

NOTE: Say It Ain't So: Non-Precedential Opinions Exceed the Limits of Article III Powers
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FN* J.D. 2002, The George Washington University Law School. The opinions expressed in this Note are solely those of the author. I would like to thank Professor Peter Raven-Hansen for his helpful suggestions and encouragement, both in regard to this Note and law school generally. This Note is dedicated to my wife and daughter, for everything and then some; my dad, who always said I would be a writer; and Bob, who was "famous."

Introduction

In a 1999 essay, Judge Richard S. Arnold of the United States Court of Appeals for the Eighth Circuit raised, but did not answer, the question of whether federal appellate court rules that deny precedential status to unpublished opinions are unconstitutional. n2 In *Anastasoff v. United States*, n3 Judge Arnold answered his own question, holding that Eighth Circuit Rule 28A(i), which states that unpublished opinions are not precedent, is unconstitutional because it confers a power on the court "beyond the bounds of Article III." n4

This holding, though vacated on other grounds, n5 is significant because every federal appellate court has a rule dealing with the precedential effect of unpublished opinions. n6 The Eighth Circuit's opinion, therefore, is likely to encourage challenges to similar rules in other circuits. n7 It is also likely that, should this issue be appealed to the Supreme Court, the Court will grant certiorari to decide it. n8

Because Judge Arnold's analysis of the scope of Article III "judicial" power is incomplete, the purpose of this Note is to show, through a more complete analysis of the sources of Article III "judicial" power, that federal appellate court rules assigning non-precedential status to unpublished opinions exceed Article III authority and are therefore unconstitutional.

Part I of this Note discusses the history of the federal appellate rules on selective publication of decisions, focusing on the problems that the rules were designed to remedy. Part II analyzes the *Anastasoff* opinion and Judge Arnold's argument that Eighth Circuit Rule 28A(i) is an unconstitutional exercise of Article III judicial power as that power was understood by the framers of the Constitution. Part III provides the historical background necessary to understand Judge Arnold's argument, in particular the relationship between modern law and the doctrine of precedent. Part IV explains why judicially-created non-precedential opinions are unconstitutional first by showing, as Judge Arnold concluded, that American courts historically have lacked the power to author non-binding opinions, and then by establishing that the power to craft non-binding opinions is outside the scope of court rulemaking powers. Part IV concludes by demonstrating that, because *stare decisis* acts a check on judicial fiat, the power to preemptively deny precedential effect to a decided case cannot lie within the judicial sphere. Part V reconciles the unconstitutionality of the rules with the problems noted in Part I by proposing a Model Rule on Limited Publication that accords precedential status to all opinions, but which still permits selective publication of cases deemed worthy of a written opinion.

I. Historical Background of the Appellate Rules on Unpublished Decisions

A. The Need for Reform

The federal appellate courts promulgated the rules on unpublished opinions in response to the proliferation of appeals and the number of published opinions these appeals necessitated. n9 Problems caused by the large number of appeals concerned jurists as early as the nineteenth century, when Justice Story remarked that the volume of appeals threatened to bury the legal establishment "alive, not in the catacombs, but in the labyrinths of the law." n10

Twentieth Century judges, facing a caseload that Justice Story could not have imagined, echoed his sentiments. n11

B. A Proposal for Reform

Despite these judicial rumblings, the exponential growth of opinions was not formally addressed until 1964, when the Judicial Conference of the United States, in its Annual Report, suggested that the federal appellate and district courts adopt rules authorizing publication of only those cases that are of "general precedential value." n12 The issue remained dormant, however, until 1972, when the recently established Federal Judicial Center ("FJC") recommended to the Judicial Conference that the circuit courts adopt rules on selective publication, including a rule against citing unpublished opinions either in briefs or court opinions. n13 The Conference accepted this recommendation and, in turn, requested proposed plans for its implementation from the courts of appeals. n14 By 1974, the circuit courts had

submitted their proposed plans to the Judicial Conference. n15

Around the same time, the FJC and Congress sponsored studies on appellate procedures and selective publication rules. n16 While the FJC-sponsored report recommended selective publication combined with a no-citation rule, the congressional study expressed concern over problems of access that citation rules would create. n17 Nevertheless, the Judicial Conference, in its final report on the implementation of the circuit court rules, noted the positive effect the rules were having on the number of dispositions and concluded that the experimentation should continue. n18

C. The Current State of the Rules

Currently, each federal court of appeals has some version of a selective publication rule, but the rules vary widely on the issues of citation and precedential status of unpublished opinions. n19 Moreover, the courts have not shown any hesitation in applying the rules; to the contrary, one recent study shows that in the regional circuits, the number of unpublished dispositions as a percentage of terminations on the merits increased from sixty-two percent to seventy-two percent between 1987 and 1998. n20

The increase of unpublished opinions tracks the increase in the number of appeals filed over the same period and therefore suggests that the courts of appeals are relying heavily on selective publication as a means of docket management. n21 These statistics thus underscore the dilemma Judge Arnold faced in the Anastasoff case: whether to invalidate a rule specifically promulgated and regularly relied upon by the court to enable it to effectively manage its business. n22 The next Part sets forth the facts in Anastasoff and explains why, despite these concerns over judicial efficiency, Judge Arnold concluded that Eighth Circuit Rule 28A(i) is unconstitutional.

