

TREES THAT FALL IN THE FOREST: THE PRECEDENTIAL EFFECT OF UNPUBLISHED OPINIONS

*I know of no phase of our law so misunderstood as our system of precedent.*¹

*[I]t will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them.*²

*[S]tare decisis seemingly operates with the randomness of a lightning bolt: on occasion it may strike, but when and where can be known only after the fact.*³

INTRODUCTION

Lawyers and law students know not to spend time searching for an unpublished opinion to cite as authority. Some court rules expressly prohibit the citation of unpublished opinions altogether, while others declare them merely persuasive authority.⁴ If retrieved through LEXIS and Westlaw, many unpublished opinions announce the nature of their limited use and precedential value in the eyes of the issuing court; others are practically impossible to locate. If a relevant unpublished opinion is found, it is likely that it will be

1. KARL N. LEWELLYN, *THE COMMON LAW TRADITION, DECIDING APPEALS* 62 (1960).

2. THE FEDERALIST NO. 78 (Alexander Hamilton), *reprinted in* 4 THE PAPERS OF ALEXANDER HAMILTON 662 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

3. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 743 (1988).

4. *See infra* note 18 and accompanying text (listing no-citation rules among various federal circuits).

exceedingly short, lacking both factual background and possibly the court's rationale.

Recently, however, the rules creating unpublished opinions have been called into question by both federal and state courts alike. For example, the Ninth Circuit recently relaxed its rules prohibiting the citation of unpublished opinions,⁵ while the Texas Supreme Court has planned to review its own rules for some time.⁶ According to Texas Supreme Court Chief Justice Tom Phillips, "[i]t's become a big issue having cases available that you can't cite."⁷ The Texas court's decision to review its court rules has received a strong boost of support from a recent Eighth Circuit decision.

In *Anastasoff v. United States*,⁸ a three-judge panel of the Eighth Circuit Court of Appeals handed down a controversial decision in what the litigants thought was a routine tax case.⁹ Although neither party challenged the constitutionality of unpublished opinions, the court followed an unpublished opinion as binding precedent and then declared its own no-citation rule unconstitutional. The *Anastasoff* opinion, written by Circuit Judge Richard S. Arnold, has been

5. See 9TH CIR. R. 36-3 ("Circuit Rule 36-3 has been adopted for a limited 30-month period, beginning July 1, 2000 and ending December 31, 2002. Litigants are invited to submit comments regarding the rule to the Clerk during the first 24 months of the trial period. After the rule has been in effect for 24 months, the Advisory Committee on Rules will study and report to the Court on the frequency with which unpublished dispositions are cited to the Court and on any problems or concerns associated with the rule Unless, by December 31, 2002, the Court votes affirmatively to extend the rule, it will automatically expire on December 31, 2002 and the former version of Circuit Rule 36-3, prohibiting citation of dispositions under all circumstances will be reinstated.").

6. See Mary Alice Robbins, *Unpublished No More? All Cases May Soon Be Citable*, TEX. LAW., Oct. 30, 2000, at 4.

7. *Id.*

8. 223 F.3d 898 (8th Cir. 2000), *vacated as moot en banc*, No. 99-3917, 2000 WL 183092 (8th Cir. Dec. 18, 2000).

9. See Steve France, *Swift En Banc Review Expected of Case Treating Unpublished Opinions as Precedent*, 69 U.S. L. WK. 2227, 2228 (2000).

called “impeccably reasoned.”¹⁰ After *Anastasoff*, the constitutionality and nonprecedential status of unpublished opinions is an open question.¹¹

This Note examines both the controversy surrounding limited publication—the system by which opinions are designated “unpublished”—and the no-citation rules that limit their ability to be cited. Specifically, this Note addresses why limited publication is a troubled system. It also questions whether courts should adopt the *Anastasoff* case rationale, requiring adherence to unpublished opinions. Part I briefly examines the history of the modern “experiment” with limited publication in the federal circuits. Part II presents some of the practical and theoretical problems of limited publication. Part III examines the rationale of the *Anastasoff* case directly. Part IV demonstrates why the *Anastasoff* rationale is unlikely to be adopted by other federal appellate and state courts. Finally, Part V offers thoughts and suggestions on the future of limited publication.

I. BACKGROUND: THE FEDERAL EXPERIMENT WITH UNPUBLISHED OPINIONS AND NO-CITATION RULES

Unpublished opinions are not new to the American legal system. During the early years of the Republic, lawyers and judges often relied upon their memory of court decisions or upon the unpublished notes of lawyers.¹² In fact, until relatively recently, case reporting had been a private and “haphazard enterprise.”¹³ As early as the

10. Howard J. Bashman, *A Closer Look: The Unconstitutionality of Non-Precedential Appellate Rulings*, LEGAL INTELLIGENCER, Dec. 11, 2000, at 7 (“[T]hat decision presented an impeccably reasoned explanation of why the U.S. Constitution prohibits federal appellate courts from denying precedential effect to their opinions. If you doubt the soundness of that ruling, . . . those doubts will disappear once you review the opinion . . .”).

11. On December 18, 2000, the Eighth Circuit issued an en banc ruling in the *Anastasoff* case, vacating the earlier decision on other grounds, while specifically calling the constitutional matter of unpublished opinions an “open question.” *Anastasoff v. United States*, No. 99-3917, 2000 WL 1863092, at *2 (8th Cir. Dec. 18, 2000) (en banc).

12. See 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 (Perry Miller ed., 1962).

13. William L. Reynolds & William M. Richman, *An Evaluation of Limited*

1790s and continuing until as late as 1887, private individuals collected and reported cases for profit.¹⁴ Even the Supreme Court was subject to poor reporting standards, including: publications with numerous typographical errors, failure to print dissenting opinions, and in some cases, failure to print opinions altogether.¹⁵

What is “new and radical” about the modern system of limited publication is that it grants the judge deciding a case the discretionary power to issue an unpublished opinion.¹⁶ The appeals before a court are not frivolous,¹⁷ yet, under the rules of limited publication, a court may choose to limit the ability of an opinion to be cited¹⁸ in

Publication in the United States Courts of Appeals: The Price of Reform, 48 U. CHI. L. REV. 573, 575 (1981) [hereinafter Reynolds & Richman, *An Evaluation*].

14. *See id.* at 576 n.10 (citing Samuel Blatchford, who reported Second Circuit decisions until the Federal Reporter finally put him out of business in 1887).

15. *See id.* at 576 nn.9-11.

16. *See id.* at 577.

17. *See* RICHARD A. POSNER, *THE FEDERAL COURTS, CRISIS AND REFORM* 122 (1985).

18. *See, e.g.*, 2D CIR. R. 0.23 (stating that unreported cases shall not be cited); 3D CIR. I.O.P. 5.3 (stating that opinions of value only to the trial court and the parties are designated unreported and non-precedential); 4TH CIR. R. 36(c) (stating that citation of unpublished dispositions is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case); 5TH CIR. R. 47.5.3 (stating that unpublished opinions issued before January 1, 1996, are precedent but should normally be cited only when the doctrine of res judicata, collateral estoppel, or the law of the case is applicable); 5TH CIR. R. 47.5.4 (stating that unpublished opinions issued after January 1, 1996, may be persuasive authority); 6TH CIR. R. 206(c) (stating that published panel opinions are binding); 7TH CIR. R. 53(b)(2)(iv) (stating that unpublished opinions shall not be cited or used as precedent, except to support a claim of res judicata, collateral estoppel, or the law of the case); 8TH CIR. R. 28(i) (stating that unpublished opinions are not precedent and parties generally should not cite them except when relevant to establishing res judicata, collateral estoppel, or the law of the case when they may be cited for persuasive value); 9TH CIR. R. 36-3 (stating that unpublished dispositions may be cited for res judicata, collateral estoppel, the law of the case, or for factual purposes, to show double jeopardy, sanctionable conduct, entitlement to attorneys' fees, existence of a related case, or to show conflict among opinions, dispositions, or orders); 10TH CIR. R. 36.3(B)(1), (2) (stating that citation of unpublished decisions is disfavored but that they may be cited if they have persuasive value with respect to a material issue that has not been addressed in a public opinion or would assist the court in its disposition); 11TH CIR. R. 36-2 (stating that unpublished opinions are not

subsequent cases while possibly casting it into oblivion.¹⁹ Limiting the citation of a case merely because it is unpublished involves a presumption that the case is of no precedential value whatsoever. But saying an unpublished case does not set precedent does not make it so.²⁰ And prohibiting its citation just might be unconstitutional.²¹

The current system creating unpublished opinions and no-citation rules in the federal courts traces back to 1964. That year, in response to a growing crisis of overburdened courts, the Judicial Conference of the United States recommended “[t]hat the judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value and that opinions authorized to be published be succinct.”²² This recommendation did not result in any concrete changes until a decade later when the matter was taken up again by a distinguished commission of lawyers, law professors, and judges brought together by the Federal Judicial Center.²³

The commission was formed in direct response to the concern that the courts would be unable to handle their increasingly heavy caseloads.²⁴ It issued an influential report under the title *Standards for Publication*, in which it was observed that judges ranked opinion-writing as the second most significant cause of delay in the courts.²⁵

binding precedent, but they may be cited as persuasive authority provided a copy is attached).

19. See, e.g., *Re Rules of the United States Court of Appeals for the Tenth Circuit*, 955 F.2d 36, 37 (10th Cir. 1986) (Holloway, C.J., dissenting) (“[A]ll rulings of this court are precedents, like it or not, and we cannot consign any of them to oblivion by merely banning their citation.”); see also *infra* Part II.B.1-2 (discussing the concept of secret law).

20. But see Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation To Unpublished Dispositions*, CAL. LAW., June 2000, at 43, 81 (arguing that unpublished opinions only have as much precedential value as the judges intended to give them).

21. See *Anastasoff v. United States*, No. 99-3917, 2000 WL 1863092 (8th Cir. Dec. 18, 2000) (en banc).

22. JUDICIAL CONFERENCE OF THE UNITED STATES REPORT 11 (1964).

23. See COMM. ON USE OF APPELLATE COURT ENERGIES, ADVISORY COUNCIL FOR APPELLATE JUSTICE, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS preface (1973) [hereinafter STANDARDS FOR PUBLICATION].

