

## Precedent, Judicial Power, and the Constitutionality of “No-Citation” Rules in the Federal Courts of Appeals

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On April 13, 1996, Faye Anastasoff mailed a tax refund claim to the IRS. The deadline for the claim was April 15; Anastasoff believed that by mailing it before the deadline, the claim was valid. Ordinarily, she would have been right; the so-called “mailbox rule”<sup>1</sup> provides that in most instances, a claim is timely upon receipt if it is postmarked by the original deadline. The IRS received Anastasoff’s claim on April 16, and rejected it under an obscure exception to the mailbox rule.<sup>2</sup> In the ensuing litigation, the district court rejected Anastasoff’s claim that the mailbox rule applied in her case.<sup>3</sup> On appeal to the Eighth Circuit, the government provided Anastasoff with a copy of *Christie v. United States*,<sup>4</sup> an unpublished decision involving a fact-pattern identical to Anastasoff’s. The Eighth Circuit’s Rule 28A(i) provides that “[u]npublished opinions are not precedent and parties generally should not cite them,” although such opinions may be cited if they “[have] persuasive value on a material issue and no published opinion . . . would serve as well.”<sup>5</sup> During oral argument, Circuit Judge Richard Arnold asked Anastasoff’s attorney what he thought about the *Christie* decision. The lawyer’s response? “[*Christie* is] not binding on this court.”<sup>6</sup>

The court disagreed. In *Anastasoff v. United States*,<sup>7</sup> a three-judge panel of the Eighth Circuit ruled that Rule 28A(i), a type of “no-citation” rule prevalent

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1. 26 U.S.C.A. § 7502 (West 2001).
2. See Roger Parloff, *Publication Rights*, AM. LAW., Oct. 2000 (headnotes).
3. See *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000) (describing the proceedings below).
4. No. 91-2375MN (8th Cir. Mar. 20, 1992) (per curiam) (unpublished).
5. 8TH CIR. R. 28A(i).
6. Tony Mauro, *Stealth Decisions Under Fire*, LEGAL TIMES, Sept. 4, 2000, at 1, 6.
7. 223 F.3d at 898.

among the U.S. Circuit Courts of Appeals, violated the Constitution by conferring a power on the federal courts in excess of the judicial power granted by Article III.<sup>8</sup> The decision meant that every written opinion in the circuit would henceforth have precedential effect. The Eight Circuit convened *en banc* to review the *Anastasoff* panel's decision, and vacated the ruling as moot.<sup>9</sup> The constitutionality of Rule 28A(i) remains an open question in the Eighth Circuit.<sup>10</sup>

Recently, a three-judge panel of the Ninth Circuit upheld the constitutionality of no-citation rules. In *Hart v. Massanari*,<sup>11</sup> Circuit Judge Alex Kozinski maintained that Article III does not require federal courts to treat all of their decisions as binding precedent.<sup>12</sup> Under his analysis, the extent to which a circuit opinion must be followed in future cases within that circuit is a matter of judicial policy, and may be determined with regard to such needs as judicial economy and the prevention of premature adjudication.<sup>13</sup> As both a constitutional and a practical matter, then, the status of unpublished decisions and related no-citation rules has serious implications for the judicial branch, which crafted these policies in an effort to manage burgeoning caseloads in the federal courts of appeals.

This Note discusses the problems created by no-citation rules and provides a number of potential solutions to these problems. Part I describes the history of the debate over nonpublication and no-citation rules, identifying the practical concerns that such rules seek to address and the criticisms to which those rules have been subject. Part II analyzes the constitutional holdings of *Anastasoff* and *Hart*, arguing that the text and history of Article III support a doctrine of precedent that, at the very least, gives presumptively binding effect to judicial interpretations of constitutional and statutory law. Part III identifies the authority of precedent as stemming from both the act of adjudication and the reasoning behind a decision, and argues that no-citation rules are therefore constitutionally justified as applied to decisions that are objectively non-precedential. Part IV attempts to resolve the practical and constitutional

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8. *Id.* at 900; *see also* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in [the Supreme Court and the inferior courts].").

9. *Anastasoff v. United States*, 235 F.3d 1054, 1056 (8th Cir. 2000) (noting that the IRS had capitulated to a Second Circuit decision in conflict with *Christie*, and had satisfied *Anastasoff*'s refund request).

10. *Id.*; *cf.* *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) (upholding the constitutionality under Article III of Ninth Circuit Rule 36-3, which states that "[u]npublished dispositions . . . are not binding precedent"); *Re Rules of the United States Court of Appeals for the Tenth Circuit*, 955 F.2d 36 (10th Cir. 1986) (upholding Tenth Circuit Rule 36.3, which provided that "unpublished opinions . . . have no precedential value and shall not be cited"); *see also* *Symbol Techs., Inc. v. Lemelson Med.*, 277 F.3d 1361, 1366-69 (Fed. Cir. 2002) (adopting the reasoning of *Hart* in order to refute a claim that unpublished opinions are binding precedent in the Federal Circuit).

11. 266 F.3d 1155 (9th Cir. 2001).

12. *Id.* at 1175.

13. *Id.* at 1175-77.

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problems created by no-citation rules, by providing a number of suggestions designed to protect the availability of precedential decisions while respecting the need of judges to quickly dispose of cases having no precedential value.

### I. THE DEBATE OVER NONPUBLICATION AND NO-CITATION RULES

The current controversy over nonpublication and no-citation rules stems from an easily identified problem: case volume.<sup>14</sup> As the docket load of the average federal judge increases and is not met with a corresponding increase in the number of federal judgeships, the concern arises that judges are spreading themselves too thin.<sup>15</sup> One way of addressing this concern is to create different classifications of cases; for example, where the governing law makes a case's resolution a fairly straightforward matter, the necessity of crafting an intricately worded opinion for future litigants might not exist. In 1964, the Judicial Conference of the United States issued a recommendation that federal courts only authorize publication of "those opinions which are of general precedential value."<sup>16</sup> Eight years later, the Board of the Federal Judicial Center recommended that the Judicial Conference direct federal circuits to review and modify their publication policies such that 1) opinion publication would require a majority panel vote, 2) unpublished opinions could not be cited in briefs or subsequent court opinions, and 3) the public record of unpublished opinions would contain only the judgment of the court.<sup>17</sup> The circuit courts proposed a diverse set of publication plans, which the Conference hailed as useful for developing a broad position on publication.<sup>18</sup>

The number of unpublished cases has risen rapidly since 1974. By 1979, when William Reynolds and William Richman finished the first system-wide study of circuit publication plans,<sup>19</sup> the Courts of Appeals were publishing only 38.3 percent of their opinions.<sup>20</sup> Approximately twenty years later, that percentage has fallen to 20.2 percent, with every circuit publishing fewer than

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14. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 221 (1999); William L. Reynolds & William M. Richman, *The Non-Precedential Precedent-Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1168 (1978).

