decisions inherently possessed precedential status as a by-product of the judiciary's power to declare the law and that such decisions must be followed in subsequent cases — which he collectively labeled the "doctrine of precedent" — were "well established and well regarded at the time this nation was founded."[76] Moreover, Judge Arnold contended that "[t]he Framers of the Constitution considered these principles to derive from the nature of judicial power, and intended that they would limit the judicial power delegated to the courts by Article III of the Constitution."[77]

These, of course, were bold claims and, as such, required a powerful defense. To substantiate these claims, Judge Arnold looked to the views of precedent among leading lawyers and judges in three different time periods: the seventeenth and early eighteenth century (the "pre-Framing period"), the late eighteenth century (the "Framing period"), and the nineteenth century (the "post-Framing period"). He contended that, in the pre-Framing period, the doctrine of precedent was a fixed part of common law adjudication. As proof, Judge Arnold pointed to the notable English judicial authorities Sir Edward Coke and William Blackstone, both of who acknowledged the duty of common law judges to follow past precedents.[78] But, as Judge Arnold must have realized, demonstrating that English common law jurists felt some duty to follow precedent did not do much to support his claim that the Framers necessarily must have intended to incorporate that duty into the "judicial Power" in the new federal courts established by the Constitution. Hence, Judge Arnold went further and asserted that English common law jurists attributed the duty to follow precedent to the nature of the judicial power itself.[79] Judge Arnold relied heavily on several passages from Sir William Blackstone's *Commentaries on the Laws of England*, in which Blackstone described the obligation of a judge to follow the law rather than make it.[80] For Judge Arnold, Blackstone's views possessed particular relevance to American legal theory because Arnold thought it to be a "familiar fact" that Blackstone possessed "great influence" on the

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[76] *Anastasoff*, 223 F.3d at 900.

[77] *Id.*

[78] *Id.* at 900 & n.5 (citing, *inter alia*, 1 WILLIAM BLACKSTONE, COMMENTARIES *69 and Slade v. Morley, 76 Eng. Rep. 1074 (K.B. 1602)).

[79] *Id.* at 901.

[80] *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *69).

Framers.[81] In addition, Judge Arnold pointed to the works of Sir Edward Coke and Sir Matthew Hale,[82] whose writings were also "familiar to" the Framers.[83]

Contending that the Framers were "familiar" with these writings is not the same thing as proving that the Framers endorsed the views expressed therein and incorporated them into the Constitution. To prove the latter, it was necessary to cross the Atlantic (figuratively speaking) and focus on the views of leading American politicians and judges during the Framing period. Judge Arnold asserted that the Framers adopted this common-law-based view of the power of precedent and incorporated it into their conception of the "judicial Power" conferred by Article III,[84] but his evidence to support that assertion was rather indirect. Judge Arnold first turned to *Federalist* 81, in which Alexander Hamilton described the duty of a federal court judge to "pronounce[] the law" on the facts of each case.[85] Hamilton's description of the judicial role obviously bore similarities to that urged by Blackstone, but it hardly suggested that the Framers viewed the doctrine of precedent as a necessary component of "pronouncing the law." More helpfully, Judge Arnold invoked *Federalist* 78, in which Hamilton directly linked the judicial duty to follow precedent to the need to cabin judicial decision making and avoid "arbitrary discretion in the courts."[86] To suggest that Hamilton's views were not his alone, Judge Arnold also pointed to a statement by James Wilson endorsing the value of precedents,[87] a letter from James Madison to Samuel Johnston,[88] and several essays by prominent Anti-Federalists, who likewise expressed some expectation that federal judges would follow past precedents.[89]

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[81] *Id.* at 901 n.8 (citing Schick v. United States, 195 U.S. 65, 69 (1904)).

[82] *Id.* at 901 (citing 4 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 138 (1642) and MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 44-45 (Univ. of Chicago ed., 1971)).

[83] *Id.*

[84] *Id.* at 901-02 ("The Framers accepted this understanding of judicial power (sometimes referred to as the declaratory theory of adjudication) and the doctrine of precedent implicit in it.").

[85] *Id.* at 902 (citing THE FEDERALIST NO. 81, at 531 (Alexander Hamilton) (Modern Library ed., 1938)).

[86] *Id.* (quoting THE FEDERALIST NO. 78, at 510 (Alexander Hamilton) (Modern Library ed., 1938)).

[87] *Id.* at 902 n.10 (citing, *inter alia*, JAMES WILSON, II THE WORKS OF JAMES WILSON 502 (Robert G. McCloskey ed., 1967)).

[88] *Id.* at 902 (citing Letter from James Madison to Samuel Johnston (June 21, 1789), *in* 12 PAPERS OF JAMES MADISON 250 (Robert A. Rutland et al. eds., 1977)).

[89] *Id.* at 903 n.13 (citing *Essays of Brutus, XV*, *in* 2 THE COMPLETE ANTI-FEDERALIST 441

Obviously, Hamilton and Madison occupy a special place in the American constitutional firmament, and, consequently, their views deservedly command attention in interpreting the Constitution. That said, however, their isolated references to the role of precedent in adjudication — they did not engage in a lengthy discussion of the role of precedent, much less ever expressly link such role to Article III — hardly sealed the case for Judge Arnold's claim that the Framers viewed the adherence to precedent as a constitutionally compelled component of the "judicial Power." Hence, Judge Arnold felt it necessary to look to the views of prominent individuals and judges in the post-Framing period.

In Judge Arnold's view, the statements by leading lawyers and judges in the nineteenth century confirmed that the Framers incorporated the doctrine of precedent into the "judicial Power" vested in the federal courts by Article III. Judge Arnold pointed to Chancellor James Kent and William Cranch, both of who — like Hamilton before them — noted that precedent constrained judicial discretion.[90] Judge Arnold also referred to a letter written in 1831 by James Madison to Charles Jared Ingersoll in which Madison described the authoritative force of precedent as deriving from the "obligations arising from judicial expositions of the law on succeeding judges."[91] Judge Arnold then closed with a lengthy quote from Justice Joseph Story, who in his *Commentaries on the Constitution of the United States* declared that the doctrine of precedent was "in the full view of the framers of the constitution" and "a departure from it would have been justly deemed an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all the just checks upon judicial authority."[92]

(Herbert J. Storing ed., 1981), and *Letters From the Federal Farmer No. 3, in* 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 244).

[90] *Id.* at 902 n.12 (citing 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 479 (12th ed. 1873) and William Cranch, *Preface*, 5 U.S. (1 Cranch) iii (1804)).

[91] *Id.* at 902 & n.10 (quoting Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), *reprinted in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 390, 390-93 (Marvin Myers ed., rev. ed. 1981). Judge Arnold cites this letter twice in his discussion of the Framers' views of precedent. Though this is a letter from Madison, I find Judge Arnold's use of it as proof of the Framers' view of precedent to be somewhat far-fetched. The letter was written over forty years after the ratification of the Constitution. Given the passage of time, it is highly improbable that the letter accurately describes Madison's views as they existed at the Framing. *See infra* text accompanying note 281. Consequently, I treat this letter as reflective of Madison's post-Framing views.

[92] *Anastasoff*, 223 F.3d at 904 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 377-378 (1833)).

This was — at least on the face of it — a powerful historical argument for viewing Article III as embodying a duty on the part of federal judges to follow the law as expressed in prior judicial decisions. Nevertheless, there was one potent objection that Judge Arnold acknowledged the need to address — namely, how could the duty to obey precedent be squared with the undeniable historical fact that few opinions were reported at the time of the Framing? Did not the absence of an official reporting system prove that the Framers acknowledged that there were some decisions that need not be followed (i.e., non-precedential decisions)?

In response, Judge Arnold readily conceded that there was no official reporting system and few private reporters in existence at the time of the Framing.[93] Nevertheless, he contended that the absence of a reliable reporting system did not deprive judicial decisions, even if embodied in no written report, of their precedential status. Indeed, he assured us, "judges and lawyers of the day" — meaning the Framing period — "recognized the authority of unpublished decisions even when they were established only by memory or by a lawyer's unpublished memorandum."[94]

Judge Arnold's decision invalidating the circuit's no-precedent rule was short-lived: Less than four months later, the Eighth Circuit sitting en banc vacated the panel decision.[95] The en banc court did not disagree with the panel's decision regarding the constitutionality of the circuit's no-precedent rule; indeed, Judge Arnold wrote the opinion for the en banc court. Rather, the en banc court ruled that the case had become

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[93] *Id.* at 903 ("Before the ratification of the Constitution, there was almost no private reporting and no official reporting at all in the American states." (citing Frederick G. Kempin, Jr., *Precedent and* Stare Decisis: *The Critical Years, 1800-1850*, 3 AM. J. LEGAL HIST. 28, 34 (1959))).

[94] *Id.* at 903 & n.14 (citing 4 COKE, INSTITUTES, *supra* note 82, at Proeme; Jesse Root, *The Origin of Government and Laws in Connecticut* (1798), *reprinted in* THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR 38-39 (Perry Miller ed., 1962); Peter Karsten, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA 30 (1997); and James Ram, SCIENCE OF LEGAL JUDGEMENT (1834)). Despite Judge Arnold's seemingly impressive array of support, his evidence that the Framers understood each decision to have precedential status was more equivocal. The sole Framing-era source cited by Judge Arnold, Judge Jesse Root's preface to his private reports of Connecticut decisions, states only that the common law is composed of judicial decisions and notes the general absence of reports of decisions before his reporter. Root, *supra*, at 38, 39; *see also* Wesley W. Horton, *Day, Root and Kirby*, 70 CONN. B.J. 407, 412-413 (1996) (discussing introduction to Root's Reports). It is quite a leap from that innocuous (and salesman-like) observation to Judge Arnold's conclusion that the Framers recognized that each and every prior decision, even if unreported, possessed precedential force.

[95] Anastasoff v. United States, 235 F.3d 1054, 1056 (8th Cir. 2000) (en banc).

moot because, subsequent to the panel's decision, the IRS paid Ms. Anastasoff's refund claim and decided to apply the mailbox rule to refund claims.[96] Consequently, the en banc court ordered the panel decision's judgment vacated and declared that the constitutionality of the circuit's no-precedent rule remained "an open question."[97]

Needless to say, whatever one thinks about his conclusion, Judge Arnold's historical analysis was a dramatic improvement over the cursory treatment given the issue by the Fourth Circuit in *Jones*. Indeed, Judge Arnold seemed to agree, refusing even to acknowledge *Jones'* existence, much less discuss its contrary conclusion. Not surprisingly, the Eighth Circuit's decision in *Anastasoff* drew immediate attention and provoked considerable discussion among federal court scholars.[98] Perhaps more importantly, it reignited the constitutional debate about the no-precedent rules that had gradually cooled in the three decades since *Jones*.[99] Armed with *Anastasoff*, litigants in other circuits contemplated challenges to those circuits' no-precedent rules.

A year later, the first post-*Anastasoff* challenge to a circuit no-precedent rule was considered by the Ninth Circuit in *Hart v. Massanari*.[100] In contrast to the Eighth Circuit, a panel of the Ninth Circuit led by Judge Alex Kozinski upheld its no-precedent rule against challenge under Article III.[101] Somewhat surprisingly, Judge Kozinski like Judge Arnold engaged in a lengthy historical inquiry. Though he expressed some doubts whether the "judicial Power" contained any substantive limitation on the judicial decision-making process,[102] Judge Kozinski

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[96] *Id.* at 1055. Since the panel decision, the IRS had issued an "Action on Decision" in which the service announced that it would acquiesce in the Second Circuit's decision in *Weisbart v. United States*, 222 F.3d 93 (2d Cir. 2000), holding that the mailbox rule applied to refund claims mailed prior to the lapse of the statute of limitations. *See Anastasoff*, 235 F.3d at 1055-56 (summarizing Action on Decision, AOD 2000-09, 2000 WL 1711554 (Nov. 13, 2000)).

[97] *Anastasoff*, 235 F.3d at 1056.

[98] *See supra* text accompanying notes 10-12.

[99] *See, e.g.*, Williams v. Dallas Area Rapid Transit, 256 F.3d 260, 263 (5th Cir. 2001) (Smith, J., dissenting from denial of rehearing en banc) (contending that en banc court should consider constitutionality of issuing non-precedential opinions); Cmty. Visual Communications, Inc. v. City of San Antonio, 148 F. Supp. 2d 764, 775 (W.D. Tex. 2000) (requesting circuit court to address constitutionality of circuit no-precedent rule).

[100] 266 F.3d 1155 (9th Cir. 2001).

[101] *Id.* at 1180. The Ninth Circuit, however, did not find Ms. Hart's counsel in contempt. Recognizing that the Eighth Circuit's decision in *Anastasoff* provided counsel with a plausible basis for challenging the Ninth Circuit's no-citation rule, the court declared that, in its discretion, it would not impose sanctions on counsel for his disregard of the local rule. *Id.*

[102] *Id.* at 1160-61.

agreed that the Framers' views regarding precedent were determinative of the constitutional inquiry.[103] Nevertheless, he directly challenged Judge Arnold's reading of Anglo-American judicial history. Although Judge Kozinski agreed that the doctrine of precedent was "well established" in common law courts prior to the Framing, he disagreed that the pre-Framing understanding of that doctrine was as rigid as that recognized by modern lawyers.[104] Rather, he contended that the doctrine of precedent recognized at common law treated prior cases less like binding precedents and more like persuasive precedents, "binding" only to the extent that the judge in the instant case found the reasoning of the prior case relevant and persuasive.[105] The doctrine of binding precedent, according to Judge Kozinski, arose only in the nineteenth century, after the development of reliable case reporters and the establishment of a multi-level judicial hierarchy in need of the stabilizing influence of binding precedent.[106] In light of this view of the history of the doctrine of precedent, Judge Kozinski bluntly rejected *Anastasoff*'s conclusion that the Framers intended the "judicial Power" vested by Article III to limit the power of the federal courts to treat some decisions as non-precedential.[107] In short, Judge Kozinski viewed the doctrine of precedent not as a matter of constitutional compulsion but rather "judicial policy": a managerial tool developed in the nineteenth century for an increasingly hierarchic and bureaucratic federal judiciary.[108]

Viewing the doctrine of binding precedent merely as a matter of judicial policy and not constitutional command, Judge Kozinski then went on to explain the need to narrowly confine the scope of the doctrine so as to avoid intra-circuit conflicts (which require the cumbersome en banc process to correct) and to maintain a coherent body of circuit precedent.[109] These last claims are debatable, but their validity

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[103] *Id.* at 1163 ("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.").

[104] *Id.* at 1174.

[105] *Id.* at 1175.

[106] *Id.*

[107] *Id.* at 1180 ("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.").

[108] *Id.* at 1175; *see also id.* at 1173 (noting that rules of precedent reflect "the organization and structure of the federal courts and certain policy judgments about the effective administration of justice").

[109] *Id.* at 1171-72, 1175-79. Judge Kozinski provided several policy arguments against a strict system of precedent. First, though providing predictability and consistency to litigation, a strict system of precedent deprives the judicial system of "flexibility and

is beside the point. My concern is exclusively with the reasons and evidence that Judge Kozinski gave to support his *constitutional* conclusion that the doctrine of precedent — "binding precedent" to use his formulation — is not part of the "judicial Power" vested in the federal courts by Article III.

The primary source of the constitutional disagreement between Judge Arnold and Judge Kozinski lies in their reading of the pre-Framing understanding of precedent. According to Judge Kozinski, seventeenth- and early eighteenth-century English jurists treated prior decisions not as law but merely as "evidence of what the law is."[110] In support of that claim, Judge Kozinski pointed to eighteenth-century English authorities Sir Matthew Hale and Lord Mansfield, both of who denied that judicial decisions were law rightly understood.[111] Indeed, Judge Kozinski even found some support for this contention in the *Commentaries* of Blackstone, whom he (like Judge Arnold) declared was "greatly

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adaptability" and forces courts of appeals to treat the *first* decision on a particular issue as the *final* decision on the matter. *Id.* at 1175. Second, a strict system of precedent would (in Judge Kozinski's view) require each federal circuit to treat decisions by other circuits as authoritative and potentially require federal district courts to treat prior district court decisions as binding — a possibility he evidently thought unthinkable. *Id.* at 1176. Third, a strict system of precedent would inhibit the ability of the various circuits to develop "a coherent and internally consistent body of caselaw." *Id.* As Judge Kozinski explained, drafting a precedential opinion is "an exacting and extremely time-consuming task." *Id.* at 1177. This task cannot be performed properly in every case because of the crushing workload of the federal courts. Moreover, even if it could, requiring all opinions to be treated as precedential would encourage judges to spend more time on the unpublished opinions, thereby reducing the time spent on the most important cases and inevitably reducing the quality of published decisions. *Id.* at 1178. This, in turn, would produce further disarray in each circuit's body of precedent as the number of precedents would skyrocket with the attendant likelihood of confusion and "unnecessary conflict" among the various opinions. *Id.* at 1179. In addition, counsel would be expected to read and analyze these unpublished opinions, which (Judge Kozinski speculated) would materially increase the cost of litigation to parties. *Id.* Thus, according to Judge Kozinski, the limited resources of the courts of appeals require judges to decide *ex ante* which decisions merit a published precedential opinion and which can be resolved summarily via an unpublished opinion — which Judge Kozinski characterized as a "letter from the court to parties." *Id.* at 1178.

[110] *Id.* at 1163-64 (citing THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 343-44 (5th ed. 1956)).

[111] *Id.* at 1164 n.8 (citing SIR MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 68 (London, Nutt & Gosling 1739) and Fisher v. Prince, 97 Eng. Rep. 876, 876 (K.B. 1762) (Mansfield, L.)). As further support, Judge Kozinski referred to the twentieth-century English legal historian, Sir William Holdsworth, but Judge Kozinski's invocation of Holdsworth is curious. Though Holdsworth acknowledged that judges often found ways of avoiding the binding character of prior decisions (as modern judges often do too), he expressly declared that the "general rule" is that "decided cases must always be followed." *See id.* at 1164 n.9 (quoting 12 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 150-51 (1938)).

respected and followed" by the Framers.[112] In Judge Kozinski's view, this jurisprudential distinction between the law rightly understood and the judicial decision's statement of the law precluded any strict conception of the role of precedent.

