

# THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

## ESSAYS

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### FROM ANASTASOFF TO HART TO WEST'S FEDERAL APPENDIX: THE GROUND SHIFTS UNDER NO- CITATION RULES

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#### I. INTRODUCTION: A FAST-PACED YEAR

Last year's mini-symposium on unpublished opinions<sup>1</sup> seems to have unleashed a wave of further developments. The fast-breaking events include these:

1. Judge Richard S. Arnold's opinion for the Eighth Circuit in *Anastasoff v. United States*,<sup>2</sup> holding—until vacated as moot—that the circuit's rule denying precedential effect to unpublished opinions exceeded the Article III judicial power,

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1. *Anastasoff, Unpublished Opinions, and "No Citation" Rules*, 3 J. App. Prac. & Process 169 (2001).

2. 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

has been ringingly answered by Judge Alex Kozinski's opinion for the Ninth Circuit in *Hart v. Massanari*.<sup>3</sup>

2. The American Bar Association's House of Delegates has declared that the practice of some federal circuits in "prohibiting citation to or reliance upon their unpublished opinions" is "contrary to the best interests of the public and the legal profession."<sup>4</sup> The ABA urges the federal appellate courts to "make their unpublished opinions available through print or electronic publications [and] publicly accessible media sites," as well as to "permit citation to relevant unpublished opinions."<sup>5</sup>

3. In a startling action that drains the meaning from the term "unpublished" opinion, the West Group in September 2001 launched its *Federal Appendix*.<sup>6</sup> This is a new case-reporter series in West's National Reporter System that consists entirely of "unpublished" opinions from the federal circuit courts of appeals (except, currently, the Fifth and Eleventh Circuits).<sup>7</sup> By late April 2002, West had published twenty-seven volumes of the *Federal Appendix*, averaging some 400 cases per volume, and was expecting to report some 12,000 cases per

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3. 266 F.3d 1155 (9th Cir. 2001). Meanwhile, two federal appeals cases in which panels refused to follow unpublished opinions have drawn pro-*Anastasoff* dissents. *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315 (5th Cir. 2001), *petition for reh. en banc denied*, 256 F.3d 260 (5th Cir. 2001) (Smith, Jones & DeMoss, JJ., dissenting); *Symbol Techs., Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361, 1368 (Fed. Cir. 2002) (Newman, J., dissenting). See *infra* n. 72.

4. American Bar Association, Sections of Litigation, Criminal Justice, Tort and Insurance Practice and Senior Lawyers Division, *Report to the House of Delegates*, Resolution No. 01A115 (Aug. 1, 2001).

5. *Id.*

6. See West Group Press Release, *West Group Launches New National Reporter System Publication for Unpublished Decisions* (Sept. 5, 2001) (copy on file with author). The press release explained that "many legal researchers want access to unpublished opinions because they often include relevant fact situations and particular applications of settled law." *Id.* It stated that "all U.S. Court of Appeals unpublished decisions" issued from January 1, 2001, would be included, and that each case would "receive full West Group editorial enhancements, be given a new citation and be made available in print in the *West's Federal Appendix* volumes, on CD-ROM and on Westlaw." *Id.*

7. In line with their policy of denying online access to their unpublished opinions (while allowing citation of them), see *infra* nn. 12, 27-28 and accompanying text, the Fifth and Eleventh Circuits make available to West only the information needed for the Decisions Without Published Opinions tables in the Federal Reporter. Telephone Interviews with West Group representative (Jan. 10, 2002, Mar. 4, 2002, May 3, 2002). (All interviews for this essay with judges, court personnel, and West Group representatives were conducted on the understanding that the sources' identities would not be disclosed. Redacted notes of each interview are on file with the author.)

year.<sup>8</sup> The cases in the *Federal Appendix* are supplied with headnotes, indexed to West's Key Number system, garnished with the other "editorial enhancements" of West's reporting system, and christened with their own citation form: "\_\_\_ Fed. Appx. \_\_\_." Except for its citation restrictions,<sup>9</sup> the Federal Appendix looks, reads, and quacks like a book of "published" case reports. If nothing else, West's action is requiring that definitions of "unpublished" be radically revised.<sup>10</sup>

4. The most significant move by the federal courts has come from the District of Columbia Circuit. Effective January 1, 2002, that court abandoned its no-citation rule and declared that all unpublished opinions issued on or after that date "may be cited as precedent."<sup>11</sup> Meanwhile, the Third Circuit has become

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8. Telephone Interview with West Group representative (Mar. 4, 2002); see also e.g. West's *Federal Appendix*, vol. 27 (West Group 2002).

