

CITING UNPUBLISHED OPINIONS: THE EIGHTH CIRCUIT HOLDS IT VIOLATES THE CONSTITUTION TO IGNORE THE PRECEDENTIAL VALUE OF UNPUBLISHED OPINIONS: *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated on other grounds*, 235 F.3d 1054 (8th Cir. 2000)

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I. INTRODUCTION

The debate surrounding citation of unpublished opinions has resurfaced yet again; this time the argument in favor of citation to unpublished opinions is rooted in the Constitution and the theory that courts violate Article III when they prevent litigants from citing such opinions. Federal appellate and district courts began classifying certain opinions as unpublished in the 1960s and 1970s because the courts were generating an enormous amount of opinions.¹ The courts saw limiting the publication and citation of opinions written for the sole purpose of resolving a dispute, and not to establish new law, as a way to allow judges to spend more time on critical issues and reduce the burden of case preparation and publication costs.² The federal courts first considered limiting the number of published opinions in the 1940s.³ By 1973, the Advisory Council for Appellate Justice produced a report to help courts design and execute their own limited publication rules.⁴ Today, all of the federal appellate courts have limited publication and citation rules.⁵ However, in a recent opinion from the

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1. William L. Reynolds & William M. Richman, *The Non-Precedential Precedent) Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM.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, 1169 n.17 (1978).
2. ADVISORY COUNCIL FOR APPELLATE JUSTICE, FJC RESEARCH SERIES No. 73-2, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS 5-6 (1973) [hereinafter STANDARDS FOR PUBLICATION].
3. Reynolds & Richman, *supra* note 1, at 1168.
4. See generally STANDARDS FOR PUBLICATION, *supra* note 2.
5. All of the federal appellate courts have individually developed rules regarding the citation to and precedential value of their unpublished opinions. See D.C. CIR. R. 28(c); 1ST CIR. R. 36(b)(2)(F); 2D CIR. R. 0.23; 3D CIR. I.O.P. 5.3; 4TH CIR. R. 36(c); 5TH CIR. R. 47.5.3 and

United States Court of Appeals for the Eighth Circuit, *Anastasoff v. United States* [hereinafter *Anastasoff I*],⁶ the Eighth Circuit struck down its own rule limiting the citation of unpublished opinions, causing courts, practitioners and scholars nationwide to revisit the legitimacy of similar no-publication, no-citation rules.⁷

In *Anastasoff I*, the court held unconstitutional the portion of its Rule 28(A)(i),⁸ which declares that unpublished opinions are not precedent.⁹ The rule states that “[u]npublished opinions are not precedent and parties generally should not cite them” unless they are relevant in establishing *res judicata*, collateral estoppel or the law of the case.¹⁰ The court found that this portion of the rule violated the judicial power given courts under Article III¹¹ in that the rule “purports to confer on the federal courts a power that goes beyond the ‘judicial.’”¹² The court reasoned that the doctrine of precedent was well-established before the Constitution was written, and that the Framers understood and accepted the doctrine. Thus, the court reasoned that the Framers meant for the doctrine of precedent to limit the judicial power given to the courts through Article III.¹³

While the majority in *Anastasoff I* convincingly argued that the doctrine of precedent limits the scope of judicial power, the opinion lacked direction on how to put its principle into practice and handle the resulting consequences, such as unequal access to unpublished opinions, increased research time and costs, and loss of judicial efficiency. Part II of this note examines each point made by the *Anastasoff I* majority in arriving at its holding. Part III of this

47.5.4; 6TH CIR. R. 28(g); 7TH CIR. R. 53(e); 8TH CIR. R. 28(A)(i); 9TH CIR. R. 36-3 (adopted for a 30-month period beginning July 1, 2000, and ending December 31, 2002); 10TH CIR. R. 36.3; 11TH CIR. R. 36-2; FED. CIR. R. 47.6(b).

6. *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000) [hereinafter *Anastasoff I*], *vacated on other grounds*, 235 F.3d 1054 (8th Cir. 2000) [hereinafter *Anastasoff II*].

7. Most publication and citation plans have two rules: one governing whether and how to limit publication and another to determine when future parties can cite to unpublished opinions. Kirt Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541, 547 (1997).

8. 8TH CIR. R. 28(A)(i) (“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 decision. 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.”).

9. *Anastasoff I*, 223 F.3d at 899.

10. 8TH CIR. R. 28(A)(i).

11. U.S. CONST. art. III, § 1, cl. 1. “The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”

12. *Anastasoff I*, 223 F.3d at 899.

13. *Id.* at 903.

note provides a brief explanation of the history of unpublished opinions, an overview of how the Eighth Circuit has applied its limited publication and no-citation rule, and an examination of how both case law and commentary has addressed the constitutional issues surrounding limited publication and no-citation rules. Part IV provides an analysis of the constitutional principles that support the decision and of the impractical effects of the *Anastasoff I* decision.

II. EXPOSITION OF THE CASE

A. The Reasoning Behind *Anastasoff I*

In *Anastasoff I*, the court denied the plaintiff's request for a refund of overpaid federal income tax; to reach this decision, the court applied an on-point, unpublished opinion, *Christie v. United States*.¹⁴ The court noted that the two cases were factually similar insofar as they both considered a refund claim mailed prior to the statutory three-year bar and received just after.¹⁵ In applying the unpublished opinion to deny the plaintiff's refund, the court also held unconstitutional a portion of its unpublished opinion rule, Rule 28(A)(i).¹⁶ In an opinion written by Judge Richard Arnold, the court reasoned that the Constitution's Framers understood and accepted the doctrine of precedent; thus, the Framers meant for the doctrine of precedent to limit the judicial power given to the courts through Article III.

Anastasoff I was later vacated in an opinion also written by Judge Arnold after the IRS decided to pay the taxpayer's claim in full.¹⁷ In *Anastasoff II*, the court determined the case was moot and held "[t]he constitutionality of that portion of Rule 28A(i) which says that unpublished opinions have no precedential effect remains an open question in this Circuit."¹⁸ Although the Eighth Circuit vacated *Anastasoff I*, the issues it raised concerning the precedential value of unpublished opinions have generated much debate. Courts, practitioners and scholars nationwide are reevaluating no-publication, no-citation rules, questioning both their

14. *Id.* at 899.

15. *Id.*

16. *Id.*

17. *Anastasoff II*, 235 F.3d at 1055.

18. *Id.* at 1056.

constitutionality and effectiveness, and hypothesizing what would result were courts to repeal their limited publication and citation rules.¹⁹

In the process of holding Rule 28(A)(i) unconstitutional, insofar as it declares that unpublished opinions have no precedential value,²⁰ the court made four major points. First, “[t]he doctrine of precedent was well-established by the time the Framers gathered in Philadelphia.”²¹ Citing *Marbury v. Madison*, the court found that “[i]nherent in every judicial decision is a declaration and interpretation of a general principle or rule of law.”²² Further, the court noted that “[t]his declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties.”²³ The court found that these principles formed the doctrine of precedent and were well regarded when the Framers founded the nation: “To the jurists of the late eighteenth century (and thus by and large to the Framers), the doctrine seemed not just well-established but an immemorial custom, the way judging had always been carried out, part of the course of the law.”²⁴

The court’s second point was that “the judge’s duty to follow precedent derives from the nature of the judicial power itself.”²⁵ To establish this point, the court generally relied on William Blackstone’s *Commentaries* because his

19. See generally Lance A. Wade, *Honda Meets Anastasoff: The Procedural Due Process Argument Against Rules Prohibiting Citation to Unpublished Judicial Decisions*, 42 B.C. L. REV. 695 (2001) (arguing that limited publication and citation rules deprive litigants of due process rights); Joshua R. Mandell, *Trees that Fall in the Forest: The Precedential Effect of Unpublished Opinions*, LOY. L.A. L. REV. 1255 (2001) (arguing that limited publication is a troubled system); Jerome I. Braun, *Eighth Circuit Decision Intensifies Debate Over Publication and Citation of Appellate Opinions*, JUDICATURE, Sept./Oct. 2000 (suggesting that a uniform national rule is needed).

