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TEXT:
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Introduction

In 1964, the Judicial Conference of the United States recommended to the federal courts that "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." n1 These recommendations were made largely to slow the increase in [*1861] the number of reported opinions n2 and to alleviate burgeoning caseloads, which have continued to explode since that time. n3

Since the recommendations were made, every Article III court of appeals has adopted a rule allowing selective publication of opinions and restricting the precedential value of unpublished opinions. n4 To be clear, the designation "unpublished" does not mean that an opinion is secret, nor does it mean that the opinion is available only to the parties to the case. Quite the opposite is true. Unpublished opinions are simply those opinions or orders not published in bound volumes. n5 They are, however, available to any person who pays a fee at the office of the clerk of the courts. n6 Some circuits also make all of their opinions available through their web sites, generally at no cost. n7 Finally, unpublished opinions and orders from all circuits are contained in the online legal databases maintained by Westlaw and LexisNexis. n8 Therefore, describing these widely and publicly available opinions as unpublished can be misleading. The fact remains, however, that even though unpublished [*1862] opinions are available for public consumption, typically they are not given precedential effect as law of the circuit. n9

Until recently, the rules allowing selective publication and limiting citation of unpublished opinions largely have gone unchallenged, except for occasional articles by practitioners (and some judges) lamenting their inability to cite unpublished opinions. n10 However, a decision from the U.S. Court of Appeals for the Eighth Circuit, rendered in August 2000, dramatically changed the focus of the discussion on this topic. *Anastasoff v. United States* n11 challenged the longstanding assumption that noncitation regimes [*1863] are constitutional. The *Anastasoff* court held that the Eighth Circuit noncitation rule, n12 which generally prevented the court from citing to its own unpublished cases, was an unconstitutional extension of the power granted to the judiciary in Article III. n13 The court reasoned that the binding power of precedent is derived from the nature of the Article III judicial power itself and, therefore, a circuit rule preventing citation to a prior opinion unconstitutionally abandoned important limits on judicial power. n14 Additionally, the *Anastasoff* court reasoned that such a rule violated the principle of the separation of powers because it allowed the court to act as a legislature, reversing its prior (unpublished) decisions without providing any justification for the change and without relying on the en banc process. n15

The circumstances of the *Anastasoff* case presented an unusual scenario - one that placed the judges of the Eighth Circuit panel in the same position that many practitioners recently have found themselves in. n16 When hearing the *Anastasoff* appeal, the judges were presented with a prior unpublished case from their circuit that was directly on point, *Christie v. United States*, n17 and they felt bound to use it as authority. n18 The problem was that under the Eighth Circuit's own rules, the case had no precedential value. Eighth Circuit Rule 28A(i) states:

> Unpublished opinions are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well n19

> Rule 28A(i) rendered Christie valueless as precedent because that decision was unpublished; however, the Anastasoff court still applied the holding in Christie to the case before it. In the process, the court held that Rule 28A(i) was unconstitutional. n20 The court reasoned that the rule, "insofar as it [*1864] would allow us to avoid the precedential effect of our prior decisions, purports to expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional." n21 As a result of the invalidation, Christie became binding precedent which the court then applied in Anastasoff.

In the wake of *Anastasoff*, the debate over the precedential value of unpublished opinions continues to gain momentum. The questions at the core of the debate are: (1) does the U.S. Constitution require that decisions have precedential value?; (2) are there persuasive policy reasons why decisions should have precedential value?; and conversely, (3) are there persuasive policy reasons why unpublished decisions should not have precedential value? n22 Each of these questions is considered below.

This Comment argues that it is not good judicial policy to develop "an underground body of law good for one place and time only." n23 Rather, it would be better to require official publication (with full precedential effect), of all judicial decisions, while using summary dispositions to ease the burden on the judiciary. The resulting system would acknowledge and accommodate the strains facing the judiciary, but would also ensure the judiciary's stability, accountability, and transparency by maintaining a system of justice that binds itself.

Part I of this Comment analyzes the constitutionality of selective publication and noncitation rules. Part II evaluates the policy arguments regarding limiting the precedential value of unpublished opinions and concludes that prudential concerns favor universal publication and unrestricted citation of judicial opinions. Part III proposes a regime requiring official publication of all judicial decisions, thus giving all decisions precedential effect. Under this regime, published precedential summary dispositions should replace nonprecedential unpublished opinions. This part includes recommendations for determining whether a full written opinion, rather than a summary disposition, may be appropriate. The regime proposed here is appropriate whether precedent is a constitutional requirement or a prudential matter.

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I. The Constitutional Quagmire: Does the Constitution Require that Decisions Have Precedential Effect?

A. Making a Constitutional Case for Precedent: *Anastasoff v. United States*

The Eighth Circuit's decision in *Anastasoff v. United States* stemmed from a claim for an unpaid tax refund. Plaintiff Faye Anastasoff overpaid her taxes on April 15, 1993, but did not mail her claim for a refund until April 13, 1996. n24 The Internal Revenue Service (IRS) received her claim three days later but denied it, citing *26 U.S.C. 6511*(b), which disallows any claim not filed within three years of filing the return. n25 In her lawsuit, Anastasoff claimed that *26 U.S.C. 7502*, n26 the "Mailbox Rule," should be read broadly to fulfill its remedial purposes and to protect taxpayers against delays by the postal service. n27 Thus, the Mailbox Rule would operate without regard to the timeliness of the claim's filing and it would save Anastasoff's claim for a refund, which was timely mailed but received and filed by the IRS one day after the three-year time limitation. n28 The District Court for the Eastern District of Missouri, in a brief unpublished order, dismissed Anastasoff's complaint. n29

Anastasoff appealed the district court's decision. The government argued that the appeal was controlled by the Eighth Circuit's unpublished opinion in *Christie v. United States*, n30 which had rejected the broad reading of the Mailbox Rule proposed by Anastasoff in her case. n31 *Christie* held that the Mailbox Rule applied only to untimely claims, and thus could not save a claim that was mailed on time but was received and filed after the deadline. n32 Though this reasoning seemed to speak directly to the viability of Anastasoff's claim, Anastasoff did not try to distinguish *Christie*; she merely argued that the court of appeals was not bound by the decision under Circuit Rule 28A(i) because Christie was an unpublished decision. n33

The Eighth Circuit panel that heard Anastasoff's appeal unanimously affirmed the dismissal of Anastasoff's complaint. n34 Judge Richard Arnold, [*1866] writing for the panel, held that Christie was squarely on point and that its reasoning directly conflicted with Anastasoff's interpretation of the Mailbox Rule. n35 However, Judge Arnold's opinion was not simply an ordinary decision applying a prior circuit case to one with similar facts. Rather, according to Rule 28A(i), Christie was not binding on the court and generally should not be cited by the parties because it was unpublished. Indeed, the government was only able to cite the case because of an exception in Rule 28A(i) that allows parties to cite an unpublished case if it has '"persuasive value on a material issue and no published opinion of this or another court would serve as well.'" n36 However, despite Rule 28A(i)'s declaration that unpublished opinions are not precedent, the *Anastasoff* court felt compelled to follow Christie because it directly answered the question before the *Anastasoff* court and was the only prior circuit case to do so. n37 In order to follow *Christie*, the court held Rule 28A(i) to be unconstitutional. n38

The *Anastasoff* court argued that, for the Framers of the Constitution, the authority of precedent derived not simply from equitable or prudential considerations, but rather "from the nature of the judicial power itself." n39 Citing Blackstone's Commentaries, Judge Arnold asserted that exercising Article III "judicial power" meant expounding and interpreting law upon the facts of certain cases, so that "the law in that case, being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule." n40 It follows that once law becomes "certain" through judicial interpretation, the nature of the Article III judicial power requires that such law be binding.

The Framers (and Blackstone) also saw the doctrine of precedent as an important safeguard against one of their greatest fears, the concentration of power in a single branch of government. n41 By requiring judges to observe previously established law, the doctrine of precedent keeps judges in their proper roles and separates judicial power from legislative power. n42 Allowing [*1867] judges to depart from established legal principles would permit them to wield both judicial and legislative power, precisely the result that the separation of powers principle sought to avoid. The judicial power was meant to be exercised in a self-binding system that would prevent arbitrary decisionmaking by judges.

The *Anastasoff* court concluded that the doctrine of precedent was rooted in the Constitution and therefore held that Rule 28A(i), which allowed an Article III court to ignore the constitutional command of observing precedent, was unconstitutional. n43 As a result, the court was obligated to apply its prior decision in *Christie* to *Anastasoff*, and to reject the plaintiff's argument to ignore Christie simply because it was unpublished. Accordingly, Christie's interpretation of the Mailbox Rule barred Anastasoff's claim against the IRS.

Just prior to the decision in *Anastasoff*, the U.S. Court of Appeals for the Second Circuit decided a case that directly conflicted with Christie. n44 The concurrence in *Anastasoff*, written by Judge Healey, suggested that the Eighth Circuit reconsider the merits of Christie and its interpretation of the Mailbox Rule. n45 Nonetheless, the Eighth Circuit panel felt obligated to apply Christie because it now was binding Eighth Circuit precedent. However, the court did grant Anastasoff's application for en banc review in light of the decision of the Second Circuit. n46

Before the Eighth Circuit could complete its en banc hearing on the matter, the IRS changed its position regarding the Mailbox Rule, and granted Anastasoff's request for a refund. n47 Therefore, hearing the case en banc, the Eighth Circuit, Judge Arnold writing again, held that the issues raised by the plaintiff were moot, and "the case having become moot, the appropriate and customary treatment is to vacate our previous opinion and judgement ... as moot... . [As a result,] the

constitutionality of that [*1868] portion of Rule 28A(i) which says that unpublished opinions have no precedential effect remains an open question in this Circuit." n48

Although the original panel decision in Anastasoff was vacated as moot, the arguments Judge Arnold raised regarding the nature of the judicial power and the constitutional force of precedent n49 remain ripe for consideration by the Eighth Circuit, other courts of appeals, and scholars alike.

