

Anastasoff versus Hart: The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions

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*Unpublished opinions are not precedent and parties generally should not cite them.*¹

*Unpublished dispositions of this Court are not binding precedent ... [and generally] may not be cited to or by the courts of this circuit*²

*“These rules would not be strangers in totalitarian jurisprudence or in a Franz Kafka novel.”*³

In 1999, the Eighth Circuit Court of Appeals shook the jurisprudential world by finding unconstitutional its rule prohibiting reliance on its unpublished opinions as precedent: *Anastasoff v. United States*.⁴ The opinion by Judge Richard Arnold is thoroughly researched, elegantly written, and persuasive. Judge Arnold had previously expressed misgivings about the rule,⁵ so it was hardly surprising that he should write when the opportunity presented itself. Like most with an interest in jurisprudence, I read the opinion with fascination, and opened a file -- “This is great stuff,” I thought, “but it must be wrong.”

¹ Eighth Circuit Rule 28A(i)

² Ninth Circuit Rule 36-3

³ Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?* 50 S.C.L.REV. 235, 249 (1998-99) (The author was a “Member, ABA Task Force on Unreported Opinions, 1996” along with three judges and two other practitioners, *Id* at 235; he brings to bear the insights of extensive practical experience.)

⁴ *Anastasoff v. United States*, 223 F.3d 898, vacated as moot on reh’g en banc, 235 F.3d 1054 (8th Cir. 2000).

⁵ Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J.APP.PRAC. & PROC. 219 (1999).

Two years later, Judge Alex Kozinski of the Ninth Circuit, another of the finest thinkers among our federal appeals court jurists, systematically disagreed with Judge Arnold: *Hart v. Massanari*.⁶ Judge Kozinski's is also a most impressive opinion, perhaps even more thoroughly researched, tightly reasoned, and persuasive. It had the benefit, too, of the plethora of academic commentary following *Anastasoff*.⁷ Nevertheless, my reaction to it was similar: "This is great stuff, but it must be wrong."

Both wrong? How could that be? Well for starters, one's first reactions to opinions on questions of such moment ought not be taken very seriously. Perhaps a bit of thought might sort it out, especially aided by some reading in the voluminous literature soon to be discovered on the topic. But further thought and investigation left me still uneasy about both sides of the debate. It doesn't matter a fig that *Anastasoff* became moot when the government conceded.⁸ The constitutionality and wisdom of the prohibition, and the underlying issues of the nature of precedent, what justifies it, and its relation to the duties of a judge remain in play. This article is my attempt to sort out those issues, focusing on precedent—or "stare decisis"⁹—and its functions and

⁶ *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001). Like Judge Arnold, Judge Kozinski, writing with 9th Circuit Judge Stephen Reinhardt, had also previously published his position; see Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, CALIFORNIA LAWYER, June 2000, at 43.

⁷ "*Anastasoff* set off a feeding frenzy of scholarship, taking up space in legal journals of every stripe." Bob Berring, *Unprecedented Precedent*, 5 GREEN BAG 2d 245, 246 (2002). The copious footnotes to this introduction attest to an already intimidating volume of literature on this subject. But despite their being numerous, the works cited here by no means exhausts the writings on non-publication and no-citation rules. That means that I shall fail to give credit where it is due at many points; in anticipation, I apologize to those thus shorted.

⁸ Thomas R. Lee & Lance S. Lenhof, *The Anastasoff Case and the Judicial Power to "Unpublish" Opinions*, 77 NOTRE DAME L.REV. 135, 173 (2001) ("Judge Arnold's now-vacated opinion in *Anastasoff* raises a fundamental and significant constitutional issue that cannot be ignored.")

⁹ Some draw a distinction between the two: See, e.g., Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM.J.LEGAL HISTORY 28, 30 (1959) (Precedent needs a doctrine developed through a line of cases; stare decisis can use one case alone as authority); K.K.DuVivier, *Are Some Words Better Left Unpublished?: Precedent and the Role of Unpublished Decisions*, 3 J.APP.PRAC. & PROC. 397 (2001) (stare decisis means only "stand by things decided"; precedent is about bases for decision, and is an "evolving doctrine."); Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C.L.REV. 81, 105 (2000) (stare decisis is strict, formalistic; precedent is less so.) I shall treat them as synonyms, but having considerable variability in meaning, which ought always to be acknowledged.

justifications.¹⁰ But first, by way of introduction, let me sketch the ontogony, justifications, and criticisms of selective publication and no-citation rules.

Selective publication of opinions and no-citation rules came into use in response to the pressing problem of volume: the appellate case load was increasing very much faster than the number of appellate judges.¹¹ The problem was the same for all circuit courts of appeals, and the solution of non-publication is now generally in use, although not always linked to no-citation rules.¹²

¹⁰ I shall try not to repeat the many deep and insightful arguments that have already been made, but merely acknowledge and use them where needed; repetition would be pointless.

¹¹ *Hart*, *supra* note 6 at 1176 (The courts do not “have the resources to write precedential opinions in every case that comes before them.”); Arnold, *supra* note 5 at 221 (“...the most serious problem facing all our courts today: volume.”); Hon. Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST.L.J. 177, 177-79 (1999)(same); Hon. Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG 2D 17, 19 (2000)(same); David Dunn, *Unreported Decisions in the United States Courts of Appeals*, 63 CORNELL L.REV. 128 (1977)(increase in volume of appeals greatly exceeding growth of appellate bench brought the practice about); Daniel N. Hoffman, *Publicity and the Judicial Power*, 3 J.APP.PRAC. & PROC. 343, 346 (2001)(the problem is “an exponential growth in the quantity of law, unmatched by commensurate growth in the size and staffing resources of the judiciary.”); DuVivier, *supra* note 9 at 398(“...the Eighth Circuit rule and others like it continue to provide the best solution for how to deal effectively with heavy caseloads.”).

¹² For a survey of circuit courts of appeals rules diminishing the precedential value of unpublished opinions, see Lee & Lenhof, *supra* note 8 at 137 n.13. Absolute prohibitions on citation are now in the minority; DuVivier, *supra* note 9 at 403 (no-citation rules are “now a minority position in the circuit courts, the no-citation rule is still widely used.” citing, e.g., 1st Cir. R. 36 (2000); 2nd Cir. R. 0.23 (2000); 7th Cir. R 53 (e) (2000); 9th Cir. R. 36-3 (2000).) Many writers have provided fine introductions to the origin and proliferation of non-publication of opinions and no-citation rules; see, e.g. William L.Reynolds & William M. Richman, *The Non-Precedential Precedent –Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM.L.REV. 1167, 1168-72 (1978); Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U.MICH.J.L.REF. 119, 121-126 (1994); Price, *supra* note 9 at 81 *et seq.*; Melissa H. Weresh, *The Unpublished, Non-Precedential Decision: An Uncomfortable Legality?* 3 J.APPELATE PRACTICE & PROCEDURE 175, 178 (2001); Salem M. Katsh and Alex V. Chachkes, *Constitutionality of “No-Citation” Rules*, 3 J.APP.PRAC. & PROC. 287, 291-95 (2001); DuVivier, *supra* note 9 at 405-10; Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?* 44 AM.U.L.REV. 757, 760-62 (1995); Joshua R. Mandell, *Trees that Fall in the Forest: The Precedential Effect of Unpublished Opinions*, 34 LOYOLA L.A.L.REV. 1255, 1257-61 (2001). Statistical data on the extent of the practice can be found in Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J.APPELATE PRACTICE & PROCEDURE 199, 199ff (2001)(a remarkable assembly of data); Dunn, *supra* note 11 at 129-135 (survey of the circuits’ rules at that time); Reynolds & Richman, *supra*, 78 COLUM.L.REV. at 1173-81, 1207-08 (survey and tabulation of the circuits’ rules as of 1978); William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U.CHIL.REV. 573, 580-626 (1981)(tabulation of data on aspects of selective publication for 1978-79); Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH.L.REV. 940 (1989)(reporting on a one year study of 9th Circuit opinions, published and unpublished, data which suggests, *inter alia*, that concurrences and dissents are at least as likely in unpublished as in published decisions; *id* at 948.)

The original justification is pragmatic, weighing the burden of opinion writing on judges against the often small jurisprudential importance of a case. As almost all who write on this subject repeat, a decision of a court of appeals and its attendant opinion have two functions: first, to resolve the dispute between the parties, ideally in such a way as to make even those who do not prevail content that their position has received proper consideration; second, to help establish a basis for resolution of similar issues should they arise in the future, that is, to advance the state of the law.¹³ If a decision requires merely the routine application of precedent and does not make new law or revise or develop old, then surely relieving the burden on the judges is worth the cost to jurisprudence of non-publication. The Supreme Court controls the quality of its opinions and its work load by limiting its docket. The circuit courts of appeals do not have that power; but they effect the same quality control by selecting which cases to treat to precedential and published opinions.¹⁴ Prohibiting the citation of unpublished opinions as authority is said to be an essential concomitant of non-publication, as allowing citation “would frustrate the very goals of cost and judicial efficiency.”¹⁵ Provided that only routine decisions remain unpublished, the argument goes, no harm will be done to the overall system of precedents, and justice in decision making (as distinguished from reporting and explaining) need not be compromised.¹⁶ Thus non-publication is said also to avoid cluttering the published reports with routine decisions of little jurisprudential

¹³ But see Robel, *supra* note 12 at 941-42 (opinions have functions other than advancing the state of the law). For example, the opinion itself has been further justified as “forc[ing] judges to clarify their thinking,” Martineau, *supra* note 12 at 123, and subjecting the grounds of decision to public evaluation, Hoffman, *supra* note 11 at 352 (We are entitled to try to change laws we think wrong; for that we must have the grounds of decision; therefore “Courts—especially appellate courts—must give reasons.”).

¹⁴ This comparison is made by Judge Kozinski; Hart, *supra* note 6 at 1176. At 1177 he writes that judges do not have sufficient time to write publishable opinions for all decisions, and in a footnote quotes Judge Howard T. Markey, *On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand*, 33 S.D.L.REV. 371, 379, 384 (1988) to the effect that the present appellate judge simply does not have enough time to engage in “reflective personal craftsmanship”. But William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L.REV. 273, 275 (1995-96) point out that with staff screening appeals and deciding whether a summary decision or an oral argument and panel decision with or without publication, “the circuit courts have become certiorari courts.”; see also Robel, *supra* note 12 at 953 (Staff make the first and major decisions with respect to subsequent treatment of an appeal.)

¹⁵ Martin, *supra* note 11 at 193 (Without limits on citation “there is virtually no distinction between published and unpublished.”) and 196 (“[I]t will not save us any time if [unpublished opinions] are cited back to us. We will have to prepare unpublished opinions as we do published opinions—as if they were creating precedent.” (quoted in Hart, *supra* note 6 at n.36); Carpenter, *supra* note 3 at 249; further “Without the no-citation rule, a market for unpublished opinions will develop, thereby hindering judicial efficiency.” *Id.* at 242; Reynolds & Richman, *supra* note 12, 78 COLUM.L.REV. at 1185 (allowing citation would “frustrate the purpose of non-publication...”)).

consequence,¹⁷ to minimize inconsistency,¹⁸ and to improve the quality of the more important decisions for which opinions are published.¹⁹ No-citation rules have also been said to have the virtues of protecting those who cannot afford to search unpublished opinions²⁰ and avoiding further increase in citation of cases of no independent interest.²¹

Yet unpublished opinions have always been obtainable. One could simply purchase a copy from the clerk of the court, and more recently many although not all can be found in commercial electronic data bases, and at the courts' web sites.²² This century, West Publishing Company has begun publishing unpublished opinions in the traditional way: collected and bound into serial volumes called the *Federal Appendix*.²³ In a spritely review of the first year's volumes, Brian P. Brooks finds that not only does this make nonsense of the fiction of non-publication, "[T]he *Federal Appendix* has something for everyone who questions the traditional justifications for unpublished opinions: long opinions; controversial opinions; opinions with dissents; and opinions that are cited as precedent in other opinions, among others. ... [it] render[s] absurd a fiction that was at

¹⁶ Dragich, *supra* note 12 at 789-90("development of the law is not impeded when redundant, straightforward, or unimportant cases are not published.")

¹⁷ *Anastasoff*, *supra* note 4 at 904("Courts may decide, for one reason or another, that some of their cases are not important enough to take up pages in a printed report." quoted out of context); DuVivier, *supra* note 9 at 399("it is helpful for courts to distinguish between those opinions that are potentially more valuable for the analysis of future cases (*i.e.* "published decisions") and others that are more routine (*i.e.* "unpublished decisions").")

¹⁸ "Adding endlessly to the body of precedent—especially binding precedent—can lead to confusion and unnecessary conflict." *Hart*, *supra* note 6 at 1179; Reynolds & Richman, *supra* note 12, 78 COLUM.L.REV. at 1184 (fear that publication of so many cases would threaten the cohesion of the law.)

¹⁹ "Deciding a large portion of our cases in this fashion frees us to spend the requisite time drafting precedential opinions in the remaining cases." *Hart*, *supra* note 6 at 1177-78. J.Thomas Sullivan, *Concluding Thoughts on the Practical and Collateral Consequences of Anastasoff*, 3 J.APP.PRAC. & PROC. 425, 437 (2001)("The truth is that many unpublished decisions are delivered in opinions that include neither a careful discussion of facts nor a sophisticated application of the controlling authority on which the court relied.")

²⁰ Katsh & Chachkes, *supra* note 12 at 287.

²¹ "... an unpublished opinion will not 'in any way interest persons other than parties to [the particular] case,' because the opinion neither establishes a new rule of law, modifies an existing rule of law, applies an existing rule to distinct facts, nor concerns any issue of significant public interest. 5TH CIR. R. 47.5.1." *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, 261 (5th Cir. 2001).

²² For data on accessibility of unpublished opinions, see William R. Mills, *The Shape of the Universe: The Impact of Unpublished Opinions on the Process of Legal Research*, forthcoming (2002); Hannon, *supra* note 12 at 206 ff; DuVivier, *supra* note 9 at 400-02.

²³ abbreviated _ Fed.Appx. __ (xth Cir. 200y).

least plausible until recently: the idea that there is something categorically different about unpublished opinions as compared to their precedential cousins.”²⁴

These simple facts undermine further benefits sometimes attributed to selective publication. For example, it is said to reduce the burden on libraries of the growing quantity of reporters and associated costs, to reduce the costs of publication, and to reduce the burdens on researchers of greater volumes of data. All such burdens become costs to the legal system, to be passed to its participants and ultimately to its customers.²⁵

On the critics’ side, selective publication and no-citation rules have been subject to serious doubts. In addition to Judge Arnold’s argument that the concept of judicial power in Article III of the Constitution includes the restraint of precedent, constitutional arguments have been made on grounds of due process²⁶ and equal protection.²⁷ Because the court making the decision also decides whether to publish, and thus whether to give precedential effect to its decision,²⁸ critics fear that judges may be tempted to use unpublished opinions

²⁴ Brian P. Brooks, *Publishing Unpublished Opinions: A Review of the Federal Appendix*, 5 GREEN BAG 2D 259, 260, 263 (2002).

²⁵ James N. Gardner, *Ninth Circuit’s Unpublished Opinions: Denial of Equal Justice?*, 61 ABA J. 1224, 1225 (1975); Carpenter, *supra* note 3 at 249; Robert C. Berring, *Collapse of the Structure of the Legal Research Universe: The Imperative of Digital Information*, 69 WASH.L.REV. 9, 28 (1994)(“Existing methods of case law research have collapsed under the weight of decisions, at least for research that is national in scope.”); Reynolds & Richman, *supra* note 12, 78 COLUM.L.REV. at 1185 (“as volume increases, so does prolixity and confusion.”).