Moreover, Judge Kozinski viewed the absences of a multi-level judicial hierarchy and a formal opinion reporting system as undermining the notion that judicial decisions served as binding precedent. Judge Kozinski noted that, until the middle of the nineteenth century, English common law courts (King's Bench, Common Pleas, and Exchequer) could ignore decisions of the House of Lords, which had yet to establish itself as the head of the English judicial system.[113] Yet, he failed to explain the relevance of this fact to the question at hand regarding the responsibility of a court to obey its *own* prior precedents. Indeed, Judge Kozinski did not discuss the views of the common law courts regarding their own past precedents. More relevantly, Judge Kozinski emphasized that few opinions were reported and that even those decisions that were reported were prepared by private reporters who often transcribed the opinion in an abbreviated or, worse, erroneous fashion.[114] According to Judge Kozinski, this absence of a formal and accurate reporting system led eighteenth-century judges and lawyers to rely on treatises by learned jurists and not reports of prior decisions as authoritative statements of the law — an intellectual custom inconsistent with a strict sense of precedent.[115]

While he self-assuredly asserted that a binding conception of precedent was not a part of the pre-Framing understanding of the judicial function in England in the seventeenth and eighteenth centuries, Judge Kozinski was less confident when it came time to discuss the American view of precedent during the Framing. Rather than claim (as Judge Arnold had) that the Framers had endorsed the English common law conception of the judicial function, Judge Kozinski ventured only

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[112] *Id.* at 1165 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *70-71).

[113] *Id.* at 1164-65.

[114] *Id.* at 1166 (noting, *inter alia*, that Lord Coke, "most valued" and "most famous" of private reporters, "distorted the language and meaning of prior decisions" to fit his own "jurisprudential and political agenda"); *see also id.* at 1167 ("[C]ase reporters routinely suppressed or altered cases they considered wrongly decided.").

[115] *Id.* at 1165-66. This particular argument has been criticized by Professor Jeffrey Cooper, who contends that the lack of an accurate reporting system does not immunize against criticism a system in which the authoring court determines *ex ante* whether a particular decision will have precedential status. Jeffrey O. Cooper, *Citability and the Nature of Precedent in the Courts of Appeals: A Response to Dean Robel*, 35 IND. L. REV. 423, 427-28 (2002).

that the Framers' view of precedent was "unclear" and that the concept of precedent was subject to "lively debate" among the Framers.[116] Moreover, while Judge Arnold had turned to the writings of such prominent Framers as Hamilton and Madison to buttress his historical claims, Judge Kozinski conspicuously omitted any mention of the *Federalist Papers* or other direct evidence of the Framers' views. Instead, he was content to rely principally on several twentieth- and twenty-first-century commentators.[117] His other evidence for even this tepid claim — that, during the Framing period, American colonial courts took inconsistent views regarding the applicability of English common law decisions to the colonies[118] — fell wide of the mark. It was evidently lost on Judge Kozinski that the refusal of several American courts to follow English common law decisions (on the ground that the common law did not apply to the colonies) did not reveal at all those courts' views of their duty to obey their own prior decisions (which obviously did apply to the colonies). In the end, Judge Kozinski was left to speculate that eighteenth-century lawyers, "had they been confronted with the regime of rigid precedent that is in common use today, would have reacted with alarm."[119]

Finally, as for the post-Framing understanding of precedent, Judge Kozinski largely confined himself to describing the institutional and jurisprudential changes in the nineteenth century that — in his mind — first gave rise to a binding system of precedent.[120] He did not discuss individual lawyers' or jurists' understanding of precedent as such. Indeed, he brushed aside Justice Story's observation regarding the importance of the doctrine of precedent, claiming that Story was concerned solely with the duty of lower courts to obey the decision of higher courts.[121] Rather, he attributed the federal court's rigid adherence

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[116] Hart v. Massanari, 266 F.3d 1155, 1167 & n.20 (9th Cir. 2001).

[117] *Id.* at 1167 n.19 (citing Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 770 n.267 (1988) and Melissa H. Weresh, *The Unpublished, Non-Precedential Decision: An Uncomfortable Legality*, 3 J. APP. PRAC. & PROCESS 175, 186 (2001)).

[118] *Id.* (citing ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 29 (1955) and R. Ben Brown, *Judging in the Days of the Early Republic: A Critique of Judge Richard Arnold's Use of History in* Anastasoff v. United States, 3 J. APP. PRAC. & PROCESS 355, 375, 383 (2001)).

[119] *Id.* at 1167.

[120] *Id.* at 1168-69 (contending that "modern concept of binding precedent" arose gradually over nineteenth and early twentieth century as lawyers began to believe that judges make law, not just describe it, and as reliable, official reporting system emerged).

[121] *Id.* at 1160 n.3.

to precedent to the emergence in the nineteenth century of official court reporters who accurately transcribed judicial decisions and to the creation of a hierarchy of trial and appellate courts.[122] The former made a strict system of precedent possible, while the latter made it necessary or at least desirable (since only through a strict system of precedent could higher courts control the decisions of the lower courts).[123]

Several months after the Ninth Circuit issued its decision in *Hart*, the Federal Circuit joined the Ninth Circuit in upholding its no-precedent rule.[124] Rather than chart its own analytical course, the Federal Circuit simply endorsed the Ninth Circuit's "comprehensive, scholarly treatment of the issue" and added nothing of importance regarding the constitutionality of the practice of issuing non-precedential opinions.[125] To date, these are the sole court of appeals decisions to discuss the constitutionality of the no-precedent rules.

Although Judge Arnold and Judge Kozinski reached opposite conclusions regarding the constitutionality of each circuit's no-precedent rule, the two courts agreed on two significant points. First, both Judge Arnold and Judge Kozinski agreed that the putative source of the constitutional requirement that the courts of appeals issue precedential opinions is the Vesting Clause of Article III, Section 1. For Judge Arnold, the no-precedent rules were unconstitutional because they arrogate to the federal courts a power different from and inconsistent with the "judicial Power" vested in the federal courts by Article III.[126] Conversely, Judge Kozinski found no constitutional problem in the no-precedent rules because, in his view, the Vesting Clause simply describes what the federal courts do and carries no substantive content or limitation on the process by which the federal courts perform their adjudicative tasks.[127] Neither jurist suggested that the Fifth Amendment's Due Process Clause

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[122] *Id.* at 1175.

[123] *Id.* at 1170 (noting that Court of Appeals judges may not decline to follow decisions of Supreme Court or prior decisions of own circuit).

[124] Symbol Techs., Inc. v. Lemelson Med., LP, 277 F.3d 1361 (Fed. Cir. 2002).

[125] *Id.* at 1367 & n.*. Even Judge Newman, who dissented from the panel opinion's conclusion regarding the underlying legal question, agreed that the circuit's no-precedent rule was constitutional. *Id.* at 1370 (Newman, J., dissenting) (noting that "I fully agree that a court is allowed to and indeed must have the right to issue nonprecedential opinions.").

[126] Anastasoff v. United States, 223 F.3d 898, 899 (8th Cir. 2000) (holding no-precedent rule unconstitutional "under Article III, because it purports to confer on the federal courts a power that goes beyond the 'judicial'").

[127] *Hart*, 266 F.3d at 1161 (questioning whether Vesting Clause "contains any limitation at all, separate from the specific limitations of Article III and other parts of the Constitution" and concluding that "the term 'judicial Power' in Article III is more likely descriptive than prescriptive").

or some other constitutional provision bears upon the validity of the no-precedent rules.

Second, the *constitutional* debate between Judge Arnold and Judge Kozinski was a *historical* one. Both Judge Arnold and Judge Kozinski agreed that the constitutionality of the no-precedent rules turns upon the Framers' views of the doctrine of precedent at the time of the Founding. The two jurists drew different conclusions regarding the constitutional status of the doctrine of precedent because of their different opinions regarding the Framers' views, but both presume that history provides the conclusive answer to the constitutional question. This in itself is surprising since this is a patently originalist approach to constitutional interpretation,[128] yet neither judge is a noted originalist. Indeed, Judge Kozinski had previously acknowledged the difficulty of using the Framers' intent as the authoritative source of constitutional meaning.[129]

Needless to say, these shared conclusions regarding the source of the constitutional inquiry and the methodological process by which to assess the no-precedent rules are neither self-evident nor beyond contest. There are other constitutional provisions, such as the Fifth Amendment Due Process Clause, that may speak more directly than the Vesting Clause of Article III to the issue whether a federal court may declare *ex ante* that some of its decisions lack precedential status. Similarly, there are methodologies other than an originalist-oriented, historical survey of the Framers' view of precedent for assessing whether the no-precedent rules run afoul of Article III. In short, it is far from clear that Judge Arnold and Judge Kozinski were focusing on the right constitutional provision or asking the right question about that provision.

III. IS ARTICLE III THE RIGHT FRAMEWORK?

Before assessing whether a historical inquiry into the Framers' views regarding Article III is helpful in determining the constitutionality of the no-precedent rules, it is first necessary to determine whether the Vesting Clause of Article III is the proper lens through which to evaluate the constitutionality of the no-precedent rules. As noted above, scholarly commentators have identified other constitutional provisions, which in

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[128] Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 90 (2000) (characterizing Judge Arnold's approach as originalist); Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 748 (2000-2001) (same).

[129] *See* Alex Kozinski & Harry Susman, *Original Mean[der]ings*, 49 STAN. L. REV. 1583, 1604-05 (1997).

their view condemn the no-precedent rules, such as the Fifth Amendment Due Process Clause and the Fourteenth Amendment Equal Protection Clause (made applicable to the federal courts via the Fifth Amendment Due Process Clause).[130] For example, proponents of a due process challenge contend that the notion that some decisions may be treated as non-precedential is inconsistent with the highly formalized adjudicatory process that — in their view — due process requires.[131] Given the existence of these alternatives, one should first establish whether Article III is the proper framework for assessing the constitutional issue. After all, there is little point in determining who — Judge Arnold or Judge Kozinski — has the correct view of Article III and its relationship to the doctrine of precedent, if due process or some other constitutional provision speaks more directly to the constitutional concern about these rules.

Obviously, both Judge Arnold and Judge Kozinski thought Article III was the primary, if not exclusive, source of constitutional concern about the rules. Recall that it was Judge Arnold who raised the constitutional issue regarding the Eighth Circuit's no-precedent rule *sua sponte* at oral argument.[132] Since it was his argument and not the government's, Judge Arnold possessed the argumentative freedom to select the constitutional provision under which to evaluate the no-precedent rules, and it is significant that he chose the Vesting Clause of Article III upon which to ground his argument. To be sure, he concluded that Article III condemned the rules, obviating the need to evaluate the circuit no-precedent rule's constitutionality under other provisions, but that does not detract from the fact that he selected Article III rather than some other provision on which to base his decision, which at least suggests that he thought that the Vesting Clause of Article III was the primary constitutional provision bearing upon the no-precedent rules.[133]

Similarly, though Judge Kozinski had less argumentative freedom than did Judge Arnold because he was responding to a litigant's

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[130] *See* discussion *supra* notes 18-20.

[131] *See, e.g.*, Miller, *supra* note 19, at 204 (contending no-precedent rules violate due process because they remove "necessary certainty from the law"); Weresh, *supra* note 12, at 193 (contending that no-precedent rules violate due process because due process creates right to "reasoned explanation").

[132] *See supra* text accompanying note 73.

[133] Judge Arnold's reliance on Article III was hardly surprising. Even before *Anastasoff*, Judge Arnold had publicly criticized no-precedent rules as inconsistent with Article III. *See* Arnold, *supra* note 7, at 226 (noting, one year prior to *Anastasoff*, that no-precedent rules may run afoul of Vesting Clause of Article III).

challenge to the circuit no-precedent rule based on *Anastasoff*,[134] his decision to focus exclusively on Article III was still a volitional one. True, judges typically limit themselves to addressing the arguments raised before them, but that is merely a matter of protocol, not statutory or constitutional compulsion.[135] Judges may and do address issues not raised by the parties all the time (as Judge Arnold did in *Anastasoff*);[136] indeed, some issues they are required to address even if the parties do not raise them, such as the court's subject matter jurisdiction.[137] In light of this fact, it will not do to say that Judge Kozinski was required to limit his analysis to Article III because counsel for Ms. Hart did. Judge Kozinski, too, had a choice whether to address other constitutional objections to the rule; and, though he may not be faulted for failing to address them (since, by protocol, he was entitled to ignore non-jurisdictional issues not raised by the parties), his refusal at least to flag other constitutional provisions that potentially bore upon the constitutionality of the no-precedent rule suggests that he too believed that Article III is the primary, if not exclusive, foundation for constitutional objections to the no-precedent rules.

That, of course, simply begs the question whether Judge Arnold and Judge Kozinski were right to focus on Article III. Ironically (given their aversion to the rules), proponents of the due process challenge often side with Judge Kozinski regarding Article III, contending that the Vesting Clause of Article III does not incorporate a requirement to issue precedential decisions.[138] Other proponents of the due process objection

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[134] Hart v. Massanari, 266 F.3d 1155, 1159 (9th Cir. 2001) (noting that counsel relies on *Anastasoff* in defending citation to unpublished opinion).

[135] *See, e.g.*, Davis v. United States, 512 U.S. 452, 464 (1994) (Scalia, J., concurring) (noting that refusal to consider issues *sua sponte* is based on prudential, not statutory or constitutional constraints on federal courts); United States v. Hardman, 297 F.3d 1116, 1123 (10th Cir. 2002) (noting that refusal to consider issue not raised by parties is based on prudential considerations); *see also* Silveira v. Lockyer, 312 F.3d 1052, 1063 (9th Cir. 2002) (noting that, since parties did not raise argument, court will not consider it).

[136] *See, e.g.*, Arcadia v. Ohio Power Co., 498 U.S. 73, 77 (1990) (noting that case can be decided on ground not used below or presented to court by parties); *see also* Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard*, 39 S.D. L. REV. 1253, 1255 (2002) (noting that courts "frequently" decide issues not raised by parties).

[137] *See, e.g.*, United States v. Kissinger, 309 F.3d 179, 180 (3d Cir. 2002) (noting that court must consider whether appeal became moot even though parties did not raise issue); B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1264 (9th Cir. 1999) (noting that court is obligated to consider jurisdictional issues, even if parties do not raise them).

[138] *See, e.g.*, Strongman, *supra* note 19, at 207-10 (contending that courts should not focus constitutional analysis on Article III but on due process because Article III does not require precedential decisions); *see also* Thomas F. Kibbey, Note, *Standardizing the Rules Restricting*

believe that it is more likely to be successful than an Article III challenge (though they do not explain how they made that comparative judgment).[139] Conversely, defenders of the Article III challenge seem not to care whether due process condemns the rules because Article III does.[140] Viewed in this light, one's conclusion about the proper *framework* for assessing the rules' validity seems hopelessly derivative of one's view of the *merits* of the constitutional challenge to the rules.

But what if one has yet to form a strong opinion as to whether due process or Article III condemns the no-precedent rules? Is there any way to make an initial assessment regarding which theory to investigate first? Is there any way to choose between the theories without making a final judgment regarding what each theory requires with respect to non-precedential decisions? I think that there is, and it is found in the notion of collateral consequences. Collateral consequences are those indirect effects that are likely to follow from the acceptance of a particular rule of law or, assuming doctrinal consistency, are likely to follow from a faithful application of the rule to other, related areas. For example, one collateral consequence of the common law rule that one who voluntarily accepts a duty must perform it with reasonable care might be to discourage individuals, such as doctors, from rendering aid to strangers in need of assistance. Similarly, one collateral consequence of accepting that lawyers have a First Amendment right to advertise might be that all professions and occupations, including pharmacists, have the right to advertise.

To say that these are collateral consequences is not to make a normative judgment about the desirability of the consequences. Collateral consequences may be either desirable or undesirable. Making that assessment requires additional thought about the nature of the consequence. Some are clearly undesirable (e.g., discouraging doctors from rendering aid to strangers), while others are equivocal (applying the First Amendment to advertisements by pharmacists). Nevertheless, once we have characterized a collateral consequence as desirable or not, it may inform our discussion about the rule of law giving rise to it. A collateral consequence might be grounds for accepting or rejecting a

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Publication and Citation in the Federal Courts of Appeals, 63 OHIO ST. L.J. 833, 848-49 (2002) (contending that due process offers "more plausible" basis for challenge to rules because Article III argument is not "cogent").

[139] *See, e.g.*, Wade, *supra* note 19, at 717 (contending that due process challenge "could prove more successful").

[140] *See, e.g.*, Price, *supra* note 128, at 93 (noting due process objection but providing non-originalist based defense of Article III challenge).

particular interpretation of the applicable provision,[141] though it need not be. A collateral consequence is in some sense external to the grounds that typically guide our choice of what rule of law to accept, such as the text of the legal provision whose meaning we are trying to deduce, its history, etc. Even if the collateral consequences of a rule of law do not support or undermine the validity of the proposed rule, they may nevertheless be useful in guiding the selection of the theory or grounds upon which to rest the proposed rule. Focusing on collateral consequences can provide a reasoned basis for a court to choose among several available theories in deciding upon which to base its decision.[142] All else being equal, the court should select the theory that creates the best balance of desirable and undesirable collateral consequences. It is in this latter sense that I wish to use the clarifying mechanism of collateral consequences.

To determine the collateral consequences of using due process or Article III as the basis for invalidating the no-precedent rules, I assume that both due process and Article III prohibit the issuance of non-precedential decisions — that is, I assume that these constitutional provisions, rightly understood, invalidate the issuance of non-precedential decisions. Based on the collateral consequences that flow from each theory, I believe that Article III's Vesting Clause, not the Fifth Amendment's Due Process Clause, provides the most appropriate lens through which to evaluate the constitutionality of the no-precedent rules.

First, as the text of the clause makes clear, due process must be accorded to individuals only when a person's life, liberty, or property is at stake.[143] Though the scope of "liberty" and "property" has expanded significantly in the past thirty years,[144] those terms do not encompass all the interests that are the subject of federal court litigation.[145] Reliance on

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[141] *Cf.* Thomas R. Lee & Lance S. Lehnhof, *The* Anastasoff *Case and the Judicial Power to "Unpublish" Opinions*, 77 NOTRE DAME L. REV. 135, 150 (2001) ("Surely the courts can (and should) take account of the practical consequences of their choice between two alternative constructions of the Constitution.").

