

CITABILITY AND THE NATURE OF PRECEDENT IN THE COURTS OF APPEALS:

A RESPONSE TO DEAN ROBEL

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INTRODUCTION

Unpublished opinions have become such a fixture of the appellate landscape that it is hard to recall that, in their present form, they date back only a quarter century.¹ From October 1, 1999 to September 30, 2000, the federal courts of appeals resolved 79.8% of their merits determinations by unpublished opinion,² while unpublished opinions in the state courts numbered in the tens of thousands.³ The use of unpublished, non-precedential opinions commands the support of a substantial number of federal appellate judges,⁴ and its use without complaint by state judges suggests at least passive acceptance in those courts as

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1. See generally Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 207-08 (2001) (describing the historical origins of the federal appellate courts' rules for unpublished opinions).

2. See ADMINISTRATIVE OFFICE OF UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2000 ANNUAL REPORT OF THE DIRECTOR, at tbl.S-3, available at <http://www.uscourts.gov/judbus2000/tables/s03sep00.pdf> (on file with the Indiana Law Review).

3. The Ohio Court of Appeals alone issued well over 5000 unpublished opinions between October 1, 1999, and September 30, 2000, while the unpublished opinions of the Texas Court of Appeals numbered over 6000. To determine these figures, I conducted searches on Westlaw using terms and connectors. The following search in the Ohio state cases database yielded 5886 results: rule 2 /s "unpublished opinions" & da(aft 9/30/1999) & da(bef 10/1/2000). The following search in the Texas state cases database yielded 6393 results: "not designated for publication" /p "unpublished opinions" & da(aft 9/30/1999) & da(bef 10/1/2000). Each search was tailored to capture text that Westlaw included in the headings of unpublished opinions for the respective courts. While I did not check every case found in each search, spot checks of over 100 cases in each database did not reveal a single published opinion.

4. See Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1494-95 (1995) (book review); Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This!*, CAL. LAW., June 2000, at 43; Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177 (1999); Diana Gribbon Motz, *A Federal Judge's View of Richard A. Posner's The Federal Courts: Challenge and Reform*, 73 NOTRE DAME L. REV. 1029, 1037-38 (1998) (book review); Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909 (1986). But see Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219 (1999) (criticizing the court rules authorizing non-precedential opinions).

well. However, criticism of the practice of issuing non-precedential, unpublished opinions emerged shortly after the practice began⁵ and has swelled periodically in the years since. The wave of criticism recently crested again with the Eighth Circuit's decision in *Anastasoff v. United States*,⁶ in which the panel, in an opinion by Judge Richard Arnold, held that the court's rule declaring unpublished opinions non-precedential violated Article III's definition of the "judicial power."⁷ Dean Lauren Robel, who has previously criticized the use of unpublished opinions as giving an unfair advantage to repeat players in the court system,⁸ now adds a new and powerful critique to the voices calling for reform of the use of unpublished opinions.⁹

Strictly speaking, the dispute is not about unpublished opinions *per se*—even Judge Arnold's decision in *Anastasoff* does not contend that an appellate court must publish in an official reporter every decision it renders.¹⁰ Nor is the dispute about the accessibility of unpublished opinions, at least those of the federal courts. Currently, the unpublished opinions of all but three circuits are available through Lexis and Westlaw; they are "unpublished" in the sense that they do not appear in West's Federal Reporter, but are nonetheless readily available to the legal community.¹¹ Rather, the controversy over unpublished opinions presently concerns the limited degree to which such opinions can be cited as precedent. Dean Robel argues convincingly that the power to define what constitutes precedent does not reside entirely in the hands of the judges who produce particular opinions but rather extends to those in the legal community, lawyers and judges both, who appear to derive value even from those opinions that have been labeled non-precedential.¹² However, her argument ultimately fails to give sufficient weight to the appellate courts' need to exercise some control over the circumstances in which they exercise their lawmaking role—a need that serves one of the principal bases for Judge Kozinski's defense of the Ninth Circuit's

5. See, e.g., William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1189-1206 (1978).

6. 223 F.3d 898 (8th Cir.), *vacated as moot en banc*, 235 F.3d 1054 (8th Cir. 2000).

7. *Id.* at 905.

8. See Lauren Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 946 (1989).

9. See Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399 (2002).

10. *Anastasoff*, 223 F.3d at 904-05.

