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Citation of Unpublished Opinions as Precedent

MARTHA DRAGICH PEARSON*

INTRODUCTION

Responding to a well-documented “crisis of volume,”¹ the United States courts of appeals have adopted measures to reduce the time judges must spend on each case.² These measures include using staff attorneys to screen cases,³ eliminating oral argument in many cases,⁴ relying on law clerks to draft opinions,⁵ and reducing the publication of opinions.⁶ To free judges of the task of preparing publication-worthy opinions in every case, the circuits adopted two sets of rules: one outlin-

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1. The term apparently originated in DANIEL J. MEADOR, *APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME* (1974). If a crisis existed in 1974, it has steadily worsened. According to the Commission on Structural Alternatives for the Federal Courts of Appeals (also known as the White Commission), in 1978 there were 19,657 appeals filed, or 137 per authorized circuit judge; by 1997 filings had risen to 53,688 or 300 per authorized judgeship. COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, *FINAL REPORT* 14 tbl.2-3 (1998) [hereinafter *STRUCTURAL ALTERNATIVES REPORT*]. Two earlier studies also mandated by Congress are the *REPORT OF THE FEDERAL COURTS STUDY COMMITTEE* (1990) [hereinafter *FCSC REPORT*] and the *COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE* (1975) (also known as the Hruska Commission) [hereinafter *Hruska Commission*]. Some official studies avoid using the term “crisis.” The *FCSC REPORT*, however, discusses the dimensions of the “long-expected crisis” and concludes that it “is at last upon us.” *FCSC REPORT* at 6.

2. See, e.g., *STRUCTURAL ALTERNATIVES REPORT*, *supra* note 1, at 21–25 (discussing “differentiated decisional processes”); see also THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL—THE PROBLEMS OF THE U.S. COURTS OF APPEALS* (1994) (discussing “intramural” (procedural) and “extramural” (structural) reforms); *RESTRUCTURING JUSTICE—THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS* (Arthur D. Hellman ed., 1990) [hereinafter *RESTRUCTURING JUSTICE*] (discussing measures adopted in the Ninth Circuit).

3. *STRUCTURAL ALTERNATIVES REPORT*, *supra* note 1, at 23–24, tbl.2-8.

4. *Id.* at 22, tbl.2-6.

5. See, e.g., Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, *CAL. LAW.*, June 2000, at 43, 44 (stating that most memorandum dispositions are drafted by law clerks); see also Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 *BROOK. L. REV.* 685, 697 (2000).

6. *STRUCTURAL ALTERNATIVES REPORT*, *supra* note 1, at 22 tbl.2-7.

ing the circumstances under which opinions should be published,⁷ and the other defining the “precedential value” of unpublished opinions and limiting or forbidding their citation in future cases.⁸ The latter set of rules, adopted on the grounds that they are necessary to effectuate the selective publication rules, explicitly invoke the notion of precedent.⁹

The conception of precedent reflected in the no-citation rules appears incomplete or distorted. The circuits’ rules, for example, deny in varying degrees the “precedential value”¹⁰ of unpublished opinions. These rules forbid the citation of unpublished opinions “as precedent,”¹¹ as if precedent were an all-or-nothing proposition. Yet the ability to draw compelling analogies to non-binding precedents, or to distinguish away apparently binding precedents, is the “hallmark”¹² of the lawyer’s art. One of the primary objectives of law schools in the first-year curriculum is to develop students’ understanding of an entire spectrum of “precedential value” and the sophisticated use of authority.¹³ These practices

7. D.C. CIR. R. 36; FED. CIR. R. 47.6; 1ST CIR. R. 36; 3D CIR. R. APP. I IOP 6; 4TH CIR. R. 36; 5TH CIR. R. 47.5; 6TH CIR. R. 206; 7TH CIR. R. 53; 8TH CIR. R. IOP IV.B, APP. I; 9TH CIR. R. 36-2; 10TH CIR. R. 36.1-36.2; 11TH CIR. R. 36. The Second Circuit’s rule does not mention unpublished opinions but allows disposition in open court or by summary order rather than by “written opinion.” 2D CIR. R. § 0.23.

8. D.C. CIR. R. 36(c)(2), 28(c)(1); FED. CIR. R. 47.6; 1ST CIR. R. 36(b)(2)(F); 2D CIR. R. § 0.23; 3D CIR. R. APP. I IOP 5.7; 4TH CIR. R. 36(c); 5TH CIR. R. 47.5.4; 6TH CIR. R. 28(g); 7TH CIR. R. 53(b)(2)(iv); 8TH CIR. R. 28A; 9TH CIR. R. 36-3(b); 10TH CIR. R. 36.3(B); 11TH CIR. R. 36-2. This Article deals only with the practices of the federal courts of appeals. According to a recent article, however, the “majority of states ban citation of unpublished opinions in their appellate courts” as well. Richard B. Cappalli, *The Common Law’s Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 758 (2003).

9. *See, e.g.*, D.C. CIR. R. 36(c)(2) (stating that panel sees “no precedential value” in unpublished decisions); FED. CIR. R. 47.6(b) (stating that certain dispositions “must not be employed or cited as precedent”); 3D CIR. R. APP. I IOP 5.2 (stating that an opinion is published when it has “precedential” value); 5TH CIR. R. 47.5.4 (stating that certain unpublished opinions “are not precedent”); 7TH CIR. R. 53(b)(2)(iv) (stating that unpublished orders “shall not be cited or used as precedent”); 8TH CIR. R. 28A(i) (stating that unpublished opinions “are not precedent”); 9TH CIR. R. 36-3(a) (stating that unpublished dispositions “are not binding precedent”); 10TH CIR. R. 36.3(A) (stating that unpublished opinions “are not binding precedent”); 11TH CIR. R. 36-2 (stating that unpublished opinions “are not considered binding precedent”). The Fourth Circuit allows counsel to cite an unpublished decision if she believes that it “has precedential value . . . and that there is no published opinion that would serve as well.” 4TH CIR. R. 36(c). The Sixth Circuit’s rule is very similar. *See* 6TH CIR. R. 28(g).

10. *See, e.g.*, D.C. CIR. R. 36(c)(2); 5TH CIR. R. 47.5.4; 8TH CIR. R. 28(i); 9TH CIR. R. 36-3; 10TH CIR. R. 36.3; 11TH CIR. R. 36-2.

11. *See, e.g.*, FED. CIR. R. 47.6(b); 7TH CIR. R. 53(b)(2). The position of the District of Columbia Circuit is somewhat confusing. *See* D.C. CIR. R. 28(c)(1)(B) (stating that unpublished decisions entered on or after January 1, 2002 “may be cited as precedent”); D.C. CIR. R. 36(c)(2) (stating that the panel sees “no precedential value” in unpublished decisions).

12. *Cf.* 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, 1186 (1978) (quoting testimony of Judge Robert A. Sprecher of the Seventh Circuit before the Hruska Commission).

13. Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 3 (1989).

reflect a nuanced understanding of precedent not found in the no-citation rules.

The history of the selective publication and non-citation rules is well known¹⁴ and need not be recounted here. A substantial body of literature considers various aspects of unpublished opinions and no-citation rules.¹⁵ A 1978 article by Professors William Reynolds and William Richman¹⁶ led the way, publicizing a term that suggests the murkiness of the underlying concepts: “non-precedential precedent.”¹⁷ Subsequent academic commentary on these practices has been overwhelmingly negative,¹⁸ whether examining the rules’ unfairness to one-time litigants,¹⁹ deleterious effects on the development of federal law,²⁰ possible constitutional violations,²¹ or other issues.²² Several circuit judges have also commented on these practices; their commentary has been mixed.²³ The reaction of

14. See, e.g., Martha J. Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 760–62 (1995); Salem M. Katsh & Alex V. Chachkes, *Constitutionality of “No-Citation” Rules*, 3 J. APP. PRAC. & PROCESS 287, 290–94 (2001); Reynolds & Richman, *supra* note 12, at 1168–72, and sources cited therein.

15. See, e.g., Cooper & Berman, *supra* note 5, at 704 n.48 (citing sources); Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 73 nn.5–6 (2001) (citing sources).

16. Reynolds & Richman, *supra* note 12.

17. The term comes from the testimony of Judge Robert A. Sprecher of the Seventh Circuit before the Hruska Commission. *Id.* at 1167 n.1.

18. See Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399, 410 (2002). A recent exception is the work of Professors Cooper and Berman. See Cooper & Berman, *supra* note 5, at 690, 727 (suggesting that such reforms may be advantageous in that they allow the courts of appeals to avoid engaging in “premature law-making”); Douglas A. Berman & Jeffrey O. Cooper, *In Defense of Less Precedential Opinions: A Reply to Chief Judge Martin*, 60 OHIO ST. L.J. 2025, 2025 (1999); see also Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075, 1078 (2003) (citing scholarly commentary critical of Anastasoff’s constitutional analysis of *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000)).

19. See, e.g., 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 (1989).

20. See, e.g., Dragich, *supra* note 14.

21. See, e.g., David Greenwald & Frederick A. O. Schwartz, Jr., *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133 (2002) (discussing First Amendment issues); Katsh & Chachkes, *supra* note 14 (discussing First Amendment and separation of powers issues).

22. See, e.g., Merritt & Brudney, *supra* note 15 (studying variation of publication rates among circuits).

23. Judge-written articles defending the rules include: Kozinski & Reinhardt, *supra* note 5; The Honorable Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177 (1999); Philip Nichols, Jr., *Selective Publication of Opinions: One Judge’s View*, 35 AM. U. L. REV. 909 (1986); Hon. Bruce M. Selya, *Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age*, 55 OHIO ST. L.J. 405 (1994). Statements by judges criticizing the rules include: *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, 260 (5th Cir. 2001) (Smith, J., dissenting from denial of rehearing en banc) (calling upon court to “revisit the questionable practice of denying precedential status to unpublished opinions”); Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS

the bar has tended to be critical.²⁴ Professor Lauren Robel notes that criticism of the rules has recently extended to political and popular spheres.²⁵ None of these commentaries includes an in-depth analysis of the rules in light of the doctrine of precedent.²⁶

The limited publication and no-citation rules have also been challenged in court, though that, too, has failed to resolve the matter of their precedential value.²⁷ The Eighth Circuit's rule became the subject of litigation when a party urged the court to ignore an unpublished opinion in a factually indistinguishable case under the rule permitting citation of an unpublished opinion only for preclusive effect or as persuasive authority.²⁸ In the Ninth Circuit, attorneys in two cases were ordered to show cause why they should not be sanctioned for citing unpublished cases in contravention of the rule.²⁹ Attorneys may well find themselves in an im-

219, 222 (1999); Re Rules of the United States Court of Appeals for the Tenth Circuit, adopted Nov. 18, 1986, 955 F.2d 36, 38 (10th Cir. 1992) (statement of Chief Judge Holloway); Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 768 (1983).

24. See AMERICAN BAR ASSOCIATION, MINIMUM STANDARDS FOR APPELLATE COURT OPINIONS (adopted Feb. 2000) [hereinafter ABA MINIMUM STANDARDS]; William T. Hangley, *Opinions Hidden, Citations Forbidden: A Report and Recommendations of the American College of Trial Lawyers on the Publication and Citation of Nonbinding Federal Circuit Court Opinions*, 208 F.R.D. 645 (2002) [hereinafter *ACTL Report*].

25. Robel, *supra* note 18, at 410–11.

26. Some articles include detailed discussions of the historical evolution of the doctrine of precedent, primarily by way of assessing Judge Arnold's account of that history (and its implications for courts today) in *Anastasoff*. See, e.g., Thomas R. Lee & Lance S. Lehnhof, *The Anastasoff Case and the Judicial Power to "Unpublish" Opinions*, 77 NOTRE DAME L. REV. 135 (2001). A brief discussion of the modern operation of precedent appears in Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions and the Nature of Precedent*, 4 GREEN BAG 2d 17 (2002). Robel, *supra* note 18, analyzes the ways lawyers and judges actually use published and unpublished opinions but does not focus on the doctrine of precedent. Cappalli, *supra* note 8, at 759, looks at unpublished opinions and no-citation rules "through the lens of the common law tradition," but focuses on the common law methodology of interpreting and applying precedents rather than on the doctrine of precedent. See also Michael B. W. Sinclair, *Anastasoff versus Hart: The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions*, 64 U. PITT. L. REV. 695 (2003) (analyzing no-citation rules in light of "enactment theory" and "standard theory" of precedent).

27. Soon after the rules were adopted, a challenge was filed seeking a writ of mandamus against the Seventh Circuit's action in striking citation of an unpublished opinion from petitioner's appellate brief, but the Supreme Court denied the writ. *Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit*, 429 U.S. 917 (1976). Two years later, a litigant challenged the Seventh Circuit's authority to issue non-precedential opinions; on review the Supreme Court resolved the case on jurisdictional grounds and did not reach the issue of the Seventh Circuit's rule. *Browder v. Dir., Dept. of Corr.*, 434 U.S. 257 (1978). Much more recently, a challenge to the Ninth Circuit's rule was dismissed for lack of standing. *Schmier v. United States Court of Appeals for the Ninth Circuit*, 136 F. Supp. 2d 1048 (N.D. Cal. 2001), *aff'd*, 279 F.3d 817 (9th Cir. 2002).

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

29. *Hart v. Massanari*, 266 F.3d 1155, 1159 (9th Cir. 2001); *Sorchini v. City of Covina*, 250 F.3d 706, 708 (9th Cir. 2001).

possible position if they believe that diligent representation,³⁰ compliance with the requirements of Rule 11,³¹ or the duty to call relevant adverse authority to the court's attention³² requires citation of an unpublished decision.

This Article examines the no-citation rules in light of the purpose and operation of the doctrine of precedent. Part I compares the deep disagreement on five fundamental issues of appellate process in recent opinions of the Eighth and Ninth Circuits involving limited publication and no-citation rules. Part II turns to the doctrine of precedent and summarizes current thought about how precedent constrains judicial decisionmaking. This Part concludes with a discussion of the powers and obligations of the precedent court and subsequent courts with respect to the creation, shaping and use of precedent. Part III considers the operation of the system of precedent in the courts of appeals specifically, examining the functions and structure of these courts against the assumptions of the doctrine of precedent. In particular, this Part discusses two issues: the relationship between the courts of appeals' mandatory jurisdiction and the extent of their lawmaking (i.e., precedent-creating) role, and the relationship between the courts of appeals' internal decisional structures and their obligation to maintain the law of the circuit. Part IV examines the current status of unpublished opinions as "precedent," measuring them against fundamental questions about precedent outlined in Part II. Part V considers whether limited publication and no-citation rules, even if incompatible with our system of precedent, can be justified on economy grounds. Part VI discusses how the

30. MODEL RULES OF PROF'L CONDUCT R. 1.3 provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." See also GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 6.2 (3d ed.) (discussing relationship of duty of diligence to requirement of "zealous advocacy" under Model Code of Professional Responsibility).

31. FED. R. CIV. P. 11(b)(2) requires attorneys to certify that, to the best of their knowledge, the claims, defenses, and other legal contentions [in a pleading or other filing] are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." See also HAZARD & HODES, *THE LAW OF LAWYERING*, *supra* note 30, § 27.2–27.7 (discussing attorneys' obligations under Rule 11); Dragich, *supra* note 14, at 786–87 (discussing impact of unpublished decisions on compliance with Rule 11 obligations).

32. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) provides that "[a] lawyer shall not knowingly: . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." See also HAZARD & HODES, *supra* note 30, §29.11 (discussing duty to disclose adverse authority and noting that it is especially important for lawyers to disclose authorities that are "less likely to be discovered by the tribunal itself"). This discussion includes caveats about the nature of authorities to be disclosed, suggesting that "the standard should be whether the omitted authorities would be considered important by the judge sitting on the case." *Id.* (internal quotation marks and citation omitted). This statement may cast doubt on the obligation to disclose adverse—but unpublished—decisions, depending on the circuit.

courts of appeals might recast limited publication and no-citation rules in light of the dictates of a system of precedent. This Part examines possible modifications to the selective publication and no-citation rules. I suggest an alternative way of thinking about the content and format of abbreviated opinions in easy or redundant cases. If a decision adds nothing new to the law, its opinion need only state and cite the controlling law. The opinion should summarize the relevant facts, and the decision should be confined to its facts. Abbreviated opinions of this sort would be precedential, but their precedential value would be minimal because their ambit is narrow. I further suggest a return to the “free market” of prior decisions, in which the value of prior decisions is measured by consumers (not creators) of precedent against the criteria that govern the strength of any precedent.

This Article concludes that limited publication and, especially, no-citation rules are fundamentally incompatible with a system based on the rule of precedent. The economy arguments typically advanced in support of the rules are weak, particularly in light of recent technological developments. More importantly, these economy arguments themselves reflect a flawed understanding of precedent. Thus, the limited publication and no-citation rules cannot be justified on grounds of economy or efficiency. The courts of appeals can, by rethinking the format and content of abbreviated opinions, circumscribe the future effect of selected decisions. But these courts cannot legitimately declare decisions “non-precedential” for the future, and must not continue to forbid their citation.

I. ANASTASOFF AND HART

In 2000, the Eighth Circuit panel deciding *Anastasoff v. United States* held unconstitutional the portion of the circuit’s limited publication rule allowing the court to declare certain opinions “not precedential.”³³ The court en banc later vacated the panel decision as moot after the parties reached a settlement.³⁴ The *Anastasoff* panel’s ruling created quite a stir.³⁵ More recently, a Ninth Circuit panel in *Hart v. Massanari* addressed

33. 223 F.3d at 899.

34. 235 F.3d 1054, 1056 (8th Cir. 2000).

35. Dozens of articles have commented on the *Anastasoff* case. See, e.g., Stephen R. Barnett, *From Anastasoff to Hart to West’s Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1 (2002); Boggs & Brooks, *supra* note 26; John P. Borger & Chad M. Oldfather, *Anastasoff v. United States and the Debate over Unpublished Opinions*, 36 TORT & INS. L.J. 899 (2001); Katsh & Chachkes, *supra* note 14; Lee & Lehnhof, *supra* note 26; Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81 (2000); Robel, *supra* note 18; Carl Tobias, *Anastasoff, Unpublished Opinions, and Federal Appellate Justice*, 25 HARV. J.L. & PUB. POL’Y. 1171 (2002); Sebrina A. Mason, Note, *Citing Unpublished Opinions: The Eighth Circuit Holds It Violates the Constitution to*

the propriety of sanctioning attorneys for citing unpublished opinions in circumstances not permitted by the no-citation rule.³⁶ In *Hart*, the attorney ordered to show cause as to why he should not be sanctioned relied on *Anastasoff's* ruling of unconstitutionality.³⁷ The *Hart* court declined to impose sanctions,³⁸ but “la[id] to rest” the “mistaken impression that [the Ninth Circuit’s rule] is unconstitutional.³⁹ It is difficult to reconcile these two cases. Though many differences exist among the federal circuits,⁴⁰ all of the federal courts of appeals are governed by the same statutes⁴¹ and by the same overall rules of appellate procedure.⁴² Beyond that, the circuits share a long history;⁴³ their evolution has been largely shaped by central policy development⁴⁴ and by congressionally mandated studies of the whole system.⁴⁵ Despite these significant gravitational forces, the po-

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), 26 S. ILL. U. L.J. 119 (2001); Suzanne O. Snowden, Note, “That’s My Holding and I’m Not Sticking to It!” Court Rules that Deprive Unpublished Opinions of Precedential Authority Distort the Common Law, 79 WASH. U. L.Q. 1253 (2001); Lance A. Wade, Note, *Honda Meets Anastasoff: The Procedural Due Process Argument Against Rules Prohibiting Citation to Unpublished Judicial Decisions*, 42 B.C. L. REV. 695 (2001).

36. 266 F.3d 1155, 1159 (9th Cir. 2001). See also *Sorchini v. City of Covina*, 250 F.3d 706, 708–09 (9th Cir. 2001).

37. 266 F.3d at 1159. Schmier’s challenge to the Ninth Circuit’s rule likewise “place[d] great weight” on the *Anastasoff* ruling. *Schmier v. United States Court of Appeals for the Ninth Circuit*, 136 F. Supp. 2d at 1052. In a similar case, another attorney ordered to show cause why sanctions should not be imposed for citation of an unpublished opinion claimed to have believed the citation was permissible under the “notice” exception to the Ninth Circuit’s rule. *Sorchini*, 250 F.3d at 708–09.

38. 266 F.3d at 1180.

39. *Id.* at 1159. The Federal Circuit has stated its agreement with *Hart*. See *Symbol Tech., Inc. v. Lemelson Med.*, 277 F.3d 1361, 1367 (Fed. Cir. 2002).

40. One difference is size. The circuits range from a low of six authorized judges in the First Circuit to a high of twenty-eight authorized judges in the Ninth Circuit. STRUCTURAL ALTERNATIVES REPORT, *supra* note 1, at 27 tbl.2-9. Another difference is in caseload management techniques. See RESTRUCTURING JUSTICE, *supra* note 2 (discussing many “innovations” adopted by the Ninth Circuit under Chief Judge James R. Browning).

41. 28 U.S.C. § 1291 establishes the jurisdiction of all the federal courts of appeal except the Federal Circuit, whose jurisdiction is set out in 28 U.S.C. §§ 1292(c) and 1295. 28 U.S.C. § 46 governs the manner in which all the circuits hear and determine cases.

42. The Federal Rules of Appellate Procedure apply to all the circuits. Each circuit supplements these rules with its own local rules, however.

43. Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 224–26 (1999) (tracing the development of the courts of appeals and noting that all essential elements of the courts’ present design were in place by 1925).

44. *Cf.* STRUCTURAL ALTERNATIVES REPORT, *supra* note 1, at 25 (describing gradual “emergence of the circuit itself as an important administrative entity of the federal judicial system”); *id.* at 26 (noting that until nearly the end of the twentieth century, the circuits “were not major participants in federal judicial administration”). Until the circuits took on that role, administration and policy development took place primarily through the Judicial Conference of the United States and the Administrative Office of the United States Courts. *Id.* at 25–26.

45. *E.g.*, HRUSKA COMMISSION, *supra* note 1; FCSC REPORT, *supra* note 1; STRUCTURAL ALTERNATIVES REPORT, *supra* note 1.

sitions of the Eighth and Ninth Circuits, as articulated in *Anastasoff* and *Hart*, diverge sharply on fundamental questions of appellate justice. These questions include the extent of the lawmaking obligation of the courts of appeals, the manner in which precedents are created, the scope of precedent, the court's duty *vis-à-vis* precedent, and the application of the "prior panel" rule.⁴⁶ The divergence of views in *Anastasoff* and *Hart* is not attributable to minor differences in the two circuits' no-citation rules.⁴⁷

A. THE LAW-MAKING RESPONSIBILITY OF THE COURTS OF APPEALS

Discussions of the federal courts of appeals typically start from the obvious but important premise that these courts exercise dual functions: error correction and lawmaking.⁴⁸ Many commentators have described the tension between these two functions.⁴⁹ The duality of function plays a major role both in creating the "crisis of volume" in the courts of appeals⁵⁰ and in evaluating possible solutions.⁵¹ One might assume that the circuits share a common understanding of the extent of their lawmaking responsibility. But the *Anastasoff* and *Hart* opinions dash that assumption.

The statutory jurisdiction of the courts of appeals makes clear that the courts' error-correction function arises in every appeal filed.⁵² The point of disagreement between *Anastasoff* and *Hart* is whether the lawmaking function, too, arises in every appeal. Judge Richard Arnold's analysis in *Anastasoff* begins with this statement: "Inherent in every judicial decision is a declaration and interpretation of a general principle or

46. Also called the rule of intra-circuit stare decisis or the rule of interpanel accord, the "rule" provides that later panels within a circuit will not overturn the decision of an earlier panel on the same point. See *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). Each circuit has adopted this "rule" in caselaw. See Cooper & Berman, *supra* note 5, at 721; *id.* at 721 n.91 (citing cases adopting such rules). The rules vary in their application. See *infra* Part I.E.

47. See 266 F.3d at 1159 n.2 (noting minor differences in the rules but concluding that "both rules free later panels of the court . . . to disregard earlier rulings that are designated as non-precedential"). Judge Kozinski's interpretation of the Eighth Circuit's rule conflicts with that court's own interpretation of its rule in *Anastasoff*, as explained in Part I.E of this Article, but he is correct that the text of the two rules is similar. EIGHTH CIR. R. 28A(i) provides that "unpublished opinions . . . are not precedent." NINTH CIR. R. 36-3(a) provides that "[u]npublished dispositions and orders of this Court are not binding precedent."

48. See, e.g., Cooper & Berman, *supra* note 5, at 712-14.

49. *Id.* at 713.

50. See, e.g., Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 14-15.

51. *Id.* at 45.

52. "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from *all* final decisions of the district courts . . ." 28 U.S.C. § 1291 (emphasis added). See also Cooper & Berman, *supra* note 5, at 716 (discussing mandatory jurisdiction).

rule of law.”⁵³ Likewise, “each exercise of the ‘judicial power’ requires judges ‘to determine the law’ arising upon the facts of the case.”⁵⁴ Thus, Judge Arnold appears to hold the view that the two functions, while distinct, are indivisible.⁵⁵ As one recent article puts it, the error-correction function sets the agenda and the parameters for the lawmaking function.⁵⁶ But when an appeal is filed, both functions are invoked by virtue of the courts’ mandatory jurisdiction.

Judge Alex Kozinski, writing in *Hart*, takes a different view. Though Judge Kozinski acknowledges that the courts of appeals “lack discretionary review authority”⁵⁷ similar to that of the Supreme Court, he approves the courts of appeals’ use of differential appellate processes,⁵⁸ such as non-publication of opinions, “to achieve the same end”⁵⁹ of discretionary exercise of the lawmaking power. By way of example, Judge Kozinski notes that if the lawmaking power must be exercised in every case, rather than only at the court’s discretion, “undue weight” is given to the “first case to raise a particular issue . . . whether or not the lawyers have done an adequate job of developing and arguing the issue.”⁶⁰ Better, he implies, for the court to await a suitable case. Under this view, then, the lawmaking obligation of the federal courts of appeals is invoked not through mandatory jurisdiction but as the result of a process to “separat[e] the cases” that call for the exercise of the lawmaking power from those that do not.⁶¹ Failure to separate the cases in this fashion is tantamount to “abdication[an] important aspect of judicial responsibility.”⁶² In other words, the error-correction aspect of the judicial power can be divorced from the lawmaking aspect.