[142] *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 217-18 (1995) (considering constitutionality of congressional statute under Article III, rather than due process, because of concerns of collateral consequences of using due process to ground its decision).

[143] U.S. CONST. amend. V.

[144] *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (holding that AFDC welfare beneficiary's interest in continued receipt of welfare payment is "property" interest that may not be deprived without due process).

[145] *See, e.g.*, Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 61-62 (1999) (holding that there is no "property" interest in worker compensation medical benefits); Bd. of Regents v. Roth, 408 U.S. 564, 573, 578 (1972) (holding that individual hired by public university under one-year contract did not have liberty or property interest in renewal of public

the Due Process Clause, then, has the odd consequence of condemning the no-precedent rules only when applied to the detriment of litigants in cases involving their life, liberty, or property. In all other cases, due process does not limit the application of the no-precedent rules — a result highly unlikely to appease critics of the no-precedent rules.

Second, and relatedly, using due process as the basis for a constitutional challenge to the rules poses the analytically difficult question regarding exactly how the no-precedent rules "deprive" a litigant of her life, liberty, or property. Take a run-of-the-mill tort suit seeking money damages for negligence in the operation of a motor vehicle. Does the issuance of a non-precedential opinion in this suit deprive any of the litigants of due process? It seems hard to see how it would; after all, none of the litigants lost anything as a result of the opinion in their case being treated as non-precedential in subsequent suits. Perhaps then the deprivation arises by preventing one of the litigants in the instant case from relying upon a non-precedential opinion issued in a prior suit.[146] Even that may not result in a deprivation of the particular litigant's property, however, if the prior, non-precedential decision does not materially affect the current lawsuit. After all, the Due Process Clause protects against deprivations not of due process itself but of the litigants' life, liberty, or property. If the result of the car crash litigation would be the same even if the non-precedential opinion were treated as precedential, there has been no "deprivation" of life, liberty, or property resulting from the prior decision being treated as non-precedential. Thus, it seems that a deprivation of due process would occur only when one of the litigants loses her life, liberty, or property because a prior, unpublished decision that would have altered the outcome of the litigation was treated as non-precedential.

This reveals the difficulty of using due process as the touchstone for assessing the validity of the no-precedent rules. Whether a particular unpublished decision will have outcome-changing effects if it is treated as precedential may not be easy to determine in the course of the litigation itself. Certainly, in the vast majority of cases, the litigants

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employment); *see also* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 183-84 (2000) (holding that plaintiffs have standing to pursue suit based on interest in using polluted river).

[146] Proponents of the due process challenge appear to take this view, though they do not explain their reasons for doing so. *See* Strongman, *supra* note 19, at 212 (arguing that "[d]enying litigants the opportunity to rely on prior decisions of a court offends the notion of fairness demanded by procedural due process"); Sullivan, *supra* note 12, at 432 (arguing that no-precedent rule deprives litigant of due process where rule "significantly disadvantages their likelihood of obtaining a favorable holding on appeal.").

themselves will not know for sure whether a particular unpublished decision will be outcome determinative if treated as precedential. True, the judges of the courts of appeals are in a far better position than the litigants to know if a particular decision, if treated as precedential, would change the result of the appeal, but even the judges may not always know for certain whether they would have voted a different way had a prior unpublished opinion been treated as precedential. Moreover, that uncertainty is only compounded by the fact that the courts of appeals sit in multi-member panels, usually in panels of three.[147] One member of the panel may be sufficiently self-aware of her reasoning to know that, if a prior, unpublished decision were treated as precedential, she would vote differently. But what about the other two judges? What if they do not agree that the prior decision is outcome-changing and, therefore, cling to their view of the case? Has there been a deprivation of due process for the losing litigant? The answer to that question is far from clear, which by itself suggests the difficulty in using due process as the foundation for a constitutional challenge to the no-precedent rules in the courts of appeals.

Moreover, this type of outcome-changing effect probably occurs in very few lawsuits. In this handful of suits, due process would require the court to treat the prior, unpublished decision as precedential. In the vast majority of suits, however, due process would allow the court to apply the no-precedent rule to prior, unpublished opinions — which, once again, is not likely to assuage the critics of the rules.

Third, due process may not simply be under-inclusive for the reasons described above, it may also be over-inclusive in several, potentially unattractive ways. Due process applies not just to the federal courts but also to the entire federal government, including the federal administrative agencies. In addition, many federal agencies engage in adjudication.[148] Often overlooked in the debate over the no-precedent rules is the fact that many of the federal agencies, like the federal courts

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[147] 28 U.S.C. § 46(c) (2000) (providing that cases and controversies will be heard by panel of no more than three judges, unless majority of active judges of the circuit votes to hear or rehear case en banc).

[148] Crowell v. Benson, 285 U.S. 22, 50-51 (1932) (holding that Article III does not forbid delegation of adjudicatory power to federal agencies, where provision is made for judicial review of agency action). Agency adjudication is either formal or informal in nature. The Federal Administrative Procedure Act, 5 U.S.C. §§ 551-59 (1994), governs the process for formal adjudicatory action. *See* 5 U.S.C. §§ 554, 556-57 (specifying process for formal adjudication by federal agencies). Informal agency adjudications are not governed by the APA, leaving the agency to develop its own procedures subject only to constitutional and other statutory constraints.

of appeals, also designate some of their adjudicatory rulings as non-precedential.[149] If due process condemns the judicial no-precedent rules, it would seem equally to condemn these administrative no-precedent rules. Indeed, there has been a discernible trend in recent years to subject administrative adjudication to the same constitutional constraints imposed on the federal courts.[150]

Needless to say, requiring all federal agencies to treat every adjudicatory ruling as precedential would have dramatic, potentially undesirable consequences for the way in which federal agencies perform their adjudicatory functions. Such a rule would increase the number of decisions that an agency's administrative law judges ("ALJs") would have to consult in rendering decisions. This alone would require agencies, which typically do not have a formal reporting and indexing system to keep track of their rulings, to create such a system. Moreover, according precedential status to administrative rulings could unduly hamper agency decision-making by adding another layer of formality to the adjudicatory process, requiring ALJs to parse (often without the help of counsel) the hundreds or thousands of decisions that might potentially be relevant to the instant case.

More fundamentally, such a mandate could transform the nature and complexity of decision-making in general and not just for agency ALJs. Under the Federal Administrative Procedure Act ("APA"), administrative orders may be rendered through a "formal" adjudicatory

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[149] *See, e.g.*, 4 C.F.R. § 28.87(h) (2003) (providing that initial decisions not reviewed by full GAO Personnel Appeals Board are not "precedent" in future cases); 10 C.F.R. § 1023.120 Rule 13(g) (2003) (providing that decisions of Board of Contract Appeals made pursuant to Small Claims (Expedited) procedure shall have no precedential effect); 18 C.F.R. § 1308.35(e) (2003) (providing that Tennessee Valley Authority hearing officer decisions in appeals involving small claims have no precedential effect); 19 C.F.R. § 177.9(c) (2003) (providing that Customs Service tariff classification ruling letters are binding only with respect to specific transaction described therein and others should not rely on such rulings); 26 C.F.R. § 601.601(d) (2003) (providing that unpublished IRS rulings and decisions lack precedential value); 27 C.F.R. § 70.701(d)(2)(iii)(B) (2003) (providing that unpublished ATF rulings lack precedential value); 31 C.F.R. § 103.85 (2003) (providing that written rulings of Assistant Secretary of the Treasury (Enforcement) regarding foreign currency transactions have precedential value only if published in Federal Register); 33 C.F.R. § 331.7(g) (2003) (providing that administrative decisions of Army Corps. of Engineers' division engineers lack precedential value); 49 C.F.R. § 1108.10 (2002) (providing that decisions by arbitrators appointed by Surface Transportation Board have no precedential effect).

[150] *See, e.g.*, Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760-61 (2002) (holding that Eleventh Amendment, which limits "judicial Power" of United States, and principles of state sovereign immunity embedded therein apply to federal administrative adjudications).

process, which the APA subjects to trial-like procedures similar to those used by the federal courts, or through an "informal" adjudicatory process, for which the APA sets no minimum procedures.[151] The vast majority of agency decisions fall into the latter category, which includes such routine matters as the granting of permits, issuance of licenses, etc.[152] It seems inconceivable that "informal" agency orders would be entitled to precedential status, yet there is no immediately obvious reason why the due process requirement would not equally extend to informal agency orders. Indeed, it seems implausible that the constitutional requirement to treat adjudicatory decisions as precedential would turn on the happenstance whether the decision was produced through "formal" adjudicatory procedures, which in turn depends on whether Congress statutorily required the order to be made "on the record after opportunity for agency hearing."[153] Yet, if that were not the case, agency decision making would necessarily become unduly burdensome as agency officials, in deciding even the most routine matters, would be forced to consider how prior decisions of the same sort were made and on what grounds.

Perhaps some of the administrative no-precedent rules are unconstitutional; perhaps all of them are, even those applicable to agency orders produced via "informal" adjudicatory procedures. These are issues on which I do not express a view. Nevertheless, the mere prospect of affecting such an upheaval in the way that the federal agencies engage in adjudication — requiring them to act more and more like courts — should at least caution against locating the constitutional command to issue precedential decisions in the Due Process Clause.

Fourth and finally, reliance on the Due Process Clause injects an additional, complicating concern regarding the power of state courts and state administrative agencies to adopt no-precedent rules. Many of the states have adopted some form of a no-precedent rule for either the state supreme court, intermediate appellate court, or both.[154] Moreover, many

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[151] 5 U.S.C. § 554(a) (2000) (applying formal adjudicatory requirements of Sections 554, 556, and 557 only to those adjudications required to take place "on the record").

[152] *See* RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS § 6.4.10, at 342 (3d ed. 1999) (noting that 90% of all adjudicatory decisions are informal adjudications not subject to APA).

[153] 5 U.S.C. § 554(a) (2000); *see* Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 876-77 (D.C. Cir. 1977) (applying formal adjudicatory requirements of APA where Congress required decision be made "after opportunity for an agency hearing").

[154] *See, e.g.*, ALA. R. APP. P. 53(d) (providing that unpublished opinions of state supreme court and court of civil appeals have "no precedential value"); ILL. SUP. CT. R. 23(e) (providing that unpublished opinions of appellate court are "not precedential"); *see also*

state agencies have adopted no-precedent rules for state administrative adjudicatory rulings.[155] If due process forbids the federal courts from according some decisions no-precedential status, so too it would forbid the state courts and state agencies from doing the same. Though the no-precedent rules adopted by state courts and state agencies would be evaluated under the Fourteenth Amendment's Due Process Clause, not the Fifth Amendment's Due Process Clause, the two constitutional provisions are substantively the same and impose the same restrictions on governmental actors.[156] Now, it may be that state courts and agencies should likewise be barred as a constitutional matter from according some of their decisions non-precedential status — once again, an issue on which I express no view — but that issue is sufficiently complex and fraught with federalism-based overtones to avoid relying on due process as the starting point in the constitutional analysis of the no-precedent rules.[157]

Recognizing the foregoing difficulties with the due process argument does not mean that the proponents of this view are wrong to think that

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Serfass & Cranford, *supra* note 12, at 258-85 (cataloguing state court no-precedent and no-citations rules).

[155] *See, e.g.*, 8 N.Y.C.R.R. § 279.10 (1998) (providing that decisions of New York Education Department review officer "shall not constitute binding precedent in any judicial action or proceeding or administrative appeal in any forum whatsoever"); 780 C.M.R. § 122.4.4 (2003) (providing that decisions of Massachusetts Board of Building Regulations and Standards Board of Appeals shall not be considered as "precedent for future decisions").

[156] *See* Bowles v. Willingham, 321 U.S. 503, 518 (1944) (observing that restraints imposed on federal government by Fifth Amendment Due Process Clause are no greater than those imposed on states by Fourteenth Amendment Due Process Clause). There is a curious, isolated exception to the rule that a constitutional provision applicable to both the states and Federal Government imposes the same constraints on both; the exception involves the Sixth Amendment, which is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. The Court has held that states need not use twelve-member juries in criminal cases, even though the Sixth Amendment requires twelve-member juries in federal court. *See* Williams v. Florida, 399 U.S. 78, 102-03 (1970). Similarly, the Court has held that states may provide for criminal convictions upon less than a unanimous vote of the twelve jurors, even though the Sixth Amendment requires unanimity for federal juries to convict the accused. *See* Apodaca v. Oregon, 406 U.S. 404, 410-11 (1972) (plurality opinion); Johnson v. Louisiana, 406 U.S. 356, 369 (1972) (Powell, J., concurring) (noting that he concurs in judgment in *Apodaca*, thereby providing a majority of five justices rejecting claim that Sixth Amendment requires unanimity for criminal conviction by state court jury). Needless to say, this exception does not suggest that the states may be excused from complying with a requirement of procedural due process imposed on the Federal Government.

[157] *Cf.* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 217 (1995) (considering constitutionality of congressional statute under Article III, rather than due process, because of concern that determination of unconstitutionality based on Due Process Clause would require same with respect to similar state statutes).

due process condemns the no-precedent rules. These are not necessarily objections to or reasons for rejecting the due process argument as such; rather, these are merely collateral consequences of locating the constitutional requirement to treat adjudicatory decisions as precedential in the Fifth Amendment's Due Process Clause. Acknowledging that due process offers only incomplete relief from the rules — that it does not categorically condemn the use of the no-precedent rules in all cases — demonstrates the need (at least from the critics' perspective) for a different constitutional objection to the rules — one that condemns the no-precedent rules in all cases in the federal courts. Similarly, acknowledging that due process may be over-inclusive, potentially condemning the no-precedent rules adopted by federal administrative agencies, state courts, and state administrative agencies, also suggests the need for a different constitutional objection, one that is limited exclusively to the federal judiciary.

Article III's Vesting Clause is the obvious answer. The relief afforded by the Vesting Clause would be neither under-inclusive nor over-inclusive in the potentially unattractive ways discussed above. In contrast to the Fifth Amendment's Due Process Clause, the Vesting Clause would require the invalidation of the no-precedent rules in all cases in the courts of appeals, not just those where applying the no-precedent rule to a particular unpublished decision would lead to the deprivation of the litigant's life, liberty, or property. Similarly, unlike the Due Process Clause, the Vesting Clause would not require the invalidation of the federal administrative, state administrative, or state court no-precedent rules, because Article III does not apply to or otherwise limit the power of the federal administrative agencies, the state administrative agencies, or the state judiciaries — none of which exercises the "judicial Power" of the United States.[158]

On the other hand, are there any undesirable collateral consequences that flow from using Article III as the basis for assessing the rules' validity? Judge Kozinski identified several. If Article III requires the courts of appeals to issue precedential decisions, then, he contended, it must also forbid Congress from limiting the precedential effect of court of appeals decisions to the particular circuit that issued the decision.[159] Similarly, if Article III requires the courts of appeals to issue precedential

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[158] *See* Asarco, Inc. v. Kadish, 490 U.S. 605, 617 (1989) (noting that constraints of Article III do not apply to state courts); *see also* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 754 (2002) (assuming *arguendo* that federal administrative agencies do not exercise "judicial Power" of Article III).

[159] Hart v. Massanari, 266 F.3d 1155, 1175-76 (9th Cir. 2001).

opinions, surely it must also require federal district courts to issue precedential decisions.[160] Lastly, he asserted that, if Article III requires the courts of appeals to issue precedential opinions, the end result will be the diminishment of a "coherent and internally consistent body of caselaw" as judges will be forced to spend less time on each opinion.[161]

Whether these consequences would truly follow from acceptance of the Article III objection to the no-precedent rules and whether these consequences are undesirable are issues on which I do not pass. Suffice it to say, these are debatable claims. Nevertheless, even crediting that they will follow from adoption of the Article III objection to the rules and even accepting that they are undesirable, I do not think that these collateral consequences individually or collectively count as a reason why due process is preferable to Article III as the principal or initial basis upon which to evaluate the rules' constitutionality. None of these collateral consequences are unique to Article III; rather, they equally apply to the due process challenge. If due process requires that some appellate decisions be treated as precedential, so too it would seemingly require that some district court decisions be treated as precedential. So too, it would potentially condemn the practice of allowing circuit splits. So too, it would encourage court of appeals judges to spend more time drafting opinions out of concern that the opinion will be subsequently treated as precedential in a later case. In short, all of the identified collateral consequences of using Article III as a basis for invalidating the rules equally apply to the due process objection as well. Consequently, these collateral consequences do not provide a basis for preferring due process to Article III.

Lastly, identifying these collateral consequences and recommending that critics (or defenders) of the rules' constitutionality begin their analysis with Article III's Vesting Clause is not to suggest that the critics should simply hunt for a constitutional peg upon which to hang their predetermined conclusion that the rules are invalid. Rather, it is my suspicion that the critics' hostility to the no-precedent rules actually derives from some constitutional source other than due process.[162] Indeed, I find it implausible that the critics of the no-precedent rules would be satisfied by the invalidation of the no-precedent rules only in

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[160] *Id.* at 1176.

[161] *Id.*

[162] *Cf.* Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 201-02 (2001) (arguing that due process is not source of hostility to congressional interference with judicial decision-making process and that, instead, constitutional inquiry should begin with Article III's Vesting Clause).

the rare instances in which the application of the rule has outcome-changing impact in a case involving a person's life, liberty, or property. Their hostility to the rules runs deeper than that. Likewise, I doubt that the critics of the rules are all that troubled by the no-precedent rules adopted by federal administrative agencies, much less those adopted by state courts and state agencies. Their hostility to the rules is narrower than that. Thus, encouraging critics of the no-precedent rules to focus on Article III is not purely instrumental advice; rather, to focus on Article III is to place the real source of the constitutional objection to the rules at the front and center of the debate, rather than on the periphery where it had languished until *Anastasoff* was decided.