15. Reynolds & Richman, *supra* note 14, at 1168.

16. 1964 JUDICIAL CONFERENCE OF THE UNITED STATES REPORT 11.

17. Reynolds & Richman, *supra* note 14, at 1170.

18. *Id.* at 1172. While most of the courts have modified their original plans, the diversity of approaches still exists. Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. APP. PRAC. & PROCESS 251, 253 tbl.1 (2001) (listing the various publication and citation rules currently in place in the Courts of Appeals).

19. See 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, 574 (1981).

20. *Id.* at 587 tbl. 2. The percentages of unpublished opinions ranged from a high of 81.9 percent (the Third Circuit) to a low of 31.8 percent (the Eighth Circuit). *Id.*

half of its opinions.<sup>21</sup> These statistics are especially troubling in light of the circuits' no-citation rules, some of which prohibit the citation of unpublished opinions entirely, except where necessary to decide issues of *res judicata*, collateral estoppel, or the law of the case.<sup>22</sup> The "nonpublication" controversy has always focused on the no-citation rules. Limited publication of judicial decisions was the accepted course of practice for the Framers,<sup>23</sup> and no one has seriously questioned the ability of courts to determine which of their decisions are fit for publication. What commentators have expressed concern about, however, is the ability of courts to control the body of precedent through limiting citation to their work.<sup>24</sup> No-citation rules are primarily defended as being necessary for judicial economy, and are often criticized because of the wide discretion that judges have in deciding which of their opinions carry precedential value.

A. *Judicial Economy as a Justification for the Noncitation of Unpublished Opinions*

The arguments for and against no-citation rules are based upon a set of assumptions regarding the fundamental purpose of written opinions. Commentators generally agree that written opinions can serve three purposes: 1) explaining the outcome of the case to the parties involved, 2) sharpening the deciding court's reasoning process, and 3) providing a guide to future litigants.<sup>25</sup> Defenders of no-citation rules generally frame their arguments in terms of judicial economy; judges, they say, simply lack the time to write a completely thorough decision in each case, and must ration their resources accordingly.<sup>26</sup>

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21. 2000 JUDICIAL BUSINESS OF THE UNITED STATES COURTS 44 tbl.S-3, available at <http://www.uscourts.gov/judbus2000/tables/s03sep00.pdf> (last visited Apr. 21, 2002). The Fourth Circuit disposes of 90.5 percent of its cases in unpublished opinions, while the court with the lowest percentage of unpublished opinions, the Seventh Circuit, still disposes of 56.5 percent of its cases in this manner. These statistics do not include the Federal Circuit. *Id.*

22. *E.g.*, D.C. CIR. R. 28(c) (stating that unpublished opinions are "not to be cited as precedent"); 9TH CIR. R. 36-3(a), (b) ("Unpublished dispositions . . . are not binding precedent . . . [and] may [generally] not be cited to."); *see also* 11TH CIR. R. 36-2 ("Unpublished opinions are not considered binding precedent . . . [but] may be cited as persuasive authority.").

23. *Anastasoff v. United States*, 223 F.3d 898, 903 (8th Cir. 2000).

24. Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions and the Nature of Precedent*, 4 GREEN BAG 2D 17, 18 (2000).

25. *E.g.*, Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119, 123 (1994); Reynolds & Richman, *supra* note 14, at 1182.

26. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 168-69 (1996) (arguing that limited publication rules contribute to increased judicial output); *cf.* *Anastasoff*, 223 F.3d at 904 (criticizing the argument that no-citation rules are justified because judges are too overworked "to do a decent enough job").

The main dispute surrounding unpublished opinions is whether any such thing as an “easy” case exists. An easy case, by definition, would be a case in which the application of the relevant legal principle to the relevant set of facts requires a negligible quantity of legal reasoning. Since the federal circuit courts lack the ability to reject appeals,<sup>27</sup> they often encounter cases in which the law is already well-settled.<sup>28</sup> In such instances, neither the second nor the third rationale for writing an opinion exists. Since the law is well-settled, writing an opinion will not aid the court in resolving the legal issue. Furthermore, if the court relies completely on prior law and need not make any sort of analogical deduction based on the facts, the opinion is essentially worthless as a guide to future litigants.<sup>29</sup> Thus, a court is justified in directing the opinion toward the parties, by assuming knowledge of the basic facts and providing reasoning that is specific to the case at hand.<sup>30</sup> This, in turn, allows the judge to spend a shorter amount of time on the opinion, time that he or she can then devote to other, more difficult cases.

Since opinions in so-called “easy” cases are written quickly and directed towards the parties (as opposed to future litigants), judges have two reasons for wanting to forbid or discourage their citation. The first and primary reason is that such opinions could potentially mislead litigants because they are not written broadly enough to serve as useful guides in future cases.<sup>31</sup> The second reason also stems from the amount of time a court spends preparing an opinion: a hastily written opinion is potentially unreliable for future litigants, regardless of whether the correct result is reached in the case itself. Limited citation rules for these types of cases free judges from having to spend the huge amounts of time necessary to write full-blown opinions.<sup>32</sup>

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27. Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 767 (1995); see also Hon. Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 181-82 (1999) (identifying “meritless appeals” as a major problem affecting the federal appeals courts).

28. Dragich, *supra* note 27, at 767; see also Gilbert S. Merritt, *The Decision Making Process in Federal Courts of Appeals*, 51 OHIO ST. L.J. 1385, 1392 (1990) (arguing that “because many cases do not result in a change of law or even a nuance of law. . . . the main public good produced [in these cases] is that the dispute is settled”).

29. See Hon. Philip Nichols, Jr., *Introduction of Selective Publication of Opinions: One Judge’s View*, 35 AM. U. L. REV. 909, 916 (1986) (noting that “string-citations” that do not provide new points of law or reasoning are “usually unpersuasive” to judges).