²⁶ Dunn, *supra* note 11 at 141-45; Weresh, *supra* note 12 at 193(“...removing a whole category of decisions from consideration certainly appears to ...deprive[] litigant the due process of law”); Jon A. Strongman, *Unpublished Opinions, Precedent and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value is Unconstitutional*, 50 KANSAS L.REV. 195 (2001)(Arguing that denying precedential value to any decision is “a violation of the protections guaranteed by the Fifth Amendment due process clause.” *Id* at 196).

²⁷ Daniel N. Hoffman, *Nonpublication of Federal Appellate Court Opinions*, 6 JUST.SYS.J. 405, 414 (1981)(Accessibility of unpublished opinions depends on finance, so “institutional litigants (especially the government), large urban law firms, and other powerful organizations would thus receive yet another advantage in the unequal struggle for social justice.”); Robel, *supra* note 12 at 955-959 (Institutional access to unpublished opinions exacerbates unfairness; in particular frequent litigators collect and use unpublished opinions “in making litigation and settlement decisions and in writing briefs.”, *id* at 957); *see also* Weresh, *supra* note 12 at 195; Richman & Reynolds, *supra* note 14 at 275; Dunn, *supra* note 11 at 141-45. Note that the protection ordinarily afforded the poor by rules of professional ethics that require disclosure of authority would not apply under a no-citation rule denying authority to an unpublished opinion.

²⁸ Arnold, *supra* note 5 at 221 (Rule 28A(i) says “this principle applies only when the court wants it to apply.”); Pamela Foa, *A Snake in the Path of the Law: The Seventh Circuit’s Non-Publication Rule*, 39 U.PITT.L.REV. 309, 313 (1977-78)(To decide whether to publish “judges must consider all the consequences of their decisions for the meaning or future shape of the law itself. It does not

when they cannot properly distinguish a precedent or justify a decision.²⁹ Non-publication “may also tend to conceal the court’s position on important questions of law,”³⁰ and, for at least some litigants, being deprived of citation of a case “as precedent significantly disadvantages their likelihood of obtaining a favorable holding on appeal.”³¹

Perhaps the most serious downside effect of non-publication and no-citation rules is their potential to create uncertainty. It is now a matter of course that legal researchers will find and take notice of accessible but unpublished opinions. Should counsel rely on them in advising a client prospectively, in planning litigation, in assessing settlement? A dissent to a denial of an en banc hearing in the Fifth Circuit Court of Appeals gave poignant testimony to the problem. *Williams v. Dallas Area Rapid Transit*³² followed on the heels of an unpublished but known decision:

In *Anderson v. DART*, 180 F.3d 265 (5th Cir.1999)(per curiam)(unpublished (table), *cert. denied*, 528

U.S. 1062, 120 S.Ct. 615, 145 L.Ed.2d 510 (1999) a 5th circuit panel affirmed a decision “for essentially

seem as obvious that judges are in any position to do this. ...[The no-citation] rule must distort and may even undermine the viability of the common law.”); Justice John Paul Stevens:

[A non-citation rule] assumes that an author is a reliable judge of the quality and importance of his own work product. If I need authority to demonstrate the invalidity of that assumption, I refer you to a citizen of Illinois who gave a brief talk in Gettysburg, Pennsylvania that he did not expect to be long remembered. Judges are the last persons who should be authorized to determine which of their decisions should be long remembered.

Address to the Illinois State Bar Association’s Centennial Dinner 9 (Jan.22, 1977), quoted by Reynolds & Richman, *supra* note 12, 78 COLUM.L.REV. at 1192 and by Katsh & Chachkes, *supra* note 12 at 310-311. Martineau, *supra* note 12 at 134-37 is one of the few to argue the contrary.

²⁹ Arnold, *supra* note 5 at 223; Gardner, *supra* note 17 at 1225 (“Freedom from the pressure of critical eyes may indeed allow a judge to write his opinions with greater dispatch, but does it not also create an unwholesome temptation to pay less than meticulous attention to the fine points of an appellant’s argument?”); Weresh, *supra* note 12 at 181(accountability reduces the possibility of arbitrariness and tyranny.); Hoffman, *supra* note 11 at 353 (No-citation means “there is no sufficient check, scrutiny, or accountability.”); Sullivan, *supra* note 20 at 428 (“non-publication may also serve to mask inappropriate personal agendas of appellate judges.”). These concerns may not be mere speculation; Merritt and Brudney took a census of unpublished labor law decisions and concluded that their data “raises the very specter described by the Eighth Circuit: that like cases will be decided in unlike ways, that judges opinions will be “regulated only by their own [personal] opinions,”[Anastasoff, *supra* note 4 at 901, quoting William Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND *259 (1765)] and that legal principles will evolve, not in response to the dictates of reason ...[but] because judges have simply changed their minds.” Deborah Jones Merritt and James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND.L.REV. 71, 119 (2001). Martineau, *supra* note 12 at 129-32, argues convincingly that the fear of judicial malfeasance is overblown, that “American appellate systems ... have many built-in protections to prevent against [judicial] irresponsibility without mandatory publication of opinions.” *Id* at 132.

³⁰ Sullivan, *supra* note 20 at 427.

the reasons stated by the district court in its comprehensive and well-reasoned opinion” that “DART is a political subdivision of the state of Texas, and is therefore immune from suit under the Eleventh Amendment.”³³

But in *Williams*, the Fifth Circuit panel said the opposite, that DART had no such immunity, based on “well established Fifth Circuit law from 1986.”³⁴

What is the hapless litigant or attorney, or for that matter a federal district judge or magistrate judge, to do? The reader should put himself or herself into the shoes of the attorney for DART. The client is told in May 1999, by a panel of this court in *Anderson*, that it is immune, on the basis of a “comprehensive and well-reasoned opinion.” Competent counsel reasonably would have concluded, and advised his or her client, that it could count on Eleventh Amendment immunity.

Then, in March 2000, in the instant case, a federal district judge, understandably citing and relying on the circuit’s decision in *Anderson*, holds that “[I]t is firmly established that DART is a governmental unit or instrumentality of the state of Texas.” In February 2001, however, a panel, containing one of the judges who was on the *Anderson* panel, reverses and tells DART that, on the basis of well-established Fifth Circuit law from 1986, it has no such immunity. One can only wonder what competent counsel will advise the client now.³⁵

What indeed? But of course legal counselors are going to rely on unpublished opinions; what other course could be sensible, or professionally justifiable? This is especially obvious now that any pretense that non-publication makes an opinion unavailable has long been abandoned.

³¹ *Id.* at 432. Carpenter, *supra* note 3 at 247-48, gives a summary list of twenty-three negative properties of no-citation rules.

³² 256 F.3d 260 (5th Cir. 2001)

³³ *Id.*

³⁴ *Id.* at 261. The 5th circuit rule is: “Fifth Circuit Rule 47.5.4 specifies that “[u]npublished opinions on or after January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case ...”” *Id.*

³⁵ *Id.*

All these arguments, and more, have been thoroughly visited, revisited, and often countered in the sources cited.³⁶ We must, I believe, accept that the majority of decisions of our circuit courts of appeals will continue to be unpublished,³⁷ or if published, only in a non-opinion format. Present society's enthusiasm for reduced federal taxes suggests little possibility of action on Judge Arnold's suggestion that we increase the federal bench sufficiently to make publication of all opinions possible;³⁸ as Judge Kozinski says, "Congress would have to increase the number of judges by something like a factor of five to allocate to each judge a manageable number of opinions each year."³⁹ Nor might we expect tolerance of judges' accepting the burden and legal and litigious societies' accepting ever increasing backlogs.⁴⁰ We have now more than a quarter century's experience with non-publication; the only change we might reasonably anticipate is an increase in its use.

I shall argue that the constitutionality and wisdom of no-citation rules depend on one's conception of *stare decisis*. Its operation and grounds are not the same now as in the Founding period; the declaratory theory of common law and *stare decisis* of the seventeenth through the early nineteenth centuries was no longer acceptable by the early twentieth century. Yet Judges Arnold and Kozinski debate the constitutionality issue

³⁶ For an accessible survey of the problems of no-citation rules, see Mandell, *supra* note 12 at 1263-72. One can't, however, leave the list of arguments without remarking the oddity (noticed by many others): under a no-citation rule, one may cite treatises, encyclopedias, dictionaries, law reviews, Restatements, social science research reports, jurists' musings, decisions of other circuits and other states and even other countries, and of trial courts, and statutes of any level of government, but *not* 80% of the decisions of this Circuit Court of Appeals!

³⁷ See Hannon, *supra* note 12 at 201 ("Currently more than 79 percent of federal circuit court opinions are unpublished." Hannon provides a wealth of tabulated data on non-publication and its concomitants.); Robel, *supra* note 12 at 960-961 ("[T]he system we have—at least as it concerns judges—is what we are likely to have in the future.")

³⁸ Anastasoff, *supra* note 4 at 904: "The remedy, instead, is to create enough judgeships to handle the volume ..."; Richman & Reynolds, *supra* note 14 at 297-334 (same).

³⁹ Hart, *supra* note 6 at 1179, n.39.

⁴⁰ Anastasoff, *supra* note 4 at 904: "...or, for each judge to take enough time to do a competent job with each case. If this means that backlogs grow, the price must still be paid." For a thorough exploration of the practical consequences of adopting Judge Arnold's thesis, see Lee & Lenhof, *supra* note 8 at 145-51 (Explaining "the pragmatic convulsion that would be released on the slippery slope of Judge Arnold's opinion. ... Such a rule would paralyze the federal court system." *Id.* at 147.); see also Hart, *supra* note 6 at 1178-79.

primarily on originalist grounds, that is on the Framers' understanding of stare decisis, as best we can reconstruct it. Part I is an outline of the two cases, *Anastasoff* and *Hart* followed by an assessment of their interaction. It includes explanations of the declaratory theory on which the originalist conception of judicial power and its limitation by stare decisis rests, and of why it is no longer viable.

If the late eighteenth century's is no longer the operational concept of precedent, that aspect of the debate may stand in need of revision. If we can sort out stare decisis and its justifications, then we should be able to sort out the limits on reasonable, constitutional non-publication practices and no-citation rules.⁴¹ Part II is about the two dominant conceptions of common law decision making and stare decisis that have replaced the declaratory theory, namely, the enactment theory and what I shall call the standard theory. These are the conceptions manifest by Judges Kozinski and Arnold (respectively) in their opinions, if not the one they attribute to the Framers of the constitution. The section includes an assessment of the interaction of these theories with non-publication practices and no-citation rules: the enactment theory comports with selective publication and no-citation rules, and indeed is a key element in Judge Kozinski's argument. I shall argue that although convenient, the enactment theory is inadequate as an account of legal practice, and thus gives no comfort to no-citation rules. The standard theory, although more difficult, is fully adequate as an account of actual reasoning and practice. However it makes full precedential status of decisions unavoidable, and is thus incompatible with no-citation rules. But it is compatible with selective publication. Thus the thesis I shall defend is that the presently accepted and acceptable model of stare decisis and its justifications may tolerate non-publication of opinions but does not allow prohibition of citation of decisions. Elimination of no-citation

⁴¹ I came to Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG 2D 17 (2000) late in my work on this article, and read it with heart in mouth. It is an article to recommend, written with style as well as insight by a 6th Circuit judge and a Washington attorney, thus bringing practical experience as well as theoretical sophistication to the matter. There is indeed some over-lap, *see id* at 22-25, but not too much.

rules, however, can be accommodated to the reasons for the developed practice with a few, relatively easy adjustments to selective publication practice.

In the conclusion I shall offer a solution fitted to the dilemma as described in these terms. The basic justification for selective publication is that routine decisions merely applying established precedents do not justify overburdening judges and the appellate system with full opinions. Yet true non-publication has not proven possible, and practitioners are inevitably going to rely upon the supposedly unpublished opinions to which they have access. Accordingly, our federal circuit courts of appeals should publish all decisions, as precedents, but in eviscerated form, stating only their conclusions and the cases relied upon. If a decision cannot be adequately stated in such a form, then it should be given a full opinion. This solution might not satisfy all enactment theorists, but it would meet most of the arguments of both proponents and critics of the present rules and practices.

§ I. *Anastasoff versus Hart*

Judge Arnold writing for the Eighth Circuit bench and Judge Kozinski for the Ninth Circuit reached opposite conclusions as to the constitutionality of their respective circuit's no-citation rules. The rules are sufficiently similar to suggest that the difference in outcome does not turn on a difference in rule.⁴² The key parts of the rules are:

Eighth Circuit Rule 28A(i):

Unpublished opinions are not precedent and parties generally should not cite them.

Ninth Circuit Rule 36-3:

Unpublished dispositions of this Court are not binding precedent ... [and generally] may not be cited to or by the courts of this circuit

In this section I shall sketch the arguments of each opinion and how they match up.

Anastasoff

A prior, unpublished case, *Christie v. United States*,⁴³ had facts indistinguishable from those of Faye Anastasoff's.

Ms. Anastasoff contends that we are not bound by *Christie* because it is an unpublished decision and thus not a precedent under 8th Circuit Rule 28A(i). We disagree. We hold that the portion of Rule 28A(i) that declares that unpublished opinions are not precedent is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the “judicial.”⁴⁴

The relevant language in Article III of the Constitution is: “The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may, from time to time, ordain and establish.” “Judicial power” is the only relevant expression used, and it is not elaborated.⁴⁵ Thus the federal judiciary has judicial power, no more, no less. What did the Framers understand by that?

⁴² Judge Kozinski notes writes: “The difference is not material to the rationale of *Anastasoff* because both rules free later panels of the court, as well as lower courts within the circuit, to disregard earlier rulings that are designated as nonprecedential.” *Hart, supra* note 6 at 1159 n.2. But I shall suggest below one difference in language that might be consequential; *see text infra* at notes 68 - 69.

⁴³ No. 91-2375MN (8th Cir. Mar. 20, 1992)(Per curiam) (unpublished).

⁴⁴ *Anastasoff, supra* note 4 at 899.

The Framers thought of stare decisis as “derive[d] from the nature of judicial power”;⁴⁶ so in using the words in Article III, they understood the doctrine to be implied in and a limitation on the power vested in the courts. It follows that for a federal court to exercise power unrestrained by the doctrine of precedent would be to exercise power beyond that with which it is vested. At the end of the opinion, Judge Arnold nicely and accurately caricatures Rule 28A(i) and similar rules: “Those courts are saying to the public: “We may have decided this question the opposite way yesterday, but that does not bind us today, and, what’s more, you cannot even tell us what we did yesterday.””⁴⁷ A rule permitting a court or system of courts to exercise such unrestrained power would therefore be unconstitutional. And thus the part of Rule 28A(i) denying precedential power to any decision is unconstitutional.

That is the thesis. In the remainder of the opinion Judge Arnold’s task is to explain and justify it. His explanation and justification are in terms of the Framers’ understanding; he reconstructs what they would take as understood in using the critical words, “judicial power.”

Not in question is the practice of selective publication; nor is the argument about “whether opinions ought to be published.”⁴⁸ In the absence of an official reporting system, the Framers were accustomed to limited and uncertain publication,⁴⁹ especially “publication (in the sense of being printed in a book)...”⁵⁰

⁴⁵ One might take a clue from the use of “ordain and establish” for creating new, inferior courts: “ordain” and “establish” are both words used of churches and religious offices; perhaps the Framers thought of courts and churches as somewhat similar. This is not an argument taken up by Judge Arnold or anyone else, and probably rightly; one would not want to hang much on it.