II. The Anastasoff Opinion

A. Facts

Faye Anastasoff sought a refund for overpayment of federal income tax. n23 The Internal Revenue Service ("IRS") denied her request on the ground that it was untimely. n24 The issue was whether Ms. Anastasoff's claim could be saved by application of the "Mailbox Rule," 26 U.S.C. 7502. n25

The district court held for the IRS, stating that the Mailbox Rule did not apply. n26 On appeal, Ms. Anastasoff argued that the Eighth Circuit was not bound by a prior unpublished opinion, n27 in which the court held for the IRS on the same issue and operative facts, because Eighth Circuit Rule 28A(i) denied precedential effect to that decision. n28 Judge Arnold disagreed, stating that Rule 28A(i) is unconstitutional under Article III "because it purports to confer on the federal courts a power that goes beyond the 'judicial.'" n29

B. Judge Arnold's Analysis

Judge Arnold's conclusion that Rule 28A(i) is unconstitutional is based on three premises, which he supports through references to historical records extant at the time of the founding of the United States:

1. "In the late eighteenth century, the doctrine of precedent was well established in legal practice ..., regarded as an immemorial custom, and valued for its role in past struggles for liberty." n30
2. "The duty of courts to follow their prior decisions was understood to derive from the nature of the judicial power itself and to separate it from a dangerous union with the legislative power." n31
3. "The statements of the Framers [of the Constitution] indicate an understanding and acceptance of these principles." n32

Based on this analysis, Judge Arnold concluded that "the doctrine of precedent limits the 'judicial power' delegated to the courts in Article III." n33

In order to understand how Judge Arnold arrived at this conclusion, and to provide a context for examining whether the federal courts historically have the power, under Article III, to issue non-precedential opinions, it is necessary to have some familiarity with legal history and the role of precedents in judicial decision-making. With this in mind, the next Part briefly discusses the history of modern law and its connection with the doctrine of precedent.

III. A Brief History of Modern Law and Its Relationship to the Doctrine of Precedent

Modern law is generally derived from two very different legal systems: civil codes and customary or "common" law. n34 Any historical power of the federal courts to author non-binding opinions must therefore have roots in one of these two systems and have been included by the framers of the Constitution as within the "judicial" power set forth in Article III. n35 The sections that follow briefly discuss the history of civil codes and common law and the

significance of both the courts and precedents in each system.

A. Civil Codes

Most European civil codes are based on the Roman model of the Code of Justinian. n36 Under the Justinian Code, the judges were only permitted to apply the written law, the Corpus Juris, and were not bound by the prior decisions of other judges. n37 The goal of this system was to create stability in the law by reserving to the sovereign the sole right to interpret it. n38

The idea of an accessible, understandable, and stable body of codified law appealed to European philosophers in the Age of Enlightenment. n39 It was not until the Nineteenth Century, following the success of the French Code Civil, that the "Age of Codification" began. n40

Under the Code Civil, the law as written was presumed to be so complete that the judge's only role was to be a "mechanical interpreter of legal texts, and his decisions were not to be binding precedents." n41 Most European civil code countries are based on the Code Civil and envision a similar role for judges. n42 Thus, in jurisdictions where the law is based on the European civil code model, the purpose of the courts is to apply the code to the facts of the case, and prior decisions generally have no binding effect on succeeding adjudications.

B. Common Law

Although civil codes are commonplace on the European continent, they never crossed the "legal straits of Dover." n43 Rather, the English law inherited by the United States was customary or "common" law. n44

English common law was judge-made; the courts created it, "bit by bit, as cases successively arose and were determined." n45 Although reliance by the English courts on prior decisions, or precedents, had, to some extent, been the norm for many years in early English history, systematic use of precedents in the development of common law did not begin until the publication of reports became commonplace, sometime in the fourteenth century. n46 These recorded judgments not only became evidence of the law, but also sources of it, and constrained succeeding judges. n47 Case reporting and reliance on precedents are, therefore, historically related in English common law. n48

With this brief history in mind, Part IV explains why, from the standpoint of historical court powers, Judge Arnold's conclusion of unconstitutionality is correct. Because legal history is not the only possible source of Article III power to issue non-precedential opinions, however, Part IV also explores the rulemaking powers of the courts and concludes that these powers do not permit the courts to issue non-precedential opinions. Part IV also discusses the role of stare decisis in judicial decision-making and explains why, contrary to the suggestion in Judge Arnold's opinion, stare decisis is an external check on the judiciary that prevents the courts from issuing non-binding opinions.

IV. Why Judicially-Created Non-Precedential Opinions Are Unconstitutional

Judge Arnold based his conclusion of unconstitutionality primarily on historical grounds, namely that the legal history underlying Article III "judicial" power demonstrates an unquestionable acceptance of precedent as a limit on that power. Although the history of modern law suggests that under certain circumstances courts are empowered to regulate precedent, the next section concludes, as did Judge Arnold, that the framers of the Constitution did not envisage such a role for the federal courts and thus did not include this authority in the "judicial" power set forth in Article III.

A. No Historical Basis for the Rules Exists

The history of modern law suggests that, where the function of a court is to apply statutory law to a case pending before it, the court need not rely on precedent and its own decision in that case does not become precedent. Arguably, the federal courts fit this mold. Subsection 1 explains how federal courts resemble civil law tribunals. Subsection 2 explains why, despite the resemblance, the federal courts follow the English common law model in which precedents are constraining on judicial decision-making.