IV. THE FRAMERS' VIEWS OF PRECEDENT

To agree that Judge Arnold and Judge Kozinski identify the correct starting point in the constitutional controversy over the no-precedent rules — the Vesting Clause of Article III — is not to endorse their analysis of the issue, however. In fact, their analysis goes astray because they ask the wrong question about that provision — namely, whether the Framers' understanding of the Vesting Clause included a requirement that all federal appellate decisions be accorded precedential status. As I explain below, the available historical materials are simply too few and too opaque to provide an authoritative answer regarding the Framers' views of the role of precedent in judicial decision making. Few Framers discussed the role of precedent, and those that did so offered only vague guidance regarding the relationship between precedent and the judicial function. Moreover, none of them linked their conception of the role of precedent to the Constitution (i.e., none of them claimed that consideration of precedent was a constitutionally compelled feature of federal court adjudication). On the other hand, none of them acknowledged, much less endorsed as permissible under the new Constitution, the issuance of decisions that intentionally possessed no precedential value.

This conclusion obviously bears upon the narrow question whether *Anastasoff* or *Hart* was rightly decided, but there is also a broader point to be made regarding the use of history in legal disputes. Martin Flaherty has ably identified the danger of so-called "law office history" — meaning the selective use of historical materials drawn out of context to support preconceived legal claims.[163] Legal historians such as John Reid

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[163] Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L.

and William Nelson have similarly decried this use of history as "forensic history."[164] Even well-meaning and intelligent lawyers and jurists can fall prey to this misuse of history, selectively identifying statements made by particular individuals in the past to support legal claims without ever seriously questioning whether those statements are emblematic of a broader societal consensus regarding the point, or whether the statements truly bear upon the point at issue in the case. The perception that an important person from the past agrees with one's views of the law is an intoxicating one, and, like all intoxicating agents, it retards the skepticism and intellectual modesty that are the hallmarks of careful historical analysis. That, unfortunately, is the tale of *Anastasoff* and *Hart*, and the mere fact that two such illustrious and academically oriented judges as Judge Arnold and Judge Kozinski could seemingly fall prey to it provides a cautionary lesson for all lawyers and jurists seeking vindication in the annals of history.

There is also an important point to be made here with regard to originalism and the resort to the Framers' intent or understanding in resolving constitutional questions. To be sure, originalism has come under much fire as a method of constitutional interpretation generally.[165] One can doubt, as a phenomenological matter, whether there is such a thing as the Framers' intent and, if so, whether it is ascertainable through neutral, scholarly methods.[166] More broadly, one can dispute whether the Framers' intent, even if it exists and is ascertainable, provides a normatively attractive approach to constitutional interpretation.[167]

Even if we put aside those politically charged issues — that is, even if we accept originalism as a workable and legitimate account of constitutional meaning — the following analysis of the historical records regarding the "judicial Power" and its relationship to precedent demonstrates that originalism provides an incomplete methodological approach to constitutional interpretation. Originalism can provide

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REV. 523, 554 (1995).

[164] *See* William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1244 (1986); John P. Reid, *Law and History*, 27 LOY. L.A. L. REV. 193, 203 (1993).

[165] *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 34-55 (1985); LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 284-99 (1988); Mark Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 793-804 (1983).

[166] *See, e.g.*, DWORKIN, *supra* note 165, at 48-57; LEVY, *supra* note 165, at 295 ("The entity we call 'the Framers' did not have a collective mind, think in one groove, or possess the same convictions."); Kozinski & Susman, *supra* note 129, at 1604.

[167] Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 209-17 (1980).

answers to constitutional questions only where the historical materials are sufficiently dense and detailed to provide a clear indication of the Framers' views of the meaning of a particular constitutional provision and its relationship to a questioned, contemporary practice.[168] Needless to say, historical materials often fail to be sufficiently illuminating or clear, such as is the case with respect to the "judicial Power" vested by Article III in the federal courts.

A. The Framing Period

The historical records from the Framing cannot provide an authoritative answer to the constitutionality of the no-precedent rules. As I show below, the Framers said precious little (comparatively speaking) about the new federal courts, and what little they did say was confined largely to the composition and jurisdictional reach of the new courts, not to the manner in which the judges would discharge their interpretive duties. The few times that the Framers mentioned the role of precedent, they did so in the context of discussions of other matters, such as the Supreme Court's equity powers. At best, their cursory and passing references to the role of precedent signify an expectation among select Framers, who had been schooled in the common law tradition, that the courts would consult prior judicial opinions in deciding cases; they do not reflect any broadly shared consensus regarding the role of precedent in adjudication, much less any agreement that the Constitution itself compels the use of and reliance upon precedent as a constituent of the "judicial Power."

1. The Framers' Discussions of Precedent Were Too Few and Too Opaque

The first problem with the use of history to assess the constitutionality of the no-precedent rules is evidentiary: There is too little evidence regarding the Framers' understanding of the Vesting Clause of Article III and its relationship to the doctrine of precedent. To be sure, there was discussion regarding the federal courts in the debates at the Constitutional Convention, but the debate was focused on broad institutional considerations (such as the composition of the federal

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[168] Larry Kramer, *Fidelity to History – And Through It*, 65 FORDHAM L. REV. 1627, 1651 (1997) ("Uncertainty [in the historical records] is a problem for originalism because originalism looks to the Founding for definite answers.").

judiciary, method of appointment, and salary protection)[169] and jurisdictional matters (such as whether the federal courts would have jurisdiction over maritime matters and suits involving foreign consuls, and whether there would be appellate jurisdiction over state court decisions).[170] There was no discussion of the meaning of the "judicial Power," much less a discussion of how judges were to perform their adjudicative roles, much less a discussion of the role of precedent in adjudication.[171] Indeed, the term "judicial Power" used in Article III, Section 1 was selected by the Convention's Committee of Detail simply as a substitute for the term "national judiciary," which had been used previously to describe the federal courts.[172]

Nor was there any extended discussion of the role of precedent in the state ratifying conventions. Once again, the debates regarding the federal judiciary primarily revolved around institutional and jurisdictional matters, such as whether the federal judges were sufficiently independent of the political branches.[173] The role of precedent in adjudication was not discussed, much less connected to the Constitution as an indispensable part of the "judicial Power" vested in the federal courts.[174] In short, the Framers' views regarding the federal

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[169] *See* 4 THE FOUNDERS' CONSTITUTION 133-39 (Philip B. Kurland & Ralph Lerner eds., 1987) (compiling debates from Constitutional Convention regarding Article III, Section 1).

[170] *See id.* at 220-27 (compiling debates from Constitutional Convention regarding Article III, Section 2, Clause 1); *see also* Southwick, *supra* note 12, at 227-28 (noting that bulk of discussion at Constitutional Convention centered on structure and jurisdiction of federal courts).

[171] 4 THE FOUNDERS' CONSTITUTION, *supra* note 169, at 133-39; *see also* Lawson, *supra* note 162, at 203 ("The judicial Power simply was not a term that received serious attention during the founding period."); Price, *supra* note 128, at 90 ("We cannot know much more about what the Framers thought about precedent because no one at the Constitutional Convention, or afterward in the ratification effort, seems to have said anything specific about it.").

[172] *Compare* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 104 (Madison) (Max Farrand ed., 1911) ("Resolved that a National Judiciary be established"), *and* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 132 (Madison) ("[A] national Judiciary be established to consist of one Supreme Tribunal . . . ."), *with id.* at 172 (Committee of Detail, IX) ("The Judicial Power of the United States shall be vested in one Supreme (National) Court . . . ."), *and id.* at 186 (Madison) ("The Judicial Power of the United States shall be vested in one Supreme Court . . . .").

[173] *See, e.g., Proceedings and Debates of the Pennsylvania Convention, reprinted in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 495-96, 569 (John P. Kaminski & Gaspare J. Saldino eds., 1981) [hereinafter DOCUMENTARY HISTORY] (statement of James Wilson defending proposed Constitution against claims that federal judges were insufficiently independent because they could hold other offices or have their salary increased by Congress).

[174] *See* Southwick, *supra* note 12, at 229.

court's use of precedent — if there was one, collective view rather than an amalgam of views among the various Framers — is impossible to divine from the limited discussions regarding the federal courts.[175]

Proof of this point is implicit in the debate between Judge Arnold and Judge Kozinski. Take Judge Arnold's discussion of the Framing period. The evidence of the Framers' intent marshaled by Judge Arnold conspicuously omits any reference to the Constitutional Convention or state ratifying conventions. Rather, the sole direct and contemporaneous evidence of the Framers' intent upon which he relies is mention of the value of precedent by Hamilton in *Federalist* 78, by several Anti-Federalists in essays published in newspapers during the ratification debate in New York, and by Madison in a private letter to Samuel Johnston.[176] Though some of these materials, such as the *Federalist Papers*, are common grist for constitutional interpretation, they are hardly overwhelming in number or indicative of a widespread, national consensus among the Founding generation regarding the role of precedent.

Judge Kozinski, in turn, was unable to identify any direct evidence that the Framers rejected the notion that prior decisions were necessarily precedent for future cases. Rather, he was content to rely upon the work of several twentieth- and twenty-first-century commentators and declare only that the historical evidence was "unclear."[177] Moreover, the fault is not entirely Judge Kozinski's. Supporters of his view of the historical development of the doctrine of precedent, such as Professor Thomas Lee, similarly are unable to identify statements by leading lawyers or politicians during the Framing era that suggest that courts were free to ignore some decisions as non-precedential.[178] Indeed, the sole materials

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[175] Price, *supra* note 128, at 83-84 ("Intent is impossible to determine here, one might suggest, because the Framers said nothing specific about this understanding of judicial power."); Southwick, *supra* note 12, at 220 (noting fragmentary nature of source materials regarding Framers' intent).

[176] Anastasoff v. United States, 223 F.3d 898, 902-03 & n.13 (2000) (citing THE FEDERALIST NO. 78, at 507-08, 510 (Alexander Hamilton) (Modern Library ed., 1938); Letter from James Madison to Samuel Johnston (June 21, 1789), *in* 12 PAPERS OF JAMES MADISON 250 (Robert A. Rutland et al. eds., 1977); *Essays of Brutus, XV* (Mar. 20, 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST 441 (Herbert J. Storing ed., 1981); and *Letters from the Federal Farmer No. 3* (Oct. 10, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST 244 (Herbert J. Storing ed., 1981)).

[177] Hart v. Massanari, 266 F.3d 1155, 1167 & n.19 (citing Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 770 n.267 (1088), and Melissa H. Weresh, *The Unpublished, Non-Precedential Decision: An Uncomfortable Legality*, 3 J. APP. PRAC. & PROCESS 175, 186 (2001)).

[178] *See, e.g.*, Lee & Lehnhof, *supra* note 141, at 157-61, 166-68 (discussing Founding-era

from the Framing era that Professor Lee mentions are materials that support Judge Arnold's case, such as *Federalist* 78, which Professor Lee dismisses as describing only the "vertical" component of stare decisis, and an essay by the Anti-Federalist Federal Farmer, which Lee minimizes as containing only an "oblique" reference to precedent.[179]

2. There Was No Consensus Among the Framers Regarding the Role of Precedent

Second, what materials that are available come nowhere near demonstrating that there was a widespread, shared consensus among the Framers regarding the role of precedent in judicial decision-making, much less that the Framers linked that conception of the role of precedent to the requirements of the Constitution. A key point to keep in mind in assessing the available historical Framing-era references to the doctrine of precedent is that they were not made during the Constitutional Convention or during any of the state ratifying conventions. That is significant since it was the delegates to the Constitutional Convention and the various state ratifying conventions whose actions created the Constitution and, therefore, whose views (according to originalism) contain authoritative interpretive force.[180] Rather, the Framing-era references to the role of precedent in

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views of precedent). Professor Lee and Mr. Lehnhof's discussion of the Framing-era discussion of precedent is largely derivative of a pre-*Anastasoff* article authored by Professor Lee. *See* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999).

[179] Lee, *supra* note 178, at 662-64 & n.79.

[180] *See* RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 70-71, 108-10 (1987); BORK, *supra* note 23, at 144. The agreement among originalists that the post-Framing views of individuals who did not participate in the Framing are irrelevant conceals a sharp debate among originalists over the exact identities of the Framers. Madison, for one, thought that the views of the delegates to the Constitutional Convention were irrelevant and that only the views of the delegates to the state ratifying conventions mattered. *See* Letter from James Madison to Nicholas P. Trist (Dec. 1831), *reprinted in* 9 THE WRITINGS OF JAMES MADISON 471, 477 (G. Hunt ed., 1910) ("Another error has been in ascribing to the *intention* of the *Convention* which formed the Constitution an undue ascendancy in expounding it. Apart from the difficulty of verifying that intention is clear, that if the meaning of the Constitution is to be sought out of itself, it is not in the proceedings of the Body that proposed it, but in those of the State Conventions which gave it all the validity and authority it possesses."); *see also* LEVY, *supra* note 165, at 295-97 (summarizing complexity of debate). *Compare* BERGER, *supra*, at 108-10 (arguing that views of delegates to Constitutional Convention and state ratifying debates matter), *with* Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 247 (1988) (arguing that only views of ratifying convention matter) and BORK, *supra* note 23, at 144.

adjudication were made outside those venues. Consequently, it is insufficient for originalists simply to point to a particular essay published in a newspaper during the Framing and assume that the views contained therein were representative of the Framers' views; rather, it is necessary to demonstrate that the essay reflected views shared more generally by the delegates who attended either the Constitutional Convention or the state ratifying conventions or by the People.[181] In the absence of such a showing, the essay simply represents the view of one person (albeit sometimes an important person).

Once again, take the evidence marshaled by Judge Arnold, since he (in contrast to Judge Kozinski) relies on primary historical materials authored during the Framing. Judge Arnold invokes *Federalist* 78 and 81 to support his claim that the Framers believed in a strict doctrine of precedent. Reliance upon the *Federalist Papers* as accurate and representative expositions of the original understanding of the Framers, however, should not be blithely assumed. The *Federalist Papers* were drafted in late 1787 and early 1788 by three noted Federalists (Alexander Hamilton, James Madison, and John Jay) with the conspicuously partisan mission to persuade the people of the State of New York (or, more accurately, their delegates to the state ratifying conventions) to ratify the newly drafted Constitution.[182] Despite the fact that the two principal authors of the papers, Hamilton and Madison, had attended the Constitutional Convention, the passage of time and overtly political mission of the authors cast doubt on any notion that Publius' views were necessarily representative of either those who attended the Constitutional Convention during the summer of 1787 or those who attended the various state ratifying conventions.[183]

This is not to suggest that Hamilton, Madison, and Jay were disingenuous, late-eighteenth-century "spin doctors" — that they were prepared to (or did) say whatever was necessary about the Constitution to ensure its ratification, no matter how outlandish or at odds with the actual text and structure of the Constitution such statements might be. The *Federalist Papers* are not mere political "propaganda" and cannot be

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[181] H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 684-87 (1987).

[182] *Publius*, THE FEDERALIST NO. 1, NEW YORK INDEPENDENT JOURNAL (Oct. 27, 1787), *reprinted in* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 486 (John P. Kaminski & Gaspare J. Salindo eds., 1981).

[183] *See* John F. Manning, *Textualism and the Role of the Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1354 (1998) ("As a piece of advocacy — and an anonymous one at that — The *Federalist* lacks similar usefulness as a window into the reasonable ratifier's likely understanding.").

dismissed as such.[184] By the same token, however, neither can they be considered a neutral exegesis of the Constitution's meaning made by disinterested observers; to the contrary, the *Federalist Papers* were written by highly interested individuals with an avowedly political, not interpretive, mission. As Jack Rakove has cogently explained with reference to Federalist and Anti-Federalist writings during the ratification debates, "the overriding imperative was to determine whether the Constitution would be adopted, not to formulate definitive interpretations of its individual clauses."[185] As a consequence, the political nature of the papers cautions against placing too much interpretive weight on views expressed by Hamilton, Madison, and Jay in the papers, to say nothing of ascribing their views to the other delegates who attended the Constitutional Convention in Philadelphia or to the delegates who attended the various state ratifying conventions.

More particularly, the two *Federalist Papers* relied upon by Judge Arnold are especially unlikely to reflect the views of a significant number of delegates to the state ratifying conventions, much less the views of the People generally.[186] Only 24 of the papers were published in newspapers outside New York City,[187] and neither *Federalist* 78 nor 81 — the two essays invoked by Judge Arnold — were among those papers.[188] In fact, unlike the earlier papers, *Federalist* 78 and 81 were not even published in newspapers in New York.[189] Rather, those two papers appeared for the first time in the second volume of *Federalist Papers* compiled by John and Archibald M'Lean and published on May 28, 1788.[190] By that time, eight States had already ratified the Constitution.[191]

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[184] JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 17 (1996).

[185] *Id.*

[186] *See* Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 665 (1999) (noting that the *Federalist Papers* had "little effect" upon ratification); RAKOVE, *supra* note 184, at 155-56 (observing that length and complexity of the *Federalist Papers* inhibited individuals from reading all of papers and grasping full import of ideas expressed therein).

[187] *See* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 182, at 490.

[188] Elaine F. Crane, *Publius in the Provinces: Where Was* The Federalist *Reprinted Outside New York City*, 21 WM. & MARY Q. (3d Ser.) 589, 590 (1964) (noting that No. 69 was last paper published outside New York City).

[189] *See* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 182, at 490 (noting that only first seventy-six papers were printed in New York City newspapers).

[190] *Id.; see also* THE FEDERALIST NO. 78 (Alexander Hamilton), at 392 (Buccaneer Books 1992) (noting publication date as May 28, 1788); THE FEDERALIST NO. 81 (Alexander Hamilton), at 408 (Buccaneer Books 1992) (noting publication date as May 28, 1788).