30. See *id.* at 921 (arguing that all decisions should be directed toward the parties, and not toward “making precedent). *But see* Alex Kozinski & Stephen Reinhardt, *Please Don’t Cite This!*, CAL. LAW., June 2000, at 43 (stating that opinions must be crafted in much greater detail if they are to be of any use to future litigants).

31. Kozinski & Reinhardt, *supra* note 30, at 43.

32. *Id.*

B. *Removal of Precedent as an Argument for Limiting Judicial Discretion Not to Publish*

Whereas the primary argument for no-citation rules is fundamentally an argument that judges can and should spend less time on opinions they believe will not be of use to future litigants, the arguments against such rules generally focus on the damage to the legal system as a whole (and to litigants in particular) caused by judicial discretion not to publish. Most of the arguments point out that cases bearing clear precedential significance are being removed from the body of case precedent through the nonpublication/no-citation mechanism. Consider, for example, *United States v. Rivera-Sanchez*,<sup>33</sup> in which the Ninth Circuit confronted a technical sentencing question involving the application of Supreme Court precedent. In stating its reasons for publishing the decision, the Ninth Circuit pointed to the existence of *twenty* separate, unpublished panel decisions that had taken a total of three different approaches to the question.<sup>34</sup> Since the relevant Supreme Court precedent was not precisely on point, any of the Ninth Circuit opinions could easily have merited publication. The underlying critique of no-citation rules, therefore, is that they give judges too much discretion in deciding which cases do not merit publication.

Since no-citation rules apply only to unpublished dispositions, a common charge is that the standards for determining whether to publish an opinion are overbroad.<sup>35</sup> Although judges might generally be able to determine which

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33. 222 F.3d 1057 (9th Cir. 2000).

34. *Id.* at 1062-63.

35. See POSNER, *supra* note 26, at 165 (describing the argument by critics of no-citation rules that many of these standards “amount to little more than saying that an opinion should not be published unless it is likely to have value as precedent”); see, e.g., 1ST CIR. LOC. R. 36(b)(1) (stating simply that when an opinion “does not articulate a new rule of law, modify an established rule, apply a rule to novel facts or serve otherwise as a significant guide to future litigants,” it should not be published). Compare the First Circuit rule with the more detailed guidelines set down by the Federal Circuit:

The court’s policy is to limit precedent to dispositions meeting one or more of these criteria:

- (a) The case is a test case.
- (b) An issue of first impression is treated.
- (c) A new rule of law is established.
- (d) An existing rule of law is criticized, clarified, altered, or modified.
- (e) An existing rule of law is applied to facts significantly different from those to which that rule has previously been applied.
- (f) An actual or apparent conflict in or with past holdings of this court or other courts is created, resolved, or continued.
- (g) A legal issue of substantial public interest, which the court has not sufficiently treated recently, is resolved.
- (h) A significantly new factual situation, likely to be of interest to a wide spectrum of persons other than the parties to a case, is set forth.
- (i) A new interpretation of a Supreme Court decision, or of a statute, is set forth.
- (j) A new constitutional or statutory issue is treated.
- (k) A previously overlooked rule of law is treated.

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opinions make “meaningful contribution[s] to [the] body of precedent,”<sup>36</sup> the publication guidelines of most circuits do not mandate publication of opinions meeting the relevant criteria.<sup>37</sup> Some critics argue that this lack of judicial accountability will lead judges to decide cases contrary to precedent<sup>38</sup> or, more commonly, to suppress precedents with which they do not agree.<sup>39</sup> In any event, the critics remain focused on the decisions that “slip through the cracks”; although they argue against no-citation rules as a general matter, their policy arguments are largely geared towards protecting the citability of decisions with precedential merit. The *Anastasoff* case was the first opinion to address the question whether *all* decisions, as a constitutional matter, are precedents.

## II. THE CONSTITUTIONALITY OF PRECEDENT IN THE *ANASTASOFF* AND *HART* DECISIONS

Judge Arnold’s opinion in *Anastasoff* was not the judge’s first attempt at grappling with the problems caused by no-citation rules in the appellate courts.<sup>40</sup> In an article published approximately one year before the first *Anastasoff* decision, Arnold sharply criticized the Eighth Circuit’s no-citation rule. Doubting the ability of a court to declare that “[u]npublished opinions are not precedent,”<sup>41</sup> he suggested that Article III might prevent courts from removing *any* decisions from the body of law that constitutes precedent.<sup>42</sup> The judge’s article illuminates his subsequent opinion in *Anastasoff* in two significant ways. First, it belies his overarching belief that judges impermissibly exercise legislative power when they determine that a decision is not precedent.<sup>43</sup> Second, it suggests that his concerns would disappear if he

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(l) Procedural errors, or errors in the conduct of the judicial process, are corrected, whether by remand with instructions or otherwise.

(m) The case has been returned by the U.S. Supreme Court for disposition by action of this court other than ministerial obedience to directions of the Court.

(n) A panel desires to adopt as precedent in this court an opinion of a lower tribunal, in whole or in part.

FED. CIR. R. APP. § 10(4).

36. See Martin, *supra* note 27, at 189.

37. *But see* 1ST CIR. LOC. R. 36(b)(1) (establishing a presumption in favor of publishing opinions).

38. Martineau, *supra* note 25, at 123; Reynolds & Richman, *supra* note 19, at 581.

39. POSNER, *supra* note 26, at 165. These concerns, however, are probably of lesser weight than concerns that judges are inadvertently choosing for nonpublication decisions that have precedential value. Martineau, *supra* note 26, at 130 (citing case studies showing that courts generally act in good faith, and seldom exploit nonpublication rules so as to render improper decisions).

40. See Arnold, *supra* note 14, at 219.

41. 8TH CIR. R. 28A(i).

42. Arnold, *supra* note 14, at 226.

43. *Id.*

could be convinced that decisions subject to no-citation rules are really of no precedential value.<sup>44</sup>

Prior to his decision in *Hart*, Judge Kozinski had also written about his view of unpublished opinions.<sup>45</sup> Kozinski's article is based upon the premise that judges themselves give decisions precedential value through the crafting of their opinions.<sup>46</sup> This premise serves as both the beginning and end points of the *Hart* discussion, from Kozinski's accusation that *Anastasoff* requires judges "to *make* law in every case" to his assertion that "one important aspect of the judicial function is separating the cases that should be precedent from those that should not."<sup>47</sup> Of course, in order to argue that the judiciary may choose when its decisions constitute precedent, Kozinski must necessarily refute the claim that the Article III judicial power contains a constitutional limitation on such choices.