B. THE CREATION OF PRECEDENT

The *Anastasoff* and *Hart* opinions also differ on the question of how a court creates a precedent. As noted above, the *Anastasoff* opinion pro-

53. *Anastasoff v. United States*, 223 F.3d 898, 899 (9th Cir. 2000) (emphasis added). Judge Kozinski reads *Anastasoff* this way, describing *Anastasoff* as requiring federal judges “to make law in every case.” *Hart v. Massanari*, 266 F.3d 1155, 1160 (9th Cir. 2001) (emphasis added).

54. *Anastasoff*, 223 F.3d at 901 (emphasis added) (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *25).

55. *Id.* (discussing Blackstone’s view that “each exercise of the ‘judicial power’ requires judges ‘to determine the law’ arising upon the facts of the case”); *id.* (discussing views of Sir Edward Coke and Sir Matthew Hale on “derivation of precedential authority from the law-declaring nature of the judicial power”).

56. Cooper & Berman, *supra* note 5, at 722.

57. *Hart*, 266 F.3d at 1177.

58. *Id.* at 1177–78.

59. *Id.* at 1177.

60. *Id.* at 1175.

61. *Id.* at 1180.

62. *Id.*

ceeds from the premise that the declaration of law is an inherent part of every judicial decision; this “declaration of law is authoritative to the extent necessary for the decision.”⁶³ Thus, the nature of the dispute itself—the issues it presents within a particular factual context—marks the boundaries of the precedent set by the decision of the case. Precedent is an inevitable by-product of decision. Judge Arnold explicitly disavows the notion that “courts have the . . . power[] to choose for themselves, from among all the cases they decide, those [in which they will create precedent].”⁶⁴

Judge Kozinski’s view, by contrast, is that the creation of precedent is an intentional act.⁶⁵ The “principle of binding authority” is not “inevitable.”⁶⁶ To the contrary, precedential opinions are those “*meant* to govern not merely the cases for which they are written, but future cases as well.”⁶⁷ Judge Kozinski suggests that if the creation of precedent were an inevitable consequence of deciding a case, “the first circuit to rule on a legal issue would then bind not only itself and the courts within its own circuit, but all inferior federal courts”⁶⁸ and the courts of appeals could no longer choose “to adopt a body of circuit law on a wholesale basis”⁶⁹ as did the Eleventh⁷⁰ and Federal⁷¹ Circuits upon their creation. These objections illustrate the intentional character of the creation of precedent articulated in *Hart*.⁷²

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

64. *Id.* at 904.

65. *Hart*, 266 F.3d at 1177 (judges “select . . . cases in which to publish precedential opinions”); *id.* at 1180 (inherent aspect of judges’ function is “managing precedent”); *id.* at 1160 (rules that “empower courts of appeal to issue nonprecedential decisions” allow judges to “determine whether future panels . . . will be bound by particular rulings”).

66. *Id.* at 1175.

67. *Id.* at 1176 (emphasis added).

68. *Id.*

69. *Id.*

70. *Bonner v. City of Prichard*, 661 F.2d 1207 (11th Cir. 1981) (en banc) (adopting as binding precedent all decisions of the former Fifth Circuit before its division into the new Fifth and Eleventh Circuits).

71. *South Corp. v. United States*, 690 F.2d 1368, 1370–71 (Fed. Cir. 1982) (en banc) (adopting as binding precedent all decisions of the Federal Circuit’s predecessor courts).

72. These objections are puzzling. The decision of a panel in one circuit would not bind “all inferior federal courts,” given the widely accepted “law of the circuit” doctrine, under which the courts within one circuit are under no obligation to follow the decisions of another circuit. *See infra* notes 304–308 and accompanying text; *see also* Dragich, *supra* note 50, at 36–37 n.146 and sources cited therein. As for the wholesale adoption of a body of law as precedent, that decision (at least in the context of the creation of a new circuit) is simply different from the decision of any single case. The decisions in *Bonner* and *South Corp.* are akin to the adoption of a court rule and would not seem to be precluded by changes to the publication or citation rules.

C. THE SCOPE OF PRECEDENT

Another issue on which *Anastasoff* and *Hart* differ is the question of how much of the court's decision constitutes the precedent set by the decision. Professor Alexander considers at length whether precedent inheres generally in the result of a decision, the rule established by the decision, or the reasons offered in support of the result of the decision.⁷³ On this question, it is not easy to determine Judge Arnold's view. Some indications point toward the result. For example, Judge Arnold says that the effect of no-citation rules is to "say[] 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 cannot even tell us what we did yesterday.'" ⁷⁴ What the court "did"—the "way" it decided—suggests it is the result that constitutes the precedent.⁷⁵ Furthermore, much of Judge Arnold's analysis is grounded in the so-called "declaratory theory" of law, which held sway in the Framers' era.⁷⁶ If the law has an independent existence, needing only to be found and declared (not made) by judges,⁷⁷ then it would seem that the relevant action of the court would be to order a particular result. On the other hand, Judge Arnold quotes authorities that speak of "the *principles* of the decision [that] are held [] as precedents and authority"⁷⁸ and denounce the idea that courts are "at liberty to disregard all former rules and decisions."⁷⁹ Even under the de-

73. Alexander, *supra* note 13, at 29–33 and 44–45 (discussing versions of the result model); *id.* at 17–19 (discussing rule model); *id.* at 20 (discussing a version of the rule model that "really amount[s] to . . . constraint by the reasons of the precedent court"); *id.* at 32–33 (discussing a version of the result model in which the precedent court's reasons, rather than its result, constrain). Application of these models is well beyond the scope of this Article.

74. *Anastasoff v. United States*, 223 F. 3d 898, 904 (8th Cir. 2000). Judge Arnold's comment is vaguely reminiscent of the writing of then-Judge Cardozo:

It will not do to decide the same question one way between one set of litigants and the opposite way between another. "If a group of cases involves the same point, the parties expect the same decision. . . . If a case was decided against me yesterday when I was defendant, I shall look for the same judgment today if I am plaintiff. To decide differently would raise a feeling of resentment and wrong in my breast; it would be an infringement, material and moral, of my rights." . . . Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts.

BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 33–34 (1921) (quoting W.G. MILLER, *THE DATA OF JURISPRUDENCE* 335 (1903)).

75. For a related discussion, see Arthur D. Hellman, *Breaking the Banc: The Common-Law Process in the Large Appellate Court*, 23 ARIZ. ST. L.J. 915, 925 (1991) (explaining that the rule of a case "derives its binding force from the result in the case" and arguing that a mere difference in rationale, without a different result, cannot create an intra-circuit conflict).

76. *Anastasoff*, 223 F.3d at 901–02.

77. *Id.* at 901 (citing 1 COKE, *INSTITUTES* 51 (1642)).

78. *Id.* at 903 (quoting JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* §§ 377–78 (1833)) (emphasis added).

79. *Id.* at 904 (quoting STORY, *supra* note 78, §§ 377–78).

claratory theory, it is judges' "pronounce[ments]"⁸⁰—precedents—that are "the 'best and most authoritative' guide of what the law is."⁸¹ Accordingly, the precedent may encompass more than the simple result.

Judge Kozinski is somewhat clearer on this point. His discussion in *Hart* of the process of writing a precedential opinion makes clear that it is more than the mere result that matters. "Writing a precedential opinion . . . involves much more than deciding who wins and who loses in a particular case."⁸² For example, the authoring judge carefully selects both the relevant facts and the rule of decision "after due consideration of the relevant legal and policy considerations."⁸³ Moreover, "[w]here more than one rule could be followed . . . the court must explain why it is selecting one and rejecting the others."⁸⁴ Elsewhere, Judge Kozinski writes that "precedent" entails "not merely . . . the result but also . . . the phrasing of the disposition."⁸⁵ In contrast, an unpublished disposition is akin to "a letter from the court to [the] parties . . . announcing the result" using language "adequate to inform the parties how their case has been decided."⁸⁶ In these cases, it suffices for the three panel judges to "agree on the outcome of the case," even if not on "the precise reasoning or the rule to be applied to future cases."⁸⁷ In other words, when an opinion sets precedent, it does so not merely by ordering a result but by articulating a rationale. The result itself (something that exists in every case that is seen through to decision) is not the "precedent."⁸⁸

D. THE COURT'S DUTY *VIS-À-VIS* PRECEDENT

The *Anastasoff* and *Hart* opinions present differing theories of the court's obligations with respect to precedent. In considering the court's duty to follow precedent, it is important to bear in mind the differing definitions of precedent described above.

80. *Id.* at 902 (quoting THE FEDERALIST No. 81, at 531 (Alexander Hamilton) (Modern Library 1938)).

81. *Id.* at 901 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *69).

82. *Hart v. Massanari*, 266 F.3d 1155, 1177 (9th Cir. 2001).

83. *Id.* at 1176.

84. *Id.*

85. Kozinski & Reinhardt, *supra* note 5, at 44.

86. *Hart*, 266 F.3d at 1178.

87. *Id.* (discussing consequences of allowing parties to cite unpublished dispositions, including need for judges "to clarify their differences with the majority, even when those differences had no bearing on the case before them").

88. According to Professor Cappalli, Judge Kozinski "reverses" the common law maxim that "it is not what a court says, but what it does" that matters. See Cappalli, *supra* note 8, at 775.

In *Anastasoff*, Judge Arnold speaks of the court's duty to follow binding precedents,⁸⁹ defined as any "prior decisions"⁹⁰ of the court, so long as they are "directly on point."⁹¹ These statements confirm Judge Arnold's view that precedent is created by each decision of the court⁹² (not only when the court intends that effect) and that the result of the prior decision significantly, if not exclusively, determines the scope of the precedent.⁹³ Under this view, there are a large number of "precedents" (i.e., prior decisions), but relatively few "binding precedents"—cases indistinguishable from the case at bar.⁹⁴ The court's duty is to follow binding precedent, but not blindly or "eternal[ly]."⁹⁵ Judge Arnold acknowledges the court's prerogative to depart from precedent. Implicit in his reference to cases "directly on point" is the notion that when cases can be meaningfully distinguished, they are not "binding."⁹⁶ The *Anastasoff* opinion explicitly describes the conditions under which courts can overrule even binding precedent. They may do so when "the reasoning of a case is exposed as faulty, or [when] other exigent circumstances justify it,"⁹⁷ but the court operates under a "burden of justification"⁹⁸ that requires it to "ma[ke] convincingly clear" the "reasons for rejecting" the precedent.⁹⁹

In *Hart*, on the other hand, Judge Kozinski states that the courts discharge their obligations within the system of precedent when they "acknowledge[] and consider[]" "earlier authority."¹⁰⁰ Further, "in the absence of binding precedent," the court "may forge a different path than suggested by prior authorities."¹⁰¹ By virtue of his use of the term

89. Cf. 223 F.3d 898, 904 (8th Cir. 2000) (describing contrary argument that what the court did "yesterday . . . does not bind us today").

90. *Id.* at 905.

91. *Id.*

92. See *supra* text accompanying notes 53–55.

93. See *supra* text accompanying notes 74–81.

94. It is worth noting that *Anastasoff* involved precisely this situation: a prior decision, *Christie v. United States*, No. 91-2375MN, 1992 U.S. App. Lexis 38446 (8th Cir. Mar. 20, 1992) (per curiam), was indistinguishable, but the court's rule allowed, and Ms. Anastasoff urged, the court to disregard it. *Anastasoff v. United States*, 223 F. 3d 898, 899 (8th Cir. 2000). The court notes that Ms. Anastasoff made no attempt to distinguish *Christie* and characterizes the two cases as involving "precisely the same legal argument." *Id.* *Christie* is the "only case directly in point." *Id.*

95. *Anastasoff*, 223 F.3d at 904 (emphasizing that *Anastasoff* does not create a "rigid doctrine of eternal adherence" to precedent).

96. Cf. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 594 (1987) (discussing process of distinguishing cases and noting that when the prior case is "simply different" there is "no relevant precedent to follow").

97. 223 F.3d at 904–05.

98. *Id.* at 905; see also Robel, *supra* note 18, at 400.

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

100. *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001).

101. *Id.*

“authorities,” Judge Kozinski’s view seems at once broader and narrower than Judge Arnold’s. In speaking of “prior” (but not necessarily “binding”) “authorities,” Judge Kozinski suggests that the court should consider a wide range of writings, including, perhaps, decisions of inferior or unrelated courts¹⁰² and “even . . . non-case authorities, such as treatises and law review articles.”¹⁰³ This process is extensive, but discretionary.¹⁰⁴ Conversely, “caselaw on point *is* the law”¹⁰⁵ and such “binding authority must be followed unless and until overruled by a body competent to do so.”¹⁰⁶ If prior decisions create “binding precedent” only when the deciding court intends them to do so,¹⁰⁷ and when the court intends that result in only some sixteen percent of its merits decisions,¹⁰⁸ the narrow ambit of binding precedent in Judge Kozinski’s view becomes clear. It is only this relative handful of cases to which subsequent courts must defer. Prior decisions of the court, even if indistinguishable, do not bind the court unless the deciding court labeled them “precedential.”

102. *Id.* at 1169–70.

103. *Id.* at 1170. In *Anastasoff*, Judge Arnold does not discuss other authorities, only judicial decisions, and implicitly only those of the court itself. The Committee Note of the Advisory Committee on Appellate Rules, accompanying proposed new Rule 32.1 of the Federal Rules of Appellate Procedure, states that “[p]arties have long been able to cite in the courts of appeals an infinite variety of sources solely for their persuasive value.” See attachment to Memorandum from Judge Samuel A. Alito, Jr., to Judge Anthony J. Sirica 32 (May 22, 2003), available at <http://www.uscourts.gov/rules/appo803.pdf>. The Committee further notes that “it is difficult to justify a system that permits parties to bring to a court’s attention virtually every written or spoken word in existence *except* those contained in the court’s own ‘unpublished’ opinions.” *Id.* at 33. Judges opposed to adoption of the proposed rule maintain that unpublished opinions cannot be likened to other persuasive authorities. See, e.g., Letter from Judge Diarmuid F. O’Scannlain, to Peter G. McCabe, Sec’y, Comm. on Rules of Prac. & Proc. 3 (Feb. 5, 2004), available at http://www.secretjustice.org/new_proposed_frap_32_1.htm#complete_list_public_comments (stating that the “*only* reason litigants have any interest in citing an unpublished opinion is because such authorities bear the imprimatur of an Article III appellate panel”); Letter from Judge Alex Kozinski, to Judge Samuel A. Alito, Jr. 3 (Jan. 16, 2004), available at <http://www.nonpublication.com/kozinskiletter.pdf> (stating that “[u]nlike law review articles, opinions of district courts and other nonbinding authorities, unpublished dispositions of the circuit are seldom dismissed as inconsequential, yet they should be”); Letter from Judge William C. Canby, Jr., to Peter G. McCabe, Sec’y, Comm. on Rules of Prac. & Proc. 2 (Jan. 8, 2004), available at http://www.secretjustice.org/new_proposed_frap_32_1.htm#complete_list_public_comments (noting that “[t]o cite, even supposedly for persuasive value, is to ask us to follow our decision”).

104. *Hart*, 266 F.3d at 1169 (stating that when “ruling on a novel issue of law, [courts] will *generally consider*” other authorities) (emphasis added). Of course, if an issue is truly novel, the court by definition has no precedent of its own to follow.

105. *Id.* at 1170.

106. *Id.*

107. See *supra* text accompanying notes 58–62.

108. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2002 ANNUAL REPORT OF THE DIRECTOR 39 tbl.S-3 (reporting Ninth Circuit’s use of unpublished opinions or orders in 83.9% of cases terminated on the merits during the year ending on September 30, 2002) [hereinafter 2002 ANNUAL REPORT].

E. THE APPLICATION OF THE PRIOR PANEL RULE

Both *Anastasoff* and *Hart* recite the court's duty to follow binding precedent¹⁰⁹ (however that term is defined), and both acknowledge that, for the courts of appeals, once a panel of the court has resolved an issue, the decision can be overruled only by the en banc court or the Supreme Court.¹¹⁰ This apparent agreement dissolves, however, when one recalls the two opinions' divergent definitions of "binding" precedent. The *Anastasoff* decision reveals Judge Arnold's view that the prior panel rule binds subsequent panels in all cases controlling on the basis of identity of facts and issues, regardless of whether the prior decision was published or unpublished.¹¹¹ In fact, statements of the prior panel rule frequently omit any qualification based on the type of opinion issued.¹¹² The *Hart* opinion explicitly disagrees, characterizing the prior panel rule as applying only when a panel has "resolve[d] an issue *in a precedential opinion*."¹¹³

F. SUMMARY

Anastasoff and *Hart* articulate sharply divergent conceptions of the nature and operation of precedent in the federal courts of appeals. Each view is internally consistent. The system of precedent described in *Anastasoff* is one in which every decision of the court is an act of lawmaking, and the creation of precedent is inherent in the act of decision. The decision of a case is, fundamentally, its result, and the result generally determines the scope of the precedent. Subsequent panels must follow prior decisions in all cases where the identity of facts and issues between the prior and subsequent cases makes the precedent "binding," regardless of the publication or non-publication of the prior decision. *Hart* describes a system of precedent in which the court decides for itself which cases call for lawmaking (as opposed to simple review for error). The court intentionally determines which of its decisions create precedent. When the court establishes a precedent, the precedent consists not only of the result, but also of the reasons given and the precise language the deciding court employed. Subsequent panels are obliged to consider a range of au-

109. *Anastasoff v. United States*, 223 F.3d 898, 900 (8th Cir. 2000); *Hart*, 266 F.3d at 1170.

110. *Anastasoff*, 223 F.3d at 904; *Hart*, 266 F.3d at 1171. A third possibility, of course, is for the decision to be overruled by statute. *See, e.g., Maine General Med. Ctr. v. Shalala*, 205 F.3d 493, 499 (1st Cir. 2000) (stating that case had not "been subsequently overruled by statute").

111. *See* 223 F.3d at 905 (stating that rule allowing the court to "depart from . . . prior decisions without any reason to differentiate the cases" is unconstitutional).

112. *See, e.g., Hellman, supra* note 75, at 935 (referring to Ninth Circuit's rule and stating that the "rule of intracircuit stare decisis" provides that "panel decisions bind subsequent panels unless overruled by the court en banc").

113. 266 F.3d at 1171 (emphasis added).

thorities in deciding later cases, but are bound to follow the decisions of prior panels only when they were originally designated as “precedential.”

In *Anastasoff* and *Hart*, the Eighth and Ninth Circuits both analyzed the merits of limited publication and no-citation rules, and came to different conclusions. Along the way, the two circuits disagreed about virtually every aspect of precedent as it operates in the federal courts of appeals. Analysis of these rules must proceed within the context of the system of precedent, which the rules explicitly invoke. The next step in developing a better understanding of the rules is to examine how precedent works.

II. THE DOCTRINE OF PRECEDENT

A complete account of the modern doctrine of precedent, much less of its historical roots, is outside the scope of this Article. But an understanding of how precedent works is critical to untangling the notion that some decisions are “precedential” while others are not. Accordingly, this Article draws on the literature of precedent to summarize a few key features.

Precedent serves multiple roles in our legal system, providing both information and constraint.¹¹⁴ Chief among the difficulties in understanding precedent is that there is no single vantage point from which to examine it. Precedent is both backward-looking (when a court today looks to the past for guidance)¹¹⁵ and forward-looking (when a court today contemplates the future ramifications of its decision in the instant case).¹¹⁶ The informational value of precedent looks backward.¹¹⁷ The decisions of the past provide information as to the likely consequences of actions undertaken today.¹¹⁸

Precedent’s constraining effect operates in both directions. A rule of precedent “direct[s] a decisionmaker to take prior decisions into account.”¹¹⁹ The way earlier cases were decided limits the flexibility of the current decisionmaker.¹²⁰ Relying on past decisions promotes fairness, decisionmaking efficiency, and stability.¹²¹ On the other hand, a rule of precedent requires today’s decisionmaker “to commit [to] the future be-

114. See James Boyd White, *What’s an Opinion For?*, 62 U. CHI. L. REV. 1363, 1367 (1995).

115. Schauer, *supra* note 96, at 572 (describing “use of yesterday’s precedents in today’s decisions”).

116. *Id.* at 572–73 (discussing need to “view today’s decision as a precedent for tomorrow’s decisionmakers”).

117. *Cf. id.* at 572 (stating that traditional perspective on precedent looks backward).

118. *Id.* at 597 (discussing justification of precedent on grounds of predictability).

119. *Id.* at 576.

120. *Id.* at 575; see also *id.* at 595–97 (discussing justification of precedent on grounds of fairness).

121. *Id.* at 595–602. (discussing fairness, efficiency, and stability).

fore [he or she] get[s] there.”¹²² As Llewellyn put it, “the opinion has as . . . its major office to show how like cases are properly to be decided in the future. This . . . affects the deciding of the cause in hand.”¹²³ Today’s judge must be willing to “stand to” today’s result in future cases.¹²⁴

Precedent’s constraining influence promotes judicial accountability.¹²⁵ One of the most familiar arguments for a system of precedent is “public legitimacy.”¹²⁶ Precedent “fosters the *appearance* of certainty and impartiality by providing a seemingly neutral source of authority” to justify decisions and “[limiting] the actual impact which any single judge . . . has on the shape of the law.”¹²⁷ The system of precedent “standardizes” decisions, “dampen[ing] the variability that would otherwise result from dissimilar decisionmakers.”¹²⁸ By minimizing inconsistency in decisions, the system of precedent “may generally strengthen [the] decisionmaking environment as an institution.”¹²⁹

The system of precedent does more than merely promote the appearance of just decisionmaking. Checks on the power of courts “come from two principal sources”¹³⁰: the review power of superior courts, and the ability of lawyers, scholars, and the public to comment on decisions. The idea is that bad decisions will be rooted out either on review by a higher court or as their quality is determined in a “free market” of decisions. Both mechanisms depend on the availability of a record of the decision. The general notion of decision according to precedent antedates the regular publication of decisions,¹³¹ and publication may “have nothing to do with the authoritative effect of any court decision.”¹³² But given the vast number of decisions rendered each year, the system of precedent today cannot function in the absence of generally available decisions.¹³³

122. *Id.* at 573; *see also id.* at 590 (stating that “[a]ccepting the constraints of precedent thus entails taking into account an array of instances broader than the one immediately before the decision-maker”); Frederick Schauer, *Giving Reasons*, 47 *STAN. L. REV.* 633, 644 (1995) (discussing commitment effect of giving reasons for a decision).

123. KARL LLEWELLYN, *THE COMMON LAW TRADITION* 26 (1960).

124. *Id.* *See also* Schauer, *supra* note 96, at 590. Schauer has acknowledged the tension between committing to a result in future cases and avoiding advisory opinions. Schauer, *supra* note 122, at 655.

125. *See, e.g.*, Reynolds & Richman, *supra* note 12, at 120–24; Cappalli, *supra* note 8, at 789.

126. Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, N.Y. *ST. B. J.* 15, 18 (July 1990) (referring to decisions of United States Supreme Court).

127. Earl Maltz, *The Nature of Precedent*, 66 *N.C. L. REV.* 367, 371 (1988).

128. Schauer, *supra* note 96, at 600.

129. *Id.*

130. Reynolds & Richman, *supra* note 12, at 1202.

131. *Anastasoff v. United States*, 223 F. 3d 898, 903 (8th Cir. 2000) (stating that the doctrine of precedent was well-established in the late eighteenth century despite the absence of a reporting system).

132. *Id.* at 904.

133. Dragich, *supra* note 14, at 770–75 (discussing role of opinions in development of law).

Unless decisions are available, the information required to hold courts accountable for their decisions is lacking.

Precedent also imposes costs. Deciding according to precedent may cause decisionmakers to “ignore fine but justifiable differences in the pursuit of large similarities.”¹³⁴ It also ties the consideration of future cases to the imperfect decisions of the past,¹³⁵ giving “undue weight to the first case to raise a particular issue.”¹³⁶ In some cases, “the best decision within a regime of precedent is nevertheless a suboptimal decision for the case at hand.”¹³⁷ Nevertheless, “reliance on precedent is one of the distinctive features of the American judicial system.”¹³⁸ Both *Anastasoff*³⁹ and *Hart*⁴⁰ invoke the concept of precedent and assume that it shapes the decisionmaking process of the courts of appeals. The limited publication and no-citation rules, too, are rooted in the concept of precedent.⁴¹

This Part explores the nature of decision according to precedent to lay the foundation for an argument that the courts of appeals, in adopting limited publication and no-citation rules, have taken an incomplete view of the way precedent matters. Three relatively recent articles⁴² consider the operation of precedent in broader terms and provide some guidance for the present inquiry, though none considers the notion of “non-precedential precedent.”

A. THE NATURE OF A “PRECEDENT”

As one scholar notes, the theory of precedent itself, although the “core”⁴³ of our judicial system, remains underdeveloped.⁴⁴ The very terminology used to describe the nature or effect of a precedent is confusing and often inconsistent.⁴⁵ Contemporary usage tends to “conflate

134. Schauer, *supra* note 96, at 595.

135. Cooper & Berman, *supra* note 5, at 722–23.

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

137. Schauer, *supra* note 96, at 590.

138. Maltz, *supra* note 127, at 367.

139. 223 F. 3d at 900–04.

140. 266 F. 3d at 1160, 1163–69.

141. See sources cited *supra* note 9.

142. Alexander, *supra* note 13; Maltz, *supra* note 127; Schauer, *supra* note 96.

143. Alexander, *supra* note 13, at 3 (stating “the notion that the courts ordinarily should follow precedent in deciding cases is one of the core structural features of adjudication in common-law legal systems”); see also Price, *supra* note 35, at 106–07 (stating that the “core idea of common-law court systems is that what courts have done in the past, to some extent and to some degree, must at least be considered when a similar case comes along”).

144. Alexander, *supra*, note 13, at 3 (noting that “theoretical understanding of the practice” of precedent “is still at a very primitive stage”).