1. How the Federal Courts Behave as Civil Law Tribunals

The federal courts decide cases based on the Constitution, statute, or state law; there is no federal common law. n49 The common law that remains is generally the province of the states. n50 This suggests that the function of federal courts is not to make common law, but to apply various codes, e.g., the United States Code, to the cases before them.

It further suggests that, inasmuch as the federal courts function within a system dominated by codes and not common law, n51 they should have the power to disregard or even disestablish precedent as they see fit.

2. Why the Federal Courts Are Actually Common Law Tribunals and Thus Bound by Precedents

Despite the historical parallels between the federal courts and civil law tribunals, it must be borne in mind that civil code rules forbidding courts to rely on precedent were made by the sovereign, the legislature, or some combination thereof, not the courts. n52 Thus, even in civil code jurisdictions, the courts historically lack the power to promulgate such rules on their own. In addition, based on separation of powers, the legislative or legislative-executive origin of these rules necessarily places them beyond the reach of Article III, which is limited solely to "judicial" power. n53

Moreover, history shows that the federal courts are akin to English common law courts. It has always been the duty of the federal courts to "say what the law is." n54 Consistent with this duty, the courts must interpret the Constitution and statutes, filling in gaps when necessary, and then clearly explain the reasons for the decision. n55 Constitutional and statutory interpretations are, therefore, evidence and sources of the law, just as in English common law. n56

Furthermore, it is clear from the statements of the founding fathers and their contemporaries that America adopted the English common law model so that both the doctrine of precedents and published reports would constrain the decision-making of federal judges. n57 The history of federal law, therefore, is inextricably intertwined with reliance on precedents as Judge Arnold correctly concluded. As such, the federal courts historically do not have the power to disregard or disestablish precedents.

Even though there is no historical basis within the Article III "judicial" power for permitting the courts of appeals to deny precedential effect to a case, other sources of "judicial" power exist that could provide the necessary foundation: the inherent and statutory rulemaking powers of the federal courts. The next section explores these powers and explains why neither permits the courts to regulate precedent by issuing non-precedential opinions.

B. Neither Inherent Nor Statutory Rulemaking Power Enable the Federal Courts to Regulate Precedent

The federal courts are empowered to make rules governing various aspects of their business. Thus, the Article III "judicial" power to create non-precedential opinions could possibly be found within the rulemaking authority of the courts. The following sections explore the inherent and statutory rulemaking powers of the courts. Subsection 1 concludes that the courts lack inherent power to establish rules regulating substantive law, which is the function of the rules at issue. Subsection 2 explains that the courts cannot promulgate rules pursuant to statutory rulemaking authority, which deny precedential effect to an opinion because such rules abridge the right to due process.

1. Inherent Rulemaking Power

Courts inherently possess certain powers, such as the power to punish for contempt and to control attorney discipline and admission to practice, which are independent of the legislative sphere. n58 Whether rulemaking is within the scope of this power or it is the domain of the legislature, however, is a matter of debate. n59

Several commentators believed, as did Deans Pound and Wigmore, that the courts, not the legislature, should promulgate rules governing judicial practice and procedure. n60 These scholars argue that the courts are simply more responsive to matters of judicial administration than the legislature. n61

Others suggest that, because rules of practice and procedure involve policy considerations, elected officials, rather than permanent judicial appointees, are better situated to make such decisions. n62 In fact, the consensus in the literature is that there should be legislative involvement in judicial rulemaking. n63 It is, therefore, at least questionable whether rulemaking is one of the inherent powers circumscribed by Article III "judicial" power. Moreover, because the appellate court rules deny precedential status to decided cases, they extend beyond simple matters of administration and practice and into the realm of substantive law. n64 This was Judge Arnold's concern in *Anastasoff*: that the rules encroached on the legislative sphere. n65 Thus, even if the appellate courts do have inherent rulemaking authority under Article III, the rules exceed the scope of any such power because they regulate more than practice and procedure; they regulate the substantive law, which is the function of the legislature. n66

2. Statutory Rulemaking Power

Congress enacted a quasi-legislative procedure that enables the federal courts to develop rules, like the rules at issue, for the purpose of regulating judicial administration, practices and procedures. n67 Because the appellate court rules were enacted to promote judicial economy, n68 they appear to fall within the ambit of 28 U.S.C. 2071, which

permits appellate courts to "prescribe rules for the conduct of their business." n69

Rules under 2071 "shall not abridge, enlarge or modify any substantive right." n70 Despite this provision, the courts generally presume that rules promulgated according to this statutory process are valid. n71 Not surprisingly, "substantive right" challenges to federal court rules have not met with much success. n72 Similarly, challenges to appellate court rules on unpublished, non-precedential decisions on the grounds that such rules offend "substantive rights" of due process or freedom of speech have not been well received by the courts. n73

The fact that past challenges have been unsuccessful emphasizes the problem with this rulemaking scheme - the courts themselves create the very rules whose validity they are later called on to decide. n74 Some commentators have suggested that, despite prior "substantive right" defeats, this dual role of rulemaking and rule-applying nevertheless offends due process because the courts are not disinterested in the outcome of the case. n75 In other words, the entire statutory rulemaking scheme is arguably structurally offensive to due process because the courts must sit in judgment of themselves. n76