⁴⁶ *Anastasoff*, *supra* note 4 at 900.

⁴⁷ *Id.* at 904.

⁴⁸ *Anastasoff*, *supra* note 4 at 904, “whether that means in a book or available in some other accessible form to the general public.” *Id.*

⁴⁹ There was, at the time, little reporting of cases and no official reporting, but that was not seen “as an impediment to the precedential authority of a judicial decision.” *Anastasoff*, *supra* note 4 at 903, with many cites in support.

⁵⁰ *Id.* at 903.

Courts may decide, for one reason or another, that some of their cases are not important enough to take up pages in a printed report. Such decisions may be eminently practical and defensible, but in our view they have nothing to do with the authoritative effect of any court decision.⁵¹

And of course non-publication of a circuit court decision does not mean that it is unavailable, secret; copies are and have always been available, even though “[y]ou may have to walk into a clerk’s office and pay a per-page fee.”⁵² This is about denial of precedential value.

At the end of the eighteenth century, the doctrine of precedent was well established in the United States, and seen as a weapon against the tyranny of the monarch, Lord Coke’s weapon for establishing a judiciary independent of the crown. So it was a concept entrenched and revered by the framers, most of whom had legal training.⁵³ To get at how the Framers would have understood judicial power and its relation to stare decisis, Judge Arnold looks to the authorities who were in use at the time, the foremost being Blackstone.⁵⁴ According to Blackstone, the power of precedent “derives from the nature of the judicial power itself. As Blackstone defined it, each exercise of of the “judicial power” requires judges “to determine the law” arising upon the facts of the case. 3 Blackstone, *Commentaries* *25.”⁵⁵

We now call the theory of common law judging prevailing at that time a “declaratory theory.” There is a law, a natural and God-given law, fixed, permanent, a “brooding omnipresence in the sky” as Holmes derided it;⁵⁶ judges “are the depositaries of the laws; the living oracles”⁵⁷ who find the relevant aspect of that law and

⁵¹ *Id.* at 904.

⁵² *Id.* He does not address differential availability and the possibility of discriminatory effects.

⁵³ *Id.* with copious citations.

⁵⁴ Chancellor Kent, a near contemporary of the Framers, wrote of Blackstone that he “is justly placed at the head of all the modern writers who treat of the general elementary principles of law.” James Kent, 1 COMMENTARIES ON AMERICAN LAW 512 (1826). In a footnote Judge Arnold notes the importance of Blackstone and his “great influence on the Framers’ understanding of law”, with authority; *Anastasoff*, *supra* note 4 at 901, n.8.

⁵⁵ *Id.* at 901 (footnotes omitted.)

⁵⁶ *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917); *Holmes-Laski Letters* (London, 1953), ii. 822.

apply it to a particular set of facts. Having done that: “what was uncertain, and perhaps indifferent, is now become a permanent rule ...”.⁵⁸ That decision is binding on later judges because judges find the law, independently of their own opinions, they don’t make it; on this conception, following a prior decision is following the law there uncovered and declared. “The judicial power to determine law is a power only to determine what the law is, not to invent it. Because precedents are the “best and most authoritative” guide of what that law is, the judicial power is limited by them.”⁵⁹ This was the theory the Framers would have learned, not only from Blackstone but also from Coke and Sir Matthew Hale.⁶⁰

But in addition, Judge Arnold points out, Blackstone saw precedent as “essential ... for the separation of legislative and judicial power.” Legislatures make law; judges don’t have that power. If they did, the “power to ‘depart from’ established legal principles, ‘the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their opinions ...’.”⁶¹

“The Framers accepted this understanding of judicial power ... and the doctrine of precedent implicit in it.”⁶² There are numerous quotable passages from writings of our Founders and the Framers, and Judge Arnold cites and quotes many of them. Best for his purposes is, of course, Alexander Hamilton’s: “To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them ...”.⁶³ This is a splendid passage for Judge Arnold as it *defines* the judicial power in just the manner his thesis needs.

⁵⁷ William Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND *69 (1765).

⁵⁸ **Id.**

⁵⁹ *Anastasoff*, *supra* note 4 at 901, citing Blackstone, *supra* note 57 at *69.

⁶⁰ *Anastasoff*, *supra* note 4 at 901.

⁶¹ **Id.** quoting Blackstone, *supra* note 57 at *259.

⁶² **Id.** at 901-02.

⁶³ *The Federalist* No.78 at 510; also No.78, at 507-08, and No.81, at 531. Also cited and quoted are James Madison and James Wilson; *Anastasoff*, *supra* note 4 at 902. The anti-federalists also believed in precedent, quoting Brutus; *Anastasoff*, *supra* note 4 at 903 n.13.

To summarize, in the late eighteenth century, the doctrine of precedent was well-established in legal practice (despite the absence of a reporting system), regarded as an immemorial custom, and valued for its role in past struggles for liberty. The duty of courts to follow their prior decisions was understood to derive from the nature of the judicial power itself and to separate it from a dangerous union with the legislative power. The statements of the Framers indicate an understanding of these principles. We conclude therefore that, as the Framers intended, the doctrine of precedent limits the “judicial power” delegated to courts in Article III.⁶⁴

Stare decisis, as the Framers saw it, is an inescapable aspect of judicial power; a purported rule denying it is unconstitutional.

Hart v. Massanari

Plaintiff-appellant Hart cited a non-published case and so counsel was ordered “to show cause as to why he should not be disciplined for violating Ninth Circuit Rule 36-3.” In response, he argued that *Anastasoff* had thrown sufficient doubt on the constitutionality of that rule to permit him to violate it. “We write to lay these speculations to rest.”⁶⁵

Judge Kozinski’s opinion is rich, diverse, and erudite. It’s essential strategy, however, is quite straightforward: Judge Arnold was correct that the Framers would surely have understand stare decisis in terms of the declaratory theory of judicial decision-making, but he erred as to the nature of the doctrine under that

⁶⁴ **Id** at 903. He then quotes Justice Story (Joseph Story, *Commentaries on the Constitution of the United States* §§377-78 (1833)) in additional support of this account of the Framers’ understanding; **id**.

theory and its consequences to the constitutionality of no-citation rules. The Framers' conception of stare decisis, judging from historical resources, was of *persuasive* precedent, not the strict horizontal stare decisis practiced by panels within our federal circuit courts of appeals or the strict vertical stare decisis operative in our modern, hierarchical court systems. No-citation rules treat unpublished cases as merely persuasive, not as binding precedent; they thus accord comfortably with treatment of the prior decisions in the founding era, and with the understanding of the Framers (should they have, indeed, vested the words "judicial power" with the restraining freight of stare decisis.)⁶⁶ If, then, the original understanding of the Framers is determinative of constitutional meanings, no-citation rules are not unconstitutional.

Accordingly, Hart's counsel had, in citing an unpublished opinion, violated the Ninth Circuit Court of Appeals' constitutionally valid prohibition. However, in light of the doubt cast by *Anastasoff* and the attorney's "good faith [in] seek[ing] to test [the] rule's constitutionality," the panel decided to "exercise our discretion not to impose sanctions."⁶⁷

Curiously, on Judge Kozinski's argument both decisions may have been wrong on the most pedestrian basis: the modal auxiliary verbs of their rules. The Eighth Circuit's Rule 28A(i) uses the words "Unpublished opinions are not precedent..." of any kind, but continues with discouragement, not a ban: "...and parties generally *should not* cite them." Two sentences later, however, it permits parties to "cite an unpublished opinion if the opinion has persuasive value on the material issue and no published opinion of this or another court

⁶⁵ Hart, *supra* note 6 at 1159.

⁶⁶ This argument was made with great thoroughness and care in Section III of Lee & Lenhof, *supra* note 8 at 153-65, published concurrently with *Hart v. Massanari*. Lee & Lenhof point out that "contrary to Judge Arnold's conclusion, the declaratory notion of common-law decisions aligns itself quite closely with the status that modern courts accord to unpublished decisions." *Id* at 161. "Thus, as compared to the historical baseline suggested in the *Anastasoff* opinion, the prevailing circuit rules do not *reduce* unpublished opinions to a lower class of precedent, as Judge Arnold supposes; they actually *elevate* published opinions to a higher degree of deference." *Id* at 165.

⁶⁷ Hart, *supra* note 6 at 1180.

would serve as well.”⁶⁸ On Judge Kozinski’s reasoning, this permission to cite unpublished opinions as persuasive is exactly in accord with the Framers’ understanding of stare decisis, *contra Anastasoff*. On the other hand, the Ninth Circuit’s Rule 36-3 uses a general prohibition: “Unpublished dispositions of this Court are not binding precedent ... [and generally] *may not* be cited to or by the courts of this circuit” The only exceptions are those necessary for res judicata, collateral estoppel, and law of the case. If the Constitution were to require cases at the very least to be persuasive authority, then this general prohibition would be unconstitutional. Did Hart’s counsel cite *Rice v. Chater*⁶⁹ as binding or persuasive? If as persuasive, then he would be constitutionally protected, *contra Hart*.

Originalism

Both protagonists in the *Anastasoff versus Hart* debate choose as their ground the interpretive position commonly called “originalism,” the understanding that may be attributed to the Framers of our Constitution. Despite some passionate rhetoric, nobody has privileged access to the specific intentions of the Framers: we work from surviving texts.⁷⁰ Sometimes those texts can be quite explicit, but in the interpretation of “judicial power” in Article III, none is unequivocally dispositive. Judicial power and the nature of precedent it does not appear to have been seen by the Framers as problematic or contentious. But in this originalist argument we are interpreting the key phrase “judicial power” and the nature of precedent through the understandings of the Framers as best we can reconstruct them.

⁶⁸ Eighth Circuit Rule 28A(i).

⁶⁹ No. 95-35604, WL 583605 (9th Cir. Oct.9, 1996); see *Hart*, *supra* note 6 at 1158.

Originalism is not an uncontested interpretive stance for any question of Constitutional interpretation, and not clearly correct or sensible in this case. Indeed, as Price writes, “In the absence of solid evidence of specific intent, one might argue, a constitutional interpretation that stands solely on “originalism” is a weak argument for invalidating non-citation rules.”⁷¹ I do not intend to enter a debate of the merits or obligation of originalism. But it does seem to raise difficult conceptual questions in this particular debate.

The problem with adopting originalism here is that it includes the declaratory theory of common law and precedent. Judges Arnold and Kozinski both recognize this, but do not seem to see it as problematic.⁷² However, it has to be a serious problem to the constitutionality and coherence of no-citation rules and their denial of precedential value to unpublished decisions, for it is a theory that few if any jurists, be they of the bench, bar, or academy, would presently espouse.⁷³ Certainly it does not appear to be the conception of common law decision making and stare decisis of either Judge Arnold or Judge Kozinski. My main argument in this paper is that any position on the wisdom and constitutionality of the no-citation rules hangs on one’s conception of stare decisis. To attempt to justify a position on a conception generally abandoned for at least a century would seem at least anachronistic, if not entirely irrelevant. But before coming to alternative theories of the judicial power and stare decisis, we should explore the declaratory theory a little further.

⁷⁰ Polly J. Price, who, of all the prior commentators I read, wrote most explicitly on the question of originalism, calls this “moderate originalism”: the general understanding, intention, or purpose of the Framers, citing Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U.L.REV. 204, 204-05 (1980); Price, *supra* note 9 at 84.

⁷¹ Price, *supra* note 9 at 84. Price’s thesis is that Judge Arnold in *Anastasoff* is right, but that you don’t need originalism to make the case. *Id.* at 83.

⁷² Judge Kozinski expresses caution about relying on original intent of the Framers “lest we freeze the law into a mold cast in the eighteenth century. The law has changed in many respects since the time of the Framing, some superficial, others quite fundamental.” *Hart*, *supra* note 6 at 1162.

⁷³ Justice Scalia is the only prominent member of the judiciary that I can think of who comes even close to being a declaratory theorist today. “Between the occasional flashes of humility are long stretches of arid self-righteousness.” Daniel A. Farber and Suzanna Sherry, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 30 (2002). Scalia’s utter, unshakable certainty of his own rectitude contrasts strongly with Learned Hand’s “The spirit of liberty is the spirit which is not too sure that it is right.”; quoted in Gerald Gunther, *LEARNED HAND*, 544 (1994). Others

The Declaratory Theory

Think of the cosmology current at the time of the Founding, the cosmology that the Framers would –at least publicly –have taken for granted. The universe and the earth and all its populations were created by God according to a plan. We still subscribe, more or less,⁷⁴ to this today in mathematics and the natural sciences. But two hundred to three hundred years ago most in the Anglo-American legal tradition believed that God also laid down a moral blueprint.⁷⁵ That moral blueprint was seen as the supreme law: “This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times; no human laws are of any validity, if contrary to this...”⁷⁶ Judges in common law decisions seek to find and apply this universal law, deity prescribed.⁷⁷

It follows that a common law decision, if accurately down-loaded by the judge, would dominate any other decision, including a statute, and so it was in the early days.⁷⁸ Lord Coke said in *Dr. Bonham's Case*:

who might count as declaratory theorists are those law and economics theorists who see no further than Kaldor-Hicks efficiency (maximize the aggregate wealth of the society) and their Pigouvian perfect market models as calculators of it.

⁷⁴ Unless of course one is a devout nouveaux solipsistic post-modern. “In Fishean pomo [“pomo” = “postmodernism; the reference is to Stanley Fish, a leading and outspoken postmodernist], all we have are competing claims, whether the issue is the numerical value of pi or the assertion that the Mossad destroyed the World Trade Center.” Edward Rothstein, *Moral Relativity Is a Hot topic? True. Absolutely.*, New York Times, July 13, 2002, §A, 13, 14 c.1.

⁷⁵ This is still popular today, if survey statistics of religious fundamentalism are anything to go by. It is not, however, officially receivable as a source of law in the modern secular state.

⁷⁶ Blackstone, *supra* note 57 at *41; but note that Prof. Thomas Lee has shown that Blackstone’s position is not presented with complete consistency; Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VANDERBILT L.REV. 647, 661-62 (1999).

⁷⁷ See Michael Sinclair, GUIDE TO STATUTORY INTERPRETATION, 31-32 (2000).

⁷⁸ 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. & PROC. 355, 383 (2001). (“Precedential analysis, according to these judges, expanded the judiciary’s power to allow them to void statutes.”); From the early 17th century: “[T]he customary law of England, which we doe likewise call *ius commune*, as comming neerest to the lawe of Nature, which is the root and touchstone of all good lawes, and which also is *ius non scriptum*, and written onley in the memory of man ... doth far excell our written lawes, namely our statutes or acts of Parliament.” Sir

[I]t appears in our books that in many cases the common law will controul acts of Parliament and adjudge them to be utterly void. For when an act of Parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such act to be void.⁷⁹

If you find this difficult to swallow, think of an analogy in mathematics: had the Indiana legislature passed its infamous bill to make π equal an even 3,⁸⁰ would that have made π equal 3? If you conceived of societal law as we do laws of mathematics and the natural sciences the impossibility of a legislature's countermanding it would appear the same. Of course legislatures did then as now have power, so they could back their choices with force. Recognition of this gave us the early concept of legislative supremacy and also the maxim of construing narrowly statutes in derogation of the common law.