1. Article III Requires Adherence to Prior Decisions

Article III's grant of "judicial power" to the federal courts implicitly incorporated the idea of precedent, thus requiring federal courts to follow their prior decisions. Judge Arnold asserted that at the time the Framers met in Philadelphia, the doctrine of precedent was well-established in legal practice. n50 He cited other influential legal commentators of the period who expounded the so-called "declaratory theory of adjudication." n51These commentators, including Sir Edward Coke and Sir Matthew Hale, viewed the judicial system as one in which "precedential authority [derived] from the law-declaring nature of the judicial power." n52 Because these commentators so heavily influenced the beliefs of the Framers, the argument follows that the Framers subscribed to this declaratory theory of adjudication and its implicit doctrine of precedent. n53 Further, referencing Blackstone's Commentaries, Judge Arnold argued that even though there was no established reporting system at that time, obedience to precedent was "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 ... ." n54 Thus, fidelity to the Constitution requires that courts not depart from precedent "without very good reasons publicly acknowledged." n55

However, a system that allows selective publication of opinions allows courts to depart from prior decisions for no reason whatsoever. Because the court decides which opinions to publish in the first instance, it is free to decide that it will not be bound by a particular decision in the future by rendering that decision as an unpublished opinion. Particularly striking is the notion that because of the prohibition on the general citation of unpublished opinions, "if [the court] decided a case directly on point yesterday, [*1869] lawyers may not even remind us of that fact. The bar is gagged." n56 This means that a court can freely depart from its past unpublished opinions. n57 In this way, a system that allows for selective publication of opinions circumvents the limits imposed by the doctrine of precedent.

2. Separation of Powers Requires Adherence to Precedent

Allowing judges to ignore or reverse prior decisions without offering any public justification is contrary to the judicial function, because the proper role of judges in a system based on the separation of powers is to observe previous interpretations of the law. n58 Judge Arnold argued that the beliefs reflected in Blackstone's Commentaries were also held by the Framers: "If judges had the legislative power to 'depart from' established legal principles, 'the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions ... .'" n59 The constitutional requirement of separation of powers serves to "separate [the judicial branch] from a dangerous union with the legislative power." n60

One obvious criticism of a system requiring strict adherence to precedent is that courts will never be able to reinterpret the law in light of evolving social mores or when legal rules prove unworkable. However, Judge Arnold did not propose "some rigid doctrine of eternal adherence to precedents." n61 Rather, he conceded that cases can be and sometimes should be overruled. n62 However, within federal courts of appeals, that function is performed not by a single panel but by the court sitting en banc:

> If the reasoning in a case is exposed as faulty, if other exigent circumstances justify it, precedents can be changed. When this occurs, however, there is a burden of justification... . In this way, the law grows and changes, but it does so incrementally, in response to the dictates of reason, not because judges have simply changed their minds. n63

Thus, in Judge Arnold's view, the grant of judicial power in Article III established a reasoned system of rendering judgments, one that allows for flexibility but not arbitrary reversal of prior interpretations of the law. Moreover, the separation of powers requires that courts not function as legislatures that can freely reverse themselves or announce new policies. Accordingly, [*1870] a circuit rule such as 28A(i), which allows courts to ignore what was decided before, violates the separation of powers and extends a court's power beyond that granted by Article III.

B. Mounting a Constitutional Offensive Against Anastasoff: Hart v. Massanari n64

The U.S. Court of Appeals for the Ninth Circuit was the next court of appeals to address the constitutionality of noncitation rules. In Hart v. Massanari, counsel to one of the parties violated Ninth Circuit Rule 36-3, n65 the circuit's noncitation rule, but argued that he should not be sanctioned because Rule 36-3 was unconstitutional. Therefore, the court had to decide the constitutional status of the rule as a threshold matter. n66

Rule 36-3 commands: "Unpublished dispositions and orders of this Court are not binding precedent ... [and generally] may not be cited to or by the courts of this circuit ... ." n67 The rule allows the court to impose sanctions on a party who violates the prohibition on citation. In spite of Rule 36-3, appellant's counsel in Hart cited an unpublished opinion in his opening brief. n68

The panel ordered the attorney to show cause why he should not be sanctioned for violating Rule 36-3. n69 The attorney responded that the rule's constitutionality had been called into question by the recently decided Anastasoff case. n70 The Ninth Circuit recognized that the Anastasoff decision retained persuasive force n71 even though it had been vacated and that the decision "may seduce members of our bar into violating our Rule 36-3" under the notion that noncitation rules violate Article III. n72

Ultimately, however, the Ninth Circuit panel in Hart concluded that Rule 36-3 does not cause courts to overstep their Article III "judicial power." The court, Judge Alex Kozinski writing, argued that Anastasoff was based on an erroneous view of how precedent was treated in English common law or in the American judicial system when the Constitution was adopted. n73 The Hart court concluded that Article III does not require courts to render precedential [*1871] opinions. n74 The court reasoned that because of the strong force of binding precedent, n75 Article III courts have the power to decide which of their cases will have forward-looking precedential effect as a matter of judicial administration. n76 Additionally, the court recited examples of modern rules relating to precedent that do not reflect English common law tradition, further indicating that these modern rules are based on prudential, not constitutional, concerns. n77

After holding that Rule 36-3 was constitutionally sound, the court addressed whether to discipline the attorney in Hart for violating the rule. The court concluded that counsel's violation of Rule 36-3 was not willful, and that sanctions could chill the actions of attorneys seeking to challenge the constitutionality of a particular rule. Accordingly, the court chose not to impose sanctions. n78

1. Article III Does Not Require Courts to Render Binding Precedential Opinions

Neither the traditions of English common law, nor those of the American legal system at the time the Constitution was adopted, required that all judicial decisions have binding precedential effect. The Hart court warned that even accepting the premise in Anastasoff that "judicial power" is limited by concepts not expressly stated in the Constitution, courts should be cautious before recognizing such limitations. n79 The Hart court concluded that because not all case law served as binding precedent at common law, Anastasoff's stringent concept of binding precedent was not part of the judicial power under Article III.

In discussing the historical development of the doctrine of precedent, the Hart court explained that English common law treated judges as exposing natural principles of law, rather than making law, and thus "opinions were merely judges' efforts to ascertain the law." n80 The Hart court noted that often decisions either were not published or the exact language of such decisions was not recorded; instead, the results were summarized in treatises [*1872] or commentaries. n81 Because decisions sometimes were not recorded, and also because judges simply might ignore a decision they believed incorrectly discerned the law, n82 the Hart court concluded that judges and lawyers of the time did not understand precedent to be binding in the strict sense advocated by Anastasoff. n83 The court concluded: "Case precedent at common law ... resembled much more what we call persuasive authority than the binding authority which is the backbone of much of the federal judicial system today." n84

Moreover, the court explained that American tradition did not incorporate organized publication of opinions until the late eighteenth-century, after adoption of the Constitution. n85 As such, "[a] survey of the general landscape as it might have been viewed by the generation of the Framers casts serious doubt on the proposition - so readily accepted by Anastasoff - that the Framers viewed precedent in the rigid form that we view it today." n86 Therefore, because the traditions of English common law and of the American judicial system at the time of the Constitution's adoption did not consider all case law binding precedent, Article III "judicial power" is not limited to rendering only precedential opinions. Following

this view of precedent, the Hart court upheld Ninth Circuit Rule 36-3 and the use of unpublished, nonprecedential opinions. n87

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2. The Force of Precedent and the Rules as to How Precedent Is Applied Counsel that Precedent is a Matter of Policy and Not a Constitutional Requirement

a. The Force of Binding Precedent Counsels that It Is a Matter of Judicial Policy

The federal court system was meant to embody the flexibility of the English common law system, and therefore did not require, or desire, that customs always be ossified into binding legal rules. n88 According to the court in Hart, the system of common law, while recognizing the idea of precedent, also understood the dangers associated with binding precedential rules that prevented customs from changing in response to changed circumstances. n89

That concept of precedent based on the flexibility of custom, the Hart court asserted, is different from the rigid concept of precedent applied today. The modern theory of precedent, which gradually developed over the nineteenth and early twentieth centuries, was defined by the court as "a single opinion [that] sets the course on a particular point of law and must be followed by courts at the same level and lower within a pyramidal judicial hierarchy." n90 Several systemic changes aided the move toward a stricter regime of precedent: the establishment of a strict hierarchy of appellate courts, improvements in the means of collecting and reporting cases, n91 and the move away from notions of natural law, such that "lawyers began to believe that judges made, not found, the law." n92 These changes all made it possible for decisions rendered by judges "making law" to serve as binding authority.

Given the force that precedent has under the modern conception, it should be a matter of judicial policy to choose which decisions are binding and which are not. As Judge Kozinski has written about the status of precedent today, "binding authority within this regime cannot be considered as cast aside; it is not merely evidence of what the law is. Rather, case law on point is the law." n93 Moreover, under notions of vertical and horizontal precedent, "the first panel to consider an issue sets the law not only for all the inferior courts in the circuit, but also future panels of the court of appeals." n94 [*1874] Designating a decision as binding precedent is a "weighty decision" because such decisions may only be overturned by the circuit court sitting en banc or by the U.S. Supreme Court - neither of which is easily accomplished. n95 Therefore, because notions of precedent are much stricter now than they were two centuries ago, the decision about which cases serve as binding precedent should be left to the courts.

b. Modern Rules as to the Development of Binding Precedent Indicate that It Is a Matter of Judicial Administration

Rules that have developed regarding how binding precedent is made and applied do not reflect the traditions of English common law, but instead reflect the structure of the federal courts and policy decisions about how to administer them effectively. n96 These rules could have developed in a number of different ways, and sometimes the treatment of precedent differs by circuit or as between federal and state courts. This fact indicates that the concept of binding precedent is not a constitutional imperative, but is itself a '"principle of policy."' n97

Circuits have taken different routes here. n98 For example, newly created circuits n99 are allowed to choose whether to adopt the law of another circuit as its own, or to create its own body of circuit law. n100 Next, the decisions of appellate panels constitute horizontal precedent for all panels in that circuit, but decisions of trial courts are not likewise binding on other trial courts within the circuit. n101 This is not the only way of administering precedent. In California state courts, for example, courts of appeal decisions are not binding on other courts of appeal though their decisions are binding on all lower courts within California, regardless of district. n102 The fact that the [*1875] judicial system allows this kind of flexibility and diversity in the administration of precedent shows that the rules regarding precedent derive from policy decisions, not constitutional requirements.