20. *Anastasoff I*, 223 F.3d at 899.

21. *Id.* at 900.

22. *Id.* at 899. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803):

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. . . . This is of the very essence of judicial duty.

23. *Anastasoff I*, 223 F.3d at 900. (citing *James B. Beam Distilling, Co. v. Georgia*, 501 U.S. 529, 544 (1991); *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 399 (1821)).

24. *Anastasoff I*, 223 F.3d at 900. “For it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge’s opinion. . . .” 1 WILLIAM BLACKSTONE, COMMENTARIES *69.

25. *Anastasoff I*, 223 F.3d at 901.

“great influence on the Framers’ understanding of law is a familiar fact.”²⁶ The court noted “[a]s Blackstone defined it, each exercise of the ‘judicial power’ requires judges ‘to determine the law’ arising upon the facts of the case.”²⁷ And, further, “[t]o determine the law’ meant not only choosing the appropriate legal principle but also expounding and interpreting it, 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.’”²⁸ Judges are supposed to determine what the law is, rather than create new law, and “[b]ecause precedents are the ‘[principal] and most authoritative’ guide of what the law is, the judicial power is limited by them.”²⁹ Therefore, the court reasoned, it follows that this doctrine of precedent was intended by the Framers to limit the “judicial power” they gave the courts through Article III³⁰ of the Constitution.³¹

Third, the court said that the doctrine of precedent is essential for the separation of legislative and judicial powers.³² Blackstone wrote that judicial power is limited in that judges must remain separated from the legislative and executive powers.³³ If judges could depart from established legal principles, “the subject would be in the hands of arbitrary judges, whose decisions would then be regulated by their own opinions”³⁴ To enforce this point, the court also cited *The Federalist No. 78*, where Alexander Hamilton, like Blackstone, “thought that ‘[t]he courts must declare the sense of the law,’ and that this fact means courts must exercise ‘judgment’ about what the law is rather than ‘will’ about what it should be.”³⁵ Hamilton, the court noted, also recognized that a judge’s power to find the law rather than create new law was “a crucial sign of the separation of the legislative and judicial power.”³⁶

26. *Id.* at 901 n.8. See *Schick v. United States*, 195 U.S. 65, 69 (1904):

Blackstone’s Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the Federal Constitution it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England; so that undoubtedly, the framers of the Constitution were familiar with it.

27. *Anastasoff I*, 223 F.3d at 901 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *25).

28. *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *69).

29. *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *69).

30. U.S. CONST. art. III, § 1, cl. 1. “The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”

31. *Anastasoff I*, 223 F.3d at 903.

32. *Id.* at 901.

33. 1 WILLIAM BLACKSTONE, COMMENTARIES *259.

34. *Anastasoff I*, 223 F.3d at 901 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *259).

35. *Anastasoff I*, 223 F.3d at 902.

36. *Id.*

In summary, the court noted the doctrine of precedent was well-established in the late eighteenth century, courts understood that the nature of judicial power required them to follow their prior decisions, and that recognizing precedent served to separate judicial power from legislative power.³⁷ Thus, the court concluded that the Framers' understanding and acceptance of the above principles indicates that they intended the doctrine of precedent to limit the judicial power given to the courts under Article III.³⁸

B. The Implications of *Anastasoff I*

Among its final points, the court attempted to clarify its holding and address possible implications. First, the court found that the availability of unpublished opinions to the public was adequate. Judge Arnold wrote that the case was “not about whether opinions should be published, whether that means printed in a book or available in some other accessible form to the public in general.”³⁹ He wrote that a court’s decision not to publish a case “may be eminently practical and defensible, but in our view [that decision has] nothing to do with the authoritative effect of any court decision.”⁴⁰ The court stated that the Framers did not intend the publication of all opinions.⁴¹ Limited publication was the rule and, before the Constitution was ratified, there was “almost no private reporting and no official reporting at all in the American states.”⁴² However, the court noted that “the Framers did not regard this absence of a reporting system as an impediment to the precedential authority of a judicial decision.”⁴³ Thus, published or not, an opinion is precedent, and a party should still be able to cite it. The court pointed out that “unpublished” does not mean “secret”:

So far as we are aware, every opinion and every order of any court in this country, at least of any appellate court, is available to the public. You may have to walk into a clerk’s office and pay a per-page fee, but you can get the opinion if you want it. Indeed, most appellate courts now make their opinions, whether labeled “published” or not, available to anyone on line.⁴⁴

37. *Id.* at 903.

38. *Id.*

39. *Id.* at 904.

40. *Id.*

41. *Id.* at 903.

42. *Id.*

43. *Id.*

44. *Id.* at 904.

The court also addressed the argument that judges do not have time to treat every opinion as precedent.⁴⁵ The court said, “[i]f this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only.”⁴⁶ Rather, the court found that the remedy is either creating enough judgeships to handle the volume or, if that is not practical, to have each judge take time to do a competent job even though it would increase the backlogs.⁴⁷

Finally, the court stressed that “we are not here creating some rigid doctrine of eternal adherence to precedents. Cases can be overruled. Sometimes they should be.”⁴⁸ However, the court said when a case is overruled, it must be done with justification:

The precedent from which we are departing should be stated, and our reasons for rejecting it should be made convincingly clear. In this way, the law grows and changes, but it does so incrementally, in response to the dictates of reason, and not because judges have simply changed their minds.⁴⁹

III. BACKGROUND

A. The History of Unpublished Decisions

The practice of designating certain opinions as unpublished developed in the federal appellate and district courts because they were generating an enormous amount of opinions. In 1915, a judge noted that federal and state courts had produced more than 65,000 opinions, filling 630 volumes in five years.⁵⁰ These figures were alarming because “it was thought that no private lawyer, judge, or law professor could possibly remain current with the avalanche of decisional law.”⁵¹ By the 1940s, federal courts began to consider limiting the number of published opinions.⁵² At the 1964 meeting of the Judicial Conference of the United States, the Conference adopted a resolution that authorized courts of appeals and district court judges to publish “only those

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 905.

50. Reynolds & Richman, *supra* note 1, at 1168–69.

51. *Id.* at 1169.

52. *Id.*

opinions which are of general precedential value and that opinions authorized to be published be succinct.”⁵³

In 1973, the Advisory Council for Appellate Justice produced a report to guide courts in implementing limited publication rules.⁵⁴ The report included procedures that courts should use in determining which opinions to publish, standards for publication, and guidelines governing citation to unpublished opinions.⁵⁵ The report also contained a model rule for courts to use in forming their own unpublished opinion and no-citation rule.⁵⁶ Reasons given in the report for implementing such rules included saving the common law from being “crushed by its own weight” due to publication of all opinions, freeing judges to work on more critical issues, alleviating the requirement that lawyers sift through countless opinions in preparation for a case, and reducing the burden of publication and storage of opinions.⁵⁷

The same concerns are relevant today. The number of cases the federal appellate courts dispose of annually continues to rise. In 1992, for example, the federal courts of appeal decided 23,597 cases, which is almost six times the number these same courts decided in 1964 when the Judicial Conference adopted its resolution advocating limited publication.⁵⁸ In 2000, the federal courts of appeal disposed of 27,516 cases on the merits, and 79.8% of those opinions were unpublished.⁵⁹

B. Treatment of Unpublished Opinions by the Eighth Circuit Before *Anastasoff I*

Limited publication and citation rules fulfill their intended purposes only when courts take care to follow their own publication and citation rules. When courts fail to follow these rules, inconsistencies can result, such as allowing an occasional party or even the court itself to cite an unpublished opinion and giving differential treatment to independent parties in identical factual situations.

53. *Id.* at 1169 n.17.

54. See STANDARDS FOR PUBLICATION, *supra* note 2.

55. *Id.*

56. *Id.* at 22.

57. *Id.* at 6–8.

58. Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119, 143 (1995). In 1964, the federal courts of appeals decided 3,552 cases. *Id.*

59. Statistics Div., Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts: 2000 Annual Report of the Director*, table S-3 (2000), at <http://www.uscourts.gov/judbus/tables/s03sep00.pdf> (last visited Sept. 3, 2001).

For example, in *United States v. Drummond*,⁶⁰ Judge Heaney expressed concern in his dissent that the decision in *Drummond* conflicted with a recent unpublished per curiam opinion, *United States v. Wixson*.⁶¹ In *Drummond*, the court held that the trial court's failure to inform a criminal defendant of his right to appeal was not a per se violation of Federal Rule of Criminal Procedure 32(a)(2); rather, to avoid violation of the rule, the government must prove that the trial court's failure to inform the defendant of the right to appeal was harmless error.⁶² The *Drummond* court found that the government met this burden by producing testimony that the defendant's attorney had informed the defendant of the right to appeal.⁶³ Conversely, in *Wixson*, where the trial court had similarly failed to inform a criminal defendant of his right to appeal, the court held that "[i]t is not necessary that a defendant be informed of his right to appeal at sentencing so long as it is clear that such information was conveyed by the sentencing court to the defendant at some point."⁶⁴ Thus, the *Wixson* court held that, to fulfill Rule 32(a)(2), a defendant must receive instruction on the right to appeal from the court rather than from another source, such as the defendant's attorney. In his dissent, Judge Heaney wrote, "While unpublished opinions are not precedent, I am dismayed that we would give two similar petitioners different results in opinions that squarely conflict."⁶⁵

Inconsistencies also result where courts fail to uniformly apply no-publication and no-citation rules. Generally, the Eighth Circuit has been faithful in applying its no-citation rule. For example, in *United States v. Kinsley*, the court declined to consider or distinguish one of its own unpublished decisions, which the United States attorney had attempted to use.⁶⁶ The Eighth Circuit treated unpublished opinions from other jurisdictions the same way. For example, in *FDIC v. Newhart*, the court refused to consider two unpublished opinions from the Western District of Missouri, noting that precedential weight is not given to unpublished opinions.⁶⁷ Further, the author of the majority

60. 903 F.2d 1171 (8th Cir. 1990).

61. *Id.* at 1177 n.2.

62. *Id.* at 1174. "Fed.R.Crim.P. 32(a)(2) provides in relevant part: 'After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal. . . .'" *Id.* at 1172 n.1.

63. *Id.* at 1174-75.

64. *Id.* at 1177 n.2 (quoting *United States v. Wixson*, 902 F.2d 1574 (8th Cir. 1990)).

65. *Id.*

66. *United States v. Kinsley*, 518 F.2d 665,670 n.10 (8th Cir. 1975).

67. *FDIC v. Newhart*, 892 F.2d 47,50 nn.3-4 (8th Cir. 1989). The court in *FDIC v. Newhart* relied on Local Rule 8(i), which states that "[n]o party may cite an opinion that was not intended for publication by this or any other federal or state court, except when the cases are related by virtue of an identity between the parties or the causes of action." *Leimer v.*

opinion in *Anastasoff I*,⁶⁸ Judge Arnold, and the concurring judge, Judge Heaney, declined to follow an unpublished opinion in *Leimer v. Leimer*,⁶⁹ because “unpublished opinions of this court are not intended to create binding precedent. The decision of a panel not to publish an opinion usually represents the judges’ view that the case is without substantial value as a precedent.”⁷⁰

There has been at least one instance, however, where the Eighth Circuit failed to follow its own no-citation rule. In an article on unpublished opinions, Judge Arnold cited *McCoy v. Schweiker* as an example of where “an unpublished opinion was cited as authority on an important jurisdictional point.”⁷¹ He wrote, “I deliberately included this citation in the draft opinion when I circulated it, and all the members of the en banc court concurred without a murmur.”⁷² This is significant in that it shows the potential inconsistency with which courts can apply limited publication and citation rules. Courts can keep litigants from citing unpublished opinions in court documents and, at the same time, cite unpublished opinions in their own decisions.

C. Case Law on the Constitutionality of Limited Publication Rules

Despite having the opportunity, the Supreme Court has failed to address the constitutionality of limited publication and citation rules. The Supreme Court refused to rule on the constitutionality of the Seventh Circuit’s no-citation rule in both *Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit*⁷³ and *Browder v. Director*.⁷⁴ The *Do-Right* Court, in a single sentence, denied a motion for leave to file a petition for writ of mandamus and prohibition.⁷⁵ The constitutional challenge asserted in *Do-Right* was an unlawful prior restraint of freedom of speech and a violation of equal protection and due process.⁷⁶ In *Browder*, the Court refused to consider the issue and stated, “[P]etitioner questioned the validity of the Seventh

Leimer, 724 F.2d 744, 746 n.3 (8th Cir. 1984).

68. *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated on other grounds*, 235 F.3d 1054 (8th Cir. 2000).

69. 724 F.2d 744 (8th Cir. 1984).

70. *Id.* at 745–46.

71. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 225 n.9 (1999).

72. *Id.*

73. 429 U.S. 917, 917 (1976).

74. 434 U.S. 257, 258 (1978).

75. *Do-Right Auto Sales*, 429 U.S. at 917.

76. David Dunn, *Unreported Decisions in the United States Courts of Appeals*, 63 CORNELL L. REV. 128, 142–43 (1977).

Circuit's 'unpublished opinion' rule. We leave these questions to another day."⁷⁷ After *Anastasoff I* was handed down, commentary hypothesized that the Supreme Court would have another opportunity to determine the constitutionality of limited publication and citation rules.⁷⁸ However, now that the Eighth Circuit has vacated *Anastasoff I*, the Court's opportunity to address the issue must come from another case.

If the Court does eventually address the constitutionality of limited publication rules, there is little indication from the Court as to how it would decide the issue. The Court has expressed concern, however, about the public policy implications of no-publication, no-citation rules. In *County of Los Angeles v. Kling*, for example, the Court noted that the United State Court of Appeals for the Ninth Circuit should have discussed the case's record in greater depth and reasoned that the record was brief because the Ninth Circuit had decided not to publish the opinion.⁷⁹ The Court stated, "[t]hat decision not to publish the opinion or permit it to be cited) like the decision to promulgate a rule spawning a body of secret law) was plainly wrong."⁸⁰ In a footnote, the Court, commenting on unpublished opinions, added that "[t]he proliferation of this secret law has prompted extensive comment" and cited various law review articles dealing with the issue.⁸¹ In the end, the Ninth Circuit decided to publish the opinion.⁸²

Although the Supreme Court has declined to address the issue, several federal circuit courts have discussed the constitutional issues surrounding limited publication and no-citation rules. For example, in *Jones v. Superintendent, Virginia State Farm*,⁸³ the United States Court of Appeals for the Fourth Circuit noted, "[w]e believe that our screening procedures and disposition by unreported memorandum decisions accords with due process and our duty as Article 3 judges, but we confess its imperfection."⁸⁴ The court recognized that every decision is precedent and stated that "we cannot deny litigants and the bar the right to urge upon us what we have previously done."⁸⁵ The court gave two reasons, however, as to why it would still regard

77. *Browder*, 434 U.S. at 258.

78. See generally *Law and Motion: Panel Says Unpublished Decisions are Precedent*, 15 NO. 10 FED. LITIGATOR 246 (2000) (noting the major implications of the *Anastasoff I* decision and hypothesizing that the Supreme Court would hear the issue).

79. *County of Los Angeles v. Kling*, 474 U.S. 936, 938 (1985).

80. *Id.*

81. *Id.* at 938 n.1.

82. *Id.* at 939.

83. 465 F.2d 1091 (4th Cir. 1972).

84. *Id.* at 1094.