[191] *See Ratification Chronology, 1786-1790, reprinted in* 2 DOCUMENTARY HISTORY, *supra*

Moreover, even as to those states (including New York) that had yet to ratify the Constitution, there is little to support the view that *Federalist* 78 and 81 had a material impact on the ratification of the Constitution. New York had already elected its delegates to the state ratifying convention by the time those papers were published. These late-appearing papers could not have influenced the election of the delegates to the New York Convention, nor (as far as we can tell) did they influence the convention debates themselves. At the New York convention, the Anti-Federalist delegates outnumbered their Federalist rivals by more than two-to-one.[192] New York ultimately ratified the Constitution not because of the artful debating skills of the Federalist minority armed with *Federalist* 78 and 81 but rather because New Hampshire and Virginia both ratified the Constitution (as the ninth and tenth States, respectively), leaving New York with no choice but to ratify the Constitution or find itself a sovereign nation isolated from the new union.[193] Indeed, once news of Virginia's ratification reached the New York Convention on July 2nd, the Federalists simply yielded the floor and no longer participated in the Convention debates.[194] Given this chronology of events, it is hardly surprising that, as one commentator has concluded, the *Federalist Papers* had a "negligible" impact upon New York's decision to ratify the Constitution.[195]

Outside New York, there is even less reason to believe that *Federalist* 78 or 81 had a material impact on ratification. Only 500 copies of the M'Lean volume were published,[196] and, even then, several hundred copies remained unsold by October 1788.[197] By that time, the Constitution had come into force and all but two states (North Carolina

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note 173, at 22-23 (including Delaware, Pennsylvania, New Jersey, Georgia, Connecticut, Massachusetts, Maryland, and South Carolina). Professor Boris Bittker suggests that, since Article VII requires only nine states for ratification, the meaning of the Constitution for originalists must be set exclusively by reference to the views of the delegates to the ratifying convention in those first nine states. *See* Boris I. Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 CAL. L. REV. 235, 268 (1989).

[192] John P. Kaminski, *New York: The Reluctant Pillar*, *in* THE RELUCTANT PILLAR: NEW YORK AND THE ADOPTION OF THE FEDERAL CONSTITUTION 79 (Stephen L. Schechter ed., 1985) (noting that, of convention's sixty-five delegates, Anti-Federalists controlled forty-six delegates and Federalists controlled nineteen delegates).

[193] *Id.* at 115.

[194] *See* RAKOVE, *supra* note 184, at 125.

[195] Kaminski, *supra* note 192, at 71-72.

[196] *See* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 182, at 491.

[197] *Id.* at 492.

and Rhode Island) had ratified the Constitution.[198] In short, the publication of *Federalist* 78 and 81 simply came too late in the process to infer that ratification of the Constitution also constituted ratification of the views of the federal courts espoused by Publius.[199]

Likewise, the Anti-Federalist essays cited by Judge Arnold are hardly likely to be representative of the views of those individuals who drafted and ratified the Constitution. The letters of the Federal Farmer were originally published in a forty-page pamphlet advertised for sale in several New York newspapers beginning in early November, 1787, two months after the Constitutional Convention adjourned.[200] Shortly thereafter, the *Poughkeepsie Country Journal* reprinted the letters in weekly installments.[201] Though originally published in New York, the pamphlet was advertised for sale in Philadelphia, where over a hundred copies were purchased by Anti-Federalist leaders in late November, 1787, and distributed to supporters in the state ratifying convention and rural countryside.[202] By mid-December, 1787, copies of the letters were circulating in Connecticut, and, in January, 1788, advertisements for the pamphlet appeared in Boston newspapers.[203] Of the Anti-Federalist writings, the letters of the Federal Farmer were among the most widely distributed, but its influence in the states in which it circulated is questionable. Indeed, the Federalists viewed it with little alarm, publishing only a couple of rebuttals to the letter.[204]

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[198] *Ratification Chronology, 1786-1790, reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 173, at 23-24 (noting that, on June 21, 1788, New Hampshire — the required ninth state — ratified Constitution, and, on Sept. 13, 1788, Confederation Congress set dates for election of President and meeting of new government under Constitution).

[199] Bittker, *supra* note 191, at 273. To be sure, *The Federalist Papers* are a vital source of constitutional meaning, but one must not misunderstand the *source* of their importance. *Cf.* Kramer, *supra* note 186, at 671 (noting that *Federalist* No. 10 is relevant not because all Framers endorsed Madison's view but because Madison's view is "good theory"). The *Federalist Papers* do not have authoritative significance because they are evidence of a collective, shared understanding of the Constitution by those who framed and ratified the document. Rather, their interpretive value lies in the fact that they provide a comprehensive, normatively attractive interpretation of the Constitution espoused by several of the most prominent Framers to have given their attention to the matter. Stated differently, the interpretive value of the *Federalist Papers* lies not in their value as a historical record of the shared views of the Framers but rather in their attractiveness as a coherent explanation of the Constitution's meaning offered at the time of the Founding.

[200] *Federal Farmer: Letters to the Republican* (Nov. 8, 1787), *reprinted in* 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 14-15 (John P. Kaminski & Gaspare J. Salindo eds., 1983).

[201] *Id.* at 15-16; 2 THE COMPLETE ANTI-FEDERALIST 214 (Herbert J. Storing ed., 1981).

[202] *See Federal Farmer, supra* note 200, at 17; RAKOVE, *supra* note 184, at 145.

[203] *See Federal Farmer, supra* note 200, at 17-18.

[204] *Id.* at 18.

The essays of Brutus, in turn, appeared in the Anti-Federalist *New York Journal* during the ratification debates in New York.[205] Essay XV (which Judge Arnold cites) was deservedly popular among a small core of intellectual elites, but it was not widely disseminated or read.[206] In fact, after its initial publication, it was reprinted only twice: in the *Boston American Herald* — *after* Massachusetts had ratified the Constitution — and in the Providence *United States Chronicle*.[207] In light of its limited publication, Professor Larry Kramer concludes that it had virtually no influence during the ratification debates.[208]

The other historical materials relied upon by Judge Arnold — a private letter from James Madison to Samuel Johnston and a statement made by James Wilson — are of even more limited use in ascertaining the original understanding of the Constitution. There is no evidence that Madison's letter, which was written after the Constitution had been ratified and the first Congress assembled, was publicly disseminated. James Wilson, in turn, endorsed (equivocally) the value of precedent in his Lectures on Law at the College of Philadelphia, but those lectures were delivered in 1790-1791 — three years after Pennsylvania had ratified the Constitution and two years after the Constitution had come into force.[209] Significantly, Wilson made no similar statement regarding the value of precedent during the ratification debates in Pennsylvania.[210]

3. The Framers Did Not View the Use of Precedent as a Constitutionally Compelled Component of the "Judicial Power"

Third, even were we to assume that the foregoing discussions of precedent were representative of the Framing-era views of delegates to the conventions, the Framers who discussed the role of precedent simply did not address the issue at the level of detail necessary to draw any conclusion regarding the Framers' understanding of Article III and its

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[205] *See* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 201, at 358.

[206] Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 68 (2001).

[207] *Id.* at 67 n.265.

[208] *Id.* at 68.

[209] Michael J. Gerhardt, *The Lessons of Impeachment History*, 67 GEO. WASH. L. REV. 603, 609 (1999); *see also* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 238 n.68 (1994) (noting that Wilson's Lectures on Law "are post-ratification writings (1790-92) and, as such, should not enjoy the same weight as ratification-era writings").

[210] *See* James Wilson, *Speech Delivered on 26th November, 1787, in the Convention of Pennsylvania*, *in* II THE WORKS OF JAMES WILSON 759-72 (Robert G. McCloskey ed., 1967).

relationship to the doctrine of precedent. A close examination of the historical materials reveals that the Framers' views regarding precedent were far less sharply defined than those attributed to them either by Judge Arnold or by Judge Kozinski. The most that can be said about the doctrine of precedent is that the Framers *assumed* that adjudication in the federal courts would typically involve recourse to precedent; significantly, the materials do not confirm either Judge Arnold's far different claim that the Framers viewed the development and use of precedents as an indispensable, *constitutionally compelled* component of the judicial function or Judge Kozinski's contrary claim that the Framers viewed the use of precedent as constitutionally unnecessary and potentially dangerous.

The noted Anti-Federalist Federal Farmer (who, of the individuals cited by Judge Arnold, was the first to discuss the role of precedent) referred to the use of precedents in the course of his discussion of the Supreme Court's appellate jurisdiction. Specifically, the Federal Farmer feared that the Supreme Court's jurisdiction to hear both cases in law and in equity empowered the Supreme Court to ignore legal constraints on its authority simply by invoking its equitable jurisdiction.[211] For modern lawyers, this concern must seem fanciful, if not incomprehensible; after all, the federal courts' equitable powers are subject to significant constraints.[212] Nevertheless, the Federal Farmer was writing at a time when, at least to some, it was unclear whether the new federal courts would be subject to the same equitable doctrines to which the chancery courts of England and the states were subject.[213] The Federal Farmer worried that the absence of precedents to confine the Court's equitable powers would allow the Court to engage in unbridled, discretionary law making. As he explained, "we have no precedents in this country, as yet, to regulate the divisions in equity as in Great Britain; equity, therefore, in the supreme court for many years will be mere

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[211] *See Letters from The Federal Farmer III* (Oct. 10, 1787) ("It is a very dangerous thing to vest in the same judge power to decide on the law, and also general powers in equity . . . ."), *in* 2 THE COMPLETE ANTI-FEDERALIST 244 (Herbert J. Storing ed., 1981).

[212] *See, e.g.*, FED. R. CIV. P. 65 (defining procedure for issuance of temporary restraining orders and preliminary injunctions); Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32 (1975) (holding that, to warrant preliminary injunction, party must demonstrate irreparable harm if injunction is not issued and likelihood of success on merits).

[213] *See also Letters from The Federal Farmer III* (Oct. 10, 1787) ("I confess in the constitution of this supreme court, as left by the constitution, I do not see a spark of freedom or a shadow of our own or the British common law."), *in* 2 THE COMPLETE ANTI-FEDERALIST 244 (Herbert J. Storing ed., 1981).

discretion."[214]

That is the sum total of the Federal Farmer's discussion of precedent and its role in the federal courts. Needless to say, it is far from a direct endorsement of the role of precedent in adjudication, much less a condemnation of the issuance of non-precedential opinions as unconstitutional. Nowhere does the Federal Farmer suggest that the Vesting Clause of Article III, Section 1 — which he does not mention — requires the issuance of precedential opinions. Nor can that understanding be inferred from his concern about the absence of precedents to guide the Supreme Court's equitable decision making. While he obviously contemplated the development of judicial precedents, his brief reference to precedent does not indicate whether he thought that all decisions would be precedential or only that some would be. That, of course, is the key issue dividing Judge Arnold and Judge Kozinski.

While the Federal Farmer feared the absence of precedents, Brutus (the other notable Anti-Federalist upon whom Judge Arnold relied) worried about the accumulation of precedents. In particular, Brutus feared that, if the federal courts were to remain independent of the political branches and unaccountable to the People, they would gradually accrete power to the federal government at the expense of the states through the semi-clandestine and undemocratic function of adjudicating individual cases. With some degree of hyperbole, Brutus alarmingly warned that "[p]erhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial [branch]."[215] How, one might ask, were the federal courts to wreak such constitutional havoc? The answer lay in the federal courts' reliance on precedent:

> Their decisions on the meaning of the constitution will commonly take place in cases which arise between individuals, with which the public will not be generally acquainted; one adjudication will form a precedent to the next, and this to a following one. These cases will immediately affect individuals only; so that a series of determinations will probably take place before even the people will be informed of them.[216]

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[214] *Id.*

[215] *Essays of Brutus XV* (Mar. 20, 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 201, at 441.

[216] *Id.*

Brutus' solution was to reconstitute the federal courts so as to render them accountable to the political branches or the people directly.[217]

It was to these apocalyptic warnings that Publius responded in *Federalist* 78. Hamilton, the author of *Federalist* 78, devoted the paper to answering Brutus' charge that an independent federal judiciary whose members would effectively serve for life threatened the republican form of government. In response, Hamilton endorsed the notion of life tenure, explaining that it was a necessary feature of a federal judiciary entrusted with the power and duty to invalidate legislative acts at variance with the Constitution (i.e., the power of judicial review).[218] As an additional reason for investing federal judges with life tenure, Hamilton argued that life tenure was necessary to attract the most capable lawyers from lucrative private practice to serve as federal judges.[219] These individuals, Hamilton explained, would necessarily have devoted much time and effort to mastering the voluminous bulk of precedents comprising American law.[220] Indeed, the development of such a mass of precedent was both necessary and inevitable. Necessary because "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them."[221] Inevitable because "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."[222]

To be sure, both Brutus and Hamilton envisioned a federal judiciary in which judges would consult past precedents in deciding the cases before them. While Brutus viewed this feature of adjudication with alarm because it would allow unelected judges to make law through individual cases that would be decided outside the public's view, Hamilton praised this feature as an "indispensable" defense against arbitrary decision making.[223] Nevertheless, these select, isolated references to the role of precedent in the new federal courts do nothing more than show that both Brutus and Hamilton shared the expectation that the federal courts would rely on past precedents as a source of law in adjudicating cases;

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[217] *Id.* at 441-42.

[218] THE FEDERALIST NO. 78, *supra* note 190, at 397.

[219] *Id.* at 399.

[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] *Id.*

they do not indicate that either Brutus or Hamilton believed that the issuance of a precedential opinion was a necessary feature of adjudication in *all* cases, much less one that was *constitutionally compelled.* Their observations about the role of precedent came not in the course of a discussion regarding what analytical constraints the new Constitution would impose upon federal judges — in which case the quoted remarks might suggest that they believed Article III to require the use of precedent in adjudication. Rather, they arose in the course of a discussion regarding the life tenure of federal judges.[224] No doubt, both Brutus and Hamilton *expected* that the federal courts would consult precedents, but it is straining their remarks too far to conclude that, therefore, they believed that Article III *required* federal judges to issue precedential opinions in all cases.[225]

In *Federalist* 81, Hamilton turned his attention to Brutus' claim that the conferral of appellate jurisdiction upon the Supreme Court both as to law and to fact would jeopardize the power of juries by empowering the Court "to re-examine the whole merits of the case, both with respect to the facts and the law which may arise under it, without the intervention of a jury."[226] In response, Hamilton vigorously denied that the Supreme

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[224] *See* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey, 109 YALE L.J. 1535, 1573 (2000) (minimizing importance of *Federalist* 78 since Hamilton's reference to precedent was not made as part of explication of meaning of "judicial Power").

[225] Professor Lee agrees that *Federalist* 78 does not authoritatively resolve the role of precedent in the federal courts, though he does so on the ground that it is not "clear" that Hamilton was addressing the obligation of the Supreme Court to follow its own decisions, rather than the obligation of the lower courts to follow Supreme Court decisions. Lee, *supra* note 178, at 664. In this respect, Professor Lee seizes upon the distinction between the "horizontal" component of the doctrine of precedent — the obligation of courts to obey their own decisions — and the "vertical" component — the obligation of lower courts to follow the decisions of a higher court. *Id.* Though Lee is correct to conclude that *Federalist* 78 offers a far from clear account of the exact role of precedent in the federal courts, his claim that Hamilton was possibly referring only to the vertical component of the doctrine of precedent does not bear close scrutiny. Hamilton refers to federal judges in general and does not limit his defense of the role of precedent only to the judges of the inferior federal courts; rather, his discussion equally encompasses the justices of the Supreme Court, who were the only federal judges guaranteed to exist after ratification and who also were guaranteed life tenure — the subject of *Federalist* 78. *Id.* at 664-87. Of course, the vertical component of the doctrine of precedent would not apply to the justices of the Supreme Court, who were not subject to review by any higher court. Thus, his discussion could only be understood to refer to the horizontal component of the doctrine of precedent. Any doubt on the matter is laid to rest by remembering that Hamilton's defense of the role of precedent was made in direct response to Brutus' attack that precedents would accumulate and bind courts in the future — an attack mounted on the horizontal component of the doctrine of precedent. *Id.* at 709 n.709.

[226] *Essays of Brutus XIV* (Mar. 28, 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note

Court's appellate jurisdiction extended so far; rather, he contended (in words quoted by Judge Arnold) that the Supreme Court would have no greater power than that of an appellate court of the State of New York, which "cannot institute a new inquiry concerning the fact but it takes cognizance of it as it appears upon the record and pronounces the law arising upon it."[227] Significantly, Hamilton makes no mention of precedent or its role in the pronouncement of law, much less does he suggest that precedent forms a part of the constitutional core of the "judicial Power" vested in the federal courts by Article III.

Finally, neither the private letter from James Madison to Samuel Johnston nor James Wilson's statement regarding the value of precedent demonstrate that either man believed Article III required every judicial opinion to carry precedential value. Madison lamented the absence of "precedents" settling the Constitution's meaning, but it is far from clear that he was referring to judicial precedents rather than legislative precedents.[228] Nowhere in the letter does Madison mention the federal courts. Moreover, the context of the letter — at the time Madison was a representative in the First Congress, which was grappling with constitutional issues such as the President's power to remove executive officials — suggests that Madison was referring to the concept of legislative precedent — the idea that the meaning of the Constitution could be settled by actions taken by Congress.[229] Indeed, later in life, Madison would rely upon this doctrine of legislative precedent to defend his own decision as President to reauthorize the Bank of the United States, which he originally thought unconstitutional.[230] In any event, even if Madison were referring to judicial precedents, his lone reference to the absence of "precedents" hardly suggests that he thought that Article III (which he nowhere mentions in the letter) required all decisions be accorded precedential status.

In contrast to Madison, James Wilson was clearly referring to judicial precedents, but his endorsement of the value of precedent was not tied

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201, at 433.

[227] THE FEDERALIST NO. 81, *supra* note 190, at 415. Whether or not Hamilton was right, he failed to assuage the Anti-Federalist fears on this point. The Anti-Federalists' concerns led to adoption of the Seventh Amendment, which provides in pertinent part that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

[228] Letter of James Madison to Samuel Johnston (June 21, 1789), *in* 12 THE PAPERS OF JAMES MADISON 250 (Robert A. Rutland et al. eds., 1977).

[229] *Id.* (observing that Congress had decided that Constitution entitled President to remove Executive officials without congressional approval).