24. See *id.*

25. See *id.* at 1.

Writing opinions, it was said, took more time than hearing arguments, holding conferences, conducting research, or other miscellaneous duties.²⁶ The commission recommended that “[i]f a tentative determination can be made at a very early stage in the process of decision-making that a case is one that does not warrant a published opinion, drafting will be facilitated.”²⁷ Reducing the number of cumbersome opinions should lighten the judge’s load and assist in speeding up the judicial process. The commission explained:

Non-published opinions can be short. They do not need to cite all of the law, and can deal mainly with facts as they relate to law. They can be written especially for the parties. They need not be polished. On the other hand, opinions that are designated for publication will, under the standards, involve cases that have broader importance; therefore the written expression of the court’s decision deserves more intensive craftsmanship [sic].²⁸

Thus, it was urged that the net benefits of limited publication would include: saving the judge and the appellate court time in writing a polished opinion; saving the lawyer time in researching opinions; reducing the logistical burden on the court, lawyers and law libraries; reducing the burden on the publishing industry; and reducing the difficulty in locating precedent.²⁹

The commission formulated a Model Rule,³⁰ which became the basis for limited publication rules throughout the federal circuits.³¹ According to the 1974 Judicial Conference Report, variation among the circuit court rules would create a welcomed experiment with limited publication. The commission wrote:

While the plans of each circuit generally follow the basic recommendations of the report . . . each circuit, to a limited extent is *experimenting* with respect to some phases of its plan. There are in effect 11 *legal laboratories* accumul-

26. *See id.* at preface.

27. *Id.* at 5.

28. *Id.*

29. *See id.* at 6-8.

30. *See id.* at 22-23.

31. JUDICIAL CONFERENCE OF THE UNITED STATES REPORT 12 (1974).

ing experience and amending their publication plans on the basis of that experience. Because the possible rewards of such experimentation are so rich, the Conference agreed that it should not be discontinued until there is considerably more experience under the diverse circuit plans.³²

These plans became the basis for the system that is in place today.³³

II. THE PROBLEMS OF LIMITED PUBLICATION

The *Anastasoff*³⁴ case comes at a time when seventy-eight percent of the case dispositions by federal appeals courts are already unpublished.³⁵ Nevertheless, the problems identified in the 1960s and 1970s for which limited publication was to be a solution have still not been resolved. According to the 1990 Report of the Federal Courts Study Committee to the Judicial Conference of the United States, the “crisis of volume is beyond dispute.”³⁶ This overload is largely to blame on a heightened proclivity to appeal district court decisions. For example, in 1945, litigants appealed approximately one out of every forty district court decisions.³⁷ By contrast, in 1990, one in eight cases were appealed, resulting in a fifteen-fold increase.³⁸ During the same years, the number of appellate judgeships only increased by a factor of less than three.³⁹ The heavy burden upon individual judges and appellate panels remains uncorrected, raising the specter of ongoing delays and inferior work.⁴⁰

32. *Id.* (emphasis added).

33. See Reynolds & Richman, *An Evaluation*, *supra* note 13, at 579.

34. *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot en banc*, No. 99-3917, 2000 WL 183092 (8th Cir. Dec. 18, 2000).

35. See Tony Mauro, *Judge Ignites Storm Over Unpublished Opinions*, FULTON COUNTY DAILY REP., Sept. 5, 2000, available at LEXIS, U.S. News Library, Combined File (citing statistics of the Administrative Office of the U.S. Courts).

36. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 110 (1990) [hereinafter 1990 REPORT OF THE FEDERAL COURTS].

37. See *id.*

38. See *id.*

39. See *id.*

40. See Hon. Boyce F. Martin, Jr., *Judges on Judging: In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 183 (1999) (“An even greater problem than the workload is the quality of the work.”).

Commentators on the limited publication system frequently cite statistics reflecting the sheer bulk of published opinions already produced today. In 1996 alone, in spite of the enormous volume of unpublished opinions, the Federal Reporter grew in size by thirty volumes, filling more than 45,000 pages with published appellate opinions.⁴¹ Proponents of limited publication suggest that these numbers simply reflect “too much written material creating too little new law.”⁴² As Chief Judge Boyce Martin of the Sixth Circuit recently wrote, limited publication “separates the diamonds from the dross.”⁴³ Opinions that merely apply existing law to new litigants are said to be of value only to the litigants themselves.⁴⁴ Thus, not all cases merit publication.⁴⁵

The 1990 Report of the Federal Courts Study Committee signaled a possible retreat from limited publication. The Report stated that the system of limited publication and restricted citation has “always been a concession to *perceived* necessity.”⁴⁶ While the Report acknowledged that the sheer bulk of cases prohibits the universal publication of many of those opinions that merely require the application of established law, the Report also recommended that the Judicial Conference review the policy on unpublished opinions.⁴⁷ Although the Report was not specific, it noted that the limited publication policies and no-citation rules “present many problems.”⁴⁸

A. *The Purpose of the Written Opinion*

Before examining the shortcomings and flaws unique to limited publication, it is necessary to recognize the reasons why a written opinion is so important to the disposition of a case. First, the written opinion permits the parties and their attorneys to see that the court

41. *See id.* at 177.

42. *Id.* *But see* POSNER, *supra* note 17, at 122 (explaining how the no-citation rules make unpublished opinions unworthy of publication).

43. Martin, *supra* note 40, at 191.

44. *See id.* at 189.

45. *See id.*

46. 1990 REPORT OF THE FEDERAL COURTS, *supra* note 36, at 130 (emphasis added).

47. *See id.*

48. *Id.*

has considered the parties' positions and arguments through disclosure of its reasoning and conclusion.⁴⁹ Second, the process of committing ideas to paper helps each judge to clarify and organize his or her thoughts.⁵⁰ This places a check on the judge's intuition and allows the judge to see whether his or her ideas "will write." Third, the judicial opinion provides "the stuff of law: to permit an understanding of legal doctrine, and to accommodate legal doctrine to changing conditions."⁵¹ Fourth, the court's opinion serves as a teaching device, educating those in the legal profession and informing those in society with special obligations as to what actions conform to the law.⁵² Fifth, as some commentators have expressed, "[j]ustice must not only be done, it must also appear to be done"; a written opinion tells the public at large that a case has actually been checked and given fair consideration.⁵³

B. Shortcomings and Flaws of Limited Publication

1. Unpublished "secret law"

In the debate surrounding limited publication, the notion that unpublished opinions create secret law is frequently heard. For example, in a dissent to a 1985 Supreme Court case,⁵⁴ Justice John Paul Stevens wrote, "[the Ninth Circuit's] decision not to publish [its] opinion or permit it to be cited—like the decision to promulgate a rule spawning a body of secret law—was plainly wrong."⁵⁵ It is easy

49. See STANDARDS FOR PUBLICATION, *supra* note 23, at 2.

50. *See id.*

51. *Id.* at 2-3.

52. *See id.* at 3.

53. 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, 1175 (1978) [hereinafter Reynolds & Richman, *Non-Precedential Precedent*].

54. *See County of Los Angeles v. Kling*, 474 U.S. 936, 937 (1985) (Stevens, J., dissenting).

55. *Id.* at 938 (Stevens, J., dissenting). In *Kling*, the Supreme Court granted certiorari and in a one-sentence summary disposition reversed the decision of the Ninth Circuit. *See id.* at 936 (Stevens, J., dissenting). The case involved a claim that the plaintiff was wrongly denied admission to the County of Los Angeles School of Nursing. *See id.* at 937 (Stevens, J., dissenting). Stevens

to see how limited publication can spawn secret law. Under the system of limited publication, judges have the discretion to decide whether a particular opinion is worthy of publication.⁵⁶ If deemed unworthy of publication, the opinion may be either unattainable or uncitable.⁵⁷ And if the unpublished opinion cannot be cited before the court, it is effectively nonexistent in the eyes of the court. The prospect of judges exercising broad discretion under the auspices of limited publication in order to sweep difficult issues under the rug by inappropriately designating an opinion unpublished is frightening.⁵⁸

2. Overuse of limited publication

Supporters of limited publication properly point out that the worst-case scenario fears of secret law are overstated.⁵⁹ That the

expressed the concern that the Ninth Circuit opinion, which was initially issued as an unpublished opinion but reissued as a published opinion two days after certiorari was granted, failed to explain the reasons for its holding. *See id.* at 938 (Stevens, J, dissenting). Stevens suggested that the Supreme Court's unusually short disposition of the case might therefore be partly to blame on the inadequate record before it. *See id.* (Stevens, J, dissenting).

56. *See, e.g.*, STANDARDS FOR PUBLICATION, *supra* note 23, at 10 (asserting that “[u]nless directed by a higher court, opinions should be published only if a majority of the judges participating in the decision determine that publication is required”).

57. *See* Re Rules of the United States Court of Appeals for the Tenth Circuit, 955 F.2d 36, 37 (10th Cir. 1986) (Holloway, C.J., dissenting).

58. *See, e.g.*, POSNER, *supra* note 17, at 123 (noting that an argument for publishing all opinions is that “the unpublished opinion provides a temptation for judges to shove difficult issues under the rug, in cases where a one-liner would be too blatant an evasion of judicial duty”); Martha J. Dragich, *Will the Federal Courts of Appeal Perish if they Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 787 (1995) (noting that selective publication makes it difficult to assess the clarity of the law or the complexity of the legal issues by creating secret law); Reynolds & Richman, *An Evaluation*, *supra* note 13, at 608 (detailing the problem of cases involving constitutional issues that were unpublished).

59. *See, e.g.*, France, *supra* note 9, at 2229 (quoting Ninth Circuit Judge Alex Kozinski, who refuted the notion that limited publication is used to sweep difficult issues under the rug: “I can’t say no judges have ever said, ‘oh let’s just hold our nose and affirm it, even though if we had to publish we’d go the other way,’ but I can’t think of a single time it’s [sic] happened.”); Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119, 129 (1994) (arguing that the

mere opportunity for abuse exists is not a sufficient reason to reform the system. The debate should be refocused away from the specter of the worst-case-scenario to the frequent overuse of limited publication creating uncitable precedent. A few notable cases have drawn criticism from the justices and judges involved in the process of reviewing unpublished decisions.

