



11-1-2001

The Anastasoff Case and the Judicial Power to Unpublish Opinions

Thomas R. Lee

Lance S. Lehnhof

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>

Recommended Citation

Thomas R. Lee & Lance S. Lehnhof, *The Anastasoff Case and the Judicial Power to Unpublish Opinions*, 77 Notre Dame L. Rev. 135 (2001).

Available at: <http://scholarship.law.nd.edu/ndlr/vol77/iss1/4>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

THE ANASTASOFF CASE AND THE JUDICIAL POWER TO "UNPUBLISH" OPINIONS

Thomas R. Lee*
Lance S. Lehnhoff†

When Faye Anastasoff challenged the IRS's denial of her claim for a refund of her 1992 income taxes, she could hardly have imagined that her simple tax refund case would turn into a constitutional debate over fundamental questions of the power of the judiciary and the Framers' understanding of *stare decisis*.¹ Initially, Anastasoff's right to a refund appeared to turn on the unremarkable question of the whether the "Mailbox Rule" should revive her otherwise time-barred claim.² Because the Eighth Circuit had adopted the IRS's construction of the Mailbox Rule in an earlier unpublished decision in *Christie v. United States*,³ Anastasoff's case seemed destined for a routine, unnoticed dismissal.

On appeal, however, Anastasoff cited the applicable Eighth Circuit rule holding that unpublished decisions are at most "persuasive" authority and are not "precedent," and accordingly offered her argument that *Christie* was wrongly decided.⁴ The Eighth Circuit panel re-

* Professor of Law, Brigham Young University, J. Reuben Clark Law School. Thanks to Kif Augustine-Adams, John Fee, Doug Floyd, Jim Gordon, Jim Rasband, Lynn Wardle, and Kevin Worthen for their comments on earlier drafts, and to Steve Averett and Ben West for their helpful research assistance.

† J.D. Candidate, Brigham Young University, J. Reuben Clark Law School, 2002.

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

2 See *id.* at 899.

3 *Christie v. United States*, No. 91-2375MN, 1992 U.S. App. LEXIS 38446, at *7-*8 (8th Cir. Mar. 20, 1992) (*per curiam*) (unpublished).

4 *Anastasoff*, 223 F.3d at 899 (quoting 8TH CIR. R. 28A(i)).

Unpublished opinions are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of *res judicata*, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well. A party who cites an unpublished opinion for the first time at oral argument must attach a

sponded by raising sua sponte the fundamental question of judicial power⁵ that is the subject of this Article. In an opinion by Judge Richard S. Arnold, the Eighth Circuit panel held that the Eighth Circuit rule on unpublished opinions was unconstitutional and that the panel was therefore constitutionally bound to follow *Christie*.⁶ Specifically, Judge Arnold's opinion suggests that the Eighth Circuit's treatment of unpublished authority is inconsistent with the historical treatment of precedent at the time of the founding of the Constitution.⁷ Because, in Arnold's view, this historical treatment of precedent was incorporated in the "judicial power" conferred on the federal courts under Article III, the Eighth Circuit panel struck down as unconstitutional the unpublished opinion rule relied on by Ms. Anastasoff.⁸

Judge Arnold's opinion immediately attracted significant attention, from both a sizable group of admirers⁹ and a similar band of

copy of the unpublished opinion to the supplemental authority letter required by FRAP 28(i). When citing an unpublished opinion, a party must indicate the opinion's unpublished status.

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

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

6 See *id.*

7 See *id.* at 905 ("The judicial power of the United States is limited by the doctrine of precedent. Rule 28A(i) allows courts to ignore this limit This discretion is completely inconsistent with the doctrine of precedent Insofar as it limits the precedential effect of our prior decisions, the Rule is therefore unconstitutional.").

8 See *id.* at 900 ("[W]e conclude that 8th Circuit Rule 28A(i), insofar as it would allow us to avoid the precedential effect of our prior decisions, purports to expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional.").

9 See, e.g., Howard J. Bashman, *A Closer Look: The Unconstitutionality of Non-Precedential Appellate Rulings*, LEGAL INTELLIGENCER, Dec. 11, 2000, at 7, 7 ("Judge Richard S. Arnold . . . has in that decision presented an impeccably reasoned explanation of why the U.S. Constitution prohibits federal appellate courts from denying precedential effect to their opinions.") [hereinafter Bashman, *A Closer Look*]; Howard J. Bashman, *3rd Circuit Should Use Judgment Orders—Wisely*, LEGAL INTELLIGENCER, Jan. 8, 2001, at 9, 9 ("I continue to believe that the 8th Circuit correctly concluded that federal appellate courts lack the power to deny precedential effect to their unpublished opinions."); David R. Fine, *Keeping Mum Kills Precedents*, NAT'L L.J., Feb. 19, 2001, at A21 ("Judge Arnold's constitutional analysis, which will surely be resurrected in some other case, was right."); William P. Murphy, *8th Circuit Panel Declares Unpublished Opinions Precedential*, PA. L. WKLY., Sept. 18, 2000, at 13 (arguing that *Anastasoff* sent the message that there is one body of judicial law and stare decisis applies universally); Roger Parloff, *Publication Rights*, AM. LAW., Oct. 2000, at 15, 15 ("[T]he animating force behind Judge Arnold's ruling was the simple recognition that technological improvements—specifically, the now universal availability of online law libraries and databases—have supplied us with a literal deus ex machina that solves the quandary posed by unpublished opinions.").

detractors.¹⁰ It also provoked an immediate petition for rehearing en banc. Before the broader circuit had a chance to tackle the constitutional question raised by Judge Arnold, however, the IRS refunded Ms. Anastasoff's money and the case was dismissed as moot.¹¹

Despite the vacatur of Judge Arnold's opinion, the fundamental question it raises seems unlikely to be extinguished quite that easily. Judge Arnold himself seems likely to revive his objection to the unpublished opinion rule, and in any event, his now-vacated views undoubtedly will provide ammunition for litigants to insist on the precedential status of unpublished opinions that support their cause.¹² The issue has nationwide significance—all circuits have adopted some variation of the rule according diminished weight to unpublished opinions.¹³ Moreover, Judge Arnold's argument has im-

10 See, e.g., Recent Cases, 114 HARV. L. REV. 926, 943 (2001); *Swift En Banc Review Expected of Case Treating Unpublished Opinions as Precedent*, 69 U.S.L.W. (BNA) No. 15, at 2227, 2227–29 (Oct. 24, 2000) (debating the significance of the *Anastasoff* decision).

The Eighth Circuit's conclusion regarding the bounds of Article III finds little support in either history or practice. Although the court asserted that the doctrine of precedent is implicit in the declaratory theory, it produced scant evidence that the Framers relied on the explicit theory, let alone on the implicit doctrine, when drafting the Constitution.

Recent Cases, *supra* at 243.

11 See *Anastasoff v. United States*, 235 F.3d 1054, 1056 (8th Cir. 2000) (en banc) (noting that the IRS's payment of Ms. Anastasoff's \$11,437.32 refund had rendered the case moot).

12 Judge Arnold's en banc opinion indicated that "[t]he controversy over the status of unpublished opinions is, to be sure, of great interest and importance, but this sort of factor will not save a case from becoming moot." *Id.* Arnold's comments indicate an interest on his part—and perhaps on the part of other judges in the Eighth Circuit—to revisit the issue in an appropriate case. In an even more recent opinion, Judge Arnold specifically recognized the fact that the court had no opportunity to apply the *Anastasoff* rationale in regard to Arkansas Supreme Court Rule 5-2, limiting the precedential effect of unpublished opinions. See *Rogerson v. Hot Springs Adver. & Promotion Comm'n*, 237 F.3d 929, 931 n.2 (8th Cir. 2001).

13 See D.C. CIR. R. 28(c) (prohibiting the citation of unpublished opinions, orders, or other dispositions except to establish the binding or preclusive effect of the disposition); 1ST CIR. R. 36(b)(2)(F) (prohibiting citation to unpublished opinions in all "unrelated cases," presumably meaning only to assert *res judicata*, collateral estoppel, or the law of the case); 2D CIR. R. § 0.23 (allowing judges to make oral opinions from the bench, providing for the transcription of such opinions, and yet prohibiting the citation of such opinions in "unrelated" cases); 3D CIR. R. IOP 6.2.1 (stating that a "judgment order" [the functional equivalent of an unpublished opinion] has no precedential or institutional value); 4TH CIR. R. 36(c) (stating that citation to unpublished opinions is disfavored, but nevertheless permissible when there is no published opinion on point); 5TH CIR. R. 47.5.3 (stating that "unpublished opinions issued before January 1, 1996 [the effective date of the amended rule] are precedent," but noting that since "every opinion believed to have precedential value is published, such an

plications far beyond those that are contemplated in his opinion. His conception of the judicial power would appear to call into question the summary disposition rules that prevail in the Supreme Court and in the courts of appeals, and even the non-precedential status of district court decisions.¹⁴

Although a reexamination of the constitutionality of unpublished opinion rules is certainly in order, the commentary unleashed on the heels of the *Anastasoff* opinion has largely ignored Judge Arnold's historical premises,¹⁵ focusing instead on questions of pragmatics,¹⁶ or

unpublished opinion should normally be cited only when the doctrine of res judicata, collateral estoppel or law of the case is applicable"); 5TH CIR. R. 47.5.4 ("[U]npublished opinions issued on or after January 1, 1996 are not precedent, except for the res judicata, etc., but may be cited as persuasive authority."); 6TH CIR. R. 206(c) (stating only that published opinions are binding on subsequent panels but may not overrule them without en banc consideration; no apparent limitations on citation of unpublished opinions, although they might not be treated as binding); 7TH CIR. R. 53(b)(2)(iv) & 53(e) (stating that a court may dispose of an appeal by an unpublished order or a published opinion; unpublished orders may only be cited for purposes of establishing res judicata, promissory estoppel or law of the case, whereas published opinion may be cited without limitation as precedent; also prohibiting citation of unpublished opinions or orders from any court if that court prohibits its citation); 8TH CIR. R. 28A(i) (stating that unpublished opinions are not precedent and that parties should not cite them, except that they may be cited to show res judicata, collateral estoppel, law of the case, and "if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well"); 9TH CIR. R. 36-3(a) to (b) (stating that any disposition that is not an opinion or order designated for publication is not precedent and should not be cited except to show res judicata, etc.); 10TH CIR. R. 36.3(A)-(B) (stating that unpublished opinions are not precedent and may only be cited to show res judicata, etc., or if it has persuasive value, with respect to a material issue that has not been addressed in a published opinion, "and it would assist the court in its disposition"); 11TH CIR. R. 36-2 (stating that unpublished opinions are not precedent but may be cited as persuasive authority); FED. CIR. R. 47.6(b) (prohibiting citation to opinions "designated as not to be cited as precedent" unless it is to assert claim preclusion, issue preclusion, etc.). For a summary of the various rules, see 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, 762 n.17 (1995); Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 75-79 (2001).

14 See *Anastasoff v. United States*, 223 F.3d 898, 899-900 (8th Cir.), *vacated en banc as moot*, 235 F.3d 1054 (8th Cir. 2000); see also *infra* Part III.B.2.

15 The HARVARD LAW REVIEW's "Recent Cases" series recently devoted a few pages to *Anastasoff*. See Recent Cases, *supra* note 10, at 940-46. This piece identifies, but does not analyze in any detail, the question whether the Framers would have condemned a departure from precedent in the manner authorized by Rule 28A(i).