145. See 3d Cr. I.O.P. 5.2 (“An opinion . . . is designated as precedential . . . when it has precedential or institutional value.”); see also Barnett, *supra* note 35, at 9–12 (describing “binding precedent,” “overrulable precedent,” “precedent” or “precedential value,” “persuasive value,” and “citable prece-

the ideas of precedent and stare decisis,” though the two “are not entirely the same.”¹⁴⁶ This “conflation” of ideas may help to explain the courts of appeals’ adherence to no-citation rules despite long-standing criticism.¹⁴⁷

1. *Precedent as Fact*

In its simplest conception, a “precedent” is nothing more than a historical fact. As Price puts it, “precedent is simply the record of how courts have decided prior cases.”¹⁴⁸ Boggs and Brooks call this the “common-law sense” of precedent.¹⁴⁹ In this sense of the word, “precedent” merely means that a particular case was once decided a particular way,” and no later court can change that fact.¹⁵⁰ Judge Arnold’s account of precedent as inherent in every decision is an expression of this view.¹⁵¹

Read against this conception of precedent, no-citation rules seem especially offensive. None of these rules forbids outright the citation of a decision for preclusive effect, and to that very limited extent the rules acknowledge precedent as fact. But several of the rules prohibit citation for any purpose other than preclusive effect, or generally prohibit citation “as precedent.”¹⁵² These rules, it appears, concede the fact of a precedent only within the same or closely related litigation; beyond that context the fact of the precedent disappears. The essence of Judge Arnold’s complaint in *Anastasoff* is that parties cannot inform the court of the fact of a prior decision.

2. *Precedent as Rule*

A broader conception of precedent regards it as a rule. On this view, precedent is more than a simple fact; it is a fact that calls for a particular type of response. Professor Frederick Schauer describes precedent as a “rule of relevance.”¹⁵³ Deciding according to precedent “presupposes an

dent”); Robel, *supra* note 18, at 400 (describing practice of precedent as broader than linguistic formulations of rule).

146. Price, *supra* note 35, at 105. “Stare decisis” refers to “a strict sense of the degree to which courts are to be bound by precedent.” *Id.* (emphasis added). In Price’s view, the more general doctrine of precedent requires, at a minimum, that courts consider what had been done in the past. *Id.* See also Dragich, *supra* note 14, at 773 nn.80–86 and sources cited therein (discussing orthodox and general theories).

147. See *supra* notes 17–25 and accompanying text.

148. Price, *supra* note 35, at 88 (citing Judge Arnold in *Anastasoff*) (emphasis omitted).

149. Boggs & Brooks, *supra* note 26, at 23.

150. *Id.*

151. See *supra* text accompanying notes 53–55.

152. See sources cited *supra* note 9.

153. Schauer, *supra* note 96, at 576–79. Similarly, Harrison likens rules of precedent to “rules of evidence for questions of law rather than fact.” John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L. J. 503, 512 (2000).

ability to identify the relevant precedent.”¹⁵⁴ Though all prior decisions are precedents in fact, not all are relevant precedents for a given later decision. Instead, prior decisions are “precedent” for a later decision only if the “past [decision] is sufficiently similar to the present facts to justify assimilation” of the two.¹⁵⁵ Thus, precedent in this sense depends on the characterization of the earlier case.¹⁵⁶

In this conception, precedent provides both information and (at least potentially) constraint. *Stare decisis* is the narrowest and most constraining form of the rule of precedent. It dictates that once a matter is decided, it should stand undisturbed.¹⁵⁷ As distinguished from the general doctrine of precedent, *stare decisis* makes a single decision “‘binding’ authority.”¹⁵⁸ *Stare decisis* applies “to any subsequent case that is ‘on all fours’ with the prior decision.”¹⁵⁹ Thus, within a very narrow range of cases (assuming that the same facts very rarely arise again¹⁶⁰) *stare decisis* exerts a powerful constraint. Looking backwards, it requires that today’s decision come out the same as the prior one, even if the prior decision is believed to be erroneous,¹⁶¹ unless the present court chooses (and has the power) to overrule the prior decision.¹⁶² Looking forward, it requires today’s decisionmaker to commit to the same result in future, indistinguishable cases.

As just noted, identical cases are rare. But *Anastasoff* involved just such a situation.¹⁶³ Because the two cases could not be distinguished, Judge Arnold regarded *Christie* as binding on *Anastasoff*. Commentators,¹⁶⁴ including Judge Kozinski,¹⁶⁵ seem to read more into *Anastasoff*

154. Schauer, *supra* note 96, at 576–77.

155. *Id.* at 577.

156. *Id.*

157. 18 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 134.01(1) (Coquillette et al. eds., 3d ed. 2004) [hereinafter MOORE’S FEDERAL PRACTICE].

158. Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800–1850*, 3 AM. J. LEG. HIST. 28, 29 (1959); see also *Hart v. Massanari*, 266 F.3d 1155, 1168 (9th Cir. 2001); Dragich, *supra* note 14, at 773 (discussing evolution of precedent and *stare decisis*); Price, *supra* note 35, at 105 (*stare decisis* refers to a “strict sense of the degree to which courts are to be bound” by precedent).

159. 18 MOORE’S FEDERAL PRACTICE, *supra* note 157, § 134.03(1) (citing cases).

160. Schauer, *supra* note 96, at 578.

161. Cf. Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 103 (2001) (considering whether more than mere demonstration of error should be required for Supreme Court to overrule its prior decisions).

162. *Anastasoff v. United States*, 223 F. 3d 898, 904 (8th Cir. 2000); *Hart*, 266 F.3d at 1170; see also 18 MOORE’S FEDERAL PRACTICE, *supra* note 157, § 134.02(1)(a).

163. 223 F. 3d at 899 (describing the *Christie* decision).

164. See, e.g., Cooper & Berman, *supra* note 5, at 748 (suggesting that *Anastasoff* precludes “any treatment of unpublished opinions as other than binding precedent”) (emphasis added).

165. *Hart*, 266 F. 3d at 1163 (suggesting that, “to adopt *Anastasoff*’s position, we would have to be satisfied . . . that all judicial decisions necessarily served as *binding* authority on later courts” (empha-

than is really there. *Anastasoff* rejects courts' power to deny, in advance, that the case is a "precedent" even if an identical case arises later. In other words, *Anastasoff* reads the limited publication and no-citation rules as an attempt to evade the constraint of precedent,¹⁶⁶ and holds them unconstitutional on that ground.¹⁶⁷

Defenders of the rules seem to assume that if a decision is acknowledged at the time it is issued to have "precedential effect," the decision becomes "binding" in an unusually broad or strict way.¹⁶⁸ This is one way the no-citation rules reflect an inaccurate understanding of precedent.¹⁶⁹ No decision of the courts of appeals (or any other court), no matter what the court calls it, is anything more than potentially or "presumptively"¹⁷⁰ binding upon subsequent courts at the time it is issued. Indeed, only the later court can make that determination.¹⁷¹

B. THE INFLUENCE OF A "PRECEDENT"

The doctrine of precedent merely establishes a presumption that the decision matters in similar cases that may arise later.¹⁷² How, and how much, it matters is a separate question governed by the analysis that delineates the actual influence of a precedent: the identity between the cases. This section explores that concept.¹⁷³

sis added)). Nowhere does Judge Kozinski acknowledge the effect of identity (or lack thereof) between the cases.

166. Cf. Schauer, *supra* note 96, at 589 (discussing "presumptively binding" nature of today's decisions on future decisionmakers).

167. See Price, *supra* note 35, at 117 (noting that *Anastasoff* leaves courts "free to overrule precedent" (i.e., looking backward at a prior case) but not to "assert" (i.e., looking forward) "that their decisions are not precedent").

168. See, e.g., Hart, 266 F. 3d at 1180 (dismissing the idea that courts must "make binding law every time [they] issue a merits decision"); *id.* at 1175-76 (reciting problematic consequences of creating binding precedent).

169. See, e.g., *supra* notes 8-9 (citing the rules describing precedential value and limiting or prohibiting citation in future cases); see also Hart, 266 F. 3d at 1180 (asserting that deciding court can, and should decide in advance which of its decisions will bind future panels); *id.* at 1179 n.39 (describing *Anastasoff* as suggesting that "appointment of more judges would enable courts to write *binding* opinions in *every* case" (emphases added)).

170. Schauer, *supra* note 96, at 589.

171. See, e.g., Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 624 (2001); Maltz, *supra* note 127, at 372.

172. See, e.g., Harrison, *supra* note 153, at 512 (comparing precedent to evidentiary presumptions); Hathaway, *supra* note 171, at 624 (stating that precedents "fix the point of departure"); Nelson, *supra* note 161, at 1 (stating that "American courts of last resort recognize a rebuttable presumption against overruling their own past decisions"); Price, *supra* note 35, at 105 (stating that precedent is a "beginning point" in analysis); see also Robel, *supra* note 18, at 400 (describing precedent as imposing a "burden of justification"); Schauer, *supra* note 96, at 589 (discussing notion of precedent as "presumptively binding").

173. The relationship between the courts is also an important factor in determining the influence of a "precedent." See *infra* Part III.B for an examination of this factor. A third factor, critical to de-

I. *The Identity Between the Cases*

Schauer explains that “[i]n order to assess what is a precedent for what, we must engage in some determination of the relevant similarities between the two [cases].”¹⁷⁴ He elaborates:

No two events are exactly alike. For a decision to be precedent for another decision does not require that the facts of the earlier and the later cases be absolutely identical. Were that required, nothing would be a precedent for anything else. . . . [T]he relevance of an earlier precedent depends upon how we characterize the facts arising in the earlier case.¹⁷⁵

Thus, the “power of a precedent” is an “issue . . . of *assimilation*.”¹⁷⁶ The constraint of precedent is “not . . . an all-or-nothing affair.”¹⁷⁷

For a precedent to exert a constraining influence, we must be able to group the prior decision and the subsequent case together into some meaningful category.¹⁷⁸ The smaller the category into which the two events fit (or the greater the similarity between the two cases), the stronger the influence of the prior decision over the later case.¹⁷⁹ This concept finds expression in the notion that a precedent is “binding” when the cases are “on all fours”¹⁸⁰ but otherwise may be distinguished away.¹⁸¹ If the system of precedent operates this way, one thing that matters is how the precedent court characterizes its decision.¹⁸² It is harder to distinguish a precedent described in broad, general terms (i.e., encompassing a larger category of events) and easier to distinguish one described more narrowly.¹⁸³ Likewise, it is easier to expand a narrow decision later than to contract the reach of a broader one.¹⁸⁴

termining the actual influence of a precedent, involves the scope of the precedent. See *supra* Part I.C. The question is whether it is the result of the decision alone, or the result plus the reasons or the rule formulated by the decision, that binds later cases. This factor sometimes is expressed in terms of identifying the holding of a case, and the *ratio decidendi*, and isolating them from “mere dictum.” See generally 18 MOORE’S FEDERAL PRACTICE, *supra* note 157, § 134.03(2)–(5). Consideration of this factor is outside the scope of this Article. For a thorough analysis, see Alexander, *supra* note 13.

174. Schauer, *supra* note 96, at 577.

175. *Id.*

176. *Id.* at 579.

177. *Id.* at 591. See also Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, L. & CONTEMP. PROB. 157, 162 (Summer 1998) (noting that “real distinction . . . is the distinction between those opinions having *substantial* precedential value and those that do not”).

178. Schauer, *supra* note 96, at 591.

179. *Id.* at 596; see also *id.* at 591, 594–95 (explaining that weight or strength of a precedent depends on the size or generality of the category).

180. See Schauer, *supra* note 96, at 577.

181. *Id.* at 594 (stating that when a later case is “simply different . . . there is actually no relevant precedent to follow”).

182. *Id.*

183. *Id.* at 594–95.

184. *Id.* at 580 n.19.

These ideas form the basis for determining the separate roles of the precedent court¹⁸⁵ and the subsequent court¹⁸⁶ in the operation of the system of precedent. For simplicity, assume that the precedent court confronts a true case of first impression. The court's obligation is to decide the case, looking to whatever external sources of law may be available and likely exercising considerable discretion.¹⁸⁷ The court may justify its result in an opinion,¹⁸⁸ articulating a characterization of its decision.¹⁸⁹ Before it does so, "no single authoritative characterization presents itself."¹⁹⁰ Rather, many alternative characterizations are possible.¹⁹¹ Articulating a characterization is like formulating a rule.¹⁹² So is giving reasons.¹⁹³ In so doing, decisionmakers "commit themselves"¹⁹⁴ to "act in conformity"¹⁹⁵ with the characterization or the reasons in cases "encompassed" by them.¹⁹⁶ This is the forward-looking commitment the courts of appeals apparently wish to avoid making when they label their decisions "not precedential." But the no-citation rules seemingly disavow the constraining influence even of the bare result¹⁹⁷ by forbidding litigants to inform the court of its prior decisions.¹⁹⁸ In this respect, the rules overstate the proper role of the precedent court. The precedent court is entitled to choose whether and how to characterize its decision; it may choose a characterization that is likely to constrain future courts very broadly or very narrowly.¹⁹⁹ But the precedent court may not, consistent with the doctrine of precedent, decide "for one place and time only."²⁰⁰

185. I use the term "precedent court" to refer to a court that has decided a particular matter. The "precedent court" is not necessarily the first court ever to have decided the issue, but its decision is earlier in time than those of other courts that subsequently address the same issue.

186. I use the term "subsequent court" to refer to a court that decides an issue already addressed by prior panels or courts. The subsequent court does not start with a blank slate; at least one decision already exists regarding the issue at bar.

187. Cf. Nelson, *supra* note 161, at 4 (describing discretion available to judges deciding cases of first impression).

188. See Dragich, *supra* note 14, at 776 (discussing role of opinions).

189. Schauer, *supra* note 96, at 579.

190. *Id.* at 581.

191. *Id.*

192. *Id.*

193. Schauer, *supra* note 122, at 651; see also *id.* at 641 (stating that "to provide a reason for a decision is to include that decision within a principle of greater generality than the decision itself").

194. *Id.* at 657.

195. *Id.* at 645.

196. *Id.* at 644.

197. Cf. Schauer, *supra* note 96, at 572 n.4, 573 (discussing difficulty of separating decision from canonical language surrounding it).

198. This is clearly the import of Judge Arnold's complaint in *Anastasoff*. See *Anastasoff v. United States*, 223 F. 3d 898, 904 (8th Cir. 2000).

199. Cf. Schauer, *supra* note 96, at 579 (explaining how one who wishes to set a precedent, or to avoid setting one, can determine how to characterize the decision). "Even a mere statement of facts

The condition of identity between the cases creates an important role for the subsequent court as well. Though the simplest description of the subsequent court's role is to follow precedent, the task is more complex.²⁰¹ The condition upon which the "bindingness" of precedent rests is similarity;²⁰² "some decisions, even within a given jurisdictional ambit, *must* be followed while others . . . might carry with them some lesser force."²⁰³ Thus, the "idea of precedent as a constraint" is distinct from the "idea of precedent as absolutely binding."²⁰⁴ Precedent provides the subsequent court with "*one*" reason (perhaps a very powerful one²⁰⁵) for deciding the later case a particular way, but it may not provide a "*conclusive*" reason.²⁰⁶

2. *The Role of the Subsequent Court*

Precedent is the starting point for the subsequent court.²⁰⁷ The subsequent court is obligated, at a minimum, to "acknowledge[] and consider[]" relevant authorities.²⁰⁸ But as Maltz forcefully puts it, "[a]n uncontrovertible answer to the question of which factual differences are relevant to a case's precedential impact cannot be obtained until the precedent case is actually interpreted by later courts."²⁰⁹

The characterization of the prior decision by the precedent court sets some boundaries of constraint.²¹⁰ Within these boundaries, it is up to the subsequent court to recharacterize the earlier decision in light of the subtle differences presented by the instant case.²¹¹ Accordingly, it is the subsequent court, not the precedent court, that ultimately determines the

is . . . a characterization," albeit of the narrowest, least-constraining kind. *Id.* at 581; *see also* PHILIP C. KISSAM, *THE DISCIPLINE OF LAW SCHOOLS: THE MAKING OF MODERN LAWYERS* 8 n.23 (2003) and sources cited therein (discussing ability to interpret precedents broadly or narrowly); Schauer, *supra* note 96 at 574 (stating that "even an uncharacterized precedent can influence the future").

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

201. Maltz, *supra* note 127, at 372.

202. Schauer, *supra* note 96, at 594.

203. *Id.* at 592.

204. *Id.* at 593.

205. *Id.* at 575 (stating that the mere "fact that something was decided before gives it present value" even if we now "believe that the previous decision was erroneous").

206. *Id.* at 592.

207. *See* sources cited *supra* note 172.

208. *Hart v. Massanari*, 266 F.3d 1155, 1169–70 (9th Cir. 2001) (discussing courts ruling on "novel issues of law").

209. Maltz, *supra* note 127, at 372; *see also* Cappalli, *supra* note 8, at 773.

210. *Cf.* Schauer, *supra* note 96, at 580.

211. *See, e.g.*, Cappalli, *supra* note 8, at 768–69; Hathaway, *supra* note 171, at 624 (describing ways courts may interpret a prior decision); *id.* at 574 (stating that "the process of characterizing a decision does not end with its first formulation" but rather it is "necessarily and continuously reinterpret[ed]").

extent to which it is bound by the earlier decision.²¹² Put another way, the subsequent court can often know at the time of decision that a particular case will establish a new precedent, but it cannot know which decisions will not prove useful in the future.

The limited publication and no-citation rules seem to deny the subsequent court's role. Two reasons seem to be at work. The first is an implicit premise of the rules, that large numbers of cases are identical (or at least indistinguishable). Many of the rules speak in terms of decisions that add nothing to the law.²¹³ Defenders of the rules assert that opinions that merely decide cases, correct lower courts, and explain results to the parties "have [no] value . . . to the public at large."²¹⁴ Judge Kozinski describes unpublished opinions as a "torrent" of decisions "materially indistinguishable from . . . prior published opinions."²¹⁵ If required to be published, they would "clutter up" the law with "redundant and unhelpful authority."²¹⁶

Commentators refute the contention that purely "dispute-settling" opinions have no value. On the contrary, unpublished opinions are relevant to attorneys and judges attempting to work within a system of precedent. Reynolds and Richman assert that even these opinions are "important" elaborations of the law, contributing to the "vital" process of "fleshing out [the law] by application of principle to different facts."²¹⁷ Indeed, as Judge Kozinski admits, "small differences . . . can have significantly different implications when read in light of future fact patterns."²¹⁸ In fact, "unpublished decisions are a *particularly useful* means of deter-

212. Judge Kozinski admits this much. *Hart*, 266 F. 3d at 1172 (discussing "controlling" authority, a status he denies to unpublished opinions).

213. *See, e.g.*, 1ST CIR. R. 36(b)(1) (allows nonpublication of case that does not articulate a new rule of law); 3D CIR. I.O.P. 5.3 (allows opinions that have value only to the parties to be designated not precedential); 4TH CIR. R. 36(a) (requires opinion to be published only if it establishes, alters, or modifies a rule of law); 5TH CIR. R. 47 (same); 6TH CIR. R. 206 (same); 7TH CIR. R. 53(c)(1) (same); 8TH CIR. I.O.P. Appx. I (similar); 9TH CIR. R. 36-2 (similar); 11TH CIR. R. 36-3 I.O.P. 5 (states policy that unlimited proliferation of published opinions is undesirable); D.C. CIR. R. 36(a)(2) (requiring publication of opinions in cases of first impression, cases that alter or modify existing law, etc.). Three circuits allow disposition without written opinion in certain circumstances, but do not speak directly in terms of redundancy in the law. *See* 2D CIR. R. 0.23 (written opinion not required if no jurisprudential purpose would be served by it); 10TH CIR. R. 36.1 (need not write opinions in cases that do not require application of new points of law); FED. CIR. R. 36 (opinion not required when judgment below is based on findings that are not clearly erroneous, etc.).

214. Kirt Shuldberg, Comment, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541, 550 (1997).

215. *Hart*, 266 F.3d at 1179.

216. *Id.*

217. Reynolds & Richman, *supra* note 12, at 1190; *see also* Cappalli, *supra* note 8, at 768-69.

218. *Hart*, 266 F. 3d at 1179.

mining [the] actual practice” of a court.”²¹⁹ Robel’s²²⁰ and Hannon’s findings²²¹ clearly demonstrate that attorneys and judges ascribe value to unpublished decisions. The recent actions of groups including the American Bar Association²²² and the American College of Trial Lawyers²²³ confirm these findings.

The second reason why no-citation rules deny the subsequent court its role in the operation of precedent is a mistaken notion of the forward-looking responsibilities of the precedent court. The rules are based on the notion that the precedent court is entitled to fix the future “bindingness” (or lack thereof) of its decisions. This idea perverts the notion of precedent as constraint. One way precedent constrains today’s decisionmakers is by requiring the current decisionmaker to “take into account what would be best for some different but assimilable events yet to occur. The decisionmaker must then decide on the basis of what is best for *all* of the cases falling within the appropriate category of assimilation.”²²⁴ As Schauer puts it, today’s decisionmaker makes a “commitment” to the future.²²⁵ Looking to the future constrains by helping decisionmakers appreciate the reliance their decisions will generate and by making it less likely that they will decide on the basis of such “illegitimate reasons” as bias, self-interest, or haste.²²⁶ The limited publication and no-citation rules take the forward-looking constraint of precedent off the table by removing any need to consider or commit to the future.

C. SUMMARY

To summarize, “precedent” is in one sense a fact and in another sense a rule. Limited publication and no-citation rules deny even the fact of certain decisions as precedent, and they deny the application of precedent as rule even in identical cases where it cannot be avoided. The operation of precedent depends on the identity of the facts between the prior and subsequent cases. The question of the identity between the cases is one in which both the precedent court and the subsequent court have important roles to play. The limited publication and no-citation

219. *Powell v. Lambert*, 357 F.3d 871, 879 (9th Cir. 2004) (emphasis added).

220. *See Robel*, *supra* note 18.

221. *See Hannon*, *infra* note 432.

222. *See ABA MINIMUM STANDARDS*, *supra* note 24, at 2 (calling for decisions which “at a minimum” set out the “operative facts of the case, the issues presented, and the legal basis for the ruling” in all except wholly non-meritorious appeals).

223. *ACTL Report*, *supra* note 24, at 647 (stating that “all circuits should release their opinions for publication” at least to online sources).

224. Schauer, *supra* note 96, at 589.

225. Schauer, *supra* note 122, at 657–58. Professor Schauer acknowledges the tension between this notion of committing to the future and deciding only the present case. *Id.* at 655.

226. *Id.* at 657–58.

rules overstate the role of the precedent court and understate the role of the subsequent court.

III. THE REGIME OF PRECEDENT IN THE COURTS OF APPEALS

This Part explores features of the federal courts of appeals that directly affect the operation of precedent: the dual functions of these courts, their division into independent circuits, and their “tradition” of sitting in panels of three judges.²²⁷ The relationship between the precedent court and the subsequent court is ordinarily a straightforward matter,²²⁸ but is complicated in the federal courts of appeals because of their complex structure. This structure has led to the adoption of strictures such as the “law of the circuit” doctrine and “prior panel” rules that shape the operation of precedent within the courts of appeals. The historical development of the courts of appeals, along with other changes in the federal court system, have tended gradually to magnify the significance of courts of appeals decisions. This tendency contrasts with the circuits’ limited publication and no-citation rules, which diminish (if not nullify) the precedential effect of the vast majority of today’s courts of appeals decisions.

A. DUAL FUNCTIONS

It is well established that the courts of appeals serve two distinct functions: to review lower court decisions for error, and to make law.²²⁹ Given the courts of appeals’ mandatory jurisdiction,²³⁰ it is clear that the error-correction function arises in every appeal filed. Part I.A above described a lively disagreement, however, about whether the lawmaking function arises in all cases or only some. Many commentators have noted the inherent tension between the two roles,²³¹ a tension made more acute

227. *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247 (1952) (quoting Reviser’s Note to 28 U.S.C. § 46(c)). The Reviser’s Note can be found at the end of 28 U.S.C. § 46 (1946 ed., Suppl. V, vol. 1, p. 1576). The “tradition” is now codified in 28 U.S.C. § 46(c).

228. Alexander speaks in terms of three possible relationships. *Vis-à-vis* the “precedent” court, the subsequent court may be a “constrained court of lower rank,” a “constrained court of equal rank,” or an “unconstrained court” (one of higher rank than or outside the jurisdiction of the precedent court). Alexander, *supra* note 13, at 53–54.

229. *See, e.g., PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 2–4* (1976); Cooper & Berman, *supra* note 5, at 712.

230. 28 U.S.C. § 1291 (2000).

231. *See, e.g., Cooper & Berman, supra* note 5, at 717, 722. Cooper and Berman argue that the courts of appeals are forced to accept the lawmaking role in cases that are atypical or poorly developed, again by virtue of their mandatory jurisdiction. *Id.* at 722. Reynolds and Richman state in a recent article that “circuit judges are minimizing their historic role as error correctors and emphasizing their role as law makers.” William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 293 (1996) (lament-

by the increased caseload.²³² This tension is further exacerbated by the increasingly “remote” Supreme Court.²³³ But neither Congress nor the Court has clearly defined the contours of the lawmaking function of the courts of appeals.

1. *The Lawmaking Role*

The Constitution makes the Supreme Court “supreme” and leaves it to Congress to establish lower federal courts.²³⁴ The courts of appeals trace their history to the Evarts Act of 1891, which created the intermediate tier of federal appellate courts to relieve enormous backlog in the Supreme Court.²³⁵ As a result of this legislation, the Supreme Court was “transform[ed] from a law-declaring and error-correcting court into a court almost exclusively for law declaring.”²³⁶ At the time of their creation, it seemed clear that the courts of appeals would serve primarily, if not exclusively, the error-correction function.²³⁷ But later changes in the jurisdiction of the Supreme Court, eliminating almost all of that court’s mandatory appellate jurisdiction, have clouded the picture.²³⁸ Congress has never defined the balance between the dual functions of the courts of appeals, nor delineated the boundary (except hierarchically) between the lawmaking roles of the courts of appeals and the Supreme Court. Congress has ratified developments within the courts of appeals that have tended to solidify their lawmaking role, such as the power to decide cases en banc.²³⁹

The Supreme Court famously declared that “[i]t is emphatically the province and duty of the judicial department to say what the law is,”²⁴⁰ but like Congress, it has done little to clarify the division of lawmaking responsibility between the Supreme Court and lower federal appellate courts. It is clear that when the Supreme Court addresses an issue, the courts of appeals’ lawmaking role on that precise issue comes to an

ing the demise, despite courts of appeals’ mandatory jurisdiction, of full traditional appellate process in vast majority of appeals).