In *United States v. Edge Broadcasting Co.*,⁶⁰ the Supreme Court reversed a Fourth Circuit decision in which the court of appeals found that federal restrictions forbidding the advertising of lotteries on television violated the First Amendment guarantee of free speech.⁶¹ Writing for a seven-member majority of the Court, Justice Byron White criticized the Fourth Circuit's disposition of a case involving constitutional questions in an unpublished opinion. "We deem it remarkable and unusual," White wrote, "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."⁶²

In *National Classification Committee v. United States*,⁶³ a case involving a second appeal from an unpublished opinion, Circuit Judge Patricia Wald strongly criticized the decision of the Court of Appeals for the District of Columbia not to publish.⁶⁴ Judge Wald stressed that because the original case involved a matter of first impression with a substantial question of statutory interpretation it should have been published.⁶⁵ In *National Classification Committee*, the petitioners sought review of two Interstate Commerce Commission decisions they contended exceeded the Commission's statutory authority.⁶⁶ Resolution of the matter, Judge Wald said, "requires an examination of Congress' purpose and intent."⁶⁷ Under these circumstances, "a published opinion setting forth the court's analysis and reasoning for upholding the Commission, and establishing a

risks of a secret law existing is overstated).

60. 509 U.S. 418 (1993).

61. *See id.* at 425.

62. *Id.* at 425 n.3.

63. 765 F.2d 164 (D.C. Cir. 1985).

64. *See id.* at 172-75.

65. *See id.* at 174.

66. *See id.* at 164.

67. *Id.* at 174.

precedent applicable to all [similarly situated parties], not just petitioners, should . . . have been written.”⁶⁸

Branding an opinion unpublished can have the detrimental effect of creating uncitable law or inadvertently hiding from view important cases involving novel questions and even constitutional matters.⁶⁹ In this context, “secret” need not suggest a conspiracy to hide, but rather a body of important law “practically inaccessible to many lawyers.”⁷⁰

3. Inferior opinions

In the interest of time, the unpublished opinion is, by definition, supposed to be shorter and less polished than a formally published opinion.⁷¹ It is also widely acknowledged, however, that unpublished opinions are simply inferior in quality to published ones.⁷²

68. *Id.*

69. Court rules provide specific guidance when an opinion should be published. For example, the D.C. Circuit holds that an opinion will be published if it meets one or more of the following criteria:

- (A) with regard to a substantial issue it resolves, it is a case of first impression;
- (B) it alters, modifies, or significantly clarifies a rule of law previously announced by the court;
- (C) it calls attention to an existing rule of law that appears to have been generally overlooked;
- (D) it criticizes or questions existing law;
- (E) it resolves an apparent conflict in decisions within the circuit or creates a conflict with another circuit;
- (F) it reverses a published agency or district court decision, or affirms a decision of the district court upon grounds different from those set forth in the district court’s published opinion;
- (G) it warrants publication in light of other factors that give it general public interest.

As Judge Wald made clear publication criteria are not always followed. See *Nat’l Classification Comm.*, 765 F.2d at 174.

70. *Id.* at 173 n.2; see also Reynolds & Richman, *An Evaluation*, *supra* note 13, at 608 (noting that they discovered “no widespread ‘hiding’ of law-declaring opinions,” but there were definitely “some exceptions”).

71. See STANDARDS FOR PUBLICATION, *supra* note 23, at 5.

72. See Reynolds & Richman, *An Evaluation*, *supra* note 13, at 598 (stating that “[a]nyone who has read a large number of unpublished opinions must conclude that they are, as a group, far inferior in quality to the opinions [published] in the *Federal Reporter*”); see also POSNER, *supra* note 17, at 124 (stat-

More important than the prevalence of bad grammar or misspelled words is the lack of substantive quality. According to William Reynolds and William Richman, who have studied limited publication more than anyone else, some unpublished opinions “are so short that they raise serious questions concerning the exercise of judicial responsibility.”⁷³

In order to determine whether these exceedingly brief opinions satisfy the court’s exercise of judicial responsibility, Reynolds and Richman evaluated unpublished opinions in relation to the “essential characteristics of the judicial opinion.”⁷⁴ They suggest that the “minimum standards” an opinion should meet are: (1) the identity of the case decided; (2) the ultimate disposition; and (3) the reasons for the result.⁷⁵ It is the latter of these that raises the most problems.⁷⁶ In their analysis, Reynolds and Richman compiled statistics from the various circuits assessing the percentage of unpublished opinions which were (1) clearly reasoned; (2) decided on the basis of the opinion below; or (3) decided with no discernable justification.⁷⁷ Of these, the third category most strikingly raises the issue of judicial irresponsibility.⁷⁸ Their results ranged from a low 7.4% of unpublished opinions without a discernable rationale within the Tenth Circuit to an astoundingly high 85.2% within the Third Circuit.⁷⁹ Of

ing that “[t]he federal courts of appeals have adapted to the caseload explosion in part by reducing the quality of their output”).

73. Reynolds & Richman, *An Evaluation*, *supra* note 13, at 600-01.

74. *Id.* at 601; *see also supra* Part II.A (describing the purpose of the judicial opinion).

75. *See* Reynolds & Richman, *An Evaluation*, *supra* note 13, at 601.

76. *See, e.g.,* LLEWELLYN, *supra* note 1, at 26. Llewellyn described the important reason for stating the rationale for a decision:

The deciding is, in the main, done under felt pressure or even compulsion to follow up with a published ‘opinion’ which tells any interested person what the cause is and why the decision—under the authorities—is right, and perhaps why it is wise. . . . This opinion is addressed also to the losing party and counsel in an effort to make them feel at least that they have had a fair break.

Id.

77. *See* Reynolds & Richman, *An Evaluation*, *supra* note 13, at 602 tbl.10.

78. *See id.* at 603.

79. *See id.* at 602 tbl.10. Reportedly, the Third Circuit has made a concerted effort to reduce the number of judgment orders it issues and no longer has the “dubious distinction” of issuing the most opinions without an articu-

this problem generally, they observed:

A decision without articulated reasons might well be a decision without reasons or one with inadequate or impermissible reasons. That is not to suggest that judges will be deliberately arbitrary or decide cases without adequate grounds. The discipline of providing written reasons, however, often will show weaknesses or inconsistencies in the intended decision that may compel a change in the rationale or even in the ultimate result. Even if judges conscientiously reach correct results, an opinion that does not disclose its reasoning is unsatisfactory. Justice must not only be done, it must appear to be done. The authority of the federal judiciary rests upon the trust of the public and the bar. Courts that articulate no reasons for their decisions undermine that trust by creating the appearance of arbitrariness.⁸⁰

Reynolds and Richman later concluded that the “most striking finding of the study is the extremely high cost of nonpublication in terms of opinion quality”⁸¹ and suggested a Model Rule with a minimum standard requirement to remedy the problem.⁸²

In *County of Los Angeles v. Kling*,⁸³ Justice John Paul Stevens highlighted the problem inferior unpublished opinions may have on appellate review. In his dissent, Justice Stevens suggested that the inadequate Ninth Circuit opinion likely had something to do with the Supreme Court’s own one-sentence summary disposition.⁸⁴ He wrote, “[t]he brevity of analysis in the Court of Appeals’ unpublished, noncitable opinion . . . does not justify the [Supreme] Court’s summary reversal.”⁸⁵ Stevens expressed concern that the Supreme

lated rationale. See Howard J. Bashman, *3rd Circuit Should Use Judgment Orders Wisely*, LEGAL INTELLIGENCER, Jan. 8, 2001, at 9.

80. Reynolds & Richman, *An Evaluation*, *supra* note 13, at 603.

81. *Id.* at 628.

82. See *id.* at 626-27. “Every decision will be accompanied by an opinion that sufficiently states the facts of the case, its procedural stance and history, and the relevant legal authority so that the basis for the disposition can be understood from the opinion and the authority cited.” *Id.*

83. 474 U.S. 936 (1985).

84. See *id.* at 938 (Stevens, J., dissenting).

85. *Id.* (Stevens, J., dissenting).

Court did not undertake its own review of the district court's findings of facts, but instead erroneously relied upon an inadequate decision of the Ninth Circuit Court of Appeals.⁸⁶ He wrote:

As this Court's summary disposition today demonstrates, the Court of Appeals would have been well advised to discuss the record in greater depth. One reason it failed to do so is that the members of the panel decided that the issues presented by this case did not warrant discussion in a published opinion that could be "cited to or by the courts of this circuit, save as provided by Rule 21(c)." That decision not to publish the opinion or permit it to be cited—like the decision to promulgate a rule spawning a body of secret law—was plainly wrong.⁸⁷

Moreover, for Stevens, a real suspicion is raised when an opinion lacks a rationale. He noted, "a court of appeals that issues an opinion that may not be printed or cited . . . engages in decisionmaking without the discipline and accountability that the preparation of opinions requires."⁸⁸

4. Lack of uniformity, repetition, and inefficiency

No-citation rules raise the additional problems of lack of uniformity, repetition, and inefficiency. The reason is basic: no-citation rules explicitly limit the precedential value of an opinion and therefore limit its ability to be cited. In a hypothetical situation, it is conceivable that on Monday a judge may interpret a statute as creating a specific right of recovery in an unpublished opinion, while on Tuesday, another judge in the same court facing identical factual circum-

86. *See id.* (Stevens, J., dissenting).

87. *Id.* (Stevens, J., dissenting) (citation omitted).

88. *Id.* at 940 (Stevens, J., dissenting); *see also Nat'l Classification Comm.*, 765 F.2d at 173 n.2 (stating that unpublished opinions "result in less carefully prepared or soundly reasoned opinions; reduce judicial accountability; increase the risk of nonuniformity; allow difficult issues to be swept under the carpet; and result in a body of 'secret law'"); Reynolds & Richman, *An Evaluation*, *supra* note 13, at 608 (discovering no widespread 'hiding' of law-declaring opinions, but noting that there are some definite "exceptions"). *But see* Martineau, *supra* note 59, at 129 (arguing that the desire of every judge to do the right thing and the constraints imposed on the appellate court by the appellate process itself eliminate judicial irresponsibility).

stances will have an opposite holding because (1) the unpublished opinion is hidden from view, or (2) the available unpublished opinion is not citable before the court.

This problem is illustrated in *National Classification*. In that case, the underlying unpublished decision interpreted a specific provision of the Motor Carriers Act of 1980⁸⁹ to permit federal regulation of pork skins and bacon rinds. The first disposition of the case contained so little analysis that the parties ended up appealing a second time because neither was sure whether the issues had been decided.⁹⁰ Further, as Circuit Judge Wald wrote, “[b]eing unpublished, No. 83-1866 has no precedential effect. Thus it is highly likely that another rate bureau will again call upon this court to decide the same statutory questions.”⁹¹

It is ironic that the very system designed to streamline the court’s adjudicative process can itself give rise to unnecessary future litigation. Efficiency goals are undermined where the unpublished opinion is so deficient that even the litigants question whether the issues were resolved. Efficiency goals are further defeated where an unpublished opinion is used to dispose of a matter that other parties are likely to litigate. In spite of guidelines for publication, courts do dispose of important matters in unpublished opinions. When this happens, the court and similarly situated parties may find themselves confronting issues previously disposed of but unavailable because of the no-citation rules. As Judge Wald explained in *National Classification*, this forced “both the parties and this court [to go] through the time and expense of a fruitless second appeal.”⁹²

5. Inability to predict precedential value

A fundamental flaw of limited publication is the inability of a court to predict the future precedential effect of a given case. According to the *Standards for Publication*, “the decision not to publish should be made as soon as possible.”⁹³ From an efficiency stand-

89. 49 U.S.C. § 10706(b)(3)(B) (1994).