Despite the lack of success in past challenges to court-made rules on due process grounds, the appellate court rules on unpublished non-precedential opinions present a different, stronger case because the procedural offenses to due process caused by these rules exacerbate the structural-abridgement defect inherent in the statutory framework. n77 Those rules having a no-citation provision offend due process because they procedurally interfere with a party's right to be heard. n78 The critical provision, that unpublished cases are not precedent, pushes the rules over the constitutional line because it effectively prevents a party from presenting a possible defense. n79 Because the rules both structurally and procedurally abridge the substantive right to due process, there is little question that they are unconstitutional exercises of statutory rulemaking authority and a challenge to the rules on these grounds should, therefore, succeed in a truly "neutral" court. n80

As sections A and B of this Part demonstrate, the Article III "judicial" power set forth by the Framers does not encompass any historical or rulemaking authority that permits the federal appellate courts to author non-precedential opinions. One further reason exists as to why the courts do not possess the power to regulate precedent in this manner: stare decisis. Contrary to Judge Arnold's suggestion in *Anastasoff*, stare decisis is more than a "blank check" on judicial excess, but rather, a critical element in the public's social contract with the government and, therefore, a constitutional limitation on Article III "judicial" power.

C. Stare Decisis: A Blank Check on the Judiciary?

In the *Anastasoff* opinion, Judge Arnold suggested that adherence to precedents derived "from the nature of judicial power," and for that reason would serve to "limit the judicial power delegated to the courts by Article III of the Constitution." n81 This is another way of saying that adherence to precedents, or stare decisis, is an internal judicial check on judicial overreach. Stare decisis cannot be an internal check, however, because it gives rise to a reliance interest on the part of the public in the state of the law, and thus creates an external check on the judiciary. n82 Subsection 1 that follows explains the reliance interest. Subsection 2 describes how the reliance interest creates an external, rather than an internal or "blank," check on the judiciary, thus creating a limit on the ability of the courts to regulate precedent.

1. The Reliance Interest

Stare decisis serves several policy functions, primarily creating stability, certainty, predictability, consistency and accountability in the law and its practice. n83 These functions address the concerns of the public in maintaining an orderly judicial process and in allowing the people to "trade and arrange their affairs with confidence." n84 In other words, stare decisis protects the public's "reasonable expectations" of how the law will apply in the future. n85 Some authorities have also argued that "stability, certainty, and predictability are prerequisites to the consent of the public to be governed by law, including judge-made law." n86 This means that, in exchange for its consent to be governed by the rule of law, the public requires from the courts protection of its social interests. If the rule of law is seen, then, as a "social contract" between the people and the judiciary, stare decisis is the public's reliance interest in proper judicial administration. n87

2. A Blank Check?

Accepting the notion that stare decisis is a reliance interest in judicial decision-making, it is clear that stare decisis cannot be an internal self-limiting restraint or "blank check" on the judiciary. Rather, because the locus of the reliance is in the public, the check must be external to the judiciary. This makes sense because, under the separation of powers doctrine, one would expect that checks against excess by one branch of government would either be located within another coordinate branch or, as in this case, in the hands of the people. n88

Because stare decisis is an external check on the judiciary and is the public's consideration in its social contract with the government to be subject to the rule of law, the power to create a rule denying precedential status to a decided case cannot lie within Article III. n89 Otherwise, the federal courts would be free to disregard precedent without reason, thus usurping legislative power and causing instability, uncertainty, and unpredictability in the creation and administration of the law.

V. A Modest Proposal

Despite the invalidity of the rules in their current form, it is clear that the proliferation of appellate opinions is having an adverse impact on judicial economy and efficiency, and for this reason, some rules on limited publication are necessary. It is also clear that not all decisions require a complete exposition of the facts, the law on which the court relies, and the court's holding. With these concerns in mind, I offer the following Model Rule and commentary.

A. Model Rule on Limited Publication

1. Each panel of the court, by unanimous vote, shall determine whether an opinion is to be published in a printed report.
2. Opinions deemed not for publication in a printed report shall be made available to the public by posting them to an Internet website maintained by each circuit for this purpose.
3. Opinions deemed not for publication shall consist of a syllabus, which sets forth the names of the parties, the procedural posture of the case, the operative facts, and the holding of the panel, including any relevant legal authority on which the holding relies.
4. Within [a number to be established by each court] days from the posting of the opinion to the website, any interested party may request, upon a showing of good cause, a more complete opinion to be issued by the deciding panel.
5. Upon granting such a request, the deciding panel shall issue a per curiam opinion more fully explaining the panel's reasoning, and the opinion shall be made available for publication in a printed report.
6. All opinions of the court shall be binding precedent.

B. Commentary on the Model Rule

The principle behind the Model Rule is that all opinions of a court are binding precedent and the public should have access to every opinion. The Rule recognizes, however, the impact that a requirement for publication of a complete opinion in every case would have on the courts. The Rule, thus, offers a compromise by permitting selective publication of only those opinions deemed worthy of a complete explanation, while enabling the public to have access to all opinions.