232. Dragich, *supra* note 50, at 28–29.

233. Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1047 (2003).

234. U.S. CONST. ART. III, §§ 1, 8. Congress has done so: 28 U.S.C. §41 currently constitutes the circuits; 28 U.S.C. §43 establishes a “court of appeals” in each circuit; and 28 U.S.C. §1291 gives these courts jurisdiction over “all final decisions of the district courts.”

235. Evarts Act, ch. 517, 26 Stat. 826 (1891); see Dragich, *supra* note 50, at 20–21.

236. STRUCTURAL ALTERNATIVES REPORT, *supra* note 1, at 12.

237. *Id.*

238. *Id.* (citing Supreme Court Case Selection Act, Pub. L. No. 100-352, § 2, 102 Stat. 662 (1988) (codified at 28 U.S.C. § 1254 (1988))).

239. See sources cited *infra* note 246.

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

end.²⁴¹ What is less clear is the scope of the lawmaking role of the courts of appeals when the Supreme Court has not resolved a particular issue. In this situation, the lawmaking role of the courts of appeals is described as provisional²⁴² but often long-lasting.²⁴³

The Supreme Court admits that the courts of appeals are effectively the courts of last resort in the federal system and explicitly acknowledges their lawmaking role. In *Textile Mills*,²⁴⁴ the Supreme Court emphasized the importance of avoiding intra-circuit conflicts and promoting finality of decisions.²⁴⁵ The resolution of conflicts, in particular, is a law-making function. *Textile Mills* held that it was permissible (despite the lack of clear authorization in the statute) for a circuit to sit en banc to hear (or rehear) and decide cases.²⁴⁶ In *United States v. American-Foreign Steamship Corp.*,²⁴⁷ the Court described the function of en banc courts as providing “authoritative consideration and decision by those charged with the . . . development of the law of the circuit.”²⁴⁸ The Court stressed that en banc proceedings

enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions, while enabling the court at the same time to follow the efficient . . . procedure of having panels of three judges hear and decide the vast majority of cases as to which no division exists within the court.²⁴⁹

This passage clearly recognizes the lawmaking role of the courts of appeals. The question it raises is whether the lawmaking role arises *only* in cases heard en banc. The Court stressed that en banc proceedings “are

241. U.S. CONST. Art. III, § 1 (making Supreme Court supreme); 28 U.S.C. § 1254 (providing for review by Supreme Court of courts of appeals decisions). Cf. *Appellate Procedure—Force of Precedent—Ninth Circuit Holds that Three-Judge Panels May Declare Prior Cases Overruled When Intervening Supreme Court Precedent Undercuts Theory of Earlier Decisions—Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (*en banc*), 117 HARV. L. REV. 719, 719 (2003) (“When the Court directly overrules a decision of a court of appeals, it is agreed that the overruled decision loses the force of law.”).

242. See, e.g., Henry J. Friendly, *Foreward: The “Law of the Circuit” and All That*, 46 ST. JOHN’S L. REV. 406, 412 (1972) (describing circuit as making law “at least for a short time,” unless and until the Supreme Court rules).

243. *Id.* (discussing examples where circuit lawmaking endured for a long time in absence of any further review).

244. *Textile Mills Sec. Corp. v. Comm’r*, 314 U.S. 326 (1949).

245. *Id.* at 335. On the other hand, the *Textile Mills* Court describes the “hearing and decision of appeals” as the “most important function” of the courts of appeals. This function serves the error-correction role. *Id.* at 333.

246. *Id.* Congress ratified this interpretation in 1948 when it adopted 28 U.S.C. § 46(c). See *supra* note 227.

247. 363 U.S. 685 (1960).

248. *Id.* at 689.

249. *Id.* at 689–90 (quoting Albert B. Maris, *Hearing & Rehearing Cases in Banc*, 14 F.R.D. 91, 96 (1954)).

the exception, not the rule” and are ordered “only [in] extraordinary circumstances.”²⁵⁰

The limited publication and no-citation rules rest on the premise that not all decisions in fact make law.²⁵¹ If that is the case, one of the most important functions of the courts of appeals is, as Judge Kozinski suggests, separating lawmaking cases from the rest. Others question whether it is proper for the courts of appeals to differentiate cases in this manner. Reynolds and Richman wrote in 1978 that limited publication rules effectively “transform[] the courts of appeals into certiorari courts, a step hardly consistent with common understanding of congressional design.”²⁵² They predicted that the rules would “effect a pernicious diminution in both judicial responsibility and judicial accountability.”²⁵³

Those who promulgate and defend the rules must believe that the courts of appeals sometimes—and at the discretion of the panel assigned to hear the case—exercise only the error-correction function. The belief that many cases are not even *potentially* lawmaking, and that their “precedential value” (or lack thereof) is properly determined at the time of decision, is hard to reconcile with the operation of a system of precedent as described above. In the first place, to the extent that precedent is simply an historical fact,²⁵⁴ the result in a purely error-correcting case would be a precedent, though the rules deny it. Furthermore, to the extent that precedent is described as a rule of relevance,²⁵⁵ decisions are only potentially binding on future cases. Their actual influence is determined only later, when they serve as the measure for later decisions. But the *potential* “bindingness” of today’s decision is what constrains the decision-maker. To declare in advance that a decision will have no “precedential value,” no matter how assimilable a later case may be, is to flout the notion of constraint by precedent under the guise of expediency in handling cases deemed in advance as not of the lawmaking ilk.

2. Identifying Lawmaking Cases

A critical premise in the argument for limited publication rules is that judges can determine, before writing an opinion, whether the opinion would be “lawmaking.”²⁵⁶ Judge Kozinski clearly believes it is possi-

250. *Id.* at 689.

251. *See supra* note 213.

252. Reynolds & Richman, *supra* note 12, at 1201. The authors elaborate on this view in a recent article. Richman & Reynolds, *supra* note 231.

253. Reynolds & Richman, *supra* note 12, at 1199; *see also id.* at 1200–02 (discussing requirements that courts decide cases consistently, develop and elaborate the law, and consider each case fully regardless of its apparently “routine” nature).

254. *See supra* Part II.A.1.

255. *See supra* Part II.A.2.

256. Reynolds & Richman, *supra* note 12, at 1191–92.

ble to do so.²⁵⁷ Reynolds and Richman reject this premise, citing both the views of judges who doubt their ability to make this determination²⁵⁸ and evidence that “many lawmaking opinions are in fact going unpublished.”²⁵⁹ That evidence has mounted in the years since they wrote.²⁶⁰ The Eighth Circuit panel’s decision not to publish *Christie*, the unpublished case at issue in *Anastasoff*, is just one example of a court’s failure to identify a “lawmaking” decision that should have been published.²⁶¹ There are at least three reasons why “lawmaking” opinions may go unpublished.

First, in some circuits the publication rule itself may be at fault. Several circuits have articulated a presumption *against* publication; this presumption may cause judges to take a very narrow view of what is a “lawmaking” case.²⁶² In addition, the rules of some circuits provide only the most general guidance about which opinions should be published, generally referring to those that “are lawmaking” or “have precedential value” without defining those terms or providing more specific criteria.²⁶³ Recently, two circuits have moved from very general publication rules to highly specific ones.²⁶⁴ These circuits may be acknowledging that the general criteria did not work well because it is difficult to determine which opinions are “lawmaking.” Moreover, Merritt and Brudney have found a

257. *Hart v. Massanari*, 266 F.3d 1155, 1180 (9th Cir. 2001).

258. Reynolds & Richman, *supra* note 12, at 1192 (quoting Justice Stevens, among others).

259. *Id.* at 1192–93; *see also* Cappalli, *supra* note 8, at 797 (noting that “great numbers of appeals have mistakenly been assigned to the fast track”); Gulati & McCauliff, *supra* note 177, at 162 (stating that Third Circuit “may have used the [without-comment disposition] in some of its hardest cases”).

260. *See, e.g.*, Robel, *supra* note 18, at 405–08; Donald R. Songer, *Nonpublication in the Eleventh Circuit: An Empirical Analysis*, 16 FLA. ST. L. REV. 963, 984 (1989) (concluding there is “serious doubt” that “the official criteria [for publication] of opinions provide a meaningful guide to the judges”).

261. *See* 223 F. 3d at 899 (describing *Christie* as the only case on point and as indistinguishable from *Anastasoff* itself); *see also* Murphy, *supra* note 18, at 1156 (describing courts’ mistaken categorization of cases “as nonprecedents even though they are actually cases of first impression within [the] circuit”); Robel, *supra* note 19, at 948–49 (detailing higher number of concurrences and dissents in unpublished immigration opinions than in published ones, suggesting that unpublished cases were neither easy nor routine).

262. *See* 3D CIR. I.O.P. 5.3; 9TH CIR. R. 36-2; 11TH CIR. R. 36-3 I.O.P. 5. The Fourth Circuit rule calls for publication only in cases fully briefed and presented at oral argument, if additional criteria are met. 4TH CIR. R. 36(a). These circuits tend to be among the lowest in terms of percentage of opinions published. *See* 2002 ANNUAL REPORT, *supra* note 108, at 39 tbl.S-3. But the Fifth Circuit, with no stated presumption against publication, is also a low publisher. *Id.* *See also infra* notes 417–419 and accompanying text.

263. *See* 1ST CIR. R. 36; 2D CIR. R. 0.23; 3D CIR. I.O.P. 5.2; 10TH CIR. R. 36.1; 11TH CIR. R. 36. Of these circuits, the Third and Eleventh are low publishers, but the First and Second have tended to be among the highest publishers. *See* 2002 ANNUAL REPORT, *supra* note 108, at 39 tbl.S-3.

264. *See* 5TH CIR. R. 47; 6TH CIR. R. 206. *See also infra* note 422. According to Reynolds and Richman, the evolution of the rules since their inception has been in the direction of greater specificity. Reynolds & Richman, *supra* note 12, at 1176.

correlation between publication rate and the rule's provision regarding who makes the publication decision.²⁶⁵ They report that cases "resolved in circuits requiring a majority consensus for publication . . . were significantly more likely to be published than cases decided in circuits neglecting to specify the number of judges needed" to decide on publication.²⁶⁶ Reynolds and Richman forecast some of these effects.²⁶⁷

Second, even if the rules sufficiently guide publication decisions, judges do not always apply them correctly.²⁶⁸ This would seem to have been the case in *Christie*,²⁶⁹ which, as a case of first impression²⁷⁰ merited publication under the Eighth Circuit's rule.²⁷¹ Commentators have recounted numerous other examples.²⁷²

Third, in many cases the "precedential value" of a decision emerges only later, when subsequent cases are measured against it.²⁷³ "Precedent rests on similarity,"²⁷⁴ and the similarity of the instant decision to an as-yet-unknown future case cannot be determined until the later case arises.

B. STRUCTURE AND STRICTURES

It is well known that "under the norms of precedent with which we are familiar, the authority of a judicial decision depends in part on the appellate structure of the courts."²⁷⁵ Precedent exerts its strongest influ-

265. Merritt & Brudney, *supra* note 15, at 89.

266. *Id.* at 89 n.66.

267. Reynolds & Richman, *supra* note 12, at 1176-79 (discussing publication criteria and decision procedures).

268. See, e.g., Cappalli, *supra* note 8, at 791-92 (describing several empirical studies all showing that significant number of reversals, dissents, and concurrences go unpublished, despite the fact that disagreement on the panel indicates the cases are "controversial"); Dragich, *supra* note 14, at 790-91 (discussing unpublished opinions with dissents or concurrences, or reversing the lower court); Gulati & McCauliff, *supra* note 177, at 165 (noting that non-publication and no-citation rules lack both policing mechanism and sanctions).

269. No. 91-2375MN, 1992 U.S. App. Lexis 38446 (8th Cir. Mar. 20, 1992) (per curiam).

270. 223 F. 3d at 899 (describing *Christie* as the only Eighth Circuit case directly on point).

271. See 8th Cir. I.O.P. APPX. I, § 4(A) (requiring publication of opinions that establish a new rule of law). Indeed, "*Christie* . . . is . . . a textbook example of an unpublished opinion that in fact . . . does announce a new rule of law." *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, 262 (5th Cir. 2001) (Smith, J., dissenting from denial of rehearing en banc).

272. See, e.g., Dragich, *supra* note 14, at 788-89; Robel, *supra* note 18, at 413-14 n.87.

273. See, e.g., Hathaway, *supra* note 171, at 624 (stating that determination of the "application of precedent . . . is solely the function of the court in the [subsequent] case"); Robel, *supra* note 18, at 410 (future value of opinions is "determined by consumers").

274. Schauer, *supra* note 96, at 587.

275. Harrison, *supra* note 153, at 511. Alexander speaks in terms of three possible relationships. *Vis-à-vis* the "precedent" court or the "constraining" court, the subsequent court may be a "constrained court of lower rank," a "constrained court of equal rank," or an "unconstrained court" (one of higher rank than or outside the jurisdiction of the precedent court). Alexander, *supra* note 13, at 53-54.

ence when the subsequent court is of lower rank than the precedent court.²⁷⁶ So, for example, federal district courts must follow the decisions of the court of appeals,²⁷⁷ which are “binding” on lower federal courts within their geographic or subject matter reach.²⁷⁸ This is the “vertical” dimension of precedent.²⁷⁹

Precedent also operates along a horizontal axis, requiring the same court in subsequent cases to follow its own prior decisions.²⁸⁰ This “horizontal dimension”²⁸¹ is an “extremely complex” relationship, posing more difficulties than the vertical dimension.²⁸² The horizontal dimension of precedent helps ensure that a court rules consistently in similar cases. Indeed, the uniformity justification for the doctrine of precedent is thought to “appl[y] especially to horizontal . . . precedent.”²⁸³ As Harrison notes, understanding the operation of horizontal precedent in the courts of appeals is not easy.²⁸⁴ Two structural features of the courts of appeals shape the regime of precedent: their division into thirteen independent circuits,²⁸⁵ and the provision that within each circuit the court sits either in panels of three judges or en banc.²⁸⁶ Two questions require analysis: whether the doctrine of precedent “operates throughout each level” of the federal courts,²⁸⁷ and how it operates on a multi-member court that sits in smaller panels to decide cases.²⁸⁸ These questions, particularly the second one, play an important role in the debate over unpublished opinions and no-citation rules.²⁸⁹

Horizontal precedent depends on the definition of the “court.” The general rule for a court confronting its own prior ruling is that while the

276. Cf. *Hart v. Massanari*, 266 F. 3d 1155, 1170 (9th Cir. 2001) (discussing federal district courts).

277. *Id.*

278. *Id.* See also Schauer, *supra* note 96, at 576.

279. Harrison, *supra* note 153, at 513 n.25. See generally Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994). The vertical dimension of precedent comes with a qualification in the case of the federal courts, such that federal district courts are bound only by the decisions of the court of appeals of the circuit in which they are located. Harrison, *supra* note 153, at 511. 28 U.S.C. § 41 (2000) establishes the number and composition of the circuits and specifies which states and territories are assigned to each.

280. Harrison, *supra* note 153, at 513 n.25; see also Schauer, *supra* note 96, at 576 (differentiating obligation of a court to follow its own prior decisions from the obligation of lower courts to follow the decision of superior courts).

281. *Id.* at 513, n.25 (defining “horizontal stare decisis” as rule that a court must follow its own precedents).

282. Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2025 (1994).

283. Harrison, *supra* note 153, at 513.

284. *Id.* at 516–17.

285. 28 U.S.C. §§ 41, 43 (2000).

286. *Id.* § 46.

287. Harrison, *supra* note 153, at 516.

288. *Id.* at 517.

289. See *supra* Part I.E.

precedent is not absolutely binding, the court should “give considerable weight to [its previous] decisions.”²⁹⁰ This rule is easy to apply in the case of a “unitary” court like the Supreme Court where all the judges participate in all the decisions. The situation is somewhat more complicated when the court is divided into sub-units for decision. “Coordinate” or co-equal courts operate independently and are not bound by each other’s decisions.²⁹¹ As section III.B.1 explains, the various circuits have been treated as “coordinate” courts for purposes of the horizontal operation of precedent within the federal intermediate appellate tier. Section III.B.2 explains that while individual circuits ordinarily sit in panels, circuit panel decisions are treated as decisions of the whole “court.”

1. *Independent Circuits and the “Law of the Circuit”*

Federal “circuits” have existed ever since Congress first provided for inferior federal courts in the Judiciary Act of 1789,²⁹² but their relevance to the operation of precedent at the intermediate appellate level began to emerge only when the courts of appeals were created in 1891.²⁹³ Only then did circuit boundaries “define[] the territorial reach of appellate court jurisdiction.”²⁹⁴ The details of how these courts would operate were worked out over several decades after their creation.

As the new courts of appeals developed, they followed a model of independence from each other.²⁹⁵ Though they speak respectfully of their “sister” circuits,²⁹⁶ these courts are firmly committed to the notion that “the decisions of one circuit are *not* binding on other circuits.”²⁹⁷ Early on, federal appellate judges asserted that “it was their duty to independently examine questions of federal law even if the precise point had already been decided by another circuit court of appeals.”²⁹⁸ The

290. *Colby v. J.C. Penny Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987).

291. *Caminker*, *supra* note 279, at 824–25 (describing the situation of the courts of appeals as follows: “[A] court can ignore precedents established by other courts so long as they lack revisory jurisdiction over it. Thus, a circuit court of appeals is not bound by decisions of coordinate circuit courts of appeals. . . .”). See also Joseph F. Weis, Jr., *Disconnecting the Overloaded Circuits—A Plug for a Unified Court of Appeals*, 39 ST. LOUIS U. L.J. 455, 459–60 (1995) (citing cases).

292. Act of Sept. 24, 1789, ch. 20, § 1, 1 Stat. 73. See STRUCTURAL ALTERNATIVES REPORT, *supra* note 1, at 7–28, for a history of the federal courts of appeals.

293. *Id.* at 10–11 (describing creation of courts of appeals by Act of Mar. 3, 1891, 26 Stat. 826).

294. *Id.* at 11. The newest circuit, the Federal Circuit, is defined not geographically but by subject-matter jurisdiction. See 28 U.S.C. § 41 (2000).

295. See Arthur D. Hellman, *Precedent, Predictability, and Federal Appellate Structure*, 60 U. PRR. L. REV. 1029, 1039 (1999) (describing “defining characteristics” of federal appellate structure, including “jurisprudential[] independen[ce]”).

296. See, e.g., *Walker v. O’Brien*, 216 F.3d 626,634 (7th Cir. 2000).

297. *Bonner v. City of Prichard*, 661 F. 2d 1206, 1209 (11th Cir. 1981) (emphasis added).

298. Weis, *supra* note 291, at 459 (citing *Heckendorn v. United States.*, 162 F. 141, 143 (7th Cir. 1908)).

Heckendorn court relied on the Supreme Court's earlier statement that judges must decide cases according to their own convictions, at least absent contrary Supreme Court precedent.²⁹⁹ Though each circuit "draws to some extent on other circuits' cases,"³⁰⁰ it is not at all uncommon for a court of appeals decision to note that it is creating a conflict with the ruling of another circuit.³⁰¹ This is so even though the result may be that the various circuits "will at times interpret the same statute in different ways"³⁰² or create other serious conflicts in federal law.³⁰³

One consequence of the independence of the circuits is that they are treated as "coordinate" courts not bound to follow each others' decisions.³⁰⁴ In fact, according to Judge Weis, the courts of appeals now focus on circuit law, not federal law.³⁰⁵ The doctrine of precedent applies within each circuit, but not across circuit boundaries. Each circuit's decisions, then, constitute the body of precedent for that circuit.³⁰⁶ The "law of the circuit" doctrine treats "decisions of the same circuit as authoritative," while treating "decisions of other circuits as no more than persuasive."³⁰⁷ As Judge Posner describes them, "the thirteen courts of appeals constitute at best a loose confederacy, brought under some semblance of unity only by their common subjection to the ultimate authority of the Supreme Court."³⁰⁸

This arrangement allows one circuit to regard its own panel decision as more authoritative than the decision of another circuit, even if the latter were an en banc decision.³⁰⁹ Consequently, inter-circuit conflicts de-

299. *Id.* (citing *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488-89 (1900) (upholding Seventh Circuit's refusal to follow earlier decision by Eighth Circuit)).

300. Stephen L. Wasby, *Intercircuit Conflicts in the Courts of Appeals*, 63 MONT. L. REV. 119, 120 (2002).

301. *See, e.g., Walker*, 216 F.3d at 639 n.6; *Midlantic Nat. Bank v. Hansen*, 48 F.3d 693, 696-97 (3d Cir. 1995); *United States v. Stouffer*, 986 F.2d 916, 929 (5th Cir. 1993); *United States v. Riviuccio*, 919 F.2d 812, 815 n.3 (2d Cir. 1990); *see also Mary Garvey Algero, A Step in the Right Direction: Reducing Intercircuit Conflicts by Strengthening the Value of Federal Appellate Court Decisions*, 70 TENN. L. REV. 605, 607 (2003).

302. *Critical Mass Energy Proj. v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 876 (D.C. Cir. 1992).

303. *See generally Wasby, supra note 300; Weis, supra note 291, at 460-61.*

304. *Cf. LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (stating that "the-law-of-the-circuit doctrine is derived from . . . the structure of the federal courts of appeals"); *see also supra note 291, and accompanying text.*

305. *Weis, supra note 291, at 460 (citing cases).*

306. United States Supreme Court decisions are also precedent in every circuit, and so are state supreme court decisions from states within the circuit in diversity cases. *See Caminker, supra note 279, at 824-25.*

307. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 380 (1996).

308. *Id.*

309. *Cf. Cooper & Berman, supra note 5, at 721-22 (contrasting enduring significance of panel decisions, even if rendered with participation of only one active judge of the circuit, with rarity of en*

velop, though the extent and consequences of such conflicts are debatable.³¹⁰ Commentators have suggested a variety of ways to alleviate inter-circuit conflicts, including adjusting the operation of precedent in the courts of appeals so as to apply, at least in some circumstances, across circuit boundaries.³¹¹ For now, however, precedent operates horizontally within each circuit, not across circuits. Implicit in this arrangement is the obligation (confirmed by recognition of the power to sit en banc) to maintain a body of circuit law to serve as precedent for future decisions. That fact leads us to examine the internal decisional structure of the circuits.

2. *Internal Structure of the Courts of Appeals*

Current federal statutes allow the courts of appeals to hear and decide cases sitting either in panels of three judges³¹² or en banc.³¹³ Neither mode was ordained by the Evarts Act, which provided for three judges on each newly constituted circuit court of appeals.³¹⁴ At their inception, these courts were unitary courts—all three judges participated in deciding each case.³¹⁵ Neither panels (to distribute the caseload) nor en banc courts (to reconcile conflicting panel decisions) were necessary. Before long, however, Congress added a fourth judge to some circuits.³¹⁶ At that point, a statutory “anomal[y]” thus defined the “court” as having three members, while authorizing four (or more) judges of the court.³¹⁷ This inadvertent ambiguity³¹⁸ raised questions about how the courts of appeals should be constituted to hear and decide cases.

banc review, involving participation of all (or many) active judges of the circuit, and implying that en banc determinations are stronger authority by virtue of wider participation).

310. Professor Arthur Hellman has studied the matter extensively and reports little correlation between circuit structure and unpredictability in federal law, for example. *See* Hellman, *supra* note 295, at 1086 (expressing doubt that “regime of national stare decisis . . . would reduce contingency in appellate outcomes”).

311. *See, e.g.*, POSNER, *supra* note 307, at 380–81.

312. 28 U.S.C. § 46(b) (2000). The panel may include the circuit Justice, active or retired judges of the circuit, or judges of other circuits or of district courts, sitting by assignment. *Id.* at § 46(c).

313. *Id.* § 46(c). Circuits with more than 15 authorized active judges may sit en banc with “such number of members” of the court participating “as may be prescribed by rule” of the court. Pub. L. No. 95-486, § 6, 92 Stat. 1633 (Oct. 20, 1978). The Ninth Circuit has established a limited en banc court by rule. *See* 9TH CIR. R. 35-3.

314. Act of Mar. 3, 1891, ch. 517, § 2, 26 Stat. 826. For a brief history, see Steven Bennett & Christine Pembroke, “Mini” *In Banc Proceedings: A Survey of Circuit Practices*, 34 CLEV. ST. L. REV. 531, 533–36 (1986).

315. *See* *Textile Mills Sec. Corp. v. Comm’r of Internal Revenue*, 314 U.S. 326, 328–30 (1941).

316. Bennett & Pembroke, *supra* note 314, at 534 (citing Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087). The trend of adding judges as caseloads increased has continued without any modification in the courts’ structure (other than dividing the old Fifth Circuit into the new Fifth and Eleventh Circuits, and creating the Federal Circuit). *Cf.* Dragich, *supra* note 50, at 46.

317. *Textile Mills Sec. Corp.*, 314 U.S. at 329–30.

318. *Id.* at 333.

a. *Decision by Panels*

In 1948, Congress enacted revisions to the statutes constituting the courts of appeals, including a provision allowing the courts of appeals to sit in panels.³¹⁹ The Reviser's Note describes this provision as "continu[ing] the tradition of a three-judge appellate court and mak[ing] the decision of a [panel], the *decision of the court*, unless rehearing in banc is ordered."³²⁰ Whenever a multi-member court sits in panels or divisions, the potential for conflicting decisions arises.³²¹ The consequences of the panel structure of the federal courts of appeals were described recently as follows:

The . . . fact that only a small percentage of the active judges of a circuit actually hear any individual case has a profound impact on both the error-correction and law-making functions of the courts of appeals. Both when looking backward to correct claimed errors and when looking forward to develop the law, the courts of appeals necessarily operate in a fractured manner and thus necessarily assess claims of errors with a fractured viewpoint and speak with a fractured voice. Only when a court of appeals considers a case en banc can the litigant seeking correction of an error below, or the actors and courts seeking future legal guidance, be confident that the views, insights, and judgments of all the members of the circuit court were brought to bear on a particular case.³²²

The authors go on to state that because of the prior panel rules, panel decisions "have, in a sense, more precedential weight than decisions rendered by other courts within the federal judiciary"³²³ even though rendered by only a few of the active judges of a circuit.³²⁴

Such comments highlight the importance of maintaining the consistency and coherence in the law of the circuit. Professor Hellman labels intra-circuit conflict a "pernicious phenomenon,"³²⁵ more troubling than inter-circuit conflicts, presumably because the law of the circuit doctrine

319. Act of June 25, 1948, ch. 646, § 46(c), 62 Stat. 871 (using term "divisions" in place of "panels").

320. See *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 256 n.13 (1953) (emphasis added) (quoting Reviser's Note). The Supreme Court in the *Western Pacific* case endorsed this model for the courts of appeals. *Id.*

321. See, e.g., Paul D. Carrington, *The Obsolescence of the United States Courts of Appeals: Roscoe Pound's Structural Solution*, 15 J.L. & POL. 515, 518-19 (1999) (describing "law of the circuit" as "illusory" in view of rotating panels, infrequent en banc review, and unpublished decisions); Daniel Meador, *Afterword*, 15 J. L. & POL. 567, 568-69 (1999) (describing similar).