On the declaratory theory, the aim of a judge should be to find the blueprint and its proper application; judging on the declaratory theory is finding and declaring, not making law.⁸¹ But since the seventeenth century⁸² there has been a clear difference between science and the law: scientists can use the empirical world to mediate their disputes, and their observations perforce tend to be pretty much the same.⁸³ The moral law, in contrast, does not present itself as an objectively observable property of inter-personal interactions. Different

John Davies, LE PRIMER REPORT DES CASES ET MATTERS EN LEY (1628), quoted by Thorne, *The Equity of a Statute and Heydon's Case*, 31 ILL. L. REV. 202, 207 (1936).

⁷⁹ *The Case of the College of Physicians*, commonly called *Dr. Bonham's Case*, 8 Co. 114a, 118a, 2 Brownl. 255, 265 (C.P. 1610). See Theodore F. T. Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30 (1926-27), S.E. Thorne, *Dr. Bonham's Case*, 54 LAW QUARTERLY REVIEW 543 (1938).

⁸⁰ Bill No. 246, Indiana State Legislature, 1897.

⁸¹ Professor Wesley-Smith points to the reason for the persistence of this notion of law finding rather than law making: "Judges have good reason to remain attracted to the declaratory theory, if only because it deflects the charge that decisional law is retrospective and undemocratic and it absolves them of personal responsibility for what they do. It is still commonplace for judges to talk of a final court's common law decision as erroneous, as though there were some standard ('the law') standing behind it." Peter Wesley-Smith, *Theories of Adjudication and the Status of Stare Decisis*, Laurence Goldstein, ed., PRECEDENT IN LAW, 73, 76 (Clarendon Press, Oxford, 1987).

⁸² At least since the work of Bacon and Galileo in the early 17th century.

⁸³ If you –even if you are a post-modern –and I look at the same thermometer in the same pot of pure water boiling on the beach fire, you will not see a reading of 150°F while I see 212°F.

observers may honestly ascribe different moral predicates to the same action; only one can be correctly applying the great blueprint, but how do you tell which?

They must have seen the great blueprint as written at a fairly high level of abstraction because one should properly find many variations according to varying circumstances when it was applied to cases. Francis Bacon said it nicely:

And as veins of water acquire diverse flavors and qualities according to the nature of the soil through which they flow and percolate, just so in these legal systems natural equity is tinged and stained by the accidental forms of circumstances, according to the site of territories, the disposition of peoples, and the nature of commonwealths.⁸⁴

Blackstone saw this too, and so denied that the common law of England should apply in “Our American plantations.”⁸⁵

An accurate answer to a question in litigation may not be simple given the difficulty of perceiving the moral blueprint, the relevant details of the interaction in question, and the factual environment. But past decisions of similar questions and traditional practice should be a source of reassurance. Indeed, if a person with expertise had previously visited a similar question, or many had and had developed a stable solution, that

⁸⁴ Spedding and Heath, VI THE WORKS OF FRANCIS BACON 418 (London, 1857-74); Daniel R. Coquillette, FRANCIS BACON 288 (Stanford U.P., Stanford, 1992).

⁸⁵ Blackstone, *supra* note 57 at **108-109:

[I]t hath been held that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being ... are immediately in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such, especially, as are enforced by penalties), the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted, and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provisional judicature, subject to the revision and control of the king in council Our American plantations are principally of the latter sort. ... And, therefore, the common law of England, as such, has no allowance or authority there, they being no part of the mother-country, but distinct (though dependent) dominions.

should be followed unless very compelling reasons indicate otherwise. As Blackstone put it “the monuments and evidences of our legal customs are contained in the records of the several courts of justice, in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity ... receive their binding power, and force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom.”⁸⁶ Sir Matthew Hale, writing earlier in the 18th century, listed “Common Usage, or Custom, and Practice ...[statutes; and] The Judicial Decisions of Justice, consonant to one another in the Series and Successions of Time.”⁸⁷ As higher courts do today, eighteenth century jurists took an eclectic approach to sources of authority.

But of all sources, judges in prior cases were the most authoritative. To Blackstone judges had, if not perfect vision, a privileged access to the blueprint underpinning the common law: “[T]he judges in the several courts of justice ... are the depositaries of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land.”⁸⁸ Hale was somewhat less mystical; he gives four practical reasons, only the second coinciding with Blackstone’s: First, because judges are chosen for their “greater Learning, Knowledge, and Experience in the Laws than others. 2^{dly}. Because they are upon their Oaths to judge according to the Laws of the Kingdom. 3^{dly}. Because they have the best Helps to inform their Judgments. 4^{thly}. Because they do *Sedere pro Tribunali*, and their Judgments are strengthened and upheld by the Laws of this Kingdom, till they are by the same Law revers’d or avoided.”⁸⁹ Thus if one were to be seeking the common law on a question, one would be best advised to consult the wisdom of prior judicial decisions.

⁸⁶ *Id* at **63-64 (contrasting acts of parliament which do not enjoy such authority.)

⁸⁷ Sir Matthew Hale, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 44 (1713)(Charles M. Gray, ed., U. Chicago Press, 1971).

⁸⁸ Blackstone, *supra* note 57 at *69.

On the declaratory theory of common law, a judicial decision is not itself law,⁹⁰ but is evidence of law, the best evidence one will find.⁹¹ “[I]ndeed these judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such custom as shall form a part of the common law.”⁹² Of course: judges may be arrogant, but it would be heresy to claim to see the mind of God. Hale is, as always, perspicuously on point: “Judicial Decisions,” he writes, are binding as law “between the parties thereto” unless reversed on appeal,

yet they [judicial decisions] do not make a Law properly so called, (for that only the King in Parliament can do); yet they have 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 tho’ such Decisions are less than a Law, yet they are a greater Evidence thereof than the Opinion of any private Persons, as such, whatsoever.⁹³

In the new United States, early in the nineteenth century, Chancellor Kent wrote “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.”⁹⁴

Thus we have *stare decisis*, the “established rule to abide by former precedents, where the same points come again in litigation.”⁹⁵ Conceptually it fit the declaratory theory and its metaphysical underpinnings, but it had the practical benefits of stability and certainty especially for those cases that needed certainty more than

⁸⁹ Hale, *supra* note 87 at 45.

⁹⁰ Kempin, *supra* note 9 at 33 (“It is doubtless true that the common law was viewed, by the colonists, as something other than and apart from decided cases.”)

⁹¹ Lee & Lenhof, *supra* note 8, lays out very thoroughly the declaratory theory as espoused by Blackstone and others of that time, and that it makes decisions merely evidence of the law.

⁹² Blackstone, *supra* note 57 at *69.

⁹³ Hale, *supra* note 87 at 45.

⁹⁴ Kent, *supra* note 54 at *475.

⁹⁵ Blackstone, *supra* note 57 at *69.

accurate justice.⁹⁶ Yet mistakes could still occur. Privileged access, optimal working conditions, assistance, and his oath, do make the oracular judge infallible. “Yet this rule [to abide by precedents] admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the Divine law.. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation.”⁹⁷ One can see the natural law orientation here: the prior holding was not “*bad law*, but ... it was *not law*...”⁹⁸ On the declaratory theory, the only way to vary a prior decision was to find it mistaken.⁹⁹

Notice, however, that the power to decide that a prior case was mistaken did not depend on the status of the court. In England it could not; the hierarchical structure of the English court system was not firmly in place until the mid-nineteenth century.¹⁰⁰ There could be no vertical stare decisis on the declaratory theory, nor could there be binding precedent. A prior decision was evidence of common law but not dispositive, and it lay in the power of any judge at any level to find alternative and, in sum, better evidence.¹⁰¹ Law finding capacity is independent of status.¹⁰² Thus, Plucknett tells us, prior to the nineteenth century, courts found it relatively easy to avoid unpalatable precedents. “[I]t was arguable that the precedents did not represent the true state of the law—a specious argument typical of Coke’s mentality.” Or one could blame the reporter “a device often used by

⁹⁶ **Id.**: “... as well as to keep the scale of justice even and steady, and not liable to waver with every new judge’s opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule which it is not in the breast of any subsequent judge to alter or vary from according to his own private sentiments: he being sworn to determine, not according to his own private judgments, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound an old one.”

⁹⁷ Blackstone, *supra* note 57 at **69-70.

⁹⁸ **Id.**, (italics in original).

⁹⁹ Wesley-Smith, *supra* note 83 at 76. He cites Hale, *supra* note 87 at 45.

¹⁰⁰ Theodore F.T. Plucknett, *A CONCISE HISTORY OF THE COMMON LAW* 350 (1956); in this aspect the United States led England.

¹⁰¹ Wesley-Smith, *supra* note 83 at 78.

¹⁰² It is perhaps not surprising that the first exposition of the power of vertical stare decisis occurred in an ecclesiastical court, part of a religious order thoroughly familiar with hierarchy. *Veley and Joslin v. Burder*, 1 Curt. 372, 163 Eng.Rep. 127 (Consistory Court of London, 1837)

Mansfield”.¹⁰³ Stare decisis on the declaratory theory did not –and conceptually *could not* --include the binding horizontal precedent practiced within our federal courts of appeals.

Sir Matthew Hale offers us perhaps the clearest and most succinct summary of the common law and stare decisis on the declaratory theory. Cases do not themselves make law; but they do “expound, declare, and publish” it, and their doing so is enhanced by “congruity” with prior decisions. Thus decisions of cases though “less than a Law”, are evidence of law, and as such better than the opinions of others outside the judiciary, better even than the opinions of “a bare grave Grammarian or Logician ...”. A prior case need not be exactly similar –“in Point” --to the one in question if it agrees “in Reason” or is analogous.¹⁰⁴ That was in 1713. Hale’s writings were voluminous and popular. The Framers were as likely to have been familiar with them as with Blackstone. Blackstone is more woolly but entirely consistent with Hale: “The doctrine of the law then is this: that precedents and rules must be followed unless flatly absurd or unjust: for though their reason be not obvious at first view, yet ye owe such a deference to former times as not to suppose that they acted wholly without consideration.”¹⁰⁵ And he immediately gives an example where a judge would follow the established precedents even though his sympathies ran to the contrary.

The declaratory theory of common law was unquestionably the dominant theory of the time and almost certainly the theory in contemplation at the Framing of the Constitution.¹⁰⁶ “Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177-78, 2 L.Ed. 60 (1803). This declaration of law is authoritative to the extent necessary for the

¹⁰³ Plucknett, *supra* note 101 at 349. That England had three systems with concurrent jurisdiction made it possible also to pick and choose among prior opinions. **Id.**

¹⁰⁴ Hale, *supra* note 87 at 45.

¹⁰⁵ Blackstone, *supra* note 57 at *70.

¹⁰⁶ For a detailed study of early American understandings of stare decisis see Lee, *supra* note 76 at 662-87.

decision, and must be applied in subsequent cases to similarly situated parties.”¹⁰⁷ It is the conception derided by Holmes as the “brooding omnipresence in the sky”;¹⁰⁸ it would not come under attack until the pioneer positivists of the the 19th century, Bentham and Austin. Austin, not always boring, called it

the childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely *declared* from time to time by the judges.¹⁰⁹

It is the conception of precedent on which Judges Arnold and Kozinski pinned their differences.¹¹⁰

It is easy to see that this theory is neither viable nor popular today. The underlying premise of the moral blueprint in the sky, universal and unalterable, simply does not accord with modern moral understanding or the democratic political ethic. The most striking practical indicator of inconsistency with the theory is the hierarchical structure of our court systems and the strict vertical stare decisis that results. Lower court judges are obliged to follow the opinions of judges higher in the system; as Lee & Lenhof point out, “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.”¹¹¹ The converse of vertical stare decisis, the accepted practice of circuit court judges and Supreme Court justices of treating lower court decisions as merely advisory, is equally out of accord with the declaratory theory. On the declaratory theory a prior judicial

¹⁰⁷ *Anastasoff*, *supra* note 4 at 899-900, citing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991); *Cohens v. Virginia*, 6 Wheat. 264, 399, 5 L.Ed. 257 (1821).

¹⁰⁸ *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917); *Holmes-Laski Letters* (London, 1953), ii. 822.

¹⁰⁹ John Austin, *LECTURES ON JURISPRUDENCE*, 634 (R. Campbell, ed. London, 1885)

¹¹⁰ See *Anastasoff*, *supra* note 4 at 901 (where he uses series of Blackstone quotes but also points out that the Framers learned this not only from Blackstone, but also from Coke and Hale; decisions are binding on later judges because judges find the law, independently of their own opinions, they don’t make it.); Price, *supra* note 9 at 89; *Hart*, *supra* note 6 at 1163-64 (“Common law judges did not make law as we understand that concept; rather, they “found” the law with the help of earlier cases that had considered similar matters. An opinion was evidence of what the law is, but it was not an independent source of law.” In fn.8 Judge Kozinski quotes Hale, and Mansfield: “In Lord Mansfield’s view, “[t]he reason and spirit of cases make law; not the letter of particular precedents.” *Fisher v. Prince*, 97 Eng.Rep. 876, 876 (K.B. 1762).” and “Opinions were merely judges’ efforts to ascertain the law, much like scientific experiments were efforts to ascertain natural laws.”; and at 1165 he quotes Blackstone, *supra* note 57 at *70-71, about the possibility of mistake.)

decision is evidence of the law, no matter what the status of the judge: the blueprint was consulted and applied to a set of facts; the result can be avoided only if it is shown to be mistaken. But if a decision is mistaken, it *must* be avoided;¹¹² there can be no binding precedent, as authority lies in principles laid down in the moral blueprint.¹¹³

On the declaratory theory, the difference between published and unpublished decisions falls by the wayside. Of course it was important to have records of decisions “... carefully registered and preserved” to be referred to “when any critical question arises, in the determination of which former precedents may give light or assistance.”¹¹⁴ But judges of that era simply did not have reliable recording systems, either in England or the new United States. In the United States in the late eighteenth through mid-nineteenth century recording of decisions was “unsystematic, idiosyncratic private reporting of vastly increased numbers of cases.”¹¹⁵ This may have been bothersome, yet on the declaratory theory it was not disastrous: the judge was looking at the decision as evidence of the law, not at its precise wording as some sort of rule. “Viewed in this light, the circuit rules’ dichotomy between published and unpublished opinions is difficult to condemn as a constitutional matter.”¹¹⁶ And in this light, attributing precedential value to only a select few decisions chosen by their authors makes very little sense: a judge’s decision, following the principles of the common law blueprint as best he can

¹¹¹ Lee & Lenhof, *supra* note 8 at 165.

¹¹² Wesley-Smith, *supra* note 83 at 78, quotes Baron Parke in *Mirehouse v. Rennell*, (1833) 1 Cl & F 527, 566; 6 ER 1015, 1030 that it would be wrong not “to retract a judgment he was later convinced was erroneous: ‘for none but a weal, nay a wicked mind, will persist in error, if the understanding and more mature reflection convince a man that he had before formed a wrong judgment.’”

¹¹³ Lord Mansfield: “[T]he law of England would be a strange science indeed if it were decided upon precedents only. Precedents serve to illustrate principles, and to give them a fixed certainty. But the law of England, which is exclusive of positive law, enacted by statute, depends upon principles; and these principles run through all the cases according as the particular circumstances of each have been found to fall within the one or other of them.” *Jones v. Randall*, 1 Cowp. 37, 39, 98 Eng.Rep. 954, 955 (1774); there is another report of the case which records the point thus: “The law would be a strange science if it rested solely upon cases; and if after so large an increase of commerce, arts and circumstances accruing, we must go to the time of Rich. 1 to find a case, and see what is law. Precedent indeed may serve to fix principles, which for certainty’s sake are not suffered to be shaken, whatever might be the weight of the principle, independent of precedent. But precedent, though it be evidence of law, is not law in itself; much less the whole of law.” *Jones v. Randall*, Loft. 384, 386, 98 Eng.Rep. 706, 707 (1774).