9. West runs a disclaimer on each volume's title page and on the report of each case, stating that the cases "have not been selected for publication in the Federal Reporter." This implies, misleadingly, that West has made some sort of case-by-case selection, and it fails to state the central point that the cases are all "unpublished." However, the title-page notice does advise readers to "consult local court rules to determine when and under what circumstances these cases may be cited," and each case bears a notice reciting whatever formula the issuing circuit employs to designate its unpublished opinions and restrict their usage. See e.g. *U.S. v. Martini*, 27 Fed. Appx. 1 (1st Cir. 2001) ("[NOT FOR PUBLICATION—NOT TO BE CITED AS PRECEDENT]").

10. The First Circuit reacted with instant alarm, hurriedly amending its rules to redefine a "published opinion" as "one that appears in the ordinary *West Federal Reporter* series (not including *West's Federal Appendix*)." 1st Cir. Interim Loc. R. 36 (b)(2)(F) (Sept. 24, 2001) (emphasis in original). See also 8th Cir. R. 28A(i) (amended Jan. 16, 2002) ("Unpublished decisions are decisions which a court designates for unpublished status"). The need for other rule-makers to take similar steps is suggested in Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. App. Prac. & Process 199, 205-206 (2001) ("In regard to federal circuit court opinions, 'unpublished' appears to mean that the opinion is not available in print.").

11. D.C. Cir. R. 28(c)(12)(B). A companion rule advises counsel, however, that "a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition." D.C. Cir. R. 36(c)(2). The D.C. Circuit simultaneously amended its *Handbook of Practice and Internal Procedures* to caution that while the new rule "makes a major change in the Court's practice," and while counsel "will now be permitted to argue that an unpublished disposition is binding precedent on a particular issue," the court's decision to issue an unpublished disposition "means that the Court sees no precedential value in that disposition, . . . i.e., the order or judgment does not add anything to the body of law already established and explained in the Court's published precedents." D.C. Cir., *Handbook of Practice and Internal Procedures* 42, 52 (as amended through Jan. 1, 2002). Further, "counsel should recognize that the Court believes that its published precedents already establish and adequately explain the legal principles applied in the unpublished disposition, and that there is accordingly no need for counsel to base their arguments on unpublished dispositions." *Id.* at 41.

the eleventh of the thirteen federal circuits to post its unpublished opinions online and make them available to legal publishers.<sup>12</sup>

5. The action by the D.C. Circuit tips the balance in the federal courts against no-citation rules. Of the thirteen circuits, there remain only five—the First,<sup>13</sup> Second,<sup>14</sup> Seventh,<sup>15</sup> Ninth,<sup>16</sup>

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Asked why they made the rule change, two D.C. Circuit judges called the move “long overdue” and mentioned variously the *Federal Appendix*, the *Anastasoff* opinion, the broad availability of unpublished opinions through online sources and elsewhere, and that “we don’t like secret law.” Telephone Interviews with D.C. Cir. judges (Jan. 11, 2002, Feb. 28, 2002).

12. See 3d Cir. Press Release (Dec. 5, 2001) (announcing that as of January 2, 2002, all court opinions in counseled cases “will be posted on the court’s web site . . . and available for dissemination by legal publishers”; the court, however, will continue to observe Internal Operating Procedure (I.O.P.) 5.8, “which provides that the *court* will not cite to non-precedential opinions as authority”) (emphasis in original) (available at <<http://www.ca3.uscourts.gov/>> (accessed Apr. 4, 2002; copy on file with *Journal of Appellate Practice and Process*)). This surrender to the online world was an about-face for the Third Circuit. Until this year it had been “generally considered that the Third, Fifth and Eleventh circuits have banned electronic dissemination of unpublished opinions, and these cases are neither added to Westlaw or LEXIS nor available from the courts’ websites.” Hannon, *supra* n. 10, at 211. The Third Circuit clarified its new procedures in late February, announcing that opinions in counseled cases will now be labeled either “precedential” or “not precedential,” and that “the court will continue to observe its practice of not citing not precedential opinions as authority.” 3d Cir. Press Release (Feb. 21, 2002) (available at <[http://www.ca3.uscourts.gov](http://www.ca3.uscourts.gov/)>) (accessed Apr. 14, 2002; copy on file with *Journal of Appellate Practice and Process*)).