1. The requirement for a unanimous panel vote is adopted from the procedure currently in place in several circuits. n90 A unanimous vote is preferred to a simple majority vote or leaving the decision to the judge responsible for writing the opinion because it more adequately ensures that only those cases truly unworthy of a complete opinion will be posted to the website pursuant to Part 2 of this Rule. n91
2. The requirement that opinions not deemed for publication be posted to a dedicated website provides reasonable access to unprinted opinions, given the technological advances of the past decade and the widespread availability of Internet service throughout the country. This requirement also facilitates online searching and reduces the number of opinions that will be placed in published reports, thereby decreasing the physical space needed to house them. n92 In addition, the posting of opinions to the website rather than a printed report signifies to the public that the court does not believe the opinion to be a significant contribution to the existing law. n93
3. The syllabus requirement ensures that the minimum necessary information about the case is made available to the public and to a reviewing court. n94 The requirement also facilitates searching and reasonably informs the public as to the relative importance of the decision, so that an informed request for a more complete opinion pursuant to Part 4 of this Rule may be made.
4. The request provision is adopted from the current rules in several circuits. n95 This provision serves two purposes. First, it allows the public to decide which cases it believes are meritorious of a complete written opinion, and also allows the court to decide whether the request is for good cause. Second, it reduces the volume of printed opinions by eliminating those cases for which no request has been made or granted.

5. The requirement for publication of a per curiam opinion upon granting a request also serves two purposes. First, it requires the deciding panel to more fully explain its reasoning, so that the public is better informed as to the law of that circuit. Second, a more complete explanation creates more public confidence in the adjudication. The requirement thus serves the interest of the courts in reducing workload and the interest of the public in obtaining as complete an explanation as is reasonably necessary. n96

6. The requirement that all opinions be binding precedent avoids the concerns over the power of the court to decide which opinions it issues will be precedential, the creation of a "secret" body of law, and unfair advantage to institutional litigants. n97 It also keeps firmly in place the limiting constraints of stare decisis. n98

VI. Conclusion

The current federal appellate court rules denying precedential status to unpublished opinions are unconstitutional. Nevertheless, the courts should have some recourse to reduce the number of published opinions required by the disposition of an ever-increasing number of cases. The proposed Model Rule overcomes the problems associated with non-precedential opinions and balances the interest of the courts in reducing the number of published opinions with the public's interest in stability, certainty, and predictability in the law.

FOOTNOTES:

n1. Alexis De Tocqueville, *Democracy in America* 276 (Phillips Bradley ed., Alfred A. Knopf 1987) (1835).

n2. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 *J. App. Prac. & Process* 219, 226 (1999).

n3. *Anastasoff v. United States*, 223 F.3d 898, vacated as moot on reh'g en banc, 235 F.3d 1054 (8th Cir. 2000).

n4. *Anastasoff*, 223 F.3d at 900.

n5. *Anastasoff*, 235 F.3d at 1056.

n6. See Temp. Emer. Ct. App. R. 21(j); Fed. Cir. R. 47.6(b); D.C. Cir. R. 28(c); 1st Cir. R. 36; 2d Cir. R. 0.23; 3d Cir. I.O.P. 5.3; 4th Cir. R. 36(b)-36(c); 5th Cir. R. 47.5.3-.4; 6th Cir. R. 28(g); 7th Cir. R. 53; 8th Cir. R. 28A(i); 9th Cir. R. 36-3; 10th Cir. R. 36.3; 11th Cir. R. 36-3.

n7. Indeed, the opinion already has caused one such challenge. See *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001). *Hart* is addressed infra Parts III and IV.

n8. See *Browder v. Director*, 434 U.S. 257, 258-59 n.1 (1978) (leaving the validity of the Seventh Circuit's unpublished opinion rule "to another day").

n9. See George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 *Mercer L. Rev.* 477, 477-78 (1988). For a complete history of the appellate rules on unpublished opinions, see William M. Reynolds & William M. Richman, *The Non-Precedential Precedent - Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 *Colum. L. Rev.* 1167, 1168-72 (1978).

n10. Joseph Story, *Address*, in 1 *Am. Jurist* 1, 31 (1829).

n11. See John B. Winslow, *The Courts and the Papermills*, 10 *Ill. L. Rev.* 157, 158 (1915); see also John J. O'Connell, *A Dissertation on Judicial Opinions*, 23 *Temp. L.Q.* 13, 14-15 (1949). Judge O'Connell, seemingly less troubled with the impact of proliferation on judges than on litigants, remarked:

Of much greater importance to me is the distinct possibility that, every day, individuals with meritorious claims and defenses are failing to establish their legal rights purely because the sheer volume of reference material has provided sanctuary for the elusive controlling case or has so beclouded the issue as to confuse.

O'Connell, *supra*, at 14.

n12. Admin. Office of the U.S. Courts, 1964 Annual Report. 11 (1964). Curiously, the courts have paid little to no attention to the other suggestion made by the Judicial Conference in the 1964 report - that judges make a conscious effort to reduce the length of the opinions they write. See *id.*

n13. Reynolds & Richman, *supra* note 9, at 1170.

n14. Donna Stienstra, Fed. Judicial Ctr., Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals 2 (1985).

n15. *Id.* at 3.

n16. *Id.*

n17. *Id.* at 2-3. The report suggested that a rule permitting citation of unpublished opinions would favor litigants having abundant search resources or institutional litigants such as the U.S. Government, who have their own records of unpublished dispositions. Conversely, a no-citation rule would create a "hidden" body of law unknown to most practitioners. *Id.* at 3. The latter notion, however, has not been well received. See, e.g., *Anastasoff v. United States*, 223 F.3d 898, 904 (8th Cir. 2000) ("Unpublished' ... has never meant 'secret'").

n18. Stienstra, *supra* note 14, at 4. Apparently, the experimentation continues. See Admin. Office of the U.S. Courts, Long Range Plan for the Federal Courts 69 (1995).