¹¹⁴ Blackstone, *supra* note 57 at *69.

¹¹⁵ Dragich, *supra* note 12 at 773

¹¹⁶ Lee & Lenhof, *supra* note 8 at 165.

determine them, is evidence of law even if no opinion sees public distribution. It could only be otherwise were the judge in dereliction of duty.¹¹⁷

What can we conclude at this stage? The declaratory theory of the common law and stare decisis was surely the conception of the Framers, to the extent they thought of it at all. As Judge Arnold says, it does not permit a court to consign a selection of decisions to precedential oblivion or subsequent judges to ignore decisions purportedly thus consigned. Thus the Framers' declaratory theory of the judicial power would not allow Judge Kozinski's opinion in *Hart* that the constitution condones the 9th Circuit's Rule 36-3 that courts and counsel may, indeed must, ignore most of their decisions. But the attention that must be paid to prior decisions is not the binding precedential power Judge Arnold would attribute to them: it would not oblige him to follow the unpublished 8th Circuit decision in *Christie v. United States*¹¹⁸ in deciding *Anastasoff*; it would oblige him to take account of it, but the 8th Circuit's Rule 28A(i) permitted that anyway. Thus the declaratory theory does not support *Anastasoff*'s finding that Rule 28A(i) was unconstitutional.

But it is strange indeed to allow the matter to rest on a theory so thoroughly at odds with jurisprudential thought these last hundred or more years. In this particular matter, even moderate originalism seems thoroughly out of place. How would we resolve this debate on more acceptable theories of judicial power and its limitations?

§ II: *The Enactment Theory and the "Standard" Theory*

¹¹⁷ And that is information a judge would hardly be likely to provide by declaring the decision non-precedential!

¹¹⁸ *Supra* note 43.

Stare decisis is a very natural human propensity, not at all peculiar to judicial decision-making.¹¹⁹ We learn from experience.¹²⁰ But outside the courts one doesn't have to follow another's course or justify refusing to do so;¹²¹ and although doing so may be prudent, mere prudence hardly defines a legal system.¹²² To be an institutional constraint on judicial power, stare decisis must at some time oblige a judge to follow a prior decision when personally she would rather not; that is, the justification required for deviating must be publicly adequate, not just personally satisfying.¹²³

We do not have statutes mandating stare decisis; given the entrenched status and intrinsic malleability of the doctrine, it is doubtful that it would make any difference if we did.¹²⁴ Nor can a case itself generate the doctrine as law;¹²⁵ the precedential force of the case purporting to establish stare decisis would itself depend on the rule it announced, a bootstrapping circularity.¹²⁶ Stare decisis remains, as Justice Frankfurter so famously

¹¹⁹ Soia Mentschikoff, *The Significance of Arbitration—A Preliminary Inquiry*, 17 LAW & CONTEMP. PROBS. 698, 701 (1952) (“The doctrine of precedent is not an institution peculiar to our common law. It is in essence a response to the human need in any group for reckonability and predictability of result.”).

¹²⁰ Kempin, *supra* note 9 at 29 (“stare decisis is a peculiar and legal adaptation of the common practice of relying on past experience.”)

¹²¹ Arnold, *supra* note 5 at 221 (“A court should not, without very good reasons publicly acknowledged, depart from past holdings.”); ““Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification.” *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)”, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) *per* O'Connor, J.

¹²² Kempin, *supra* note 9 at 30 (experience and custom “would be too vague and irregular to constitute a legal system.”)

¹²³ This is stronger than Professor Price's “core idea” of stare decisis: “The core idea of common law court systems is that what courts have done in the past, to some extent and to some degree, must at least be considered when a similar case comes along.” Price, *supra* note 9 at 106-07. It is more in accord with pioneer court reporter William Cranch's view: 90-91 (P-1, P-4, P-9) quotes Cranch 1804: “He can not decide a similar case differently, without strong reasons ...”. 5 U.S. (1 Cranch) iii-iv (1804)(Preface by William Cranch)(quoted by Price, *supra* note 9 at 90-91.) Similarly, “[T]he common law doctrine of *stare decisis* gives a decided case authoritative force with respect to future decisions in other cases, whether or not the case is later thought to have been decided correctly in the light of principle.” Thomas C. Grey, *Langdell's Orthodoxy*, 45 U.PITT.L.REV.1, 24(1983).

¹²⁴ Perhaps the closest is the House of Lords Practice Statement of 1966, [1966] 3 All E.R. 77, 1 W.L.R. 1234 (H.L.), but this is, despite its lofty origins, still a statement of intent of a court. The practice statement indicated a change from prior practice:

[Their Lordships] propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from previous decision when it appears right to do so.

As Professor Patterson points out the “modification” from the strict adherence to precedent announced in the *London Street Tramways* case, *London Street Tramways Co., Ltd. v. London City Council*, [1898] A.C.375, was more a recognition of what had in fact become the practice than a real change. Alan Patterson, *THE LAW LORDS*, 143-155 (1982).

¹²⁵ The announcement of the House of Lords in *London Street Tramways*, *supra* note 125, to the contrary notwithstanding.

¹²⁶ Glanville L. Williams, *SALMOND ON JURISPRUDENCE*, 187 (11th ed., 1957).

wrote, “a principle of policy and not a mechanical formula of adherence to the latest decision”¹²⁷ It may be a thoroughly entrenched principle of policy, intrinsic to our prevailing concept of judicial power, but nevertheless it still stands in need of justification: if *stare decisis* cannot be justified then it should be abandoned as an unwarranted restraint on freedom;¹²⁸ and its justifications will determine the nature and extent of the constraints it puts on judicial power. The latter is exactly what is in question in the debate over no-citation rules.

The declaratory theory had its background justification in the moral blueprint drawn by the white bearded lady in the sky, but it is not one on which courts of our modern secular state can rely. Jurists of that era, however, were well aware of alternative justifications tuned to societal needs. Blackstone saw it as serving the interests of stability, certainty, and minimizing judicial discretion.¹²⁹ These, along with justice and fairness,¹³⁰ are the values commonly trotted out in its support today. Justice Rehnquist expressed them succinctly: “*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual

¹²⁷ *Helvering v. Hollock*, 309 U.S. 106, 119 (1940). Judge Kozinski emphasizes that *stare decisis* is contingent: “The very existence of the binding authority principle is not inevitable. The federal courts could operate, though much less efficiently, if judges of inferior courts had discretion to consider the opinions of higher courts, but “respectfully disagree” with them for good and sufficient reasons.” *Hart*, *supra* note 6 at 1174.

¹²⁸ For this reason, simply saying that following precedent is what judges and lawyers customarily do, as a matter of fact, and are socialized into doing –see, e.g., A.W.B.Simpson, *The Common Law and Legal Theory*, Simpson, A.W.B.(ed.), OXFORD ESSAYS IN JURISPRUDENCE(2d Series), 77, 94 (1973) –is not adequate. After all, if what judges do is not justifiable, then it should be changed.

¹²⁹ Blackstone, *supra* note 57 at *69 (“For it is an established rule to abide by former precedents, where the same points come again in litigation: as well as to keep the scale of justice even and steady, and not liable to waver with every new judge’s opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule which it is not in the breast of any subsequent judge to alter or vary from according to his own private sentiments: he being sworn to determine, not according to his own private judgments, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound an old one.”) Alexander Hamilton, *The Federalist*, No.78, 507 at 510: “To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them”

¹³⁰ Judge Arnold cites only Frederick Schauer, *Precedent*, 39 STAN.L.REV. 571, 595-602 (1987) for “Modern legal scholars tend to justify the authority of precedents on equitable or prudential grounds.” –i.e., (1) fairness, (2) predictability, (3) to help judges’ judging. *Anastasoff*, *supra* note 4 at 901, n.7. But he was drawing a contrast with it as conceived in the Founding era, not establishing grounds for the modern doctrine.

and perceived integrity of the judicial process. See *Vasquez v. Hillery*, 474 U.S. 254, 265-266 (1986).”¹³¹ It is also justified by the demands of efficiency: “The obligation to follow precedent begins with necessity, ... With Cardozo, we recognize that no judicial system could do society’s work if it eyed each issue afresh in every case that raised it.”¹³²

But the common law and stare decisis¹³³ have only survived over so many centuries in England and the United States, and through such a variety of circumstances, because of their great flexibility and adaptivity,¹³⁴ Professor White wrote that “the decisions of appellate courts, upon being issued, are just beginning their history...”;¹³⁵ not only are they followed and distinguished, they get reshaped, reframed, their focii get moved, their justifications changed and refurbished, not just by academic commentators but by later judges. It is as if the original opinion were the photographic negative on which subsequent critics work to make prints. They may take only a portion of it into a new frame, they may adjust the intensity of light on different parts, they may give it a wholly new color; with today’s technology they may even “pick up, drag, and drop” elements from one part to another or to nowhere. So too is it with the original decision. But this very adaptivity depends on an “inherent corrigibility,”¹³⁶ in common law that cuts against socially prized stability.¹³⁷

¹³¹ *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) *per* Rehnquist, C.J.

¹³² *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 844 (1992) *per* Souter, J. (in the ellipsis: “and a contrary necessity marks its outer limit”, of which more later.)

¹³³ The two are inextricably linked: The Right Hon. Lord Wright, *Precedents*, 8 CAMBRIDGE L.J. 118, 118 (1943), reprinted at 4 U.TORONTO L.J. 247 (1942); see also Levi, Edward H., AN INTRODUCTION TO LEGAL REASONING, 2(1949), Williams, *supra* note 127, at 162 *et seq.*

¹³⁴ As noted above, this was accommodated under the declaratory theory by having the universal source law at a conveniently high level of abstraction and incorporating such contextual detail as necessary to reach a satisfactorily distinct justification. See text *supra* at notes 84-85.

¹³⁵ White, TORT LAW IN AMERICA 115 (1980)

¹³⁶ This felicitous term comes from Simpson, *supra*, note 129 at 94.

¹³⁷ See Hart, *supra* note 6 at 1174 (“While bringing to the law important values such as predictability and consistency, it also (for the very same reason) deprives the law of flexibility and adaptability.” Here he cites *Casey*, *supra* note 133 at 868, quoting “The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue

Lord Mansfield, as adept a manipulator of precedent as Justice Cardozo would be nearly two hundred years later, expressed both sides with his usual perspicuity:

In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other.

Because speculators in trade then know what ground to go upon.¹³⁸

[A] statute very seldom can take in all cases, therefore the common law, that works itself pure by rules drawn from the fountain of justice, is for this reason superior to an act of parliament.¹³⁹

Here is the essential tension underlying the common law and stare decisis. If stare decisis is meaningful, it must require a court sometimes to make less than optimal decisions because, and only because, that or a superior court has previously decided a similar case in a way that is now less than optimal. That may provide stability and predictability, but how then is it to adapt to changing societal needs, to mould itself to the demands of justice?

has not changed so fundamentally as to render the commitment obsolete.” Note that this text after the “and” is incompatible with the enactment theory, notes 149-152 *infra*.)

¹³⁸ *Vallejo v. Wheeler*, 1 Cowp. 143, 153, 98 Eng.Rep. 1012, 1017 (K.B. 1774). Both Justices Holmes and Brandeis neglected the limitation to business. Holmes: “one of the first things for a court to remember is that people care more to know that the rules of the game will be stuck to, than to have the best possible rules.” Letter from Oliver Wendell Holmes, Jr., to Franklin Ford (Feb.8, 1908), reprinted in Richard A. Posner, *THE ESSENTIAL HOLMES* 201 (1992); Brandeis: “[I]n most matters it is more important that the applicable rule be settled than that it be settled right.” *Commissioner v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932)(Brandeis, J., dissenting).

¹³⁹ *Omychund v. Barker*, 1 Atk. 21, 33, 26 Eng.Rep. 15, 22-23 (Ch. 1744) (argument of Mr.Murray, then Solicitor-General of England, later Lord Mansfield). The willingness of courts to drink from the “fountain of justice” is not always evident. Critics have long bemoaned the reluctance of courts to react to societal change. Arch-positivist John Austin wrote:

But it is much to be regretted that Judges of capacity, experience and weight, have not seized every opportunity of introducing a new rule (a rule beneficial for the future). ... [T]he Judges of the Common Law Courts would not do what they ought to have done, namely to model their rules of law and of procedure to the growing exigencies of society, instead of stupidly and sulkily adhering to the old and barbarous usages.

Austin, *supra* note 110 at 647.

There is one other great problem for theories of common law and stare decisis, the requirement of notice. A person cannot be bound by a law of which he or she has no notice.¹⁴⁰ How could a person follow a rule if she didn't know it? As Jeremy Bentham said: "That a law may be obeyed, it is necessary that it should be known ... that it may be known, it is necessary that it be promulgated."¹⁴¹ Very few people in normal life are able to find cases,¹⁴² and they ought not have to hire someone to do it for them. Among those with the necessary expertise, put two on opposite sides of a dispute and they will come up with different cases, and different interpretations of the cases they find in common. And a major decision, one that we will come to call a landmark, has no precursors or rejects those it has; thus it will appear, at least to the losing party and all those who advised their clients otherwise, to be retroactive, temporally preclusive of prior notice.¹⁴³ Any explanation, or justification of the judicial power and its constraint by stare decisis has to account for this joint problem of notice and retroactivity.

¹⁴⁰ Aquinas, St. Thomas, *SUMMA THEOLOGICA*, Question 90, Articles 1 and 3 (1273); John Locke, *SECOND TREATISE ON GOVERNMENT*, §§ 57, 136 (1690); Blackstone, *supra* note 57 at **45-46; G.F.Hegel, *PHILOSOPHY OF RIGHT* 138, ¶ 215 (T.Knox trans. 1942) *See also id.* at 134-136, ¶211. "If laws are to have the binding force that, in view of the right self-consciousness ... they must be made universally known."; Jeremy Bentham, *Of Promulgation of the Laws*, 1 *WORKS* 155 (Bowring, ed. 1859); Lon L. Fuller, *THE MORALITY OF LAW*, 34-35,39(1964); *Lambert v. California*, 355 U.S. 225 (1957); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

¹⁴¹ Bentham, *supra* note 141 at 157. Similarly, see Aquinas, *supra* note 141 at Question 90, Art. 4 ("[I]n order that a law obtain the binding force which is proper to a law, it must needs be applied to the men who have to be ruled by it. Such application is made by its being notified to them by promulgation. Wherefore promulgation is necessary for the law to obtain its force."); John Locke, *SECOND TREATISE OF GOVERNMENT*, §57 (1690)("[N]o body can be under a law, which is not promulgated to him.").

¹⁴² There are still fewer than half a million lawyers in this country, out of over two hundred and fifty million people.

¹⁴³ This problem with notice and retroactivity led Bentham to a wonderful metaphor:

Do you know how they make [common law]? Just as a man makes laws for his dog. When your dog anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me.