322. Cooper & Berman, *supra* note 5, at 720.

323. *Id.* at 721 (comparing panel decisions to district court and Supreme Court decisions).

324. *Id.* at 720 (stating that it is "not uncommon for only two or even just one active judge of the circuit to participate" on a given panel).

325. Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 543 (1989).

gives rise to an expectation of uniformity of law within the circuit but not beyond it.³²⁶ The en banc power is the only statutory mechanism allowing the full court to control the law of the circuit.³²⁷ No other procedures for maintaining intra-circuit consistency are required, although most circuits have adopted one or more such mechanisms.³²⁸ The en banc power and other mechanisms to promote consistency are described in the following sections.

b. *En Banc Decisions*

The courts of appeals occasionally sit en banc rather than in panels, often to resolve inconsistencies in panel decisions. In 1941, the Court upheld the Third Circuit's rule allowing that court to sit en banc when the court so directs by special order.³²⁹ Ordinarily, the Court said, a "court . . . will consist of all the judges appointed to it,"³³⁰ as the new courts of appeals originally had. Providing for en banc review when the court usually sits in panels "makes for more effective judicial administration"³³¹ by establishing a means for resolving conflicts, among other things. Congress ratified this result in 1948.³³² En banc hearings or rehearings are allowed but never required, and now may be conducted by less than the full complement of active circuit judges on large courts.³³³

The Court has made it clear that litigants have no *right* to appeal a panel's decision.³³⁴ The Court gave wide latitude to the courts of appeals to determine their en banc procedures, not even requiring these courts to allow litigants to move for en banc rehearing.³³⁵ The en banc power is seldom exercised.³³⁶ Circuit judges express distaste for the procedure and doubts as to its effectiveness,³³⁷ describing en banc hearings as "unwieldy," "time-consuming," "cumbersome," "expensive," and even as a

326. *Cf. id.* at 542 (discussing structure of federal courts and ascendancy of law of the circuit doctrine).

327. *See supra* text accompanying notes 242–249.

328. *See Bennett & Pembroke, supra* note 314, at 544–57 (describing mechanisms such as circulation of draft opinions).

329. *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326, 334–35 (1941).

330. *Id.* at 333.

331. *Id.* at 334–35.

332. *See West. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 250–51 (1953) (citing 28 U.S.C. § 46(c) (1948)).

333. 28 U.S.C. § 46(c) (2000).

334. 345 U.S. at 258 (denying that a horizontal appeal to en banc court is implicit in 28 U.S.C. § 46(c)).

335. *Id.* at 252.

336. *Bennett & Pembroke, supra* note 314, at 540; *see also George, supra* note 43, at 215 (“[T]he courts of appeals resolve fewer than one percent of their cases en banc.”).

337. *See Hart v. Massanari*, 266 F.3d 1155, 1171–72, 1172 n.29 (9th Cir. 2001).

“damned nuisance.”³³⁸ Importantly, the courts of appeals have stated that they “do not take cases en banc merely because of disagreement with a panel’s decision,” nor merely “to review a panel opinion for error.”³³⁹ As a result, panel decisions are significant and enduring,³⁴⁰ and unlikely to be reviewed.³⁴¹

c. *Prior Panel Rules*

The courts of appeals have adopted rules making the decision of a panel the decision of the court, absent en banc review.³⁴² Prior panel rules vest great power in three-judge panels, as can be seen in the *American-Foreign Steamship* case.³⁴³ The Second Circuit panel hearing the case expressed considerable doubt as to the correctness of earlier Second Circuit decisions that the district court had held controlling.³⁴⁴ But the later panel stated categorically that it would “not overrule these recent decisions of other panels of the court.”³⁴⁵ This has become the classic statement of the “prior panel” rule.

Against the “assumption that the authority to develop doctrine is vested in the court as a whole,”³⁴⁶ prior panel rules reflect the view that panels “are agents of the full court” and that “inaction by the full court constitutes endorsement” of the panel’s decision.³⁴⁷ When we speak of circuit precedent we speak almost always of panel decisions. It is these decisions to which the notion of horizontal precedent applies most often in the courts of appeals. The prior panel rules strengthen the sense that

338. *Id.*

339. *Id.* (citing *EEOC v. Ind. Bell Tel Co.*, 256 F.3d 516 (7th Cir. 2001)).

340. *Cf. id.* (arguing that use of unpublished opinions promotes institutional orderliness by reducing need for en banc review); see also *Bennett & Pembroke*, *supra* note 314, at 540. *But see Carrington*, *supra* note 321, at 517 (law of the circuit is “transitory” because “the range of legal issues arising within the appellate jurisdiction of the courts of appeals is limited,” consisting mostly of cases requiring interpretation of “transitory texts” such as federal statutes and administrative regulations).

341. *Dragich*, *supra* note 14, at 767–68; *George*, *supra* note 43, at 272.

342. See, e.g., *Anastasoff v. United States*, 223 F.3d 898, 905 (8th Cir. 2000); *Hart*, 266 F.3d, at 1171. The need for such rules was explained by then-Judge Benjamin Cardozo as follows:

We have had ten judges, of whom only seven sit at a time. It happens again and again, where the question is a close one, that a case which one week is decided one way might be decided another way the next if it were then heard for the first time. The situation would, however, be intolerable if the weekly changes in the composition of the court were accompanied by changes in its rulings.

BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149–150 (1921). See also *Hellman*, *supra* note 325, at 545 n.13, 549.

343. *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685, 688–901 (1960).

344. *American-Foreign Steamship Corp. v. United States*, 265 F.2d 136, 142 (2d Cir. 1958).

345. *Id.*

346. *Harrison*, *supra* note 153, at 536. This certainly is the assumption the Supreme Court articulated in *Textile Mills Securities Corp. v. Commissioner*, 314 U.S. 326, 333 (1941). See *George*, *supra* note 43, at 272.

347. *Harrison*, *supra* note 153, at 536.

there is a “law of the circuit” even though the full court has not participated—at least formally—in most of the decisions.³⁴⁸

d. *Other Mechanisms to Promote Consistency*

Most circuits have adopted one or more mechanisms to ensure awareness of and to seek broader participation in panel decisions, so as to promote uniformity in circuit law.³⁴⁹ These mechanisms may be described in local rules or internal operating procedures,³⁵⁰ or may simply be practices of the court.³⁵¹ Generally, these mechanisms involve circulation of opinions, prior to issuance, to the full court,³⁵² particularly where an intra-circuit or inter-circuit conflict may be created or where the panel wishes to overrule the decision of a prior panel.³⁵³ The Ninth Circuit has adopted an elaborate inventory system that attempts to minimize intra-circuit conflicts by assigning cases presenting the same issues to the same panel.³⁵⁴ The rotation of judges on panels was also devised as a mechanism to promote continuity and consistency in circuit law.³⁵⁵ Now, however, the vast number of panel combinations may threaten coherent development of circuit law.³⁵⁶

How effective these mechanisms are in securing broader participation in panel decisions³⁵⁷ or in avoiding conflicts³⁵⁸ is uncertain. In earlier days, these mechanisms would have been unnecessary because all (or nearly all) opinions would have been published.³⁵⁹ Moreover, citation of any opinion by the parties was allowed and could inform the court of conflicting or persuasive cases.

348. See Carrington, *supra* note 321, at 518–19; Meador, *supra* note 321, at 568.

349. Bennett & Pembroke, *supra* note 314, at 544. Bennett and Pembroke term these procedures “mini” en banc proceedings.” *Id.* I dislike that term because these mechanisms are not, in fact, “proceedings” of any kind but rather internal review processes, usually quite informal. See *id.* at 547 (describing mechanism used by Second Circuit); Cooper & Berman, *supra* note 5, at 691.

350. See, e.g., Bennett & Pembroke, *supra* note 314, at 544 (describing the Seventh Circuit).

351. See, e.g., *id.* at 552 (describing the Tenth Circuit).

352. *Id.* at 544 (describing Seventh Circuit’s review process).

353. *Id.*

354. Hellman, *supra* note 325, at 547.

355. *Cf. W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 255–56 n.13 (1953); see also STRUCTURAL ALTERNATIVES REPORT, *supra* note 1, at 30.

356. Hellman recounts discussions on this point, quoting Judge Kleinfeld as saying that “there are over 3,000 combinations of judges who may wind up on panels” together in the Ninth Circuit. Hellman, *supra* note 295, at 1091–92.

357. See Bennett & Pembroke, *supra* note 314, at 565 (finding mechanisms for broader review effective).

358. See Hellman, *supra* note 325, at 548 (finding conflict-avoidance mechanisms not entirely effective).

359. See Richman & Reynolds, *supra* note 231, at 274–75.

C. SUMMARY

As the effective courts of last resort in the federal court system, the courts of appeals shoulder enormous responsibility for both correcting error and developing federal law. At present, the Supreme Court is so remote as to provide little guidance on most questions. The courts of appeals are under no obligation to follow each others' decisions; each circuit develops its own law. Yet the courts of appeals almost never sit en banc to develop or reconcile circuit law. Prior panel rules require that a subsequent panel within a circuit follow the ruling of a prior panel, even if the precedent is believed erroneous. Thus, panel decisions have taken on enormous significance.

At the same time, the vast majority of panel decisions are "unpublished," a status which in most circuits seriously undermines their precedential value. Limited publication and no-citation rules remove unpublished decisions from the body of precedent in many circuits regardless of their similarity to future cases. Citizens are left with little guidance from the Supreme Court, the en banc courts of appeals, or precedential decisions of circuit panels. The publication and citation rules also interfere with the circuit's ability to maintain coherence and consistency in the law of the circuit, which in turn are required for the operation of horizontal precedent in the courts of appeals. The next Part of this Article analyzes the proper place of unpublished opinions in a system based on precedent.

IV. UNPUBLISHED OPINIONS AS PRECEDENT

Professor Schauer identified three questions as central to understanding a system of precedent³⁶⁰:

"What does it mean for a past event to be *precedent* for a current decision?"³⁶¹

"[H]ow does something we do *today* establish a precedent for the future?"³⁶² and

When precedent matters, just *how much* should it matter?"³⁶³

The answers to these questions establish a basis for assessing the legitimacy and effectiveness of limited publication and, especially, no-citation rules.

360. Schauer, *supra* note 96, at 571.

361. *Id.* See also Robel, *supra* note 18, at 400, for a similar discussion.

362. Schauer, *supra* note 96, at 571.

363. *Id.*

A. PAST EVENTS AS PRECEDENT FOR CURRENT DECISIONS³⁶⁴

Schauer writes that “if we are truly arguing from precedent, then the fact that something was decided before gives it present value despite our current belief that the previous decision was erroneous.”³⁶⁵ The “earlier decision has a status that must be respected by a later decisionmaker.”³⁶⁶ A rule of precedent that requires a current decisionmaker to consider its own prior decisions constrains by limiting the decisionmaker’s flexibility in the later case or by requiring him or her to overcome a burden of justifying a departure from the precedent decision.³⁶⁷

Limited publication and no-citation rules deny the present value of past decisions. The no-citation rules forbid parties to refer to the earlier decision and prevent later panels from taking it into account (at least openly). In so doing, the rules eliminate the backward-looking constraint of precedent, which urges current decisionmakers to consider past decisions and to issue rulings that validate litigants’ interests in consistency and reliance on settled law.³⁶⁸

The elimination of this constraint is particularly problematic in the courts of appeals, whose structure and place in the federal judicial hierarchy impose little other constraint. Review by the Supreme Court or the en banc court of appeals is extremely unlikely.³⁶⁹ And internal mechanisms by which the full court of appeals can oversee the decisional output of all its panels do not inspire confidence that consistency, predictability, and stability will be maintained in the law of the circuit.³⁷⁰ Furthermore, so long as Congress provides litigants an appeal as of right and does not differentiate between cases deserving greater or lesser appellate process, rules removing some cases from the stream of precedent are misguided. If Schauer is right about how past events constrain current decisions, it would seem that a system of precedent either is in place or is not. The courts of appeals’ limited publication and no-citation rules try to have it both ways by declaring some decisions “precedential” and rendering others nullities from their inception.

Finally, the no-citation rules “significantly diminish the accountability”³⁷¹ of the courts of appeals by decreasing the prospect of en banc or

364. *Id.*

365. *Id.* at 575.

366. *Id.* at 576.

367. *Id.* at 574, 580, 600.

368. See generally Schauer, *supra* note 96, at 596.

369. See *supra* Part III.B.2.b; see also Barrett, *supra* note 233, at 1046 (noting that “courts of appeals resolve fewer than one percent of their cases en banc” and that “[t]he chances that the Supreme Court will grant certiorari are similarly low”).

370. See *supra* Part III.B.2.d.

371. Reynolds & Richman, *supra* note 12, at 1202; see also Cappalli, *supra* note 8, at 789.

Supreme Court review and diminishing critical commentary.³⁷² The accountability point is at the heart of the *Anastasoff/Hart* debate. Judge Arnold is, above all, concerned with accountability to the public, a value he believes is advanced by allowing citation to the court of “what [it decided] yesterday.”³⁷³ *Anastasoff* held only that the portion of the rule allowing the court to declare opinions “not precedent” was unconstitutional.³⁷⁴ The no-citation aspect of the rule was not squarely at issue. In *Hart*, however, the question presented was whether an attorney should be sanctioned for citing an unpublished decision.³⁷⁵ The accountability question is directly invoked when litigants are forbidden to point out to the court what it has decided in the past.³⁷⁶ Judge Kozinski does not address this question directly but appears to believe accountability is served when the court of appeals “maintain[s] a coherent, consistent and intelligible body of caselaw” by producing the most “lucid and consistent [opinions] as humanly possible.”³⁷⁷ He believes this end is achieved by careful selection of “lawmaking” cases to become precedents for future decisions. Commentators appear to favor Judge Arnold’s view.³⁷⁸

B. PRESENT ACTIONS AS PRECEDENT FOR THE FUTURE³⁷⁹

According to Schauer, a “system of precedent . . . involves the special responsibility accompanying the power to commit to the future before we get there.”³⁸⁰ Judges contemplating a decision “must acknowledge its many possible subsequent characterizations, and thus the many directions in which it might be extended.”³⁸¹ In other words, decision-makers must consider future situations to the extent possible and issue rulings they would be willing to “stand to” in future cases.³⁸² This forward-looking aspect of constraint is necessary to ensure careful decisionmaking³⁸³ and to reduce the possibility that decisions are based on bias or other impermissible factors.³⁸⁴ It also promotes predictability in

372. Reynolds & Richman, *supra* note 12, at 1203.

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

374. *Id.* at 905.

375. *Hart v. Massanari*, 266 F.3d 1155, 1159 (9th Cir. 2001).

376. *Barnett*, *supra* note 35, at 13–14.

377. 266 F.3d at 1179.

378. *See, e.g.*, *Barnett*, *supra* note 35, at 25–26; *Greenwald & Schwartz*, *supra* note 21, at 1174; *Katsh & Chachkes*, *supra* note 14, at 322–23.

379. Schauer, *supra* note 96, at 571.

380. *Id.* at 573.

381. *Id.* at 574.

382. *See supra* note 124.

383. Schauer, *supra* note 96, at 589.

384. *Cf. Cappalli*, *supra* note 8, at 787 (noting that judges “freed from the constraints of precedent . . . may let their biases and personal preferences decide” cases).

the law because citizens can order their affairs around precedents issued today with a commitment to the future.³⁸⁵

Current decisions sometimes set precedent and sometimes do not, but this is not a function of the precedent court's declaration of the decision's future effect. Rather, the eventual "precedential value" of a decision turns on the subsequent court's judgment about the assimilability of the precedent case to the instant case.³⁸⁶ Limited publication and no-citation rules allow the courts of appeals to issue some decisions absent any commitment to the future.³⁸⁷ By denying the future effect of decisions, these rules eliminate the obligation of judges to consider the future ramifications of current decisions.³⁸⁸ The loss of this constraining influence, again, is especially troubling considering the absence of other constraints, such as en banc or Supreme Court review, on most courts of appeals decisions.

Limited publication and no-citation rules impair the ability of future decisionmakers to treat today's unpublished decisions as precedent, thus interfering with consistency and decisionmaking efficiency. The rules are premised on the notion that cases given the "unpublished" treatment are easy,³⁸⁹ and that the same easy question arising over and over again will generate consistent results because the answers are obvious.³⁹⁰ But the experience of thirty years shows that many of the cases are not easy³⁹¹ and some of the results are in conflict.³⁹²

385. Schauer, *supra* note 96, at 597.

386. *Cf. id.* at 577 (discussing existence of precedent to govern present case).

387. *See* Robel, *supra* note 18, at 410 (describing no-citation rules as attempt to "strip" opinions of their future value "by fiat").

388. Most courts of appeals judges probably consider the future ramifications of their decisions even in cases receiving abbreviated consideration, but they are not constrained to do so. *Cf.* Schauer, *supra* note 96, at 589 (discussing tendency of conscientious decisionmakers to treat past decisions as precedent even absent the "pull" of precedent).

389. *See generally* Kenneth Anthony Laretto, *Precedent, Judicial Power, and the Constitutionality of "No-Citation" Rules in the Federal Courts of Appeals*, 54 *STAN. L. REV.* 1037, 1039-41 (2002) (discussing "easy" cases and unpublished opinions).

390. *Cf.* Friendly, *supra* note 242, at 412 (dismissing as "wishful thinking" the notion that all circuits will decide a question of federal law the same way); Schauer, *supra* note 96, at 578 (noting that in fact, "rarely" does a decisionmaker "think that almost the exact same facts will arise again"). Yet the rules themselves and defenses of them seem to assume a large number of all-but-identical cases. *See, e.g.,* Hart v. Massanari, 266 F.3d 1155, 1179 (9th Cir. 2001). This premise holds up better in some categories of cases than others, *see* Robel, *supra* note 19, at 952-53, but probably underestimates case-to-case variation even in those categories.

391. Judge Jerry E. Smith notes that in the first half of 2001 alone, the Fifth Circuit "has declined to publish at least four opinions in which a judge dissented, indicating that at least one [judge] felt that each of these cases was *not* an easy application of existing law to indistinguishable facts." *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, 262 (5th Cir. 2001) (Smith, J., dissenting from denial of rehearing en banc) (emphasis added); *see also* Merritt & Brudney *supra* note 15, at 110-11 (concluding that unpublished opinions are "not as straightforward as some judges maintain" and "may represent

C. HOW MUCH PRECEDENT MATTERS³⁹³

Schauer recognizes that the fact that something is a “precedent” raises new questions, namely, how tightly the precedent binds future decisionmakers, and what it should take to loosen the bond.³⁹⁴ Precedent, as noted earlier, can be described as a rule of relevance.³⁹⁵ As such it depends on assimilation between past and current events (or assimilability of contemplated future events to current ones).³⁹⁶ “Only by looking to the [precedent] can we determine if that source constrains.”³⁹⁷ Even when precedent constrains, it does not do so “absolutely.”³⁹⁸ Rather, “precedent can matter even if it has less [than controlling] weight.”³⁹⁹ The weight or strength of precedent depends, simply, on the degree of similarity between the two cases.⁴⁰⁰

The limited publication and no-citation rules, by contrast, depend on the idea of precedent as an all-or-nothing proposition. A decision is declared at the outset (by virtue of its publication) to be precedent, or (by

more discretionary application of legal principles than the publication rules contemplate”). *But see id.* at 116 (acknowledging that even if law is well-settled, judges may disagree about how to apply law to facts of case).

392. A recent Fifth Circuit case provides a good example. In *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315, 322 (5th Cir. 2001), the Fifth Circuit reversed the district court’s determination that DART is a governmental entity entitled to Eleventh Amendment immunity. On petition for rehearing en banc, judges dissenting from denial of the petition described the background of the case as follows:

[DART] is told, in May 1999, by a panel of this court in *Anderson* [a case also involving DART as defendant], that it is immune, on the basis of a “comprehensive and well-reasoned opinion.” Competent counsel [for DART] reasonably would have concluded, and advised his or her client, that it could count on Eleventh Amendment immunity. Then, in March 2000, in the instant case, a federal district judge, understandably citing and relying on the circuit’s decision in *Anderson*, holds that “it is firmly established that DART is a governmental unit” In February 2001, however, a panel, containing one of the judges who was on the *Anderson* panel, reverses and tells DART that, on the basis of well-established Fifth Circuit law from 1986, it has no such immunity.

256 F.3d at 261 (Smith, J., dissenting from denial of rehearing en banc). The 1986 decision was published, *see Clark v. Tarrant County*, 798 F.2d 736 (5th Cir. 1986), causing one to wonder why the *Anderson* panel did not rely on it. *Anderson* is unpublished and unavailable on Westlaw; therefore, it is unknown whether the panel cited the 1986 case. As an unpublished decision issued after January 1, 1996, *Anderson* is “not precedent” under 5TH CIR. R. 47.5.4. *Id.* It seems odd (not, as the dissenters state, “understandabl[e]”) that the district court in *Williams* relied on the unpublished *Anderson* decision (even though *Anderson* involved the very same defendant as *Williams*) and not on the published decision from 1986.

393. Schauer, *supra* note 96, at 571.

394. *Id.*

395. *See supra* text accompanying notes 153–156.

396. Schauer, *supra* note 96, at 579.

397. *Id.*

398. *Id.* at 580.

399. *Id.* at 592.

400. *Id.* at 594.

virtue of being labeled “unpublished”) not to be precedent. Under the rules, unpublished decisions are not “precedent” even in virtually identical cases (like *Anastasoff*), despite the fact that precedent should apply with particular strength in such cases to ensure fairness and consistency. The no-citation rules forbid parties even to refer to unpublished decisions, apparently on the theory that if cited, these decisions will “bind” the subsequent court.⁴⁰¹

This makes little sense. The courts of appeals, when they adopted limited publication and no-citation rules, seem to have thrown time-honored modes of decisionmaking out the window. A precedent case is no more than a “point of departure”⁴⁰² that provides an “indicator of what the law requires.”⁴⁰³ Its actual effect is for the subsequent court to determine. In making that determination, the subsequent court considers the similarity of the cases, the applicability of analogical reasoning,⁴⁰⁴ and the familiar rules about the hierarchy of authorities.⁴⁰⁵ As the *Anastasoff* opinion suggests, courts of appeals could continue to issue “unpublished” decisions⁴⁰⁶ (probably signaling that these cases received abbreviated review) without declaring such decisions “not precedential” or forbidding their citation. It would still fall to the subsequent court to determine the decision’s actual strength or value, using all the techniques it ordinarily would to deal with a precedent.⁴⁰⁷ Indeed, “no version of *stare decisis* that might plausibly be followed in America comes anywhere close to an ironclad rule.”⁴⁰⁸ A court faced with an erroneous or unworkable precedent of its own may overrule it, subject to the requirement that it provide a justification for doing so.⁴⁰⁹ The structure and strictures of the courts of

401. The *Hart* opinion seems to say exactly that. *Hart v. Massanari*, 266 F.3d 1155, 1179 (9th Cir. 2001).

402. See *Hathaway*, *supra* note 171, at 624 (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, 20 (1921)).

403. Harrison, *supra* note 153, at 512. Recently, Professor Schauer has offered a reminder that even those who subscribe to the possibility of strong constraint by . . . legal precedents must acknowledge that those . . . precedents can only take us so far. . . . [L]egal precedents may determine the boundaries of plausible legal decision without determining precisely what is to be done within those boundaries.

Frederick Schauer, *The Dilemma of Ignorance: PGA Tour, Inc. v. Casey Martin*, 2001 SUP. CT. REV. 267, 267–68.

404. See *Boggs & Brooks*, *supra* note 26, at 24.

405. See Harrison, *supra* note 153, at 506–07. The *Hart* opinion likewise discusses a variety of case and “non-case” authorities that courts consult for guidance. 266 F.3d at 1169–70.

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

407. See KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 72–76 (1960).

408. Nelson, *supra* note 161, at 82; see also Price, *supra* note 35, at 114–15 (comparing American practice to the rigid rule formerly followed by the British House of Lords).

409. *Anastasoff*, 223 F.3d at 904–05; see also *Robel*, *supra* note 18, at 400.

appeals make overruling prior panel decisions difficult, but that is no excuse for avoiding the rule of precedent altogether.

V. JUSTIFYING THE RULES ON ECONOMY GROUNDS

Judge Arnold notes in *Anastasoff* that “[m]odern legal scholars tend to justify the authority of precedents on equitable or prudential grounds.”⁴¹⁰ The same characterization holds true for much of the literature on unpublished opinions and no-citation rules, which until recently focused mainly on issues of judicial economy,⁴¹¹ equal access,⁴¹² and the like rather than on constitutional grounds⁴¹³ or other, more fundamental issues.⁴¹⁴ The best overall analysis of early arguments surrounding these rules is Reynolds and Richman’s 1978 article, *Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*.⁴¹⁵ The authors concluded that flawed premises and powerful counter-arguments subject the rules to “serious question.”⁴¹⁶ Much of their analysis depends on how the courts of appeals actually operate with respect to precedent. The starkly contrasting accounts presented in *Anastasoff* and *Hart* invite reexamination of the rules using Reynolds and Richman’s framework. This Part briefly reviews the current status and effects of the rules, and then considers whether the rules can be justified on grounds of economy despite their incompatibility with the rule of precedent.