n19. Compare 8th Cir. R. 28A(i) ("Unpublished opinions are not precedent and parties generally should not cite them.") with 6th Cir. R. 28(g) ("Citation of unpublished decisions ... is disfavored" but if a party believes that "an unpublished disposition has precedential value in relation to a material issue in a case," it may be cited provided certain requirements are fulfilled.) and Fed. Cir. R. 47.6(c) ("Within 60 days after any nonprecedential opinion or order is issued, any person may request ... that the opinion or order be reissued as precedential.").

n20. Judith A. McKenna et al., Fed. Judicial Ctr., Case Management Procedures in the Federal Courts of Appeals 21 (2000). The FJC's statistics show a general upward trend in most circuits in the annual number of unpublished dispositions. In some circuits, the trend is rather alarming. The Fourth Circuit, for example, went from a low of eighty-one percent unpublished in 1987 to a high of eighty-nine percent in 1998. *Id.*

n21. See Statute Div., Admin. Office of the U.S. Courts, 1999 Annual Report of the Director 16 (1999).

n22. Judge Arnold's decision earned him the immediate wrath of Judge Kozinski, who labeled the opinion "total nonsense," and said that "as a matter of constitutional doctrine, it's hogwash." *Swift En Banc Review Expected of Case Treating Unpublished Opinions as Precedent*, 69 U.S. L. Wk. 2227 (2000). Other colleagues were already on record as supporting the rules. See, e.g., Hon. Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 Ohio St. L.J. 177, 196 (1999) (Chief Judge of the Sixth Circuit) ("If judges are producing pseudo-published opinions... it will not save us any time if those opinions are being cited back to us. We will have to prepare unpublished opinions as we do published opinions - as if they were creating precedent.").

n23. *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000).

n24. *Id.*

n25. *Id.*

n26. *Id.*

n27. *Christie v. United States*, No. 91-2375MN, 1992 U.S. App. LEXIS 38446 (8th Cir. Mar. 20, 1992) (*per curiam*).

n28. Anastasoff, 223 F.3d at 899.

n29. Id.

n30. Id. at 903.

n31. Id.

n32. Id.

n33. Id.

n34. William Seagle, *The History of Law* 277-98 (Tudor Publishing ed., 1946).

n35. This position is at odds with that of Judge Kozinski in *Hart*. See *Hart v. Massanari*, 266 F.3d 1155, 1160-61 (9th Cir. 2001) (arguing that many established judicial practices lack a constitutional foundation and that the term "judicial power" as used in Article III is merely descriptive, not proscriptive). Judge Kozinski's argument, however, does not square with the notion of a government of limited and defined powers, which includes the judiciary.

n36. Seagle, *supra* note 34, at 278-79; see also Henry Campbell Black, *Handbook on the Law of Judicial Precedents* 21 (1912).

n37. Black, *supra* note 36, at 15, 20; see also George W. Keeton, *The Elementary Principles of Jurisprudence* 66 (1930) ("The idea ... being ... that the code should be the sole authoritative source of the law.").

n38. Black, *supra* note 36, at 20.

n39. Seagle, *supra* note 34, at 278-79.

n40. Id. at 283.

n41. Id. at 286-87.

n42. Id. at 288-89. Seagle admits, however, that even in civil code jurisdictions, precedents are relied upon to a certain extent and that the codes are often amended to fill gaps. Id. at 297.

n43. Id. at 295.

n44. Black, *supra* note 36, at 25.

n45. Id. at 24.

n46. Id.; see also 1 William Blackstone, *Commentaries* 71-72 (noting that regular publication of reports or "Year Books" began during the reign of King Edward II).

n47. Black, *supra* note 36, at 25. But see *Hart v. Massanari*, 266 F.3d 1155, 1163-64 (9th Cir. 2001) (Judge Kozinski suggesting that opinions were viewed as evidence and not sources of law). The authorities on which Judge Kozinski relies, however, simply note that opinions stating what the law is may later be distinguished. See *id.*

n48. Helen Silving, *Sources of Law* 156 (1968).

n49. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). But see *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 469 (1942) (Jackson, J., concurring). Justice Jackson noted that although the federal courts do not have common law,

this is not to say that wherever we have occasion to decide a federal question which cannot be answered from

federal statutes alone we may not resort to all of the source materials of the common law, or that when we have fashioned an answer it does not become part of the federal non-statutory or common law.

Id.

n50. See *D'Oench, Duhme, & Co.*, 315 U.S. at 469 (Jackson, J., concurring) ("Many subjects... in the traditional common law are ordinarily within the province of the states and not of the federal government."). Torts are the typical example of a state common law subject.

n51. See *Seagle*, supra note 34, at 296 ("Codes of civil and criminal procedure as well as criminal codes are a commonplace of the judicial system.").

n52. See *Black*, supra note 36, at 20 (explaining that Justinian reserved the right of interpreting and expounding the law to himself, not the courts); see also *Seagle*, supra note 34, at 283-87 (noting that the creation of the Code Civil involved various lawmakers, legislative bodies, and even Napoleon).

n53. U.S. Const. art. III, 1.

n54. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

n55. See *Gene R. Shreve & Peter Raven-Hansen, Understanding Civil Procedure* 183 (2d ed. 1994). Professors Shreve and Raven-Hansen also note that this "gap-filling" function may be deliberately delegated to the courts by the legislature. *Id.* Other commentators have suggested that the courts must necessarily fill in gaps because the legislature leaves "thorny" problems for them to decide. Robert A. Leflar, *Sources of Judge-Made Law*, 24 *Okla. L. Rev.* 319, 331 (1971).