The Fifth Circuit, on the other hand, lost heart. After announcing that it would put its unpublished opinions online, in late January 2002 it reconsidered and decided to maintain the status quo. Telephone interview with Fifth Cir. official (Feb. 1, 2002). See also 5th Cir. Website FAQ (“*Only opinions designated for publication (published opinions) are put on our website.*”) (emphasis in original) (available at <[http://www.ca5.uscourts.gov](http://www.ca5.uscourts.gov/)> (accessed Mar. 25, 2002; copy on file with *Journal of Appellate Practice and Process*)).

13. See 1st Cir. R. 36(b)(2)(F) (unpublished opinions may be cited “only in related cases”).

14. See 2d Cir. R. 0.23 (citation of written statements attached to summary orders prohibited, since they “do not constitute formal opinions of the court and are unreported or not uniformly available to all parties”).

15. See 7th Cir. R. 53(b)(2)(iv) (unpublished orders “shall not be cited or used as precedent”).

16. See 9th Cir. R. 36-3 (unpublished dispositions “not binding precedent” and “may not be cited”) A provisional rule in effect for the thirty-month period ending December 31, 2002, allows citation of unpublished dispositions in petitions for rehearing or rehearing en banc and in requests to publish an opinion, but only for the purpose of showing conflict among published and/or unpublished dispositions. *Id.* R. 36-3(b)(iii).

and Federal<sup>17</sup>—that ban citation of unpublished opinions (except, of course, for related-case uses such as *res judicata*). The other eight circuits discourage citation of unpublished opinions, typically calling it “disfavored,” but grudgingly allow it. They do this generally under one of two formulas—(1) that the opinions may be cited as “precedent” or for “precedential value” (the Fourth,<sup>18</sup> Sixth,<sup>19</sup> and D.C.<sup>20</sup> Circuits), or (2) that they are “not precedent” but may be cited for their “persuasive” value (the Fifth,<sup>21</sup> Eighth,<sup>22</sup> Tenth,<sup>23</sup> and Eleventh<sup>24</sup> Circuits). The Third Circuit, a loner, uses no formula but allows citation.<sup>25</sup>

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17. See Fed. Cir. R. 47.6(b) (opinion or order “designated as not to be cited as precedent . . . must not be employed or cited as precedent”).

18. See 4th Cir. R. 36(c) (citation of unpublished opinions “disfavored,” but “[i]f counsel believes, nevertheless, that an unpublished disposition . . . has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited”).

19. See 6th Cir. R. 28(g) (citation of unpublished decisions “disfavored,” but “[i]f a party believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case, and that there is no published opinion that would serve as well, such decision may be cited”).

20. See D.C. Cir. R. 28(c) (unpublished orders entered before January 1, 2002, “are not to be cited as precedent,” but ones entered on or after January 1, 2002, “may be cited as precedent”). See also D.C. Cir. R. 36(c)(2) (panel’s decision to issue unpublished disposition “means that the panel sees no precedential value in that disposition”); *D.C. Circuit Handbook*, *supra* n. 11, at 42, 52.

21. The Fifth Circuit uses both formulas, depending on when the opinion was issued. See 5th Cir. R. 47.5.3 (unpublished opinions issued before January 1, 1996, “are precedent,” but “because every opinion believed to have precedential value is published,” unpublished opinions “normally” should not be cited); 5th Cir. R. 47.5.4 (unpublished opinions issued on or after January 1, 1996, are “not precedent”; such opinions “may, however, be persuasive,” and may be cited).

22. See 8th Cir. R. 28A(i) (unpublished opinions “are not precedent and parties generally should not cite them,” but parties may do so if the opinion “has persuasive value on a material issue and no published opinion of this or another court would serve as well”).