A. CURRENT STATUS OF RULES

Each circuit has a rule limiting publication of opinions and specifying the conditions under which an unpublished opinion may be cited.⁴¹⁷ Appendix A provides a chart comparing the rules as they stand today.⁴¹⁸ A comparison of the rules thirty years ago and today reveals a few trends that may be relevant in re-assessing the rules. Fewer rules today include a presumption against publication. Five of twelve circuits (41.6%) today

410. *Anastasoff*, 223 F.3d at 901 (citing Schauer, *supra* note 96, at 595–602) (distinguishing modern treatment from “eighteenth-century view” that duty to follow precedent “derives from the nature of the judicial power itself”).

411. See, e.g., Kozinski & Reinhardt, *supra* note 5.

412. See, e.g., Robel, *supra* note 19.

413. See, e.g., Katsh & Chachkes, *supra* note 14 (analyzing constitutional issues).

414. See, e.g., Cooper & Berman, *supra* note 5 (examining selective publication and no-citation rules in light of the dual functions and complex structure of the courts of appeals).

415. Reynolds & Richman, *supra* note 12.

416. *Id.* at 1205.

417. See sources cited *supra* notes 7–8.

418. This chart is based on the one Reynolds and Richman used to compare the rules soon after their adoption. Reynolds & Richman, *supra* note 12, at 1206 tbl.I (publication and citation rules); *id.* at 1207 tbl.II (criteria for publication).

include such a presumption in their rules,⁴¹⁹ with the position of the Third Circuit unclear.⁴²⁰ Reynolds and Richman reported in 1978 that six of the then-existing eleven circuits (54.5%) had adopted a presumption against publication.⁴²¹ The current rules provide more specific guidance about when to publish than did earlier versions. Today, nine of thirteen circuits (69.2%) provide relatively specific criteria for publication.⁴²² Five of the eleven circuits (45.5%) in 1978 provided only the most general criteria for publication; six circuits' rules were more detailed.⁴²³ Currently, seven of the thirteen circuits (53.8%) provide a procedure for requesting publication of an otherwise unpublished disposition,⁴²⁴ compared with two of eleven circuits (19.2%) in 1978.⁴²⁵ Finally, today's non-citation rules are somewhat more liberal than in the past. Only four of thirteen circuits currently (30.8%) forbid the citation of unpublished decisions in all but the most limited circumstances.⁴²⁶ In 1978, seven of eleven circuits did so (63.6%)⁴²⁷

Clearly, the courts of appeals have modified their publication and citation rules in light of experience.⁴²⁸ The courts of appeals today show slightly more caution about limiting publication and significantly more willingness to allow citation of unpublished dispositions.⁴²⁹ In fact, given the trends just described, the debate about non-publication and non-citation rules is beginning to look like simply another facet of the debate

419. See Appendix A.

420. See 3D CIR. I.O.P. 5.1-5.3.

421. Reynolds & Richman, *supra* note 12, at 1206.

422. The First, Fifth, Sixth and D.C. circuits have expanded their publication criteria. The rules of the Fourth, Seventh, Eighth, Ninth and D.C. circuits always included several specific criteria. The rules of the Second, Third, Tenth, Eleventh, and Federal circuits remain quite general.

423. Reynolds & Richman, *supra* note 12, at 1207.

424. See Appendix A. For example, on Jan. 1, 2002, the D.C. Circuit abandoned its no-citation rule, permitting citation of unpublished opinions as precedent. See D.C. CIR. R. 28(c)(1)(B). Similarly, according to a press release dated Dec. 5, 2001, the Third Circuit itself still follows its no-citation rule, but now allows lawyers to cite unpublished decisions to the court. The Internal Operating Procedures, 3D CIR. I.O.P. 5.7 now state that the Third Circuit "by tradition" does not cite to its unpublished decisions "as authority."

425. Reynolds & Richman, *supra* note 12, at 1206.

426. See Appendix A; see also Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROCESS 473, 474-76 (2003) (discussing trends in citation rules and publication practices of the federal courts of appeals). The First Circuit has just modified its rule. That court now "disfavor[s]" citation of unpublished opinions, but permits such citation "only if . . . the opinion persuasively addresses a material issue . . . and . . . there is no published opinion of [the] court that adequately addresses the issue." Letter from Chief Judge Michael Boudin, to Peter G. McCabe, Sec'y, Comm. on Rules of Prac. & Proc. (Jan. 21, 2004), available at http://www.secretjustice.org/new_proposed_frap_32_1.htm (discussing and attaching new rule 32.3(a)(2)).

427. Reynolds & Richman, *supra* note 12, at 1206.

428. See Barnett, *supra* note 426, at 474-76 (discussing recent developments in various circuits).

429. See Cooper & Berman, *supra* note 5, at 432.

about how to deal with the huge caseload of the Ninth Circuit. Though three other circuits join the Ninth in continuing to prohibit citation of unpublished opinions, Ninth Circuit judges seem to be most passionate about the issue,⁴³⁰ and their comments without exception stress the crushing burden that court currently bears.

B. CURRENT PRACTICES AND CONSEQUENCES

Given the trends just described in the evolution of limited publication and no-citation rules, it is perhaps surprising that publication rates continue to decline sharply. Today, the average publication rate across all circuits but the Federal Circuit is 19.5%.⁴³¹ As recently as 1984, the overall average publication rate was 61.2%.⁴³² At the same time, “[l]arge numbers of participants in the federal appellate system, including judges, use unpublished opinions in ways not contemplated” by the limited publication and no-citation rules.⁴³³ Specifically, both attorneys⁴³⁴ and federal judges⁴³⁵ regularly read unpublished decisions, suggesting that these opinions “provide useful information,”⁴³⁶ contrary to the assumptions underlying the rules.⁴³⁷ Both Robel and Hannon present data showing that federal court judges have cited unpublished dispositions thousands of times.⁴³⁸

430. About 285 individuals and organizations submitted comments on proposed rule 32.1. See http://www.secretjustice.org/new_proposed_frap_32_1.htm#complete_list_public_comments. At least twenty-seven of these are Ninth Circuit judges. The Seventh and Federal Circuits, which also prohibit citation, each submitted one comment, in the case of the Seventh Circuit on behalf of a majority of judges and in the case of the Federal Circuit expressing unanimous opposition to the proposed rule. See Letter from Judge John L. Coffey, to Judge Samuel A. Alito (Feb. 11, 2004) (expressing opposition of majority of judges of the Seventh Circuit to proposed Rule 32.1), available at http://www1.law.ucla.edu/~volokh/blog_data/judges7cir.pdf; Letter of Chief Judge Haldane Robert Mayer, to Peter McCabe, Sec’y, Comm. on Rules of Prac. & Proc. (expressing unanimous opposition of Federal Circuit judges to proposed Rule 32.1), available at <http://www.fedcir.gov/pdf/fedcir.pdf>.

431. 2002 ANNUAL REPORT, *supra* note 108, at 39 tbl.S-3. This Table omits the Federal Circuit.

432. Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 204 tbl.2 (2001).

433. Robel, *supra* note 18, at 414.

434. *Id.* at 405 and 419–20 tbl.2.

435. *Id.* at 407–08 and 421–22 tbl.3 (discussing federal district and circuit judges).

436. *Id.* at 406.

437. *Id.* at 404; see also Cappalli, *supra* note 8, at 768 (describing process by which the “actual scope of a doctrinal formulation is learned through its applications”).

438. Hannon, *supra* note 432, at 224–37; Robel, *supra* note 18, at 406–07. In one interesting example, a Tenth Circuit panel described the law as “well settled” on a particular issue. It did so in an unpublished opinion, and cited as authority another unpublished decision of the Tenth Circuit, which in turn cited a published decision of the Seventh Circuit. See *Florez v. Johnson*, No. 02-2131, 2003 WL 1605857, at *2 (10th Cir. March 28, 2003) (citing *Poulos v. McKinna*, 210 F.3d 390 (10th Cir. 2000) (unpublished opinion) (citing *Pischke v. Litscher*, 178 F.3d 497 (7th Cir. 1999))). If these citations accurately represent the state of the law, lawyers and citizens in the Tenth Circuit must look either to non-precedential Tenth Circuit decisions, or to decisions of other circuits, to find the law.

Certain effects of the limited publication and no-citation rules are demonstrable.⁴³⁹ For example, given the tendency of attorneys to monitor unpublished decisions (and their belief that it is incumbent upon them to do so⁴⁴⁰), it is not surprising that attorneys sometimes cite unpublished dispositions in apparent violation of the rules.⁴⁴¹ Beyond the temptation to cite favorable but “forbidden” authority,⁴⁴² non-publication and no-citation rules may create or mask intra-circuit conflicts.⁴⁴³ *Anastasoff* involved an open invitation to the Eighth Circuit to create a conflict. The only case on point was unpublished and contrary to appellant’s position; she urged the court to ignore that decision and rule in her favor.⁴⁴⁴ Had the court done so in an unpublished decision, under its rule non-binding decisions would have pointed both ways.⁴⁴⁵ Had it done so in a published opinion, but without overruling the earlier decision, a “conflict” of sorts might still have existed.⁴⁴⁶ One commentator notes that the Ninth Circuit “issued twenty separate, unpublished panel decisions that [took] a total

439. Here I discuss only a few of the possible effects of the rules. Many other consequences—actual or potential—have been discussed elsewhere. See, e.g., Greenwald & Schwartz, *supra* note 21 (discussing constitutional issues, confidence in adjudication, and government waste, among others); Marla Brooke Tusk, *No-Citation Rules as a Prior Restraint on Attorney Speech*, 103 COLUM. L. REV. 1202 (2003); see also sources cited *supra* note 35.

440. Robel, *supra* note 18, at 406.

441. See *supra* note 29 and accompanying text.

442. The term comes from the title of the *ACTL Report*, *supra* note 24.

443. Richard S. Arnold, *Irving L. Goldberg Lecture, Southern Methodist University, Dedman School of Law: The Federal Courts: Causes of Discontent*, 56 S.M.U. L. REV. 767, 779 (2003).

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

445. 8TH CIR. R. 28A(i) makes unpublished decisions “not precedent.”

446. This was the situation in the Fifth Circuit’s DART cases. See *supra* notes 391–392. In 1999, the Fifth Circuit ruled in an unpublished opinion that DART was entitled to Eleventh Amendment immunity. In 2001, a different panel ruled the opposite way in a published opinion. *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315 (5th Cir. 2001). The 2001 opinion discussed at some length the errors of the 1999 panel, but did not explicitly overrule the unpublished decision. *Id.* at 318–19 n.1 (explaining that the immunity finding in the 1999 decision was merely dictum). The Fifth Circuit declined to rehear the 2001 case en banc to resolve whatever conflict may have remained. *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260 (5th Cir. 2001). Thus, at least for less than careful researchers, the presence of the two conflicting decisions continues to present a danger. See Arnold, *supra* note 443, at 779 (describing conflicting Fifth Circuit decisions in the DART cases). The same conflict is discussed in Sinclair, *supra* note 26, at 702. The leading study of intra-circuit conflicts took unpublished decisions out of the calculus, accepting the premise that such decisions are “irrelevant” to the question of intra-circuit conflicts “because [they] cannot be cited as precedent.” Hellman, *supra* note 325, at 599. This is the other side of the same coin examined *supra* Part I.E, involving the proper application of the prior panel rules. If the later panel is obliged to follow *all* decisions of prior panels, it creates a conflict when it fails to do so even if the prior panel’s decision was unpublished (*Anastasoff* position). But if later panels are bound to follow only “precedential” decisions of prior panels and if the circuit’s rule makes unpublished decisions not “precedential,” then the later panel creates no conflict (applying the term strictly) when it fails to follow the unpublished decision of a prior panel (*Hart* position). I use the term “conflict” more broadly to include such uncertainty in circuit law and hence would include unpublished decisions within the realm of intra-circuit conflicts.

of three different approaches” to a technical sentencing issue before issuing one published decision.⁴⁴⁷ Intra-circuit conflicts, particularly those involving unpublished decisions, pose real difficulty for analyses that depend on knowing whether the law was “clear,” for example in cases involving procedural bars to habeas petitions⁴⁴⁸ or claims of official immunity.⁴⁴⁹

C. CURRENT STATUS OF ARGUMENTS FOR THE RULES

Professors Reynolds and Richman in 1978 succinctly summarized⁴⁵⁰ and evaluated⁴⁵¹ arguments for the rules. This section briefly re-examines some of those arguments in light of changes in the rules and the practices of attorneys and judges since 1978. The divergent accounts of the operation of precedent in the *Anastasoff* and *Hart* opinions also bear upon the current status of arguments for the rules.

I. *Limited Publication Rules*

One premise of the argument for limited publication is that publication of all appellate opinions is “excessively costly” both to the courts who produce the opinions and to attorneys and court personnel as “consumers” of opinions.⁴⁵² This premise in turn depends on the assumption that a great deal of judges’ time is “spent in opinion writing” and that much time could be saved if brief, unpolished opinions not destined for

447. Laretto, *supra* note 389, at 1042.

448. See Powell v. Lambert, 357 F.3d 871 (9th Cir. 2004) (discussing Washington state courts’ opinion publication practices). The Powell panel held that “[i]t is the actual practice of the state courts, not merely the precedents contained in their published opinions, that determine the adequacy of procedural bars preventing the assertion of federal rights.” *Id.* at 879. In other words, unpublished decisions are “not irrelevant to a determination of a court’s actual practice,” *id.*, under the United States Supreme Court’s rule that “state courts must follow a firmly established and regularly followed state practice in order for an asserted procedural bar to be adequate.” *Id.* at 872. Because several unpublished state decisions were “flatly inconsistent” with the rule announced in the published decision upon which the Washington courts relied, the state’s actual practice was not consistent and could not bar Powell’s petition, notwithstanding the state courts’ rule that “unpublished decisions have no precedential value and cannot be cited to the Washington state courts” *Id.* at 879.

449. Officials are liable for illegal acts when the law was clear but immune from liability when they could not have been expected to know what the law demanded. See Jonathan M. Stemmerman, *Unclearly Establishing Qualified Immunity: What Sources of Authority May Be Used to Determine Whether the Law Is “Clearly Established” in the Third Circuit?*, 47 VILL. L. REV. 1221, 1228 (2002) (noting that “courts of appeals ‘have disagreed on . . . the extent to which [non-binding] kinds of decisional law should be considered’” in determining whether a legal rule is “clearly established” but focusing on district court decisions and other circuits’ decisions, not on unpublished opinions) (citation omitted).

450. Reynolds & Richman, *supra* note 12, at 1188–89.

451. *Id.* at 1189–1204.

452. *Id.* at 1188.

publication would suffice in many cases.⁴⁵³ Reynolds and Richman noted that while intuitively appealing, the “link between limited publication and increased productivity . . . ha[d] yet to be established by careful study.”⁴⁵⁴ Judge Kozinski clearly accepts that premise. He discusses the opinion-writing process at length in *Hart*⁴⁵⁵ and concludes that judges’ time is better spent “fulfill[ing] their paramount duties: producing well-reasoned published decisions and keeping the law of the circuit consistent through the en banc process.”⁴⁵⁶ Judge Arnold acknowledges this argument but rejects it.⁴⁵⁷

It is not clear how significantly unpublished opinions differ from published ones. Some have labeled unpublished opinions “junk,”⁴⁵⁸ while others describe them as similar to published opinions.⁴⁵⁹ In fact, “on occasion, the length and intellectual rigor of an unpublished opinion may rival those of opinions that appear in the Federal Reporter.”⁴⁶⁰ A recent review of opinions in the *Federal Appendix* found that many unpublished opinions appearing in its pages “are longer than five pages or have more than [ten] headnotes.”⁴⁶¹ Moreover, opinions in this reporter include controversial opinions and opinions with dissents, “rendering absurd [the] fiction . . . that there is something categorically different about unpublished opinions.”⁴⁶² On the other hand, some judges commenting on a proposed new rule that would liberalize citation rules in all the circuits describe unpublished opinions as quite different from published opinions in both the manner of preparation and the nature of the resulting document.⁴⁶³

453. *Id.* Discussing this line of argument, Cappalli suggests that “[t]he opinion writing task of judges is not that of the treatise writer,” but rather should be geared toward “singular determinations on singular issues reasoned narrowly.” Cappalli, *supra* note 8, at 783. He also denounces “discursive, endless federal appellate opinion[s]” and calling on judges to write “practical, focused opinions.” *Id.* at 789.

454. Reynolds & Richman, *supra* note 12, at 1191.

455. *Hart v. Massanari*, 266 F.3d 1155, 1176–79 (9th Cir. 2001).

456. *Id.* at 1178.

457. *Anastasoff v. United States*, 223 F.3d 898, 904 (8th Cir. 2000) (calling instead for increase of judges).

458. *See, e.g.*, Reynolds & Richman, *supra* note 231, at 284 (quoting remarks of former Chief Judge Markey of the Federal Circuit). Richman and Reynolds describe unpublished opinions as “dreadful in quality,” but as “Cardozo-esque in comparison” to one-word dispositions. *Id.* at 284–85.

459. *See, e.g.*, Hannon, *supra* note 432, at 212–13 (quoting Robel, *supra* note 19, at 943). The district court in *Williams* described the unpublished Fifth Circuit opinion upon which it relied as “comprehensive and well-reasoned.” *See Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, 260 (5th Cir. 2001) (Smith, J., dissenting from denial of rehearing en banc).

460. Cooper & Berman, *supra* note 5, at 702.

461. Brian P. Brooks, *Publishing Unpublished Opinions*, 5 GREEN BAG 259, 260 (2002).

462. *Id.* at 263.

463. *See, e.g.*, Letter from Judge William C. Canby, Jr., to Peter G. McCabe, Sec’y, Comm. on Rules of Prac. & Proc. (Jan. 8, 2004) (noting that when preparing a memorandum disposition (as the

If unpublished opinions do not differ significantly in length or complexity from published opinions, one wonders how much time is actually saved in their preparation. Moreover, the underlying assumptions about the nature of unpublished opinions are puzzling. Many commentators focus on the diminished need to recite the facts in opinions destined only for the parties, who already know the facts.⁴⁶⁴ Reciting the facts should not be all that difficult in the routine cases for which unpublished opinions are theoretically appropriate because in most cases the facts are well documented in the lower court's findings or in discovery documents submitted under oath.⁴⁶⁵ "Easy" cases are easy, at least in part, because their facts are relatively uncomplicated;⁴⁶⁶ summarizing the relevant facts in such cases should not take much time. Another possibility is that the facts of the instant case are indistinguishable from the facts in one or more previously published cases. If precedent depends on similarity, as discussed above, similarity of facts is an essential element of what the court of appeals must mean when it claims that the instant case falls

Ninth Circuit terms unpublished opinions), the judge checks to make sure the result is correct and "do[es] not concern [himself] greatly with how we describe our reasons"); Letter from Judge Barry G. Silverman, to Peter G. McCabe, Sec'y, Comm. on Rules of Prac. & Proc. (Dec. 17, 2003) (pointing out that a "mem dispo can be knocked out in an hour or less"), available at http://www.secretjustice.org/new_proposed_frap_32_1.htm#complete_list_public_comments; Letter from Judge William A. Fletcher, to Peter G. McCabe, Sec'y, Comm. on Rules of Prac. & Proc. (Dec. 12, 2003) (noting that unpublished opinions may be only "a page or two" in length, though sometimes longer), available at http://www.secretjustice.org/new_proposed_frap_32_1.htm#complete_list_public_comments; Letter from Judge Procter Hug, Jr., to Peter G. McCabe, Sec'y, Comm. on Rules of Prac. & Proc. (Dec. 16, 2003) (stating that "unpublished opinions are specifically not intended" to present arguments for particular points of law), available at http://www.secretjustice.org/new_proposed_frap_32_1.htm#complete_list_public_comments; Letter from Judge Kim McLane Wardlaw, to Peter G. McCabe, Sec'y, Comm. on Rules of Prac. & Proc. (Jan. 7, 2004) (noting that unpublished decisions "are designed to quickly and concisely deliver a decision to the litigants in a particular case" and therefore "largely omit[]" discussion of the facts and procedural posture of the case), available at http://www.secretjustice.org/new_proposed_frap_32_1.htm#complete_list_public_comments. See *infra* text accompanying notes 532-541 for discussion of the proposed rule.

464. See, e.g., Letter from Judge Procter Hug, Jr., to Peter G. McCabe, Sec'y, Comm. on Rules of Prac. & Proc., *supra* note 463; Letter from Judge Kim McLane Wardlaw, to Peter G. McCabe, *supra* note 463; Letter from Judge Dorothy W. Nelson, to Peter G. McCabe, Sec'y, Comm. on Rules of Prac. & Proc. (Jan. 7, 2004), available at http://www.secretjustice.org/new_proposed_frap_32_1.htm#complete_list_public_comments; see also *Hart v. Massanari*, 266 F.3d 1155, 1177-78 (9th Cir. 2001).

465. The courts of appeals ordinarily do not review the lower court's factual findings (in cases that have reached that stage) for correctness, but rather accept the facts as found below. See Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1500 n.277 (2003) (stating that "it is well established that circuit courts are to defer to district court findings regarding the facts of the case") (citations omitted). Of course, review in some cases is *de novo*. STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* § 2.14 (describing *de novo* review as requiring "no particular deference" to the trial court but not as amounting to "retrying the entire case").

466. Or as Cappalli, *supra* note 8, at 768, puts it, an "easy case occurs when the factual variations in the current case plainly do not demand a different outcome" from that of the precedent case.

squarely within existing law. If that is true, the opinion in the later case could simply state that the facts of the case at bar are the same in all relevant respects as those of the controlling case.⁴⁶⁷ Treating the facts in this manner would not allow future attorneys or litigants independently to assess the facts of a large sample of previous cases (unless they had access to the facts through district court opinions, court filings, or other accounts). Litigants would, however, have an opportunity to point out factual distinctions to the court of appeals in seeking rehearing (by comparing the facts of their own case to those of the cited case).⁴⁶⁸

By the same token, in routine cases that pose no new issues, the law is, by definition, settled.⁴⁶⁹ It should be a relatively simple matter in such a case to state and cite the controlling law. If the instant case is on all fours with the controlling case, nothing more is needed. Thus, “easy” cases should require little opinion-writing time regardless of publication or citation rules.⁴⁷⁰

Commentators are skeptical that time is saved primarily in the writing process.⁴⁷¹ The *Hart* opinion states that when “drafting a precedential opinion” (but apparently only then), a judge must “envision the countless permutations of facts that might arise in the universe of future cases.”⁴⁷² In fact, constraint by precedent imposes this obligation in all cases. Circuit judges seem to have convinced themselves that they do justice to the parties (for example, by deciding according to law) even in cases where the appellate process is abbreviated.⁴⁷³ The limited publication and no-citation rules reflect, at least in part, a concern that appellate

467. As noted above, it is true that no two cases are exactly alike. See *supra* note 175.

468. Cf. Letter from Judge William A. Fletcher, to Peter G. McCabe, Sec’y, Comm. on Rules of Prac. & Proc. (Dec. 12, 2003) (stating that unpublished decisions, in contrast to summary dispositions, give litigants “a basis from which to argue in a petition for rehearing that we misunderstood their case”), available at http://www.secretjustice.org/new_proposed_frap_32_1.htm#complete_list_public_comments.

469. See Boggs & Brooks, *supra* note 26, at 20–21 (discussing difficulty of determining, in the abstract, which cases or issues will be “easy” even if what we mean by that term is that the result is dictated by precedent); Schauer, *supra* note 96, at 599. The “easy case” premise underlies of all the limited publication rules. Boggs & Brooks, *supra* note 26, at 20; see also Gulati & McCauliff, *supra* note 177, at 161.

470. Cappalli, *supra* note 8, at 768, notes that calling the “resolution of a legal issue under existing case law easy is quite different from saying that the resolution is non-precedential, yet this distinction is not made in the non-precedent debate.” Gulati & McCauliff, *supra* note 177, at 160, note that “the harder the case, the greater the saving in judicial resources” one would expect.

471. See, e.g., *ACTL Report*, *supra* note 24, at 680–81; Boggs & Brooks, *supra* note 26, at 19–21; Cappalli, *supra* note 8, at 785, 788 (noting that writing process cannot be divorced from reasoning process and expressing skepticism that non-precedent cases are fully considered by judges). Comments of Ninth Circuit judges to proposed rule 32.1 dispute these claims. See Public Comments re FRAP 32.1, at http://www.secretjustice.org/new_proposed_frap_32_1.htm#complete_list_public_comments.

472. 266 F. 3d at 1176.

473. See *ACTL Report*, *supra* note 24, at 680–81.

shortcuts will lead to mistakes that are hard to undo.⁴⁷⁴ That is the appeal of the “non-precedential precedent.” But as argued above, this notion is incompatible with the rule of precedent.

Arguments about the costs of producing publishable opinions overlook the time *savings* created by relying on precedent. Schauer puts it bluntly: “when a precedent has no decisional significance as a precedent, the conscientious decisionmaker must look at each case in its own fullness.”⁴⁷⁵ Conversely, the decisionmaker in a case indistinguishable from a prior, precedential case need go no further” than invoking the prior case.⁴⁷⁶ Relying on a precedent allows the decisionmaker to “‘relax,’ in the sense of engaging in less scrutiny of the [instant] case.”⁴⁷⁷ But if the body of “precedential” decisions contains no matching case, the decisionmaker must either search through non-precedential decisions⁴⁷⁸ or start from scratch. Even if a non-precedential but relevant case is found, the later court (in a circuit that limits citation) may rely on it only in contravention of its own rules.⁴⁷⁹ Alternatively, the later court may decide (and, ideally, explain its decision) to go the other way.⁴⁸⁰ Surely the Eighth Circuit panel in *Anastasoff* spent more time deciding what to do with the allegedly non-precedential *Christie* decision than would have otherwise been required to decide the case.⁴⁸¹

As for the costs of consumption, Judge Kozinski writes that the publication of additional opinions will “muddy the water,”⁴⁸² “clutter up” law

474. See, e.g., *Hart v. Massanari*, 266 F.3d 1155, 1171–73 (9th Cir. 2001) (discussing resolution of conflicts).

475. Schauer, *supra* note 96, at 599. But see Maltz, *supra* note 127, at 370 (stating that “closer analysis undermines [the] persuasive force of arguments that reliance on precedent promotes judicial efficiency”); Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court’s Doctrine of Precedent*, 78 N.C.L. REV. 643, 649 (2000).