[230] *See infra* notes 282-84 and accompanying text.

to the Constitution. The lecture upon which Judge Arnold relies makes no mention of Article III, nor does Wilson suggest that the duty of a judge to defer to prior decisions was constitutionally compelled.[231] Indeed, his defense of precedent was limited to common law cases — a curious limitation if the doctrine of precedent is constitutionally derived — and, even then, he grounded the doctrine in prudential concerns.[232] In contrast, in an earlier lecture, Wilson had discussed at length the provisions and requirements of Article III, but, significantly, he made no mention of the doctrine of precedent.[233]

That the historical materials do not support Judge Arnold's claim that the Framers understood Article III to require federal courts to issue precedential opinions does not mean, however, that Judge Kozinski or his supporters are correct that the Framers intended precedent not to form a necessary part of the federal judiciary's discharge of its adjudicatory duties. As noted above, Judge Kozinski cited no contemporaneous materials from the Constitutional Convention or state ratifying conventions but rather relied upon several late twentieth-century and early twenty-first-century commentators, neither of whom made the bold claim that the Framers understood Article III to permit the issuance of some decisions lacking precedential status.[234] Moreover, those historical materials that are available, such as *Federalist* 78 — which Judge Kozinski does not address — belie his suggestion that the Framers "would have reacted with alarm" at the prospect of a system in which decisions were accorded precedential status.[235]

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[231] James Wilson, *Of the Constituent Parts of Courts – Of the Judges, in* II THE WORKS OF JAMES WILSON 501-02 (Robert G. McCloskey ed., 1967).

[232] *Id.*

[233] James Wilson, *Of the Judicial Department, in* II THE WORKS OF JAMES WILSON 454-93 (Robert G. McCloskey ed., 1967).

[234] Hart v. Massanari, 266 F.3d 1155, 1167 & n.19 (9th Cir. 2001) (citing Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 770 n.267 (1988); Melissa H. Weresh, *The Unpublished, Non-Precedential Decision: An Uncomfortable Legality*, 3 J. APP. PRAC. & PROCESS 186 (2001)). Moreover, neither Professors Monaghan nor Weresh contends that the Framers rejected the role of precedent in adjudication. To the contrary, Professor Monaghan concedes that "the Framers were familiar with the idea of precedent" (citing *Federalist* 78) and contends only that the Framers possessed some "uncertainty" over the exact value of precedent — a claim that is entirely consistent with the notion that each judicial decision did have some (perhaps even constitutionally compelled) precedential value in adjudication. *See* Monaghan, *supra*, at 770 n.267. Professor Weresh, in turn, makes no attempt to survey the historical materials from the time of the Framing and instead claims only that *publication* of opinions was not mandatory at the time of the Framing. *See* Weresh, *supra*, at 186 (emphasis added).

[235] *Hart*, 266 F.3d at 1167.

Nor can Judge Kozinski salvage his analysis by softening his historical claim and contending only that the Framers rejected the particularly "strict" conception of precedent in practice today.[236] Such a defense would do much to bring Judge Kozinski's reasoning in line with the few historical materials available but at a high — indeed, fatal — cost to his originalist defense of the no-precedent rules. Indeed, such a defense would rest on a non sequitur. The fact that the Framers may have thought that prior decisions could be disregarded if they were erroneous — a point that bears upon their conception of the closely related doctrine of stare decisis — does not indicate that they thought some decisions could be issued *ex ante* with no precedential value.[237] Stated differently, one cannot conclude that the Framers would indisputably accept as constitutional a regime in which some appellate decisions are marked as having *no* precedential value, when those very same Framers assumed that appellate decisions would have *some* precedential value in subsequent cases. Rather, to prove that the no-precedent rules are consistent with the Framers' intent, Judge Kozinski would have to demonstrate that the Framers rejected the notion of precedent *en toto* for some decisions. And that, as noted above, he cannot do.

The over-arching point to draw from this discussion is that none of the historical materials validates either Judge Arnold's or Judge Kozinski's historical claims. The materials upon which they rely do no more than show that the Framers, many of whom were lawyers, expected that the federal courts, like their colonial and state counterparts, would rely upon and consult precedents in deciding the cases before them. This explains the absence of any discussion of the use of precedent in the constitutional debates,[238] but it fails to provide a compelling originalist argument for invalidating (or upholding) the no-precedent rules as inconsistent (or consistent) with Article III.[239] Perhaps a majority of the Framers did assume that precedent was a customary source of legal meaning to

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[236] *Id.*

[237] *See* Cooper & Berman, *supra* note 128, at 752 (noting that circuits that forbid all citation to unpublished opinions cannot be defended by pointing to uncertain nature of stare decisis at time of framing); Lee & Lehnhof, *supra* note 141, at 162 n.137 (noting that circuit no-precedent rules that provide that unpublished opinions have no precedential value, rather than persuasive value, are subject to constitutional challenge based on available historical materials).

[238] Price, *supra* note 128, at 90 (noting that some features of federal courts were deemed so fundamental that no debate about those features ensued and speculating that precedent was one such feature).

[239] *See also* Southwick, *supra* note 12, at 224 (characterizing Judge Arnold's originalist argument as not "very persuasive").

which federal judges would ordinarily resort, but that says nothing about the Framers' views about the constitutional validity of a deliberate choice by the federal courts to declare some decisions non-precedential. Stated another way, it is a long way from acknowledging the assumed importance of precedent to the different legal claim pressed by Judge Arnold that the issuance of non-precedential decisions in accordance with preset criteria adopted by the court of appeals is unconstitutional. Conversely, perhaps the Framers disagreed about the exact interpretive weight to attach to precedent — a problem that plagues us still[240] — but that too says nothing about what the Framers would have thought about the no-precedent rules. It is a long way from acknowledging that there was no consensus among the Framers about the exact weight of precedent to the different legal claim pressed by Judge Kozinski that the Framers would have found nothing constitutionally troublesome about the issuance of deliberately non-precedential opinions.

Ultimately, both Judge Arnold's and Judge Kozinski's analyses fail for the same reason: They both draw definitive conclusions from Framing-era materials that simply do not speak to the narrow legal issue whether the issuance of non-precedential opinions is consistent with Article III. Some Framers may have thought that a federal court's decision to issue non-precedential opinions would pose no constitutional difficulty; some might have thought it per se unconstitutional; some might have thought that the validity of the decision depended on the reasons proffered by the court for adopting such a policy and the limits on the use of such policy; and, most likely, some may not have thought about the matter at all. There is simply no way to know which of these views, if any, commanded the assent of a majority of the Framers.

B. Before and After the Framing Period

The absence of compelling contemporaneous evidence of the Framers' views led both Judge Arnold and Judge Kozinski, as well as their respective supporters, to resort to several non-contemporaneous indicators of the Framers' intent, specifically to both pre-Framing and

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[240] *Compare* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 864 (1992) (holding that decision to overrule past precedent "should rest on some special reason over and above the belief that a prior case was wrongly decided"), *with id.* at 955 (Rehnquist, C.J., concurring in judgment in part and dissenting in part) ("It is . . . our duty to reconsider constitutional interpretations that 'depar[t] from a proper understanding' of the Constitution."), *and id.* at 999 (Scalia, J., concurring in judgment in part and dissenting in part) (suggesting that past precedent may be overruled where it was not correctly decided and failed to produce "a settled body of law").

post-Framing historical records. Judge Arnold turned to the writings of several seventeenth- and eighteenth-century English common law jurists, such as Blackstone and Coke,[241] and to various post-ratification materials, several of which were written almost a half century after ratification.[242] Similarly, Judge Kozinski turned to pre-ratification, English materials written by Blackstone, Sir Matthew Hale, and Lord Mansfield.[243] Meanwhile, their respective supporters have similarly emphasized either pre-Framing or post-Framing materials.[244]

As an initial matter, it is important to point out the limited interpretive significance of these materials to their originalist arguments. For originalists, the only people whose views matter regarding the Constitution are those who actually framed the Constitution.[245] While those who came before the Framing and those who came after may be able to provide some additional insight into the Framers' views of a particular provision, their value to originalists is purely dependent on the extent to which they shed insight on the Framers' views.[246] Critically, their views cannot substitute for those of the Framers'.[247]

This is particularly true for those individuals who came after the Framing, whose views obviously could not have influenced the Framers. The relevance of these individuals depends on the likelihood that their opinions reflect the views of the Framers, and, since opinions change

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[241] Anastasoff v. United States, 223 F.3d 898, 900-01 (8th Cir. 2000) (citing, *inter alia*, 1 WILLIAM W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *258-59 (1765); 4 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 138 (1642)).

[242] *Id.* at 902 & nn.10 & 12, 903-04 (citing, *inter alia*, William Cranch, *Preface to 5 U.S.* (1 Cranch) iii, iii (1804); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 479 (12th ed. 1873); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 377-378 (1833); Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), *reprinted in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 390-93 (Marvin Myers ed., rev. ed. 1981)).

[243] Hart v. Massanari, 266 F.3d 1155, 1164-65, 1164 n.8 (citing, *inter alia*, Bole v. Horton, 124 Eng. Rep. 1113 (C.P. 1673); Fisher v. Prince, 97 Eng. Rep. 876 (K.B. 1762); 1 WILLIAM W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *70-71 (1765); MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 68 (London, Nutt & Gosling 1739)).

[244] *See, e.g.*, Lee, *supra* note 178, at 659-66; Price, *supra* note 128, at 94-107; Southwick, *supra* note 12, at 234-75.

[245] *See supra* note 178 and accompanying text.

[246] BERGER, *supra* note 180, at 49-50 (noting that post-enactment remarks, particularly where they contradict statements made by speaker during enactment process, carry "little weight" and should be treated "with special reserve"); BORK, *supra* note 23, at 165 (noting that post-ratification materials can be relevant to extent that they were "thoroughly familiar with the thought of the time").

[247] *See, e.g.*, Manning, *supra* note 183, at 1352-53 (noting that reliance on Blackstone's *Commentaries*, though commonplace, "requires careful discernment" since Framers rejected some elements of Blackstone's thought).

with time, their relevance varies directly with their temporal proximity to the Framing. Thus, one assumes as a starting point that, for example, William Cranch, who memorialized his views of precedent in 1804, more likely reflects the views of the Framing generation than Joseph Story, whose *Commentaries* were published in 1833. Indeed, because of the passage of time, Justice Thomas, the Supreme Court's most ardent originalist, dismisses Story's views of the Constitution as not representing "the original understanding of the Constitution" but "only his own understanding."[248] In any event, the available pre-Framing and post-Framing materials add little insight into the Framers' understanding of the judicial power vested by Article III and its relationship to the doctrine of precedent.

1. The Pre-Framing Period

As for the pre-Framing period, there is not much to be said since the ambiguities regarding the role of precedent in judicial decision-making only increase as one moves farther back in time from the Framing.[249] The notion of precedent emerged as early as the twelfth century, but that notion differed markedly from the modern understanding of precedent.[250] At that time, a precedent referred to an entry on the judgment rolls, which did not necessarily contain any statement of the reasons for the judgment. Over time, members of the bar began to compile and report the oral statements of the judges in rendering judgments, but the judicial decisions included in the reports were not treated as precedent in the modern sense as a binding statement of law. Rather, judicial statements were viewed merely as evidence of the law, to which subsequent courts need not accord any particular respect or deference.[251]

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[248] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 856 (1995) (Thomas, J., dissenting); *see also* Paulsen, *supra* note 209, at 312 (arguing that Story's *Commentaries* "are later in time — more distant from the framing — and are, to that extent, less authoritative"); John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169, 1181-82 (1999) (noting that "Story had no personal experiences that gave him special insight into the drafting or ratification of the Constitution" and that Story's *Commentaries* "should not be considered to be evidence of the original understanding").

[249] That has not prevented others from spilling much ink about it. *See, e.g.*, Southwick, *supra* note 12, at 234-59 (summarizing pre-Framing views of jurisprudential value of judicial decisions in Europe and North America).

[250] J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 225 (3d ed. 1990). *But see* Southwick, *supra* note 12, at 235 (tracing precedent to thirteenth century writings of Bracton).

[251] BAKER, *supra* note 250, at 226-27.

Over the course of the seventeenth and eighteenth centuries, there was a profound shift in the jurisprudential thinking of English common law jurists from the notion that judicial decisions were merely evidence of the law to the modern view that the decisions were themselves law.[252] Needless to say, this shift posed major implications for the understanding of precedent — implications that would be fully recognized by the middle of the nineteenth century when the English courts adopted a strict rule of stare decisis that required judges to adhere to prior decisions[253] — but it is unclear to what extent common law jurists understood the implications for precedent presented by this jurisprudential shift in the decades immediately prior to the Framing. In 1762, Lord Mansfield declared that he was not bound by "the letter of particular precedents," but his opinion fully honored the modern concept of precedent, discussing and — more importantly — following prior decisions that he thought to provide the applicable rule of decision in the instant case.[254]

Blackstone — whose *Commentaries* were published in 1765-1769 and whose views were familiar to the Framers — was also caught in the riptide of this jurisprudential shift, and his views of law and precedent reflected the transitional character of the times. Blackstone acknowledged that the law and the opinion of the judge "are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may mistake the law."[255] Yet, he declared that "the doctrine of the law" is that "precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration."[256]

These materials indicate that, in the mid- to late-eighteenth-century, the English common law courts were moving to a system akin to the modern one in place today, but the transitional character of the times precludes reaching any firm conclusion regarding the Framers' conception of the judicial function and its relationship to precedent.

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[252] Lee, *supra* note 178, at 660-62; *see also* Lee & Lehnhof, *supra* note 141, at 167 (noting that "most historians agree that during the period leading up to the framing of the constitution the whole theory and practice of precedent was in a highly fluctuating condition") (internal quotation marks and citations omitted).

[253] BAKER, *supra* note 250, at 228-29.

[254] Fisher v. Prince, 97 Eng. Rep. 876, 876-77 (K.B. 1762) (holding that, in action for trover, goods of uncertain number or value need not be deposited with court and finding support in prior decisions involving watch and other goods).

[255] 1 WILLIAM W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *71 (1765).

[256] *Id.* at *70.

More importantly, none of these materials reveal whether these common law jurists understood the judicial function to require the issuance of precedential decisions in all cases or only in some. Lastly, even had there been a universally accepted understanding of the role of precedent in adjudication, one would still need to show that the Framers endorsed that view and, more importantly, that they intended to constitutionalize it by incorporating it into Article III. As the statements of the Framers discussed above indicate, however, there was no indication which conception of precedent, if any, the Framers embraced and whether they understood Article III to constitutionalize that conception.

2. The Post-Framing Period

As for the post-Framing period, the historical materials offer virtually no insight into the views of the Framers regarding the requirements of Article III and its relationship to the doctrine of precedent. Although Judge Kozinski did not rely upon statements by prominent jurists made after the Framing, Judge Arnold invoked several post-Framing legal authorities. First in time after the Framing is William Cranch, who endorsed the value of precedent in his preface to his first volume of Supreme Court reports in 1804.[257] One has to smile at the reliance on Cranch for an endorsement of the value of precedent, for, if ever there was a self-serving statement, Cranch's brief encomium to precedent is it.

On a personal level, Cranch had an incentive to laud the value of precedent so as to encourage sales of his reports. Cranch's reporter was a private undertaking;[258] Congress did not create the official post of Reporter for the Supreme Court, along with a small government stipend of $1000, until 1817.[259] Though selling copies of the Supreme Court reports was hardly an easy path to riches — publishing the reports generated little income for the early reporters, such as Cranch[260] — Cranch desperately needed the money since he had recently suffered financial ruin in a land speculation deal gone bad.[261] Given his financial stake in the success of the reporter, his endorsement of the value of precedent is hardly surprising. After all, there is no point in lawyers

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[257] Anastasoff v. United States, 223 F.3d 898, 902 n.12 (8th Cir. 2000); *see also* Lee, *supra* note 178, at 664 (discussing briefly Cranch's statement).

[258] Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1307 (1985).

[259] Act of Mar. 3, 1817, ch. 63, § 1, 3 Stat. 376, 376.

[260] Joyce, *supra* note 258, at 1345 (noting that early reporters earned little money from sales of their volumes).

[261] *Id.* at 1307.

purchasing Cranch's reporter if the decisions contained therein had no value in subsequent suits. Indeed, it is telling in this regard that Cranch's endorsement of precedent appears in the preface to his reporter — a kind of justificatory advertisement for the volume.

Aside from his direct pecuniary interest, Cranch also had a political interest in endorsing the value of precedent. Cranch was a noted Federalist and the nephew-in-law of President John Adams; indeed, in the waning days of his presidency, Adams appointed Cranch to serve as a judge on the newly created Circuit Court of the District of Columbia.[262] Soon after the Senate confirmed the appointment, President Jefferson was inaugurated, and the Republicans took control of Congress, leaving the judiciary as the sole branch in Federalist hands. The rest — as they say — is history, serving as prologue to the seminal case of *Marbury* v. *Madison*.[263] The Republican Congress repealed the Judiciary Act of 1801,[264] abolishing the newly created, Federalist-controlled Circuit Courts (other than the Circuit Court of the District of Columbia, on which Cranch sat),[265] and, to ensure that Chief Justice John Marshall and his Federalist colleagues on the Supreme Court could not intervene and rule on the constitutionality of that action, Congress abolished the two 1802 terms of the Supreme Court.[266] The Supreme Court opened for business in February 1803, and, several weeks later, Chief Justice Marshall issued the Court's decision in *Marbury* establishing the power of judicial review.

Now, here is the important part for present purposes: It is against this backdrop of a struggle between President Jefferson and the Republican-dominated Congress, on the one hand, and the Federalist-controlled judiciary, on the other hand, that Cranch suddenly decides to take on the task of reporting the decisions of the Federalist-controlled Supreme Court. Cranch's volume begins with the August 1801 term of the Supreme Court — the first term since the Republicans took control of the

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[262] Susan Low Bloch, *The Marbury Mystery: Why Did William Marbury Sue in the Supreme Court?*, 18 CONST. COMM. 607, 611-12 (2001).

[263] 5 U.S. (1 Cranch) 137 (1803). For an excellent examination of the political context leading to *Marbury*, see James M. O'Fallon, *Marbury*, 44 STAN. L. REV. 219 (1992).

[264] Judiciary Act of 1801, ch. 4, 2 Stat. 89.

[265] Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132. That Act repealed the Judiciary Act of 1801 but did not repeal any portion of the Act Concerning the District of Columbia, ch. 15, § 3, 2 Stat. 103, 105 (1801), which had created the Circuit Court of the District of Columbia.

[266] Act of Apr. 29, 1802, ch. 31, § 1, 2 Stat. 156, 156; *see also* WILLIAM E. NELSON, MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 58 (2000) ("Congress also postponed the next term of the Supreme Court until 1803 so that the Court could not rule on the constitutionality of the 1802 act before the act went into effect.").