11. All the circuits but the Third, Fifth, and Eleventh routinely publish their "unpublished" opinions through Lexis and Westlaw. See Robel, *supra* note 9, at 401 n.9; see also Hannon, *supra* note 1, at 210-13. Professor Hannon did find sixty-three unpublished text opinions from the Third, Fifth, and Eleventh Circuits in Westlaw's database. Given that Prof. Hannon found over 100,000 unpublished dispositions without textual opinion from the three circuits in Westlaw, the sixty-three cases can only be viewed as aberrations. See *id.* at 211 & n.59.

12. Robel, *supra* note 9, at 404-09.

non-citability rule in the recent case of *Hart v. Massanari*.¹³ As a result, while I agree that the no-citation rules currently in place ought to be reconsidered, I differ as to the form that the reconsideration should take.

In Part I of this essay, I briefly consider the historical arguments for and against the appellate courts' power to issue non-precedential opinions, focusing on Judge Arnold's now-vacated opinion in *Anastasoff* and Judge Kozinski's opinion in *Hart*. I conclude that, while Judge Arnold goes too far in arguing that current non-citation rules violate Article III's conception of the "judicial power," Judge Kozinski's argument that the courts of appeals are entirely free to designate some of their opinions as non-precedential equally seems to push the boundaries of judicial propriety, if not of constitutional principle. In Part II, I consider Dean Robel's argument that the no-citation rules in the federal and state courts of appeals should be abolished. While I agree with Dean Robel's contention that unpublished opinions should be freely citable, I take issue with her implicit assertion, following the spirit if not the letter of *Anastasoff*, that these opinions should be treated as binding precedent. Finally, in Part III I note that, while the limits on availability and citability of unpublished opinions in the federal courts stand as obstacles to a productive and proper use of unpublished opinions, the rules in the state courts present even greater problems. I end by suggesting that state governments should rethink the rules that limit the availability and citability of unpublished opinions emanating from the state intermediate courts of appeals.

I. THE POWER TO DEFINE PRECEDENT

Judge Arnold's conclusion in *Anastasoff*¹⁴ that treating unpublished opinions as non-precedential was unconstitutional relied principally on an originalist interpretation of the "judicial power" identified, but not defined, by Article III.¹⁵ Because the debates in Philadelphia were silent on the role of precedent in defining the judicial power, and because the *Federalist* papers referred to the question only obliquely,¹⁶ Judge Arnold was forced to look to other sources on

13. 266 F.3d 1155, 1180 (9th Cir. 2001).

14. *Anastasoff*, 223 F.3d at 905.

15. Section 1 of Article III identifies the courts in which "[t]he judicial power of the United States, shall be vested," and Section 2 describes the categories of cases to which "[t]he judicial power shall extend." U.S. CONST. art. III, §§ 1, 2. Neither section offers any further description or definition of the judicial power, nor does any other article or amendment to the Constitution.

16. In THE FEDERALIST No. 78, Alexander Hamilton wrote of judges: "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 particular case that comes before them." THE FEDERALIST No. 78, at 527 (Alexander Hamilton) (Van Doren ed. 1979). This passage, however, is not part of any detailed description of the nature of judicial power; instead, it forms part of Hamilton's argument in favor of life tenure for judges. The need to master a large body of precedent, Hamilton argued, required substantial ability, education, and experience, which few would possess, and even fewer would simultaneously have sufficient integrity. Life tenure,

the nature of judging that the founding generation regarded with respect, including the writings of Sir Edward Coke and the *Commentaries* of Sir William Blackstone.¹⁷ These authorities, Judge Arnold concluded, held that respect for prior court decisions was an essential component of the judicial function, providing the only real bulwark against the exercise of unbridled, and potentially tyrannical, discretion.¹⁸ From this, Judge Arnold concluded that the framers of the Constitution understood the constitutional act of judging to require observance of a fairly rigid rule of horizontal *stare decisis*, in which, once a question of law was decided, subsequent members of the same court would be bound by that decision.¹⁹

Judge Arnold's originalist argument has been challenged by scholars, who contend that the strict adherence to precedent inherent in Judge Arnold's conception of *stare decisis* was a creature of the Nineteenth Century, not the Eighteenth, and that the founding generation had a less developed sense of the meaning of precedent than Judge Arnold suggested.²⁰ Moreover, scholars argue that even the authorities cited by Judge Arnold, including Coke and Blackstone, viewed prior decisions as having at most persuasive effect—a prior decision was evidence of what the law was, but if subsequent judges believed that the prior case was wrongly decided, they were not compelled to follow it.²¹ Judge Kozinski's opinion in *Hart* further undermines *Anastasoff's* historical rationale, arguing that the organization of the courts in both England and the United States and the methods of reporting court decisions remained inchoate until some time after the adoption of the Constitution.²²