Bentham, *supra* note 141, vol.V at 235. But retroactive laws have been thought anathema for about as long as we have records; *see Ricciardi & Sinclair, Retroactive Civil Legislation*, 27 *U.TOL.L.REV.* 301, 328 (1996)("As early as 353 B.C. in Athens, Demosthenes called [a retroactive] statute "the most disgraceful and scandalous ever enacted in your assembly.""). Demosthenes' Speech Against Timocrates (353 B.C.), in *DEMOSTHENES AGAINST MEIDIAS, ANDROTION, ARISTOCRATES, TIMOCRATES, ARISTOGEITON* 370-71 (J.H.Vince trans., T.E.Page et al. eds., 1935).

By mid-nineteenth century the scathing attacks of positivists John Austin and Jeremy Bentham had taken their toll on the declaratory theory;¹⁴⁴ judge's did not find law, they made it.¹⁴⁵ If judges made law, then courts superior in the hierarchy imposed superior law on inferior courts. The distinction between vertical and horizontal stare decisis, which made no sense under the declaratory theory, became operative. Vertical stare decisis could become strict, the law, not merely persuasive evidence of an underlying universal moral law;¹⁴⁶ it became the most commonplace and functional aspect of precedent.¹⁴⁷ Horizontal stare decisis could be as strict or persuasive as the court saw fit. That it could be strict, as it is within the circuit courts of appeals today (only changeable by an en banc court or the Supreme Court, both very rare), further attests to the demise of the declaratory theory.

But how did judges make law? There are two major theories of judicial decision-making and stare decisis in vogue today, the enactment theory and what might now be called the "standard" theory. They are not entirely mutually exclusive, and neither is entirely satisfactory. I shall describe and evaluate them *seriatim*, and assess their relation to the debate over the no-citation rules in our federal circuit courts of appeals.

¹⁴⁴ Austin, *supra* note 110 at 634 (the declaratory theory is a "...childish fiction employed by our judges, that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity, and merely *declared* from time to time by the judges.")

¹⁴⁵ Hart, *supra* note 6 at 1168 ("Lawyers began to believe that judges made, nor found, the law. This coincided with monumental improvements in the collection and reporting of case authorities.") Jim Evans, *Change in the Doctrine of Precedent during the Nineteenth century*, Laurence Goldstein, ed., PRECEDENT IN LAW, 35, 68 (1987) (by the 1860s "Bentham's term for case law, 'judge-made-law', had become a popular term...").

¹⁴⁶ Wesley-Smith, *supra* note 83 at 81 ("When a judge is recognized, however, as able to *make* law, the notion of vertical *stare decisis*—of a court being bound by decisions of courts above it in the hierarchy—is perfectly rational. No superior court is infallible when it 'declares' law, but a superior court can have greater authority than a lower court to 'make' law.")

¹⁴⁷ Hart, *supra* note 6 at 1170: "A district judge may not respectfully (or disrespectfully) disagree with his learned colleagues on his own court of appeals who have ruled on a controlling legal issue, or with Supreme Court Justices writing for a majority of the court."

The Enactment Theory

The enactment theory holds that judicial decisions (cases) create rules; there are rules in opinions, of much the same kind as we find in statute books. As one eminent jurisprude wrote, “This may be called the ‘School-rules concept’ of law, and it more or less assimilates all law to statute law.”¹⁴⁸ It is possibly the most common conception of judicial power in law schools today, as it is the theory behind the “*R*” (“Rule”) in the popular acronym “IRAC”,¹⁴⁹ a formula for planning briefs and examination answers. It is in this sense that Judge Easterbrook used it when he wrote “Judges both resolve disputes and create rules.”¹⁵⁰

Although a court would not have the opportunity to create the rule had the dispute not been brought to it for resolution, its decision will not only instantiate a rule, but will give the rule conceptual priority. The rule crafted by the court to govern future decision-makers has to be a verbal formulation of greater generality than a mere recitation of the facts of the case and “affirmed” or “reversed and remanded ...” or the like. Making the decision resolving the dispute is what gives that verbal formula its status and power as a rule, with power to control subsequent lower court decisions and, on a federal court of appeals, subsequent coordinate panels.¹⁵¹

Binding authority within this regime cannot be considered and cast aside; it is not merely evidence of what the law is. Rather, caselaw on point *is* the law.” (citations omitted)

¹⁴⁸ Simpson, *supra* note 129 at 82.

¹⁴⁹ **Issue – Rule – Application/analysis/argument – Conclusion**

¹⁵⁰ Frank Easterbrook, *The Supreme Court 1983 Term, Forward: The Courts and the Economic System*, 98 HARV. L. REV. 4, 5 (1984). The idea was spelled out, perhaps for the first time explicitly, in Goodheart, *Determining the Ratio Decidendi of a Case*, 40 YALE L. REV. 161 (1930).

¹⁵¹ We should avoid turning this into a verbal question, making all analysis turn on what is the meaning of “rule”. But some minimal qualities go along with any conception of prescriptive rule, such as for example being general (i.e., having at least one common noun phrase), being in an identifiable, canonical verbal formula, having authority independent of the grounds for its enactment, etc. See Michael Sinclair, *What is the ‘R’ in ‘IRAC’?* __N.Y.L.S.L.REV. __, §2 (200__)(forthcoming)(outlining a minimal family resemblance of legal rules).

How does this “enactment theory” of common law decision-making account for *stare decisis*, the power of precedent? The use of precedents is thought of as akin to the use of a code: apply the rule of the precedent case to this dispute and resolve it accordingly. “Judges, when they decide particular cases at common law, lay down general rules that are intended to benefit the community in some way. Other judges, deciding later cases, must therefore enforce these rules so that the benefit may be achieved.”¹⁵² This is one of the principal virtues of the enactment theory: it makes the question of *stare decisis* redundant. No explanation is needed. The hierarchy of courts produces an hierarchy of rules and a decision-maker must follow those that come from above, and if one is on a federal court of appeals, those that come from a collegial panel.¹⁵³

The enactment theory also generates stability, predictability, and reliability. Rules are evenhanded, predictable, and consistent,¹⁵⁴ and “foster[] reliance on judicial decisions.”¹⁵⁵ What could be more stable and reliable than authoritative, canonical verbal formulae? Just as statutes are the same sets of words for all who must follow them, so are the rules enacted in judicial decisions. They also “contribute[] to the actual and perceived integrity of the judicial process”,¹⁵⁶ “avoid an arbitrary discretion in the courts”,¹⁵⁷ and insure against “the caprice or will of judges.”¹⁵⁸ Finally, the enactment theory also accounts for the demands of efficiency,

¹⁵² Ronald Dworkin, *TAKING RIGHTS SERIOUSLY*, 110 (1977)(Dworkin is implacably hostile to the enactment theory; he continues the quoted passage “If this account were a sufficient justification of the practices of precedent, then [a judge] could decide these hard common law cases as if earlier decision were statutes ... But he will encounter fatal difficulties if he pursues that theory very far.”) Similarly Colin Manchester, David Salter, and Peter Moodie, *EXPLORING THE LAW: THE DYNAMICS OF PRECEDENT AND STATUTORY INTERPRETATION*, 3, 4 (2nd ed., 2000)(“A legal rule established by the ratio of a case forms a precedent for application in future cases.”).

¹⁵³ Some writers have gone so far as to deny that there is *stare decisis* in supreme courts: as a supreme court has the power to overrule its prior decisions it is not bound by them, therefore they cannot have created rules for any but junior courts! Horizontal *stare decisis* does not exist!? For example “[A]ppellate courts, or so-called ‘higher’ courts, are not legally bound to adhere to the principle of *stare decisis*.” Glaser, Lieberman, Ruescher, Su, & Mills, *THE LAWYER’S CRAFT*, 23 (2002). *See also*, Manchester, Salter, and Moodie, *supra* note 153 at 3, 4.

¹⁵⁴ *Cf.* Justice Rehnquist’s account of the virtues of *stare decisis* in *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Alexander Hamilton, *The Federalist*, No.78, 507at 510.

¹⁵⁸ Joseph Story, *Commentaries on the Constitution of the United States* §§377-78 (1833), quoted in *Anastasoff*, *supra* note 4 at 903.

relieving the judiciary of the burden of considering the factual details and argument of a precedent case; they must simply apply the rule, just as they would a statute.¹⁵⁹

The most obvious criticism of the theory is that it simply abandons the common law's sensitivity to the interests of justice.¹⁶⁰ Rules have the great virtue of certainty, but they ignore much of the variability and richness of the natural topology. Common law can be as fact sensitive as a situation calls for; rules by their generality lump facts into classes, and choose among them which is to count.¹⁶¹ This same stability and reduced sensitivity inhibits adaptation to developing social mores and technology. The rule must remain fixed, at least until a higher authority –the legislature, higher court, or, for federal courts of appeals, the circuit en banc – should overrule it.

At least one important theorist, Professor Fred Schauer, has embraced this eschewing of justice. According to Schauer, common law courts should forego optimal immediate decisions for the sake of more general ideals, expressible as rules. The constraint of precedent, Schauer argues, applies prospectively as well as retrospectively:¹⁶²

the conscientious decisionmaker must recognize that future conscientious decisionmakers will treat her decision as precedent, a realization that will constrain the range of possible decisions about the case at hand.¹⁶³

¹⁵⁹ This is not to pretend that applying rules is either simple or determinate. The difficulties associated with statutory interpretation and the burgeoning judicial and academic debate over them should sufficiently negate any such suggestion.

¹⁶⁰ For an extensive criticism of the enactment theory, see Sinclair, *supra* note 152 [What is the 'R' in 'IRAC'?]

¹⁶¹ Justice Scalia wrote: "But the whole point of rulemaking (or of statutory law as opposed to case-by-case common law development) is to incur a small possibility of inaccuracy in exchange for a large increase in efficiency and predictability." *Association of Data Processing Service Organizations, Inc. v. Board of Governors of the Federal Reserve System*, 745 F.2d 677, 689 (D.C.Cir. 1984), (Scalia, C.J.).

¹⁶² Schauer, *supra* note 131 at 571-3, 574, 578, 589.

¹⁶³ *Id.* at 589

Thus the judge is restrained by the force of precedent even if there has never been a similar case in the past: the judge must take into account future cases that might be assimilated under the description of this one.¹⁶⁴ “The decisionmaker must then decide on the basis of what is best for *all* of the cases falling within the appropriate category of assimilation.”¹⁶⁵ Taking account of all future decisions that are the potential progeny of this decision can require a less than optimal, less than just decision in the case at hand.¹⁶⁶

The enactment theory’s “rule of the case” also gives us pause as to the requirement of notice. Certainly in those behavioral domains in which we seek guidance before acting, such as issuing securities or estate planning,¹⁶⁷ rules provide the ideal guidance. But these are also typically the behaviors for which we seek professional guidance before acting. What about most of ordinary life, the domains governed by tort law and small value contracting? Ordinary people do not and could not be expected to know of the case rules, to look them up, or to seek professional advice before going about their business. Nor would we want them to; society cannot afford it.¹⁶⁸ Are they at the mercy of secret rules? On the enactment theory they are. Even those who

¹⁶⁴ “the many directions in which it may be extended.” *Id.* at 574. This is not as implausible as it may first appear. Think of the example used by Schauer: “... fear that allowing restrictions on Nazis because they are Nazis will establish a precedent for restrictions on socialists because they are socialists...”; *id.* at 578. As he notes, the example is a reference to the dispute over allowing Nazis to march in Skokie, Illinois.

¹⁶⁵ *Id.* at 589.

¹⁶⁶ “...in some cases we will make decisions that are worse than optimal for that case taken in isolation.” *Id.* What a colossal ego a judge would have to have for this attitude; she’d have to think herself smarter than all those who might meet such questions in the future. Surely parties to present litigation should not be denied a just decision merely because the judge takes a patronizing attitude to other and future judges.

¹⁶⁷ Characteristically rich people’s joys and problems.

¹⁶⁸ Lord Mansfield recognized the difference between behavioral domains in which we do take prior notice of the law and those in which we do not by restricting his predictability goal to “all mercantile transactions.” *Vallejo v. Wheeler*, 1 Cowp. 143, 153, 98 Eng.Rep. 1012, 1017 (K.B. 1774). Holmes and Brandeis, in making the point without limitation, were overbroad; *see* text and note 138-39 *supra*. To be sure, secondary players in non-notice domains –lawyers and insurers who must settle claims –may wish for certain, conservative law, but theirs is not the behavior governed. In passing, notice that, in his reason (“Because speculators in trade then know what ground to go upon”) Mansfield also anticipated Coase, R.H.Coase, “*The Problem of Social Cost*,” 3 J. LAW & ECON. 1 (1960).

do take professional advice in planning action but then become party to a landmark case, effective retroactively, can rightly complain at being governed by an undiscoverable rule.

The enactment theory must also face the problem of power: where do judges get the power to make rules? The Framers knew how to allocate rule making power and did so in Article I, section 1: “All legislative powers herein granted shall be vested in a Congress of the United States ...”. The courts, in contrast, were given judicial power.¹⁶⁹ Could judicial power include the power to make rules, legislative power? The words are fairly clear, especially the “All legislative power...” of Article I, section 1; they rather preclude their being any allocation of legislative power to the judicial branch. This is a serious problem for the enactment theory, as a rule to cover cases beyond that before the court must have common noun phrases and predicates reaching more general, and thus different cases. But rules governing beyond the specific are legislative.¹⁷⁰ The separation of powers is a central concept of our Constitution; the Framers saw combining those powers as “the very definition of tyranny.”¹⁷¹ Thus the enactment theory, were it correct, would create serious constitutional problems of separation of powers: rule making is a legislative function (one should, perhaps, say *the* legislative function), not a judicial power.

Judge Kozinski is, in *Hart*, an avowed enactment theorist: “Writing an opinion is not simply a matter of laying out the facts and announcing a rule of decision. Precedential opinions are meant to govern not merely the cases for which they are written, but future cases as well.”¹⁷² This is not merely gratuitous theorizing, but part of his reasoning in that case. He continues:

¹⁶⁹ Article III

¹⁷⁰ This is a distinction Justice Traynor was drawing when he said “[A] judge invariably takes precedent as his starting point; ... [s]tare decisis signifies the basic characteristic of the judicial process that differentiates it from the legislative process.” Roger Traynor, *The Well-Tempered Judicial Decision*, 21 ARK.L.REV. 287, 290 (1967) [!]

¹⁷¹ *The Federalist Papers* #47, James Madison. See Hoffman, *supra* note 11 at 347 (“Judicial independence and neutrality are the fundamental motivations of Article III.”)

¹⁷² *Hart*, *supra* note 6 at 1176. See also Kozinski & Reinhardt, *supra* note 6 at 43.

Moreover, the rule must be phrased with precision and with due regard to how it will be applied in future cases. A judge drafting a precedential opinion must not only consider the facts of the immediate case, but must also envision the countless permutations of facts that might arise in the universe of future cases. Modern opinions generally call for the most precise drafting and re-drafting to ensure that the rule announced sweeps neither too broadly nor too narrowly, and that it does not collide with other binding precedent that bears on the issue. ... When properly done, it is an exacting and extremely time-consuming task.¹⁷³

The present case load of the federal circuit courts of appeals makes it impossible to devote such time, care, and attention to proper selection and drafting of the rule of decision in all cases.

How do no-citation rules interact with the enactment theory? The no-citation rules' denial of precedential power to applicable decisions requires decision-making without rule-making. The theory doesn't account for that except when the decision is under a rule already laid down. If the selection of cases for non-publication is according to the usual criteria, that is merely routine decisions under established law, then prohibiting citation and the enactment theory accord very well.¹⁷⁴ In fact after the rule has been laid down in the first decision on point, all subsequent applications would do little for notice, stability, limiting judicial whimsy, or justice. In such cases and only such cases, the judicial power, exercised by applying a judge-made rule, does not seem to require publication or precedential attention.