White House and Congress.[267] Moreover, it is in the midst of this inter-branch partisan struggle that Cranch offers his endorsement of the role of precedent – an endorsement that (obviously) strengthens the power of the Federalist-controlled Supreme Court by suggesting that the decisions of the current, Federalist-dominated Supreme Court are binding upon subsequent, potentially Republican-controlled courts. This is not to suggest that Cranch's endorsement of precedent was purely the result of partisan politics or, more conspiratorially, that it was part of a plot hatched with Chief Justice Marshall to establish the enduring legacy of the Federalist-dominated Marshall Court; rather, the point is that one cannot take Cranch's pronouncement of the value of precedent as a unbiased declaration of law, much less one necessarily reflective of the views of the Framers fifteen years earlier.

In any event, Cranch's endorsement of the value of precedent, even on its own terms, comes nowhere near establishing that respect for precedent was part of the "judicial Power." Like Hamilton before him, Cranch viewed precedent's value as providing a "check" upon the "discretion of the judge."[268] Cranch, however, made no attempt to link the role of precedent to the Constitution, much less to Article III's Vesting Clause — that is, he did not suggest that the judge's obligation to follow precedent was constitutionally compelled flowing from the nature of the "judicial Power." Moreover, Cranch's view of precedent was not universally shared even at the time. As late as 1816, members of Congress expressed the view that decisions of the Supreme Court were not law and, therefore, need not be published by an official reporter.[269]

At least Cranch's endorsement of precedent came in 1804, within one generation of the Framing; the next work invoked by Judge Arnold and his academic supporters, Chancellor Kent's *Commentaries on American Law*, did not appear until 1826 — almost forty years after the Constitutional Convention was held.

Kent is a powerful figure in early American law. An avid Federalist and friend of Hamilton, he began his career as a young lawyer in Poughkeepsie, New York.[270] In fact, in the summer of 1788, Kent

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[267] *See, e.g.*, Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 26 (1804) (noting that case was argued at Aug. 1801 Term and decision issued on Aug. 11, 1801); *see also* Joyce, *supra* note 258, at 1310.

[268] William Cranch, *Preface*, 5 U.S. (1 Cranch) iii, iii (1804).

[269] *See* Joyce, *supra* note 258, at 1345 (noting that opponents of reporter's bill opposed bill on ground that decisions of Supreme Court were not entitled to status of laws "binding on their successors and on other authorities") (citation omitted).

[270] John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L.

attended (as a spectator, not a delegate) the New York state ratifying convention, which was meeting in Poughkeepsie.[271] After brief stints as an assemblyman in the New York Assembly and a professor at Columbia University, Kent was appointed by Governor John Jay in 1798 to the New York Supreme Court.[272] In 1814, he accepted the position of Chancellor of New York, the head of the state's equity court system.[273] Forced out of office in 1823 due to his age — he had reached the mandatory retirement age of sixty — Kent returned to Columbia University.[274] While at Columbia, Kent began to compile his lectures into a work that would subsequently become the *Commentaries*, the first volume of which was published in 1826.[275] Kent revised the *Commentaries* several times, and, after his death in 1847, other individuals continued to publish new editions of the work. A young lawyer from Massachusetts named Oliver Wendell Holmes published the twelfth edition in 1873.[276]

The four-volume *Commentaries* were justly celebrated as a remarkable achievement in legal scholarship, but here's the rub: Chancellor Kent never subscribed to the view that the separation of powers and judicial independence required a respect for precedent. The language that Judge Arnold quotes parenthetically does not appear in Kent's *Commentaries*; rather, it appears in Francis Lieber's *Legal and Political Hermeneutics*.[277] To be sure, Kent asserted that "[a]djudged cases become precedents for future cases resting upon analogous facts, and brought with the same

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REV. 547, 556 (1993).

[271] *Id.* at 556-57.

[272] *Id.* at 558, 564.

[273] *Id.* at 564.

[274] Judith S. Kaye, *Commentaries on Chancellor Kent*, 74 CHI.-KENT L. REV. 11, 25-26 (1998).

[275] Langbein, *supra* note 270, at 564-65.

[276] *Id.* at 565.

[277] *Compare* Anastasoff v. United States, 223 F.3d 898, 902 n.12 (8th Cir. 2000) (quoting 1 KENT, COMMENTARIES, *supra* note 90, at 479 as stating "[t]hose nations, which have adopted the civil law as the main foundation of their own [recognize precedent to a far less degree than our own] . . . . With them the necessity of judiciary independence upon the executive, is not so clearly acknowledged . . . . It has been shown already that this independence requires, in a considerable degree, the acknowledgment of precedential authority") (alteration and ellipses in original), *with* FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 221-22 n.1 (Boston, C.C. Little and J. Brown 1839) ("Those nations, which have adopted the civil law as the main foundation of their own, act upon similar principles. With them, the necessity of judiciary independence upon the executive, is not so clearly acknowledged, as with the Anglican race. It has been shown already that this independence requires, in a considerable degree, the acknowledgment of precedential authority.").

reason,"[278] but he did not link the role of precedent to the separation of powers or the Constitution. Indeed, his discussion of the role of precedent does not appear in the lecture dedicated to an examination of Article III of the Constitution, in which he discusses the need for an independent judiciary, but rather in the lecture devoted to the nature of judicial reports, in which he makes no mention of Article III.[279] Moreover, Kent qualified his endorsement of the doctrine of precedent with a lament about the growth in the number of judicial decisions and reporters. In fact, Kent counseled both lawyers and jurists that to read all the reports, even if practicable, "would be a melancholy waste or misapplication of strength and time."[280] These are hardly the views of a man who would be unsympathetic to the decision of the Court of Appeals (who face a volume of cases far greater than that which Kent ever encountered or could imagine) to adopt selective publication and no-precedent rules. Consequently, it is hazardous to assume that Kent's conception of the judicial function and the role of precedent in it would necessarily condemn the no-precedent rules as unwise, much less unconstitutional.

Lieber, the source of the language quoted by Judge Arnold, provides even less insight into the views of the Framers. Lieber was born in Prussia in 1800, and he emigrated to the United States in 1827 — forty years after the Framing.[281] While in the United States, Lieber became a renowned legal scholar who, at the time that he published *Legal and Political Hermeneutics* in 1839, was teaching at the College of South Carolina.[282] Not only was Lieber in no position to know first-hand the views of the Framers, he never even suggested that their views were relevant to his theory of interpretation in general or the role of precedent in particular. His theory of interpretation was drawn not from history but philosophy: The works of John Austin and German theologians such as Friedrich Schleiermacher — not Madison, Hamilton, or Wilson — provided the intellectual foundation for his views regarding the interpretation of legal texts.[283] Furthermore, Lieber never attempted to

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[278] 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 440 (Boston, Little, Brown, & Co. 1st ed. 1826). In contrast to Judge Arnold, who cites to the Twelfth Edition edited by Holmes, I cite to the First Edition, which was personally prepared by Kent.

[279] *Id.* at 274-77.

[280] *Id.* at 442.

[281] Jordan J. Paust, *Dr. Francis Lieber and the Lieber Code*, 95 AM. SOC'Y INT'L L. PROC. 112, 112 (2001).

[282] Paul D. Carrington, *Meaning and Professionalism in American Law*, 10 CONST. COMMENT. 297, 304 (1993).

[283] Guyora Binder, *Institutions and Linguistic Conventions: The Pragmatism of Legal*

link his theory of interpretation, much less his views of the role of precedent, to the Constitution. Courts were obliged to give due consideration to precedents not because the Constitution commanded it but because, for example, the passage of time suggested a political acceptance of the rule announced in the prior decision.[284] Indeed, as the title of the book suggests, Lieber's preoccupation was with literary interpretation as applied to legal texts, not with the U.S. Constitution and its requirements for federal court adjudication. To put it bluntly, Lieber's discussion of precedent does not remotely indicate what Article III requires with respect to the doctrine of precedent, much less what the Framers thought the Constitution required.

Though closer to the mark, Madison's 1831 letter to Charles Jared Ingersoll adds no greater insight than Lieber into the meaning of the Vesting Clause of Article III.[285] Obviously, Madison was a Framer — he attended and played significant roles in both the Constitutional Convention and the Virginia ratifying convention — and, therefore, his Framing-era statements undoubtedly matter to originalists. The letter to Ingersoll, however, was written over forty years after the Framing. Consequently, unlike his Framing-era statements, which may have influenced the other Framers' understanding of the Constitution, his letter to Ingersoll reflects only his post-Framing views, which do not necessarily inform the meaning of provisions adopted forty years earlier.

Even if Madison's views of precedent had not changed in the intervening forty years — even if the letter accurately reflected his Framing-era views — the letter does not indicate that Madison thought judges were constitutionally compelled to follow prior precedent. In fact, the letter was drafted not as a defense of the *judicial* doctrine of precedent — which defines the extent to which judges in subsequent cases are bound by earlier decisions — but rather as an exploration of the notion of *legislative* precedent — which defines the extent to which presidents and individual congressmen should be bound by the interpretations of the Constitution implicitly endorsed by prior congresses.[286] To be sure, Madison analogized the case for a doctrine of

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Hermeneutics, 16 CARDOZO L. REV. 2169, 2173, 2184 (1995); Paul D. Carrington, *William Gardiner Hammond and the Lieber Revival*, 16 CARDOZO L. REV. 2135, 2135-36, 2139 (1995).

[284] LIEBER, *supra* note 277, at 200-03.

[285] Anastasoff v. United States, 223 F.3d 898, 902 & n.10 (8th Cir. 2000) (citing Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), *reprinted in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 390 (Marvin Myers ed., rev. ed. 1981)).

[286] Madison criticized President Jackson's decision to veto the renewal of the Bank of United States. Letter from James Madison to Charles Jared Ingersoll (June 25, 1831),

legislative precedent to the doctrine of judicial precedent, but — critically — he defended the latter purely on pragmatic, not constitutional, grounds. Indeed, the justifications for a doctrine of judicial precedent were, first, to provide predictability as to the content of the law and, second, to preserve legislative supremacy.[287] At no point did he suggest that Article III or any other provision of the Constitution gave rise to or incorporated the doctrine of judicial precedent. Moreover, Madison's conception of the doctrine of judicial precedent differed from that of most lawyers and judges of the day. Madison made no mention of the precedential effect of individual judicial decisions; rather, he thought the binding power of precedent attached only through "reviews and repetitions."[288]

Last in line (of the sources relied upon by Judge Arnold) is Justice Story's *Commentaries on the Constitution of the United States*, which was first published in 1833. Like Kent, Story commands a prominent position in American law and deservedly so. A brilliant jurist and the youngest justice ever to sit on the Supreme Court (at age 32), he is considered the architect of the "nationalist constitutionalism" of the Marshall Court.[289] Nevertheless, as noted above, originalists accord little, if any, weight to Story's views regarding the Constitution. Justice Thomas has openly declared that Story's *Commentaries* do not represent "the original understanding of the Constitution" but "only his own understanding."[290] So too, Michael Stokes Paulsen has remarked that, while deserving "careful examination," Story's *Commentaries* "are not themselves

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reprinted in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 390 (Marvin Myers ed., rev. ed. 1981) (noting that constitutionality of bank is "sustained by the considerations to which I yielded in giving my assent to the existing bank"). Yet, Madison acknowledged that his own decision as President in 1817 to reauthorize the Bank had subjected him to charges of inconsistency in light of his statements in 1791 as a Representative that he thought a national bank was beyond Congress' constitutional power to charter. To defend himself, Madison declared that the charge of inconsistency "turns on the question how far legislative precedents, expounding the Constitution, ought to guide succeeding Legislatures and overrule individual opinions." *Id.*

[287] *See id.* at 391; *see also* William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis: Casey, Dickerson, and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 68 n.72 (2002) (noting Madison offered "policy justifications" for duty to follow precedent); Lee, *supra* note 178, at 665.

[288] *See* Letter from James Madison to Charles Jared Ingersoll, *supra* note 92, at 390-91; *see also* Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 87 (2001).

[289] H. Jefferson Powell, *Joseph Story's Commentaries on the Constitution: A Belated Review*, 94 YALE L.J. 1285, 1286 (1985) (internal quotation marks and citation omitted).

[290] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 856 (1995) (Thomas, J., dissenting).

evidence of original understanding."[291] These claims are probably true as far as they go — since Story, who was eight at the time of the Constitutional Convention, was hardly in a position to know from first-hand experience what the Framers thought — but the depth and sophistication of thought displayed in the *Commentaries* entitles them to at least some consideration, even if one does not rank them high in the pantheon of originalist sources.[292]

On its face, Justice Story's defense of precedent is a powerful one. Not only does he declare that "the principles of [a judicial] decision are held, as precedents and authority, to bind future cases of the same nature,"[293] he thought that, because of the doctrine of precedent, "our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice or will of particular judges."[294] Indeed, he emphasized that "[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."[295] And, as if that were not enough, Story then links this robust defense of precedent to the Constitution and the Framers' understanding of it, declaring that "this conclusive effect of judicial adjudications, was in the full view of the framers of the constitution."[296]

No wonder Judge Arnold closed his constitutional analysis with Story;[297] this is powerful evidence of a *constitutional* duty to follow past precedent. Or is it? Judge Kozinski and his supporters dismiss Story's statements as referring only to the duty of lower court judges, particularly state court judges, to obey the decisions of the United States Supreme Court.[298] Who's right?

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[291] Paulsen, *supra* note 209, at 312.

[292] Ironically, in contrast to Justice Thomas and others, Judge Bork believes Story's views to be relevant to originalists since he was, according to Judge Bork, "thoroughly familiar" with the Framers' views. BORK, *supra* note 23, at 165.

[293] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 377 (Boston, Little, Brown, & Co. 1833).

[294] *Id.*

[295] *Id.*

[296] *Id.* § 378.

[297] Anastasoff v. United States, 223 F.3d 898, 903-04 (8th Cir. 2000). Michael Stokes Paulsen agrees with Judge Arnold's reading of Story's remarks, though he rejects Story's view as aberrant. Paulsen, *supra* note 224, at 1578 n.115 (noting that Story's "extreme view — that the Constitution requires adherence to judicial precedent — has never been the accepted view in American constitutional law").

[298] Hart v. Massanari, 266 F.3d 1155, 1160 n.3 (9th Cir. 2001); Lee, *supra* note 178, at 664 n.84; Lee & Lehnhof, *supra* note 141, at 161.

The answer is neither, though Judge Kozinski is closer to the mark. On its face, Story's defense of precedent does not limit itself solely to "vertical" stare decisis — the obligation of lower court judges to follow decisions of a higher court. In fact, Story's justifications for a doctrine of precedent — to cabin judicial discretion and promote predictability in the law — equally justify a system of "horizontal" stare decisis — the obligation of a court to follow its own past decisions.[299] The fly in the ointment for Judge Arnold and his supporters is that Story offered his endorsement of the doctrine of precedent in the context of a discussion of the obligation of the states to obey decisions of the United States Supreme Court on matters of federal law. The chapter in which the quoted discussion appears is entitled "Who is the Final Judge or Interpreter in Constitutional Controversies," and the section immediately preceding the quoted remarks ends with the remark that "[t]he only point left open for controversy" — the issue taken up in the ensuing sections quoted by Judge Arnold — is "whether such decision, when made, is conclusive, and binding upon the states, and the people of the states."[300] The sections following the quoted remarks then confirm this understanding, as Story refers to the Supremacy Clause[301] and the fact that, in the forty years since ratification, the states have complied with Supreme Court interpretations of the law — points that do not bear upon whether federal courts are constitutionally bound to honor their own prior decisions.[302] Thus, Story's remarks, though providing a

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[299] *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 597-98, 600-01 (1987) (defending "horizontal" doctrine of precedent as promoting predictability and consistency in adjudication).

[300] STORY, *supra* note 293, § 376. As others have noted, Story's *Commentaries* were published in the wake of and in response to the nullification crisis of the late 1820s, during which South Carolina proclaimed its power to interpret the constitutionality of federal actions for itself. *See* Paulsen, *supra* note 209, at 312-13 (observing that "Story's chief concern in the 'Final Interpreter' section of his treatise is to refute and discredit the position of state nullifiers and vindicate national supremacy"); Powell, *supra* note 289, at 1292.

[301] U.S. CONST. art. VI, § 2.

[302] STORY, *supra* note 293, §§ 383, 391. Professor Lee and, to a lesser extent, Judge Kozinski misread Story as well. While they both attempt to confine Story's remarks as limited to only the obligation of lower courts to obey the decision of higher courts — "vertical stare decisis" as Professor Lee labels it — Story's point was actually broader than that, involving the interpretive power of the federal courts generally, not just the precedential constraints on individual courts. Indeed, this was an interpretative power being described, not simply a rule for ordering the relationship of courts within a judicial hierarchy. *Id.* § 392 (arguing that "the interpretation [of the judicial department] was conclusive, as well upon the states, as upon the people"). Moreover, the entire federal judiciary possessed this interpretive power, not just the Supreme Court. *Id.* § 385 ("We find the power to construe the constitution expressly confided to the *judicial department*, without any limitation or qualification, as to its conclusiveness.") (emphasis added). In short, Story

powerful justification for asserting the Supreme Court's judicial supremacy, do not demonstrate that the "judicial Power" forbids the issuance of non-precedential decisions.

In short, the pre-Framing and post-Framing materials do not fill in the gaps in the historical record regarding the Framers' view of precedent and its relationship to the constitutional functions of the federal courts. They do not establish that the Framers' understanding of the "judicial Power" required courts to issue precedential opinions in all cases, nor (conversely) do they establish that the Framers understood the "judicial Power" to permit the issuance of deliberately non-precedential opinions in some cases. As the foregoing review indicates, individuals before and after the Framing never thought about the matter. To be sure, they gave some passing consideration to the value of precedent in adjudication, but the most that can be said is that they — like the Framers before and after them — expected courts in adjudicating cases to give some degree of consideration to prior decisions. One simply cannot infer from these materials what the Framers understood Article III to require or permit with regard to the precedential status of judicial decisions.

V. ORIGINALISM AND HISTORICAL UNCERTAINTY

What does the opacity of the historical materials mean for the constitutionality of the no-precedent rules? If history does not reveal what the Framers understood the "judicial Power" to require or permit with regard to the precedential status of opinions, what are courts to do?