90. See *Nat’l Classification Comm.*, 765 F.2d at 174.

91. *Id.*

92. *Id.*

93. STANDARDS FOR PUBLICATION, *supra* note 23, at 11.

point, this makes sense. Otherwise, the expected savings in opinion preparation time would not be realized.⁹⁴ This early decision will determine how thoroughly the opinion is prepared. The problem arises, however, that at the time the judge is writing, it is not possible to predict the precedential value of the opinion.⁹⁵ The inability to predict precedential value may arise from a factual question or an interpretation of the law. It is interesting to note that in order for limited publication to work, the decision to publish must be made before writing. Yet, paradoxically, the *Standards for Publication* also recognizes that the “reduction of ideas to paper . . . significantly affects ultimate decisions.”⁹⁶ The danger is that the decision not to publish will affect the reasoning or even the result.⁹⁷

This problem was highlighted by Chief Judge Holloway of the Tenth Circuit. In his dissent to that court’s adoption of stricter notation rules, Judge Holloway observed that in the common-law tradition, “all rulings of this court are precedents.”⁹⁸ Holloway writes:

[W]hen we make our *ad hoc* determination that a ruling is not significant enough for publication, we are not in as informed a position as we might believe. Future developments may well reveal that the ruling is significant indeed. As we know, we are frequently changing our views on publication decisions, deciding later to publish them on motions of the parties or on our own motion. The classifications are too fine in many instances and we cannot confidently say, in deciding whether to publish, that we are not working an *injustice on parties in later cases*.⁹⁹

Justice Stevens was even more critical, believing that a judge is simply never in a position to predict future value. “Judges are the last

94. *See id.*

95. It might be presumed that if the panel that issued the unpublished per curiam opinion in *Christie v. United States*, No. 91-2375MN (8th Cir. Mar. 20, 1992), later relied upon by the *Anastasoff* court, realized that it was creating in-circuit precedent it would have issued a published opinion.

96. STANDARDS FOR PUBLICATION, *supra* note 23, at 2.

97. *See Reynolds & Richman, An Evaluation, supra* note 13, at 581.

98. Re Rules of the United States Court of Appeals for the Tenth Circuit, 955 F.2d 36, 37 (10th Cir. 1986) (Holloway, C.J., dissenting).

99. *Id.* at 38 (Holloway, C.J., dissenting) (emphasis added).

persons,” he wrote, “who should be authorized to determine which of their decisions should be long remembered.”¹⁰⁰

These problems might manifest themselves when, after oral argument, a judge or a panel of the court decides that a case does not warrant a published opinion. The opinion is then written with the knowledge that the final result will not be published and will not later be cited as authority. Knowing this to be the end, a brief opinion is written by the judge or judicial staff,¹⁰¹ one that lacks a discernable expression of the court’s reasoning. Later it is realized that: (a) the case was more novel than the court predicted; (b) the opinion lacked a sufficient rationale; (c) other parties have since litigated the same issues on identical facts; and (d) those parties did not have the benefit of the previous opinion because: (1) it was hidden from view; (2) it could not be cited; or (3) it lacked a sufficient rationale.

III. THE *ANASTASOFF*¹⁰² CASE

On April 13, 1996, Faye Anastasoff, a retired school teacher, mailed a refund claim to the Internal Revenue Service for federal taxes she overpaid on April 15, 1993.¹⁰³ Anastasoff had three years from the date of the first mailing in which to file her refund claim.¹⁰⁴ As it turned out, however, her claim arrived on April 16, 1996—one

100. Reynolds & Richman, *Non-Precedential Precedent*, *supra* note 53, at 1192 (quoting Justice John P. Stevens, Remarks at Illinois State Bar Association’s Centennial Dinner, Springfield, Illinois (Jan. 22, 1977)). Stevens explained this remark:

[A] rule which authorizes any court to censor the future citation of its own opinions or orders rests on a false premise. Such a rule assumes that an author is a reliable judge of the quality and importance of his own work product. If I need authority to demonstrate the invalidity of that assumption, I refer you to a citizen of Illinois who gave a brief talk in Gettysburg, Pennsylvania that he did not expect to be long remembered.

Id.

101. It is acknowledged that judicial clerks most often write unpublished opinions. See POSNER, *supra* note 17, at 124; Martin, *supra* note 40, at 190.

102. *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot en banc*, No. 99-3917, 2000 WL 183092 (8th Cir. Dec. 18, 2000).

103. See *id.* at 899.

104. See 26 U.S.C. § 6511(b) (1994).

day late. The IRS rejected her claim and kept her money.¹⁰⁵ Anastasoff subsequently brought suit against the IRS in the United States District Court for the Eastern District of Missouri contending that her refund was timely under the “mailbox rule.”¹⁰⁶ The district court rejected her claim and granted summary judgement for the government.¹⁰⁷ The court reasoned that the mailbox rule could not apply under these circumstances because Anastasoff’s original tax claim filed on April 15, 1993 was itself timely.¹⁰⁸ The court held that the mailbox rule “could not apply to any part of a timely claim.”¹⁰⁹ In other words, because Anastasoff filed her 1993 income taxes on time, the mailbox rule could not save her claim for a refund mailed within the three-year limitation, but received one day late.

On appeal to the Eighth Circuit, Anastasoff argued that as a matter of policy, the mailbox rule should apply “whenever necessary” to fulfill its remedial purpose and save taxpayers from the “vagaries of the postal system.”¹¹⁰ If applied, the mailbox rule would preserve her refund claim as timely as if received when mailed.¹¹¹ Writing for a unanimous three-judge panel, Circuit Judge Richard S. Arnold affirmed the district court ruling.¹¹² In so doing, the Eighth Circuit issued a precedent-setting opinion that was the “talk of the appellate world within hours,”¹¹³ and which inspired renewed calls for court reform.¹¹⁴

Judge Arnold explained that the court had no choice but to affirm the district court and reject Anastasoff’s claim because eight years before, on similar facts, the court “rejected precisely the same

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

106. *See id.* at 898.

107. *See id.* at 899.

108. *See id.*

109. *Id.*

110. *Id.*

111. *See* 26 U.S.C. § 7502 (1994).

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

113. Mauro, *supra* note 35.

114. *See All Opinions Are Precedential*, N.J. L.J., Sept. 4, 2000, available at LEXIS, News Library, N.J. L.J. File (using Arnold’s opinion to call for the appointment of more New Jersey state court judges and the reform of the local judicial selection process).

legal argument.”¹¹⁵ In that earlier decision, *Christie v. United States*,¹¹⁶ the court considered a refund claim that was mailed just prior to the three-year bar but was received just after the deadline.¹¹⁷ Like Anastasoff, the taxpayer in that case argued that the mailbox rule should operate regardless of the claim’s timeliness.¹¹⁸ Although the *Christie* opinion was unpublished and mere persuasive

authority under the court’s own rules, the panel felt it was nonetheless bound to it as authoritative in-circuit precedent.¹¹⁹

Anastasoff’s attorney did not attempt to distinguish the *Christie* case and Judge Arnold pointed out that Anastasoff’s reasoning was “squarely inconsistent with the effect [she] desires to attribute to the regulation.”¹²⁰ At oral argument, Arnold pointedly asked Anastasoff’s attorney: “What do you make of the *Christie* opinion?”¹²¹ In response, her attorney matter-of-factly replied that because the decision was unpublished it was “not binding on this court.”¹²² Taking issue, Arnold said: “This is where I disagree with you. I think it is unconstitutional for a court to say we decided a case a certain way yesterday, but we don’t like it anymore and we’re ignoring it. It flies in the face of the whole notion of a court.”¹²³

On August 22, 2000, Judge Arnold issued a decision for the court declaring Rule 28A(i)¹²⁴ unconstitutional.¹²⁵ The Rule, “inso-

115. *Anastasoff*, 223 F.3d at 899.

116. No. 91-2375MN (8th Cir. Mar. 20, 1992).

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

118. *See id.*

119. *See id.*

120. *Id.*

121. Oral argument for the *Anastasoff* case (No. 99-3917) can be heard through the Eighth Circuit’s website, United States Court of Appeals, Oral Arguments, at <http://8cc-www.ca8.uscourts.gov/Oral-Arg/scripts/GetRA.asp>.

122. *Id.*

123. *Id.*

124. It provides:

Unpublished opinions are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would

far as it would allow us to avoid the precedential effect of our prior decisions,” he wrote, “purports to expand the judicial power beyond the bounds of Article III. . . . That rule does not, therefore, free us from our duty to follow this Court’s decision in *Christie*.”¹²⁶

Faye Anastasoff did not anticipate the ruling. Her attorneys went to the Eighth Circuit prepared to argue the merits of the mailbox rule and the fine points of the relevant IRS regulations—a seemingly routine case. Of the ruling, her attorney later said “[it] certainly was a surprise” especially since the constitutionality of the rule was “not raised in either brief by either side.”¹²⁷

In declaring the Eighth Circuit’s no-citation rule unconstitutional, Judge Arnold cited no precedent of his own.¹²⁸ Rather, his opinion rested upon two interrelated arguments. First, Arnold made an historical argument about the establishment and adoption of the doctrine of precedent by the Framers of the Constitution. Second, he suggested that the nature of this doctrine incorporated into the Constitution was more strict than is our contemporary understanding of the doctrine of precedent.

Anastasoff subsequently filed a petition for rehearing en banc, asserting that the panel’s constitutional holding was in error, and that, on the merits, the Eighth Circuit should abandon *Christie*.¹²⁹ While still pending review, the government took two important actions that mooted Anastasoff’s claim. First, the IRS reversed course with its arguments and formally announced that the mailbox rule would apply to claims such as Anastasoff’s.¹³⁰ Second, the govern-

serve as well.

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

125. See *Anastasoff*, 223 F.3d at 905.

126. *Id.* at 900.