16 See, e.g., Bashman, *A Closer Look*, *supra* note 9, at 7-8 (explaining that "Judge Richard S. Arnold . . . has in that decision presented an impeccably reasoned explanation of why the U.S. Constitution prohibits federal appellate courts from denying

even constitutional implications under provisions outside of Article III.¹⁷ To the extent the current literature expressly addresses Judge Arnold's historical argument,¹⁸ it does so without confronting three

precedential effect to their opinions," but nevertheless focuses on the implications of the ruling for the Third Circuit, rather than the historical constitutional issues); J. Wylie Donald & Pamela Keyl, *Practicalities of Unpublished Decisions: Practitioners Should Expect To See Briefs Citing More Unpublished Decisions, and Judges Paying More Attention to Them*, N.J. L.J., Dec. 4, 2000, at 28 (discussing the effect of the decision on litigating attorneys); Fine, *supra* note 9, at A21 (arguing that "unpublished-so-nonprecedential rules" invite abuse and discretion); Jeffrey Stempel, *Federal Circuit Court Holds Unpublished "Nonprecedential" Judicial Opinions Unconstitutional, Igniting New Debate over the Practice*, NEV. LAW., Nov. 2000, at 23 (summarizing the case and discussing the possible future effects thereof); *see also* Steven B. Katz, *California's Curious Practice of "Pocket Review"*, 3 J. APP. PRAC. & PROCESS 385 (2001) (criticizing limited citation rules and identifying a specific practice in California resulting from such rules); J. Thomas Sullivan, *Concluding Thoughts on the Practical and Collateral Consequences of Anastasoff*, 3 J. APP. PROC. & PROCESS 425, 440-47 (2001) (raising questions about access to and reliance on the work product of appellate courts); Stephen L. Wasby, *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J. APP. PRAC. & PROCESS 325 (2001) (outlining the two main lines of criticism of unpublished opinions, and focusing on the process of making the decision to publish, guidelines for publication, and enforcement of those guidelines within courts); Daniel B. Levin, Case Note, *Fairness and Precedent—Anastasoff v. United States*, 223 F.3d 898 (8th Cir.), vacated on other grounds 235 F.3d 1054 (8th Cir. 2000), 110 YALE L.J. 1295, 1300-02 (2001) (discussing the pragmatic issues of efficiency and equality of access).

17 *See, e.g.*, Daniel N. Hoffman, *Publicity and the Judicial Power*, 3 J. APP. PRAC. & PROCESS 343 (2001) (discussing the case as raising various pragmatic concerns and as presenting an issue of separation of powers); Salem M. Katsh & Alex V. Chachkes, *Constitutionality of "No-Citation" Rules*, 3 J. APP. PRAC. & PROCESS 287 (2001) (arguing that limited citation rules are unconstitutional as violations of the First Amendment protection of free speech and petition, and the separation of powers); Melissa H. Weresh, *The Unpublished, Non-Precedential Decision: An Uncomfortable Legality?*, 3 J. APP. PRAC. & PROCESS 175 (2001) (arguing that limited citation rules might violate substantive and procedural due process).

18 *See, e.g.*, R. Ben Brown, *Judging in the Days of the Early Republic: A Critique of Judge Richard Arnold's Use of History in Anastasoff v. United States*, 3 J. APP. PRAC. & PROCESS 355, 361-83 (2001) (criticizing Arnold's argument by citing many cases from the early republic in which courts did not adhere strictly to precedent; arguing that these examples indicate that even shortly after the adoption of Article III courts relied upon multiple sources of law, including mere custom, and that some courts even held these sources of common law to supercede statutory law); Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81 (2000) (defending Judge Arnold's originalist analysis of the issue, suggesting that despite the inherent difficulties of an originalist approach and the ambiguities of history, Arnold's argument is supported by a preponderance of the evidence standard; also challenging claims that Arnold's reasoning will prove problematic in future contexts); Brian Endter, Note, *Death, Taxes, and Unpublished Opinions: In the Wake of Anastasoff v. United States and Its Holding That Eighth Circuit Rule 28(A)(i) Unconstitutionally Expands the Judicial Power*, 33 ARIZ. ST. L.J. 613, 624-26 (2001) (suggesting that founding-era commentators might have

essential premises in his argument: (1) that the “declaratory theory” of law was adopted by the Framers and is inconsistent with the modern treatment of unpublished opinions; (2) that the Framers’ conception of precedent was static and not subject to further evolution; and (3) that the original understanding foreclosed the possibility of a hierarchy of varying levels of judicial precedents.

This Article seeks to fill the void by offering comprehensive answers to these fundamental questions left open by the existing commentary. After describing in Section I the facts of the case and the essence of Judge Arnold’s opinion, Section II begins by placing his position in pragmatic perspective. Here, the Article outlines some unforeseen implications of the constitutional objection raised by Judge Arnold, and concludes that the practical consequences of adherence to *Anastasoff* should at least produce some skepticism as to whether it is a constitutional mandate. Then, in Section III the Article evaluates Judge Arnold’s premise that the original understanding of the judicial power precludes a rule that would deprive unpublished opinions of precedential effect. Ultimately, we conclude that the founding-era conception of precedent cannot be reconciled with the historical model proposed by Judge Arnold, and in fact that the original understanding is most closely in line with the merely persuasive weight generally accorded unpublished opinions today. Moreover, we also reject Judge Arnold’s assertion that a hierarchy of precedents is historical anathema—since the notion of a lower class of precedent finds a list of fairly close historical analogues.

I. THE ANASTASOFF CASE IN THE EIGHTH CIRCUIT

A. *The Factual Context*

Despite the controversy created by the case, the factual context is quite pedestrian. On April 13, 1996, Ms. Faye Anastasoff filed a claim

understood precedent to be something less strict than absolute adherence to prior cases); Joshua R. Mandell, Note, *Trees That Fall in the Forest: The Precedential Effect of Unpublished Opinions*, 34 *LOV. L.A. L. REV.* 1255, 1276–84 (2001) (supporting Arnold’s assertion that the Framers believed in the importance of the doctrine of precedent, although not questioning Arnold’s assertion that the doctrine was well established at the time of the founding; also suggesting that some early commentators understood precedent to be something much more flexible than Arnold’s strict doctrine of precedent); Recent Cases, *supra* note 10, at 943–44 (suggesting that Judge Arnold may not have considered sufficient sources of historical commentary and that some of that commentary might favor an alternative conception of precedent); Evan P. Schultz, *Gone Hunting—Judge Arnold of the 8th Circuit Has Taken Aim at Unpublished Opinions, but Missed His Mark*, *LEGAL TIMES*, Sept. 11, 2000, at 78 (identifying historical examples of courts not bound by strict precedent).

for a \$6,436 refund of overpaid federal income tax, which she had paid on April 15, 1993.¹⁹ The Internal Revenue Service denied her claim on the ground that the Internal Revenue Code "limits refunds to taxes paid in the three years prior to the filing of a claim."²⁰ The IRS argued that because Ms. Anastasoff's claim was not received until April 16, 1996, she was entitled to a refund only of tax paid on or after April 16, 1993.²¹ Ms. Anastasoff argued that she should be protected by "the Mailbox Rule," which, as codified in § 7502 of the United States Code, deems claims to be received on the date they are mailed, rather than the date received by the IRS, if it would otherwise be untimely.²² However, § 7502 applies only to claims that are untimely filed,²³ and both parties agree that the claim was timely filed.²⁴ The timing dispute is not as to whether the claim was timely filed, but as to whether the taxes were paid within the prior three years.²⁵

Fortunately for the IRS, the applicability of the Mailbox Rule to timely filed claims was not a novel issue for the Eighth Circuit, since the court had decided a case in 1992 that was almost factually identical.²⁶ In *Christie v. United States*, an Eighth Circuit panel held, in an unpublished opinion, that the Mailbox Rule does not apply to refund claims that are filed in a timely manner, even if the taxes previously were paid more than three years ago.²⁷ In her defense, Ms. Anastasoff cited Eighth Circuit Rule 28A(i), which states that unpublished opinions are not precedent and that parties should not cite them.²⁸ However, since the rule does not prohibit citation to unpublished cases, the IRS cited the opinion as persuasive authority.²⁹

Ms. Anastasoff's counsel argued that although *Christie* was directly on point it was not binding on the court and that policy considerations favored an extension of the Mailbox Rule to situations such as

19 See *Anastasoff*, 223 F.3d at 899. The amount of the refund (\$6,436) is not referred to in the panel opinion, but is found in the en banc opinion. See *Anastasoff v. United States*, 235 F.3d 1054, 1055 (8th Cir. 2000) (en banc).

20 *Anastasoff*, 223 F.3d at 899; 26 U.S.C. § 6511(b) (1994).

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

22 *Id.*; 26 U.S.C. § 7502 (1994 & Supp. V 1999).

23 26 U.S.C. § 7502.

24 *Anastasoff*, 223 F.3d at 899.

25 See *id.*

26 See *Christie v. United States*, No. 91-2375MN, 1992 U.S. App. LEXIS 38446, at *1 (8th Cir. Mar. 20, 1992) (per curiam) (unpublished).

27 See *id.* at *7.

28 *Anastasoff*, 223 F.3d at 899.

29 See *id.* Rule 28A(i) specifically states that unpublished opinions may be cited if it "has persuasive value on a material issue and no published opinion of this or another court would serve as well." 8TH CIR. R. 28A(i).

hers.³⁰ After hearing the policy considerations from both parties, the court filed its opinion, in which Judge Arnold introduced the panel's sua sponte proposition that Rule 28A(i) was unconstitutional "because it purports to confer on the federal courts a power that goes beyond the 'judicial.'" ³¹

Ms. Anastasoff subsequently filed a petition for rehearing en banc. Interestingly, the rehearing petition is the only brief filed in this case, with any court, that discusses the constitutional issue. The IRS responded by offering to refund Ms. Anastasoff's taxes, and the panel's opinion was vacated as moot.³² While this may serve as an efficient way to resolve the issue, it is nevertheless unsatisfying for those concerned about the implications of the panel's arguments, which are certain to resurface in the future.

B. *The Eighth Circuit Panel's Reasoning*

The Eighth Circuit panel's constitutional condemnation of Rule 28A(i) is based primarily on a recitation of historical commentaries on the doctrine of stare decisis.³³ The panel argues that Rule 28A(i) "purports to expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional."³⁴ Article III states that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."³⁵ Without any specific language in Article III requiring conformity to precedent, proponents of the panel's argument must rely on the premise that "the judge's duty to follow precedent derives from the nature of the judicial power itself."³⁶

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

31 *Id.*

32 *Anastasoff v. United States*, 235 F.3d 1054, 1055 (8th Cir. 2000) (en banc).

33 See *Anastasoff*, 223 F.3d at 899–904. Judge Arnold cites such historical sources as Sir William Blackstone, James Wilson, James Kent, Sir Edward Coke, Sir Matthew Hale, Alexander Hamilton, James Madison, William Cranch, and Justice Joseph Story. See *id.* While these sources are certainly reliable and authoritative, a careful analysis of the writings of these commentators suggests that Judge Arnold misconstrued their conception of stare decisis. See *infra* Part III.A.

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

35 U.S. CONST. art. III, § 1, cl. 1.

36 *Anastasoff*, 223 F.3d at 901. Judge Arnold's historical analysis depends upon the assumption that the Framers intended the term "judicial power" to import some notion of stare decisis. But see Recent Cases, *supra* note 10, at 944.

The Eighth Circuit's historical analysis is too cursory Notably absent from *Anastasoff* are discussions of the ratifying debates in any of the states and of the debates surrounding the drafting of Article III. These debates are crucial because, although one person may have drafted the language, it is

According to Judge Arnold, "[t]he doctrine of precedent was well-established by the time the Framers gathered in Philadelphia,"³⁷ and "[t]o the jurists of the late eighteenth century (and thus by and large to the Framers), the doctrine seemed not just well established but an immemorial custom, the way judging has always been carried out, part of the course of the law."³⁸ In support of this proposition the panel cites the writings of Hamilton and Madison in an effort to show their acquiescence in these views.³⁹ The panel quotes the writings of Hamilton in *The Federalist No. 78* to show that, "[I]ike Blackstone, he recognized that this limit on judicial decision-making is a crucial sign of the separation of the legislative and judicial power."⁴⁰

The weight of the panel's argument is found in reference to the writings of Sir William Blackstone, an eighteenth-century common-law commentator whose views have elsewhere been deemed to reflect those of his American contemporaries.⁴¹ The panel not only argues that the Framers ascribed to Blackstone's teachings regarding the general importance of precedent, but goes one step further in arguing that the Framers believed that the "precedent" of which Blackstone

ratification by the People that ultimately imbues the Constitution with legitimacy. If the court examined these debates found nothing, then what is the legitimate inference to draw from such silence? The court inferred a particular meaning because that meaning was 'in full view' of the Framers and thereby, presumably, the ratifiers. In addition to raising questions as to what constitutes 'full view,' this method of constitutional interpretation would ultimately render every historical silence pregnant with meaning.