Obviously, for originalists, the opacity of the historical materials precludes striking down the rules as unconstitutional. Originalism proceeds on the working theory that governmental practices may not be set aside as unconstitutional where the historical records do not clearly show that the Constitution as understood by the Framers condemns those practices.[303] At a bare minimum, then, Judge Arnold was wrong to conclude on originalist-based grounds that the no-precedent rules are

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was laying out an expansive view of the federal judiciary's interpretive power like that announced more than a century later in *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (concluding that *Marbury* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution"). *See also* Paulsen, *supra* note 209, at 312 (arguing that *Cooper* is "merely a reprise" of Story's argument).

[303] BORK, *supra* note 23, at 166 ("The judge who cannot make out the meaning of a provision is in exactly the same circumstance as a judge who has no Constitution to work with."); Lino A. Graglia, *"Interpreting" the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019, 1023-24 (1992) (arguing that originalism provides that "no law should be held unconstitutional unless it is prohibited by the Constitution; that is, unless it is in fact inconsistent with the Constitution as understood by those who made it authoritative").

unconstitutional.

But what about the reverse? Does the absence of a clear indication that the Framers thought the federal courts were constitutionally obligated to issue precedential opinions in all cases require the courts to uphold the no-precedent rules' constitutionality? Judge Kozinski apparently thought so. He was content to close his historical analysis with the conclusion that the views of the Framers, who he said engaged in a "lively debate" regarding the concept of precedent, were "unclear."[304] Implicit in this view is a bias in favor of upholding challenged practices unless the historical records clearly reveal that the Framers' understanding of the Constitution would have condemned them — that the no-precedent rules are constitutional so long as the historical records do not show that the Framers clearly would have thought them unconstitutional.[305] This approach to constitutional adjudication is one often made by originalists.[306]

This instruction to courts to uphold questioned governmental practices unless the historical record clearly indicates that the Framers' understanding of the Constitution would condemn them transforms originalism from simply a theory of interpretation into a theory of judicial review.[307] Originalism, so conceived, is not simply about what the Constitution means but what courts are empowered to do in its name. So conceived, it acknowledges that what the Constitution prohibits and what a court may set aside as unconstitutional are two different things — the latter being a subset of the former. Moreover, so conceived, originalism cannot simply invoke this bias; it must defend it, demonstrating that this presumption in favor of upholding challenged governmental actions where the historical record is unclear is somehow rooted in the Constitution or the Framers' understanding of it.

As an initial matter, this bias cannot be justified on interpretive grounds — that upholding challenged governmental actions in the face of historical uncertainty best accords with the original understanding of the Framers. There is a large universe of practices for which the historical record provides no definitive guidance one way or the other,

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[304] Hart v. Massanari, 266 F.3d 1155, 1167 & nn.19-20 (9th Cir. 2001).

[305] *Id.* at 1163 ("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.").

[306] *See, e.g.*, BORK, *supra* note 23, at 166-67 (arguing that, where constitutional meaning is unclear, "judges must stand aside and let current democratic majorities rule").

[307] *Cf.* RAKOVE, *supra* note 184, at 9 (distinguishing between originalism as theory of interpretation and as theory of judicial review).

and, as for these practices, it seems highly implausible as a historical matter that the Framers intended modern courts to declare them constitutional simply because the historical records were unclear. For example, one searches in vain in the historical records for any statement condemning the adjudication of cases based on, say, a game of cards, roll of the dice, or flip of the coin, but it seems highly dubious that the Framers would have intended modern courts to uphold such practices simply because we were uncertain of the Framers' understanding of the requirements of the "judicial Power."[308] Indeed, there is no more basis for presuming that the Framers intended the federal court to adopt a bias in favor of upholding the constitutionality of questioned practices that the historical materials do not clearly show to have been condemned by the Framers than there is for presuming that they intended the courts to adopt a bias in favor of invalidating questioned practices that the historical records do not clearly show to have been approved by the Framers. Either bias is ahistorical.[309]

Implicitly conceding the foregoing, originalists instead typically ground this bias in favor of the constitutionality of questioned practices not in the Framers' understanding of the adjudicatory process, but rather in democratic theory.[310] According to originalists, it is improper for a group of unelected judges to set aside governmental action that is the product of the democratically accountable branches, such as the President or Congress, unless there is a clear indication that the Constitution as understood by the Framers would condemn such action.[311] To do so risks judicial tyranny. This should all have a familiar ring; it is the familiar bug-a-boo of constitutional theory: the counter-majoritarian dilemma.[312] The originalist bias in favor of upholding questioned practices unless clearly condemned by the Framers is the

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[308] Hoffman, *supra* note 12, at 343 (arguing as theoretical matter that Article III courts do not have constitutional authority to decide cases based on flip of coin).

[309] Kay, *supra* note 180, at 244 n.77 (noting that adoption of bias in favor of constitutionality of questioned practice cannot be justified by original intent of Framers).

[310] *See* BORK, *supra* note 23, at 143 (arguing that "only the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy"); Graglia, *supra* note 303, at 1024 (observing that argument for originalism is premised on reconciling judicial review with democracy).

[311] *See* BORK, *supra* note 23, at 166-67 (arguing that, where judges cannot "decipher" meaning of constitutional provision, "judges must stand aside and let current democratic majorities rule"); *see also* LEVY, *supra* note 165, at 358 (noting that originalists view themselves as democrats protecting democratically enacted legislation from judicial invalidation).

[312] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962).

originalist response to the counter-majoritarian difficulty. In fairness, moderate originalists concede that originalism does not completely eliminate the dilemma (because it too licenses judges to set aside democratically validated governmental action).[313] Nevertheless, they contend that originalism serves to blunt much of the force of the dilemma by limiting the circumstances in which courts set aside democratically enacted legislation to only those situations in which the historical records clearly show that such legislation is inconsistent with the super-majoritarian Constitution as understood by the enacting super-majority.[314] Indeed, Judge Bork hyperbolically contends that originalism is so crucial to reconciling judicial review with democratic governance that we must accept it "in order to save the constitutional design."[315]

Others have challenged this version of originalism, claiming that it rests on a debatable view of democratic legitimacy and that it fails to dissolve the counter-majoritarian difficulty.[316] I do not wish to enter or rehash that debate. My point is a more limited one: Even if one accepts originalism in principle, the originalist-endorsed bias in favor of upholding questioned practices so as to respect democratic government is utterly inapplicable when it comes to adjudicating constitutional challenges to most federal court procedural rules and practices, such as the no-precedent rules. Some federal court procedures are directly mandated by Congress,[317] but the rest — the vast majority of the courts' procedural rules — were adopted by the federal courts themselves (i.e., by unelected judges) through processes that bear absolutely no resemblance to a democratic process.

Indeed, the procedure used to adopt the no-precedent rules exemplifies the undemocratic nature of the federal court rulemaking process. As noted above, the no-precedent rules are local rules adopted by the judges of each circuit. The circuits possess the power to promulgate local rules pursuant to Federal Rule of Appellate Procedure 47, which authorizes a majority of the active judges of each circuit to adopt local rules. Though Rule 47(a)(1) now requires (as a result of a

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[313] *See, e.g.*, Kay, *supra* note 180, at 289 (acknowledging that originalism does not solve counter-majoritarian dilemma).

[314] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (arguing that "originalism seems to me more compatible with the nature and purpose of a Constitution in a democratic system").

[315] BORK, *supra* note 23, at 155.

[316] DWORKIN, *supra* note 165, at 56; LEVY, *supra* note 165, at 363-65 (arguing that judicial review does not interfere with constitutional democracy and may foster democracy).

[317] *See, e.g.*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 103, 110 Stat. 1214, 1218 (amending Federal Rule of Appellate Procedure 22).

1995 amendment) the circuits to provide the public with "appropriate" notice of the proposed rule and the opportunity to comment on it,[318] the original Rule 47 in effect at the time that the no-precedent rules were adopted did not require even that. Rather, the pre-1995 version of Rule 47 imposed no procedural requirements on the circuits and simply authorized a majority of the active judges of each circuit to "make and amend rules governing its practice not inconsistent with these rules."[319] Not only were the circuits permitted to exclude the public from the process of adopting the no-precedent rules, they were entitled to adopt the rules through a secretive process outside public view. Indeed, the Tenth Circuit concealed for six years the fact that three of the circuit's active judges, including the Chief Judge, dissented from the approval of the circuit's no-precedent rule.[320] Moreover, in contrast to the Federal Rules of Appellate Procedure themselves, the no-precedent rules were not submitted to Congress for its tacit approval; there was (and still is) no requirement that local rules be submitted to Congress for its review.[321] Thus, the no-precedent rules were the product of a secretive process in which the sole stakeholders were the unelected federal circuit court judges themselves.

True, the no-precedent rules were promulgated pursuant to authority delegated by the Federal Rules of Appellate Procedure, which were submitted to Congress for its approval in accordance with the Rules Enabling Act.[322] That the Federal Rules of Appellate Procedure were promulgated via the congressional approval process specified in the Rules Enabling Act, however, hardly confers democratic legitimacy upon local rules of court adopted pursuant to the federal rules. To begin with, federal rules of practice and procedure, like the Federal Rules of

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[318] FED. R. APP. P. 47(a)(1). The 1995 Amendment to Rule 47 was made belatedly in response to the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 403(a)(C), 102 Stat. 4642, 4650 (1988), which amended the Rules Enabling Act, 28 U.S.C. §§ 2071-2077, to require public notice and comment for all court rules. *See* 28 U.S.C. § 2071(b) (2000) ("Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment.").

[319] *See* FED. R. APP. P. 47 (1990).

[320] *See* Re: Rules of the United States Court of Appeals for the Tenth Circuit, Adopted Nov. 18, 1986, 955 F.2d 36, 36 (10th Cir. 1992); *see also supra* text accompanying notes 63-64.

[321] *See* 28 U.S.C. § 2074 (requiring submission to Congress of rules adopted by Supreme Court pursuant to 28 U.S.C. § 2072, which provides for adoption of "general" rules of practice and procedure, but not of local rules adopted pursuant to 28 U.S.C. § 2071(a)).

[322] 28 U.S.C. § 2074(a). For a history of the adoption of the Federal Rules of Appellate Procedure, see 16A CHARLES ALLEN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURIS. (3D) § 3946 (1999).

Appellate Procedure, become effective *unless* Congress acts, not because of it.[323] At best, inaction by Congress signifies its tacit acceptance of the proposed rules. Even if we concede that fact and agree that Congress' failure to veto the Federal Rules of Appellate Procedure, including Rule 47, signifies its approval of the rules — itself a dubious proposition[324] — there is simply no plausible basis for assuming that local rules promulgated in accordance with the federal rules have been tacitly approved by Congress. In this respect, local rules of court are analogous to regulations adopted by an administrative agency pursuant to a statutory delegation of power by Congress, which are not assumed to represent the will of or have been endorsed by Congress simply because they were validly promulgated pursuant to a delegation of authority by Congress. Indeed, Congress has created a review process for administrative regulations precisely because *it* recognizes that the use of delegated authority may often lead to the adoption of rules at variance with Congress' wishes.[325]

In fact, local rules of court actually stand in a worse position (democratically speaking) than agency rules and regulations. Administrative rules and regulations are promulgated by an agency or official that is accountable at least in some respect to the President;[326] local rules of court have no similar linkage to an elected official. Moreover, the promulgation process for local rules of court is one step more removed from the legislative process than that for agency rules. Agency rules are the direct product of a delegation of rulemaking authority that has been affirmatively approved by both houses of Congress and signed into law by the President (or at least been passed over his veto through the super-majoritarian requirements of Article I, Section 7).[327] Local rules, in contrast, are enacted pursuant to a delegation only tacitly approved by Congress (by its silence) and

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[323] 28 U.S.C. § 2074(a) (providing that rule adopted by Supreme Court and submitted to Congress shall take effect no earlier than Dec. 1 "unless otherwise provided by law").

[324] *Cf.* INS v. Chadha, 462 U.S. 919, 956-58 & n.22 (1983) (invalidating legislative veto and noting that failure to exercise veto does not equate with congressional approval of action).

[325] *See* 5 U.S.C. §§ 801-02 (2000) (providing for expedited Congressional review of "major rules" adopted by administrative agencies).

[326] *See* Morrison v. Olson, 487 U.S. 654, 692-93 (1988) (suggesting that President has residual, constitutional authority to terminate official who exercises executive power, though power may be limited by Congress); *see also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2284-309 (2001) (describing Presidential mechanism of control of administrative agencies during Clinton Administration).

[327] U.S. CONST. art. I, § 7, cl. 2.

regarding which the President had no say (since the President has no role in the approval of federal rules of practice and procedure unless Congress passes a bill disapproving a proposed rule, which it did not do with respect to the Federal Rules of Appellate Procedure).

Thus, the no-precedent rules cannot lay claim to any democratic provenance; they must be seen as (and, more importantly, judged by) what they are: rules of practice adopted by a small cadre of unelected federal judges via a process in which the public had no right to participate and which it was unable to view.[328] This, of course, is hardly the type of action the judicial review of which gives rise to the counter-majoritarian dilemma.

The implication of this insight for originalist-based inquiries regarding the constitutionality of the no-precedent rules is manifest. The originalist bias that, where the historical records are unclear, federal courts must uphold questioned practices so as to respect the democratic process is inapplicable because the no-precedent rules are not the product of a democratic process. They are the product of a secretive process employed by the federal judiciary for the self-serving purpose of alleviating its own workload, and, as such, their constitutionality cannot be determined on the basis of the simple default rule employed by originalists that uncertainty in the historical records militates in favor of the constitutionality of a practice. Rather, to be honest to the originalist project, their constitutionality must be assessed solely with regard to what the Framers understood Article III to require — and that is precisely what the opacity of the historical records precludes originalists from doing.[329]

Thus, both Judge Arnold and Judge Kozinski are wrong. The uncertainty regarding the Framers' view of the role of precedent in

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[328] This is not to suggest that the federal courts are without constitutional authority to promulgate local rules. Indeed, there is still debate whether the power of the federal courts to regulate their internal practices and procedures derives exclusively from the Constitution (and therefore cannot be regulated by Congress) or exists by virtue of an express delegation of such power by Congress or some measure of both. *See, e.g.*, Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1322 (1993) (contending that federal courts have inherent, constitutionally-derived rulemaking power); *see also* 4 CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL (3D) § 1001 (2002) (summarizing debate). My point is only that such rules cannot claim the imprimatur of democratic approval.

[329] *See* Kay, *supra* note 180, at 254 (conceding that there will be cases in which originalism fails to provide answer to constitutional question, though asserting without support that such cases will be "exceedingly rare" because historical evidence is so "plentiful").

federal court adjudication cuts against both of their conclusions. To condemn practices of the federal courts as unconstitutional on originalist grounds, one must show that the Framers' understanding of the Constitution, rightly applied, would condemn the practice; conversely, to uphold such a practice as constitutional on originalist grounds, one must prove that the Framers' understanding of the Constitution, rightly applied, would have endorsed or at least accepted the practice. The inability to do either with respect to the no-precedent rules precludes using originalism as the interpretive methodology for assessing the rules' constitutionality.

More generally, this insight shows that originalism provides an incomplete interpretive theory. This is not a novel proposition as a general matter,[330] but its particular importance to adjudicating constitutional challenges to federal court procedures and practices has never been made clear.[331] The available historical records simply give us no indication of the Framers' views regarding a whole host of federal court practices, such as limiting the availability of oral argument or dispensing with reasoned explanations for appellate decisions. What materials that are available refer only to the broadest institutional and jurisdictional features of the federal courts; on the types of questions that are likely to be challenged and litigated today regarding the practices and procedures of the federal courts, the materials are all too often unilluminating, particularly at the level of detail that would allow judges to decide, based on history alone, whether the practice is constitutional or not. As to these practices for which the historical records are inconclusive, originalism simply will not provide an authoritative answer to the constitutional question — one way or (and this is the important part) the other. Thus, contrary to Judge Kozinski's approach, the opacity of the historical materials does not support the constitutional validity of a questioned practice; rather, it vitiates the resort to history to resolve the constitutional issue in the first place.

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[330] Powell, *supra* note 181, at 669-70; Tushnet, *supra* note 165, at 793-96.

[331] Professors Wells and Larson have challenged the use of originalism to define the power of Congress to control the jurisdiction of the federal courts on the ground that the historical records do not clearly reveal the Framers' understanding of congressional power. *See* Michael L. Wells & Edward J. Larson, *Original Intent and Article III*, 70 TUL. L. REV. 75, 95-108 (1995). They make no attempt, however, to extend their analysis to encompass other aspects of the federal courts, such as the procedural rules and practices adopted by the courts themselves.

CONCLUSION

As should no doubt be clear by now, I view the debate regarding the Framers' understanding of the "judicial Power" and the role of precedent in it as unanswerable. Some defend Judge Arnold's reading of history;[332] some, like Judge Kozinski, criticize it.[333] Regardless of who is right — and, as I argue above, there is no way to know for certain because of the paucity of historical evidence on the point — history simply cannot provide the conclusive answer to the question of the constitutionality of the no-precedent rules.[334] Rather, that answer must be found elsewhere.

More generally, my critique of originalism as an incomplete interpretive theory should not be confused with an attack on the use of history generally in constitutional adjudication. My point is not that history is utterly irrelevant to constitutional questions or that the courts are free to disregard the Framers' views in assessing the constitutionality of the practices and procedural rules of the federal courts. The views of those who participated in the debates leading to the adoption of the Constitution must be considered and given the weight due them, which may be great or may be little depending on a host of factors. The critical point is that, though the constitutional analysis might begin with a historical inquiry into the views of the Framers regarding the power of the federal courts, it cannot end there.

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[332] *See, e.g.*, Nitta, *supra* note 12, at 815-17.

[333] *See, e.g.*, Brown, *supra* note 12, at 356 ("A crucial factor that Judge Arnold's analysis fails to address is the role of the common law in colonial America and during the years of the early Republic."); Southwick, *supra* note 12, at 276-77 (chastising Judge Arnold's historical research and conclusions).

[334] Price, *supra* note 128, at 84 ("In the absence of solid evidence of specific intent, one might argue, a constitutional interpretation that stands solely on 'originalism' is a weak argument for invalidating non-citation rules.").