127. Mauro, *supra* note 35 (quoting Anastasoff’s attorney Juan Keller).

128. See France, *supra* note 9, at 2228; see also Steve France, *Right to Cite*, A.B.A. J., Oct. 2000, at 24 (stating that in establishing a new right to cite unpublished opinions, Judge Arnold did not cite any cases on the subject).

129. See *Anastasoff v. United States*, No. 99-3917, 2000 WL 1863092 (8th Cir. Dec. 18, 2000) (en banc).

130. See *Weisbart v. United States*, 2000 WL 1711554 (Nov. 13, 2000); see also *IRS Agrees that Refund Claim on Late Return Can be Timely Under Mailbox Rule*, 46 FED. TAXES WKLY. ALERT 581, 583 (2000) (describing the IRS changes regarding the timeliness of refund claims under the mailbox rule).

ment paid Faye Anastasoff her refund claim in full, with interest.¹³¹ In light of these actions, the Eighth Circuit, sitting en banc, vacated its earlier decision as moot and remanded the case back to the district court.¹³² Under the pen of Judge Arnold, however, the court did not foreclose on its earlier rationale. Explaining that the court sits “to decide cases, not issues,” Arnold wrote that “whether unpublished opinions have precedential effect no longer has any relevance for the decision of this tax-refund case.”¹³³ The constitutionality of the non-citation rule, however, “remains an open question.”¹³⁴

IV. A HISTORICAL ANALYSIS OF THE DOCTRINE OF PRECEDENT

A. *American Legal Tradition and the Constitution*

The doctrine of precedent dates at least as far back as the old English year-books.¹³⁵ Bolstering an argument with examples of a similar case is a logical short-hand technique for lawyers. This habit of reasoning by example, it is said, is more or less a compulsive habit of common lawyers.¹³⁶

Yet, the extent to which the Framers incorporated the notion of binding precedent into the Constitution is unsettled. For the framing of the Constitution fell squarely in the middle of a historical shift: a movement away from the prevailing English common law toward the formation of a particularly American legal tradition. The weight one accords to these two traditions, what the Framers might have previously known in the English colonies, and what emerged immediately following independence and the drafting of the Constitution, may de-

131. See *Anastasoff*, 2000 WL 1863092, at *1.

132. See *id.* at *2.

133. *Id.*

134. *Id.*

135. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 171 (2d ed. 1979) (“By the 1280s the very words of the judges and pleaders were being taken down in the year-books, and by the fourteenth century we find these books being cited as evidence of law and practice.”); see also E.M. Wise, *The Doctrine of Stare Decisis*, 21 WAYNE L. REV. 1043, 1047 (1975) (stating that “[t]he habit of looking to what was decided before for guidance, of reasoning by analogy, by example, is found of course in English law in the middle ages”).

136. See Wise, *supra* note 135, at 1047.

termine how the historic roots of the doctrine of precedent are judged. By analogy, in contractual disputes, the conduct of the parties is often held as some indication of what their intentions might have been at the moment of contract formation. Historically, the Supreme Court has looked beyond contemporaneous statements to the establishment of trends or absence thereof when evaluating the Framers' intent.¹³⁷ Assessing the Framers' intent in this situation is especially difficult given the unsettled state of American law at the time.

Despite the Constitution's silence,¹³⁸ Judge Arnold suggests that the doctrine of precedent was implicitly adopted by the Framers of the Constitution. A majority of the Framers, he points out, were lawyers familiar with the doctrine of precedent by the time they gathered in Philadelphia.¹³⁹ The implication is that the Framers were not only familiar with the doctrine of precedent, but they embraced it as the appropriate method of adjudication in the new United States. The doctrine was not merely "well-established," Arnold suggests, it was the "historic method of judicial decision-making" and considered a "bulwark of judicial independence."¹⁴⁰ Arnold supports his straightforward argument by looking at the influential writings of Sir William Blackstone and Sir Edward Coke.

1. Early influences on the doctrine of precedent

Sir William Blackstone's popularity arose at a time when there was but one small American law school and lawyers were starved for books.¹⁴¹ For example, John Adams complained that in 1758, before

137. *Cf.* *Myers v. United States*, 272 U.S. 52, 175 (1926) ("This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions.").

138. *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.").

139. *See* *Anastasoff v. United States*, 223 F.3d 898, 900 n.4. (8th Cir. 2000), *vacated as moot en banc*, No. 99-3917, 2000 WL 183092 (8th Cir. Dec. 18, 2000).

140. *Id.* at 900.

141. *See* ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN*

the publication of Blackstone's *Commentaries*, the American study of law was "a dreary ramble."¹⁴² Blackstone's famous *Commentaries* was the single most authoritative source reporting English cases.¹⁴³ In fact, Blackstone was considerably more popular in the United States than in his native England. According to an early twentieth-century Supreme Court opinion, cited by Judge Arnold, "[a]t the time of the adoption of the Federal Constitution, . . . [Blackstone's work] had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England; so that undoubtedly, the Framers of the Constitution were familiar with it."¹⁴⁴

Given Blackstone's "great influence on the Framers' understanding of law,"¹⁴⁵ Arnold suggests that when Blackstone wrote "it is an established rule to abide by former precedents,"¹⁴⁶ the Framers collectively adopted his word as their own. Arnold provides evidence of this through the words of Alexander Hamilton. For example, Hamilton wrote in *The Federalist No. 78* that "[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."¹⁴⁷ Arnold observes that both Hamilton and James Madison endorsed the idea that the accumulation of precedents would be beneficial. For example, Madison is quoted as saying "[a]mong other difficulties, the exposition of the Constitution is frequently a copious source, and must continue so until its meaning on all great points shall have been settled by precedents."¹⁴⁸

SYSTEM OF GOVERNMENT 34 (1955); see also Perry Miller, *Introduction to THE LEGAL MIND IN AMERICA*, *supra* note 12, at 17 (declaring that the American legal profession was in a "sorry state" when the Constitution was adopted).

142. Miller, *supra* note 141, at 15.

143. See *id.* at 19 (describing Blackstone's *Commentaries* as the bible for the American legal profession, but limited to the laws of England).

144. *Anastasoff*, 223 F.3d at 901 n.8 (citation omitted).

145. *Id.*

146. *Id.* at 900 (quoting SIR WILLIAM W. BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND 69 (1765)).

147. THE FEDERALIST NO. 78, *supra* note 2, at 662.

148. *Anastasoff*, 223 F.3d at 902 (quoting James Madison, Letter from James Madison to Samuel Johnson (June 21, 1789), in 12 PAPERS OF JAMES MADISON 250 (Robert A. Rutland et al. eds., 1977)).

The other great influence cited by Arnold is Sir Edward Coke, who “more than any other person . . . established the authority of rules on the basis that they had been previously enunciated by courts of common law.”¹⁴⁹ Coke was something of a hero to American patriots for he had led a successful struggle against the arbitrary usurpations by the English monarchy through the strength and authority of those precedents.¹⁵⁰ American patriots identified his struggle with their own against the English Crown and frequently turned to Coke for authority.¹⁵¹

Further, in *The Transformation of American Law*, cited by Arnold,¹⁵² Morton Horwitz states that “the overwhelming fact about American law through most of the eighteenth century is the extent to which lawyers believed that English authority settled virtually all questions for which there was no legislative rule.”¹⁵³ Relying on these authorities, Arnold concludes that the doctrine of precedent “was not merely well-established; it was the historic method of judicial decision-making, and regarded as a bulwark of judicial independence in past struggles for liberty.”¹⁵⁴

2. The uncertain establishment of the doctrine of precedent

As a young nation founded on independence from England, the historical context of the Constitution suggests that the nature of the doctrine of precedent would be unclear. As former Supreme Court Justice Jackson pointed out, in the early days, the Supreme Court “had no tradition of its own.”¹⁵⁵ The Court, he analogized, was like a ship without a rudder, for “[t]he Constitution . . . launched a Court without a jurisprudence.”¹⁵⁶ Furthermore, the precedents which did

149. Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 438, 446-47 (1996).

150. See *Anastasoff*, 223 F.3d at 900 n.6.

151. See *id.* (quoting Sir Edward Coke as stating that “precedents have always been respected”).

152. See *id.* at 900.

153. MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 8 (1992).

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

155. JACKSON, *supra* note 141, at 29.

156. *Id.*; see also Perry Miller, *Introduction* to Nathaniel Chipman, *Sketches*

exist at the time came from the common law, the state courts, or from England. Contrary to common assumptions, adherence to the common law was not “inevitable and unopposed.”¹⁵⁷ In the aftermath of the Revolution, British law was so unpopular that some states prohibited lawyers from citing British precedents.¹⁵⁸

Even the revered Sir William Blackstone was called into question. As early as 1793, Judge Nathaniel Chipman¹⁵⁹ directly criticized Blackstone and his position of influence in America. In a nationalist tone, Chipman suggested that American law ought to be distinct and removed from any association with England. Specifically, American law should “be able both in theory and in practice to exclude all foreign principles.”¹⁶⁰ As such, Blackstone, a “British subject, highly in favor with the government” had no place in the learnings of a democratic republic.¹⁶¹ “Unhappily,” Chipman lamented, “[Blackstone’s] *Commentaries* are the only treatise of law, to which the law students, in these states, have access.”¹⁶² St. George Tucker, one of America’s foremost legal educators at the time, seized upon the same problem.¹⁶³ In 1803, Tucker sought to limit the influence of Blackstone on the emerging American legal community by publishing his own Americanized version of the *Commentaries*.¹⁶⁴

on the Principle of Government, in THE LEGAL MIND IN AMERICA, supra note 12, at 19 (describing America as a “*tabula rasa*,” compelled to start anew).

157. JACKSON, *supra* note 141, at 29.

158. *See id.*; *see also* ROBERT M. COVER, JUSTICE ACCUSED, ANTISLAVERY AND THE JUDICIAL PROCESS 140-41 (1975). Cover explained the nature of the tension between the English common law tradition and the search for an American tradition: “In early nineteenth-century America, without reference to the British corpus, the richness of experience desirable for common law jurisprudence would be lacking. But resort to the English decisions meant potential adoption of rules and principles from highly suspect Englishmen and an admission of national inadequacy.” COVER, *supra*, at 140-41.

159. *See* Miller, *supra* note 156, at 19 (referring to the Vermont judge as a leader of the bar).

160. Nathaniel Chipman, *Sketches of the Principles of Government, in THE LEGAL MIND IN AMERICA, supra* note 12, at 29.

161. *Id.*

162. *Id.*

163. *See* CRAIG EVAN KLAFTER, REASON OVER PRECEDENTS: ORIGINS OF AMERICAN LEGAL THOUGHT 2 (1993).