Id. (citing *Anastosoff*, 223 F.3d at 904).

37 *Anastosoff*, 223 F.3d at 900 (citations omitted).

38 *Id.* (footnotes omitted).

39 *See id.* at 902-03.

40 *Id.* at 902 (citing THE FEDERALIST NO. 78, at 508 (Alexander Hamilton) (Modern Library ed. 1938)). For a criticism of Judge Arnold's interpretation of Hamilton's discussion of precedent in *The Federalist No. 78*, see *infra* notes 87-91 and accompanying text. *See also generally* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999) (tracing the evolution of important strands of the Rehnquist Court's doctrine of stare decisis from founding-era treatises to early application in the Marshall and Taney Courts); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535 (2000) (arguing that Congress could require the Court not to follow a precedent that the Court is otherwise persuaded is wrong on the merits).

41 *Anastosoff*, 223 F.3d at 901 n.8; *see also* Schick v. United States, 195 U.S. 65, 69 (1904) ("At the time of the adoption of the Federal Constitution [Blackstone's *Commentaries*] had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England, so undoubtedly the framers of the Constitution were familiar with it.").

was wrote necessarily encompasses all classes of judicial decision.⁴² Quoting Blackstone, Judge Arnold concludes that “[b]ecause precedents are the ‘best and most authoritative’ guide of what the law is, the judicial power is limited by them.”⁴³ In the panel’s opinion, “[t]he Framers thought that, under the Constitution, judicial decisions would become binding precedents in subsequent cases.”⁴⁴ Judge Arnold uses these and other quotes from Hamilton, Madison, and others, to show that although no official reporting system existed at the time the Constitution was written, the Framers nevertheless presumed that case law would become voluminous as a result of the necessity for precedents.⁴⁵

In selected writings of Blackstone, Coke, Hale, and others, Judge Arnold claims to find the essence of the Framers’ belief that the judicial power merely authorized a judge to declare the law, “not according to his own judgments, but according to the known laws. [Judges are] not delegated to pronounce a new law, but to maintain and expound the old.”⁴⁶ This view of the judicial power, it is argued, not only allows for stability in the law, but creates an appropriate separation of judicial and legislative power to the extent that judges have the authority to “determine what the law is, not to invent it.”⁴⁷ It is this limitation on the judicial power that the panel was afraid would be

42 See *Anastasoff*, 223 F.3d at 901–03. Several cases in the Eighth Circuit state that unpublished opinions need not be given precedential deference. See, e.g., *Fed. Deposit Ins. Corp. v. Newhart*, 892 F.2d 47, 50 n.3 (8th Cir. 1989); *In re Leimer*, 724 F.2d 744, 745–46 (8th Cir. 1984). Thus, under Arnold’s own rule, the *Anastasoff* panel had no right to depart from those prior cases. Ironically, one of the cases from which the panel departed was an opinion written by Judge Arnold, in which he stated that

[o]ur holding here is inconsistent with our prior unpublished decision in *Ewald v. The Cornelius Co.*, 696 F.2d 1000 (8th Cir. 1982). In *Ewald* we held that the grant of relief in an adversary proceeding to lift a stay was an interlocutory order. We decline to follow this rule for several reasons. First, unpublished opinions of this Court are not intended to create binding precedent. The decision of a panel not to publish an opinion usually represents the judges’ view that the case is without substantial value as precedent.

Leimer, 724 F.2d at 745–46. The *Anastasoff* court easily could have ruled against Ms. Anastasoff and remained consistent with *Leimer*, since that case did not prohibit a court from following an unpublished opinion, it simply did not require the court to follow it. So it is not the result of the case that contradicts the rule, but the opinion itself, which essentially adopts the opposite rule.

43 *Anastasoff*, 223 F.3d at 901 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *69).

44 *Id.* at 902.

45 See *id.* at 902–03.

46 *Id.* at 901 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *69).

47 *Id.*

violated should the court hold that it was not bound to follow the *Christie* case.

The panel describes these principles as the "declaratory theory of adjudication,"⁴⁸ a theory that legal historians largely attribute to Blackstone.⁴⁹ As the panel interprets it, Blackstone's declaratory theory stands for the proposition that since judges have only the power to declare the law, they are therefore bound to follow all decided cases.

II. ANASTASOFF IN PRAGMATIC PERSPECTIVE

The Eighth Circuit's proposed prohibition of non-precedential opinions threatens a fundamental upheaval of the current widespread practice of the federal courts. For at least the past couple of decades, the federal circuit courts generally have adhered to some variation on the rule struck down by Judge Arnold.⁵⁰ The various circuits differ in the degree to which they deprecate unpublished authority—a majority of circuits purport to preclude any citation to unpublished decisions except to support an assertion of *res judicata*, collateral estoppel, or law of the case;⁵¹ others permit their citation as "persuasive" (but not binding) authority under varying degrees of limita-

48 *Id.* at 901–02 ("The Framers accepted this understanding of judicial power (sometimes referred to as the declaratory theory of adjudication) and the doctrine of precedent implicit in it.")

49 See, e.g., Peter Wesley-Smith, *Theories of Adjudication and the Status of Stare Decisis*, in PRECEDENT IN LAW 73, 73 (Laurence Goldstein ed., 1987) (stating that the declaratory theory received its most authoritative exposition by Blackstone).

50 The evolution of the non-publication rules in the circuit courts essentially began with the 1964 *Annual Report of the Director of the Administrative Office of the United States Courts*, which suggested that the courts only publish cases that were of general precedential value. ADMIN. OFF. OF THE U.S. CTS., 1964 ANNUAL REPORT 11 (1965) [hereinafter 1964 ANNUAL REPORT]. In 1972 the Administrative Office required that every circuit adopt a publication plan. See ADMIN. OFF. OF THE U.S. CTS., 1972 ANNUAL REPORT 33 (1973) [hereinafter 1972 ANNUAL REPORT]. It was this 1972 report that resulted in the most dramatic increase in the number of unpublished opinions in the circuit courts. See Merritt & Brudney, *supra* note 13, at 75–79. In their study of the increase in unpublished opinions, Merritt and Brudney suggest that while until the 1970s most circuits published a majority of their opinions, by 1979 half of the circuit opinions were unpublished, and that number increased to two-thirds by 1989 and to nearly eighty percent in 2001. See *id.* at 75–76 (citing ADMIN. OFF. OF THE U.S. CTS., 1979 ANNUAL REPORT 344–46 tbl.B-1 (1980); ADMIN. OFF. OF THE U.S. CTS., 1989 ANNUAL REPORT 109 tbl.S-5 (1990); ADMIN. OFF. OF THE U.S. CTS., 1999 ANNUAL REPORT 49 tbl.S-3 (2000)).

51 See D.C. CIR. R. 28(c); 1ST CIR. R. 36(b)(6); 2D CIR. R. § 0.23; 3D CIR. R. IOP 6.2; 5TH CIR. R. 47.5; 7TH CIR. R. 53(b)(2)(iv) & 53(e); 9TH CIR. R. 36-3; FED. CIR. R. 47.6.

tions;⁵² but all agree that some hierarchy of authority relegating unpublished decisions to second-class status is a practical necessity.⁵³

This approach is traceable in part to a report of the Administrative Office of the United States Courts in 1964.⁵⁴ In that report, the Administrative Office recommended that judges publish only those opinions that "are of general precedential value."⁵⁵ Selective publication was necessary, according to the report, "in view of the rapidly growing number of published opinions of the courts of appeals and of the district courts . . . and the ever increasing practical difficulty and economic cost of establishing and maintaining accessible private and public law library facilities."⁵⁶ In 1972, the Administrative Office issued another report requiring that all circuits adopt a publication plan.⁵⁷ Since the 1964 Report, and particularly since the 1972 Report, all of the federal circuit courts have adopted some variation on the rule condemned by Judge Arnold in the *Anastasoff* panel decision.⁵⁸

Moreover, the number of unpublished decisions in the courts of appeals has risen markedly in recent years. After the 1972 Report, the courts responded slowly, and in the mid-1970s the federal appellate courts still published a "substantial majority of their opinions."⁵⁹ By the late 1970s however, nearly half were unpublished, and by 1989 over two-thirds were unpublished.⁶⁰ The latest reports suggest that

52 See 4TH CIR. R. 36(c) (stating that citation to unpublished opinions is disfavored, but nevertheless permissible when there is no published opinion on point); 6TH CIR. R. 206(c) (stating only that published opinions are binding on subsequent panels but may not overrule them without en banc consideration; no apparent limitations on citation of unpublished opinions, although they might not be treated as binding); 8TH CIR. R. 28A(i) (stating that "[u]npublished opinions are not precedent and parties generally should not cite them," except that they may be cited to show res judicata, collateral estoppel, law of the case, and "if the opinion has persuasive value on a material issue and no published opinion of this or any other court would serve as well"); 10TH CIR. R. 36.3 (stating that unpublished opinions are not precedent and may only be published to show res judicata, etc., or if it has persuasive value, the issue has not been addressed in a published opinion, "and it would assist the court in its disposition"); 11TH CIR. R. 36-2 (stating that unpublished opinions are not precedent but may be cited as persuasive authority).

53 See *supra* note 50 and accompanying text.

54 1964 ANNUAL REPORT, *supra* note 50, at 11.

55 *Id.*

56 *Id.*

57 1972 ANNUAL REPORT, *supra* note 50, at 33.

58 See Merritt & Brudney, *supra* note 13, at 75-76.

59 See *id.* at 75 n.13.

60 See *id.*; DONNA STIENSTRA, UNPUBLISHED DISPOSITIONS: PROBLEMS OF ACCESS AND USE IN THE COURTS OF APPEALS 40 tbl.2 (Fed. Jud. Ctr., Staff Paper 1985) (finding that 48.8% of decisions in 1981 were not published).

nearly eighty percent of all federal appellate opinions are unpublished.⁶¹

The sheer volume of appellate cases indicates the difficulty that would accompany a requirement that all of these unpublished opinions be treated as binding authority. If an appellate court were faced with a rule mandating that all of its decisions would bind future panels, the stakes would be higher in each individual case, and judges would be pressed to devote significantly more time and effort to each case. The attention required, moreover, would not be directed to assuring that the proper result would be reached, but to considering the possible import of each word that is used in an opinion for fear that it might be improperly extended in a future case. Because unpublished opinions are supposed to be handed down in routine cases where new precedent is not needed, this increased attention to the opinion itself arguably would be unproductive.

Judge Arnold's rule would also require judges to spend more time reviewing decisions of other panels in order to identify cases that should be reviewed en banc, since that would be the only way to eliminate a poorly reasoned opinion that would otherwise bind the rest of the circuit. Additionally, the rule would undoubtedly compound the number of en banc reviews, thus compounding the growing strain on the judiciary.

And this is only a small part of the pragmatic convulsion that would be unleashed on the slippery slope of Judge Arnold's opinion. Judge Arnold's analysis leaves no room for distinguishing the "judicial power" exercised by the federal circuits from the "judicial power" exercised by the federal district courts. The Constitution itself draws no distinction between the trial courts and intermediate courts of appeals; both are vested with the same "judicial power" granted generally to the "inferior Courts" under Article III. Thus, if the judicial power conferred by Article III mandates a rule of "horizontal" stare decisis applicable to all decisions of the circuit courts, then there is no reason to believe that a similar rule would not bind the district courts to accord "horizontal" deference to their own decisions.

Such a rule would paralyze the federal court system. The volume of cases in the courts of appeals pales in comparison to the caseload of the district courts. The most recent Report of the Administrative Office of the United States Courts shows that 56,236 appeals were filed in the circuit courts, while 320,194 cases were filed in the district

61 See Merritt & Brudney, *supra* note 13, at 76 (citing ADMIN. OFF. OF THE U.S. CTS., 1999 ANNUAL REPORT 49 tbl.S-3 (2000)).

courts.⁶² Unlike their circuit court counterparts, district court judges have long rendered decisions without any pretense of being “bound” to follow them in future cases.⁶³ Such an approach is a practical necessity. Without it, district court judges would become perpetually enmeshed in the task of fine-tuning the text of their decisions in an effort to fly-speck around any concerns that might arise if their analysis were extended to an unforeseen set of facts.