The rules regarding the overruling of precedent are another example of judicially created rules adopted to ease the administration of the federal courts. The en banc method of rehearing panel decisions did not develop until the early twentieth century when the courts of appeals increased in size. n103 The Supreme Court confirmed the authority of appellate courts to sit en banc in Textile Mills Securities Corp. v. Commissioner, n104 and Congress subsequently codified the procedure, giving the courts of appeals the freedom to develop their own procedures for allowing a majority of the

judges in a given circuit to order a rehearing in a particular case. n105 The Hart court noted that the en banc procedures of the various circuits have developed as a matter of trial and error, further demonstrating that the rules governing the administration of precedent are a matter of judicial policy, not a constitutional requirement.

Finally, the Hart court challenged the very notion that the term "judicial power" in Article III incorporated then-existing common law practices and gave them constitutional status. Judge Kozinski wrote:

> One danger of giving constitutional status to practices that existed at common law, but have changed over time, is that it tends to freeze certain aspects of the law into place, even as other aspects change significantly. This is a particularly dangerous practice when the constitutional rule in question is not explicitly written into the Constitution, but rather is discovered for the first time in a vague, two-centuries-old provision. The risk that this will allow judges to pick and choose those ancient practices they find salutary as a matter of policy, and give them constitutional status, is manifest. n106

Kozinski implied that Judge Arnold had made precisely this mistake. He pointed out that Arnold himself had written an article expressing his personal policy preferences and foreshadowing the legal position that Arnold later adopted as a matter of law in Anastasoff. n107

[*1876] Kozinski also argued that the same "manifest" risk obtains where judges can "pick and choose [among] ancient practices" and thus choose not to "give them constitutional status." n108 Interestingly, Kozinski himself may be guilty of this error. n109

C. Irresolution of the Constitutional Issue Demonstrates the Importance of Prudential Concerns

As to whether precedent is a constitutional requirement, it remains to be seen which of the arguments will prevail. The debate over precedent is not a new one, though it has been given new form - the debate over the precedential value of unpublished opinions. The Eighth Circuit has outlined one legal position, and the Ninth Circuit has outlined the opposing view. However, because the Eighth Circuit's decision was vacated, there is not yet a true intercircuit conflict. If and when such a conflict arises, the Supreme Court likely will address the question. Until then, it is important to continue discussing the policy justifications for selective publication and noncitation rules.

The policy recommendations made by the Hart court were not required by the court's constitutional analysis. Though the court declared the principle of precedent not to provide a limitation on federal courts under the "judicial power" delegated in Article III, the court could have recommended to the committee that adopts its circuit rules that Rule 36-3 be modified to allow citation of unpublished opinions, or to publish all opinions of the Ninth Circuit. Rather than doing that, however, the court set forth in dicta its policy arguments as to why noncitation rules are a good idea.

Judge Kozinski wrote that there are certain practices in the federal courts "that are so much a part of the way we do business that few would think to question them." n110 Until Anastasoff, the use of unpublished, nonprecedential opinions seemed to have become just such a practice. But Judge Arnold opened the door to a constitutional challenge of this practice. n111 While Judge Kozinski thoroughly exposes the dangers of a system of binding precedent, I remain unpersuaded that a system of selective publication is preferable. How does a system of underground law answer his concerns? This Comment argues that, regardless of which constitutional [*1877] argument ultimately prevails, prudential considerations counsel for uniform circuit rules calling for universal publication and citation.

II. To Bind or Not to Bind?: Prudential Arguments over Precedential Value

A. Why Universal Publication Is Good Policy

That judges render binding precedential decisions is the basic precept of our common-law judicial system. Since its inception, the American legal system has been modeled after the English common-law judicial system. n112 The common-law tradition is characterized by a lack of codification of law, and instead is a system in which judges expound and interpret the law based on precedent and custom. However, the civil-code tradition, having its origins in Roman law, is characterized by codification of large portions of private law n113 and is one in which judges typically decide each issue on an interpretation of the code as a matter of first impression. In choosing a common-law system over that of a civil-code

system, the Founders expressed their preference for giving judges the power to make decisions that were prospectively binding. The Framers of the Constitution shared this high regard for the rule of law and the role of judges in interpreting and administering the law and making decisions binding on later courts and on the coordinate branches of government. The Framers consciously continued the common-law judicial system, placing their faith in the rule of law and in judges to follow their interpretations of the law in later cases. The choice of the common-law system reflects the notion of respect for judgments, affording to the judiciary the power to render binding precedential decisions as a proper exercise of its judicial power.

2. Publication Ensures that Cases Deciding Issues of First Impression Are Given Precedential Value

Courts sometimes decide issues of first impression without rendering them as published decisions with precedential value. A prime example is the Eighth Circuit's decision in Christie. n114 Christie was the only circuit-level [*1878] case to address the application of the Mailbox Rule to a claim for a tax refund that was mailed on time, but received after the deadline. Yet, the decision was unpublished, and generally not citable under Eighth Circuit Rule 28A(i). n115 It is unhelpful, and even potentially detrimental, for courts of appeals to determine new principles of law without making them binding on any lower courts. By deciding the issue in Christie in an unpublished opinion, the Eighth Circuit effectively sent out the message that, although the case addressed an issue of first impression, the result was not really important enough to require anyone else to follow it. Why expound a first impression principle at all, if it is not worth having as a principle?

Moreover, deciding issues of first impression in unpublished opinions is especially problematic because the federal courts of appeals often are the final appellate voice to speak on an issue. Because review by the circuit courts is mandatory, but Supreme Court review of most matters is only discretionary, most cases will terminate with the circuit court's disposition of the matter. n116 Thus, because most final appellate review happens in the courts of appeals, those courts are primarily responsible for the development of the law within the federal judiciary. n117 When so many cases are decided by unpublished opinion, and these cases include the disposition of issues of first impression, development of the law is artificially stunted by selective publication and limited citation rules. A system of universal publication and citation would afford the opportunity for the law to develop and reflect the resolution of novel issues decided by the courts of appeals.

One response to this position is that circuits could adopt rules that require publication of opinions deciding issues of first impression rather than requiring publication of all of their opinions. However, most circuits already have such rules in some form. n118 At worst, these rules are simply ignored; at [*1879] best, "compliance ... is at times not complete nor immediate." n119 Courts in many circuits continue to decide issues of first impression in unpublished opinions. n120 Sometimes courts resolve the case at hand without answering the novel substantive issue, and sometimes they answer it but do not publish the decision. n121 A uniform rule requiring publication of all opinions will resolve this problem and will ensure that issues of first impression are rendered as published precedent that will bind future courts facing the same issue.

2. Publication Ensures Proper Allocation of Power Among the Branches of Government

As courts increasingly choose not to publish their opinions, they diminish their power in relation to Congress and the Executive. Since Marbury v. Madison, n122 we have understood that "it is emphatically the province and [*1880] duty of the judicial department to say what the law is." n123 In describing the decision to allocate power among three branches of government, Professor Laurence Tribe has said: "The concerns that inspired the system's design were human; the design itself, mechanical. Structure would thus serve substance, in a framework ultimately supervised by a disinterested judiciary." n124 Thus, to maintain the structural balance of power, is it essential that courts exercise their power to interpret and expound the law, thereby "supervising" the other branches of government. But, as courts decline to publish their decisions, they cede this supervisory power. Unavoidably the balance of power shifts toward interpretations of the law posited by the two coordinate branches. Anastasoff illustrates this shift. The challenged interpretation of the Mailbox Rule was issued by the IRS, an executive agency. When the Christie court first addressed the issue, the court left in place the IRS's narrow interpretation of the Mailbox Rule. However, by rendering its decision in an unpublished opinion, the Christie court actually left the issue open as a legal matter. The IRS was free to change its application of the rule, even without changing the current form of the rule. Essentially, the Christie court did not exercise its power to issue a binding interpretation of the rule; rather, the court's unpublished decision affected only the parties to the Christie case and left subsequent parties uninformed as to how to properly apply the Mailbox Rule to a tax refund claim timely filed but untimely received. This

indecision resulted in the challenge in Anastasoff coming to light, where the government argued that Christie controlled, and the plaintiff argued that the issue was left open for the Eighth Circuit court to (re)decide. Thus, even though the Christie court heard the case as a matter of first impression and had the opportunity to render a binding decision, the court chose not to exercise that power, necessitating a decision on the very same legal issue by the another Eight Circuit panel, and in the interim, deferring to the IRS's interpretation of its rule.

By issuing published, binding decisions, the judicial branch properly exercises its power to interpret the law and to constrain the power of Congress and the Executive. This is especially the province of the courts in interpreting constitutional matters, to ensure constitutional compliance by the lower courts and the coordinate branches. n125 Conversely, when courts decline to render most of their decisions in published opinions, even though the law is [*1881] being interpreted it does not bind future parties and thus affords the coordinate branches the opportunity to exercise their power in contradiction to interpretations of the law formulated in unpublished judicial decisions. By ensuring that courts exercise the power vested in them to render binding interpretations of the law, a system of universal publication and citation will preserve the proper balance of power among the branches of government. n126

3. Publication Promotes Stability

Giving decisions precedential value provides stability in a system of judge-made law. n127 The stability derives from the binding nature of decisions that have come before; judges are not free simply to depart from previous decisions.