85. *Id.*

unpublished opinions as having no precedential value: (1) The decisions are not prepared with the assistance of the bar, and (2) access to the opinions is “unequal and depends on chance rather than research.”⁸⁶

Judges in the Tenth Circuit have also argued that denying litigants the opportunity to argue unpublished opinions may be unconstitutional. In a dissent to the adoption of the Tenth Circuit’s limited publication rule, Rule 36.3,⁸⁷ Chief Judge Holloway commented on the constitutionality of the rule:

No matter how insignificant a prior ruling might appear to us, any litigant who can point to a prior decision of the court and demonstrate that he is entitled to prevail under it should be able to do so as a matter of essential justice and fundamental fairness. To deny a litigant this right may well have overtones of a constitutional infringement because of the arbitrariness, irrationality, and unequal treatment of the rule.⁸⁸

The dissent also addressed the question of what the Tenth Circuit would do if it knew of a prior ruling that was controlling but was in an unpublished opinion. The judge wrote, “[w]e would clearly have the duty as a matter of basic justice to apply it, and in so doing logic would demand citing the earlier ruling.”⁸⁹ However, the judge did not point to any specific constitutional violations.

D. Commentary on the Constitutionality of Limited Publication Rules

Commentators have also suggested that limited publication rules are unconstitutional. David Dunn focused on potential due process violations, noting that stare decisis is fundamental and “[t]o allow judicial sleight-of-hand to create a body of law exempt from the doctrine would assault a rudimentary underpinning of our legal system.”⁹⁰ He cited Justice Douglas, who said, “[T]here will be no equal justice under law if a . . . rule is applied in the morning but not in the afternoon. *Stare decisis* provides some moorings so that men may trade and arrange their affairs with confidence.”⁹¹ Further, he argued that, “if due process requires notice and opportunity to be heard before

86. *Id.*

87. 10TH CIR. R. 36.3. “Unpublished orders and judgments of this court are not binding precedents, except under the doctrines of law of the case, res judicata, and collateral estoppel.” *Id.*

88. *In re Rules of the United States Court of Appeals for the Tenth Circuit*, 955 F.2d 36, 37 (10th Cir. 1992).

89. *Id.*

90. Dunn, *supra* note 76, at 144.

91. *Id.* at 145 n.110.

judgement, the opportunity to present ‘every available defense’ must include the chance to cite unreported decisions.”⁹²

Judge Arnold first posed the question that no-citation rules may violate Article III in a comment he wrote in 1999, just one year before he wrote the *Anastasoff I* opinion.⁹³ Although he left the question unanswered, he noted that federal appellate courts are bound by the limit of “judicial power” as granted in Article III and asked, “[w]hen a governmental official, judge or not, acts contrary to what was done on a previous day, without giving reasons, and perhaps for no reason other than a change of mind, can the power that is being exercised properly be called ‘judicial’?”⁹⁴ Judge Arnold wrote that the practice of designating certain opinions as having no precedential value disturbs him:

If we mark an opinion as unpublished, it is not precedent. We are free to disregard it without even saying so. Even more striking, if we decided a case directly on point yesterday, lawyers may not even remind us of this fact. The bar is gagged. We are perfectly free to depart from past opinions if they are unpublished, and whether to publish them is entirely our own choice.⁹⁵ While Judge Arnold agreed that many cases do not need full opinions, he questioned “the proposition that any opinion lacks precedential value.”⁹⁶ He said, “[t]his unpublished-opinion practice is creating a vast underground body of law, fully accessible to the public at a reasonable cost by way of computers, but disavowed by the very judges who are producing it.”⁹⁷

IV. ANALYSIS

A. Legal Principles

The crux of the court’s argument in *Anastasoff* is that the doctrine of precedent was well established when the Framers wrote Article III and gave judges “judicial power;”⁹⁸ thus, they intended that the doctrine of precedent serve as a limitation to a court’s judicial power.⁹⁹ With this principle in mind,

92. *Id.* at 145.

93. Arnold, *supra* note 71, at 226.

94. *Id.*

95. *Id.* at 221.

96. *Id.* at 222–23

97. *Id.* at 225.

98. U.S. CONST. art. III, § 1, cl. 1. “The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”

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

the *Anastasoff I* court concluded it was unconstitutional for it to decide which opinions would have precedential value simply by labeling them “unpublished” because that authority was beyond the scope of the “judicial power” given in Article III as limited by the doctrine of precedent.

1. *Stare Decisis*

Case law justifies the court’s reliance on the Framers’ knowledge of the doctrine of precedent when interpreting the Constitution. The court’s reasoning, that the Framers understood and were influenced by Blackstone’s writings on precedent in his *Commentaries*, is supported by *Schick v. United States*.¹⁰⁰ In *Schick*, the Court held that the Constitution “must be interpreted in light of the common law, the principles and history of which were familiarly known to the Framers of the Constitution.”¹⁰¹ The Court recognized Blackstone’s *Commentaries* as a primary source in determining the Framers’ intent:

Blackstone’s *Commentaries* are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the Federal Constitution, it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England; so that undoubtedly, the [F]ramers of the Constitution were familiar with it.¹⁰²

Thus, through Blackstone’s writings, the Framers knew that the doctrine of precedent had been around “even so early as the conquest,” and that it was “an established rule to abide by former precedent, where the same points come again in litigation . . . to keep the scale of justice even and steady, and not liable to waver with every new judge’s opinion.”¹⁰³ And, according to *Schick*, one must interpret the Constitution in light of what the Framers knew about the common law.¹⁰⁴ Accordingly, it follows that, because the Framers knew the importance of the doctrine of precedent through writers such as Blackstone, they intended precedent to limit the scope of “judicial power” granted to the courts in Article III. The court’s interpretation of Article III is further supported by Joseph Story’s writings on the Constitution and the doctrine of precedent:

100. 195 U.S. 65 (1904).

101. *Id.* at 69 (relying on Blackstone’s definition of the word “crimes” given in his *Commentaries*).

102. *Id.*

103. 1 WILLIAM BLACKSTONE, COMMENTARIES *69.

104. *Schick*, 195 U.S. at 69.

[T]he principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them, when they first emigrated to this country; and it is, and always has been considered, as the great security of our rights, our liberties, as our property. It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice, or will of particular judges. A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles. This known course of proceeding, this settled habit of thinking, this conclusive effect of judicial adjudications, was in the full view of the Framers of the constitution. It was required, and enforced in every state in the Union; and a departure from it would have been justly deemed an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all the just checks upon judicial authority.¹⁰⁵

A counter-argument to the court's view in *Anastasoff I* is grounded in a comparison of the American and English systems, and the notion that American rules limiting publication and citation mirror the system in England.¹⁰⁶ In an article on limited publication, Robert Martineau argued that those who feel that limited publication rules go against *stare decisis* and are inconsistent with common law principles are ignoring the history behind the reporting system in England, as well as the way opinions are reported in England today.¹⁰⁷ For example, in England, due to the practice of rendering most opinions orally rather than in writing, some appellate opinions are unpublished.¹⁰⁸ Not until 1951 did the courts produce transcripts of oral opinions and place them in England's supreme court library.¹⁰⁹ The opinions can be located in the library and on computer databases; however, they cannot be cited in court because citation is allowed only to opinions written by a

105. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 377–78 (Boston, Hillard, Gray, and Co. 1833).

106. Martineau, *supra* note 58, at 136–37.

107. *Id.* at 136. However, Martineau also argues that “[a]n unpublished, uncitable decision cannot fit with the definition of *stare decisis* and the purpose of common law. . . . This is because ‘all decisions make law, or at least contribute to the process, for each shows [prospective litigants] how courts actually resolve disputes.’” (citing Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 579 (1981)).

108. Martineau, *supra* note 58, at 136.

109. *Id.*

barrister and published in print form.¹¹⁰ Thus, because the English reporting system has never published every opinion of the English appellate courts and because citation to those unpublished opinions is not allowed, one could argue that American no-citation rules are actually similar to those in England, which is where the principles of precedent and stare decisis developed.¹¹¹ However, this argument is misplaced.