Since Arnold’s criticism of Rule 28A(i) is rooted in the judicial power itself, his argument applies to much more than the treatment of unpublished opinions, but to every exercise of the judicial power. Taken to its extreme, Judge Arnold’s understanding of the judicial power would require that every action under the authority of the judicial power be given conclusive precedential effect. The pragmatic effect of this argument would be to require deference to such informal “precedents” as the decisions of circuit motions panels and the procedural and evidentiary rulings in the district courts.⁶⁴ Such a result would not only create a severe logistical burden on the federal courts at all levels, but would result in a fundamental change in the role of the judiciary.⁶⁵

62 See 1999 DIR. OF ADMIN. OFF. OF THE U.S. CTS., 1999 ANNUAL REPORT 116, 125, 130, 186 tbls.B-6, B-8, C, & D (2000), available at <http://www.uscourts.gov/judbus1999/contents.html>.

63 See *infra* Part III.B.2.a.

64 See *infra* Part III.B.2 (discussing several types of judicial decisions that have historically been deprived of binding precedential effect such as district court rulings, summary dispositions, evidentiary rulings and orders, etc.; illustrating that it is completely consistent with the Blackstonian view of precedent to have more than one degree of precedent).

65 The more general policy question of the value or validity of rules and policies favoring non-publication of judicial decisions has received significant attention since the circuit courts began adopting non-publication rules following the 1964 Report of the Administrative Office. Judge Arnold himself has authored one article aimed at this policy question, suggesting that his historical analysis may not be based simply on an academic or philosophical devotion to history. See Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 222 (1999) (discussing the general validity of non-publication rules, but specifically raising the issue of whether unpublished opinions should be treated as precedential). Ninth Circuit Judges Kozinski and Reinhardt have authored another piece addressing this policy question. See Alex Kozinski & Stephen Reinhardt, *Why We Don't Allow Citation to Unpublished Decisions*, CAL. LAW., June 2000, at 43, 81 (expressing serious concerns about the burden that publication of all cases would place on the courts; specifically arguing that non-publication rules are necessary to ensure that judges carefully and dutifully fulfill their responsibilities, and that “[b]ased on [their] combined three decades of experience as Ninth Circuit judges, [they] can say with confidence that citation of [unpublished opinions] is an uncommonly bad idea” that not only gives some lawyers an undeserved advantage in some cases but also is damaging to the court). For more on the

Judge Arnold's Eighth Circuit panel opinion offers a preemptive strike against these pragmatic concerns. It may be asserted, Judge Arnold conceded, "that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision," in the sense that the courts of appeals "do not have time to do a decent enough job . . . to justify treating every opinion as a precedent."⁶⁶ But "[i]f this is true," Judge Arnold's response is that "the remedy is not to create an underground body of law good for one place and time only," but "to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case."⁶⁷ "If this means that the backlogs will

underlying policies favoring publication or non-publication of judicial decisions, see also Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C. L. REV. 235, 259 (1998) (standing for the compromise position—accepted in several circuits—that courts should "allow the citation of unpublished opinions as persuasive authority but not as binding precedent"); 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, 786–87, 791–97 (1995) (suggesting that selective publication creates an unreasonable burden on attorneys under Rule 11 of the Federal Rules of Civil Procedure, in requiring that they perform a reasonable inquiry before filing a complaint; also suggesting that selective publication creates uncertain precedent and complicated legal research); Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 193–94 (1999) (arguing that "[i]f we do not discourage citations to unpublished opinions, then we are creating a type of second-class precedent," a slight variation on Judge Arnold's argument); Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119, 149 (1994) (arguing that courts should adopt the following rules: (1) internal review of a decision not to publish; (2) a party (or a non-party) should be able to petition the court to publish an unpublished statement of reasons; (3) unpublished opinions should not be in the form of an opinion, but rather a letter from the clerk to the parties; and (4) each court should rigorously enforce its no-citation rules); 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, 962 (1989) (suggesting that unpublished opinions inhibit attorneys' and scholars' ability to "discern trends in [government] agency decision-making . . . [I]n essence the practice of selective publication obstructs effective oversight of government litigation and decision-making by both interested and disinterested observers" and that a "system of universal publication with limited citation would eliminate this obstruction"); Kirt Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541, 574 (1997) ("A rule of limited publication that allows for both electric dissemination of, and citation to, all unpublished opinions for their persuasive value strikes the best balance.").

66 *Anastasoff v. United States*, 223 F.3d 898, 904 (8th Cir.), *vacated en banc as moot*, 235 F.3d 1054 (8th Cir. 2000).

67 *Id.*

grow,” Judge Arnold’s conclusion is that “the price must still be paid.”⁶⁸

In a sense, Judge Arnold has it right on this point. If the Constitution clearly requires that federal courts invest the time necessary to render precedential opinions at every turn, then the press of time is an insufficient justification for ignoring this requirement.⁶⁹ Thus, the principal question presented by Judge Arnold’s opinion is not whether pragmatic difficulty can justify a constitutional defect, but whether the constitutional defect is really there to begin with.⁷⁰

That is not to say, however, that the overwhelming upheaval required by Judge Arnold’s opinion is entirely irrelevant to the constitutional analysis. Surely the courts can (and should) take account of the practical consequences of their choice between two alternative constructions of the Constitution. If one of two equally plausible constructions of the “judicial power” clause of Article III would require a fundamental revision of the structure and extent of the federal court system, surely the alternative construction that does not envision such a sea of change should be favored.

On the other hand, it may well be that Judge Arnold’s approach would have a very different effect on judicial practice. A judge faced with a rule assigning precedential effect to every word uttered in his opinions would likely spurn the notion of explaining his decisions in writing, realizing that any effort to do so might tie his hands in unforeseen circumstances in the future. One-word summary affirmances and reversals would become the order of the day on appeal, and one-word denials or grants of motions would be the likely decision at the district court level.⁷¹ Such decisions would not present a significant risk of tying the judge’s hands in future cases, as the result itself would have little or no precedential power.

This pragmatic effect also calls Judge Arnold’s rule into question. It demonstrates that a constitutional prohibition on non-binding, unpublished opinions will only discourage the result that he thinks is required by Article III—instead of producing more careful, better-reasoned opinions in all cases, it is likely to discourage the drafting of any

68 *Id.*

69 *See, e.g.,* *Bush v. Gore*, 531 U.S. 98, 108 (2000) (“The press for time does not diminish the constitutional concern” associated with diluting the voting power of a particular segment of the population.).

70 *See* discussion *infra* Part III.A.

71 *See* Stempel, *supra* note 16, at 24 (identifying this potential result of the *Anastasoff* opinion, and noting that such an incentive might “result in less substantive review on appeal rather than more—the opposite of what *Anastasoff* appears to intend”).

opinions in any case that would otherwise be resolved by a non-binding, unpublished opinion. Thus, the net result of the *Anastasoff* rule would be to deprive the parties of the benefit of the court's analysis of their case and to leave them with only a one-word statement of the result reached by the court.

Once again, the pragmatic effect of this "rule" should cause the courts to think twice before they adopt it. A rule that invites such easy circumvention—in direct contravention of the policies that motivate it—should not blithely be embraced.

III. ANASTASOFF IN HISTORICAL PERSPECTIVE

Judge Arnold's constitutional analysis is premised on his understanding of the historical practice of the courts in the founding era.⁷² Arnold concludes (citing Blackstone, Coke, and others) that "[t]he doctrine of precedent was well-established by the time the Framers gathered in Philadelphia."⁷³ Indeed, "[t]o the jurists of the late eighteenth century," Arnold asserts that "the doctrine seemed not just well established but an immemorial custom, the way judging had always been carried out, part of the course of the law."⁷⁴

At one level, this first step in the *Anastasoff* analysis seems largely unassailable.⁷⁵ It is undoubtedly true that British "jurists of the late eighteenth century" had adopted some notion of the role of precedent and that some such conception had also been adopted in this country.⁷⁶ But that general statement begs the crucial question—whether the founding-era conception of precedent leaves room for a rule that treats unpublished opinions as non-binding, merely persuasive authority.

Judge Arnold's position on that issue seems to take two different forms in his *Anastasoff* opinion. Initially, Arnold seems to stake out the position that the historical understanding of *stare decisis* pre-

72 See *supra* Part I.B (discussing Judge Arnold's reasoning).

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

74 *Id.*

75 But see discussion *infra* Part III.B.1 (suggesting that there is a debate as to whether our modern conception of the role of precedent had taken firm root at the time of the founding).

76 See the discussion *infra* Part III.A–B in which we discuss Blackstone's declaratory theory as it was accepted in early Britain and the pre-1787 colonies. The historical evidence clearly shows that Blackstone and his contemporaries accepted some concept of precedent, just as it also suggests that Hamilton, Kent, Madison, and their colonial contemporaries also accepted such a concept. Our argument is not that they did not accept the concept of precedent, but rather that they did not understand precedent to require what Judge Arnold would suggest they did.

cludes the treatment of judicial decisions as “merely persuasive” authority.⁷⁷ Under this approach, founding-era precedents were strictly binding on future courts and could not be treated as anything less than that. Later in the opinion, however, Judge Arnold appears to back away from this approach, suggesting that the Constitution does not require “some rigid doctrine of eternal adherence to precedents,” but merely demands that all decisions be given the same degree of deference.⁷⁸ Thus, under this view, a circuit court “precedent[] can be changed,” but only “by the en banc Court” and only when the “reasons for rejecting it [are] made convincingly clear.”⁷⁹

Neither of these approaches can survive careful historical analysis. First, the founding generation would not have been at all offended by the treatment of prior decisions as merely persuasive (and not binding) authority. If anything, the status generally accorded to unpublished opinions is *more* in line with the founding-era conception of precedent under the declaratory theory.⁸⁰ Second, the conception of a hierarchy of different levels of precedent also has deep historical roots.⁸¹ Unpublished opinions are closely analogous to other kinds of judicial decisions that have long been thought to fall outside the category of binding authority.⁸²

77 This position is clear from the fact that the panel felt it could not even get to the substantive legal issues involved in the case because of the binding effect of *Christie*. The court could have come to the same conclusion (affirming the district court decision) without relying on this constitutional argument by simply basing its decision on the *persuasive* nature of the *Christie* case rather than the *binding* nature of the unpublished opinion. Rather than reach its conclusion in this manner, the panel instead held that “Ms. Anastasoff’s [substantive legal claim] was directly addressed and rejected in *Christie*” and that Rule 28A(i) did not free them from their “obligation to follow that decision.” *Anastasoff*, 223 F.3d at 905.

78 *Id.* at 904–05.

79 *Id.*

80 See *infra* notes 135–44 and accompanying text. In these notes we discuss the view of the Framers, and their English contemporaries, that judicial decisions were merely evidence of the law and as such could be disregarded; whereas, current circuit rules require that published opinions be treated as binding precedent and only disregarded following an en banc overruling. Such modern treatment appears to grant more binding authority to published opinions than Blackstone and others would have granted; whereas, current treatment of unpublished opinions is very consistent with the view that judicial decisions are evidence of the law.

81 See *infra* Part III.B.2.

82 See *infra* Part III.B.2.

A. *The Declaratory Theory in the Founding Era: "Binding" or "Merely Persuasive" Authority?*

Judge Arnold bases his historical conception of precedent on the views espoused by Blackstone, Hamilton, and others.⁸³ Quoting Blackstone, Arnold asserts that "each exercise of the 'judicial power' requires judges 'to determine the law' arising upon the facts of the case."⁸⁴ Because Blackstone understood that a judicial decision would set down "a permanent rule," and because a judge at common law was "sworn to determine [the law], not according to his own judgments, but according to the known laws,"⁸⁵ Arnold concludes that the modern treatment of unpublished opinions as merely persuasive authority is inconsistent with Blackstone's vision of the "judicial power."⁸⁶

Arnold purports to find a similar view in the writings of Alexander Hamilton. Specifically, Hamilton wrote in *The Federalist No. 78* that in order "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them"⁸⁷ Moreover, Hamilton contemplated that judges would give their opinions "long and laborious study" and understood that the record of precedents "must unavoidably swell to a very considerable bulk."⁸⁸ Despite these concessions, Arnold concludes that Hamilton and his contemporaries

83 See *supra* Part I.B.

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

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

86 See *id.* Judge Arnold relies not only on Blackstone, but also Sir Edward Coke and Sir Matthew Hale for this proposition, relying mostly on their insistence upon the importance of precedent and the judicial decision as evidence of the law. See *id.* (citing 4 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 138 (London, E&R Brooke 1797) (1642) ("[A] judicial decision is to the same extent a declaration of the law."); MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 44-45 (Charles M. Gray ed., Univ. of Chicago Press 1971) (1713) ("Judicial decisions [have their] Authority in Expounding, Declaring and Publishing the Law of this Kingdom")). In regard to the Framers' conception of the judicial power, Judge Arnold relies on some of the writings of Hamilton and Madison. *Id.* at 902 n.10 (citing Letter from James Madison to Charles Jared Ingersoll (June 25, 1831), reprinted in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 390, 390-93 (Marvin Meyers ed., rev. ed. 1981) (describing the "authoritative force" of "judicial precedents" as stemming from the "obligation arising from judicial expositions of the law on succeeding judges")).