In determining the law in one case, judges bind those in subsequent cases because, although the judicial power requires judges "to determine law" in each case, a judge is "sworn to determine, not according to his own judgements, but according to the known laws. [Judges are] not delegated to pronounce a new law, but to maintain and expound the old." n128

When judges are bound by prior decisions and their role is to "expound the old," n129 legal principles are maintained and become stabilized, even as courts confront new issues and announce new legal principles.

In contrast, when decisions are not given precedential value, such as most unpublished opinions, courts are free to ignore or reverse the principles previously adopted in those opinions. n130 Such reversal without compelling reasons or without using proper en banc review procedures has a deleterious effect on the stability of the judicial process because litigants "have no assurance that a declared rule will be followed." n131 Thus, more than half a century [*1882] ago, Justice Owen Roberts cautioned: "Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy." n132 To avoid such damaging effects and to restore stability to a judicial system that has increasingly afforded itself the power to reverse itself on a whim, a system of universal publication and citation should be adopted.

4. Publication Ensures Accountability

Requiring judges to provide principled reasons for their decisions separates the judicial function from the legislative. The fact that opinions are available for scrutiny by the public and by other members of the bar and the judiciary increases the accountability of the judges on a decisionmaking panel. Additionally, by articulating their reasoning, judges inform the parties of the reasons for the result in the case. This practice increases the legitimacy of the entire judicial system in the eyes not only of the litigants, but also of the general public. In contrast, when cases are decided without oral argument or a published opinion (or without either, which commonly occurs) the "parties have little assurance that the judges have paid attention to their case." n133 A system of universal publication and citation would ensure that judges provide reasons for their decisions and thus reassure litigants that their cases are adequately adjudicated.

Even in a summary disposition, which likely will contain only a brief discussion of the law, the court must cite to cases that control the outcome. n134 [*1883] Thus, the court is still bound to provide reasons, in the form of citations to precedent, for the result it has reached in the case before it. n135 Therefore, even the herein proposed system using summary dispositions will ensure more judicial accountability than current selective publication and limited citation regimes.

Additionally, disposal of appeals through decisions written by staff attorneys undermines judicial accountability because these opinions are not written by Article III judges. n136 Reliance on staff attorneys has become an integral

mechanism for dealing with the caseload in the U.S. Courts of Appeals. In the Ninth Circuit, at least 40 percent of the decisions rendered as unpublished opinions were actually prepared and written by staff attorneys and merely submitted to a three-judge panel for approval. n137 In general, if the panel, after being presented with the briefs, records, and proposed unpublished opinion, unanimously agrees that the case is fit for decision without oral argument and that the staff attorneys reached the correct result, then the unpublished opinion usually is accepted without much (if any) editing by the judges. n138

Some judges argue that there is no need to tinker with the language in these opinions because the decision reaches the correct result and does not have prospective precedential effect; thus, any editing would consume valuable judicial time without affecting the outcome in the case or in future [*1884] cases. n139 However, even if it would drain judicial resources to review these opinions, the work of such non-Article III employees - though competent - should be carefully scrutinized by Article III judges. Staff attorneys are not insulated from the pressures of politics, as are Article III judges. Additionally, there is an inherent conflict of interest when a governmentally employed staff attorney decides cases in which the government is a party. So, even though the judges review all decisions rendered by staff attorneys, it detracts from the legitimacy of the entire system to leave language drafted by staff attorneys virtually untouched by Article III judges simply because those judges know the decision will not be published or precedential. n140

5. Publication Increases Transparency

Requiring publication of all opinions ensures that dissenting and concurring views from panel decisions will be exposed, because judges who do not agree with the reasoning of a particular case will feel a need to state their disagreement. n141 Some have argued that judicial resources will be wasted if judges feel obligated to write dissents and concurrences from decisions that would otherwise not have required them due to their unpublished, nonprecedential status. n142 However, forcing judges to express their disagreements is precisely the benefit of requiring publication of all opinions because it enables the other circuit judges to determine when to grant en banc review. En banc review is especially important in cases in which the panel judges do not agree on the reasons for deciding an issue of great importance or in which the panel's view differs from the views of the other judges in the circuit. n143 But a circuit cannot make informed decisions about which cases [*1885] to hear en banc if judges not participating in the panel decision are never made aware of disagreements over the reasoning of particular cases, because they are buried in unpublished opinions. Decisions should be published so that judges who disagree strongly enough with the reasoning or result will express that disagreement. Moreover, it will be difficult for circuits to discover that a case is decided contrary to circuit law, when the case is unpublished and parties are not allowed to cite to it. Therefore, publication will improve the ability of circuits to perform their en banc review function.

Publication of opinions also ensures that difficult decisions are not buried in unpublished opinions. The adage students hear in law school - "hard cases make bad law" - also rings true for federal judges. For example, a study of the Third Circuit's use of the "disposition without comment" procedure to decide some of the circuit's most complex cases led the authors to posit that, despite circuit rules and norms governing the publication of opinions, judges might be engaging in illegitimate behavior ("perhaps subconsciously and without explicit articulation") by not deciding the substantive issue because it would take too much time and effort, or involve too great a risk of reaching an incorrect result. n144 The study's authors concluded that "the nature of incentives and constraints operating on appellate judges" made it at least possible that "even among rational justice-seeking judges, a norm could develop in which some fraction of the circuit's hardest cases are systematically disposed of without comment." n145 Requiring publication of all decisions will help avoid this possibility and encourage judges to dispose of cases on the merits whenever the matter deserves such disposition.

B. Answering the Arguments Against Universal Publication and Unrestricted Citation of Opinions

1. Publishing All Opinions and Treating Them as Binding Precedent Will Not Unduly Burden Judicial Resources

a. The Concerns Expressed by Judges

Judges, naturally, are quite concerned about the effects that a system of universal publication and unrestricted citation might have on their already overwhelming caseloads. n146 Additionally, judges worry that publishing more [*1886] cases will result in a lower quality of work because they lack the resources to handle the increased workload. n147

The concerns are illustrated by the reaction of the Ninth Circuit judges who attended a conference meeting in August 2000, just days after the Eighth Circuit rendered its original panel opinion in Anastasoff; the hot topic of discussion was, of course, memorandum dispositions. n148 The Ninth Circuit is by far the largest federal circuit with twenty-six active

judges. n149 Some of the Ninth Circuit judges feel strongly that the use of unpublished memorandum dispositions is essential to be able to perform the functions of the court. n150 The judges discussed the practical realities of allowing citation to unpublished opinions and the potential effects on their caseloads. n151 Some judges suggested that if they were required to publish all opinions, they might be able to skirt the requirement "by deliberately making unpublished opinions so short that lawyers can't cite them." n152

Two Ninth Circuit judges in particular oppose forcing judges to render short but published precedential decisions in all cases. In their article defending the use of unpublished opinions, Judges Alex Kozinski and Stephen Reinhardt argue that the ability to issue unpublished and nonprecedential opinions is a practical necessity for the circuit courts to be able to properly perform their two functions: 1) to correct errors, ensuring that lower courts correctly apply the law, and 2) to develop the law of the circuit, writing opinions that "announce new rules of law or extensions of existing rules." n153 Without the ability to dispose of certain cases by memorandum disposition, the courts simply will not have time to accomplish both of these functions.

Kozinski and Reinhardt claim that writing an unpublished opinion is much less time-consuming than writing a published one. Because no new rule of law is being announced, such an opinion need only contain a minimal recitation of the facts (because the parties are already aware of them) [*1887] and citations to a few key cases. n154 This can often be completed in a matter of hours, as opposed to the days, weeks, or months that may be involved in writing a full opinion. n155

In contrast, when writing a full, published, precedential opinion, the facts must be crafted so as to include what is relevant and to omit what is irrelevant and might later spawn disingenuous arguments for distinguishing the case. n156 The discussion of legal principles must be specific enough to clarify the uncertain areas of law arising in the case, but be broad enough to apply prospectively. n157 The rule must not conflict with precedent or address questions beyond the scope of the issues raised. n158 The task of writing opinions, concurrences, or dissents, the judges argue, "is a tough, delicate, exacting, time-consuming process" occupying more than half of the judges' and their law clerks' time. n159 Moreover, additional time is spent scrutinizing the opinions circulated by other judges and attempting to work out differences of opinion because all three judges on the panel must agree on the language of the opinion, not simply the result, before the opinions can be published as precedent. n160 Agreement is not required, however, before issuing an unpublished disposition, "because the result is what matters in those cases, not the precise wording of the dispositions. Any refinements in the language would cost valuable time yet make little difference to the parties." n161 Thus, the process of producing published precedential opinions consumes far more time than issuing unpublished dispositions.

Beyond the time spent issuing opinions, Judges Kozinski and Reinhardt emphasize the immense amount of time spent reviewing slip opinions, to ensure that the law of the circuit remains consistent. n162 When inconsistencies arise and en banc proceedings are required to resolve them, issuing these decisions can consume even more time because the views of eleven judges must be accommodated, not just those of a three-judge panel. n163 Keeping the circuit law harmonious and consistent is quite a time-consuming endeavor.

Due to the task facing the federal courts of appeals, Judges Kozinski and Reinhardt oppose allowing citation to unpublished opinions; nor do they want previously unpublished opinions suddenly to be declared binding precedent. n164 [*1888] Accordingly, the judges ultimately conclude that the use of unpublished dispositions is necessary if they are to continue to issue carefully reasoned published opinions and keep the circuit law consistent through the en banc process. n165

b. Responding to Caseload Concerns

The question remains, however, whether these reasons justify maintaining a two-tier system of justice. Judge Arnold warns that if the judiciary does not have enough time to treat every opinion as precedent, then "the judicial system is indeed in serious trouble." n166 He proposes, however, that the solution is "not to create an underground body of law" but rather to create more judgeships to handle the work load, or to allow back logs to grow if that is the only way for the current number of judges to handle each case competently. n167

[*1889] Publishing every opinion need not increase the demands on judges because the unpublished opinions could simply be published in their current form. If it is true that the cases decided by unpublished opinion really are the straightforward cases that do not affect persons aside from the parties, n168 then published decisions in such cases need not be any longer or more developed than the current unpublished decisions in those cases. Moreover, if required to publish all opinions, judges themselves will likely shorten those decisions that courts are accustomed to rendering as unpublished memorandum dispositions. n169 Therefore, preparing such opinions for publication will not substantially

increase the burden on the courts of appeals. If, however, it requires more than a few paragraphs and a few citations to key cases to explain the result in a case to a general audience, then the decision deserves the heightened attention of the court and a lengthier opinion. Such a decision should be written carefully, with an eye toward its prospective effect.