n56. *Black*, supra note 36, at 25.

n57. See *The Federalist No. 78*, at 439 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton argued that "to avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every case that comes before them" *Id.* Hamilton also thought that the voluminous published case reports would necessarily require the permanent appointment of judges, so that they could devote "long and laborious study to acquire a competent knowledge of them," which is further evidence that the Framers intended federal judges to rely on precedents. *Id.* See also William Cranch, preface to 1 Cranch (1804), at iii-iv. Cranch, an Assistant Judge of the Circuit Court of the District of Columbia, was also one of the first Americans to publish case reports. Explaining the relationship between published reports and their constraint on judicial decisions, he noted that:

In a government which is emphatically stiled [sic] a government of laws, the least possible range ought to be left for the discretion of the judge. Whatever tends to render the laws certain, equally tends to limit that discretion; and perhaps nothing conduces more to that object than the publication of reports.

Id. at iii. But see *Hart v. Massanari*, 266 F.3d 1155, 1163-70 (9th Cir. 2001) (Judge Kozinski arguing that the Framers did not view precedent as binding based on certain English court practices and the questionable quality of published reports). To refute Judge Arnold's point, Judge Kozinski draws upon statements by English luminaries such as Hale, Coke, Mansfield, and Blackstone for the proposition that the Framers did not view precedent as binding. *Id.* at 1165-66. Strangely, Judge Kozinski did not cite any statements by the Framers supporting that proposition, nor did he explain away the significance of the above-noted quote by Hamilton.

n58. See *Mistretta v. United States*, 488 U.S. 361, 390 n.16 (1989) (recognizing inherent Article III authority over certain subjects, such as contempt, issuance of search warrants, grand juries, and appointment of private attorneys); see also Felix F. Stumpf, *Inherent Powers of the Court: Sword and Shield of the Judiciary* 8 (1994); and Arthur T. Vanderbilt, *The Doctrine of the Separation of Powers and Its Present Day Significance* 103-04 (1953) (both citing court power over admission to practice and attorney discipline).

n59. Charles W. Grau, *Judicial Rulemaking: Administration, Access and Accountability* 7-17 (1978); see also Stumpf, *supra* note 58, at 17.

n60. Vanderbilt, *supra* note 58, at 108; see also Grau, *supra* note 59, at 8 (noting Pound's belief that the authority for judicial rulemaking has its roots in English common law courts). But see Grau, *supra* note 59, at 10 ("It must be remembered that in England the government was one of fused and not divided powers.") (citation omitted).

n61. Grau, *supra* note 59, at 11.

n62. *Id.* at 12, 14.

n63. *Id.* at 14.

n64. See Black, *supra* note 36, at 6 (noting that judicial decisions are "evidence" of the law); O'Connell, *supra* note 11, at 18 (same). Professor Leflar also suggests that decided cases are part of the substantive law because their principal function is "to establish the law itself, to determine what the content of the law shall be." Leflar, *supra* note 55, at 319.

n65. See *Anastasoff v. United States*, 223 F.3d 898, 903 (8th Cir. 2000) ("The duty of courts to follow their prior decisions was understood to derive from the nature of the judicial power itself and to separate it from a dangerous union with legislative power.").

n66. See U.S. Const. art. II, 1.

n67. 28 U.S.C. 2071-2074 (1994 & Supp. IV 1999). For a complete explanation of the rulemaking process, see Donna J. Pugh et al., *Judicial Rulemaking: A Compendium* 259-63 (1984); see also Shreve & Raven-Hansen, *supra* note 55, at 7-9. This statutory rulemaking authority, although technically not an Article III power, has nonetheless been treated in this Note as an Article III power because the statute gives the judiciary the first and last word on the constitutionality of rules enacted pursuant to the statute. Thus, for all intents and purposes, it is an Article III power rubber-stamped by Congress.

n68. See *supra* Part I.

n69. 28 U.S.C. 2071.

n70. *Id.* 2072(b). This is because 2071(a) states that rules developed under 2071 "shall be consistent with ... rules of practice and procedure prescribed under section 2072" *Id.* 2071(a).

n71. See *Hanna v. Plumer*, 380 U.S. 460, 471 (1965). The Supreme Court said a challenger would be hard-pressed to show that a rule of procedure is invalid because that would mean the Court, the Advisory Committee, and Congress "erred in their prima facie judgment that the Rule ... transgresses neither the terms of the Enabling Act nor constitutional restrictions." *Id.* Although this dicta is not entirely apposite to the situation here because the appellate rules in question are not rules of procedure, i.e. part of the Federal Rules of Civil or Criminal Procedure, and were not subjected to the same congressional oversight, the Court's admonition suggests that a challenge to any rule promulgated under 2071-2073 faces an uphill battle.

n72. Shreve & Raven-Hansen, *supra* note 55, at 173 n.45.