On the constitutional question, *Anastasoff* is more persuasive. In his discussion of precedent, Arnold fails to adequately account for the declaratory theory of common law, which held prior judicial decisions to be "evidence" of the law but not independent sources of law themselves.<sup>48</sup> Although this theory was beginning to lose sway to the doctrine of *stare decisis* by the time the drafting of the Constitution took place, some commentators (including Kozinski in *Hart*) have argued that it casts doubt on whether the Framers intended the Article III judicial power to be limited by a doctrine of precedent.<sup>49</sup> Analysis of the Constitution's hierarchical structuring of the judicial branch supports the conclusion that the phrase "judicial power" should be read to incorporate a doctrine of binding precedent, at least insofar as the interpretation of written law is concerned. This conclusion is particularly persuasive when informed by the views of Hamilton and Madison, two of the most prominent Founding Fathers.<sup>50</sup> In theory, therefore, judges cannot constitutionally decide when a decision should be treated as precedent.

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44. Arnold admits that one category of cases does not, in his opinion, carry precedential weight. When a three-judge panel follows the result of a prior panel to which it is bound, the latter opinion "can truly be said to lack precedential significance." *Id.* at 222. The judge suggests, but does not state, that he reaches this result because a second panel cannot overturn the result of a first, that power being reserved to an *en banc* court. *Id.*

45. Kozinski & Reinhardt, *supra* note 30, at 43.

46. *Id.*

47. *Hart v. Massanari*, 266 F.3d 1155, 1180 (9th Cir. 2001); see also Kozinski & Reinhardt, *supra* note 30, at 81 ("Trying to extract from [unpublished decisions] a precedential value that *we didn't put into them* . . . would . . . damage the court in important and permanent ways.") (emphasis added).

48. See Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 659-60 (1999).

49. 226 F.3d at 1167-68; see also John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 522 (2000); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1577-78 (2000).

50. See discussion *infra* Part II.C.



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A. *The Anastasoff Opinion and Judge Kozinski's Critique in Hart*

Judge Arnold begins his analysis in *Anastasoff* by observing that “[t]he doctrine of precedent was well-established by the time the Framers gathered in Philadelphia.”<sup>51</sup> He traces the doctrine’s roots back to William Blackstone, who saw the “judicial power” as stemming from the responsibility of judges to “determine the law”;<sup>52</sup> interpretation of the law binds future courts, since judges are “not delegated to pronounce a new law, but to maintain and expound the old.”<sup>53</sup> English commentators such as Blackstone and Edward Coke emphasized the role of judges in declaring the law, and saw the doctrine of precedent as limiting judicial discretion.<sup>54</sup> Blackstone in particular was concerned that judges not assume legislative power by departing from established laws, as to do so would subject individuals to “the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions.”<sup>55</sup>

Arnold next explores the Framers’ attitudes toward precedent. Hamilton, he says, acknowledged that the proper function of a court is to express a judgment regarding what the law *is* rather than what that court thinks the law should be.<sup>56</sup> Madison recognized the binding force of precedent, and expected that it would be used to fix interpretation of the Constitution.<sup>57</sup> Even the Anti-Federalists shared a similar commitment to the doctrine of precedent, as evidenced by their fear that judges would have too much discretion in the absence of regulating precedents.<sup>58</sup>

The *Anastasoff* decision does not provide a large number of citations to primary sources, and has drawn criticism for its shallow treatment of the doctrine of common-law precedent.<sup>59</sup> Nevertheless, Blackstone, Hamilton and Madison are solid primary sources for determining how the Framers understood precedent within the framework of judicial power.

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51. *Anastasoff v. United States*, 223 F.3d 898, 900 (8th Cir. 2000) (citations omitted).

52. *Id.* at 901 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES 25 (St. George Tucker ed., 1969) (1803)).

53. *Id.* (quoting 1 BLACKSTONE, *supra* note 52, at 69).

54. *Id.*

55. *Id.* (quoting 1 BLACKSTONE, *supra* note 52, at 259).

56. *Id.* (citing THE FEDERALIST NO. 78, at 507-08 (Alexander Hamilton) (Robert B. Luce ed., 1976)).

57. *Id.* (citing Letter from James Madison to Samuel Johnson (June 21, 1789), in 12 PAPERS OF JAMES MADISON 250 (Robert A. Rutland et al. eds., 1977)).

58. *Id.* at 902-03 (citing Letter from the Federal Farmer (Oct. 10, 1787), in THE COMPLETE ANTI-FEDERALIST 244 (Herbert J. Storing ed., 1981)).

59. *Recent Cases: Anastasoff v. United States*, 114 HARV. L. REV. 940, 943 (2001) (criticizing the depth of the *Anastasoff* court’s historical analysis); *see also* 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, 356-57 (2001) (arguing that Arnold’s opinion fails to adequately address the role of common law during the early Republic).

Judge Kozinski focuses *Hart's* constitutional criticism of *Anastasoff* upon one major point: The Framers would not have had a view of binding precedent that was so strong as not to warrant explicit mention in the Constitution. Kozinski's argument centers around the declaratory theory of common law, in which judges were thought not to make the law themselves but rather to "find" the law with the aid of prior opinions.<sup>60</sup> Under this theory, judicial decisions were not independent sources of law, but rather evidence of what the law was; common law judges were not bound by previous decisions, but rather looked to such decisions for examples of judicial practice and policy.<sup>61</sup> Kozinski traces the existence of declaratory theory in England to as late as the mid-nineteenth century, and claims that it "casts serious doubt" upon whether the Framers meant to incorporate a doctrine of binding precedent into the judicial power.<sup>62</sup>

To develop this point, Kozinski notes that "[o]ne impediment to establishing a system of strict binding precedent was the absence at common law of a distinct hierarchy of courts."<sup>63</sup> In America, he continues, the modern notion of binding precedent gradually began to take shape in the nineteenth century, as judicial decisions were increasingly seen as sources of the law rather than as mere evidence of it.<sup>64</sup> As an illustration of this point, Kozinski asks how a constitutional notion of binding precedent survives the structure of the modern federal courts. After all, district court opinions are nonprecedential, and circuit precedents exist only within the boundaries of each circuit.<sup>65</sup> While *Hart* is thoughtfully researched, however, its conclusions fail to address two significant points: First, the argument that the hierarchical structure of the federal courts *is* provided in the Constitution, suggesting a doctrine of binding precedent, and second, that the Framers probably viewed judicial decisions interpreting written provisions of law as sources of law themselves, despite what declaratory theory might have had to say about common-law precedent.