23. See 10th Cir. R. 36.3 (unpublished decisions “are not binding precedents,” and their citation is “disfavored”; but an unpublished decision may be cited if it has “persuasive value with respect to a material issue that has not been addressed in a published opinion” and it would “assist the court in its disposition”).

24. See 11th Cir. R. 36-2 (unpublished opinions “are not considered binding precedent,” but “may be cited as persuasive authority”); see also 11th Cir. R. 36-3, I.O.P. 5 (stating that “[o]pinions that the panel believes to have no precedential value are not published,” and that “[r]eliance on unpublished opinions is not favored by the court”).

25. See 3d Cir. I.O.P. 5.8 (explaining that “the court by tradition does not cite its unpublished opinions as authority”); 3d Cir. Press Release, Dec. 5, 2001 (“The court will continue to observe Internal Operating Procedure 5.8, which provides that the *court* will not cite to non-precedential opinions as authority.” (emphasis in original)). In stating carefully that “the court” does not cite to unpublished opinions, the Third Circuit tacitly

The balance tips toward citability in numbers of cases as well. The citable unpublished cases from the eight territorial circuits that allow citation total some 15,000 per year, while the noncitable cases from the four territorial circuits that ban citation total about half that.<sup>26</sup> It should be noted, however, that the Fifth and Eleventh Circuits, which each put out more than 3,000 unpublished opinions per year, withhold those opinions from online distribution (or West's *Federal Appendix*), while schizophrenically allowing them to be cited.<sup>27</sup> It appears, nonetheless, that these opinions are not effectively suppressed and in fact are cited.<sup>28</sup>

6. While this essay focuses on the federal courts, there is noteworthy movement in the state courts as well. In what would be a seismic shift, the Texas Supreme Court has tentatively decided to lift the "Do Not Publish" stamp now affixed to some eighty-five percent of the opinions of the Texas court of appeals and to "remove prospectively any prohibition against the citation of opinions as authority."<sup>29</sup> Meanwhile, California's

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allows lawyers to do so. Telephone Interview with 3d Cir. official (Jan. 9, 2002) (First Amendment cited as reason for the policy).

26. *Judicial Business of the United States Courts, 2001*, tbl. S-3 (available at <<http://www.uscourts.gov/judbus2001/tables/s03Sep00.pdf>> (accessed April 20, 2002; copy on file with *Journal of Appellate Practice and Process*)). The eight "citable" circuits have 14,806 unpublished cases, while the four noncitable circuits have 7,114. *Id.* (The Federal Circuit is not included in Table S-3, so the number of unpublished cases it issues is not available. Telephone Interview with Fed. Cir. official (Jan. 11, 2002). The statistics show a total of 1,500 case dispositions for the Federal Circuit, but do not indicate how many of them are unpublished. See *Judicial Business*, at tbl. B-8.)

27. See *supra* nn. 7, 12, 21, 24.

28. An official in the Fifth Circuit reports that the unpublished opinions of that court are not uncommonly cited and that lawyers obtain them principally in two ways: (1) Lawyers who practice in a given area (immigration law, for example) have their own "networks" within which relevant unpublished opinions are passed around and even bound into mini-collections; law offices such as those of the U.S. Attorney and Public Defender also collect opinions relevant to their work; and (2) the opinions are available in chronological binders in the circuit's library. Telephone Interview with 5th Cir. official (Mar. 15, 2002); see also *Williams v. Dallas Area Rapid Transit*, 242 F.3d at 318 n. 1 (discussing unpublished Fifth Circuit cases). In the Eleventh Circuit, two court officials state that unpublished opinions are cited. One reports that "some of the larger law offices keep track" of the opinions, in some cases "running their own data banks." The other notes that the opinions are available in the court clerk's office and that unpublished opinions are commonly cited in briefs filed with that circuit. Telephone Interviews with 11th Cir. officials (Jan. 11, 2002, Mar. 15, 2002).

29. Texas Supreme Court, *Comparison of Advisory Committee TRAP Recommendations and Supreme Court's Tentative Conclusions* 12-15 (Jan. 14, 2002)

court of appeal, which brands some ninety-four percent of its opinions “unpublished,”<sup>30</sup> has begun posting all its unpublished opinions on the court’s website.<sup>31</sup> Citation is still prohibited, but the technological (and psychological) infrastructure is in place for possible pressure to follow a Texas lead.