Ultimately the principal difficulty with Judge Arnold's historical analysis is that he relied on it too heavily. Judge Arnold concedes toward the end of the *Anastasoff* opinion that Article III does not require rigid adherence to *stare decisis*.²³ He instead reads Article III as creating, in effect, a burden of

according to Hamilton, is necessary to persuade those few with the necessary qualifications to give up potentially lucrative private practices. *See id.* In light of this context, Hamilton's comment cannot reasonably be taken as a firm statement that the Constitution requires a strong *stare decisis* rule.

17. *Anastasoff*, 223 F.3d at 900-03.

18. *Id.* at 900.

19. *See id.* at 903.

20. *See* R. Ben Brown, *Judging in the Days of the Early Republic: A Critique of Judge Richard Arnold's Use of History in Anastasoff v. United States*, 3 J. APP. PRAC. & PROCESS 355, 356-60 (2001); Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 749-51 (2001); *Recent Cases: Constitutional Law—Article III Judicial Power—Eighth Circuit Holds That Unpublished Opinions Must Be Accorded Precedential Effect*, 114 HARV. L. REV. 940, 943 (2001) [hereinafter *Recent Cases: Constitutional Law*].

21. *See* Brown, *supra* note 20, at 356-60; Cooper & Berman, *supra* note 20, at 749-51; *Recent Cases: Constitutional Law*, *supra* note 20, at 943.

22. *See* *Hart v. Massanari*, 266 F. 3d 1155, 1168-69 (9th Cir. 2001).

23. *Anastasoff*, 223 F.3d at 904-05.

justification: where a court has previously decided an issue, a judge of the same court must either follow the prior decision or present a reasoned explanation why the prior case should not be followed.²⁴ Yet Judge Arnold relies on this reading, in effect, to constitutionalize the federal appellate courts' practice of treating a panel decision as binding on subsequent panels in the absence of an *en banc* review or other circuit-wide decision to abandon the prior holding.²⁵ Nothing in Article III requires such a rule of horizontal *stare decisis*, and Judge Arnold's historical sources do not compel it; the federal district courts, for example, have long operated on the principle that one district judge is not bound by the prior decisions of another, even within the same judicial district, without any suggestion that in doing so they were operating outside the bounds of the constitutional "judicial power."²⁶ Indeed, the Eighth Circuit's citation rule for unpublished opinions arguably is consistent with Article III as Judge Arnold seems to read the constitutional text: the rule does generally discourage citation of unpublished opinions, but permits a litigant to "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."²⁷ In a situation such as that in *Anastasoff*, where a prior panel resolved a novel legal question in an unpublished opinion that a party subsequently cites in a new and different case, the new panel perhaps should not feel free to disregard the prior decision entirely, as if the prior dispute had never occurred and the past parties had never been bound by the prior panel's determination. But neither, at least in a constitutional sense, must the new panel be bound by the actions of the old. In other words, the new panel properly could have explained the reason for its disagreement and arrived at a contrary conclusion than the prior panel.

If Judge Arnold seems to demand too much of his historical sources to support his conclusion that no-citation and limited-citation rules are unconstitutional, Judge Kozinski arguably demands too much of his own sources to support his argument that no-citation rules face no constitutional obstacle. In countering Judge Arnold's suggestion that at common law all prior decisions were regarded as authority, albeit persuasive, not binding, authority, Judge Kozinski notes that the reporters of judicial opinions in the Eighteenth Century frequently either omitted or reinterpreted cases that they believed to be wrongly decided.²⁸ One can easily distinguish, however, between a third party—a reporter, a commentator, or even a judge of a different court—concluding that a case was wrongly decided and ought not to be followed (or even be considered in a discussion of what the law is) and the issuing judge herself deciding that her opinion, while binding on the parties to the dispute before the judge, ought not to be followed or even considered in subsequent cases. In the former situation,

24. *Id.*

25. *See id.*

26. *See* Salem M. Katsh & Alex V. Chachkes, *Constitutionality of "No-Citation" Rules*, 3 J. APP. PRAC. & PROCESS 287, 288 n.5 (2001).