Additionally, because unpublished opinions can be cited and relied upon in certain circumstances, n170 it is unpersuasive to argue that selective publication and noncitation rules are beneficial because they permit courts to be imprecise with the wording of their unpublished opinions. n171 Because the opinions can be cited as persuasive authority and the reasoning may be adopted in a published opinion, it actually harms the judiciary to have a body of imprecise and less carefully worded unpublished opinions in existence. It would better serve the judiciary to spend the time to ensure that all of its decisions are carefully worded and well-reasoned.

Finally, when the Judicial Conference made its recommendation in 1964 respecting the nonpublication of opinions, lawyers and judges did not have access to electronic legal databases, such as LexisNexis and Westlaw, or to circuit web sites where decisions also are now widely accessible. The expanded ability of courts to share and publish their opinions actually affords new opportunities for the law to be harmonized. Rather than increasing the workload for judges, the publication of decisions as binding precedent will expose decisions already rendered by appellate courts, bringing to light current inconsistencies that need to be addressed, and allowing courts to address them. Thus, rather than undermining or overburdening the judicial [*1890] system, publication and citation of opinions creates opportunities for harmonizing the law.

2. Publication Does Not Impose Too Great of a Burden on Litigants

Some critics fear that a system requiring universal publication and allowing citation to all decisions rendered on an issue will dramatically increase the burden on lawyers, who will have to consider and cite even more precedent than they currently do. However, the availability of judicial opinions via new digitized research tools (discussed above) largely resolves the problem of the increased volume of precedent. Lawyers are able to examine and sort through more opinions than ever before. Additionally, if summary dispositions are not extraordinarily long, then the burden of sifting through them will not be a large one. Finally, to alleviate the burden of citing every case on an issue, circuits could adopt rules proposing that lawyers need not string-cite summary dispositions when a principal case supports the proposition. Therefore, the burden on litigants will not prove to be substantial, especially considering the benefits of a more stable, accountable, and transparent judicial system.

III. A Proposed Regime

This Comment proposes a regime that respects the precedential authority of prior decisions. Though each circuit in its rules has established criteria addressing when a decision should be published, n172 these criteria do not address the issue of whether or not a full length-opinion should be written. Therefore, this Comment suggests guidelines to assist judges in determining when full-length opinions may best serve the functions of error correction and development of the law. n173 These considerations also provide a framework within which circuits may adopt uniform rules as to when and how courts should decide to issue full-length opinions versus summary dispositions. Alternatively, the Judicial Conference of the United States may utilize this framework to make recommendations to all federal circuits, so that they proceed in a more uniform fashion as to when a matter under consideration warrants a full-length opinion. Finally, this Comment suggests that published precedential summary dispositions replace nonprecedential unpublished opinions, so that there is no longer an artificial differentiation between those decisions that are officially published and those remaining unpublished but still available to inform arguments and decisions.

In a recent article, Jerome Braun argues that the circuits need to adopt a uniform national rule for selecting opinions for publication and proposes [*1891] guidelines based on the rules of the twelve circuits and nine states that have rules on the subject. n174 In the same way that these guidelines could help judges more uniformly decide which opinions to publish, they could also help them decide whether to issue a full-length opinion versus a summary disposition. In addition, the proposed guidelines may assist judges in identifying complicated issues that may more fruitfully inform the bar and develop the body of existing law if resolved in a full-length opinion. n175

Consider, then, the following guidelines for determining when it might be most beneficial to publish a full-length opinion or when a summary disposition will suffice. As written, the guidelines refer to the decision to publish; however, they can be applied to the decision to write a full-length opinion by simply replacing the word "published" in [1] and [2] with the word "written":

[1] An opinion should be ... published, and be treated as precedential, if it:

. establishes a new rule of law;

. alters, modifies, clarifies or explains an existing rule of law;

. resolves or identifies an apparent conflict of authority, either within the circuit or between the circuit and another, or creates a conflict between the circuit and another;

. draws attention to a rule of law that appears to have been generally overlooked;

. applies an existing rule of law in a novel factual context, differing materially from those in previously published opinions of the court applying the rule;

. contributes significantly to the legal literature by reviewing the legislative, judicial, administrative or electoral history of an existing rule of law;

. interprets a rule of state law in a way conflicting with state or federal precedent interpreting the state rule;

. is a case of first impression in the court with regard to the substantial issues it resolves;

. concerns an issue of substantial or continuing public interest or importance; or

[*1892] . will otherwise serve as a significant guide to the bench, bar, or future litigants.

[2] Even without such properties, an opinion should be published if it:

. reverses, modifies, or denies enforcement, on substantive grounds, of a lower court or administrative agency decision, or affirms it on a substantive ground different from those set forth below;

. certifies a question of law to a state [court of last resort], or applies the answer;

. is by the court sitting en banc; or

. when the case has been reviewed, and its merits addressed, by an opinion of the United States Supreme Court. n176

This thorough compilation of elements addresses the essential characteristics relevant to identifying cases in which full writing is appropriate and should assist in unifying decisions by varying panels within a circuit as to when the law might benefit from a full-length opinion of the court. Conversely, when an issue before the court does not implicate any of the above principles, then resolution of the issue might require no more than a summary disposition.

Conclusion

Publishing all appellate decisions and treating them as precedent would increase the stability of judge-made law and the legitimacy of the judicial system as a whole. On the other hand, allowing "an underground body of law" to develop undermines the system's accountability and transparency and denies reasoned decisionmaking to individuals having their rights adjudicated by the system. n177 However, forcing an overburdened judiciary to render a full-length published and precedential opinion in every case might delay to intolerable levels.

This Comment proposes a solution that balances the practical concerns of overburdened judges with other considerations. Guidelines for writing (or not writing) opinions serve to identify the cases most deserving of full-length written opinions and leave the remainder to be resolved by summary disposition. In this way, the guidelines avoid increasing the demand on judicial resources. Though judges may need to spend more time carefully reviewing the minimal language in summary dispositions, the result of having better existing law certainly is a worthy trade-off. As for attorneys, they too will greatly benefit from a system of universal publication and unrestricted citation. [*1893] No longer will lawyers complain that they were unable to make arguments from points rendered in unpublished opinions, nor will there be any problem of access to decisions. Additionally, concerns about the increased volume of authority can be addressed by circuit rules that allow attorneys not to cite summary dispositions clearly controlled by precedent established in a full opinion. The resulting system preserves the binding nature of judicial decisions and serves many important policy interests, while simultaneously remaining faithful to the intent of the Framers as they constructed the federal judiciary.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesGeneral OverviewGovernmentsCourtsClerks of CourtGovernmentsCourtsJudicial Precedents

FOOTNOTES:

n1. Judicial Conference of the United States, Reports of the Proceedings of the Judicial Conference of the United States 11 (1964).

n2. The Conference resolved to reduce the proliferation of published opinions "in view of the rapidly growing number of published opinions of the courts of appeals and of the district courts ... and the ever increasing practical difficulty and economic cost of establishing and maintaining accessible private and public law library facilities." Id.

n3. From 1960 to 1999 the number of appeals filed in federal courts increased more than 1000 percent, from 3899 to 54,693, while the number of federal judges increased less than 200 percent, from 68 to 179. See Roger Parloff, Publication Rights: It's Time to End the Patently Unfair Practice of Selective Precedent, Am. Law., Oct. 2000, at 15. But caseloads are not the only aspect of judicial process that has exploded in the past three decades. Michael Hannon documents the tremendous increase in the number of unpublished opinions (discussed infra in text accompanying notes 4-9) used after the adoption of selective publication rules in most circuits between 1973 and 1974. See Michael Hannon, A Closer Look at Unpublished Opinions in the United States Courts of Appeals, *3 J. App. Prac. & Process 199, 207-08* & tbl.3 (2001).

n4. For the most recent, comprehensive compilation of the publication and citation rules of the various circuits (and states), see Melissa M. Serfass & Jessie L. Cranford, Federal and State Court Rules Governing Publication and Citation of Opinions, *3 J. App. Prac. & Process 251, 253* & tbl.1 (2001). In stark contrast to the selective publication regimes of the courts of appeals, every opinion of the U.S. Supreme Court is published. See Sup. Ct. R. 48.

n5. See, e.g., 1st Cir. R. 36(b)(2)(F) ("Unpublished means the opinion is not published in the printed West reporters.").

n6. See Richard S. Arnold, Unpublished Opinions: A Comment, *1 J. App. Prac. & Process 219, 220 (1999).*

n7. The web site for the U.S. Court of Appeals for the Eighth Circuit provides access to all opinions of the court at no cost. See http://www.ca8.uscourts.gov/index.html (last visited July 8, 2002).

n8. See Hannon, supra note 3, at 209-11 & tbls.4 & 5. Though some unpublished opinions and orders from each of the circuits do appear in these databases, the databases are not complete; some opinions are documented only as table decisions with no information about the legal dispute decided, see id. at 210, and many unpublished opinions are not reported in the databases at all. For example, the U.S. Courts of Appeals for the Third, Fifth, and Eleventh Circuits prohibit electronic distribution - whether via Westlaw, LexisNexis, or their own circuit web site - of their unpublished opinions; thus, even though some of their opinions appear in online databases, not all opinions do. See id. at 211.

n9. For a discussion of the circuit rules regarding publication and the precedential effect of unpublished opinions, see generally Serfass & Cranford, supra note 4.

n10. See, e.g., Arthur B. Spitzer & Charles H. Wilson, The Mischief of the Unpublished Opinion, Litig., Summer 1995, at 3 (discussing the Federal Circuit's prohibition on citation to unpublished opinions and concluding that "none of the three decisions we were prevented from citing would have made a decisive difference in our appeal[, b]ut each was a building block for the arguments we were crafting"); see also Carolyn Magnuson, Eighth Circuit Declares Citation Ban Unconstitutional, Trial Jan. 2001, at 88. One practitioner was quoted as saying:

It just seems to me, generally speaking, that, if a court writes an opinion, litigants should be able to use the opinion in their advocacy work because it reflects the view of the court... . I can understand designating certain opinions as carrying less weight, but to prevent people from citing them at all seems to try to pretend they were never issued in the first place.