87 *Id.* at 902 (quoting THE FEDERALIST No. 78, at 510 (Alexander Hamilton) (Modern Library ed. 1938)).

88 *Id.*

“thought that, under the Constitution, [all] judicial decisions would become binding precedents in subsequent cases.”⁸⁹

Judge Arnold’s conclusion falters on its essential historical premise that the common-law conception of precedent—rooted in the “declaratory theory”—encompasses a firm mandate to adhere to precedents. Although he accurately quotes Blackstone, Hamilton, and others in attempting to discern the common-law conception of precedent, his quotes are taken quite out of context and his analysis is premised on a fundamental misunderstanding of the declaratory theory.⁹⁰ As explained in detail below, a faithful interpretation of the Blackstonian conception of precedent thoroughly undermines Judge Arnold’s constitutional analysis at a threshold level, as the declaratory theory of the founding generation is most closely aligned with the current treatment accorded to unpublished opinions, not with the more rigid adherence extended to their published counterparts.⁹¹

Judge Arnold’s notion “that the doctrine of stare decisis is a relic of “immemorial custom”—“the way judging had always been carried out”⁹²—is surely an overstatement. The general consensus among legal historians is that the doctrine of stare decisis is of “relatively recent origin.”⁹³ Indeed, at least as late as the eighteenth century, common-law judges and commentators generally adhered to Matthew Hale’s understanding that “Decisions of Courts of Justice” serve to “bind[] as a Law between the Parties thereto,” but that otherwise “they do not make a Law properly so called (for that only the King and Parliament can do).”⁹⁴ In the words of Harold Potter in his *Historical Introduction to English Law and Its Institutions*, “during the eighteenth centur[y] we

89 *Id.*

90 See *infra* notes 119–31 (discussing Judge Arnold’s analysis of Hamilton’s writings, and specifically identifying the context in which the comments quoted by Judge Arnold were made). It also appears that Judge Arnold has fundamentally misconstrued early conceptions of the doctrine of precedent under the declaratory theory. While Blackstone, and other founding-era adherents to the declaratory theory, accepted the importance of a respect for precedent, their understanding of the concept of precedent did not exclude the possibility that those precedents were simply persuasive. Indeed, Blackstone’s own description of the role of judicial decisions refers to them as evidence of what the law is, and not as the law themselves. See *Anastasoff*, 223 F.3d at 901 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *69).

91 See *infra* notes 135–37 and accompanying text (arguing that Blackstone’s view of precedent was actually more consistent with the current treatment of unpublished opinions than it was with the absolute binding treatment granted published opinions).

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

93 Lee, *supra* note 40, at 659.

94 MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 45 (Charles M. Gray ed., Univ. of Chicago Press 1971) (1713); see also SIR CARLETON KEMP ALLEN,

find cases constantly followed in practice but a tendency to assert that they were not binding in theory."⁹⁵

This notion of the role of judicial decisions was the product of the "declaratory theory," which held that the law had a "Platonic or ideal existence" before it was ever reduced to a judicial opinion.⁹⁶ Under this view, any decision later deemed inconsistent with this "ideal" need not be overruled but could simply be superseded by a new decision as a "reconsidered declaration as a law from the beginning."⁹⁷

Thus, under the declaratory theory, judicial decisions were viewed as evidence of the law, but not as law itself.⁹⁸ This view was embraced even by Sir Edward Coke,⁹⁹ whom Judge Arnold identified as the champion of *stare decisis* "most admired and most often cited

LAW IN THE MAKING 209–19 (7th ed. 1964); 12 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 146–62 (1938).

95 HAROLD POTTER, POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 279 (A.K.R. Kiralfy ed., 4th ed. 1958).

In this period the judges did not regard themselves as absolutely bound by earlier decisions, and this attitude of mind lasted well into the fifteenth century, and in a modified form down to the nineteenth century. . . .

....

During the latter half of the seventeenth and during the eighteenth centuries we find cases constantly followed in practice but a tendency to assert that they were not binding in theory.

Id. at 275, 279.

96 See, e.g., *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 365 (1932) (rejecting due process challenge to Montana court's refusal to give retroactive effect to its decision overruling a past decision). Justice Holmes denigrated the declaratory theory of law in his famously colorful terms—as a "brooding omnipresence in the sky." *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

97 *Great N. Ry.*, 287 U.S. at 365. Blackstone himself wrote that when "the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad* law, but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined." 1 WILLIAM BLACKSTONE, COMMENTARIES *70.

98 See HALE, *supra* note 94, at 45; see also 1 MATTHEW HALE, THE HISTORY OF THE COMMON LAW *141.

[T]he decisions of courts of justice . . . have a great weight and authority in expounding, declaring, and publishing what the law of this kingdom is; especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times. And though such decisions are less than a law, yet they are a greater evidence thereof than the opinion of any private persons, as such, whatsoever.

Id.

99 E.g., 2 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR A COMMENTARY UPON LITTLETON *254(a) (noting that reported decisions are "the best *proofes* [sic] [of] what the law is") (emphasis added).

by American patriots."¹⁰⁰ Lord Coke conceived of reported decisions as "the best proofes [sic] [of] what the law is," but not as law itself.¹⁰¹ After all, under the declaratory theory of judicial decisionmaking, "[i]t is the function of a judge not to make, but to declare the law, according to the golden mete-wand of the law and not by the crooked cord of discretion."¹⁰²

Blackstone's views were roughly to the same effect. Judge Arnold may be correct to identify Blackstone as an "influential[]" exponent of the "judge's duty to follow precedent."¹⁰³ Commentators (present company included) have identified Blackstone as "one of the early authorities to speak of 'the rule of precedent as one of general obligation.'"¹⁰⁴ Thus, language may be culled from Blackstone's *Commentaries* (such as that quoted by Judge Arnold) that would seem to embrace a firm notion of "an established rule to abide by former precedents," where the same points come again in litigation.¹⁰⁵

But the quotes lifted from the *Commentaries* by Judge Arnold fail to put Blackstone's views in the relevant context—of the content of the rule and the nature of its exceptions. Blackstone's "rule" was not a hard-and-fast one; it was substantially mollified by the declaratory theory of judicial decisions. As Blackstone explained in a passage that immediately follows the one quoted by Judge Arnold, "this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law."¹⁰⁶ In other words, the "law" and the "opinion of the judge," according to Blackstone, "are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may mistake the law."¹⁰⁷

Blackstone explained the difference between "law" and the "opinion of the judge" in declaratory terms:

But even in such cases [in which an earlier decision is set aside] the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not

100 *Anastasoff v. United States*, 223 F.3d 898, 900 n.6 (8th Cir.), *vacated en banc as moot*, 235 F.3d 1054 (8th Cir. 2000).

101 2 COKE, *supra* note 99, at *254(a).

102 *Anastasoff*, 223 F.3d at 902 (quoting 1 COKE, INSTITUTES OF THE LAWS OF ENGLAND 51 (1642)).

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

104 Lee, *supra* note 40, at 661 (citing MAX RADIN, STABILITY IN LAW 18 (1944)).

105 *Anastasoff*, 223 F.3d at 900 (quoting 1 BLACKSTONE, *supra* note 97, at *69).

106 1 BLACKSTONE, *supra* note 97, at *69-*70.

107 *Id.* at *71.

that such a sentence was *bad law*; but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined.¹⁰⁸

Like Coke, Hale, and others, Blackstone conceived of a judicial decision more as evidence of the law than as law itself.¹⁰⁹ An individual decision could easily be set aside as "not law" if it was contrary to the "established custom of the realm."¹¹⁰

This declaratory view of precedent was also embraced in this country. Judge Arnold cites the founding-era American commentator James Kent in support of his conclusion that the current treatment of unpublished opinions is inconsistent with founding-era practice.¹¹¹ But Kent's *Commentaries* indicate his acquiescence in Blackstone's declaratory theory, since as Kent understood it, "[a] solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject."¹¹² Kent even suggested that "Even a series of decisions are not always conclusive of what is law . . ."¹¹³

Early colonial and state courts took a similar approach. During the colonial period, "decided cases were believed to contain evidence of the law," and nothing more than that.¹¹⁴ It was not until the mid-nineteenth century that "the theory that cases were merely evidence of the law was under heavy attack by the theoreticians [sic]."¹¹⁵ Thus, state courts in the founding era thought that "a decision" was only "prima facie evidence" of what the law is,¹¹⁶ and that "[a] court is not bound to give the like judgment, which had been given by a former court, unless they are of [the] opinion that the first judgment was according to law."¹¹⁷

108 *Id.* at *70.

109 *See supra* notes 98–99 and accompanying text (discussing the views of Coke and Hale on the role of reported cases as evidence of the law).

110 *See* 1 BLACKSTONE, *supra* note 97, at *70.

111 *See Anastoff v. United States*, 223 F.3d 898, 902 n.12 (8th Cir.), *vacated en banc as moot*, 235 F.3d 1054 (8th Cir. 2000).

112 JAMES KENT, COMMENTARIES ON AMERICAN LAW *475.

113 *Id.* at *477.

114 Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 33 (1959).

115 *Id.* at 36.

116 *Henry v. Bank of Salina*, 5 Hill 523, 535 (N.Y. 1843).

117 *Kerlin's Lessee v. Bull*, 1 Dall. 175, 178 (Pa. 1786).

Alexander Hamilton's discussion in *The Federalist No. 78* does not suggest otherwise. Arnold quotes Hamilton accurately, but again he does so quite out of context.¹¹⁸ As one of us has noted elsewhere:

Viewed in isolation, Hamilton's side-bar on precedent [in *Federalist No. 78*] might be construed to conceive of a strict rule demanding adherence to precedent under all circumstances. Hamilton wrote of a "binding" notion of stare decisis under which "precedents" would "define and point out" the "duty" of the court "in every particular case." In Hamilton's view, the policies of certainty and judicial integrity support this doctrine: adherence to "strict rules and precedents" is necessary "[t]o avoid an arbitrary discretion in the courts."¹¹⁹

But Judge Arnold errs in apparently ascribing to Hamilton the view that precedents necessarily bind the judge in every case. "*Federalist No. 78* was hardly conceived as a comprehensive exposition of the doctrine of stare decisis, and Hamilton's statement of a prima facie rule of adherence to precedent should not be construed to exclude the existence of exceptions or countervailing considerations."¹²⁰ When Hamilton spoke of the judge's "duty," he was referring not only

118 See *Anastasoff*, 223 F.3d at 902 (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).

Like Blackstone, [Hamilton] thought that "[t]he courts must declare the sense of the law," and that this fact means courts must exercise "judgment" about what the law is rather than "will" about what it should be Like Blackstone, he recognized that this limit on judicial decision-making is a crucial sign of the separation of the legislative and judicial power Hamilton concludes that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them" The Framers thought that, under the Constitution, judicial decisions would become binding precedents in subsequent cases.

Id. Although Judge Arnold correctly quotes Hamilton, it is important to note that the purpose of *The Federalist No. 78* was to discuss the manner of appointment and the life tenure of federal judges. See Paulsen, *supra* note 40, at 1573-74.

Hamilton is not in this passage explicating the meaning of "[t]he judicial Power" of Article III. He is defending the idea of life tenure by pointing to the practice that might be expected of federal judges interpreting the Constitution and laws of the nation. There is a difference between the content of a legal rule (here, the meaning of "[t]he judicial Power") and expectations concerning practice under that rule.