n73. See *Jones v. Superintendent*, 465 F.2d 1091, 1094 (1972) (holding, without explanation, that the Fourth Circuit rule on unpublished dispositions did not offend due process); see also David Dunn, Note, *Unreported Decisions in the United States Courts of Appeals*, 63 Cornell L. Rev. 128, 142-43 (1977) (discussing *Do Right Auto Sales v. United States Court of Appeals for the Seventh Circuit*, 429 U.S. 917 (1976), in which the Court refused to hear petitioner's challenge to the Seventh Circuit's rule on unpublished decisions on the grounds that it amounted to a prior restraint on speech in violation of the First Amendment). In *Schmier v. Supreme Court*, 93 Cal. Rptr. 2d 580 (Ct. App.), cert. denied, 121 S.Ct. 382 (2000), the Court denied

certiorari in a challenge to California state court rules on unpublished decisions, which are similar to those of the Ninth Circuit. Petitioner, a California attorney, sued the California Supreme Court on behalf of unnamed litigants who had been denied the chance to cite unpublished opinions. The California Court of Appeals affirmed the trial court's dismissal of the case, holding that petitioner lacked standing. The court nonetheless addressed the unpublished opinion rule and concluded that it was not only valid under California's constitution, but an administrative necessity. The court's open hostility to the challenge lends support to the conclusion, *supra* note 70, that the courts are unlikely to find any rules of their own making invalid.

n74. Grau, *supra* note 59, at 12. It also raises the collateral issue of accountability. An unpublished opinion is not reviewable by scholars or other legal consumers, thus removing important checks on judicial caprice. See Reynolds & Richman, *supra* note 9, at 1202-04. But see Gilbert S. Merritt, *The Decision Making Process in Federal Courts of Appeals*, 51 Ohio St. L.J. 1385, 1393 (1990) (former Chief Judge of the Sixth Circuit dismissing the lack of accountability argument on the basis that many unpublished opinions are available online, through services such as Westlaw and LEXIS).

n75. Grau, *supra* note 59, at 12.

n76. See *id.*

n77. See *id.* (suggesting that procedurally offensive rules are inevitable because "procedure and substance are inextricably intertwined").

n78. Dunn, *supra* note 73, at 145. Dunn makes a number of arguments that unpublished decisions generally, and non-citation rules specifically, violate due process. *Id.* at 143-45. But see Reynolds & Richman, *supra* note 9, at 1199 n.158 ("We do not find [these arguments] terribly persuasive.").

n79. See Dunn, *supra* note 73, at 145 (determining that due process includes "the opportunity to present 'every available defense'" (citation omitted)).

n80. Even Judge Kozinski would appear to agree with this point. See *Hart v. Massanari*, 266 F.3d 1155, 1161 n.4 (9th Cir. 2001) (admitting that due process is a constraint on the exercise of judicial power). If due process is an explicit constraint on the exercise of judicial power and the rules at issue deny due process, they are manifestly unconstitutional.

n81. *Anastasoff v. United States*, 223 F.3d 898, 900 (8th Cir. 2000).

n82. The Supreme Court has referred to this interest as "reasonable expectations." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). At least one commentator has labeled it the "ideal of protected expectations." Ronald Dworkin, *Law's Empire* 117 (1986). The author prefers the term "reliance interest" to "protected" or "reasonable expectations" because of its connotations to contract law, a subject familiar to most practitioners, and to the idea that *stare decisis* is part of a "social contract" between the public and the judiciary.

n83. *State Oil v. Khan*, 522 U.S. 3, 20 (1997); 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, 777-81 (1995); George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 Mercer L. Rev. 477, 485-86 (1988).

n84. William O. Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949).

n85. *Helvering*, 309 U.S. at 119.

n86. Dragich, *supra* note 83, at 777.

n87. The Supreme Court has suggested that *stare decisis* reliance is at its highest when contracts are involved. See, e.g., *Khan*, 522 U.S. at 20 (citation omitted). Although the "contract" referred to in this Note is not what the Court

had in mind, the principle of reliance is the same.

n88. See *The Federalist* No. 51, at 290 (James Madison) (Clinton Rossiter ed., 1961). Madison rather poetically summarized the concept of external checks as a necessity to controlling government:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

Id. (emphasis added).

n89. There is a significant distinction between deviating from precedent and denying precedential effect. The Supreme Court has repeatedly said that *stare decisis* is not an "inexorable command." E.g., *Khan*, 522 U.S. at 20 (citation omitted). But deviation from precedent is not undertaken lightly by courts and is ordinarily accompanied by a lengthy explanation of the reasons for a change in the approach to the law. See, e.g., *id.* at 20-22. Conversely, when a court issues a non-precedential opinion, it says little more than that the court may later, without reason, come to a different conclusion on the same operative facts.

n90. See, e.g., 1st Cir. R. 36(B); 2d Cir. R. 0.23.

n91. See Robert A. Leflar, *Internal Operating Procedures of Appellate Courts* 58 (1976) (noting that leaving the decision to individual judges has not worked well).

n92. See Dragich, *supra* note 83, at 774-75 (suggesting that technological advances now make online searching easier and faster, and that online databases reduce the physical space needed to house reporters).

n93. See Paul D. Carrington et al., *Justice on Appeal* 40 (1976) (suggesting that separating noteworthy from non-noteworthy opinions "symbolizes their fleeting significance").

n94. See William M. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. Chi. L. Rev. 573, 601, 626-27 (1981); Carrington et al., *supra* note 93, at 34-35.

n95. See, e.g., Fed. Cir. R. 47.6(c); 1st Cir. R. 36(D).

n96. See Carrington et al., *supra* note 93, at 33.

n97. See Stienstra, *supra* note 14, at 2-3 (noting that an unfair advantage is created for certain litigants when there is unequal of access to unpublished opinions).

n98. See Reynolds & Richman, *supra* note 94, at 581 (noting the restraint that *stare decisis* places on judicial responsibility).

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