Id. (quoting Joanne D'Alcomo, First Circuit Practitioner).

A few judges have also expressed their views on selective publication. Compare Arnold, supra note 6 (suggesting that if Article III courts are not bound by their earlier unpublished opinions, their function becomes less judicial and more legislative), and *Nat'l Classification Comm. v. United States, 765 F.2d 164, 172 (D.C. Cir. 1985)* (Separate Statement of Wald, J.) (questioning the circumstances under which unpublished dispositions should be issued), with Alex Kozinski & Stephen Reinhardt, Please Don't Cite This!: Why We Don't Allow Citation to Unpublished Dispositions, Cal. Law., June 2000, at 43 (arguing that unpublished opinions should remain nonprecedential), and Danny J. Boggs & Brian P. Brooks, Unpublished Opinions and the Nature of Precedent, 4 Green Bag 17, 23-24 (2000) (arguing that there is a difference between the common-law cases in which the judge applies a general rule to a set of facts and other cases in which the judge must select the appropriate rule to apply, because in the first situation, only the fact of the decision is important whereas in the second, the intention of the judge is also important).

Finally, the topic of unpublished opinions has been discussed in the pages of law journals, though most of these discussions have focused on the desirability (or undesirability) of noncitation rules from a policy perspective, not on their constitutionality. See, e.g., Martha J. Dragich, Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?, *44 Am. U. L. Rev. 757, 760 (1995)* (proposing that the "two-tracked system" which results from selective publication "challenges fundamental assumptions of lawyers and judges: that the law is findable, that the precedential value of a decision is readily ascertainable, and that past decisions provide sufficient information to guide citizens, attorneys, and judges in the future"); George M. Weaver, The Precedential Value of Unpublished Judicial Opinions, *39 Mercer L. Rev. 477, 482, 490-93 (1988)* (arguing that unpublished opinions should be used to settle disputes in the case at hand, and that they might be usefully cited as persuasive authority, but that they should not serve as binding precedent).

n11. *223 F.3d 898 (8th Cir. 2000).* Though the decision in Anastasoff was vacated en banc by *Anastasoff v. United States, 235 F. 3d 1054 (8th Cir. 2000),* the arguments presented in the panel decision remain important to any discussion of the constitutionality and desirability of selective publication and noncitation rules. Additionally, the en banc court noted that the constitutionality of Eighth Circuit Rule 28A(i) remains an open issue in the Eighth Circuit. See *id. at 1056.*

n12. See 8th Cir. R. 28A(i); see also text accompanying infra note 19 (quoting the exact language of the Eighth Circuit rule).

n13. See *Anastasoff, 223 F.3d at 900.*

n14. See *id. at 900-03.*

n15. See id.

n16. See, e.g., Spitzer & Wilson, supra note 10, at 3.

n17. The case, *Christie v. United States, No. 91-2375, 1992 U.S. App. LEXIS 38446* (8th Cir. Mar. 20, 1992) (per curiam) (unpublished disposition), applied the Mailbox Rule to a tax refund request that had been mailed in a timely manner but was not received before the deadline for requesting a refund. Id. at 7. This was exactly the issue raised in Anastasoff. Moreover, Christie was the only circuit case directly on point.

n18. See *Anastasoff, 223 F.3d at 899.*

n19. 8th Cir. R. 28A(i).

n20. See *Anastasoff, 223 F.3d at 899.*

n21. *Id. at 900.*

n22. I wish to thank Professor Erwin Chemerinsky for his assistance in formulating these concepts in this manner.

n23. *Anastasoff, 223 F.3d at 904.*

n24. See *id. at 899.*

n25. See *26 U.S.C. 6511* (2000).

n26. Id. 7502.

n27. See *Anastasoff, 223 F.3d at 899.*

n28. See id.

n29. See Anastasoff v. United States, No. 4:98-1291, *1999 U.S. Dist. LEXIS 22238* (E.D. Mo. Aug. 25, 1999) (unpublished).

n30. See *Christie v. United States, No. 91-2375, 1992 U.S. App. LEXIS 38446, at 11* (8th Cir. Mar. 20, 1992) (per curiam) (unpublished).

n31. See id.

n32. See id.

n33. See *Anastasoff, 223 F.3d at 899.*

n34. See *id. at 905.*

n35. See *id. at 899.*

n36. *Anastasoff, 223 F.3d at 899* (quoting Eighth Circuit Rule 28A(i)).

n37. See *id. at 905.*

n38. See *id. at 899;* see also supra text accompanying notes 18-20.

n39. *Anastasoff, 223 F.3d at 901.*

n40. Id. (quoting 3 William Blackstone, Commentaries 69 (2001)) (internal quotations omitted). The court asserted that it is commonly understood that Blackstone's work greatly influenced the Framers' understanding of law. See *id. at 901 n.8.* In support of this assertion, the court recounted that when the U.S. Constitution was adopted, Blackstone's Commentaries "'had been published for 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.'" Id. (quoting Daniel Boorstin, The Mysterious Science of Law 265 (1941)). But see John Harrison, The Power of Congress over the Rules of Precedent, *50 Duke L.J., 503, 524 n.66 (2000)* (arguing that the Anastasoff court misinterpreted Blackstone's position).

n41. See *Anastasoff, 223 F.3d at 901.*

n42. See id.

n43. See *id. at 905.* Federal courts generally should not resolve a constitutional question when it is unnecessary to do so. Following this principle, the court in Anastasoff should not have addressed the constitutionality of Rule 28A(i) because under Rule 28A(i), Christie was not binding precedent and thus the question it discussed was a novel issue of law in the circuit. The court was therefore free to resolve the legal issue as it saw fit, without addressing the constitutional issue.

As discussed above, however, the decision in Anastasoff moved the debate about circuit nonpublication and noncitation rules from the pages of scholarly journals to the pages of the Federal Reports and articulated the arguments on one side of the constitutional debate. Additionally, Anastasoff succeeded in renewing the debate over the judicial policies underlying noncitation rules. For these reasons, Anastasoff remains an important decision.

n44. See *Weisbart v. United States, 222 F.3d 93 (2d Cir. 2000).*

n45. See *Anastasoff, 223 F.3d at 905* (Heaney, J., concurring).

n46. See *Anastasoff v. United States, 235 F.3d 1054, 1056 (8th Cir. 2000)* (granting the petition for rehearing en banc).

n47. See id.

n48. Id.

n49. See discussion supra Part I, and infra Part II.A. & B.

n50. See *Anastasoff, 223 F.3d at 902-03;* see also supra text accompanying notes 39-42.

n51. *Anastasoff, 223 F.3d at 901.*

n52. Id.

n53. See *id. at 905.*

n54. *Id. at 903.*

n55. Arnold, supra note 6, at 221.

n56. Id.

n57. See id.

n58. See *Anastasoff, 223 F.3d at 901*.

n59. *Id. at 901* (quoting 1 William Blackstone, Commentaries 259 (2001)).

n60. *Id. at 903.*

n61. *Id. at 904.*

n62. See *id. at 905.*

n63. *Id. at 904-05.*

n64. *266 F.3d 1155 (9th Cir. 2001).*

n65. 9th Cir. R. 36-3.

n66. Thus, the Hart court was required to resolve the constitutional issue, whereas the Anastasoff court could have resolved its case without reaching the constitutional issue. See supra note 43.

n67. 9th Cir. R. 36-3.

n68. See *Hart, 266 F.3d at 1158-59.*

n69. See *id. at 1159.*

n70. See id.

n71. See id.

n72. Id.

n73. See *id. at 1163-70.*

n74. See *id. at 1180.* The U.S. Court of Appeals for the Federal Circuit also recently considered the issue. In *Symbol Technologies, Inc. v. Lemelson Medical, Education & Research Foundation, Ltd., 2002 WL 89019, at 4-6* (Fed. Cir. Jan. 24, 2002), the court rejected the constitutional argument in Anastasoff and expressly adopted the reasoning in Hart.

n75. See *Hart, 266 F.3d at 1170-72.*

n76. See *id. at 1175.*

n77. See *id. at 1173-76.*

n78. See *id. at 1180.*

n79. See *id. at 1162.*

n80. *Id. at 1164.*

n81. See *id. at 1165-66;* see also *id. at 1166 n.15* (discussing a case recorded differently in four reports). Additionally, the Hart court pointed out that because decisions were recorded by private reporters, the quality of the reports varied; as a result, "'it was always possible for a judge who was trying a case to decry the authority of a report which laid down a rule with which he disagreed.'" *Id. at 1166 n.16* (quoting William Holdsworth, 12 A History of English Law 154, 154 n.3 (1938)). Holdsworth's statement, however, also may indicate that judges did feel bound by the rules laid down in reported decisions, but used the quality of the reports as a way to challenge the rule, much as modern judges attempt to distinguish cases that announce rules with which they disagree.

n82. See *id. at 1164.*

n83. See id. For a discussion of the concept of precedent under English common law and at the time of the Constitution's framing taken from the Anastasoff court's historical account of the doctrine of precedent, see supra text accompanying notes 39-42.