Id.

119 Lee, *supra* note 40, at 663 (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).

120 *Id.*

to “precedents” but to “strict rules,” an apparent reference to the unfortunate “voluminous code of laws . . . necessarily connected with the advantages of a free government.”¹²¹ Perhaps together, “precedents” and “strict rules” might define the court’s duty “in every particular case,” but Hamilton could not have been suggesting that every case would be predetermined by the authority of case law.¹²²

Indeed, as Professor Michael Stokes Paulsen has explained,

The thrust of Hamilton’s discussion is that judges will need to be familiar with lots of statutes and lots of cases, that this mastery can be expected of only relatively few men, and that it is important that the job of federal judge contain sufficiently attractive features to assure that such men (and, today, women) will serve in such posts.¹²³

Thus, “*Federalist 78* is fully consistent with a conclusion that precedent serves primarily an ‘information’ function rather than a ‘disposition’ function.”¹²⁴ Moreover, in “defending the idea of life tenure by pointing to the practice that might be expected of federal judges,” Hamilton was not necessarily “explaining what the Constitution means about the judicial power,” but instead was merely “describing what he expects judges will do—study and consider precedents, as well as the ‘voluminous code of laws’—and that description is consistent . . . with the information function of precedent.”¹²⁵ In fact, “Hamilton *could not possibly have meant* by this discussion that precedents . . . would be literally *binding* on judges in the future, that is, that the habit of consulting precedent was anything other than a rule of practice and policy.”¹²⁶

Professor Paulsen also points out that for Hamilton to have claimed that the authority of the judiciary allowed judges to bind future judges by simply deciding a case would have given “powerful ammunition for the Constitution’s opponents.”¹²⁷ As he notes, however, the Anti-Federalist writer Brutus,

to whom Hamilton was responding more or less directly in *The Federalist No. 78*, said many disparaging things about the judicial power and its supposed uncontrollable power. But not even Brutus argued

121 See *id.* at 663–64 (citing THE FEDERALIST NO. 78 (Alexander Hamilton) (making this same point)).

122 See *id.* at 664.

123 Paulsen, *supra* note 40, at 1573.

124 *Id.*

125 *Id.* at 1574.

126 *Id.*

127 *Id.* at 1575.

that courts would possess a power to dictate that future courts be bound by precedents, even when they thought them erroneous.¹²⁸

If the Anti-Federalists had understood that he was suggesting that the judicial power gave judges the power to bind future judges merely by publishing an opinion, surely Brutus would have responded to such a claim.¹²⁹ Brutus never made such a response, nor did he ever accuse Hamilton or any of the Federalists of making such a claim.¹³⁰

Finally, Hamilton's discussion of precedent may not have been focused at all on the question whether a particular court should be bound by its *own* prior decisions. *The Federalist No. 78* may simply have been espousing a "vertical" rule of stare decisis that would limit the discretion of the lower courts by requiring them to adhere to decisions of superior bodies.¹³¹ Indeed, this was Joseph Story's under-

128 *Id.*

129 *See id.* at 1576. One of the primary claims of the Anti-Federalists was that the Constitution vested in the judicial branch an unlimited supremacy over the other governmental branches, and particularly the legislative branch. Brutus wrote that "[t]his power in the judicial, will enable them to mould the government, into almost any shape they please." *Id.* at 1575 nn.111-13 (citing BRUTUS No. XI (Jan. 31, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 417, 417-22 (Herbert J. Storing ed., 1981)). Despite his concern that the Constitution granted federal judges too much power to subvert the legislature in creating law, Brutus did not base this concern on a belief that the Constitution allowed judges to forever bind future judges by rendering a decision (essentially creating law judicially), but rather he was concerned that the courts *would not* be bound by any rules but would have complete discretion. *See id.* at 1575 n.113 ("[I]n their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution."). As Paulsen explains, Brutus was concerned more with the possibility "that courts would build upon precedents in expanding their powers" than the possibility that judges' discretion or power would be limited by prior judicial decisions. *Id.* at 1576 n.113 (citing BRUTUS No. XII (Feb. 7, 1788), reprinted in 2 COMPLETE ANTI-FEDERALIST, *supra*, at 423; BRUTUS No. XV (Mar. 20, 1788), reprinted in 2 COMPLETE ANTI-FEDERALIST, *supra*, at 441). Paulsen also points out that

[t]he closest Brutus comes to asserting a power of precedent to *bind* future judicial interpretations is his claim that "[t]he opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in this constitution, that can correct their errors, or controul [sic] their adjudications. From this court there is no appeal." . . .

Just a sentence earlier, however, he argued that the Supreme Court would not be bound by "any fixed or established rules." *Id.* at 1576 n.113.

130 *See Id.* at 1575 nn.111 & 113 (suggesting that Brutus's concerns about the supremacy of the judiciary stemmed from his belief that the Constitution, in its allocation of the judicial power, gave judges the ability to use precedent to build upon one another, thus "enabling further departures from a strict reading of the central government's powers").

131 *See Lee, supra* note 40, at 664 (suggesting that it is unclear "that Hamilton was discussing the question of whether the Supreme Court would have the power to over-

standing of the "view of the framers of the constitution" on precedent—that "judicial decisions of the highest tribunal" establish "the true construction of the laws which are brought into controversy before it," and that such decisions are "plainly supposed to be of paramount and obligation throughout all the states."¹³² Thus, although Judge Arnold relies on Story for his understanding of the Framers' views on precedent,¹³³ Story was focusing not on a judge's obligation to follow the decisions of a parallel court ("horizontal" stare decisis), but on a judge's duty to abide by the decisions of a superior tribunal ("vertical" stare decisis).¹³⁴

Accordingly, contrary to Judge Arnold's conclusion, the declaratory notion of common-law decisions aligns itself quite closely with the status that the modern circuit courts accord to unpublished decisions. Like their common-law counterparts, unpublished decisions may be cited in some circuits as persuasive authority, but are not treated as binding on the courts.¹³⁵ This treatment would hardly have been troubling to Hale, Coke, or their contemporaries; it would have been in line with their general conception of the proper role of judicial decisions. Judicial decisions in the founding era were seen as "evidence" of the law, to be followed if they were in line with the "custom of the realm" and not "contrary to reason."¹³⁶ In most of the circuit

rule its own decisions; *Federalist No. 78* may simply have been addressing a rule of vertical stare decisis requiring lower federal courts to follow case law from a superior tribunal").

132 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 377–378 (5th ed. 1994).

133 See *Anastasoff v. United States*, 223 F.3d 898, 903–04 (8th Cir.), *vacated en banc as moot*, 235 F.3d 1054 (8th Cir. 2000) (quoting 1 STORY, *supra* note 132, §§ 377–378).

134 See Lee, *supra* note 40, at 664 n.84 (discussing Justice Story's view of judicial decisions as binding precedent in the context of vertical stare decisis).

135 See rules cited *supra* note 51.

136 See 1 BLACKSTONE, *supra* note 97, at *70. Blackstone explains that when judges set aside prior decisions, they

do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*; but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined.

Id.; see also 2 COKE, *supra* note 99, at *254(a) (noting that reported decisions are "the best *proofes* [sic] [of] what the law is") (emphasis added); 1 HALE, *supra* note 98, at *141.

[T]he decisions of courts of justice . . . have a great weight and authority in expounding, declaring, and publishing what the law of this kingdom is; especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times. And though such decisions are less than a

courts today, unpublished opinions have an identical status. They may be cited for their persuasive power, but a panel of the court need not follow them if it deems them unworthy of such deference.¹³⁷

law, yet they are a greater evidence thereof than the opinion of any private persons, as such, whatsoever.

Id.

137 A few of the circuit rules do purport to forbid the citation of unpublished decisions for any purpose other than establishing *res judicata*, collateral estoppel, or law of the case. See D.C. CIR. R. 28(b) (prohibiting the citation of unpublished opinions, orders, or other dispositions except to establish the binding or preclusive effect of the disposition); 1ST CIR. R. 36(b)(2) (prohibiting citation to unpublished opinions in all "unrelated cases," presumably meaning only to assert *res judicata*, collateral estoppel, or the law of the case); 2D CIR. R. 0.23 (allowing judges to make oral opinions from the bench, providing for the transcription of such opinions, and yet prohibiting the citation of such opinions in "unrelated" cases); 3D CIR. R. IOP 6.2 (a "judgment order" [the functional equivalent of an unpublished opinion] has precedential or institutional value); 5TH CIR. R. 47.5 (stating that unpublished opinions issued prior to January 1, 1996 [the effective date of the amended rule] are precedent, but noting that since "every opinion believed to have been precedential is published, such an unpublished opinion should normally be cited only when the doctrine of *res judicata*, collateral estoppel or law of the case is applicable;" unpublished opinions issued on or after January 1, 1996 are not precedent, except for the *res judicata*, etc., but may be cited as persuasive authority); 7TH CIR. R. 53(b)(2)(iv) & 53(e) (stating that a court may dispose of an appeal by an unpublished order or a published opinion; unpublished orders may only be cited for purposes of establishing *res judicata*, promissory estoppel or law of the case, whereas published opinion may be cited without limitation as precedent; also prohibiting citation of unpublished opinions or orders from any court if that court prohibits its citation); 9TH CIR. R. 36-3 (stating that any disposition that is not an opinion or order designated for publication is not precedent and should not be cited except to show *res judicata*, etc.); FED. CIR. R. 47.6 (prohibiting citation to opinions "designated as not to be cited as precedent" unless it is to assert claim preclusion, issue preclusion, judicial estoppel, or law of the case). Rules of this nature arguably are vulnerable to a constitutional challenge that could not be leveled at rules like the Eighth Circuit rule deemed unconstitutional in *Anastoff*. The strict version of the circuit rules does seem to accord a *verboten* status to unpublished opinions that is not closely analogous to the treatment of judicial authority in the founding era.

Such rules do call to mind, however, the treatment of English common law in some of the colonies after the revolution. In 1799, for example, New Jersey passed a law generally providing that

no adjudication, decision, or opinion, made, had, or given, in any court of law or equity in Great Britain [after July 4, 1776] . . . shall be received or read in any court of law or equity in this state, as law or evidence of the law, or elucidation or explanation thereof.

ELIZABETH G. BROWN, *BRITISH STATUTES IN AMERICAN LAW 1776-1836*, at 82 (1964); see also LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW 111-12* (2d ed. 1985) (discussing the same New Jersey statute). An 1807 Kentucky statute was to the same effect—holding that "reports and books containing adjudged cases in . . . Great Britain . . . since the 4th day of July 1776, shall not be read or considered as authority

The modern treatment of unpublished decisions would have been familiar to the founding generation for a second reason. Early American decisions were not readily accessible to the bench and bar.¹³⁸ "There was no general habit of publishing American decisions; American case reports were not common until a generation or

in . . . the courts of this commonwealth." BROWN, *supra*, at 132 n.52; *see also* FRIEDMAN *supra*, at 112 (discussing the same Kentucky statute). Lawrence Friedman describes one experience under the Kentucky statute:

During Spring Term, 1808, Henry Clay, appearing before the court of appeals of Kentucky, "offered to read" a "part of Lord Ellenborough's opinion" in Volume 3 of East's reports; the "chief justice stopped him." Clay's co-counsel argued that the legislature "had no more power to pass" such a law than to "prohibit a judge the use of his spectacles." The court decided, however, that "the book must not be used at all in court."

Id. at 112.

138 In the *Anastasoff* opinion itself, the panel admits, "[b]efore the ratification of the Constitution, there was almost no private reporting and no official reporting at all in the American States." *Anastasoff*, 223 F.3d at 903. The panel suggests that limited publication was the rule at the time of the founding, and that the Framers did not intend the publication of all judicial decisions. *Id.* The panel also suggests that in the absence of wide availability of judicial decisions, judges would even rely on their own memory of decided cases. *Id.* It is certainly correct that judges at the time of the founding were accustomed to ruling without the benefit of reported cases, and that their only resources were a few reported cases (many from England) and their own memory. It may be presumptuous however to go one step further, as the panel has done, to assume that this reliance was a result of a need for definitive statements of the law. It may be more consistent with Blackstone's view of precedent to assume that this reliance upon prior decisions was a search for *evidence* of what the law was, rather than a search for definitive statements of *the law itself*.