27. 8TH CIR. R. 28A(i).

28. *See* Hart v. Massanari, 266 F.3d 1155, 1165 (9th Cir. 2001).

the judgment that a case is not good law and ought not to be followed represents a form of collective decision, for even if one reporter, one commentator, or one court concludes that the case ought to be excluded from subsequent discussions of the state of the law, others might reach a different conclusion and reintroduce the case into the body of precedents on which courts rely. In the latter situation, as in the Ninth Circuit rule that Judge Kozinski upholds, the issuing court itself, with no involvement from others, makes the determination *ex ante* about what probative force its decision will have in the future.²⁹

Adopting Judge Kozinski's approach may not necessarily be a non-judicial act in a constitutional sense, but there is nevertheless reason to question its propriety. One of the foundations of the American legal system, inherent in both common and statutory law, is the basic notion that like cases will be treated alike. This principle, embodied in the Equal Protection Clause of the Fourteenth Amendment,³⁰ is seriously threatened when a court has the option of treating a litigant in one case according to one interpretation of the law which the court then declares to be non-precedential and uncitable, and then treats a subsequent litigant in an identical factual setting according to a different interpretation of the law without any explanation of why the result should be different.

The ability to dictate whether or not a particular decision will have any precedential effect opens the door to the appearance (at the very least) of arbitrary decisionmaking: it raises the possibility that a court will decide a particular case for reasons unrelated to legal merit, avoiding any negative future ramifications of its decision by declaring that the case may not be cited in subsequent litigation.³¹ Such a result surely would have seemed strange to members of the founding generation, who were famously suspicious of the arbitrary exercise of power, in whichever branch of government it might occur.

Judge Kozinski's argument would be less troubling if the courts of appeals confined their unpublished, non-precedential opinions to appeals that involved purely factual questions, reviews of discretionary district court decisions, or application of well-established legal rules to familiar factual settings. Yet, whatever the initial drafters of the non-citation rules may have intended, we know from a quarter-century of experience that the courts of appeals do not, in fact, confine their unpublished opinions to such cases. *Anastasoff* itself involved a dispute over the propriety of relying upon a prior Eighth Circuit case that decided a legal question of first impression,³² and it is but one of many such cases.³³

29. *See id.* at 1179.

30. U.S. CONST. amend. XIV, § 1.

31. *See* Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 223 (1999).

32. *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir.), *vacated as moot en banc*, 235 F.3d 1054 (8th Cir. 2000).

33. In the most prominent post-*Anastasoff* example, a panel of the Fifth Circuit chose to ignore an unpublished opinion that had originally resolved a legal question and to reach a contrary conclusion by way of a published opinion. *See Williams v. Dallas Area Rapid Transit*, 256 F.3d

Judge Arnold's position in *Anastasoff* and Judge Kozinski's stance in *Hart* represent opposite poles with respect to the treatment of unpublished opinions: Judge Arnold would insist that unpublished opinions be accorded the same precedential weight as those that appear in the official reports, while Judge Kozinski would permit the courts to render decisions without any precedential effect whatsoever. Neither approach seems fully justified by the historical record on which each judge relies—a historical record that, as Judge Kozinski himself notes,³⁴ reflects judicial structures and methods of case reporting very different from those in place today. Thus, it would seem that determination of the proper role of unpublished opinions in the modern courts of appeals requires consideration of sources above and beyond history.

II. CASELAW AND THE ROLE OF INTERMEDIATE APPELLATE COURTS

Dean Robel abjures the constitutional and historical arguments that occupy Judge Arnold and Judge Kozinski in the *Anastasoff* and *Hart* decisions. Instead, she focuses on the cultural norms that have grown up around the use of judicial opinions. Dean Robel's innovation is to focus not on the value ascribed to unpublished opinions by those courts that issue them, but rather on the role that opinions of a court, both published and unpublished, play in the interpretive community into which those opinions are released.³⁵ Dean Robel notes that the most common consumers of appellate opinions—attorneys who practice before the court, trial court judges who are bound to follow published appellate decisions by rules of vertical *stare decisis*, and even many appellate judges of the courts that have declared unpublished opinions non-precedential—do commonly read at least a substantial portion of the unpublished opinions that the appellate courts render.³⁶ As unpublished opinions tend, as a general matter, to be uninspiring exercises in prose,³⁷ Dean Robel quite reasonably surmises that the consumers of these opinions must derive some other value from them.³⁸ Unpublished opinions, she suggests, are regarded, at least by attorneys and trial court judges, as having at least some predictive value, indicating generally the direction in which the appellate court is heading if not firmly defining the destination that the court will reach.³⁹ In other words, the opinions are regarded as having meaning by their readers, even if the judges who authored the opinions would deny them any meaning. The opinions belong, not solely to their authors, but to the legal community generally. Because the legal community generally regards them as having precedential value, at least in a loose sense, the appellate

260, 260-61 (5th Cir. 2001) (Smith, J., dissenting from denial of rehearing en banc).