Rather than being indicative of England's belief that limited publication and citation conforms with the principles of stare decisis, England's past and present publication practices may represent the fact that English courts recognized early on what American courts recognized in the twentieth century: that full publication and citation is impractical. This is further supported by the historical development of limited publication in England, where many opinions were given orally at a time when "[l]awyers and judges could remember the salient precedents as easily as law students today."¹¹² Moreover, perhaps England has retained its practice of limited publication and citation today not because the procedure conforms with stare decisis, but because implementing a new procedure would have practical consequences, as argued in the United States. Thus, the problem is not the reasoning behind the Article III argument; the problem resides in the effects of implementing a publication and citation procedure that conforms to the constitutional requirement under Article III.

2. Article III Judicial Power

The Supreme Court's comment on unpublished opinions, regarding their precedential value and the limits on Article III judicial power, is limited.¹¹³ However, the Court's ruling on vacatur after settlement supports the holding in *Anastasoff I*, because it sheds light on the value the Court places on precedent and may indicate how the Court would decide the *Anastasoff I* Article III issue regarding precedent and its limitation on judicial power.

110. *Id.*

111. *Id.*

112. Martha Dragich, *Will the Federal Courts of Appeals Perish if the Publish? Or does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV 757, 771 (1995).

113. See *County of Los Angeles v. Kling*, 474 U.S. 936, 938 n.1 (1985) (noting that the "proliferation of this secret law has prompted extensive comment"). See also *Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit*, 429 U.S. 917 (1976); *Borwder v. Dir., Dep't of Corr. of Illinois*, 434 U.S. 257 (1978).

On occasion, parties request that courts vacate published opinions as part of a settlement agreement.¹¹⁴ For example, in *U.S. Bancorp Mortgage Co.*, Bancorp requested that the Supreme Court vacate the Ninth Circuit's judgment against it,¹¹⁵ where the judgment was moot because the parties settled before the case reached the Supreme Court.¹¹⁶ Although the Court agreed that the Ninth Circuit judgment was moot, the Court denied vacatur and held that "mootness by reason of settlement does not justify vacatur of a judgment under review." In reaching its decision, the Court, in part, relied on the importance of preserving precedent: "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur."¹¹⁷

The same argument could apply to unpublished opinions. In *Bancorp*, the Court denied vacatur on settlement in part because the moot judgment did not belong to the parties involved, but to the entire legal community.¹¹⁸ Although the Ninth Circuit judgment against Bancorp was moot to the present parties, the Court recognized that the judgment could be valuable to future parties.¹¹⁹ Similarly, even though the main function of unpublished opinions is to settle a dispute between present parties,¹²⁰ the Court also could find that these opinions could be "valuable to the legal community as a whole."¹²¹ Much like future parties benefitted from the Ninth Circuit opinion in *Bancorp*,¹²² future parties could also receive value from unpublished opinions. This is true because "[i]nherent in every judicial decision is a declaration and interpretation of a general principle or rule of law."¹²³ This reasoning seems to coincide with what Judge Arnold argued in *Anastasoff I*. He wrote that courts, with no-citation rules, are "saying to the bar: 'We may have decided this question the opposite way yesterday, but this does not bind us today, and, what's more, you

114. Elizabeth Horton, *Selective Publication and the Authority of Precedent in the United States Courts of Appeals*, 42 UCLA L. REV. 1691, 1698 n.29 (1995).

115. *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 20 (1994).

116. *Id.* at 23.

117. *Id.* at 26. (citing *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27, 40 (1993) (Stephens, J., dissenting)).

118. *U.S. Bancorp Mortgage Co.*, 513 U.S. at 26.

119. *Id.*

120. Reynolds & Richman, *supra* note 1, at 1182.

121. *U.S. Bancorp Mortgage Co.*, 513 U.S. at 26.

122. Dragich, *supra* note 112, at 797 (noting that the Ninth Circuit's ruling in *Bancorp* made new law in that jurisdiction, which provided guidance to future parties).

123. *Anastasoff I*, 223 F.3d at 899 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803)).

cannot even tell us what we did yesterday.’ As we have tried to explain . . . such a statement exceeds judicial power.”¹²⁴

Thus, the *Anastasoff I* decision, insofar as it stands for the principle that the doctrine of precedent has been and continues to be an important limitation on judicial power, is correct and well-supported. However, the opinion lacks guidance on how to manage the impractical consequences that follow when this principle is put into practice.

B. Practical Considerations

1. *Unequal Access to Case Law*

The Eighth Circuit’s analysis failed to adequately address the practical consequences of its decision. First, the court failed to fully address the issue of accessibility of unpublished opinions. To maintain equal access among parties, unpublished opinions must be available in a searchable, affordable database that all parties can use. The court noted that “unpublished” does not mean that an opinion is secret: “So far as we are aware, every opinion and every order of any court in this country, at least of any appellate court, is available to the public. You may have to walk into a clerk’s office and pay a per-page fee, but you can get the opinion if you want it.”¹²⁵ However, before you can go to a clerk’s office to get an opinion, you have to know that the opinion exists. Thus, while unpublished opinions are not “secret”, one could argue that they are “hidden”. Further, while the court also noted that many unpublished opinions are available on-line,¹²⁶ the court did not address the cost of using research services, such as Westlaw and Lexis, to access unpublished opinions, as well as the costs associated with time spent researching an additional body of law. While the court touched on the issue of access, it did not fully address equal access issues and, as a result, overlooked a key factor in preserving the precedential value of unpublished opinions.

Allowing citation of unpublished opinions is one step in preserving the value of precedent; however, to make use of precedent in unpublished opinions, parties also must have reasonable access to these opinions. Precedent exists to encourage consistency in the law and to guide people in following its developments; thus, it is the use of precedent that makes it valuable. However, for the precedent in unpublished opinions to be used for its intended

124. *Id.* at 904.

125. *Id.*

126. *Id.*

purposes, all parties must have equal access to the case law. If parties do not have the ability to *find* the law, they will not be able to *use* the law.

In an article on the precedential value of unpublished opinions, a commentator wrote that “[b]efore law can legitimately regulate, it must be knowable.”¹²⁷ Further, he argued that treating unpublished opinions as precedent would not promote predictability and stability of the law, which are fundamental policies behind stare decisis:¹²⁸

If the average person, even through his attorney, does not have access to a decision, he certainly cannot take it into account in ordering his affairs. The use as precedent of an unpublished opinion, to which even the average man with counsel does not have access, would make the law capricious and unpredictable. Thus, the policies behind the doctrine of stare decisis would support the conclusion that unpublished judicial opinions are not appropriate subjects of stare decisis.¹²⁹

In principle, it is sound to promote the policies of stare decisis, predictability and stability, by giving every appellate opinion precedential value. However, the practical effect of unequal access may negate the theory that stare decisis is preserved when each decision, even if unpublished, is precedent. For example, Judge Wald, in *Nat'l Classification Comm. v. United States*,¹³⁰ wrote that unpublished opinions “result in a body of ‘secret law’ practically inaccessible to many lawyers.”¹³¹ And, if there is a body of ‘secret law’ accessible only to those parties with the resources to find such decisions, then those who cannot access those decisions will be using a different body of law to plan and litigate. Thus, to a party who relied on published law because he did not know that a body of contradictory unpublished law existed, a court decision against him will seem arbitrary and unpredictable. In result, the policies of stare decisis, predictability and stability, could be defeated by giving unpublished decisions precedential value where parties have unequal access to those opinions.

Many who oppose citation to unpublished opinions are specifically concerned that the above scenario exists in litigation between repeat litigants

127. George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477, 489 (1986).

128. *Id.* at 485 (citing *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970)). In *Moragne*, the Supreme Court has held stare decisis to be important because of “the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise. . . .” *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970).

129. Weaver, *supra* note 127, at 485–86.

130. *Nat'l Classification Comm. v. United States*, 765 F.2d 164 (D.C. Cir. 1985).