164. *See id.* Tucker successfully separated American legal thought from

A “retreat from adherence to the doctrine of precedent” coincides with the critical years surrounding the Constitution.¹⁶⁵ In *Transformation of American Law*, Morton Horwitz observes that one of the “most universal features of postrevolutionary American jurisprudence was an attack on the colonial subservience to precedent.”¹⁶⁶ Nathaniel Chipman is again heard to complain that the legal profession had followed precedents “with too great veneration.”¹⁶⁷ These precedents, he said, “were made at a time when the state of society, and of property were very different from what they are at present.”¹⁶⁸ To follow existing precedent, Chipman argued, would be akin to following “arbitrary rules” or “arbitrary decisions” without understanding that they “arose out of [a different] state of society.”¹⁶⁹ And this he said would be “certainly contrary to the principles of our government and the spirit of our laws.”¹⁷⁰ This retreat from precedent “went hand in hand with a new definition of the role of the judge in formulating legal rules.”¹⁷¹

The tension between the availability of English precedent and the proud search for an American tradition¹⁷² was clearly evident in 1798, when Jesse Root compiled the first systematic case reporter for the state of Connecticut. In the preface to his *Reports*, Root described the sources of American common law, and like Chipman, he urged independence from the inapplicable English laws.¹⁷³ Root wrote:

Blackstone and the English legal system. Specifically, Tucker introduced relativism to establish that “reason should be the law’s ultimate test.” *Id.*

165. HORWITZ, *supra* note 153, at 24.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 25.

170. *Id.*

171. *Id.* at 27.

172. See COVER, *supra* note 158, and accompanying text.

173. The superiority of American legal thought expressed by Chipman, Root, and later William Sampson can be traced to a tension existing during the revolutionary period. For example, Bernard Bailyn has observed that “English law—as authority, as legitimizing precedent, as embodied principle, and as the framework of historical understanding—stood side by side with Enlightenment rationalism in the minds of the Revolutionary generation.” BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 31 (1967).

[American common law] is essentially different from all, in that it is highly improved and ameliorated in its principles and regulations, and simplified in its forms, is adapted to the state of our country, and to the genius of the people, and calculated in an eminent manner to improve the mind by the diffusion of knowledge, and to give effectual security and protection to the person, rights, liberties and properties of the citizens, and is clothed with an energy, derived from a source, and rendered efficacious by a power, unknown in foreign governments, (*viz.*) the attachment of the citizens who rejoice in being ruled and governed by its laws, for the blessings it confers. Let us, Americans then, duly appreciate our own government, laws and manners, and be

what we profess—an independent nation—and not plume ourselves upon being humble imitators of foreigners¹⁷⁴

Root is also one of the earliest voices heard to call for the “codification” of the laws which would later gain prominence in the 1820s.¹⁷⁵ Root wrote that the unwritten customs and regulations of England, which comprised the common law, have no place in American law. Rather, he argued that in a free and orderly government such as America, our “statutes are positive laws enacted by the authority of the legislature, which consists of the representatives of the people, being duly promulgated, are binding upon all, as all are considered as consenting to them”¹⁷⁶

The push for codification was also a direct attack on the legislating role judges were seen to play.¹⁷⁷ According to the historian Robert Cover, the codifiers “stressed that common law jurisprudence put the future of the law at the mercy of the caprice, whim, class and party passion of the men who sit on the bench.”¹⁷⁸ Cover noted that

174. Root, *supra* note 12, at 38.

175. William Sampson is recognized as the most vigorous booster of “codification.” In a speech delivered before the New York Historical Society in 1823, Sampson attacked the long oral tradition of the common law arguing that Americans should no longer “believe that we can be governed, at this day, by the oral traditions of semi-savage Saxons who could have no knowledge nor conception of the objects with which our law is conversant.” William Sampson, *An Anniversary Discourse, in THE LEGAL MIND IN AMERICA*, *supra* note 12, at 126. Sampson reported that codification “has been the first glory of the greatest sovereigns and the best policy of the wisest people.” *Id.* at 131; *see also* COVER, *supra* note 158, at 141 (observing that Sampson was even more concerned that the common law meant dependence on the past); ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* 330 (1945) (observing that dissatisfaction with the state of the common law bred the movement toward codification); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1789*, at 301-03 (1968) (tracing the origins of codification to before 1780).

176. Root, *supra* note 12, at 37.

177. *See* WOOD, *supra* note 175, at 298-305.

178. COVER, *supra* note 158, at 141-42. Cover quotes Robert Rantoul: “It is because judge-made law is indefinitely and vaguely settled . . . that it possesses the capacity of adapting itself to new cases, or, in other words, admits of *judicial legislation*.” *Id.* at 142. William Sampson also extolled the virtues of codification, for “[t]he law will govern the decision of judges, and not the decisions the law [sic].” Sampson, *supra* note 175, at 132.

the common law was not without its defenders. Yet even they were heard to condemn “slavish adherence to precedent.”¹⁷⁹ For example, while Francis Lieber expressed a belief that some adherence to precedent was necessary, he also wrote: “If we should consider all future cases of a similar nature as prejudged by our [past] decision, stagnation would be the consequence, instead of an expansion and development of the law.”¹⁸⁰ Cover noted that “the rejection of the ultimate authority of precedent was necessary if the defenders of the common law” were to hold off the attacks of the codifiers.¹⁸¹

It is suggested here, that in evaluating what the Framers knew and accepted of the doctrine of precedent, it is necessary to recognize that the Constitution arose during a time of legal ferment. The Constitution was born during a “confused and confusing complex of emotions, traditions, and aspirations.”¹⁸² Placed in the context of an emerging American legal tradition, the contemporaneous statements of Hamilton and Madison cited by Arnold are of limited persuasive force. For Alexander Hamilton also recognized the emergence of an American form of law employing reason and equity in order to justify deviation from English precedent.¹⁸³ “[T]hough the reporters of adjudged cases have been read and attended to in our courts,” Hamilton wrote, “where the injustice of them could be pointed out they were rejected.”¹⁸⁴

If binding precedent was as ingrained as Arnold suggests, one should expect to find contemporaneous and weighty evidence of it beyond a few statements of Hamilton and Madison.¹⁸⁵ Rather, what

179. COVER, *supra* note 158, at 142.

180. *Id.* at 143.

181. *Id.*

182. Perry Miller, *Introduction* to THE LEGAL MIND IN AMERICA, *supra* note 12, at 17-18.

183. See WOOD, *supra* note 175, at 299.

184. *Id.* Hamilton also wrote “All Lawyers agree that the *spirit* and *reason* of a law, is one of the principal rule of interpretation.” *Id.* at 299 n.67. And to William Livingston, it was “a monstrous Absurdity to suppose, that the Law is to be learnt by a perpetual copying of Precedents [for] Time immemorial can never give a Sanctum to what is against Reason and common Sense.” *Id.*

185. *Cf.* Printz v. United States, 521 U.S. 898, 916, 918 (1996) (observing that the absence of congressional acts being forced on the states by the federal government provides evidence that the federal government did not conceive of

is consistently seen is a struggle over the role of precedent in the young nation. Under these circumstances, the country's first generation of lawyers were instilled with a "dynamic conception of law, constantly improving as it was encouraged to adapt to the needs of a changing society."¹⁸⁶ As Justice Jackson observed:

The Supreme Court was not bound to any particular body of learning for guidance. When the Court moved to Washington in 1800, it was provided with no books, which probably accounts for the high quality of early opinions. In five of Marshall's great opinions he *cited not a single precedent*. The leading commentators, Kent and Story, frequently cited civil law authorities, chiefly from Dutch or French sources.¹⁸⁷

Ascribing concrete legal thoughts to the Framers under these conditions is simply overstating the case.¹⁸⁸

B. The Nature of the Doctrine of Precedent and Stare Decisis

Up to this point, the doctrine of precedent has been referred to only in general terms. This needs clarification. Karl Llewellyn has written that precedent is one of our most misunderstood legal conceptions.¹⁸⁹ In *The Common Law Tradition*, Llewellyn writes that our "false conception" of precedent has led us to believe that prece-

such a role for itself until only recently); *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986) (stating that the arguments of James Madison before the First Congress provided "contemporaneous and weighty evidence" of the Constitution's meaning because they were adopted by Members of the First Congress who were also Framers of the Constitution).

186. KLAFTER, *supra* note 163, at 2.

187. JACKSON, *supra* note 141, at 30 (emphasis added).

188. *E.g.*, Monaghan, *supra* note 3, at 770 n.267. Monaghan stated:

The Framers were familiar with the idea of precedent. But there is no historical basis for asserting that they intended to accord a privileged position to precedent over text. The whole idea of just what precedent entailed was unclear. The relative uncertainty over precedent in 1789 also reflects the fact that "many state courts were manned by laymen, and state law and procedure were frequently in unsettled condition. The colonial and state courts did not enjoy high prestige, and their opinions were not even deemed worthy of publication."

Id. (citations omitted) (quoting JACKSON, *supra* note 141, at 33).

189. *See* LLEWELLYN, *supra* note 1, at 62.

dent is a system of dictation control.¹⁹⁰ Rather, our precedent system is one of guidance and suggestion and only rarely a system of dictation.¹⁹¹ To demonstrate the flexibility of our precedent system, Llewellyn described sixty-four ways in which precedents can be distinguished.¹⁹²

In the *Anastasoff* case, Judge Arnold contends that the principles, which form the doctrine of precedent and which give rise to a duty to follow precedent where it exists, were “well established and well regarded at the time this nation was founded.”¹⁹³ These principles included the notion that an opinion is a declaration of law which must be followed in subsequent cases. “Inherent in every judicial decision,” Arnold wrote, “is a declaration and interpretation of a general principle or rule of law.”¹⁹⁴ This declaration “must be applied in subsequent cases to similarly situated parties.”¹⁹⁵ To the extent that the Eighth Circuit’s no-citation rule would allow the court to avoid the precedential effect of the unpublished opinion on point, it would “expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional.”¹⁹⁶

Judge Arnold observes that the contemporary understanding of precedent is different from that of the Founders. “Modern legal scholars,” he writes, “tend to justify the authority of precedents on equitable or prudential grounds.”¹⁹⁷ By contrast, Arnold suggests

190. *Id.* at 62-63.

191. *See id.* at 75.

192. *See id.* at 77-91.