476. Schauer, *supra* note 96, at 599.

477. *Id.*

478. Such a case often exists, as the *Christie* decision did for the *Anastasoff* panel.

479. For example, a Fifth Circuit panel recently noted that it had “not found any published opinions [on the precise issue].” However, three unpublished Ninth Circuit opinions did address the issue: *United States v. Cuyler*, 298 F.3d 387, 390 (5th Cir. 2002) (citing *United States v. Luna-Moreno*, 10 Fed. Appx. 638, 639 (9th Cir. 2001)), *United States v. Reyes-Marro*, 238 F.3d 433 (9th Cir. 2000), and *United States v. Luna*, 152 F.3d 930 (9th Cir. 1998). If the Ninth Circuit itself wished to cite these unpublished decisions, it could do so only by violating 9TH CIR. R. 36-3 (b), which prohibits citation “to or by the courts of this circuit” (emphasis added).

480. See *Robel*, *supra* note 18, at 414. See also *Williams*, 242 F.3d 315 (ruling opposite way from previous, unpublished decision).

481. Cf. *Boggs & Brooks*, *supra* note 26, at 24 (noting that publication of *Christie* decision “would have resolved the issue once and for all” because the case called for selection of one rule over another and once selected, there would be “no opportunity for future panels to use analogical reasoning to distinguish *Christie*”); see also Cappalli, *supra* note 8, at 769–70 (describing a possible “adverse effect on the courts’ workload” resulting from limited publication and no-citation rules).

482. *Hart v. Massanari*, 266 F.3d 1155, 1179 (9th Cir. 2001) (citing *Martin*, *supra* note 23, at 192).

books and databases,⁴⁸³ “multiply . . . the number of inadvertent and unnecessary conflicts,”⁴⁸⁴ and “materially increase[e] the costs” to clients.⁴⁸⁵ Reynolds and Richman note that “cumulative opinions” should instead “make research and discernment of principle easier.”⁴⁸⁶ Uncertain precedent, conversely, drives up the cost and volume of litigation.⁴⁸⁷ Robel’s findings demonstrate that attorneys believe the costs of monitoring or researching unpublished decisions are less than the potential costs of failing to do so.⁴⁸⁸ And unpublished decisions are more widely available, and at lower cost, than ever before.⁴⁸⁹

To summarize, Reynolds and Richman initially concluded that arguments in favor of limited publication underestimated the value of opinions and overestimated the costs of production and consumption. In 1981, having conducted an empirical study of limited publication, they found “no support for the hypothesis that limited publication enhances productivity.”⁴⁹⁰ Rule changes, empirical evidence of lawyers’ and judges’ practices, and recent scholarship all tend to support these conclusions.

2. *No-Citation Rules*

The argument for no-citation rules rests on the premise that the cost savings associated with limited publication would vanish if citation to unpublished opinions were allowed.⁴⁹¹ A second premise is that allowing citation of unpublished opinions “would unfairly advantage certain litigants over others” because institutional litigants and wealthy private litigants would compile unpublished decisions for their own use, while ordinary litigants would have no means of researching them.⁴⁹² The latter premise has largely been undercut by developments in print and online publishing. Many unpublished opinions are available online, both in commercial databases⁴⁹³ and on the courts of appeals’ own web sites.⁴⁹⁴

483. *Id.*

484. *Id.*

485. *Id.*

486. Reynolds & Richman, *supra* note 12, at 1191.

487. *Cf. Lee, supra* note 475, at 670–72 (discussing Supreme Court).

488. Robel, *supra* note 18, at 405–06.

489. *See Barnett, supra* note 35, at 19–20 (discussing availability of unpublished opinions on Lexis and Westlaw, on the Internet, and in West’s Federal Appendix, a new print reporter of unpublished opinions).

490. William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 596 (1981).

491. Reynolds & Richman, *supra* note 12, at 1185.

492. *Id.* In 1978, this premise assumed the then-existing world of traditional legal research sources and methods, without free or low-cost online research databases.

493. Hannon, *supra* note 432, at 206–13 (presenting data on unpublished opinions available through Lexis or Westlaw).

The practice of posting unpublished opinions on court web sites obviates earlier concerns⁴⁹⁵ that only wealthy, powerful litigants could afford to research such opinions.⁴⁹⁶ Congress recently passed a law that requires all federal appellate courts to make unpublished decisions available over the Internet.⁴⁹⁷ In addition, in 2001 West Publishing Company introduced the Federal Appendix, a “published reporter of unpublished opinions,”⁴⁹⁸ further weakening concerns of unequal access to unpublished decisions are weakened. If all litigants now have reasonable access to unpublished decisions, the no-citation rule is not necessary to prevent unfairness. Even when these concerns were more salient, however, Reynolds and Richman argued that the unequal access point was actually a “powerful argument *against* the whole notion of limited publication.”⁴⁹⁹

As for the premise that no-citation rules are necessary if the courts of appeals are to realize the cost savings promised by limited publication plans, disagreement remains. If the cost savings of limited publication are illusory,⁵⁰⁰ this premise becomes nonsensical. But many federal circuit judges continue to assert its validity. Judge Kozinski wrote in *Hart* that if a court “allow[s] parties to cite to [unpublished] dispositions, . . . much of the time gained would likely vanish.”⁵⁰¹ Judges “would have to pay much closer attention to the way they word their unpublished rulings” and “would feel obligated to clarify” differences among the panel judges.⁵⁰² “The quality of published opinions would sink”⁵⁰³ Judges might be forced to the unwelcome choice “between preparing but not publishing opinions . . . and preparing no opinions” at all in routine cases.⁵⁰⁴ On the other hand, making unpublished opinions citable “add[s] endlessly to the body of precedent . . . lead[ing] to confusion and unnecessary conflict.”⁵⁰⁵

494. See Barnett, *supra* note 35, at 4 n.12 (discussing recent actions of Third and Fifth circuits regarding posting unpublished decisions on court web sites); See also Anastasoff v. United States, 223 F.3d 898, 904 (8th Cir. 2000) (stating that most courts make opinions available online, whether or not they are designated as “published”).

495. See, e.g., Robel, *supra* note 19, at 946.

496. See, e.g., Price, *supra* note 35, at 112; Robel, *supra* note 18, at 414.

497. E-Government Act of 2002, Pub. L. 107-347, § 205(a)(5), 116 Stat. 2899, 2913. This requirement takes effect two years after the effective date of the act, or by about the end of 2004. *Id.* § 205(f).

498. Barnett, *supra* note 35, at 25; see also *id.* at 23 (describing coverage of Federal Appendix).

499. Reynolds & Richman, *supra* note 12, at 1196.

500. See *supra* text accompanying notes 448–480.

501. 266 F.3d at 1178.

502. *Id.* This comment is echoed in the comments of virtually all judges commenting on proposed new Rule 32.1, available at http://www.secretjustice.org/new_proposed_frap_32_1.htm#complete_list_public_comments.

503. Hart v. Massanari, 266 F.3d 1155, 1178 (9th Cir. 2001).

504. *Id.* at 1177 n.33 (quoting RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 168–69 (1996)).

505. *Id.* at 1179.

Confusion and conflict, in turn, demand the time and attention of already overburdened judges. Comments of Ninth Circuit judges to proposed rule 32.1 stress this point. One judge writes

Our need to maintain consistency with our own decisions, or to justify departure, is what makes citation of our own memorandum dispositions different from citation of all other material that may be offered for its persuasive value. If our own disposition may be cited to us, we must distinguish it or explain why we may decide inconsistently. The burden will be on us to show why we are not following the disposition, and the tendency will be to follow it.⁵⁰⁶

That burden may be a heavy one, but it is what a system based on the rule of precedent requires in all cases, not only novel or difficult ones.

This cost-saving premise does not hold up well in the face of evidence accumulated over the thirty years of the rules' existence. As noted earlier, unpublished opinions are widely available,⁵⁰⁷ contrary to the state of affairs that prevailed when the rules were adopted. Empirical evidence shows that attorneys—and federal judges themselves—regularly monitor and use unpublished dispositions.⁵⁰⁸ They do so despite the fact that such opinions are written, according to Judge Kozinski's account, with far less care than published opinions receive.⁵⁰⁹ Even if the courts derive cost savings from producing lesser opinions, these dispositions still have value. Rather than too much precedent, attorneys and judges often find too little precedent.⁵¹⁰ And despite litigants' regular use of unpublished dispositions, the courts of appeals continue to issue them at increasing rates.⁵¹¹ The experience of the District of Columbia Circuit suggests that liberalizing citation rules had no discernable effect.⁵¹² Thus, it appears that the no-citation rules are "irrelevant[t]"⁵¹³ to the time savings associated with unpublished opinions.

In sum, no-citation rules no longer are (if they ever were) necessary to redress unequal access of litigants to unpublished decisions. They are also unnecessary to allow courts to realize cost savings by producing un-

506. Letter from Judge William C. Canby, Jr., to Peter G. McCabe, *supra* note 463.

507. See *supra* notes 493-499.

508. Robel, *supra* note 18, at 405-08; see also Hannon, *supra* note 432, at 224-38.

509. *Hart*, 266 F.3d at 1178 (describing unpublished dispositions as "letter[s] from the court to parties"). In his letter commenting on the proposed rule, Judge Kozinski goes so far as to describe "unpublished dispositions [as] thin on the facts, and written in loose, sloppy language." Letter from Judge Alex Kozinski, to Judge Samuel A. Alito (Jan. 16, 2004) (opposing proposed Rule 32.1), available at <http://www.nonpublication.com/kozinskiletter.pdf>.

510. Robel, *supra* note 18, at 405, 408 (discussing attorneys and judges).

511. See *supra* notes 431-432.

512. See Barnett, *supra* note 426, at 475 n.20 (2003) (citing newspaper account that D.C. Circuit "has not noticed any problems with lawyers' use of unpublished . . . rulings").

513. Robel, *supra* note 18, at 414.

published opinions. Perhaps implicitly acknowledging these defects, a few of the circuits have amended their rules to liberalize citation of unpublished opinions.⁵¹⁴

VI. RECASTING PUBLICATION/CITATION RULES IN LIGHT OF PRECEDENT

Lawmakers, professional organizations and commentators have proposed various solutions to the perceived problems posed by limited publication and no-citation rules. And as noted earlier, several circuits have recently modified their rules to eliminate presumptions against publication, incorporate more specific criteria warranting publication, provide procedures for requesting publication of an opinion, and allow more liberal citation of unpublished opinions.⁵¹⁵ Commentators have called for other circuits to follow this lead.⁵¹⁶ It would seem beneficial, as some have argued, for the courts of appeals to follow uniform rules on publication and citation,⁵¹⁷ though this would depart from the growing tradition of local control over procedural rules.⁵¹⁸ Recently, the Advisory Committee on Appellate Rules approved Proposed New Rule 32.1, which would, if adopted, establish a uniform rule for all circuits regarding citation of unpublished opinions.⁵¹⁹

This Part briefly reviews recent proposals to further modify the rules. It then presents a model for abbreviated opinions that would allow the courts of appeals to function within their existing structure and strictures (neither of which is likely to be changed soon) while comporting with the overarching precepts of the rule of precedent. This Part also ad-

514. See *supra* text accompanying notes 417–427; see also Barnett, *supra* note 35, at 3–5 (discussing rule change by District of Columbia Circuit in 2002 and noting that majority of circuits no longer strictly ban citation); Cappalli, *supra* note 8, at 758 (noting “movement . . . away from the practice of using non-precedent”). Professor Cappalli describes such developments in several state courts in addition to the federal courts of appeals.

515. See *supra* text accompanying notes 417–427.

516. Boggs & Brooks, *supra* note 26, at 25.

517. See *ACTL Report*, *supra* note 24, at 652–63 (describing practical effects of rule variations).

518. See Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 68 U. COLO. L. REV. 1, 1 (1997) (describing “growing disunity in practice and fragmentation in rules” as a result of circuits’ “separate procedural regimes”). The *ACTL Report* notes that local control over procedural rules in the federal district courts has been abandoned in favor of uniform rules for some aspects of civil procedure. *ACTL Report*, *supra* note 24, at 652. See also SUBMISSION OF THE U.S. DEPT. OF JUSTICE TO THE COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, June 1, 1998, at IV.C, available at www.library.unt.edu/gpo/csafca/ hearings/submitted/USDOJ.htm [hereinafter D.O.J. SUBMISSION].

519. See Memorandum from Judge Samuel A. Alito, Chair, Advisory Comm. on App. Rules, to Judge Anthony J. Sirica, Chair, Standing Comm. on Rules of Prac. & Proc., available at <http://www.uscourts.gov/rules/newrules1.html> [hereinafter Alito Memorandum]. This proposed rule, however, expressly leaves to each circuit the determination of the status to be accorded to unpublished opinions.

vocates a return to the “free market” of precedents, characterized by liberalized citation rules.

A. MODIFYING THE RULES

If Congress chooses not to relieve the “crisis” in the courts of appeals by reducing jurisdiction,⁵²⁰ enacting structural modifications⁵²¹ or providing more judges,⁵²² it seems likely that the courts of appeals will continue to try to sort cases into two tracks for decisionmaking.⁵²³ Relatively modest proposals suggest a variety of ways to improve this process. One way is to require “written” (perhaps not “published”) opinions in certain cases.⁵²⁴ A congressional bill introduced on February 11, 2003 by Rep. Paul would add such a rule to the Federal Rules of Appellate Procedure.⁵²⁵ The bill identifies broad categories of cases in which written opinions would be required.⁵²⁶ The coverage of this proposal is peculiar,⁵²⁷

520. See, e.g., Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1486 (1995) (reviewing THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* (1994)) (noting “lack of political will” to limit federal subject matter jurisdiction).

521. See, e.g., Dragich, *supra* note 50, at 58–73 (advocating structural reform of federal courts).

522. See, e.g., Richman & Reynolds, *supra* note 231, at 297 (advocating more circuits and more judges).

523. For a thorough recent treatment of the broader issue of the propriety of a two-track system of appellate justice in the federal courts, see *id.* Cappalli, *supra* note 8, clearly suspects that the two tracks really involve a different distinction: the attention of judges (to cases thought to have “precedential value”) as opposed to the attention of clerks and staff attorneys (to cases deemed not to have “precedential value”).

524. Such proposals may be addressed more to the problem of summary dispositions than to the problem of unpublished opinions. But there is a connection: one argument *against* requiring all “opinions” to be published is that the overburdened courts would cease to write opinions at all in many cases. See POSNER, *supra* note 307, at 168–69; see also Letter from Judge Alex Kozinski to Judge Samuel A. Alito, *supra* note 509. Most other federal appellate judges commenting on the proposed rule repeat this same concern. A complete list of comments can be found at http://www.secretjustice.org/new_proposed_frap_32_1.htm#complete_list_public_comments.

525. Openness in Justice Act, H.R. 700, 108th Congress (2003).

526. The “Openness in Justice Act,” if enacted, would read:

RULE 49. WRITTEN OPINIONS

(a)WHEN REQUIRED—A written opinion that expounds on the law as applied to the facts of the case, and explains the judicial reasons upon which the judgment is based, shall be issued in connection with a judgment entered in each of the following cases:

(1) A civil action removed from State court.

(2) A civil action wherein jurisdiction is founded solely upon diversity of citizenship, in which the matter in controversy exceeds the sum or value of \$100,000.

(3) Any appeal regarding the use of a court’s inherent powers.

(b)PARTIES’ RIGHT TO REQUEST—Each party on direct appeal may request a written opinion referred to in subsection (a).

Id.

527. H.R. 700 covers removal and diversity cases and inherent powers issues but not, apparently, federal question cases. To the extent that we are concerned with the federal courts’ law-making re-

but its provisions reflect both an understanding of the importance of opinions in a system of precedent and a desire for openness and accountability in the federal courts.

Other proposals address deficiencies in the current rules which cause the courts of appeals to do a poor job of separating decisions that should be published from those that need not be.⁵²⁸ In an earlier article I argued, for example, that the courts of appeals “should operate under a strong presumption favoring . . . publication” and should publish opinions in “all cases reversing the district court and all cases in which the panel’s decision is not unanimous.”⁵²⁹ The work of Merritt and Brudney may suggest modifications to the rules about who makes the publication decision.⁵³⁰ Additional empirical research may suggest other modifications to the current rules.⁵³¹ Such modifications may improve publication decisions in some cases, but they do nothing to address the rules’ fundamental misunderstanding of the system of precedent.

Finally, the Advisory Committee on Appellate Rules has approved a proposed new rule governing the citation of unpublished opinions.⁵³² New

sponsibilities, federal question cases would seem to be among those in which opinions should be required. In diversity cases, on the other hand, federal courts are expected to apply *state* law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *see also* 28 U.S.C. § 1652 (2004). They are not expected to make or develop state law except in the sense of predicting how the state’s highest court would rule. *See, e.g., Salve Regina College v. Russell*, 499 U.S. 225, 226–27 (1991). And to the extent that diversity cases are often considered culprits in the caseload explosion, it seems strange to require fuller opinions in these cases than in others considered the mainstay of federal courts’ proper jurisdiction. *See generally* Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 1008–10 (discussing plausibility of eliminating diversity cases from federal docket on grounds that such cases, which do not involve federal lawmaking, “have a weaker claim for a place on the docket than do other issues,” but also describing benefits of including diversity cases in federal caseload mix).

528. *See supra* text accompanying notes 254–272, and sources cited therein; *see also ACTL Report*, *supra* note 24, at 680–84 (describing examples); *id.* at 674 (pointing out that “40% of unpublished decisions arguably should have been published under the court’s governing criteria”) (quoting Nat’l Class. Comm’n. v. U.S., 765 F.2d 164, 173 (D.C. Cir. 1985) (separate opinion of Wald, J.)).

529. Dragich, *supra* note 14, at 801; *see also* Brooks, *supra* note 461, at 261 (stating that a “corollary to the ‘easy cases’ justification for unpublished opinions should be that unpublished opinions will generally be unanimous opinions”); Merritt & Brudney, *supra* note 15, at 120 (noting significant number of unpublished decisions involving reversals or accompanied by dissenting or concurring opinions); *id.* at 87–88 (stating that circuits whose rules encourage publication of reversals publish more opinions than other circuits); Songer et al., *supra* note 260, at 970 (stating hypothesis that “virtually all of the unpublished decisions will be unanimous affirmances of the decision below”).

530. Their study revealed that “specifying the number of judges needed to authorize publication . . . may be associated with higher publication rates.” Merritt & Brudney, *supra* note 15, at 89 n.66.

531. For example, the work of Songer, *supra* note 260, at 984, suggests that one reason for the very low publication rates in the Eleventh Circuit may be that the applicable rule “is stated in very broad, general language’ and lacks “precise, objective guidelines.” *Id.*

532. *See* Alito Memorandum, *supra* note 519, at 28–36. On April 13, 2004, the Advisory Committee on Appellate Rules held a hearing on proposed new Rule 32.1. After consideration, the Commit-

Rule 32.1 would prevent the courts of appeals from imposing any “prohibition or restriction . . . upon the citation of judicial opinions, orders, judgments, or other written dispositions” despite their designation as ‘unpublished’ or non-precedential.”⁵³³ The proposed rule is “extremely limited,” taking “no position” on the question whether unpublished opinions may constitutionally be denied precedential status.⁵³⁴ If adopted, the proposed rule would take effect no sooner than December 2005.⁵³⁵

The Advisory Committee Notes to the proposed rule indicate a concern with the hardship practitioners face under the current, inconsistent no-citation rules of the various circuits, and note that the courts of appeals have long permitted parties to cite an “infinite variety of sources solely for their persuasive value.”⁵³⁶ The modest scope of the proposed new rule has not precluded heated opposition from courts of appeals judges.⁵³⁷ Broadly speaking, federal appellate judges commenting on the proposed rule doubt the need for a uniform rule,⁵³⁸ forecast greater use of summary dispositions if the rule is adopted,⁵³⁹ differentiate unpublished

tee approved the proposed new rule without modification. See ADVISORY RULES COMMITTEE ACTIONS: SPRING 2004 MEETINGS, APPELLATE RULES COMMITTEE APPROVES PROPOSED RULES AND AMENDMENTS PUBLISHED FOR COMMENT IN AUGUST 2003, available at <http://www.uscourts.gov/rules/index.html>. At its June 2004 meeting, the Judicial Conference’s Standing Committee on Rules of Practice and Procedure sent the proposed rule back to the Advisory Committee on Appellate Rules for further study. See Standing Committee Action: June 2004 Meeting, available at <http://www.uscourts.gov/rules/index.html#standing0604>.

533. Alito Memorandum, *supra* note 519, at 28.

534. *Id.* at 30.

535. See Barnett, *supra* note 426, at 488.

536. *Id.* at 31–32.

537. See Letter from Judge John L. Coffey, to Judge Samuel A. Alito (Feb. 11, 2004) (expressing opposition of majority of judges of the Seventh Circuit to proposed Rule 32.1), available at http://www1.law.ucla.edu/~volokh/blog_data/judges7cir.pdf; Letter from Judge Alex Kozinski, to Judge Samuel A. Alito, *supra* note 510 (opposing proposed Rule 32.1); Letter from Chief Judge Haldane Robert Mayer, to Peter G. McCabe, Sec’y, Comm. on Rules of Prac. And Proc. (Jan. 6, 2004) (expressing unanimous opposition of Federal Circuit judges to proposed Rule 32.1), available at <http://www.fedcir.gov/pdf/fedcir.pdf>. A complete list of comments can be found at http://www.secretjustice.org/new_proposed_frap_32_1.htm#complete_list_public_comments. The proposed rule faced “a barrage of opposition from hundreds of federal judges and lawyers.” Tony Mauro, *Judicial Conference Group Backs Citing of Unpublished Opinions*, LEGAL TIMES, Apr. 15, 2004, available at <http://www.law.com/jsp/article.jsp?id=1081792928522>.

538. See Letter from Judge J. Clifford Wallace, to Peter G. McCabe, Sec’y, Comm. on Rules of Prac. & Proc. (Dec. 23, 2003) (noting that fact that the circuits “have some variation in application of the non-citation rule is irrelevant. Each circuit has its unique problems. Indeed, we learn from each other as we encounter different experiences. But this is no reason for a national rule.”), available at http://www.secretjustice.org/new_proposed_frap_32_1.htm#complete_list_public_comments. Judge Kozinski notes that “circuits differ in size, legal culture and approach to precedent.” Letter from Judge Alex Kozinski, to Judge Samuel A. Alito, *supra* note 509. I would argue that although differences in size are obvious, and differences in legal culture are apparent and accepted, differences in approach to precedent among the circuits are suspect.

539. See Letter from Judge Kim McLane Wardlaw, to Peter G. McCabe, *supra* note 463.

opinions from other non-binding sources that may be cited,⁵⁴⁰ and vigorously dispute the proposition that citation can be divorced from precedential status.⁵⁴¹

B. RETHINKING ABBREVIATED OPINIONS

Unpublished opinions have been defended on grounds of efficiency, in that judges spend less time reciting the facts, selecting the rule of decision, and explaining “with precision” why the rule was selected, giving “due regard to how it will be applied in future cases.”⁵⁴² Given their widespread availability, labeling certain opinions “unpublished” no longer makes sense.⁵⁴³ Declaring certain opinions “not precedential” is antithetical to the operation of a system of precedent. This section describes what I shall refer to as “abbreviated opinions,” which I suggest may be the appropriate record of decisions in cases receiving somewhat abbreviated consideration on appeal.⁵⁴⁴

Limited publication and no-citation rules are premised, as noted earlier, on the perceived redundancy of cases.⁵⁴⁵ This “redundancy” apparently involves both law and facts. Discussions emphasize that many cases

540. See Letter from Judge Procter Hug, Jr., to Peter McCabe, *supra* note 463 (noting that law review articles, treatises, and district court opinions “are intended to present arguments for particular points of law, whereas unpublished opinions are specifically not intended for that purpose”).

541. See Letter from Judge Diarmuid F. O’Scannlain, to Peter G. McCabe, Sec’y, Comm. on Rules of Prac. & Proc. (Feb. 5, 2004) (stating that any distinction between the citability and the precedential effect of unpublished decisions is “illusory”), available at http://www.secretjustice.org/new_proposed_frap_32_1.htm#complete_list_public_comments. See also *Twenty Questions for Circuit Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit*, at <http://20q-appellateblog.blogspot.com> (Dec. 2003) (stating that the combination of allowing designation of decisions as nonprecedential but allowing their citation “make[s] no sense”).

542. *Hart v. Massanari*, 266 F.3d 1155, 1176 (9th Cir. 2001).

543. See, e.g., *Boggs & Brooks*, *supra* note 26, at 18; *Barnett*, *supra* note 535.

544. Cappalli, *supra* note 8, at 793–96, recently offered a proposal for “short opinions” as a compromise solution to the unpublished opinion practice. His proposal identifies categories of cases for which such opinions would be appropriate, focusing on cases unlikely to be replicated in the future. His categories include summary judgment motions, new trial motions, reviews for prejudicial error in evidentiary matters, and sanctioning and sentencing decisions. The common theme is that these cases provide meaningful information about how a legal rule applied to specific facts (for example, whether specific evidence was sufficient to create a genuine issue of material fact requiring a trial), but the facts themselves need not be recounted in copious detail because the same evidence is unlikely to be presented in a future case. Similarly, Chief Judge Tacha of the Tenth Circuit recently stated a “personal ‘gripe’ about unpublished opinions. Unpublished decisions should be very short and limited strictly to the facts of that particular case. To the extent that they add any new gloss to the law, . . . the opinion should be published.” See *Twenty Questions for Chief Judge Deanell Reece Tacha of the U.S. Court of Appeals for the Tenth Circuit*, at <http://20q-appellateblog.blogspot.com> (Jan. 5, 2004).