Interestingly, some legal historians argue that even those cases that were published at the time of the founding were not treated as binding precedent. Theodore Plucknett, legal historian and author of *A Concise History of the Common Law*, argued that even the *Year Books*, the primary source of published English cases at the time of the founding, "were not regarded as collections of authoritative or binding decisions." THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 346 (5th ed. 1956). Plucknett then cites several respected English justices that question whether the actual *Year Book* cases themselves were binding authority. *See id.* at 346-47. Plucknett explains that

[i]n the Year Book period cases are used only as evidence of the existence of a custom of the court. It is the custom which governs the decision, not the case or cases cited as proof of the custom. . . . A single case was not a binding authority, but a well-established custom (proved by a more or less casual citing of cases) was undoubtedly regarded as strongly persuasive.

Id. at 347. This does not mean that the *Year Books* and other reporters were not highly esteemed. Blackstone himself refers to the *Year Books* in his *Commentaries*, expressing his opinion that it was a "wise institution," that he wished Henry the Eighth had not discontinued. 1 BLACKSTONE, *supra* note 97, at *72.

more after Independence.”¹³⁹ That is not to say that such decisions were never available, or even that they could not be cited as precedent.¹⁴⁰ The point is that early American decisions were most closely analogous to their “unpublished” counterparts today: they were not readily available in the official reporter, but they were sometimes accessible by other means, and when they were they could be cited for their persuasive (but not strictly binding) power.¹⁴¹

139 FRIEDMAN, *supra* note 137, at 112; *see also* Kempin, *supra* note 114, at 34–35 nn.21 & 23–24 and accompanying text (stating that the early reports bore little resemblance to modern reports). “During the very late eighteenth century and the early nineteenth century, reliable unofficial reports began to emerge. For instance, Dallas’s reports of United States and Pennsylvania cases were submitted to the public in 1790 as a collection of lawyers’ notes.” *Id.* at 34–35 n.21. In addition, “[t]he earliest of the official reporters appointed by some organ of the state came into existence in the early part of the nineteenth century. The movement toward official state reporters gained momentum in the 1840s and 1850s. . . .” G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE 1815–1835*, at 203 (abr. ed. 1991) (noting that “[a]dvocacy before the Marshall Court was an essentially oral medium,” that “[w]ritten briefs were rare,” and that “written treatises were neither numerous nor widely available”).

140 As Judge Arnold points out, “judges and lawyers of the day recognized the authority of unpublished decisions even when they were established only by memory or by a lawyer’s unpublished memorandum.” *Anastasoff*, 223 F.3d at 903 (citing PETER KARSTEN, *HEART VERSUS HEAD: JUDGE MADE LAW IN NINETEENTH-CENTURY AMERICA* 30 (1997); JESSE ROOT, *THE ORIGIN OF GOVERNMENT AND LAWS IN CONNECTICUT* (1798), *reprinted in* *THE LEGAL MIND IN AMERICA* 38–39 (Perty Miller ed., 1962)).

141 On the other hand, perhaps Judge Arnold’s position in *Anastasoff* could be read to suggest a different, much narrower ground on which the Eighth Circuit rule at issue arguably does depart from the notion of precedent prevailing at the time of the founding: under Rule 28A(i), a circuit panel is entitled “to depart from the law set out in [unpublished] prior decisions without any reason to differentiate the cases.” *Id.* at 905. If the founding-era notion of precedent required an overruling court to articulate a reason for setting aside an earlier decision, then perhaps the modern treatment of unpublished opinions is constitutionally vulnerable on that narrow ground. If this is the constitutional defect in the current circuit rules, however, it may easily be cured by a simple amendment to the rules, without unleashing the pragmatic cataclysm noted above.

Moreover, this narrow objection fails to account for the second historical argument set out in detail below: that unpublished opinions are closely analogous to a set of judicial decisions that long have been treated as non-precedential. There is little doubt that judges have long exercised authority to hand down certain summary and other dispositions without explaining their reasons and without establishing any precedent. If a judge is within the “judicial power” in exercising the authority to decide a claim or objection without offering any explanation, there is little reason to think that a similar power cannot be exercised by handing down an “unpublished” explanation for a similar decision. The only difference is a net benefit to the parties from the judge’s explanation.

If anything, it is the current treatment of *published* opinions that would have been seen as an anachronism in the founding era. A jurist versed in the declaratory theory would be surprised to learn that he is foreclosed from setting aside an earlier decision that he finds manifestly unjust, or contrary to reason or custom. Precedent in the founding era was only evidence of the law; it could accordingly be ignored as "not law" in appropriate circumstances.¹⁴² Under current circuit rules, however, a panel of the court is absolutely forbidden from doing any such thing.¹⁴³ Thus, as compared to the historical baseline suggested in the *Anastasoff* opinion, the prevailing circuit rules do not *reduce* unpublished decisions to a lower class of precedent, as Judge Arnold supposes; they actually *elevate* published opinions to a higher degree of deference.¹⁴⁴

Viewed in this light, the circuit rules' dichotomy between published and unpublished opinions is difficult to condemn as a constitutional matter. The *Anastasoff* vision of the judicial power is that Article III establishes a floor or minimum level of deference to prior authority. There is no basis for the conclusion that the Constitution also establishes a ceiling—precluding federal courts from according more deference than was contemplated in the founding era; yet that is exactly what the historical premise of *Anastasoff* would require in order to reach the result Judge Arnold proposes.

B. History and "Second-Class" Precedent

As noted above, the *Anastasoff* decision may be understood to stand for the alternative proposition that there is no historical basis for judicial creation of two separate classes of precedent. Under this view, if the doctrine of precedent that prevailed at the time of the

142 See *supra* notes 98–99, 136 and accompanying text.

143 While the treatment of unpublished opinions may vary between the circuits, all of the circuits have rules stating, either directly or indirectly, that published opinions are binding precedent. See *supra* note 13 (discussing the publication rules in all thirteen circuits).

144 This is not to suggest that granting binding effect to published opinions is either inconsistent with the Constitution or even the modern view of precedent. Article III's grant of judicial power would certainly not be violated by limiting the discretion of judges beyond the extent originally intended by the Framers. Furthermore, the declaratory theory as a viable modern understanding of precedent was abandoned years ago. See, e.g., Wesley-Smith, *supra* note 49, at 74 (discussing the effect of positivist theorists such as Austin and Bentham, who argued that the law was not some amorphous body of legal rules to be discovered, but one to be created as a "product of judicial will"). Judge Arnold did not base his reasoning on a modern view of precedent, but on the historic view, which is embodied in the declaratory theory despite its lack of modern acceptance.

founding had not yet recognized a “second-class” status for unpublished opinions, then arguably the “judicial power” accorded under Article III precludes the creation of such status today.

This view of *Anastasoff* is equally problematic. For one thing, the doctrine of precedent that prevailed at the time of the founding was in a state of ongoing flux and transformation, and accordingly, there is little reason to think that the Framers would have intended to freeze the doctrine in place as it stood at the time of the framing.¹⁴⁵ Moreover, the historical premise of the argument again is faulty. Historically, the courts have recognized various classes of precedent, and have long felt comfortable with the notion that some judicial decisions are of lesser precedential value than others.¹⁴⁶

1. The Founding-Era Doctrine of Precedent Was in a State of Flux

As one of us has noted in an earlier work, a rigid originalist conception of *stare decisis* may be troubling even if one embraces its legitimacy (as we do) as a general interpretive methodology.¹⁴⁷ The law governing the proper treatment of precedents is a “doctrine of judicial management”¹⁴⁸ that has constantly ebbed and flowed to account for changes in the structure of the court system. For the most part, the changes over the history of our nation have been subtle and discrete.¹⁴⁹ The founding era, however, “marked an important point of transition.”¹⁵⁰

145 See *infra* Part III.B.1.

146 See *infra* Part III.B.2.

147 See Lee, *supra* note 40, at 653–55.

148 *Id.* at 651.

149 See *id.* (explaining that “[f]or the most part . . . the modern muddle over *stare decisis* has been with us since the founding era,” but that some strands of the doctrine have undergone certain changes). For a sophisticated discussion of *stare decisis* that bucks the conventional view that the doctrine of precedent was in a state of flux at the time of the founding, see Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 8, 10 (2001) (concluding that “for much of our nation’s history, the dominant view of *stare decisis* was . . . remarkably consistent” with the author’s proposed framework of adopting “a rebuttable presumption against overruling decisions that are not demonstrably erroneous while simultaneously recognizing a rebuttable presumption in favor of overruling decisions that are demonstrably erroneous”).

150 Nelson, *supra* note 149, at 661 (citation omitted) (explaining that “the eighteenth and early nineteenth centuries marked an important point of transition” in the doctrine); see also *infra* note 155 (citing further sources in support of the proposition that the doctrine of precedent was in a stage of transition into the nineteenth century).

The essence of the transition is evident in the cases discussed in Section III.A above. At the earliest stages of the doctrine, Coke and Hale spoke of the role of precedent in the purest of declaratory terms: a judicial decision was not law, but mere evidence of it, and accordingly could be disregarded by a subsequent court.¹⁵¹ Subsequently, common-law courts and commentators "began to speak of a qualified obligation to abide by past decisions,"¹⁵² under which precedents still could be set aside, but only if manifestly absurd or contrary to reason or custom.¹⁵³

The founding era roughly coincided with this subtle change. "Although the precise timing of this step in the transition is a subject of some debate among legal historians, William Blackstone's influential *Commentaries* apparently was one of the early authorities to speak of 'the rule of precedent as one of general obligation.'"¹⁵⁴ Thus, most historians agree that during the period leading up to the framing of the constitution "the whole theory and practice of precedent was in a highly fluctuating condition."¹⁵⁵ The history of the doctrine of stare decisis in this country is marked by similarly subtle and incremental changes, by which the courts gradually have modified the bases on which an earlier decision may be set aside.¹⁵⁶

In light of the transitional state of the doctrine of precedent in the founding era, it seems likely that "the founding generation must have contemplated that this common-law doctrine of judicial management did not foreclose further development of the considerations that inform the decision whether to retain a judicial precedent."¹⁵⁷ In other words, "even under an originalist conception of the judicial power," like that embraced in Anastasoff, "further development of the

151 See *supra* notes 98–99 and accompanying text.

152 Lee, *supra* note 40, at 661.

153 See *id.* at 661–62.

154 *Id.* at 661 (quoting MAX RADIN, *STABILITY IN LAW* 18 (1944)).

155 ALLEN, *supra* note 94, at 209; see also 12 HOLDSWORTH, *supra* note 94, at 151–57 (noting that the modern doctrine of precedent was accepted by the latter part of the eighteenth century, subject to "reservations," such as the "power to disregard cases which are plainly absurd or contrary to principle"); PLUCKNETT, *supra* note 138, at 350 ("[I]t is to the nineteenth century that we must look for the final stages . . . of the present system."); POTTER, *supra* note 95, at 279 (noting that during the eighteenth century "[o]pinions differ as to the force of individual precedents"). See generally Jim Evans, *Change in the Doctrine of Precedent During the Nineteenth Century*, in *PRECEDENT IN LAW*, *supra* note 49, at 35 (noting changes in the British House of Lords' treatment of its own precedent during the nineteenth century).

156 See generally Lee, *supra* note 40 (discussing the history of subtle changes of the doctrine in the United States).

157 *Id.* at 651.

standards of stare decisis need not be rejected categorically as ahistorical."¹⁵⁸

Thus, *Anastasoff's* now-vacated holding is vulnerable in its most basic premise—that the Framers intended to enshrine in the “judicial power” in Article III their specific understanding of the role of precedent, without the possibility of further adjustments in the future. If the doctrine was in a particular state of flux at the time of the founding, it seems much more likely that the Framers would have intended to leave open the possibility of future development. Even if the founding generation had not yet seized on the idea of according differential treatment to unpublished decisions, they should not have been offended by the idea—particularly if unpublished decisions can be analogized to other judicial decisions historically deemed not to have precedential weight. We turn now to that inquiry.