131. *Id.* at 165 n.2.

and one-shot litigants. They argue that repeat litigants benefit from their access to a “secret” body of law, which they are able to develop using the unpublished opinions that the court distributes to the parties of the case: “[R]epeat litigants, such as government attorneys, may maintain a file of these opinions that would be unavailable to future opponents who may litigate similar issues.”¹³² Conversely, their opponents, one-shot litigants, are unaware that contradictory unpublished law exists. For example, in an article on selective publication, Judge Philip Nichols wrote about the Court of Claims of the Federal Circuit which, in its last years, handed down “Orders” that were similar to unpublished opinions because their publication was delayed and slip opinions were not available.¹³³ Notwithstanding, parties were allowed to cite to them.¹³⁴ He wrote, “[t]he government was defendant in all our cases and, of course, government attorneys were well acquainted with, and had ready access to, all as yet unpublished ‘Orders.’ There was no restriction on either side citing them, but it is of course not necessary to state who cited them most.”¹³⁵ Similarly, repeat litigants with more resources have both the incentive and ability to keep abreast of the “secret” body of law that exists in unpublished opinions. Conversely, one-shot litigants may not be able to afford the monetary and time costs to remain informed of the growing number of unpublished opinions. Thus, “citation should therefore be prohibited so that these attorneys do not benefit at the expense of smaller or less well-funded litigants.”¹³⁶ Based on the aforementioned arguments, equal access to unpublished opinions is important in both preserving the doctrine of stare decisis and the fairness of litigation.

132. Shuldberg, *supra* note 7, at 550. See Donna Stienstra, FEDERAL JUDICIAL CENTER, UNPUBLISHED DISPOSITIONS: PROBLEMS OF ACCESS AND USE IN THE COURTS OF APPEALS 3 (1985) (giving the U.S. Attorney as an example of a repeat litigant who may benefit from citation to unpublished opinions); Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 957 (1989) (noting several government offices that circulate and file unpublished opinions, specifically the Office of Immigration Litigation, which maintains an index of unpublished opinions). *But see* Horton, *supra* note 114, at 1701 (noting that “counsel for one-shot litigants may often be specialized repeat players with as much access to relevant unpublished opinions as their institutional opponents”).

133. The Honorable Philip Nichols, Jr., *Introduction Selective Publication of Opinions: One Judge’s View*, 35 AM. U. L. REV. 909, 917 (1986).

134. *Id.*

135. *Id.*

136. Shuldberg, *supra* note 7, at 550–51. See STANDARDS FOR PUBLICATION, *supra* note 2, at 19 (“It is unfair to allow counsel, or others having special knowledge of an unpublished opinion, to use it if favorable or withhold it if unfavorable.”).

2. *Is Access Still an Issue?*

While it has been established that equal access among parties is important, there is some debate as to whether, with computerized access to unpublished opinions, equal access is still an issue. Traditionally, those who opposed citation to unpublished opinions argued that “[u]npublished opinions are more difficult to access because they are not published in the bound volumes and are not located in the traditional digests available to the legal researcher [R]estricted access with freely allowed citation would benefit attorneys with greater time and resources.”¹³⁷

Today, however, equal access must be viewed in light of the availability of computerized research: “Legal information is no longer available exclusively in print and the researcher is now no longer constrained by the limitations of the printed page. Instead, this information can be stored, indexed and retrieved digitally.”¹³⁸ However, even though the information is electronically available, many lawyers who are either sole-practitioners or who work for small- or medium-sized firms cannot afford to use online research services. Although electronic research services are becoming more affordable, the cost is still too high for many practitioners, because they do little online research, especially for federal appellate opinions. With LEXIS, a sole-practitioner can access and Shepardize state and federal opinions for a flat monthly rate of \$204;¹³⁹ in the past year this amount has increased from a flat rate monthly fee of \$185.¹⁴⁰ With Westlaw, a sole-practitioner can purchase unlimited time to research a specific jurisdiction, such as the state of Illinois, at a starting monthly rate of

137. Shuldberg, *supra* note 7, at 550. See also Reynolds & Richman, *supra* note 1, at 1187 (“Permitting citation would unjustly favor those lawyers with sufficient resources to monitor and index unpublished opinions. The small practitioner clearly could not afford that expense.”).

138. Shuldberg, *supra* note 7, at 556. See also Dragich, *supra* note 112, at 792 (noting the wide availability of unpublished opinions and the ease of finding them using online research services).

139. Telephone interview with Laura Noll, Account Manager, LEXIS (Oct. 9, 2001). The flat rate pricing includes state, federal appellate and United States Supreme Court cases, as well as the ability to print and download. The per-month price for the same plan increases depending on the number of practitioners using the service: one practitioner pays \$204; two pay \$282; three to five pay \$390; six to 10 pay \$590; 11 to 20 pay \$885; 21 to 40 pay \$1415; 41 to 60 pay \$2190; and 61 to 100 pay \$3335. *Id.*

140. As of October 27, 2000, the flat monthly fee was \$185. Telephone interview with Angela Davis, Account Manager, LEXIS (Oct. 27, 2000). In the past year, the monthly rate LEXIS charges firms with two to 20 lawyers has also increased. The remaining fees have increased as follows: two paid \$274 and now pay \$282, three to five paid \$379 and now pay \$390; six to ten paid \$573 and now pay \$590; and 11 to 20 paid \$851 and now pay \$885. *Id.*; Telephone interview with Laura Noll, Account Manager, LEXIS (Oct. 9, 2001).

\$165.¹⁴¹ This rate would increase if more attorneys (up to 40) were added to the plan, or where additional services, such as KeyCite for \$50 per month, were added.¹⁴² Anything not included in the plan would be subject to additional fees that are either billed by the hour or by a fixed fee per search.¹⁴³ For example, a firm can choose to pay \$8.75 a minute to search federal law or pay \$89 per search¹⁴⁴ on the federal caselaw database.¹⁴⁵ While these prices sound affordable, online research is still too expensive for practitioners who rarely need to use the services, who have already invested in print reporters and who are practicing successfully without the online services.

Further, while all federal appellate courts are currently putting their opinions on the Internet for affordable access, problems still exist.¹⁴⁶ For example, most on-line services are only posting *published* opinions from 1995 to present.¹⁴⁷ Thus, few unpublished opinions are available and few, if any, unpublished opinions before 1995 are available. Further, some only allow users to search by date or case number, rather than by key word or subject.¹⁴⁸ This is not helpful because the party must know that an opinion on a particular issue exists before he can know there is a need to access it. Thus, access means more than a party getting his hands on the opinion; it means the ability to search for relevant case law. Access also means the comfort of knowing that your search of relevant case law completely shields you from any ethical or

141. E-mail from Amy Swistock, Westlaw Academic Account Manager, Westlaw, to Sebrina Mason, law student, Southern Illinois University-Carbondale (Oct. 15, 2001, 01:50:31 CDT) (on file with author).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. See Villanova University School of Law, The Federal Court Locator, at <http://vls.law.vill.edu/Locator/fedcourt.html> (accessed Nov. 2, 2000) (providing access to Internet sites for each federal appellate court). See also FindLaw, at <http://www.findlaw.com/casecode> (accessed Nov. 7, 2000) (providing database that includes federal appellate unpublished opinions for some circuits) Email from FindLaw Team, to Sebrina Mason, law student, Southern Illinois University-Carbondale (Nov. 7, 2000, 04:44:47 CST) (on file with author).

147. See e.g. *id.* See also United States Court of Appeals for the District of Columbia Circuit, at <http://www.ll.georgetown.edu/Fed-Ct/cadc.html> (last updated Oct. 10, 2000) and United States Court of Appeals for the Federal Circuit, at <http://www.ll.georgetown.edu/Fed-Ct/cafed/html> (last updated Oct. 3, 2000) (indicating that both the Federal and D.C. Circuits place only published opinions online). The Sixth Circuit's website also indicates that only published opinions are online. See United States Court of Appeals for the Sixth Circuit, at <http://pacer.ca6.uscourts.gov/index.php> (opinions posted for Nov. 3, 2000). Similarly, the Fifth Circuit also places only published opinions on its website. See United States Court of Appeals for the Fifth Circuit, at <http://www.ca5.uscourts.gov/> (last visited Nov. 3, 2000).