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60. *Hart v. Massanari*, 266 F.3d 1155, 1167-68 (9th Cir. 2001).

61. *Id.*

62. Kozinski cites but one example of a state court rejecting its own precedent without providing special justification. *Id.* at 1167 n.20, (citing *Fitch v. Brainerd*, 2 Day 163 (Conn. 1805), available at 1805 WL 203). He further argues that the question as to whether state courts would adopt English precedents after the Revolution casts doubt upon the view that the Framers had a "rigid" notion of precedent. *Id.* Although the extent to which state courts would adopt the body of English common law might indicate that "the parameters of judicial power were highly contested," Kozinski says, such an observation says little about how those courts treated precedent once they had adopted a body of common law as their own. *Id.* (citing *Brown*, *supra* note 58, at 375).

63. 266 F.3d at 1164.

64. *Id.* at 1168.

65. *Id.* at 1172-74.

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B. *Appellate Jurisdiction and the Hierarchical Structure of the Federal Court System*

Article III of the Constitution vests “the judicial Power” in the Supreme Court and in any “inferior” courts that Congress may create.<sup>66</sup> This arrangement presupposes some sort of hierarchy within the federal court system. Lest the point be made too lightly, such a hierarchy does not require that the Supreme Court possess appellate jurisdiction over all cases and controversies as those terms are used in Article III, Section 2. The Supreme Court’s appellate jurisdiction may be expanded or limited by Congress, as indeed it has been over the course of two centuries.<sup>67</sup> The hierarchical structure of the federal courts would not be defeated if the Supreme Court were deprived of appellate jurisdiction over the circuit courts in certain subject areas. Rather, it is the Constitution’s delineation of original and appellate jurisdiction, coupled with the default grant of plenary appellate jurisdiction to the Supreme Court, that provides for the establishment of a pyramid of judicial authority. Whether precedent operates to bind courts at similar and lower levels of the hierarchy depends upon how judicial power is exercised through appellate jurisdiction.

Traditionally, appellate review is thought to have two potential functions: the correction of a lower court’s errors, and the creation of new law.<sup>68</sup> The former is a necessary function of appellate courts, while the latter requires some notion of binding precedent. If, for example, a statute is susceptible to two different (and reasonable) interpretations, an appellate court does not “make law” unless its decision in favor of one interpretation precludes future courts from reaching the other interpretation. This is true both for vertical stare decisis (which makes appellate decisions binding on lower courts) and for horizontal stare decisis (which binds appellate courts on the same level). Professor John Harrison has argued that the Constitution requires neither, and echoes Kozinski’s particular concern that grounding precedent in the judicial power does not explain why district court opinions are nonbinding or how circuit court opinions can properly be considered nonbinding with regard to other circuits.<sup>69</sup>

The nature of federal appellate jurisdiction suggests answers to both questions. Exercise of original jurisdiction clearly does not entail error-correction, although it could presumably entail the creation of law. One justification for limiting the creation of law to courts exercising appellate jurisdiction is that at least two courts will have the opportunity to evaluate the legal reasoning of a case. In any event, this rationale could justify treating

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66. U.S. CONST. art. III, § 1.

67. *E.g.*, Act of Dec. 23, 1914, ch. 2, 38 Stat. 790 (granting the Supreme Court appellate jurisdiction in cases in which a state court below had upheld a federal claim).

68. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

69. Harrison, *supra* note 49, at 518.

district court decisions as nonbinding. As far as intercircuit court decisions go, the scope of appellate jurisdiction provides a satisfactory answer. Article III courts exercise the judicial power within the jurisdiction provided by Congress. The scope of an appellate court's power, including the breadth of its precedential decisions, is therefore limited to its prescribed jurisdiction. This should be the case whether the limitation is by subject matter (as with the Federal Circuit) or by arbitrary geographic designation (as with the rest of the Circuits).

Even though the creation of law through binding precedent is not necessary for the exercise of appellate jurisdiction, it makes sense that the Framers would have sanctioned such a function. Without adherence to a predetermined interpretation of ambiguous constitutional or statutory provisions, the law would be in a continuous state of flux wherever numerous interpretations were possible. Although prior interpretations might possess persuasive force as precedent, no external limitations upon judicial discretion would otherwise exist.

### C. *The Framers' View Regarding Judicial Interpretations of Written Law*

The best support for Arnold's position in *Anastasoff* comes from the writings of Hamilton and Madison. Although the exercise of judicial power was meant to give effect to legislative intent,<sup>70</sup> both men recognized that written laws would often suffer from ambiguities, making their meaning difficult to discern.<sup>71</sup> Judicial discretion, so long as it was based upon sound legal reasoning and was not an "arbitrary" exercise of a judge's will, could "liquidate and fix" the meaning of ambiguous statutory provisions.<sup>72</sup> Professor Caleb Nelson explains Madison's concept of "liquidation" as the belief that early interpretations of a statute or constitutional provision themselves helped determine the meaning of the law.<sup>73</sup> So long as a judge resolved a legal obscurity in a manner that clarified, but did not "repeal or alter" the law, subsequent courts would be bound by that interpretation even if they could and would have chosen a different interpretation on first impression.<sup>74</sup> This view

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70. See, e.g., THE FEDERALIST NO. 78, at 507 (Alexander Hamilton) (Modern Library ed. 1937) (stating that courts must defer to "the constitutional intentions of the legislature").

71. THE FEDERALIST NO. 37, at 229 (James Madison) (Modern Library ed. 1937) ("All new laws, though penned with the greatest technical skill . . . are considered as more or less obscure . . . until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."); THE FEDERALIST NO. 78, *supra* note 70, at 507 (identifying the need to resolve statutory language in order to avoid conflict between laws).

72. THE FEDERALIST NO. 78, *supra* note 70, at 507, 510.

73. Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 10-14 (2000).

74. Letter from James Madison to N.P. Trist (Dec. 1831), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 211 (J.B. Lippincott & Co. 1865); see also Nelson, *supra* note 73, at 13-14.