2. Historical Recognition of a Hierarchy of Judicial Authority

The concept that certain judicial decisions are less deserving of precedential effect is wholly consistent with Blackstone’s view of judicial decisions as evidence of the law.¹⁵⁹ Just as all forms of evidence are not of the same value, different sorts of judicial decisions have long received varying levels of deference. Despite Judge Arnold’s implicit proposition that the Framers’ conception of precedent precludes such a hierarchy, history provides several examples in which the Article III “judicial power” has been exercised without the creation of any precedent.

a. Federal District Court Decisions

Federal district courts, for example, have long exercised their judicial power without creating precedent in the same way that courts of appeals create precedent. It is commonly accepted that federal district court decisions are treated like unpublished appellate decisions: they may be disregarded in future cases except for the purposes of res judicata and collateral estoppel.¹⁶⁰ In Judge Posner’s words

district judges in this circuit must not treat decisions by other district judges, in this and *a fortiori* in other circuits, as controlling, unless of

158 *Id.*

159 1 BLACKSTONE, *supra* note 97, at *69 (“[T]hese judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law.”).

160 *See, e.g.*, *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1124 (7th Cir. 1987); *Starbuck v. City of San Francisco*, 556 F.2d 450, 457 n.13 (9th Cir. 1977); 18 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 134.02[1][d] (3d ed. 1999).

course the doctrine of *res judicata* or of collateral estoppel applies. Such decisions will normally be entitled to no more weight than their intrinsic persuasiveness merits.¹⁶¹

Judge Posner was hardly articulating a new rule of law. He was restating a rule of such historical origin that he apparently saw no need to cite to any authority. Even before the advent of the official American reporters, one can find examples of circuit judges (the contemporary equivalent of the district judge) treating the decisions of their fellow circuit judges as merely persuasive.¹⁶² For example, in *Blake v. Robertson* the circuit court for the Eastern District of New York dealt with an issue that had been previously examined four times.¹⁶³ In all four of the cases the circuit judges each followed the same rule regarding the particular issue of patent infringement.¹⁶⁴ The *Blake* court nevertheless recognized that since those courts were all circuit courts of co-ordinate jurisdiction, and since "the supreme court [had never] been called upon to reverse any of those decisions," the court was not bound by those decisions and that "the parties to [the] action [had] the right to a determination of the question by this court in this action."¹⁶⁵ While the court recognized that the consistency of the previous decisions was deserving of some inference that they were correct, the court was careful to recognize its responsibility to decide the case *de novo*.¹⁶⁶

Henry Black recognized this same rule in an early treatise on *stare decisis*. Black noted that while such decisions should be given some deference in the interest of uniformity, they were not binding on other courts of co-ordinate jurisdiction.¹⁶⁷

If the federal district courts historically have exercised their "judicial power" without creating precedent on par with that created by appellate courts, then Judge Arnold's thesis is seriously undermined. It might be argued that the federal district courts differ from appel-

161 *Colby*, 811 F.2d at 1124 (emphasis in original).

162 See *Taylor v. Royal Saxon*, 23 F. Cas. 797, 801 (E.D. Pa. 1849) (No. 13,803); see also *N. Pac. R. Co. v. Sanders*, 47 F. 604, 613 (D. Mont. 1891) (identifying this as the rule that "prevails in the circuit courts of the United States"); *Blake v. Robertson*, 3 F. Cas. 602, 603 (E.D.N.Y. 1874) (No. 1501) (noting that the decisions of other circuit courts "do not bind this court").

163 *Blake*, 3 F. Cas. at 603.

164 See *id.* ("The first of these questions has been heretofore determined in favor of the *Blake* patent by Judge Shipman, by Justice Nelson, by Judge Drummond, and by Judge Shepley, in other actions which have come before these judges.").

165 *Id.*

166 See *id.*

167 See HENRY CAMPBELL BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS § 99 (1912).

late courts, in that the former generally finds facts and the latter interprets the law, but that is not always so. Many trial court decisions involve statutory and constitutional interpretation, and in that task, district judges exercise power that is indistinguishable from that of their appellate counterparts. Moreover, both trial and intermediate courts of appeals are within the "inferior courts" to which the Constitution assigns the same judicial power.¹⁶⁸ If the district courts historically exercised their power without creating any sort of precedent, there is no reason to think that appellate courts exercising that same power should be precluded from doing the same thing.¹⁶⁹

b. Summary Dispositions

The Supreme Court has created its own hierarchy of judicial authority in recognizing that "'appropriate, but not necessarily conclusive, weight' is to be given [to] this Court's summary dispositions."¹⁷⁰ Summary dispositions, in other words, are not accorded the same level of deference as cases determined after full briefing, argument, and deliberation.

This practice of granting a lower level of deference to decisions reached on summary proceedings also has a long historical pedigree. Indeed, courts have explicitly suggested that "evidence of . . . solemn argument, and mature deliberation" is that "which, upon the doctrine of *stare decisis*, should give to this case the weight of authority sufficient to foreclose the judgment of all other tribunals upon the same question."¹⁷¹ J.C. Wells's early treatise offered a similar standard, suggesting that although courts generally should follow precedent, "a

168 U.S. CONST. art. III, § 1, cl. 1.

169 *But see* Martin, *supra* note 65, at 193–94 (arguing that non-publication rules—specifically the rules of the Sixth Circuit—are necessary to conserve judicial resources, and yet suggesting that allowing citations to unpublished opinions would create "a type of second-class precedent"). Despite his apparent distaste for a "second-class of precedent," Judge Martin does not appear to oppose the existence of multiple levels of precedent on a constitutional ground, since he states merely that such a "second class of precedent" does not help anyone unless there is no published opinion on point, in which case the unpublished opinion may be cited. *See id.* at 194. He therefore appears to see the problem not as one between persuasive and binding precedent, but between two levels of binding precedent.

170 *Mandel v. Bradley*, 432 U.S. 173, 180 (1977) (Brennan, J., concurring); *see also* *Edelman v. Jordan*, 415 U.S. 651, 670–71 (1974) (stating that cases decided by summary disposition are "obviously . . . not of the same precedential value as would be an opinion of this Court treating the question on the merits").

171 *People ex rel. Griffings v. Mayor of Brooklyn*, 9 Barb. 535, 544. (N.Y. Gen. Term 1850).

court has the right to judge as to whether a question has been formerly considered and determined *with due deliberation*.¹⁷²

This analysis is reminiscent of that offered by more modern Courts in denying precedential effect to summary dispositions.¹⁷³ It might just as easily be analogized and extended to disposition by unpublished opinion. By suggesting that the degree of deference accorded a decision may depend on the depth of the court's consideration, and indeed even by acknowledging the possibility of such varying degrees, it also casts doubt on Judge Arnold's premise that the Constitution contemplates but one level of precedent.

c. Equally Divided Courts

Courts have similarly accorded a lesser degree of deference to other decisions that have not received "solemn argument, and due deliberation," such as decisions of an equally divided court.¹⁷⁴ When the appellate panel is equally divided, the settled rule is that it affirms the ruling below, despite the lack of a majority in agreement to do so.¹⁷⁵ As Wells explained, "there is an adjudication, nevertheless, in effect—that is, the decision of the lower court is affirmed—yet it is plain no binding precedent can thus be established. . . ." ¹⁷⁶ The New York Court for the Correction of Errors has also noted that "[t]he maxim *stare decisis, et non quieta movere*, cannot be applicable to such a case, where the question never has in fact been decided by this court."¹⁷⁷

The analogy here to a decision by an unpublished opinion is not quite as apparent. In a sense, an equally divided court creates no precedent because it doesn't decide anything at all—it makes no prece-

172 J.C. WELLS, A TREATISE ON THE DOCTRINES OF RES ADJUDICATA AND STARE DECISIS 534 (Des Moines, Mills & Company 1878) (emphasis in original).

173 See *Mandel*, 432 U.S. at 180 (Brennan, J., concurring); *Edelman*, 415 U.S. at 670–71.

174 *Etting v. Bank of the United States*, 24 U.S. (11 Wheat.) *59, *78 (1826) ("The principles of law which have been argued cannot be settled."); WELLS, *supra* note 172, at 533 (citing several New York state cases as examples, including: *Bridge v. Johnson*, 5 Wend. 342, 372 (N.Y. 1830) (such a decision merely established the law for the case, and does not adopt any particular rule); *People ex rel. Attorney General v. Mayor of New York*, 25 Wend. 252, 256 (N.Y. 1840) ("The effect of such a judgment of affirmance is as conclusive upon the rights of the parties to the judgment as any other; although it is not considered as settling the question of law as to cases which may arise between other parties.")).

175 WELLS, *supra* note 172, at 533.

176 *Id.*

177 *Bridge v. Johnson*, 5 Wend. 342, 372 (N.Y. 1830); see also *Etting*, 6 U.S. (11 Wheat.) at *78.

dent because arguably it has not exercised any "judicial power." But the mere fact that there is no majority agreement on the result or the rationale does not mean that the appellate court has not taken action or has not exercised some species of judicial power. Surely there has been an exercise of some power in hearing argument and in affirming the lower court. Indeed, the principal difference between an affirmance by an equally divided court and an affirmance by a majority is that in the latter case there is a *ratio decidendi* that may be articulated in an opinion that speaks authoritatively for the court.

This is the same difference, however, between a published and an unpublished opinion. In the latter case, the court articulates an authoritative result that is binding on the parties and has preclusive effects, but it does not offer an authoritative *ratio decidendi*. Thus, this analogy further undermines Judge Arnold's position and demonstrates that courts have long recognized a judicial power to render decisions that do not result in any sort of precedent.

d. Custom of the Realm

Finally, in perhaps the most venerable illustration of a hierarchical conception of precedent, Blackstone and his contemporaries recognized that a single case was less persuasive evidence of the law than a series of cases establishing a "custom of the realm."¹⁷⁸ Thus, although an isolated decision of an individual judge might not be conceived as precedent, once that decision had been followed by several others, it could be treated as legal authority.¹⁷⁹ This conception of precedent was adopted in a dissent in early New York case, which articulates the view that "[i]t is going quite too far to say that a single decision of any court, is absolutely conclusive as a precedent."¹⁸⁰

Again, at first glance this analogy might seem inapt. Indeed, in a sense, this historical standard runs contrary to the modern circuit courts' treatment of unpublished authority. Whereas a single decision in Blackstone's era was not authoritative if it broke new legal ground, such a groundbreaking decision would be precisely the sort of decision that would call for publication today, and thus would create binding precedent. Conversely, routine application of a settled principle

178 1 BLACKSTONE, *supra* note 97, at *70.

179 See 1 BLACKSTONE, *supra* note 97, at *67-*70 (describing the "unwritten, or common law" as a combination of "general" and "particular" customs adopted and used by the courts); WELLS, *supra* note 172, at 537 ("We deny that a recent and solitary decision of any judge, however eminent, ought to be regarded by us as conclusive evidence of the existing law.")

180 *Butler v. Van Wyck*, 1 Hill 438, 462 (N.Y. Sup. Ct. 1841).

would constitute precedent, but today such a pedestrian decision would be unpublished and would not be authoritative.

This analysis, however, misconstrues the point of the historical inquiry. The idea is not that history's version of precedent is precisely in line with today's circuit rules on unpublished opinions. It is, rather, that a hierarchy of authority would not have been unfamiliar to the founding generation.¹⁸¹

CONCLUSION

Judge Arnold's now-vacated opinion in *Anastasoff* raises a fundamental and significant constitutional issue that cannot be ignored. If the panel decision is taken at face value, then federal judges at all levels of the system have long arrogated to themselves an ultra vires power that is inconsistent with a fundamental postulate of Article III of the Constitution. But although the historical analysis in *Anastasoff* has some superficial appeal, it cannot withstand close scrutiny. The historical understanding of the role of precedent is, if anything, more in line with the current status of unpublished decisions than it is with their published counterparts. Moreover, courts have long accepted a hierarchy of judicial authority that accords precedential weight only to certain types of decisions, and there is no reason to believe that the founding generation would have intended to foreclose extension of that hierarchy to the treatment given to unpublished decisions by the federal circuit courts today.

181 The argument, moreover, overstates the distinction. Today, the routine application of a settled rule of law may not create precedent, but that is not to say that the rule itself is not precedential. Rather, the point is that earlier decisions already have established the principle in question, and there is no particular reason to rehearse its application in a new case in a way that would elaborate further on that principle.