148. See *supra* notes 146–147.

malpractice liability. Even if other federal appellate courts follow the Eighth Circuit's lead in putting unpublished opinions online,¹⁴⁹ it will take a lot of time and expense to update their online services to include unpublished opinions. Until then, practitioners must rely on other means to access unpublished opinions to avoid liability. Currently, it seems the only universal way to effectively search the precedent in unpublished opinions is through online research services, such as Westlaw or LEXIS, which may be too expensive for many practitioners to afford or too costly to pass on to their clients.

It is not unrealistic, however, to consider that the courts could solve this problem in the future. In a dissent opinion that follows the adoption of the Tenth Circuit no-citation rule, Chief Judge Holloway, along with two additional judges, argued that the unequal access dilemma could be solved by the courts:

We can make the rulings, together with a simple index, available at our circuit library and can distribute the rulings to the clerks of the district courts, to the state bar associations, and to other depositories at law schools, without an undue burden. Making the rulings available in such places, with a rudimentary index, will afford the public, and bar and the district judges reasonable access to our unpublished rulings.¹⁵⁰

The Tenth Circuit previously maintained a subject-matter index, which was "widely circulated" via subscription and could be obtained at a minimal cost.¹⁵¹ Copies of the unpublished opinions were also available at cost.¹⁵² If a court could maintain a similar, searchable subject index via the Internet and provide the unpublished opinions without compromising its judicial efficiency, then such a service may be the answer to unequal access. However, this solution will fail to address the additional time and costs associated with searching an additional body of law) a cost that some argue will be too much for some lawyers to bear or too expensive to pass on to their clients.

3. *No Choice but to Research Unpublished Opinions*

149. See United States Court of Appeals for the Eighth Circuit, at <http://www.ca8.uscourts.gov/opinions/opinions.html> (The Eighth Circuit is currently putting both published and unpublished opinions since 1995 online. The opinions can be searched by key word.)

150. *Re Rules of the United States Court of Appeals for the Tenth Cir.*, 955 F.2d 36, 37-38 (10th Circuit 1992).

151. Reynolds & Richman, *supra* note 1, at 1181.

152. *Id.* See also Weaver, *supra* note 127, at 479-80 & n.14.

If lawyers did not see the need to research unpublished opinions before they were made precedent, they likely will search them if the view in *Anastasoff I* decision is made law. Beyond the need to find case law to help a client, lawyers must find relevant case law to avoid ethical violations, Rule 11 or similar sanctions, and malpractice liability. However, researching unpublished opinions may make research more time consuming and more costly, thus, making it more difficult for lawyers to deal with the above issues. Professor Dragich noted that selective publication “does not reduce the amount of law, but actually creates an additional, less accessible body of law that must be consulted, making research more difficult and raising the cost of litigation.”¹⁵³ Another commentator wrote on the effect of increased case law, which would be the result where unpublished opinions are precedent: “More time is required to sort through more cases. The legal researcher must spend additional time searching to find the relevant precedent and to distinguish the irrelevant. Because time is money in legal practice, the cost of research increases with the increase in case law.”¹⁵⁴

Yet, if unpublished opinions are made precedent, attorneys will have little choice but to take the time to search. First, “[a]ttorneys cannot run the risk that their opponents will gain an advantage by researching an additional body of law.”¹⁵⁵ Although, in most situations, published opinions will suffice, attorneys cannot ignore unpublished opinions because they risk not finding case law, which could either help or hurt their client. Even worse, they risk their opponent finding the case instead.

Second, ethical standards may require the lawyer to research unpublished opinions in order to represent a client competently. Many jurisdictions have adopted Model Rule of Professional Conduct 1.1, which states that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”¹⁵⁶ The comment to the rule indicates that thoroughness and preparation include “inquiry into and analysis of the factual and legal elements of the problem”¹⁵⁷ Thus, once unpublished opinions contain precedent relating to the factual and legal elements of legal issues, it follows that lawyers will be ethically required to search them. Third, an

153. Dragich, *supra* note 112, at 787.

154. Shuldberg, *supra* note 7, at 547–48. “Computerization is not a panacea, however. For all of its power and speed, it brings with it new costs and unique problems.” *See also* Shuldberg, *supra* note 7, at 559 (noting the problems of free-text searching, such as retrieving irrelevant documents with a broad search or excluding relevant documents with a narrow search).

155. Dragich, *supra* note 112, at 792.

156. MODEL RULES OF PROF'L CONDUCT R. 1.1 (1999).

157. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 5 (1999).

attorney may be required to search unpublished opinions to fulfill the Rule 11 requirement. Rule 11 and similar rules require attorneys to perform an “inquiry reasonable under the circumstances” before filing a complaint.¹⁵⁸ Attorneys are required to find supporting and adverse authority, as well as recent changes in the law.¹⁵⁹ Failure to comply with Rule 11 could result in monetary sanctions, such as attorneys’ fees and other expenses.¹⁶⁰ Thus, to avoid sanctions, attorneys must search unpublished opinions if they have precedential value.

Finally, one commentator noted that attorneys may have a duty to research unpublished opinions, even where they are given no precedential value, in order to fulfill the negligence standard of reasonable care and diligence and avoid legal malpractice.¹⁶¹ Thus, for the above reasons, if and when unpublished opinions are granted precedential status, attorneys will be forced to research them despite the cost of the researcher’s time in sifting through additional case law or of subscribing to research databases.

4. *Decreased Judicial Efficiency*

Supporting selective publication rules was the idea that judicial opinions exist for two reasons, to settle disputes and to make law, along with the notion that opinions written to make law require more time from judges.¹⁶² Thus, where a decision exists only to settle a dispute and not to make law, a judge needs only to write a short opinion for the parties involved. This allows a judge to spend more time writing at length on opinions that fulfill both the dispute-

158. FED. R. CIV. P. 11(b).

159. Dragich, *supra* note 109, at 787. The author argues that “to the extent that unpublished decisions are binding authority . . . , selective publication frustrates attorney’s attempts to fulfill their Rule 11 obligation to perform a reasonable inquiry before filing a complaint.” *Id.* at 786.

160. FED. R. CIV. P. 11(c)(2):

[t]he sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into the court, or . . . an order directing payment to the movant of some or all of the reasonable attorneys’ fees and other expenses incurred as a direct result of the violation.

161. Hinderks & Leben, *Restoring the Common in the Law: A Proposal for the Elimination of Rules Prohibiting the Citation of Unpublished Opinions in Kansas and the Tenth Circuit*, 31 WASHBURN L.J. 155, 213 (1992).

162. STANDARDS FOR PUBLICATION, *supra* note 2, at 3 (“The judicial time and effort essential for the development of an opinion to be published for posterity and widely distributed is necessarily greater than that sufficient to enable the judge to provide a statement so that the parties can understand the reasons for the decision.”).

settling and law-making functions.¹⁶³ Thus, the selective publication rules will promote judicial efficiency because “[w]hile limitation on the publication of opinions does not reduce the number of opinions to be written, it greatly reduces the time and resources that must be devoted to opinion preparation.”¹⁶⁴

However, where unpublished opinions are precedent, many judges will take a different approach in writing unpublished opinions. Rather than writing short, informal opinions directed toward the parties, judges will elaborate both fact and law so that future parties can use the opinions.¹⁶⁵ The *Anastasoff I* court briefly addressed the argument that judges do not have time to “do a decent enough job . . . to justify treating every opinion as a precedent.”¹⁶⁶ The court said that “[i]f this is true, the judicial system is indeed in serious trouble”¹⁶⁷ The court suggested the creation of more judgeships if practical,¹⁶⁸ but, if not, the court said judges should still take time to “do a competent job with each case. If this means backlogs will grow, the price must still be paid.”¹⁶⁹

Thus, where judges are forced to write every opinion as precedent, a major purpose of unpublished opinions, increased judicial efficiency, will be diminished. For example, some judges write unpublished opinions in a different manner, because they know these opinions will not be relied on at a later time. Judge Philip Nichols, Jr., while Senior Circuit Judge for the Federal Circuit, wrote that “whether I am writing for nonpublication a majority opinion or a dissent, the feeling is that because it is written, though first for the panel members, after them primarily for the parties, I can say things to or about them or others I would not shout to the world.”¹⁷⁰ Further, most judges spend less time researching and writing unpublished opinions. Chief Judge for the Sixth

163. *Id.* at 5 (“Non-published opinions can be short. They do not need to cite all of the law, and can deal mainly with facts as they relate to law. They can be written especially for the parties. They need not be polished.”).