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thus identifies judicial decisions as independent sources of law. Where a written law was subject to a number of permissible constructions, the judicial decision would fix its interpretation. Granted, the external source of the law was still the will of the legislature (or, in the case of the Constitution, the will of the People). In such cases, however, judicial decisions became more than just mere “evidence” of the law; they became part of the law itself.

This theory of binding precedent served two main purposes. First, it helped prevent arbitrary or unsound judicial discretion by forcing courts toward a correct outcome. Second, it preserved certainty and predictability in the law by restraining judges’ ability to adopt conflicting individual interpretations of a law, even when multiple interpretations might be within the scope of what the law permitted.<sup>75</sup> This second purpose is, of course, a justification for the lawmaking function of appellate courts. The Anti-Federalists feared that the power to interpret the Constitution would give the judiciary a power “above the legislative,” since courts could control the legislative process by striking down laws they deemed unconstitutional.<sup>76</sup> This fear assumed the lawmaking effect of constitutional interpretation: “one adjudication will form a precedent to the next.”<sup>77</sup> Thus, although the existing evidence is admittedly sparse, it tends to show that the Framers most likely understood the exercise of judicial power to incorporate some doctrine of binding precedent, at least insofar as questions of statutory and constitutional law were concerned.<sup>78</sup>

The preceding analysis supports Judge Arnold’s primary point in *Anastasoff*: The Framers understood that judges would not be free to arbitrarily disregard legal principles established by prior case law. This, of course, is all that Arnold needed to determine in order to justify the case’s result. *Christie* was directly on point; the Eighth Circuit had no discretion to erase the legal rule established by *Christie*; therefore, *Christie* governs Faye Anastasoff’s case despite the Eighth Circuit’s no-citation rule.

One major problem with *Anastasoff* is that Arnold ignored the connection between the Eighth Circuit’s no-citation rule<sup>79</sup> and its criteria for nonpublication.<sup>80</sup> The two rules are necessarily interrelated, since the nonprecedential status of a decision depends upon whether that decision is published. The choice not to publish *Christie* was clearly in error, since

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75. Nelson, *supra* note 73, at 11-12.

76. Essay of Brutus, Mar. 20, 1788, in THE COMPLETE ANTI-FEDERALIST, *supra* note 57, at 438.

77. *Id.* at 441.

78. Significantly, Kozinski makes no mention of Hamilton or Madison in *Hart*, arguing instead that since the declaratory theory of common law might still have held sway in parts of America at the time of the Founding, the Framers could not possibly have intended the judicial power of Article III to be limited by any doctrine of binding precedent. *Hart v. Massanari*, 266 F.3d 1155, 1163-64, 1167 (9th Cir. 2001).

79. 8TH CIR. R. 28A(i).

80. 8TH CIR. R. APP. I.

*Christie* established “a new interpretation” of the law.<sup>81</sup> Viewed in this light, Arnold could have invalidated Rule 28A as applied to *Christie*, while leaving the general rule intact. That he did not do this confirms his belief that *all* cases, not just ones involving new rules of law or widely varying fact-patterns, carry the force of precedent. The historical evidence tends to show, however, that the Framers understood precedential authority to derive from a combination of the act of adjudicating and the legal reasoning by which such adjudication was possible, not from either factor alone. If this proposition is true, then a decision’s value as precedent is determined in part by the nature of the reasoning process; a court subscribing to a no-citation rule therefore does not “create” precedential value, but rather identifies its presence or absence.

### III. PRECEDENTIAL AUTHORITY STEMS FROM THE ACT OF ADJUDICATION AND THE REASONING UNDERLYING THE DECISION

What gives a decision precedential authority? Can all decisions possess such authority, regardless of whether they establish new rules of law, apply established rules to unique fact patterns, or merely follow the decisions that have come before them? In this section, I will argue that precedential authority derives from both the act of adjudication and the nature of the legal reasoning involved. With respect to many cases, therefore, *Anastasoff* is correct: judicial decisions are precedential authority unless they contain a negligible amount of legal reasoning (i.e. they strictly follow existing precedent without needing to rely upon analogical deductions). No-citation rules would be constitutional in this latter category of cases, but unconstitutional as applied to cases having precedential weight.

The true argument from precedent gives a past decision present value despite the belief that the former decision was erroneous.<sup>82</sup> In theory, the act of adjudication constitutes the resolution of a legal issue despite the quality of the reasoning involved. While the Founders did not necessarily believe that erroneous decisions had precedential authority, they recognized that the doctrine of precedent required certain decisions to be considered final. In 1791, for example, Madison had questioned the constitutionality of a national bank.<sup>83</sup> His 1817 assent as President to the Bank of the United States provided him with an opportunity to expound on the reasons for accepting as decided a question that, in his opinion, had been incorrectly resolved:

[W]hy are judicial precedents . . . of authoritative force in settling the meaning of the law? It must be answered; 1st. Because . . . the good of society requires that the rules of conduct of its members should be certain and

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81. *See id.*

82. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 575 (1987).

83. Letter from James Madison to Charles David Ingersoll, June 25, 1831, in MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 390 (Marvin Meyers ed., rev. ed. 1981).

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known . . . 2. Because an exposition of the law publicly made, and repeatedly confirmed by the constituted authority, carries with it, by fair inference, the sanction of [the people, who] have determined its meaning through their judiciary organ.”<sup>84</sup>

In other words, Madison accepted the precedential authority of a decision with which he disagreed not solely because of the stability interest in having the issue decided, but also because the act of adjudication itself gave authoritative force to the decision. Hamilton, while less specific on why the act of deciding imbued a decision with precedential force, also acknowledged that the goal of “avoid[ing] arbitrary discretion in the courts” justified binding future judges.<sup>85</sup>

The act of adjudication alone, however, cannot sustain the precedential authority of a decision that is not solidly grounded in legal reasoning. The method a court uses for arriving at its result either sustains or undercuts the precedential value of a decision. For Blackstone, a “manifestly absurd” decision was not merely bad law—it was *not* law at all.<sup>86</sup> The declaratory theory of common law, which was based on the belief that the law had a “Platonic” or “ideal” existence apart from judicial decisions, saw judicial decisions as “evidence” of the law, binding only to the degree that they were consistent with the “ideal” law.<sup>87</sup> Blackstone himself favored a stricter adherence to precedent, but borrowed from declaratory theory the idea that the authority of a decision derived at least in part from the reasoning behind it.<sup>88</sup> Although the Founders rejected the notion that the reasoning behind every decision was subject to constant reevaluation, they preserved as an exception to the doctrine of *stare decisis* the correction of extreme errors in legal reasoning.<sup>89</sup>