34. See *Hart*, 266 F.3d at 1175.

35. Robel, *supra* note 9, at 404-09.

36. *Id.*

37. One of the most commonly-voiced rationales for unpublished opinions is that they free judges of the burden of producing polished, thoroughly-reasoned text.

38. Robel, *supra* note 9, at 404-09.

39. *Id.*

courts should recognize prior unpublished decisions and accord them precedential weight.⁴⁰ For this reason, Dean Robel argues the rules that treat unpublished opinions as non-precedential should be abandoned.⁴¹

Dean Robel's argument that rules barring citation of unpublished opinions should be abandoned is persuasive; yet it is incomplete. It appears that Dean Robel believes not only that unpublished opinions should be fully citable, but that they should constitute binding authority on the courts that rendered them, as are published opinions.⁴² This conclusion, I believe, fails to give appropriate weight to one of the central difficulties created by the unique institutional role of the courts of appeals.⁴³ The courts of appeals serve dual functions: they correct errors committed in trial-level courts and they enunciate principles of law to be applied in subsequent cases.⁴⁴ In their lawmaking function, the courts of appeals are of course subordinate to the Supreme Court, which has the ultimate say on issues of legal interpretation.⁴⁵ Yet, because the Supreme Court decides only a limited number of cases of its own choosing, inevitably a substantial portion of the legal precedent applicable in any one jurisdiction is the product of the jurisdiction's court of appeals rather than the Supreme Court.⁴⁶ The development of this body of precedent is complicated by the fact that the courts of appeals are courts of mandatory jurisdiction; they do not choose the timing or the manner in which legal issues are presented to them.⁴⁷ The courts of appeals, moreover, follow a policy in which an initial panel decision resolving a particular legal question is binding on subsequent panels. This policy, when placed in conjunction with the appellate courts' mandatory jurisdiction, means that frequently the first panel to confront a legal issue will do so in less than ideal circumstances—in a case, for example, in which the lawyers frame and argue the

40. *Id.* at 416.

41. *Id.* at 417.

42. I draw my conclusion that Dean Robel believes unpublished opinions should be binding authority from her rejection of my suggestion, voiced elsewhere, that unpublished opinions could serve a productive purpose, and could in fact improve the court's exercise of its lawmaking function if they were treated as persuasive but not binding authority. See Cooper & Berman, *supra* note 20, at 738-43. If I have misunderstood or mischaracterized Dean Robel's argument, I apologize.

43. The arguments sketched here are presented in considerably more detail in Cooper & Berman, *supra* note 20, at 712-24, 738-47.

44. See *id.* at 712.

45. For simplicity's sake, this paragraph will describe the relationship of the federal courts of appeals to the United States Supreme Court. The same principles apply, however, in any state that has an intermediate court of appeals and a supreme court with limited, discretionary jurisdiction.

46. See Cooper & Berman, *supra* note 20, at 718.

47. 28 U.S.C. § 1291 (1994). The court's mandatory jurisdiction does not extend to most categories of interlocutory appeals, 28 U.S.C. § 1292(b), but such appeals represent a relatively minuscule portion of the appellate courts' work. See Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1176, 1198-99 (1990).

legal issue poorly.⁴⁸ In these circumstances, if all decisions of the appellate courts are binding precedent, the courts' ability to develop precedent in a coherent manner is significantly impaired by the dictates of the courts' mandatory jurisdiction.⁴⁹