n84. *Id. at 1165.*

n85. See *id. at 1168-69.* The Hart court characterized early American efforts at reporting opinions as "disorganized and meager," much like those in England. *Id. at 1168.*

n86. *Id. at 1167.* The Hart court further posits that "it is entirely possible that lawyers of the eighteenth century, had they been confronted with the regime of rigid precedent that is in common use today, would have reacted with alarm." Id.

n87. See *Hart, 266 F.3d at 1180.*

n88. See *id. at 1167* ("The common law, at its core, was a reflection of custom, and custom has a built-in flexibility that allowed it to change with circumstance.").

n89. See id.

n90. Id.

n91. See *id. at 1168 n.21* (citing Theodore F. T. Plucknett, A Concise History of the Common Law 350 (5th ed. 1956)); see also *id. at 1175.*

n92. *Id. at 1168.*

n93. *Id. at 1170.*

n94. *Id. at 1171.* This statement seems inaccurate, however, because a panel addressing an issue for the first time, but in an unpublished opinion, sets no binding law. Therein lies the problem, the exact problem, in fact, encountered by the Anastasoff court when the Christie court, the first circuit case to address the Mailbox Rule interpretation issue, decided the issue in an unpublished, nonprecedential opinion. See supra text accompanying notes 17-19. An issue could be addressed by a circuit panel but subsequently treated as if it never had been decided. For further discussion of this problem, see infra Part III.A.1.

n95. *Hart, 255 F.3d at 1172.*

n96. *Id. at 1173.*

n97. Id. (quoting *Payne v. Tennessee, 501 U.S. 808, 828 (1991))* (discussing stare decisis as a prudential matter, and not a constitutional command).

n98. When the Eleventh Circuit was carved out of the former Fifth Circuit, the Eleventh Circuit chose to adopt all decisions of the Fifth Circuit as binding precedent. See *Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)* (en banc). However, in a decision by the U.S. Court of Appeals for the Tenth Circuit, the court declared that the decisions of the Eighth Circuit - the circuit from which it was created - had never been held to be controlling in the Tenth Circuit. See *Estate of McMorris v. Comm'r, 243 F.3d 1254, 1258 (10th Cir. 2001).*

n99. The boundaries of the twelve geographic circuits are governed by statute and thus can be changed by statute. See *Hart, 266 F.3d at 1173.*

n100. See *id. at 1173.*

n101. See *id. at 1174.*

n102. See *id. at 1174 n.30* (citing *In re Marriage of Shaban, 105 Cal. Rptr. 2d 863, 870-71 (Ct. App. 2001)).*

n103. See id. at 1173. As discussed earlier, English common law judges often simply ignored decisions that they believed were wrongly decided, rather than overruling them. See supra note 82 and accompanying text.

n104. *314 U.S. 326, 335 (1943)* (reasoning that en banc procedures will further desirable judicial policies by avoiding intercircuit conflicts and promoting finality of decisions).

n105. See *28 U.S.C. 46*(c) (2000).

n106. *Hart, 266 F.3d at 1163.*

n107. Compare Arnold, supra note 6 (suggesting that all opinions be published and given precedential value), with *Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000)* (holding that the Eighth Circuit's rule barring citation to unpublished opinions violates Article III).

n108. *Hart, 266 F.3d at 1163.*

n109. For an example of similar foreshadowing of policy preferences informing constitutional interpretation, compare Kozinski & Reinhardt, supra note 10 (arguing that unpublished opinions should remain nonprecedential), with *Hart, 266 F.3d at 1180* (holding that the Ninth Circuit's rule prohibiting citation of unpublished opinions does not violate the Constitution).

n110. *Hart, 266 F.3d at 1161.*

n111. See id. (commenting that Anastasoff seems to be the first case ever to read the "judicial power" clause of Article III as imposing a limitation on federal courts).

n112. See John Henry Merryman, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America 4 (2d ed. 1985), reprinted in John Henry Merryman et al., The Civil Law Tradition: Europe, Latin American and East Asia 5 (1994). In addition to the United States, common law systems based on the English common law tradition are also in effect today in Great Britain, Ireland, Canada, Australia, and New Zealand; additionally, the common law tradition has greatly influenced the law in many other nations in Africa and Asia. Id.

n113. See Arthur Taylor von Mehren & James Russel Gordley, The Civil Law System 3 (2d ed. 1977).

n114. *Christie v. United States, No. 91-2375, 1992 U.S. App. LEXIS 38446* (8th Cir. Mar. 20, 1992) (per curiam) (unpublished).

n115. See supra text accompany notes 18-19.

n116. See Douglas A. Berman & Jeffrey O. Cooper, In Defense of Less Precedential Opinions: A Reply to Chief Judge Martin, Ohio St. L.J. 2025, 2029 (1999).

N117. See id. This is true despite the fact that most academic and media attention is focused on decisions by the Supreme Court. See id. But the Supreme Court makes far less law than the circuit courts; in recent years, under its discretionary review, the Court has decided less than one hundred cases per year. See id. In contrast, in 1998 the circuit courts resolved almost twenty-five thousand cases on the merits. See id.

n118. For example, the circuit rules in the First, Fourth, and Eighth Circuits set forth a presumption that decisions establishing a new rule of law should be published. See 1st Cir. R. 36(b); 4th Cir. R. 36(a); 8th Cir. R. App. I(a). The circuit rules in the Fifth, Sixth, Seventh, Ninth, D.C., and Federal circuits include establishing a new rule

of law as one of the criteria to be considered in a panel's decision of whether or not to render a published opinion. See 5th Cir. R. 47.5.1; 6th Cir. R. 206(a); 7th Cir. R. 53(c)(1); 9th Cir. R. 36-2; D.C. Cir. R. 36(a); Fed. Cir. R. 47.6(a). The Tenth Circuit's rule only allows for written opinions to be issued in cases "requiring an application of a new rule of law." 10th Cir. R. 36.1-36.2. The rules of the Second, Third, and Eleventh Circuits do not specifically mention establishing new rules of law in relation to the decision to publish; they mention only consideration of whether a rule would serve a "jurisprudential purpose," 2d Cir. R. 0.23, or have precedential value, see 3d Cir. I.O.P. 5.2; 11th Cir. R. 36-1. See generally Serfass & Cranford, supra note 4.

n119. Stephen L. Wasby, Unpublished Court of Appeals Decisions: A Hard Look at the Process 34, Presented at the Meetings of the Midwest Political Science Association in Chicago, Illinois (Apr. 25, 2002) (unpublished manuscript, on file with author) (analyzing the process by which appeals court judges decide to issue published opinions or unpublished memorandum dispositions and focusing on the Ninth Circuit).

n120. See, e.g., *Nat'l Classification Comm. v. United States, 765 F.2d 164, 173 (D.C. Cir. 1985)* (Separate Statement of Wald, J.). Judge Wald points out that during the relevant time period, the D.C. Circuit had a court rule requiring publication if an opinion meets one of the listed criteria, including if the disposition of the case "establishes a rule of law on a point of first impression for the court, or alters or modifies a rule of law previously announced." *Id. at 173 n.3.* However, a subcommittee that studied the use of unpublished opinions in the D.C. Circuit after the adoption of that rule found that 40 percent of the decisions rendered as unpublished opinions arguably met one of the criteria and therefore should have been published. *Id. at 173.* Moreover, the subcommittee found that many of the unpublished opinions resolved "issues [that] appear to have been matters of first impression in this Circuit... . Although some of the issues may not be of great general public interest, each of these cases is significant to a certain constituency." *Id. at 173* (citation omitted). For an argument that circuits courts often avoid answering complex questions in published opinions, and therefore render such decisions as unpublished opinions, see also Mitu Gulati & C.M.A. McCauliff, On Not Making Law, 61 Law & Contemp. Probs. 157, 161 (1998).

n121. See Bruce M. Wexler & F. Christopher Mizzo, Unpublished Opinions Rising, But Do They Help?, N.Y.L.J., Feb. 11, 2002, at s.8 ("Occasionally, [unpublished] opinions are the only law to address a key point in a subsequent case. But it can be frustrating when a court prohibits citing to the case because it is 'unpublished.' Alternatively, such opinions can be perceived as creating conflicting legal statements."). Additionally, Stephen Wasby argues that even though the reasons for publication of matters of first impression are clear, judges do not universally agree with these reasons. See Wasby, supra note 119, at 34. As one example of a situation in which judges consciously choose not to follow their own circuit publication requirements, he observes that "some circuits apparently use unpublished dispositions to help an issue 'percolate.' Even if a case contains a new point of law in the circuit ... the court may not publish on the point at issue until it sees what other circuits are doing." Id.

n122. *5 U.S. 173 (1803).*

n123. *Id. at 177* ("Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

n124. 1 Laurence H. Tribe, American Constitutional Law 118 (3d ed. 2000).

n125. The Marbury Court noted the vital role of the judicial branch in reviewing the constitutionality of acts of Congress, saying:

So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.