The major difficulty is not with no-citation rules and the Constitution, it is with the enactment theory itself. It accounts for some of the virtues of common law and stare decisis, but its inadequacy in respect of

¹⁷³ Hart, *supra* note 6 at 1176-77.

notice, adaptivity, and authority make it difficult to accept seriously. And the theory simply does not account for what we do in practice, be it judicial or advisory or representational or academic. We do not quote the carefully crafted rule of the precedent case and argue that it does or does not apply to these facts.¹⁷⁵ We compare the facts of different cases, and adopt or reject the judges' reasoning in them.¹⁷⁶ Even the established common law rules are subject to various formulations and interpretations, notwithstanding authoritative precedent decisions.

. . . it is a feature of the common law system that there is no way of settling the correct text or formulation of the rules, so that it is as a single rule in what Pollock called "any authentic form of words." ...[I]f six pundits of the profession, however sound and distinguished, are asked to write down what they conceive to be the rule or rules governing the doctrine of *res ipsa loquitur*, the definition of murder or manslaughter, the principles governing frustration of contract or mistake as to the person, it is in the highest degree unlikely that they will fail to write down six different rules or sets of rules.¹⁷⁷

Nothing similar to a statute or "school rule" can be found in the supposed rules of judicial decisions.

The Standard Theory

¹⁷⁴ It is, however, well established that the limitation of non-publication to the legally routine is widely flouted. *See text supra* at notes ____-____.

¹⁷⁵ Ronald Dworkin refers to "the feature that defeated the enactment theory, which is that the force of a precedent escapes the language of its opinion. ... If an earlier decision were taken to be entirely justified by some argument of policy, it would have no gravitational force. Its value as a precedent would be limited to its enactment force, that is, to further cases captured by some particular words of the opinion." Dworkin, *supra* note 153 at 113.

¹⁷⁶ Dworkin again: "[E]ven important opinions rarely attempt that legislative sort of draftsmanship. They cite reasons, in the form of precedents and principles, to justify a decision, but it is the decision, not some new and stated rule of law, that these precedents are taken to justify." Dworkin, *supra* note 153 at 111.

In 1992 the Supreme Court, in *Planned Parenthood v. Casey*,¹⁷⁸ gave us a capsule essay on its conception of *stare decisis*:

The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. ... Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that respect for precedent is, by definition, indispensable. ... At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.

Even when the decision to overrule a prior case is not, as in the rare, latter instance, virtually foreordained, it is common wisdom that the rule of *stare decisis* is not an "inexorable command," and certainly it is not in every constitutional case ... Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability ...; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation ...; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine ...; or whether facts have so changed, or

¹⁷⁷ Simpson, *supra* note 129 at 89. *Sim. Boggs & Brooks, supra* note 11 at 25 ("Who can recall the precise language of such seminal cases as *Hadley v. Baxendale* or *Rylands v. Fletcher*? And yet the well-known holdings in those cases are fundamental to the modern lawyer's understanding of contract law and negligence.")

¹⁷⁸ *Casey, supra* note 133.

come to be seen so differently, as to have robbed the old rule of significant application or justification ...

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In this passage the Court offers two general justifications for stare decisis:¹⁸⁰

- (1) Efficiency: The costs to society would be too great were we to allow every question worth litigating to be litigated afresh every time it arose.
- (2) Stability and continuity: This puts stare decisis in “the concept of the rule of law embodied in our own Constitution”; thus it is “by definition, indispensable.” The thought here is that society, not just as a list of people within a specified territory but as a political community, requires a continuing stable set of laws; that in turn requires the settling of legal uncertainties with authority and a degree of permanence. Stare decisis provides this in the absence of legislation, and where legislated decisions are under-determinate.

On the other hand, stare decisis does not require the perpetuation of error or of decisions that have become error. “Error”? Various kinds of maladaptivity to societal needs, but again it has to be great enough to overcome the value of stability and continuity. The Court lists four categories:

- (1) The precedent simply cannot be implemented, it “def[ies] practical workability.”
- (2) If members of society act in reliance on the precedent, that counts strongly against overruling even if the precedent appears otherwise morally or socially maladapted, as overruling would “add inequity to the cost of repudiation”. This would be exemplified by decisions on which business folk relied in investing. (That, remember, was the area singled out by Lord Mansfield for certainty’s counting more than justice.)

¹⁷⁹ *Id* at 854-55 (omitting internal cites)

¹⁸⁰ Prof. Paulsen finds five elements: (1) workability; (2) protecting reliance; (3) “erosion of a decision’s doctrinal foundations by subsequent decisions”; (4) “changed factual circumstances”; and (5) “the need to preserve public impressions of judicial integrity.” Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?* 109 YALE L.J. 1535, 1551-67 (2000).

(3) “[W]hether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine.”¹⁸¹ This would likely occur when a well dated precedent had to be revisited. It is related to the next category, which is about change in the factual background and the social perception of it: both are about important changes exogenous to the particular precedential line.

(4) “[W]hether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.” Common law justifications come from the world outside the law, outside the precedent line in question. Of course that exogenous world need not be completely independent of the law: legal decisions, be they legislative or judicial, can and do influence society in both behavior and moral evaluation of it. But nevertheless the change which makes overruling reasonable, rational, and sensible occurs outside the legal decision-making system.

What the *Casey* majority expressly rejected was endogenous change, change in the attitudes or composition of the Court itself: “[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.”¹⁸² Immediately following this, the opinion quotes Justice Stewart to the effect that a mere change in membership of the Court is not a sufficient justification.¹⁸³ If we were to allow the overruling of prior decisions simply on the ground that the present court saw things differently, thought itself wiser or better informed, then we would indeed have, in the common law at least, a government of men and not of laws. Thus it is that “the very concept of the rule of law underlying our own Constitution requires such continuity over time that respect for precedent is, by definition, indispensable.”¹⁸⁴

¹⁸¹ Justice Kennedy wrote similarly: “We have overruled our precedents when the intervening development of the law has ‘removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies.’” *Neal v. United States*, 516 U.S.284, 295, 116 S.Ct. 763 , 768-9 (1996)

¹⁸² *Casey*, *supra* note 133 at 864.

¹⁸³ *Id* quoting *Mitchell v. W.T.Grant Co.*, 416 U.S. 600, 636 (1974)(Stewart, J., dissenting).

¹⁸⁴ *Casey*, *supra* note 133 at 854.

In using a precedent we compare its facts to the facts of the case at hand.¹⁸⁵ But, apart from *res judicata*, no two cases are identical; conversely, every pair of cases is similar in some way. Whether or not a prior decision is to count as precedent or be distinguishable depends on the choice of criterion of similarity. Their source lies in society, exogenous to the law. In case reports we find it in the reasoning, the *ratio decidendi*. Although a prior judge's opinion is inescapably authoritative as to the facts and outcome,¹⁸⁶ it's reasoning, the bill of excuses connecting facts to outcome, is not.¹⁸⁷ When Holmes wrote: "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men"¹⁸⁸ he was referring to societal factors at the time of decision, not factors recorded in an opinion from the past.¹⁸⁹ This gives common law its fitting balance of stability and adaptivity, geared to the needs of the social domain in question, and from which its reasons are drawn.¹⁹⁰

So long as reasons –resting in technology as well as social organization and values –remain rationally valid, so will a line of precedent. But if the reasoning of a prior case becomes obsolete, the decision itself may remain viable as precedent under new reasons. A pretty example comes from patent law. A patent requires the

¹⁸⁵ This account of common law and stare decisis is often called "reasoning by analogy": "Analogical reasoning in law] presumably involves comparing the facts of the case at hand with the facts of various precedent cases in order to determine which of the precedent cases are relevantly like and unlike the case at hand." Larry Alexander, *Incomplete Theorizing: A Review Essay of Cass R. Sunstein's LEGAL REASONING AND POLITICAL CONFLICT*," 72 NOTRE DAME L. REV. 531 (1997). In perhaps the most widely revered introduction, Prof. Levi wrote "The basic pattern of legal reasoning is reasoning by example." Edward H. Levi, AN INTRODUCTION TO LEGAL REASONING 1 (1949).

¹⁸⁶ At least since the rise of the official reporters in the mid-nineteenth century.

¹⁸⁷ "[T]o the common lawyer, it is the *decision* –not the *opinion* –that constitutes the law." Boggs & Brooks, *supra* note 11 at 17.

¹⁸⁸ Oliver Wendell Holmes, Jr., THE COMMON LAW, 1 (1881)

¹⁸⁹ Otherwise the first supreme court to meet an issue would settle it forever; common law would remain static, incapable of adapting to changing times, changing technology, changing mores and values.

¹⁹⁰ Today, this is pretty much the accepted theory, the "standard" model. See, e.g., Levi, *supra* note 185 at 7-18; Casey, *supra* note 133 at 854-856, 864 (1992).; M.B.W.Sinclair, *The Semantics of Common Law Predicates*, 61 IND. L.J. 373, 390-395 (1985-86), Melvin Aron Eisenberg, THE NATURE OF THE COMMON LAW 58-61 (1988); Heidi Li Feldman, *Objectivity in Law*, 92 U.MICH.L.REV. 1187 (1999); Sinclair, *supra* note 77 at 21-24.

invention not to have been previously described in a “printed publication.”¹⁹¹ Would a microfilm of a German patent application on file with the Library of Congress count as a printed publication for this purpose? In 1958 this question came before the Court of Customs and Patent Appeals in *Application of Tenney*¹⁹² but with a twist: the particular microfilm in question had been wrongly filed.¹⁹³ That 1958 court decided that it did not count because a “printed publication” in this context had to be a book, or journal or the like, requiring some expense to produce and justified by reasonably wide circulation. The mis-filing of the microfilm was of no significance to this reasoning. Eight years later *I.C.E. Corp. v. Armco*¹⁹⁴ brought the same issue before the District Court for the Southern District of New York, except that in this case the micro-film was properly filed. On the reasoning of *Tenney* the decision was mandated by vertical stare decisis: the micro-film did not count. But a lot had changed in that eight years: modern printing techniques and inter-library communications systems had sufficiently developed to make Library of Congress micro-films widely available; to allow them to be the source of a purportedly new advance in the United States would be a loophole not contemplated by our patent system. So the court distinguished *Tenney* on the ground that the micro-film in that case had been wrongly filed, making it inaccessible to a normal search. The *ratio decidendum* of the precedent case from a superior court did not control; “the felt necessities of the time,” not the carefully crafted opinion of a past judge controlled.

The common law has always drawn its strength from its rationality: it “is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law.”¹⁹⁵ An irrational or immoral

¹⁹¹ 35 U.S.C. §102(b). Interpreting and applying a common noun phrase –like “printed publication” –in a statute is a common law process, part of the judicial power.

¹⁹² 254 F.2d 619 (C.C.P.A. 1958)

¹⁹³ *Tenney*, *supra*, 254 F.2d at 621.

¹⁹⁴ 250 F.Supp. 738 (S.D.N.Y. 1966).

¹⁹⁵ Blackstone, *supra* note 57 at *70.

common law decision is a wrong decision. Chief Judge Charles Breitel in a deservedly oft-quoted passage wrote of common law decision-making:

The judicial process is based on reasoning and presupposes --all antirationalists to the contrary notwithstanding --that its determinations are justified only when explained or explainable in reason. No poll, no majority vote of the affected, no rule of expediency, and certainly no confessedly subjective or idiosyncratic view justifies a judicial determination. Emphatically, no claim of might, physical or political, justifies a judicial determination.¹⁹⁶

Rationality is contemporaneous, and draws on “the fountain of justice” and “felt necessities” of its own time. If the reasons remain relevant, the precedent governs: that is the power of *stare decisis*; the present judge may not decide differently simply because she assesses values differently. Of course among those exogenous grounds may well be, as Justice Souter wrote in *Planned Parenthood v. Casey*, an inertial resistance to change because of reliance, adding “inequity to the cost of repudiation.”¹⁹⁷ But that resistance to change is less significant in those behavioral domains in which denizens do not seek notice of the law before acting.¹⁹⁸

What of the requirements of notice and our distaste for retroactivity? In those areas in which we seek notice of and rely on the state of the law before acting, statutes are, no doubt, easier to use. The words of a

¹⁹⁶ Charles Breitel, *The Lawmakers*, 65 COLUM.L.REV. 749, 772 (1965).

¹⁹⁷ *Casey*, *supra* note 133 at 854.

¹⁹⁸ This makes a determination of the nature of ordinary behavior rather important to a decision, as it should be. But we do get some curious judgments on it. For example in *Casey*, Justices Kennedy, O'Connor, and Souter wrote: “[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.” *Casey*, *supra* note 133 at 856. Really? Is this empirically well informed? Determinedly supporting a death sentence, Justice Rehnquist wrote “Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved, see *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965) ...[four more cites]; the opposite is true in cases such as the present one involving procedural and evidentiary rules.” *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)(And he pointed out that in the previous 20 Terms the Court had “overruled in whole or in part 33 of its previous constitutional decisions.” *Id*) Is that wise, equitable, or correct about the law of evidence? In *Strother v. Barr*, 5 Bing 137, 130 E.R. 1013, 1019 (1828), C.J.Best wrote to the contrary that rules of evidence needed to be “the same in actions for injuries to the reversion as in high treason” For that reason we should apply the evidentiary standards that are needed for high treason to all actions, and that demands they be certain because “uncertainty in the law of high treason would prevent any state from being free.” Thus the Court could protect ordinary people from the excesses of a powerful government.

statute themselves have authority independently of the reasons for they were chosen by the legislature. To find and follow a common law decision requires one to take some responsibility for determining the meaning of precedent in the light of common decencies.¹⁹⁹ But in the natural home of the common law, those manifold interactions for which it would be absurd to seek legal guidance, notice is no problem. The reasons for a common law judicial decision are much more accessible to most people than the decision itself. The judge draws on the same societal values for in justification of a decision (and for criteria of similarity with precedents) as the ordinary denizen uses for guidance in acting. Thus a landmark decision is not objectionably retroactive in society itself: it should reflect the behavioral necessities and constraints of which the parties are or should have been aware at the time of their contentious interaction. Behave according to the demands of ordinary values and you should never run afoul of the common law.

The standard model thus solves the problems of notice, reliability, and adaptivity quite fittingly. But, one might ask, why does it select judicial decisions as authority? Surely judges come to subject matter as relative neophytes compared with specialist practitioners and academics; shouldn't the writings of experts count as more authoritative than cases on this theory? We put great faith in judicial decisions, whether by a judge with expertise in the subject area or not, because judges decide under great social and moral pressure, under "decisional fire":²⁰⁰ before them are the parties whose wealth, freedom, and sometimes lives are at stake.

Deciding with immediate consequences to fellow humans is importantly different from deciding

¹⁹⁹ When there has been justified reliance on prior decisions, courts have on occasion resorted to the expedient of announcing a decision as prospective only. This may be theoretically dubious, akin to legislating, but it is nevertheless effective. Thus, for example, when the Massachusetts Supreme Court faced the exploitation of an old decision, *Kerwin v. Donaghy*, 317 Mass. 559, 59 N.E.2d 299 (1945), to subvert a fundamental tenet of estate planning—a reliance domain—it made its decision changing the old rule prospective only: "We announce for the future that, as to any inter vivos trust created or amended after the date of this opinion, we shall no longer follow the rule announced in *Kerwin v. Donaghy*." *Sullivan v. Burkin*, 390 Mass. 864, 460 N.E.2d 572, 577 (1984).