193. *Anastasoff v. United States*, 223 F.3d 898, 900 (8th Cir. 2000), *vacated as moot en banc*, No. 99-3917, 2000 WL 183092 (8th Cir. Dec. 18, 2000).

194. *Id.* at 899 (citing *Marbury v. Madison*, 5 U.S. (3 Cranch) 137, 177-78 (1803)).

195. *Id.* at 900 (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991)).

196. *Id.*

197. *Id.* at 901 n.7 (citing Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595-602 (1987)); *see also* Berman & Reid, *supra* note 149, at 447 (stating that the “modern” doctrine of precedent holds that “judicial decisions are an authoritative source of law, binding on courts in later analogous cases [which] requires a sharp distinction between statements made by judges that are necessary to their decisions and those that are not necessary”). This requirement in the “modern” form recognizes a distinction between dicta and the holding of the case. *See* Berman & Reid, *supra* note 149, at 447. It being the holding of

that the doctrine of precedent which the Framers understood was much more strict.

Using the words of Sir William Blackstone and Sir Edward Coke, Arnold's argument progresses as follows: First, the eighteenth-century view of precedent derives from the nature of judicial power itself.¹⁹⁸ The nature of this power required that judges "determine the law."¹⁹⁹ In order to determine the existing law, judges not only chose the appropriate legal principle, but expounded and interpreted it.²⁰⁰ Second, the nature of judicial power is only to determine what the law is, not to invent it.²⁰¹ Third, because precedents are the best evidence of what the law is, the judicial power is limited by them.²⁰² Finally, the law-declaring nature of judicial power applies to a single existing decision. Thus, a single decision can create binding precedent.²⁰³

Arnold's argument finds some support in the writing of Morton Horwitz. In *The Transformation of American Law*, Horwitz describes a "strict conception of precedent" which he says is derived from "the very conception of the nature of common law principles as preexisting standards discoverable by judges."²⁰⁴ To ignore existing precedent would be to cross the line separating law and legislation.²⁰⁵

Arnold's reasoning, however, is open to strong criticism.²⁰⁶ The eighteenth century form of precedent has sometimes been called the "traditionary" doctrine of precedent.²⁰⁷ This form was closely re-

the cases that constitutes binding rules of law, whereas the "traditionary" form recognized the importance of judicial custom. *See id.* at 449.

198. *See Anastasoff*, 223 F.3d at 901.

199. *Id.*

200. *See id.*

201. *See id.*

202. *See id.*

203. *See id.* (quoting Sir Edward Coke as stating that "a judicial decision is to the same extent a declaration of the law").

204. HORWITZ, *supra* note 153, at 8-9.

205. *See id.* at 9.

206. *See France*, *supra* note 9, at 2229 (quoting Michael Paulsen: "The idea that the Constitution requires that cases be considered binding on the judiciary is really so extreme as to border on the frivolous. Stare decisis has never been understood to be a binding rule that the judiciary can't re-examine the holding of a previous case.").

207. *See Berman & Reid*, *supra* note 149, at 449.

lated to the concept of judicial custom.²⁰⁸ Within this framework it was a series of cases that provided the source of the law. A case was not the law itself, but mere evidence of it.²⁰⁹ In *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, Frederick Kempin suggests that evidence from the colonial period is “scanty” but tends to show that the colonists “believed the law to be something above and superior to cases.”²¹⁰ Under such a theory, Kempin notes it would be difficult to “convince a judge of the immutability of prior decisions.”²¹¹ The notion that there is a transcendental body of law above and beyond the law of any state was embodied in the 1842 decision in *Swift v. Tyson*.²¹²

The doctrine of precedent is also distinguishable from the doctrine of stare decisis.²¹³ According to Kempin, stare decisis “may use a single precedent (which is not necessarily the accumulated experience of the courts) as ‘binding,’ or persuasive, authority.”²¹⁴ This is particularly useful here because Judge Arnold’s application of the doctrine of precedent more closely resembles the doctrine of stare decisis than anything else. The central question Judge Arnold poses is whether a court is constitutionally bound to follow a single precedent issued by an equal or higher court. He suggests that a court is bound to follow precedent because failure to do so would amount to an abuse of judicial power akin to legislation. Assuming the Framers

208. *See id.* at 449.

209. *See* Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 31 (1959).

210. *Id.* at 33.

211. *Id.* at 33-34.

212. 41 U.S. (15 Pet.) 1 (1842).

213. *See* Roscoe Pound, *What of Stare Decisis?*, 10 FORDHAM L. REV. 1, 5-6 (1941). Pound defined stare decisis:

[A] common-law technique [of decision] based on a conception of law as experience developed by reason and reason tested and developed by experience. It is a technique of finding the grounds of decision in recorded judicial experience, making for stability by requiring adherence to decisions of the same question in the past, allowing growth and change by the freedom of choice from among competing analogies of equal authority when new questions arise or old ones take on new forms.

Id.

214. Kempin, *supra* note 209, at 30.

were influenced by more than just Blackstone's *Commentaries*, the nature of stare decisis should be examined.

Frederick Kempin suggests that without a firm doctrine of stare decisis "courts could search for the 'true' law without regard to any binding authority in prior cases" because cases were "but evidence of the law."²¹⁵ Kempin highlights various cases which demonstrate that a firm doctrine of stare decisis really did not emerge in the United States until after 1800.²¹⁶ The emergence of this doctrine had a lot to do with the fact that there was no reliable system of reporters from which attorneys and judges could cite until the early nineteenth century.²¹⁷ Without printed records of judicial opinions precedent would be difficult to adhere to, or alternately, easy to ignore.²¹⁸ Under these circumstances, it might be said that the doctrine of precedent as contained in a series of cases evidencing the law could readily be conceived as creating binding authority, but a single case need not do the same, unless the principle of law contained therein is correct. As Lord Mansfield said in 1762, "[t]he reason and spirit of cases make law; not the letter of particular precedents."²¹⁹ And it has further been said that among the American revolutionary generation "[t]he

215. *Id.* at 33; see also COVER, *supra* note 158, at 142 (explaining the distinction that precedent did not itself constitute the common law, but was mere evidence of it was important because it "justified selectivity in the holding to the past").

216. See Kempin, *supra* note 209, at 37-46.

217. See *id.* at 34; see also Wise, *supra* note 135, at 1049 (observing that the doctrine of precedent did not crystallize until systematic reports emerged). Arnold suggests, however, that the "Framers did not regard this absence of a reporting system as an impediment to the precedential authority of a judicial decision." *Anastasoff*, 223 F.3d at 903. It might be observed, however, that the reason these earliest "unpublished decisions" may have been so "recognized" is because they were a part of a well-known line of cases representing existing judicial customs.

218. Peter Tiersma has noted that the historical transition from oral legal traditions to writing and printing played a direct and important role in the development of precedent. For even if judges and lawyers could remember a prior court decision, they could conveniently "forget" it at will. Written opinions contain a more accurate recording of the court's order and thus an authority from which it is difficult to deviate. See PETER M. TIERSMA, *LEGAL LANGUAGE* 40 (1999).

219. Berman & Reid, *supra* note 149, at 449.

law was no science of what to do next.”²²⁰

220. BILYN, *supra* note 173, at 31.

While Sir Edward Coke may have been one of the most influential legal writers on precedent,²²¹ his application of it accords with the flexible nature of precedent described by Karl Llewellyn. “[J]udicial precedents,” Sir Edward Coke wrote, “and the right entries of pleas upon this (or any other) statutes are *good interpreters* of the same; and of questions that have been, or may be moved thereupon.”²²² Noticeably absent is any sense that precedents *must* be followed. Rather, Coke may not be saying much more than that precedents provide useful guidance for uncovering the existing law.²²³ Furthermore, Coke was known to have compiled and even distorted cases as “examples” that supported his views.²²⁴

If there is a majority opinion among commentators, it is simply that no firm doctrine of either precedent or *stare decisis* existed during the critical years surrounding the framing of the Constitution.²²⁵ On this basis, Judge Arnold’s conclusion again seems overstated:

[I]n the late eighteenth century, the doctrine of precedent was well-established in legal practice (despite the absence of a reporting system), regarded as an immemorial custom, and valued for its role in past struggles for liberty. The duty of courts to follow their prior decisions was understood to derive from the nature of the judicial power itself and to separate it from a dangerous union with the legislative power We conclude therefore that, as the

221. See Berman & Reid, *supra* note 149, and accompanying text.

222. SIR EDWARD COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 25 (1797), *quoted in* H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1535 n.85 (1987) (emphasis added).

223. See Wise, *supra* note 135, at 1047 (noting that “Coke . . . never says that precedents are controlling”).

224. See Berman & Reid, *supra* note 149, at 447.

225. See, e.g., Pound, *supra* note 213, at 6 (“Just how binding is ‘binding authority’ in our common-law technique? A single decision has never been regarded as absolutely binding at all events Perhaps it is just as well that the exact limits of this term ‘binding authority’ have never been rigidly defined.”); see also LLEWELLYN, *supra* note 1, at 75 (suggesting that our system of precedent has long been a “system of guidance and suggestion and pressure, and only on occasion a system of dictation-‘control’”).

Framers intended, the doctrine of precedent limits the “judicial power” delegated to the courts in Article III.²²⁶

Judge Arnold’s argument that failure to heed a precedent is akin to inventing new legislation is misplaced. If a case is mere evidence of the law, it should follow that what judges are prevented from doing is “inventing” new principles of law. Theoretically, this should be impossible because those principles were thought to be transcendental principles that would only be discoverable, not subject to creation. If this is correct, judges during the colonial era could not truly invent law as Judge Arnold suggests. Furthermore, it has been seen that as the law in this country was being Americanized, equity and reason were used to reject existing precedent.²²⁷

C. *Anastasoff and Unpublished Opinions*

In the *Anastasoff* case, Judge Richard Arnold writes that he is not deciding “whether opinions should be published.”²²⁸ The question he says he is faced with is “whether they ought to have precedential effect, whether published or not.”²²⁹ Calling the no-citation rule unconstitutional, however, is effectively pulling the rug out from under the system all together. As Chief Judge Boyce F. Martin of the Sixth Circuit has written, the crux of unpublished opinions is the no-citation rule itself. “[I]f a no-citation rule did not go hand in hand with a no publication rule,” he wrote, “I would feel that we should do away with the no-publication rule and go back to the old full publication rule, and that is because of the question of stare decisis.”²³⁰ As illustrated by *Christie*²³¹ and embodied in *Anastasoff*, a central problem with limited publication is the inability of any court issuing an unpublished opinion to be able to predict precedential value. Opinions are said to cast a shadow into the future.²³² How far or how

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

227. See *supra* notes 180-81 and accompanying text.

228. *Anastasoff*, 223 F.3d at 904.