Of course, Arnold readily acknowledges in *Anastasoff* that “[i]f the reasoning of a case is exposed as faulty . . . precedents can be changed.”<sup>90</sup> Thus, he seems willing to admit that the precedential value of a case depends at least in part upon how the court reaches its decision. But what if the court need not engage in legal reasoning to reach its result? Assume, for instance, that the *Christie* decision had been a published, *en banc* decision of the Eighth Circuit. *Christie*, which dealt with a fact pattern identical to the one in *Anastasoff*, decided the legal issue precisely at stake in the latter case. Had Faye *Anastasoff* been able to make it to a hearing on the merits before having her appeal dismissed as frivolous, Judge Arnold would have affirmed on the authority of *Christie*. The judge would not have duplicated the reasoning of the

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84. *Id.* at 391.

85. THE FEDERALIST NO. 78, *supra* note 70, at 510.

86. 1 BLACKSTONE, *supra* note 52, at 70.

87. Lee, *supra* note 48, at 660.

88. *Id.* at 662.

89. *See id.* at 683.

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

*Christie* court, but would have simply relied upon the direct authority of existing precedent. In such a case, the Eighth Circuit panel's decision could not honestly be said to constitute precedent itself.

Cases in which a court can rely upon an existing precedent without making an analogical leap are not therefore properly identified as precedents themselves, since they do not engage in legal reasoning but rather assume as correct the reasoning of the cases upon which they rely. The nonpublication and noncitation of these types of decisions do not violate Article III, and a court that forbids their citation does not legislate, but merely identifies, their lack of precedential value. But what of cases such as *Anastasoff*, in which the prior decision should *not* have been subject to the Eighth Circuit's no-citation rule? Part IV addresses the discretionary problem created by no-citation rules and suggests a number of possible approaches toward resolving it.

#### IV. PRESERVING JUDICIAL ECONOMY WITHIN THE BOUNDS OF ARTICLE III: SOME RECOMMENDATIONS

Any potential solution to the problem of unpublished opinions and no-citation rules must take into account two overarching concerns. First is the problem of case volume mentioned in Part I. Judges constantly struggle with docket management; "spending more time" on each case<sup>91</sup> is a solution that few judges will readily endorse. This observation is especially true given the second major concern: The Constitution requires neither the issuance in writing nor the publication of judicial decisions.<sup>92</sup> As a practical matter, then, the realistic choice is not between a limited citation system and a system in which all unpublished decisions are citable; rather, "[the choice] is between preparing but not publishing opinions in many cases and preparing no opinions in those cases [at all]."<sup>93</sup> An evaluation of the method by which judges commit their legal reasoning to writing demonstrates the breadth of this problem. Although judges might not be able to make a decision nonprecedential in the abstract or constitutional sense, they can certainly affect the degree to which their written opinions are *useful* as precedent in subsequent cases. While recommendations for reform must aim at reducing judicial abuse of no-citation rules (whether such abuse is intentional or inadvertent), they must also consider a potential side-effect of a reduction in judicial discretion: that judges will nullify the beneficial effects of reform if increased workload drives them to summarily dispose of cases bearing potential precedential value.

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91. *Id.* at 904.

92. *See id.* at 903; *see also* Reynolds & Richman, *supra* note 19, at 575-76 ("American reporting [was] virtually unknown until the start of the nineteenth century.").

93. POSNER, *supra* note 26, at 168-69.



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*A. The Written Opinion is Necessary to the Use of a Decision as Precedent*

The crux of Judge Arnold's argument in *Anastasoff* is that courts do not have the authority to determine a decision's precedential effect.<sup>94</sup> To the extent that a decision is a precedent (and, as I have argued, I do not believe all decisions are), a judge violates Article III by not treating that decision as precedent. This reasoning contradicts the assertion of other federal judges, most prominently Alex Kozinski and Stephen Reinhardt, that courts essentially "craft" precedent through their written opinions.<sup>95</sup> Kozinski and Reinhardt argue that an opinion's precedential value comes from the time and effort a court spends developing the factual scenario, legal reasoning, and general rule of a case into a cohesively written text. Indeed, the two judges go so far as to state that "[t]rying to extract from [unpublished decisions] a precedential value that we didn't put into them . . . would . . . damage the court in important and permanent ways."<sup>96</sup> Judge Danny Boggs and attorney Brian Brooks criticize this legal realist view, arguing that it "focus[es] on judges and judicial personality as reflected through writing" rather than on "the internal logic that prompted a particular outcome on a particular set of facts."<sup>97</sup>

What Boggs, Brooks, and Arnold all miss, however, is that the transmission of precedential authority is *precisely* dependent upon the manner of transmission. After all, knowledge of a case's holding rarely provides guidance for future cases by itself; rather, the facts and reasoning of a case are vital to the use of that case as precedent.<sup>98</sup> Although a case might have inherent precedential value apart from its written opinion, the federal courts as a practical matter have moved beyond the era in which one could cite the precedential authority of cases "established only by memory or by a lawyer's unpublished memorandum."<sup>99</sup> The danger in reforming the no-citation rules, then, is that judges will refuse to write opinions in which the facts and legal reasoning are not clearly laid out. What would happen if the federal courts took this route?

*B. The Danger of Summary Disposition as a Replacement for the Unpublished Decision*

A number of federal appeals courts currently allow panels to resolve cases without the issuance of a written opinion at all.<sup>100</sup> These resolutions usually

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94. 223 F.3d at 905.

95. Kozinski & Reinhardt, *supra* note 30, at 44; *see also* Martin, *supra* note 27, at 192 ("We are *creating* a body of law.") (emphasis added).

96. Kozinski & Reinhardt, *supra* note 30, at 81.

97. Boggs & Brooks, *supra* note 24, at 22-23.

98. Dragich, *supra* note 27, at 782-83.

99. *Anastasoff*, 223 F.3d at 903.