164. *Id.* at 6.

165. See Reynolds & Richman, *supra* note 1, at 1186. (“If citation of unpublished opinions were permitted, however, judges would no longer be satisfied with this limited exposition, fearing that careless words or omitted facts might cause difficulty later on. The savings in judge-time would thus be lost.”).

166. *Anastasoff I*, 223 F.3d at 904.

167. *Id.*

168. See generally Brian Endter, *Death, Taxes, and Unpublished Opinions: In the Wake of Anastasoff v. United States and its Holding that Eighth Circuit Rule 28(A)(i) Unconstitutionally Expands the Judicial Power*, ARIZ. ST. L.J., Summer 2001 (arguing that increasing the number of appellate court judgeships will threaten coherency by “exacerbating fragmentation”).

169. *Id.*

170. Nichols, *supra* note 133, at 925.

Circuit, the Honorable Boyce Martin, estimated that he and his clerks “spend about half as much time working on the average unpublished decision. We save time because unpublished decisions are, as a rule, shorter than published decisions.”¹⁷¹ He wrote that the “relative straightforwardness” of the legal issues in unpublished opinions also saves research time.¹⁷² However, many judges, including Chief Judge Martin, feel that citation to unpublished opinions will defeat the purpose of judicial efficiency: “[i]t 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.”¹⁷³

Moreover, where unpublished opinions are given new-found precedential status and are cited by litigants, judges must spend more time crafting them to avoid the possibility of hindering the development of precedent rather than furthering it, as argued in *Anastasoff I*. For example, in testimony before the Hruska Commission, Judge Sprecher of the Seventh Circuit said distinguishing and comparing the facts in cases is critical to *stare decisis*, but impossible to do where the facts have not been fully developed, which is common in unpublished opinions:¹⁷⁴

Finally, and I think this is really the crux of the question of citation, personally I would think that if a no-citation rule did not go hand in hand with a no-publication rule, I would feel that we should do away with the no-publication rule and go back to the old full publication rule, and that is because of the question of *stare decisis*.

I think we would find that our very delicate principles of *stare decisis*, which are the genius of the common law . . . , would break down completely if you would get into the procedure of citing cases that did not fully explore the facts. . . .

In other words, the distinguishing of cases is a hallmark of *stare decisis*, and if we were not able to do that, we would find ourselves citing cases that really had no relevance at all¹⁷⁵

The Advisory Council on Appellate Justice also noted that citation to unpublished opinions could be detrimental to precedent:

An opinion that meets the needs of the parties to know the reasons for a decision can be written with the assumption that the parties are familiar with the background of the case. It need not take pains to identify the issues the

171. The Honorable Boyce F. Martin, *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 190 (1999).

172. *Id.*

173. *Id.* at 196.

174. Reynolds & Richman, *supra* note 1, at 1186.

175. *Id.* (citing Judge Sprecher’s comments given before the Hruska Commission).

parties chose to raise, rehearse the arguments they made, or discuss the authorities they agreed were decisive and the matters of fact or law that were stipulated. An opinion for the whole world cannot rest on such assumptions or foundations. Thus, it could be misleading if opinions prepared for the more restricted purposes appropriate for unpublished opinions were cited as precedent.¹⁷⁶

Thus, in order to protect stare decisis, many judges will put forth the same effort in writing unpublished opinions as they do published opinions. As a result, judicial efficiency, which is a major objective of no-publication, no-citation rules,¹⁷⁷ will be diminished.

V. CONCLUSION

The *Anastasoff I* principle is strong. The court made a solid connection between the Framers' knowledge of the doctrine of precedent, and their intent that the doctrine limit the scope of judicial power.¹⁷⁸ Thus, by labeling some opinions as "unpublished" and denying their precedential value, courts have wielded a power beyond the scope of that granted to them in Article III.¹⁷⁹ *Anastasoff I* is further supported in light of the Supreme Court's *Bancorp* decision. In *Bancorp*, the Court held mootness by settlement is not enough to grant vacatur and, in part, based its decision on the value of precedent to "the legal community as a whole" and not merely to the parties involved in the litigation. Thus, the Court recognized that future parties could find value in judgments even though after settlement the judgment became moot to the parties involved. Similarly, future parties could find value in unpublished opinions that functioned only to settle a dispute between present parties, for "[i]nherent in every judicial decision is a declaration and interpretation of a general principle or rule of law."¹⁸⁰

However, the opinion lacked instruction on how to handle the consequences of declaring no-citation rules unconstitutional. Even though more and more jurisdictions are publishing their opinions online in an affordable, searchable database, most sites only offer opinions designated for

176. STANDARDS FOR PUBLICATION, *supra* note 2, at 18.

177. *Id.* ("One of the major objectives of efforts to curb publication is to institute a procedure whereby judges can write opinions for the benefit of the parties without having to include all the factual background and detailed rationale that is required for opinions that will enter the body of precedential law.")

178. *Anastasoff I*, 223 F.3d at 903.

179. *Id.*

180. *Id.* at 899 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803)).

book publication dated after 1995. It will take some time and expense before unpublished opinions will be available to all practitioners in an affordable, searchable format. Until then, practitioners who want to avoid potential ethical and malpractice liability must use services, such as Westlaw and LEXIS, despite the expense. However, this problem can be remedied, and if the *Anastasoff I* holding is made law, jurisdictions requiring citation to unpublished opinions will likely follow the Eighth Circuit's lead in placing unpublished opinions online. Finally, no-publication and no-citation rules were created, in part, to allow judges to spend more time on important, law-making opinions and less time on opinions that functioned merely to settle disputes.¹⁸¹ However, if citation is allowed to unpublished opinions, judges will want to spend more time researching law and illustrating facts to avoid making improper precedent.¹⁸² They will spend just as much time on unpublished opinions as they do published opinions, and judicial efficiency will be lost.¹⁸³ The court briefly addressed this issue, suggesting that more judgeships be created; but, if this is impractical, the court said that judges must take time to write all opinions competently despite the effect on backlogs.¹⁸⁴ This instruction is simply not enough, considering the *Anastasoff I* court dismantled a system governing citation and publication that has been in place since the early 1970s.¹⁸⁵ Thus, while the court's constitutional argument was compelling, the decision's impractical consequences would leave many lawyers and judges scrambling to implement a holding that makes them responsible for a vast amount of unpublished law. If and when this issue reaches the Supreme Court, as many commentators predicted that it would

prior to vacatur of *Anastasoff I*, the Court will have to consider the practical

181. Reynolds & Richman, *supra* note 1, at 1186.

182. *Id.*

183. *Id.*

184. *Anastasoff I*, 223 F.3d at 904.

185. *See generally* STANDARDS FOR PUBLICATION, *supra* note 2.

effects of its decision, which will likely reach numerous jurisdictions.¹⁸⁶

186. See Braun, *supra* note 19, at 92:

[A]s *Anastasoff* is based on Article III, it arguably extends to all Article III courts, making every district court order binding precedent within the district. It may even extend to state courts, as the judicial power defined in state constitutions is usually based on the model of the federal constitution. It is unlikely that the Supreme Court will allow such uncertainty to continue for long, whether *Anastasoff* herself brings the issue to the high court or not. It will be raised soon in every circuit, and will no doubt prompt a blizzard of requests for en banc review of cases briefed and decided under *no-citation* rules.

See also Steve France, *Departments Law Beat*, A.B.A. J., Oct. 2000, at 24.