229. *Id.*

230. Martin, *supra* note 40, at 196.

231. *Christie v. United States*, No. 91-2375MN (8th Cir. Mar. 20, 1992).

232. See LLEWELLYN, *supra* note 1, at 26. Llewellyn writes:

In our law the opinion has in addition a central forward-looking function which reaches far beyond the cause in hand: the opinion has as

wide that shadow falls is subject to change. It is simply impossible for a court to anticipate the value that any given opinion will have in the years to come.

To hold the no-citation rule unconstitutional insofar as it allows the court to avoid the precedential effect of the unpublished decision and yet still claim to uphold limited publication is problematic. Courts would be told to follow the precedent of an unpublished decision if and when one is found. The problem with this is that attorneys will have the incentive to find an unpublished opinion where they previously did not. As already noted, unpublished opinions are often inferior in substantive quality to published ones.²³³ Therefore, the real possibility exists that courts may find themselves straining to adjudicate a case based on an inadequate unpublished opinion.

This raises the additional problem of locating a precedential unpublished opinion. Judge Arnold claims that there is no secret law because all unpublished opinions are available in some form or another.²³⁴ The practical problem raised here is that there is no uniform system for discovering the existence of these unpublished opinions. For example, in *Anastasoff*, the government kept a copy of the unpublished *Christie* case in its files as an opinion favorable to its position. By virtue of its frequent litigation, the government has the unique ability to create files of favorable unpublished opinions that

one if not its major office to show how like cases are properly to be decided in the future. This also frequently casts its shadow before, and affects the deciding of the cause in hand. (If I cannot give a reason I should be willing to stand to, I must shrink from the very result which otherwise seems good.) Thus the opinion serves as a steadying factor which aids reckonability. Its preparation affords not only back-check and cross-check on any contemplated decision by way of continuity with the law to date but provides also a due measure of caution by way of contemplation of effects ahead.

Id.

233. *See supra* Part II.B.3.

234. *Anastasoff*, 223 F.3d at 904.

So far as we are aware, every opinion and every order of any court in this country, at least of any appellate court, is available to the public. You may have to walk into a clerk's office and pay a per-page fee, but you can get the opinion if you want it.

Id.

remain unknown to private litigants.²³⁵

In sum, Arnold's apparent solution would render limited publication effectively useless. For limited publication to be an effective judicial time-saver, the judge must know that the decision is only of value to the parties themselves, otherwise the same time and effort required of a formal opinion will be used to write an unpublished opinion, thus saving no time at all.²³⁶ Judges would undertake to write unpublished opinions uncertain of their future use while attorneys would have a real incentive to scour whatever records they could to find an unpublished precedent.

V. SUGGESTIONS FOR THE FUTURE OF UNPUBLISHED OPINIONS AND NO-CITATION RULES

The crisis of volume that was the impetus for the modern experiment with unpublished opinions is also a crisis of judicial understaffing. There simply are not enough judges to adequately deal with the volume of appeals. In 1990, the Report of the Federal Courts Study Committee to the Judicial Conference of the United States observed that "[f]illing the judiciary's current shortage of judgeships will not solve the current crisis of volume, but not doing so will make it demonstrably worse."²³⁷ Ten years later, Judge Richard Arnold is among a chorus of voices calling for the appointment of additional judges.²³⁸ If the national trend continues toward more

235. This is not to suggest that Judge Arnold is wrong about "access" to the unpublished opinion. Although the unpublished *Christie* case is not available on-line, a simple phone call to the law library for the Eighth Circuit resulted in a free copy of the *Christie* case by facsimile. There is an important difference, however, between prior knowledge of an unpublished case and conducting fresh research for an unpublished case on file with the clerk or library. In other words, if the existence of *Christie* was not already well-known, there is little or no possibility that a private litigant would ever find it. William Reynolds and William Richman suggest that limited publication should be accompanied by a subject matter index of recently decided unpublished opinions. See Reynolds & Richman, *Non-Precedential Precedent*, *supra* note 53, at 1205.

236. See *supra* notes 24-29 and accompanying text.

237. 1990 REPORT OF THE FEDERAL COURTS, *supra* note 36, at 112; see also POSNER, *supra* note 17, at 129 (arguing that not enough judges have been added to the federal court system).

238. *Anastasoff*, 223 F.3d at 904 ("It is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential

litigation and more appeals, maintaining the currently flawed system of limited publication is not going to remedy the situation.

It is especially interesting to note that the only empirical study of limited publication has shown that there is no positive correlation between unpublished opinions and judicial productivity.²³⁹ Presumably, limited publication does save time, as evidenced by the inferior quality of the unpublished opinions. Unfortunately, however, those short-term savings do not result in a net gain that either adequately or fairly chips away at the mountain of opinions that need to be written. Judge Richard Posner has shown that through the system of limited publication, the courts have really attempted to cope with the caseload explosion by reducing the quality of their opinions.²⁴⁰ The most egregious form of this is the judgment order which contains no rationale for a court's decision.

Defenders of limited publication admit that the system is flawed. Robert Martineau has argued, for example, that the problems of limited publication stem from three primary causes: (1) lack of a fail-safe system to ensure that all precedential opinions are published; (2) failure to strictly enforce the no-citation rules; and (3) the prevalence of unpublished opinions in computer databases.²⁴¹

value to every decision The remedy . . . is to create enough judgeships to handle the volume"). President Clinton declared that the failure of the Senate to fill judicial vacancies placed the federal appellate courts in "a state of emergency." See *Clinton Renews Judgeship Battle*, L.A. TIMES, Jan. 4, 2001, at A20; *Enough Already—Keep This Judge*, L.A. TIMES, Jan. 9, 2001, at B8. Within weeks of the *Anastasoff* decision, the case was used to support renewed calls for the appointment of additional judges within New Jersey. See *All Opinions Are Precedential*, N.J. L.J., Sept. 4, 2000, available at LEXIS, News Library, N.J. L.J. File.

239. See Reynolds & Richman, *An Evaluation*, *supra* note 13, at 596-97 (concluding that their study "provide[s] no support for the hypothesis that limited publication enhances productivity").

240. See POSNER, *supra* note 17, at 124.

241. See Martineau, *supra* note 59, at 145; see also Martin, *supra* note 40, at 194-95. Chief Judge Boyce F. Martin, Jr., of the Sixth Circuit, has argued in favor of strict no-citation rules. Martin suggests that the Sixth Circuit rule, which states that unpublished opinions are "disfavored" is unacceptably ambiguous. See Martin, *supra* note 40, at 194. Instead, Martin argues that litigants should be informed that "unpublished opinions have no precedential value and are not even the least bit persuasive." *Id.* at 194-95. Strict limits on the citation of unpublished opinions would "eradicate most of the lingering in-

It is especially difficult to propose a single solution to the problems of limited publication. This is largely because each circuit has experimented with its own rules governing citation. If, however, limited publication is to remain, courts would be wise to put in place safety measures to better ensure that no precedent-setting opinion goes unpublished.²⁴²

Universal publication makes more sense in the digital age than ever before.²⁴³ For example, the Bankruptcy Court for the Northern District of California has placed all of its decisions on-line in a searchable format.²⁴⁴ The no-citation rules which are critical to the effective operation of the limited publication system seem remarkably unfair to litigants, especially when unpublished opinions are, in fact, already widely available through online search services. Consider the analogy between unpublished opinions and children, made by Chief Judge Boyce F. Martin, Jr., of the Sixth Circuit: like children, unpublished opinions are “best seen but not heard.”²⁴⁵ Courts will continue to issue unpublished decisions, Martin wrote, “but we do not want to hear them being cited back to us.”²⁴⁶ The widespread availability of unpublished opinions is frustrating when engaging in legal research. An on-line search may yield a bounty of opinions, including published and unpublished cases alike. The diligent lawyer needs to cite prior cases most on point for the client’s interests. Yet, like forbidden fruit, unpublished opinions will tempt, if not ruin a

equity in the system.” *Id.* at 195. The inequity Martin refers to comes from the unequal access to unpublished opinions. *See id.* Robert Martineau has recommended that the no-citation rule be strictly enforced against the parties and the court itself. *See Martineau, supra* note 59, at 149.

242. Robert Martineau has suggested that preventive internal reviews and corrective actions after a problem occurs should be available in order to ensure that publication guidelines are adhered to. *See Martineau, supra* note 59, at 146.

243. *See, e.g.*, 1990 REPORT OF THE FEDERAL COURTS, *supra* note 36, at 130-31 (stating that although universal publication has problems of its own, “inexpensive database access and computerized search technologies may justify revisiting the issue”).

244. *See J. Wylie Donald & Pamela Keyl, Litigation Practicalities of Unpublished Decisions, Practitioners Should Expect to See Briefs Citing More Unpublished Decisions, and Judges Paying More Attention to Them*, N.J. L.J., Dec. 4, 2000, available at LEXIS, News Library, N.J. L.J. File.

245. Martin, *supra* note 40, at 197.

246. *Id.*

case when cited before the wrong court.

While the potential for judicial abuse of limited publication exists, the more likely problem is the innocent overuse of the system. In most cases, this likely stems from a failure to follow publication guidelines. On a more fundamental level, however, the decision not to publish a particular case flows from an early attempt to predict precedential value. Given the judge's inability to predict that value, the decision not to publish and the subsequent denial of precedential value are thus based on a systematic flaw rooted in the core of limited publication. This begs the question whether publication guidelines could ever be genuinely effective.

VI. CONCLUSION

While the constitutionality of unpublished opinions remains an open question within the Eighth Circuit, it is unlikely that other courts will follow Judge Arnold's reasoning upon an examination of the historical record. Leaving the question open, however, keeps the debate surrounding limited publication alive. Limited publication was initiated as an experiment within the federal courts. The opportunity to collect data from the various circuits, each with its own set of rules, was welcomed information. The time for a careful re-examination has arrived.

*Joshua R. Mandell**

* J.D. candidate, May 2002. This Note is dedicated to the memory of my grandmother Rose, a beautiful woman in every sense of the word. I owe many thanks to Professor Chris May for his valued guidance on this paper and in law school generally. Special thanks to the staff and editors of *Loyola of Los Angeles Law Review* for all their hard work; to Tom Werner, as a friend and for his advice; and to my sisters, Elisa and Eleni, for their support and for always keeping me real. Most of all, I want to thank my parents, Michael and Louise, for their love, support, and guidance in all things.