The need to maintain a rational body of precedent in a court whose lawmaking function is driven by its error-correcting function is part of what motivates Judge Kozinski's argument in favor of non-precedential unpublished opinions.⁵⁰ Yet the desired result could be achieved, without the danger of wholly arbitrary decisionmaking that Judge Kozinski's solution presents, if unpublished opinions were treated as persuasive but not binding authority. Such a use of unpublished opinions would allow an early panel presented with a novel legal issue in a less than ideal setting to decide the case before it, as the court's mandatory jurisdiction would require, while avoiding a definitive resolution of the legal issue.⁵¹ This approach would also avoid much of the seeming unfairness of non-precedential opinions, by effectively creating a burden of explanation on panels that would depart from the rationale of cases previously decided by unpublished opinions. Finally, the use of unpublished opinions as persuasive but non-binding precedent would accord with the meaning that, as Dean Robel argues, the interpretive communities of lawyers and lower-court judges already ascribe to them.⁵²

III. NO-CITATION RULES IN THE STATE INTERMEDIATE APPELLATE COURTS

Of course, unpublished opinions can only play the role I suggest for them if litigants have access to them and may cite them in submissions to the courts. Current rules in the federal courts obstruct the use of unpublished opinions as persuasive authority. In six circuits, unpublished opinions may be cited only in the same or related cases, for the purpose of establishing issue preclusion, claim preclusion, or law of the case.⁵³ Conversely, in six other circuits, unpublished opinions are not binding but may be cited as persuasive authority.⁵⁴ Although

48. See *Hart v. Massanari*, 266 F.3d 1155, 1175 (9th Cir. 2001).

49. See *Cooper & Berman*, *supra* note 20, at 722-23.

50. See *Hart*, 266 F.3d at 1175, 1179.

51. See *Cooper & Berman*, *supra* note 20, at 741-42.

52. See *Robel*, *supra* note 9, at 404-09.

53. See D.C. CIR. R. 28(h) (prohibiting citation to unpublished opinions for purposes other than preclusion); 1ST CIR. R. 36(b)(2)(f) (allowing citation of unpublished opinions only in related cases); 2D CIR. R. § 0.23 (same); 7TH CIR. R. 53(b)(2)(iv) (prohibiting citation to unpublished orders except for purposes of claim preclusion, issue preclusion, or law of the case); 9TH CIR. R. 36-3(a) (same); FED. CIR. R. 47.6(b) (prohibiting citation of unpublished opinion as precedent).

54. See 4TH CIR. R. 36(c) (citation to unpublished opinions is disfavored but is permissible where counsel believes that no published opinion would serve as well); 5TH CIR. R. 47.5.4 (stating that an unpublished opinion is not precedent but may be persuasive); 6TH CIR. R. 28(g) (citation to unpublished opinions is disfavored but is permissible where counsel believes that no published

some of these circuits also state that citation to unpublished opinions is disfavored, courts in these circuits can nonetheless act in a manner consistent with the interpretive community's expectations about precedent without simultaneously surrendering control over their lawmaking authority to the vicissitudes of the appellate docket.⁵⁵ There has, in addition, been movement in the direction of greater citability since the courts first adopted publication and non-citation rules in the mid-1970s.⁵⁶ Particularly in light of the renewed interest in unpublished opinions among lawyers, judges, and commentators as a result of *Anastasoff*, the federal courts may be headed in a direction that treats unpublished opinions seriously, as persuasive if not binding authority.

The rules of the state intermediate appellate courts, in contrast, reveal no such trend. Forty states now have intermediate appellate courts;⁵⁷ of these, thirty-seven have rules that permit appeals to be resolved by way of unpublished opinion.⁵⁸ The rules governing the availability and citability of these opinions generally lag behind those in place in the federal courts. Whereas the

opinion would serve as well); 8TH CIR. R. 28A(i) (although "parties generally should not cite" unpublished opinions, citation is permitted where the unpublished opinion is persuasive and no other opinion would serve as well); 10TH CIR. R. 36.3.5 (citation of an unpublished opinion is disfavored but is permissible if it is persuasive, no published opinion has addressed the issue, and citation would assist the court); 11TH CIR. R. 36-2, 36-3 (unpublished opinion is not binding precedent but may be persuasive, although the court does not favor citation to unpublished opinions). The Third Circuit is something of a wildcard. Its local rules are silent on the citability of unpublished opinions. The court's Internal Operating Procedures state that the court itself will not cite unpublished opinions but are silent as to whether counsel may cite such opinions in their submissions to the court. *See* 3RD CIR. INT. OP. PROC. 5.8. In practice, it appears that counsel do occasionally refer to unpublished opinions in their briefs.

55. *See supra* note 54 and accompanying text.