545. See *supra* text accompanying note 213; see also *ACTL Report*, *supra* note 24, at 680; *Boggs & Brooks*, *supra* note 26, at 19 (describing theory behind rules); *Hart*, 266 F.3d at 1179 (stating that opinions “in the same area of law, based on materially indistinguishable facts” are “at best . . . redundant and thus unhelpful authority”).

are decided on the basis of well-settled law⁵⁴⁶ or are “clearly dictated by existing precedent.”⁵⁴⁷ A related claim is that “easy” cases need not be published.⁵⁴⁸ These statements are reflected in rules that require publication only when a decision makes new law or alters existing law.⁵⁴⁹ The redundancy premise, as noted earlier, conflicts with empirical studies showing that judges and lawyers often think there is too little law, not too much.⁵⁵⁰ In fact, the doctrine of precedent teaches that the application of settled law to the facts of the case may introduce some variation.⁵⁵¹ As for the facts themselves, the *Hart* opinion suggests that many cases reaching a given court of appeals are “materially indistinguishable” from earlier cases.⁵⁵² Such statements implicitly incorporate a claim that the law is already settled; here, not even the facts introduce any relevant variation. It may be that in a few categories of cases⁵⁵³ factual patterns recur frequently and with minimal variation, but in general this notion contradicts the intuition that no two cases (or events) are ever exactly alike.⁵⁵⁴

The solution may lie in the taking full advantage of both settled law and the “countless permutations of facts.”⁵⁵⁵ In “easy” or “redundant” cases, the use of abbreviated opinions should yield some time savings. In “easy” cases the law is, by definition, well-settled. If the redundancy premise holds up, there should already exist multiple decisions reaffirming the relevant rule in cases factually similar to the case at bar. There should be no conflicting decisions and no difference of opinion among the cases (or on the panel) about how established law applies to the instant facts. In such situations, it should be relatively easy to state the law briefly, citing the existing authorities that dictate the decision.⁵⁵⁶ Intricate explanations of subtle permutations are not needed.

546. See, e.g., Laretto, *supra* note 389, at 1041.

547. Boggs & Brooks, *supra* note 26 (describing theory behind rules).

548. See, *id.* at 21 (describing theory behind rules).

549. See, e.g., D.C. CIR. R. 36(a)(2)(A) and (B); 4TH CIR. R. 36(a)(i); 5TH CIR. R. 47.5.1(a); 6TH CIR. R. 206; 8TH CIR. I.O.P. APPX. I, §4; 9TH CIR. R. 36-2(a).

550. See *supra* text accompanying note 509.

551. See Boggs & Brooks, *supra* note 26, at 19 (stating that, in fact, the “initial statement of a general legal rule [may] not settle the underlying legal question”); Cappalli, *supra* note 8, at 768–69 (describing development of law through application of rule to factual variations).

552. *Hart v. Massanari*, 266 F.3d 1155, 1179 (9th Cir. 2001).

553. Cf. *Robel*, *supra* note 19, at 947 (discussing non-publication of immigration and disability benefits cases but noting that non-publication of such cases obscures information important to attorneys); see also Gulati & McCauliff, *supra* note 177, at 163 n.23.

554. See Schauer, *supra* note 96, at 577.

555. *Hart*, 266 F.3d at 1176.

556. See Johanna S. Schiavoni, *Who's Afraid of Precedent? The Debate over the Precedential Value of Unpublished Opinions*, 49 U.C.L.A. L. REV. 1859, 1882–83 (2002) (proposing use of “summary dispositions”); Sinclair, *supra* note 26, at 742 (proposing use of “minimal opinions”).

Likewise, in many cases reaching the courts of appeals, the facts have been determined and the court of appeals has little authority to review or alter those findings.⁵⁵⁷ Often, a fairly complete account of the facts already exists, for example, in the statement of findings of the district court. The courts of appeals should make liberal use of such existing accounts rather than writing new ones. And even to those troubled by the role of law clerks in drafting opinions,⁵⁵⁸ allowing law clerks to summarize the facts may not seem improper.

The rub of precedent lies in the variations, however. If the constraining effect of precedent is fundamentally important to our legal system, judges cannot be freed from it on grounds of efficiency. They cannot simply refuse to contemplate future cases.⁵⁵⁹ But they can take a narrow view of the cases that potentially are swept within the instant decision. Doing so is perfectly consistent with the “one case at a time” method inherent in a common law system.⁵⁶⁰ Judges cannot legitimately deny the future effect of today’s decisions, in other words, but they can circumscribe that effect.

557. U.S. CONST. amend. VII; see Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1500 (2003) (stating that it is “well established that circuit courts are to defer to district court findings regarding the facts of the case”); cf. Richman & Reynolds, *supra* note 231, at 289 (noting that requirement that district judges file findings of fact exists to promote careful decisionmaking by district judges). The situation is somewhat more complicated, however. Cases decided on summary judgment call for a determination whether any material issue of fact exists. FED. R. CIV. P. 56(c); see also Cross, *supra*, at 1501 (noting that factual findings in summary judgment cases are not due deference from the appellate court). Some cases call for a determination whether the verdict is supported by the facts. STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 3.01 (1999) (stating that “there is no particular deference given to the trial court’s assessment of the sufficiency of the evidence”). Other appeals call for de novo review. *Id.* § 2.14 (describing de novo review as requiring “no particular deference” to the trial court but not as amounting to “retrying the entire case”). The same general observation may underlie the comments of Judge Stephen S. Trott, who notes that “a huge percentage of [the Ninth Circuit’s] unpublished dispositions are decided based upon a deferential standard of review” and that the “latitude given” first-round decisionmakers such as “trial courts[,] administrative agencies and juries is appropriately broad” and therefore concludes that “such dispositions are essentially worthless as precedent or as persuasive [sic] in other cases.” Letter from Judge Stephen S. Trott, to Peter G. McCabe, Sec’y, Comm. on Rules of Prac. & Proc. (Jan. 8, 2004), available at http://www.secretjustice.org/new_proposed_frap_32_1.htm#complete_list_public_comments.

558. See, e.g., POSNER, *supra* note 307, at 140–41; Richman & Reynolds, *supra* note 231, at 288–89.

559. As noted earlier, Schauer argues that this step is essential to the forward-looking aspect of precedent’s constraint. See *supra* text accompanying notes 380–392. Cappalli, *supra* note 8, at 774–75, argues that “[w]hen Judge Kozinski stated in *Hart* that the ‘rule must be phrased with precision and with due regard to how it will be applied in future cases,’ he confused the judicial with the legislative role.” The common law, according to Cappalli, “accepts the impossibility” that judges can “envision the countless permutations of facts” that may arise in the future. *Id.*

560. Boggs & Brooks, *supra* note 26, at 25–26.

The way to do so is to return to Professor Schauer's insight that the weight or strength of a precedent is really a question of the breadth of its characterization. Schauer writes that

if the conclusions of one case apply to a sweepingly broad set of analogies . . . , then the constraints of precedent are likely to be substantial. Not only will a broad set of subsequent decisionmakers feel the impact of the original decision, but the original decisionmaker will feel a greater obligation in making a decision with such broad application Conversely, if the categories of assimilation are comparatively small, the decisionmaker need consider only a few cases beyond the instant case and the constraints of precedent will be comparatively inconsequential.⁵⁶¹

If Schauer is correct, the courts of appeals can decide easy cases expeditiously by confining them as closely as possible to the facts presented.⁵⁶² To the extent that "we see precedents as small units, . . . we are likely to find few cases in which the current small unit is like some small unit of the past"⁵⁶³—or like some anticipated future case. In deciding today's case, the court can focus primarily on its particulars. Doing just that is an important aspect of review for error, the very thing to which all litigants in the federal courts are entitled, at a minimum. Moreover, although today's decision is a "precedent" (whether or not published), if narrowly characterized it does not create a rule that will affect a great many future cases, imposing potentially bad results that would be difficult to change.⁵⁶⁴ The decision will bind future courts—but only in virtually identical cases.⁵⁶⁵ By dint of its narrow characterization, the decision is unlikely to become the fertile source of analogies in dissimilar cases that the *Hart* court dreads.⁵⁶⁶ The hypothesis that the instant case is an "easy" one readily disposed of on the basis of existing law further limits the likelihood that lawyers in a wide range of future cases will see fit to cite it instead of stronger, pre-existing authorities.⁵⁶⁷

561. Schauer, *supra* note 96, at 591.

562. See Hathaway, *supra* note 171, at 633.

563. Schauer, *supra* note 96, at 602.

564. See, e.g., POSNER, *supra* note 307, at 168 (discussing "unreliability" of unpublished opinions).

565. The availability of the precedent case will allow subsequent courts to dispose of nearly identical cases expeditiously. Some types of cases, however, call for "assessment of a multiplicity of factors or . . . consideration of the entire factual context." Cappalli, *supra* note 8, at 785. Professor Cappalli notes that the guidance of precedent is "most needed" in such cases, where the "relevant legal standard provides weak decisional signals" but the "likelihood of the same constellation of facts recurring" is low. Such cases often wind up unpublished. *Id.* at 786.

566. See *Hart v. Massanari*, 266 F.3d 1155, 1178 (9th Cir. 2001).

567. See *ACTL Report*, *supra* note 24, at 690. In fact, the current rules are based on the premise that "there is no need for any one to cite [an unpublished] decision because other precedent exists to establish the pertinent point." Cooper & Berman, *supra* note 5, at 703; see also Dean A. Morande, *Publication Plans in the United States Courts of Appeals: The Unattainable Paradigm*, 31 Fla. St. U. L.

On the other hand, Schauer writes that “precedent has its greatest role to play” in cases presenting “a comparatively limited number of factors likely to be repeated over time.”⁵⁶⁸ If true, this insight, too, can promote efficient decisionmaking. In the categories of cases where redundancy is common, it makes sense for the courts to gather together “many conceivably distinguishing particulars”⁵⁶⁹ in a larger or broader category of assimilation, write an opinion characterizing the decision as broadly as necessary to cover the anticipated, largely redundant future cases, and allow that precedent to control future, assimilable cases. The opinion in the first case, establishing the rule and characterizing its reach, would take considerable care to produce, exactly as the *Hart* court suggests.⁵⁷⁰ But opinions in the future cases could be quite brief, as both the facts and the law would be accounted for adequately in the earlier opinion.

If this proposal for abbreviated opinions seems either simplistic or merely descriptive of unpublished opinions as they currently exist, it may be worthwhile to return briefly to the comparison between published and unpublished opinions.⁵⁷¹ The circuits’ rules do not define or describe in detail the nature of such opinions. Instead, the rules, and discussions about the rules, speak in terms of the kinds of cases for which unpublished opinions are appropriate. As noted earlier, several writers find little difference between published and unpublished opinions as documents.⁵⁷²

Judges’ comments to proposed new rule 32.1 offer a fascinating glimpse into the world of unpublished opinions. These comments suggest that unpublished opinions differ *only* in manner of preparation, and not in kind, from published opinions. For example, Judge O’Scannlain suggests that if unpublished decisions may be cited, the courts of appeals “will be forced to sort out the well-reasoned from the under-reasoned by comparing the ‘holdings’ (and—yes—even the ‘dicta’) of unpublished dispositions to those of our published opinions, and to begin the long, ar-

Rev. 751, 758 (2004). Isolated examples, however, may suggest that the courts themselves cite unpublished opinions when there is no need to do so. See, for example, *United States v. Guzman*, 318 F.3d 1191, 1195 (10th Cir. 2003), in which the court cites *first* an unpublished opinion, *United States v. Greenhaw*, 2002 WL 205730 (10th Cir. Feb. 11, 2002) and *then* a published opinion, *United States v. Atterbury*, 144 F.3d 1299, 1229 n.3 (10th Cir. 1998). TENTH CIR. R. 36.3(B) disfavors citation of unpublished decisions but allows it if the case “has persuasive value with respect to a material issue *that has not been addressed in a published opinion*” or “would assist the court in its disposition.” Neither exception would seem to apply in this instance.

568. Schauer, *supra* note 96, at 602.

569. *Id.*

570. See *Hart*, 266 F. 3d at 1176–77.

571. See *supra* notes 458–463.

572. See *supra* notes 460–461.

duous, and resource-draining process of declaring anew what is and what is not the law.”⁵⁷³ If unpublished decisions are used only in easy cases whose results are determined by existing law and factual similarity to previous cases, and if they are intended to do nothing more than provide the parties a reason for the result imposed in their case, then why do they contain any dicta at all? Similarly, Judge Kozinski worries that the language that “might be adequate when applied to a particular case might well be unacceptable if applied to future cases raising different fact patterns.”⁵⁷⁴ If cases selected for abbreviated treatment, including non-publication, are truly redundant, then it is prior published decisions that should again come into play when future cases arise. But Judge Kozinski’s comment implicitly recognizes that the constraining effect of considering possible future cases properly arises in the decision of every case.

Remarks like Judge O’Scannlain’s tend to confirm the notion that unpublished opinions are not very different from published ones. The only difference of which judges seem certain is that unpublished opinions are rather hastily prepared, by law clerks or staff attorneys, with little oversight by judges, and without attention to careful wording or possible future implications. These opinions, however, apparently contain discussions of the law and facts that one would think unnecessary in truly easy cases. If true, unpublished opinions are a remarkably poor solution to the burgeoning caseload of the courts of appeals. If judges write unpublished opinions that seem no different from published ones, they may have reason to fear having to confront such opinions in future cases. Schauer’s work suggests that it is the very characterization of the instant case as broad enough to control some hypothetical future cases that increases its scope or weight as a precedent for future decisions. Though the desire to give parties a reason is powerful (and one I have advocated),⁵⁷⁵ unpublished opinions as we know them may go well beyond what is necessary to achieve this laudable goal.⁵⁷⁶ And their very similarity to published opinions may exacerbate the notion that it is unfair not to allow their citation. Most importantly, writing relatively full opinions (even if hastily) may limit the true time savings the courts of appeals can realize.

573. Letter from Judge Diarmuid F. O’Scannlain, to Peter G. McCabe, *supra* note 541.

574. Letter from Judge Alex Kozinski, to Judge Samuel A. Alito, *supra* note 509, at 10.

575. See Dragich, *supra* note 14, at 801.

576. Judge Kozinski rightly notes that writers of unpublished opinions may “restat[e] the rule of law in slightly different language—language of no particular significance to the drafters—[and thereby] raise[] new and unintended implications.” Letter from Judge Alex Kozinski, to Judge Samuel A. Alito, *supra* note 509, at 10.

A better approach may be to impose upon all who have a hand in preparing opinions in cases receiving abbreviated treatment the discipline to prepare opinions that are fundamentally different from published opinions.⁵⁷⁷ Such opinions should be extremely brief. They should discuss only the case at bar and cases that control its outcome. They should not hypothesize about possible future cases. They can fulfill the goal of providing parties with reasons by citing controlling cases without extensively re-interpreting those cases. All these things should be possible if the cases receiving abbreviated review are in fact easy or redundant. Courts of appeals judges, who know their caseload better than anyone else can, continue to insist that this is the case.⁵⁷⁸ If it is not the case, then abbreviated review is itself inappropriate and some other solution to the caseload crisis is required.⁵⁷⁹

The courts of appeals would be correct to conclude that different types of cases require different kinds of opinions quite apart from the decision whether or not to publish. The opinion in a case of first impression interpreting a federal statute, for example, understandably looks quite different from an opinion reviewing the sufficiency of evidence on a Title VII case that went to trial. But the difference has nothing to do with a declaration of the decision's precedential status. Rather, the facts, law, and applicable standards of review of the two cases simply call for different treatment. The deciding court's role is to determine how much discussion of the facts and law is required to decide the case and to explain its result. Commentators typically frame the debate as if the question were whether to strive for a handful of well-reasoned opinions (at the expense of lots of poor-quality ones), or to adopt a uniform decisional process for all cases (knowing that the quality of the best decisions of the past cannot be maintained).⁵⁸⁰ The courts of appeals, operating in a zero-sum game with respect to time and resources, may be forced to maintain two decisional tracks. But differential tracks should be based on real differences, such as the difference between cases involving new as opposed to well-settled law, or the difference between decisions the court charac-

577. One difficulty may be that "modern judicial opinions" in general "are longer than they need be." POSNER, *supra* note 307, at 351.

578. See Letter from Judge Alfred T. Goodwin, to Peter G. McCabe, Sec'y, Comm. on Rules of Prac. & Proc. (Dec. 2, 2004), available at http://www.secretjustice.org/new_proposed_frap_32_1.htm#complete_list_public_comments (describing the "metastasis of appeals having little or no factual differentiation, little or no legal merit, and requiring little or no legal research").

579. Cf. *Twenty Questions for Chief Judge Deanell Reece Tacha of the U.S. Court of Appeals for the Tenth Circuit*, *supra* note 544 (stating that if decision adds "any new gloss to the law, . . . [it] should be published").

580. See, e.g., POSNER, *supra* note 307, at 168-69 (discussing a similar argument about the quality of opinions). This theme is echoed in many of the comments to proposed rule 32.1, available at http://www.secretjustice.org/new_proposed_frap_32_1.htm#complete_list_public_comments.

terizes broadly and those it characterizes narrowly.⁵⁸¹ The decision to spend less time on some cases, however, should not be used to evade the dictates of precedent.

C. RETURNING TO THE “FREE MARKET” OF PRECEDENTS

Unlike those who have suggested new ways to sort “lawmaking” cases from the rest, the American Bar Association and other organizations have called for more “publication” and for elimination of the no-citation rules. In February 2000 the ABA adopted a resolution on Minimum Standards of Appellate Court Opinions, which “urges the courts of appeals, federal, state, and territorial, to provide in case dispositions (except in those appeals the court determines to be wholly without merit), at a minimum, reasoned explanation for their decisions.”⁵⁸² The accompanying report concludes that the “courts of appeals . . . should ensure that there be reasoned consideration of the material facts and issues in *all* cases and, . . . a decision which . . . sets out the operative facts of the case, the issues presented, and the legal basis for the ruling.”⁵⁸³ In 2001, several ABA sections⁵⁸⁴ recommended that the ABA “urge[] the federal courts of appeals uniformly to . . . take all necessary steps to make their unpublished decisions available through print or electronic publications . . . and/or Internet Websites; and . . . permit citation to relevant unpublished opinion.”⁵⁸⁵ The Department of Justice has expressed a similar view.⁵⁸⁶ The American College of Trial Lawyers’ Report argues that “there should be no restriction upon litigants’ citations to nonbinding opinions for whatever persuasive merit they are thought to have.”⁵⁸⁷

These proposals stake out some common ground. All are concerned with openness and accountability in the decisionmaking of the federal

581. In other words, “whether a decision is precedential should depend on what the decision says, not on the label a three-judge panel decides to affix to it in advance of its issuance.” Howard Bashman, *How Appealing Blog* (Feb. 12, 2004), available at <http://www.appellateblog.blogspot.com>.

582. See ABA Minimum Standards, *supra* note 24.

583. *Id.* (emphasis added).

584. The Section of Litigation, the Criminal Justice Section, the Torts and Insurance Practice Section, and the Senior Lawyers Division issued a Draft Report to the House of Delegates on March 30, 2001. American Bar Association, Section of Litigation et al., Report to the House of Delegates, available at www.abanet.org/leadership/2001/115.pdf.

585. *Id.* Professor Joseph R. Weeks has written to the Committee on Rules of Practice and Procedure of the Judicial Conference requesting that the Advisory Committee on Appellate Rules consider a similar proposal. Letter from Joseph R. Weeks, to Peter G. McCabe, Sec’y, Comm. on Rules of Prac. & Proc. (March 4, 2003), available at www.rule-of-law.info/Weeks%20Letter%20McCabe%20030403.pdf. Professor Weeks’ proposal would add a new rule, Rule 49, to the Federal Rules of Appellate Procedure, as does H.R. 700, but in substance it is more like the ABA proposal.

586. See D.O.J. SUBMISSION, *supra* note 518, at IV.C (recommending that unpublished opinions be made uniformly available and implying that such decisions should be citable).

587. *ACTL Report*, *supra* note 24, at 647.

courts of appeals, and all attest to the value of opinions reciting the facts, citing the law, and explaining the court's rationale. The recommendation of the ABA sections explicitly calls for authorization to cite unpublished decisions. The Report accompanying the ABA resolution makes clear that judicial accountability depends on the ability to comment on the court's decisions.⁵⁸⁸ The title of H.R. 700, the "Openness in Justice Act" seems to suggest the same.

These proposals all implicitly rest on the notion that the nuances of the doctrine of precedent are sufficient to govern the use of "unpublished" decisions. The courts need not pervert the doctrine of precedent by trying to remove many cases from its reach. Instead, attorneys and judges, applying familiar rules about the reach of a "precedent" and the hierarchy of authorities, should be permitted to cite the authorities they believe most strongly support their arguments. The courts remain free to apply the same rules themselves, rejecting any precedents they find unpersuasive on the law or distinguishable on the facts.

The "value" of a "precedent" varies from one later case to the next and depends on a number of factors, including the relationship of the precedent and subsequent courts and the identity between the prior and subsequent cases. This analysis is logically distinct from any assessment of the treatment (abbreviated or otherwise) the precedent case received. To the extent that the fact of abbreviated treatment is thought to affect the weight of the precedent, citation rules or conventions could require that citations to unpublished decisions carry a notation to that effect.⁵⁸⁹ The courts of appeals should permit citation of all their prior decisions for whatever those decisions may be worth in a subsequent case.

CONCLUSION

The federal courts of appeals have a difficult juggling act to perform, balancing increasing caseloads and perhaps too few judges⁵⁹⁰ against dual (and conflicting) functions, an unenviable place in the judicial hierarchy, and a structure and strictures that complicate their task. The courts of

588. ABA MINIMUM STANDARDS, *supra* note 24, at 2.

589. In the same fashion, decisions rendered by the en banc court must be designated as such according to citation rules. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.6, at 67 (Columbia Law Review Ass'n et al. eds., 17th ed. 2000) (regarding weight of authority). Presumably, this rule exists to inform the parties of the special (stronger) weight of an en banc decision. The same principle could be used to fashion a rule that would clearly mark unpublished decisions as inferior. In addition, Proposed New Rule 32.1 requires that a person citing an unpublished decision provide a copy to all parties. See Alito Memorandum, *supra* note 519.

590. See *Anastasoff v. United States*, 223 F. 3d 898, 904 (8th Cir. 2000); see also Richman & Reynolds, *supra* note 231. I have previously argued against adding more judges to the federal courts of appeals. See Dragich, *supra* note 50, at 49.

appeals have responded to these pressures by adopting, among other things, rules that limit the publication of appellate opinions and often forbid their citation. These rules rest on flawed premises and have proved difficult to apply.

This Article attempts to show that these rules are fundamentally at odds with the actual operation of a system of precedent. "Precedent" is not a label to be slapped on a decision on its way to the publisher or the file room. It is, rather, a defining feature of our legal system that operates according to well-established rules. The circuits' rules misconstrue what it means for a past event to be precedent for a current decision; more importantly, misunderstand how today's decisions establish (or do not establish) precedents for the future; and take too narrow a view of how precedent matters. Past events are "precedents" because they are historical facts consisting of results plus reasons. Their applicability to today's decisions depends on identity of issues and identity or assimilability of facts between the past and current cases. Likewise, today's decisions establish precedents for future cases by virtue of the fact of their imposition of a result, but their ability to bind future decisionmakers depends on the degree to which today's court characterizes its decision as embracing unanticipated future cases. Finally, when precedent matters, it does so in a wide variety of ways, not limited to a binary choice between "binding" and "wholly irrelevant."

Limited publication and no-citation rules cannot be justified on grounds of economy. In fact, the economy-based arguments reveal that deeply flawed premises about the operation of precedent underlie the rules. The courts of appeals, however, can take advantage of insights about how precedent works to rethink the use of abbreviated opinions. These opinions could be quite circumscribed in their future effect, but that narrow effect would derive from the characterization of the decision, not from a declaration of its unworthiness. The courts of appeals should permit the citation of all opinions, abbreviated or otherwise, for whatever they may be worth in the "free market" of precedents. If the courts of appeals adopt this precedent-based methodology, they will restore the proper roles of the precedent court and subsequent courts, and likely would restore some measure of their own legitimacy as well.

APPENDIX A

Appendix A
Continued on next page

Circuit	Unpublished (2002) (%)	Presumption ^a	Criteria ^b	Report ^c
First	45.4	P [36(b)]	S [36(b)(1)]	Y [36(b)(2)(D)]
Second	78.5	SO [0.23]	G [0.23]	NA
Third	84.3	NA	G [IOP 5.2-5.3]	NA
Fourth	91.8	UP [36(a)]	S [36(a)]	Y [36(b)]
Fifth	84.6	P [47.5.1]	S [47.5.1]	Y [47.5.2]
Sixth	82.3	NA	S [206(a)]	NA
Seventh	58.5	UP [53(a)]	S [53(c)]	Y [53(d)(3)]
Eighth	67.1	NA	S [App. I § 4]	NA
Ninth	83.9	MO [36-1]	S [36-2]	Y [36-4]
Tenth	76.8	NA	G [36.1]	NA
Eleventh	87.9	UP [36-2]	NA	Y
D.C.	58.1	P [36(a)]	S [36(a)(2)]	Y [36(d)]
Federal	NA	NA	NA	Y [47.6(c)]

^a P=Published; SO=Summary Order; NA=Not Addressed; UP=Unpublished; MO=Memorandum or Order

^b S=Specific; G=General

^c Y=Yes; NA=Not Addressed

Appendix A continued

Circuit	Status ^d	Citation ^e	Notes on Citation
First	NBP [32.3(a)(2)]	D	allowed if persuasive and no published opinions available
Second	NA	N [0.23]	shall not be cited or used in any court
Third	NP [IOP 5-7]	Y [IOP 5-7]	court "by tradition" does not cite non-precedential opinions
Fourth	NA	D [36(c)]	allowed if has "precedential value" and no published opinion available
Fifth	Y pre-1996 [47.5.3] N post-1995 [47.5.4]	Y [47.5.3-47.5.4]	normally only for preclusive effect
Sixth	NBP [206(c)]	D [28(g)]	allowed if has "precedential value" and no published opinion available
Seventh	NP [53(b)(2)(iv)]	N [53(b)(2)(iv)]	shall not be cited or used as precedent in or by the court
Eighth	NP [28(i)] and App. 1 § 11	N [28(i)]	allowed for preclusive affect or if persuasive and no published opinion available
Ninth	NBP [36-3(a)]	N [36-3]	allowed for preclusive effect or for factual purposes
Tenth	NBP [36.3(A)]	D [36.3(B)]	allowed if persuasive and no published opinion available
Eleventh	NBP [36-2]	D [36-3 IOP 5]	may be cited as persuasive authority
D.C.	NP [36(c)(2)]	N pre-2002 [28(c)(1)(A)] Y post-2001 [28(c)(1)(B)]	court sees no precedential value in unpublished decisions
Federal	NP [47.6(b)]	N [47.5(b)]	allowed for preclusive effect only

^d NBP=Not Binding Precedent; NA=Not Addressed; NP=Not Precedent

^e D=Disflavored; N=Not Allowed; Y=Allowed