²⁰⁰ Sir Matthew Hale gave this reason in the early 18th century—"Because they do *Sedere pro Tribunali*"—Hale, *supra* note 87 at 45. I cannot find the source of "decisional fire."

hypotheticals.²⁰¹ But that critical quality of decisional fire does not stretch beyond the actual decision; it does not reach the other, future, and hypothetical disputes between parties not present, or cases that might fall under a purported rule. Whether this case counts as precedent for a future decision is for that future judge to decide.²⁰²

But, it might be objected, this claim to empirical accuracy of the standard theory, as against the enactment theory is overblown. We do resort to “rules of cases,” for example the “Rule in *Shelley’s Case*”²⁰³ or the “Rule of *Foakes ’n’ Beer*,”²⁰⁴ and many more of their ilk. Under the declaratory theory, a case was evidence of the law but not the law itself, yet they too used this locution (and these two examples.) Blackstone explained the usage as deriving from custom exemplified in the opinions spoken from the bench and recorded by reporters, such as himself: “[T]he maxims and customs, so collected, are of higher antiquity than memory or history can reach: nothing being more difficult than to ascertain the precise beginning and first spring of an ancient and long-established custom. Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary.”²⁰⁵ This explanation, if not its mode of expression, rings true today. Much may change in society, and the law must adapt to it; but most of our interpersonal conventions have remained remarkably stable; most nineteenth century wrongs remain wrongs in the twenty-first century. It is not surprising that we should have developed names –“battery”, “consideration” ... --for them, and stable verbal accounts of them. It does no harm to call these “rules”, even if there is, and can be, no canonical verbal formulae for them. “The Rule of *Foakes ’n’ Beer*” simply names a regularity in legal thinking that has persisted

²⁰¹ This also supports treating decisions as precedent even when the reasons on which we hold them to be so did not occur to the deciding judge.

²⁰² Precisely contrary to Schauer, *supra* note 131 and the enactment theory, but consistent with practice.

²⁰³ 1 Co. Rep. 93b (1581); it had a predecessor, *Abel’s Case*, Y.B. 18 Edw. II., 577 (1324).

²⁰⁴ *Foakes v. Beer*, 9 A.C. 605, __Eng.Rep. __ (1884).

²⁰⁵ Blackstone, *supra* note __ at *67.

over hundreds of years,²⁰⁶ and persists in classrooms and to this day, even if people in commerce mostly ignore it. It shows stare decisis in action when the source of reasons doesn't change in relevant respects.²⁰⁷ The principal risk of this "rule of ..." talk is that students, lawyers, and judges will be induced not to question or re-examine the underlying reasoning.²⁰⁸

A stronger objection to the standard theory flows from the reaction of lower courts and legal advisors to the great and ubiquitous power of vertical stare decisis. Legal actors in lower decision-making roles take the reasons and verbal formula of higher courts as governing, be they *dicta* or not. Think, for example, of the impact of footnote four of *Carolene Products*.²⁰⁹ It was merely an aside suggesting that instead of a presumption of constitutionality, a stricter scrutiny would be given to laws affecting a discrete and insular minority, but it "helped launch both a new substantive due process and equal protection doctrine by which the Court would closely scrutinize laws affecting political and personal rights."²¹⁰ In courts this deference stems from the need for efficiency and, perhaps, from judges' aversion to being overruled on appeal; it can also lend weight from above to an opinion, foreclosing criticism. For advisors, it simply makes pragmatic sense. On the realist argument that the governing law is what the courts would decide should we have to litigate, it is prudent to plan according to the expressed preferences of the current (or recent) supreme court of the jurisdiction. This certainly has the appearance of rule governed behavior, following authoritative words, rather than rational analysis.

²⁰⁶ It relied on *Pinnel's Case*, 5 Coke's Rep. 117a, 77 Eng.Rep. 237 (Com.Pl.1602); but *Pinnel's Case* never developed the cachet of *Foakes v. Beer*.

²⁰⁷ Sinclair, *supra* note 152 at __.[R in IRAC]

²⁰⁸ Reliance as a basis for enforcing promises does serious damage to *Foakes v. Beer*. The Rule in *Shelley's Case* --and its predecessor, *Abel's Case*, Y.B. 18 Edw. II., 577 (1324) --is said to be defunct in the law of future interests.

²⁰⁹ *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), footnote 4: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the 14th. ... [T]hose political processes ordinarily to be relied upon to protect discrete and insular minorities ... may call for a correspondingly more searching judicial inquiry."

²¹⁰ Jethro K. Lieberman, *THE EVOLVING CONSTITUTION*, 89-90 (1992). See Sinclair, *supra* note 152 at __.[R in IRAC]

Yet this does not make those words from above into rules. Recent opinions, even in their *dicta*, may be taken and followed by legal practitioners as rules for their decisions. But that doesn't make them rules of law; it just makes them commanding, and only to the limited population that knows about them, little more than a selection of lawyers. This conception of common law rules by vertical *stare decisis* is a conception of rules for lower court judges and lawyers, and those who take and pay for their prospective advice. The ordinary denizen of society, whose behavior is equally subject to legal limitation, will have no notice of such so-called rules, and thus no duty to comply. Rules of which only a limited elite can know are hardly to be counted among our governing laws.²¹¹

That, then, is the standard theory of common law and precedent. It lacks the clarity and simplicity of the enactment theory. It requires a great deal more explanation. It doesn't draw precise boundaries between the variations in treatment of different types of behavior, especially on the spectrum between reliance and non-reliance behaviors, between those we typically undertake only on legal advice and those for which we never seek advice.²¹² For decision makers (as for students) it is considerably less secure than the enactment theory: one cannot escape thinking, drawing on exogenous values in legal reasoning. The other side of that coin is that the standard theory gives opportunities to those determined to subvert the law: "If a court is intent upon acting irresponsibly, it can do so with a published opinion just as well as without one. The leeways of precedent and

²¹¹ See Sinclair, *supra* note 152 at ____ [R in IRAC -about fn. 127]

²¹² So following Wittgenstein we might call it a "family resemblance" concept. Ludwig Wittgenstein, PHILOSOPHICAL INVESTIGATIONS, Sec.66 (1953). That law is a "family resemblance concept" is argued by Stone, Roy L., *Ratiocination Not Rationalization*, 74 MIND 463, 478-480 (1965).

the fuzziness of the record almost always enable a court to make any decision appear reasonable.”²¹³ But that too is empirically accurate.

The standard theory is the position taken or implied by Judge Arnold in *Anastasoff*:

[W]e are not here creating some rigid doctrine of eternal adherence to precedents. Cases can be overruled. Sometimes they should be. On our Court, this function can be performed by the en banc Court, but not by a single panel. If the reasoning of a case is exposed as faulty, or if other exigent circumstances justify it, precedents can be changed. When this occurs, however, there is a burden of justification. The precedent from which we are departing should be stated, and our reasons for rejecting it should be made convincingly clear. In this way, the law grows and changes, but it does so incrementally, in response to the dictates of reason, and not because judges have simply changed their minds.²¹⁴

How does precedent on the standard theory accord with the prohibition on citing unpublished decisions? Very poorly. On this theory, stare decisis and common law decision-making are inextricably intertwined; a judge cannot make a decision without taking part in the common law precedent system.²¹⁵ Denying precedential status is futile. If this is the understanding with which we should now vest “judicial power” in Article III of the Constitution, then Judge Arnold is correct: no-citation rules are unconstitutional.

²¹³ Martineau, *supra* note 12 at 132.

²¹⁴ *Anastasoff*, *supra* note 4 at 904.

²¹⁵ “We concede, of course, that any decision is by definition a precedent, and that we cannot deny litigants and the bar to urge upon us what we have previously done.” *Jones v. Superintendent, Virginia State Farm*, 465 F.2d 1091 (4th Cir., 1972). *Sim. Boggs & Brooks*, *supra* note 11 at 17 (2000)(“To the common lawyer, every decision of every court is a precedent.”)

Assessment

I once heard an interview with the great French mathematician Rene Thom in which he said that “we are all realists when we do mathematics; it is only when we talk about doing it that we become Platonists and formalists and such like”, or words to that effect. It is like that with the use of precedent in law, whether by judges or attorneys or academics. Only in examinations and course guide books do we tend to find enactment theories –the familiar “IRAC” in which the “R” is for the rule. In our theories we should seek to account for the data of actual practice: the more of that data, and the wider the variety unified by the theory the better. What we are after is like a model of the wisdom of the experienced judge or practitioner. But a theory of law should also be simple and perspicuous; after all many people need to use it in their daily work, and without complex calculation.

The enactment theory failed to account for judicial power, practice, and its limitations; and it confused judging with the other great branch of legal decision-making, legislation; and it failed adequately to meet the requirements of notice and prospectivity. But it did have the virtues of simplicity and psychological security. The standard theory cannot match it in comfort and security; but it does account for the facts of legal practice and judicial decision-making practice, and properly account for notice and the avoidance of retroactivity in variegated social domains. It also accounts better for the adaptability our law has shown through changing circumstances over time, and how it can adapt without too greatly compromising the stability society requires.

But that assessment leads rather uncompromisingly to the conclusion that no-citation rules are unconstitutional, a conclusion it would be useful to avoid, or to escape in some fashion.

Conclusion: A Plausible Solution

William Mills, in a survey of the accessibility of unpublished opinions, concludes that they “have become ever more accessible in both electronic and print sources. They can be easily cited using current citation forms. And the echo of constitutional authority from the *Anastasoff* panel opinion continues to resonate. All these factors make it likely that courts will be under pressure to recognize the value of unpublished opinions as precedent.”²¹⁶ Unpublished decisions are going to be sought out and used by the legal profession. This is inescapable. No Draconian contempt measures will prevent it, although enforcement of no-citation rules will prevent actual citation. Taking guidance from unpublished opinions and referring to them in opinion letters, for example, is beyond the scope of any no-citation rule. Suitable quotes without acknowledgment of their sources may be quite effective in a brief, yet still avoid the prohibition. The present system may encourage deception in briefs, but it does little in reality, especially not the reality of prospective decision-making, planning, and advising. Nevertheless, with no indication of a decrease in appeals or an increase in the federal appellate bench, we can only expect the non-publication practice to continue. What, then, should be done about the problematic no-citation rules?

²¹⁶ Mills, *supra* note 33 at ____.

They should be repealed, and the non-publication practice should be abandoned. But in their place, publication of minimal opinions would turn the same trick. Brooks writes “[O]ne of the primary justifications for not publishing certain opinions is that they can be decided “in a few sentences with citations to two or three key cases.””²¹⁷ If this is true, if a decision is truly routine, ploughs no new ground, draws no new distinctions, creates no new law, but merely follows in the steps of established precedent,²¹⁸ then adequate articulation is surely provided by citing that precedent: “Affirmed on the basis of ...*cite* ... and ...*cite*; *cf* ...*cite*... .” For example, the full text of a Supreme Court decision reads: “Certiorari granted and judgment reversed. *Anderson v. Bessemer City*, 470 U.S. 564 (1985). Reported below: 769 F.2d 532.”²¹⁹ For a truly routine decision, publishing such minimal announcements of that routine should satisfy the requirements of the constitution under the standard theory. However, if the decision is not routine, if it creates new law or changes old law, then it should be published.

This solution would meet the basic problem of the overburden on our federal appellate judiciary. At present, many courts, including circuit courts of appeals, require the parties to be provided with written dispositions of their cases.²²⁰ A mere “Judgment affirmed.”, as occurs in some memorandum decisions, should hardly do.²²¹ But the minimal form opinion proposed, with its secure and declared grounds, should be adequate for this requirement and for the parties. It is no greater burden than judges bear under the present non-publication practice and no-citation rules.

²¹⁷ Brooks, *supra* note 35 at 260, quoting Kozinski & Reinhardt, *supra* note 6 at 43.

²¹⁸ “[C]ases whose outcomes are clearly dictated by existing precedent are often thought to be appropriate candidates for non-publication.” Boggs & Brooks, *supra* note 11 at 19.

²¹⁹ *County of Los Angeles v. Kling*, 474 U.S. 936 (1985).

²²⁰ See, e.g., Ninth Circuit Rule 21(a) requiring a “written reasoned disposition”.

²²¹ Gardner, *supra* note 17 at 1225 (“There may be room for debate about how much ink should be spilled in order to reach the threshold of articulated reason contemplated ... but it is surely violated by ... the panel’s written disposition consist[ing] of just eight words: “The district court’s judgment of conviction is affirmed.””)

Nor would this solution impose an excessive burden on researchers.²²² What would be the point of finding and citing all the subsequent one line progeny of a case? It could surely do little more than annoy judges and clerks reading briefs. Besides, it is not at all clear what having many progeny indicates about a decision. A great, clear, and decisive landmark case might generate cites only in law reviews, all others being so convinced that they don't bother to litigate the question, or accept summary judgment. On that reasoning, generating many subsequent citations should indicate frailty of reasoning rather than conviction.²²³ However that argument goes, publishing minimal accounts of routine decisions would leave a data trail for academic researchers interested in counting coup. On the other hand, publishing all such opinions would give no advantages in litigation to those able to finance unlimited research.

This solution may not satisfy the enactment theorists. For example "Rules granting precedential value to summary dispositions are based on a flawed premise –that the precedential value of a decision can be determined when only the result and not the reasoning is known" because the case will not establish "a precedent for a particular proposition."²²⁴ But, as I have argued above, this is failing only to satisfy the requirements of a misguided theory. On the standard theory it is not problematic.

The status quo is not satisfactory either practically or jurisprudentially; but absent unlimited judicial time, publishing capacity, and researcher time and finance –absences which neither will nor should be alleviated

²²² Thus alleviating the potential problem of free citation as authority Mills aptly writes "would result in researchers being held to unattainably high standards in retrieving fugitive documents." Mills, *supra* note 33 at ____.

²²³ When those subject to the court's decision seem not to hear, as for example when the Sixth Circuit in at least six cases "vacated NLRB decisions that found nurses not to be supervisors" -- Boggs & Brooks, *supra* note 11 at 19 n.12 --simply citing the precedent overlooked may be the more instructive course. Economically oriented theorists have argued that the common law is efficient ("works itself pure") because inefficient rules will be appealed by adversely affected parties until changed. See Edward Rubin, *Why is the Common Law Efficient?* 6 J.LEGAL STUD. 51 (1977) and George Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J.LEGAL STUD. 65 (1977). They may have a point. But the efficiency they would achieve is not societal, but rather for the rich and powerful and well coordinated, who can afford to keep fighting. Think, for example, of litigation over check collection procedures.

²²⁴ Dragich, *supra* note 12 at 793.

—something of its kind will continue. Publication of minimal opinions listing only a brief citation trail may not be a perfect solution to the problem,²²⁵ but it avoids constitutional limitations, and would be as effective as current practice in alleviating the overburden on our federal appellate judges. And it may be the course least likely to annoy the critics.

²²⁵ Most obviously, it depends on the judgment of the panel that the case is indeed easy; as unpublished decisions have been reversed by the Supreme Court —see, e.g., *Hughes v. Rowe*, 449 U.S. 5 (1980), *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993) — we know that as an empirical matter, such judgments are less than 100% perfect. See, Boggs & Brooks, *supra* note 11 at 20-21 (arguing that relying on judgments of “easy cases” is “self-evidently wrong for both empirical and theoretical reasons.”)