56. *Compare* 6TH CIR. R. 28(g) (citation to unpublished opinions is disfavored but is permissible where counsel believes that no published opinion would serve as well); 8TH CIR. R. 28A(k) (although "parties generally should not cite" unpublished opinions, citation is permitted where the unpublished opinion is persuasive and no other opinion would serve as well), *with* Reynolds & Richman, *supra* note 5, at 1180 & n.75 (describing rules in place in these circuits in 1978, which prohibited citation to unpublished opinions). The Fifth Circuit has more recently adopted a rule allowing unpublished opinions to be cited as persuasive authority. *See* Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. APP. PRAC. & PROCESS 251, 254 (2001).

57. Delaware, Maine, Montana, Nevada, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, Wyoming, and the District of Columbia currently lack intermediate courts of appeals. *See* Serfass & Cranford, *supra* note 56, at 252 n.5.

58. All opinions of the Connecticut and Mississippi appellate courts are published. Mississippi does permit its court of appeals to resolve cases by *per curiam* affirmance without formal opinion. *See* MISS. R. APP. P. 35-A(c), 35-B(d); *see also* Serfass & Cranford, *supra* note 56, at 269. New York appears to have a similar practice: while New York's rule requires publication of every opinion submitted, the official reports include tables of appellate resolutions without published opinion.

unpublished opinions of all but three federal circuits are available on Lexis and Westlaw,⁵⁹ only ten states make their appellate courts' unpublished opinions, civil and criminal, available on Westlaw.⁶⁰ Alabama makes available the concurring and/or dissenting opinions that accompany unpublished dispositions, but does not make available the majority opinion. Conversely, Indiana and Pennsylvania make available the dispositions of their cases decided by unpublished opinion, but do not release the opinions to Westlaw. Finally, twenty states do not make any information concerning cases decided by unpublished opinion available on Westlaw.⁶¹ As a general matter, then, it is fair to say that state appellate unpublished opinions are less accessible than federal appellate unpublished opinions.

Not only are state appellate unpublished opinions less readily available than their counterparts in the federal courts, they are also less readily citable. Only five states expressly permit the citation of unpublished appellate opinions as persuasive authority.⁶² In contrast, thirty-two states bar citation to unpublished opinions.⁶³ In these states, unpublished opinions may have utility—that is, they may assist the courts in managing expanding caseloads—but the courts in these states open themselves fully to the charges of unfairness and lack of accountability that have traditionally been leveled against the use of unpublished

59. *See supra* note 11.

60. The states are Alaska, Arizona, Massachusetts, Michigan, Minnesota, North Dakota, Ohio, Tennessee, Texas, Utah, and Virginia. I used the calendar year 2000 as the relevant period and obtained this list of states by performing the following “terms and connectors” search in each state’s caselaw database in Westlaw: (unpublished (not /4 publication)) & da(2000). Only a limited number of civil cases from the Tennessee Court of Appeals were found with this search, but a further search of references to Tennessee Court of Appeals Rules 11 and 12 (the court’s publication rules) revealed a great number on Westlaw, as are the unpublished opinions of the Tennessee Special Workers’ Compensation Appeal Panel.

61. The states are Arizona, California, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Missouri, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, and South Carolina. In ten of these states—Hawaii, Idaho, Illinois, Iowa, Louisiana, Maryland, Mississippi, Missouri, Oklahoma, and South Carolina—Westlaw includes opinions that have not yet become final and that are subject to withdrawal or modification. These opinions are not unpublished opinions, strictly speaking: they are intended for publication and thus are intended to be accorded full precedential status once they have been finalized.

62. The states are Delaware, Michigan, Minnesota, North Dakota, and Ohio. *See Serfass & Cranford, supra* note 56, at 261-75. Tennessee also permits citation of an unpublished opinions as persuasive authority, unless the opinion is expressly designated “not for citation.” *See id.* at 281. Of these, all but Delaware make their unpublished opinions available on Westlaw. *See supra* note 60.

63. The states are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Utah, Virginia, Washington, and Wisconsin. *See Serfass & Cranford, supra* note 56, at 258-75.

opinions.⁶⁴ State appellate courts therefore may wish to rethink their rules regarding the use of unpublished opinions. Much of the time-saving that serves as the principal justification for unpublished opinions would remain were unpublished opinions treated as persuasive, not binding, authority, while the courts would free themselves of the specter of arbitrary, unaccountable decision-making that inevitably accompanies the use of unpublished, uncitable opinions.

64. See William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 282-83 (1996).