100. *E.g.*, 2D CIR. R. § 0.23 (providing for disposition in open court or by summary

consist of either an oral ruling or a short, often one-word, written statement (such as “affirmed”). Currently, the number of appeals disposed of by summary disposition is relatively low, compared to the number of appeals resolved in unpublished decisions.<sup>101</sup> The precedential value of summary dispositions is often difficult to determine, since the issuing court provides no written rationale for its decision.<sup>102</sup> As a practical matter, therefore, summary dispositions could serve the same purpose of judicial economy that unpublished decisions serve today.

Reformers should be wary of changes to no-citation rules that would encourage judges to adopt the summary disposition mechanism as an alternative to writing unpublished decisions. To the degree that litigants can gain access to unpublished decisions,<sup>103</sup> they can at least review the rationales behind those decisions (however “bare-bones” those rationales might be). Unpublished decisions therefore provide at least some degree of a check against the nonpublication of clearly precedential decisions. Summary dispositions are completely impenetrable to litigants and other courts, and should therefore be avoided.<sup>104</sup>

C. *Recommendations for Reform: Tighten Up Publication Standards While Continuing to Discourage the Use of Unpublished Opinions*

Reform of the nonpublication and no-citation rules should focus on protecting the publication of those decisions that have clear precedential value. As an initial matter, the Courts of Appeals should carry a presumption in favor of publication, with a unanimous vote required for nonpublication.<sup>105</sup> This would place a burden upon deciding panels to thoroughly evaluate a case before deciding not to publish. Next, the circuits should adopt detailed criteria

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order); 11TH CIR. R. 36-1 (providing for summary affirmance in certain cases).

101. For 2000, the number of cases resolved by summary disposition was 1,136, while the number of cases resolved by unpublished decision was 20,791. JUDICIAL BUSINESS OF THE UNITED STATES COURTS, *supra* note 21.

102. Dragich, *supra* note 27, at 763-64.

103. Although unpublished decisions are not “secret” law in the sense that they are available from the appellate courts themselves, not all unpublished decisions are widely available on the Westlaw and Lexis databases. Merritt, *supra* note 28, at 1393 (noting that over half of the circuits do not release their unpublished opinions to online services).

104. Many commentators, including a number of federal judges, have expressed concern over potential abuse of the summary disposition mechanism. *E.g.* Dragich, *supra* note 27, at 801 (arguing *inter alia* that summary reversals should never be issued); Martin, *supra* note 27, at 192 (expressing disapproval of Sixth Circuit Rule 19, which permits oral rulings from the bench); Hon. Bruce M. Selya, *Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age*, 55 OHIO ST. L.J. 405, 409-10 (1994) (stating that shorter memorandum opinions are preferable to terminations without opinion).

105. Currently, nearly half of the federal appeals courts carry a presumption against the publication of opinions. See Elizabeth M. Horton, *Selective Publication and the Authority of Precedent in the United States Courts of Appeals*, 42 UCLA L. REV. 1691, 1695 n.12 (1995).

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for determining that a decision lacks precedential value.<sup>106</sup> Although courts might have difficulty in predicting the precedential value of their decisions, increasing the detail of circuit publication standards might help to rectify this problem. Finally, nonpublication should only be permitted for affirmances in which none of the panel members file separate opinions.<sup>107</sup>

To balance the increase in published opinions, the circuits should continue to discourage the citation of unpublished decisions. While a statement that unpublished opinions “are not precedent” is probably unnecessary, courts should affirm that the citation of unpublished decisions is frowned upon and that the burden of demonstrating an unpublished decision’s precedential value lies with the party seeking to use that decision.<sup>108</sup> This recommendation would serve three purposes. First, it would provide litigants seeking to establish the precedential value of an unpublished decision with a procedural mechanism not quite as extreme as an as-applied Article III challenge to a court’s no-citation rule. Second, it would generally discourage litigants from using unpublished opinions frivolously, because of the burden of showing those decisions’ precedential value. Third, it would preserve the use of the unpublished decision as a “precedential safeguard” in a way that summary dispositions would not. Following these recommendations would help ensure that the cases subject to nonpublication are really ones with no precedential value, and would limit the overall citation of unpublished decisions in the circuits.

#### CONCLUSION

Over two hundred years ago, Sir Edward Coke made a prescient observation regarding written opinions and judicial resources:

[I]n truth, if Judges should set down the reasons and causes of their judgments within every record, that immense labour should withdraw them from the necessary services of the common wealth, and their records should grow to be . . . of infinite length, and in mine opinion lose somewhat of their present authority and reverence.<sup>109</sup>

The federal appeals courts are overloaded. In order to effectively manage the disposition of cases before them, these courts have instituted rules limiting the publication and citation of decisions lacking precedential value. Whether a decision actually *is* a precedent, however, is not a question that judges may

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106. Among the circuits, the Federal Circuit’s publication criteria are the most comprehensive. *See* FED. CIR. R. APP. § 10(4).

107. Reynolds & Richman, *supra* note 19, at 612-17.

108. Permitting the use of unpublished decisions merely for their persuasive value would probably not result in a significant increase in the citation of such decisions, and as such should be allowed. *See* Martin, *supra* note 27, at 195 (admitting that the Sixth Circuit’s change from a strict no-citation standard to one allowing citation for persuasive value had not “opened the floodgates to citation of unpublished opinions”).

109. 2 EDWARD COKE, REPORTS iii (George Wilson trans., 1777).

decide. As *Anastasoff* held, the Article III judicial power does not grant courts the ability to “legislate” a case’s subsequent precedential effect. But *Anastasoff* concerned an unpublished decision that clearly had precedential value, and *Arnold* does not make a convincing case that *every* judicial decision must be viewed as precedent. Rather, where a case relies entirely upon existing law, and makes no analogical leap in order to get to its result, that case cannot truly be said to constitute a precedent. To the extent that no-citation rules forbid the use of unpublished cases that are not precedent, such rules are constitutional.

As a practical matter, however, whether a decision is *useful* as precedential authority does depend, in some degree, upon a court’s written opinion. While a court cannot deprive a decision of its precedential authority, it may identify, obscure, or even ignore that authority through its use of language. In order to protect the integrity of those opinions that do constitute precedent, the Courts of Appeals should establish presumptions in favor of publication, and continue to discourage the citation of unpublished decisions. Doing so will preserve the unpublished decision as a safeguard against the mechanism of summary disposition, which could be used to remove from public view precedential cases worthy of publication. Despite the potential for judicial abuse of the discretion to publish, therefore, nonpublication and no-citation rules should be viewed as useful tools worthy of preservation.