Marbury, 5 U.S. at 178.

n126. I wish to thank Phillip Carter for his contribution to the development of this argument.

n127. See id. at 901; see also *Planned Parenthood v. Casey, 505 U.S. 833, 866-67 (1992)* (reiterating the importance of stare decisis, especially as to politically divisive issues). Even though the Court was under political pressure to do so, the authors of the plurality opinion in Planned Parenthood v. Casey were unwilling to overrule *Roe v. Wade, 410 U.S. 113 (1973),* because its principle had not proven unworkable. See id. The Court reasoned that, because the issue was so intensely divisive, "to overrule under fire" without a compelling reason "would subvert the Court's legitimacy beyond any serious question." Id. at 867.

n128. *Anastasoff v. United States, 223 F.3d 898, 901 (8th Cir. 2000)* (quoting 3 William Blackstone, Commentaries 69 (2001)) (alteration in original).

n129. Id.

n130. For example, as discussed earlier, under the Eighth Circuit noncitation rule the Anastasoff court could have wholly ignored the prior Eighth Circuit decision in Christie simply because it was designated unpublished. See supra note 43.

n131. *Mahnich v. Southern S.S. Co., 321 U.S. 96, 113 (1944)* (Roberts, J., dissenting).

n132. Id. Though Justice Owen Roberts's comments reflect his concern about adherence to prior Supreme Court precedent, his apt commentary contemplates the dangers presented by the unfettered use of unpublished opinions. If lower federal courts and litigants are not bound to follow the law announced by courts in unpublished opinions, "the law becomes not a chart to govern conduct but a game of chance; instead of settling rights and liabilities it unsettles them." *Id. at 112.*

n133. Lauren K. Robel, Caseload and Judging: Judicial Adaptations to Caseload, *1990 B.Y.U. L. Rev. 3, 52.* Reiterating this point, Ninth Circuit Judge Stephen Reinhardt admits that as the caseloads of federal judges increase, "we inevitably pay less attention to the individual cases." Stephen Reinhardt, Too Few Judges, Too Many Cases: A Plea to Save the Federal Courts, A.B.A. J., Jan. 1993, at 52. Judge Reinhardt's commentary first took form as a letter to Congress requesting that the federal judiciary be doubled in size to accommodate the caseload burdens. Id. In this plea, he wrote:

I speak primarily about the courts of appeals. Those who believe we are doing the same quality work that we did in the past are simply fooling themselves. We adopt more and more procedures for "expediting" cases, procedures that ensure that individual cases will get less attention. In place of the traditional oral argument and written opinions that we used to provide in most instances, we now all too often give cases second-class treatment. We merely look at the files and then issue unpublished memorandum dispositions or orders.

The use of these makeshift procedures ensures that many cases do not get the full attention they deserve, and the quality of our work suffers. It is a most unsatisfactory way for us to have to do our job.

Id.

n134. See Kozinski & Reinhardt, supra note 10, at 43.

n135. But see Honorable Gilbert S. Meritt, The Decision Making Process in the Federal Courts of Appeals, *51 Ohio St. L.J. 1385, 1393 (1990)* (arguing that "the accountability problem due to nonpublication is ... overstated").

n136. Staff attorneys are not Article III appointees; rather, they are simply attorneys employed by the federal government to assist in handing appeals in the circuit courts. Formal endorsement of the use of staff attorneys came from the ABA Commission on Standards of Judicial Administration, Standards Relating to Appellate Courts, 3.62(b) (1997). See Daniel J. Meador, Toward Orallity and Visibility in the Appellate Process, *42 Md. L. Rev. 732, 735 n.12 (1983).* Staff attorneys do not work for a particular judge, but obtain work from the pool of cases appealed in the federal court system. See William M. Richman & William L. Reynolds, Appellate Justice Bureaucracy and Scholarship, *21 U. Mich. J.L. Reform 623, 628 (1988);* cf. Meritt, supra note 135, at 1389 ("Staff attorneys ... are like law clerks at-large.").

n137. See Kozinski & Reinhardt, supra note 10, at 44.

n138. See id. There is an extensive body of literature critiquing the role of staff attorneys. See, e.g., Jeffrey O. Cooper & Douglas A. Berman, Passive Virtues and Casual Vices in the Federal Courts of Appeals, *66 Brooklyn L. Rev. 685, 697-99, 705-09* (2000-2001). Similar to the staff attorney situation, criticisms can be raised where judges rely heavily on law clerks (also non-Article III appointees) to draft opinions. See Richman & Reynolds, supra note 136, at 626-27. However, some judges have defended law clerk opinion-drafting as long as the judge performs the core functions, including "the formulation and expression of the ideas and analysis that go into [the] opinion." Patricia M. Wald, The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge, Md. L. Rev. 766, 777 (1983). "Whether the judge writes the first draft for the clerks to critique and to flesh out, or the clerk writes the first draft for the judge to revise and to challenge is not dispositive of whether the judge is still in charge." Id. at 778.

n139. See Kozinski & Reinhardt, supra note 10, at 44 (stating that making "any refinements in the language would cost valuable time yet make little difference to the parties").

n140. Moreover, those decisions should be carefully reviewed anyway, because they adjudicate a party's rights according to that litigant's constitutional right of appeal, and because they may be cited as persuasive authority or have their language adopted in a published opinion. See infra text accompanying notes 170-171.

n141. See *Hart v. Massanari, 266 F.3d 1155, 1178 (9th Cir. 2001).* Judge Kozinski addressed this point in the context of a rule allowing parties to cite to unpublished opinions. He wrote:

Although three judges might agree on the outcome of the case before them, they might not agree on the precise reasoning or the rule to be applied to future cases. Unpublished concurrences and dissents would become much more common, as individual judges would feel obligated to clarify their differences with the majority ... .

Id.

n142. See id. ("Should courts allow parties to cite to [unpublished] dispositions, however, much of the time gained would likely vanish... . [because] judges would have to start treating unpublished dispositions ... as mini-opinions.").

n143. Such procedures to resolve intracircuit conflicts are especially important "where ... there is a difference in view among the judges upon a question of fundamental importance, and especially in a case where two of the three judges sitting in a case may have a view contrary to that of the other ... judges of the court." *Id. at 1174* (quoting *Comm'r v. Textile Mills Secs. Corp., 117 F.2d 62, 70 (3d Cir. 1940)).*

n144. See Gulati & MaCauliff, supra note 120, at 158. The authors conceded, however, that the judges might be engaging in legitimate behavior, perhaps not addressing the substantive question because they could dispose of the matter on procedural grounds. See id.

n145. Id.

n146. See Kevin Livingston, 8th Circuit Drops a Bombshell, The Recorder (San Francisco), Aug. 24, 2000, at 1, available at http://www.law.com/servlet/ContentServer?pagename=OpenMarket/Xcelerate/View&c=LawArticle&cid=1015973971341&live=true&cst=1&pc=0&pa=0 (last visited July 9, 2002).

n147. See Kozinski & Reinhardt, supra note 10, at 44. In their article, the judges list a parade of horrible consequences that would result from a requirement of universal publication. They argue that:

It would be impossible to [handle the additional caseload] without neglecting our other responsibilities. We write opinions in only 15 percent of the cases already and may well have to reduce that number. Or we could write opinions that are less carefully reasoned. Or spend less time keeping the law of the circuit consistent through the en banc process. Or reduce our [memorandum dispositions] to one-word judgment order, as have other circuits. None of these are palatable alternatives, yet something would have to give.

Id.

n148. See Livingston, supra note 146.

n149. See id.

n150. See, e.g., Kozinski & Reinhardt, supra note 10, at 43-44.

n151. See Livingston, supra note 146.

n152. Id.

n153. Kozinski & Reinhardt, supra note 10, at 43.

n154. See id.

n155. See id.

n156. See id.

n157. See id.

n158. See id.

n159. Id.

n160. See id. at 44.

n161. Id.

n162. See id.

n163. See id.

n164. As was the result in Anastasoff before being vacated en banc. When the original panel held Rule 28A(i) unconstitutional, all prior circuit decisions became precedential.

n165. See Kozinski & Reinhardt, supra note 10, at 44. To reiterate their point about the caseload burden in the courts of appeals and the need for measures which alleviate some of the resulting pressures, Kozinski and Reinhardt present astonishing figures describing the workload for their circuit:

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

Id. Translating these figures into terms familiar to legal scholars, the judges submit that "writing 20 opinions a year is like writing a law review article every two and a half weeks; joining 40 opinions is akin to commenting extensively once a week or so on articles written by others." Id. For additional commentary on the volume of cases in the federal courts and the resulting judicial workload for the judges, see generally Michael C. Gizzi, Examining the Crisis of Volume in the U.S. Courts of Appeals, 77 Judicature 96 (1993).

In contrast, other judges have acknowledged the time and workload pressures facing federal judges, but still disfavor a system of unpublished opinions as the proper solution. See, e.g., Wald, supra note 138, at 777 (discussing the "harsh reality" of the workload facing federal judges). Despite the caseload, however, Judge Wald disfavors a system relying too heavily on unpublished opinions, issuing these words of caution:

Judges ... must take care, however, that their reactions to a stepped-up work load do not corrode the essence of their judicial functions - reading and listening to the arguments of the parties, being familiar with the record, making and explaining their decisions, generally for publication. Taking shortcuts in any of these areas is a danger signal for the process.

Id. at 785-86; see also Reinhardt, supra note 133, at 52 (admitting dissatisfaction that some cases receive "second-class treatment" because of mechanisms that federal courts have developed to handle caseload pressures, including the use of unpublished opinions).

n166. *Anastasoff v. United States, 223 F.3d 898, 904 (8th Cir. 2000).*

n167. Id.

n168. Cf. Kozinski & Reinhardt, supra note 10, at 44 (discussing the routine nature of many of the cases decided in memorandum dispositions and written by staff attorneys).

n169. See supra text accompanying notes 114-115.

n170. Unpublished opinions may still be relied upon because some circuit rules, like the Eighth Circuit's, allow for citation to unpublished opinions as persuasive authority on a material issue where there is no other circuit precedent on point and no other circuit's precedent would serve as well. See 8th Cir. R. 28A(i).

n171. See, e.g., Kozinski & Reinhardt, supra note 10, at 44 (arguing that "the result ... [and], not the precise wording" is what matters in unpublished opinions).

n172. See supra note 118.

n173. See id. at 43.

n174. See Jerome I. Braun, Eighth Circuit Decision Intensifies Debate Over Publication and Citation of Appellate Opinions, 84 Judicature 90 (2000).

n175. This assertion is in no way meant to suggest that judges do not already competently determine when to write full-length opinions and when not to; they, of course, do precisely that every time they meet in conference. However, the guidelines here will allow for more uniformity between the circuits, thus eliminating some of the arbitrariness in differential treatment of issues. The legal issues, of course, need not be decided identically in all circuits, but greater uniformity in the process of issuing written, published opinions will serve a legitimizing function for the judicial process overall.

n176. Braun, supra note 174, at 93.

n177. *Anastasoff v. United States, 223 F.3d 898, 904 (8th Cir. 2000).*