Against the backdrop of these developments, I shall in this Essay first appraise the face-off between Judge Arnold and Judge Kozinski in *Anastasoff* and *Hart*, setting their disagreement about “precedent” against the spectrum of meanings which that word may convey. I will argue that Judge Kozinski’s opinion in *Hart*, for all its scholarly brilliance, demonstrates, in part, something different from what he may have intended. I will then consider Judge Kozinski’s arguments against no-citation rules, finding them inadequate, and will conclude by considering the degree of “precedential” force that unpublished opinions should be accorded in the federal courts.

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(addressing Rule 47.7) (available at <<http://www.supreme.courts.state.tx.us/rules/Committee/>> (accessed Mar. 26, 2002; copy on file with *Journal of Appellate Practice and Process*)). The court was divided on the issue of retroactivity and sought further guidance from its Advisory Committee, with a final decision expected by summer of 2002. Telephone Interviews with Tex. Sup. Ct official (Jan. 10, 2002, Feb. 1, 2002, Mar. 28, 2002).

The debate over unpublished opinions has become something of a public issue in Texas, with several of the state’s leading newspapers editorializing in favor of the proposed rule change. See e.g. *Publish or Perish: Unpublished Appellate Court Opinions Corrode Texas Law*, Houston Chron. 2C (Dec. 9, 2001); *Court Blackout: Too Many Opinions Are Kept Under Wraps*, Dallas Morning News 14A (Dec. 31, 2001); *Court Opinions Should Become Public*, San Antonio Express-News 2G (Dec. 16, 2001) (characterizing no-citation rules as “unfair to Texans who must pick their judges in the voting booth”); *Editorial*, Forth Worth Star-Telegram 10 (Dec. 17, 2001) (“One would think that, any time a Texas appeals court issues a ruling, anyone could find it in the law books and rely on it to make an argument in one’s own case. One would be wrong.”).

30. See Cal. R. Ct. 977(a); Jud. Council of Cal., Admin. Off. of the Cts., *2001 Court Statistics Report, Courts of Appeal*, tbl. 9 (available at <<http://www.courtinfo.ca.gov/>> (accessed Mar. 21, 2002; copy on file with *Journal of Appellate Practice and Process*)).

31. See *Unpublished Opinions* (available at <<http://www.courtinfo.ca.gov/opinions/nonpub.htm/>> (accessed May 8, 2002; copy on file with *Journal of Appellate Practice and Process*)).

II. *ANASTASOFF*, *HART*, AND THE SPECTRUM OF PRECEDENTA. *Anastasoff and Hart*

Amid the continued controversy over unpublished opinions and the uses of precedent, the debate between Judge Arnold in *Anastasoff* and Judge Kozinski in *Hart* focuses, perhaps surprisingly, on one facet of this subject. These two intellectual heavyweights go to the mat over whether Article III requires that all decisions of the federal courts of appeals be regarded as “binding precedents.” Judge Arnold finds from his examination of eighteenth-century sources that “[t]he Framers thought that, under the Constitution, judicial decisions would become binding precedents in subsequent cases.”<sup>32</sup> He thus concludes—given the “law-of-the-circuit” rule, under which a panel’s decision cannot be overruled by another panel, but only by the court en banc<sup>33</sup>—that his panel was required to follow an unpublished Eighth Circuit decision.<sup>34</sup> Judge Arnold further concludes that the Eighth Circuit’s Rule 28A(i), stating that unpublished opinions “are not precedent,” purports to “expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional.”<sup>35</sup>

In *Hart*, Judge Kozinski—who, like Judge Arnold, had previously written extra-judicially on this subject<sup>36</sup>—seized on the opportunity presented by a lawyer who cited an unpublished Ninth Circuit opinion and then defended his violation of the court’s no-citation rule by arguing that the rule was unconstitutional under *Anastasoff*. Meeting Judge Arnold on his chosen ground of eighteenth-century history, Judge Kozinski offers a scholarly account that refutes *Anastasoff*’s claim of a

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32. 223 F.3d at 902.

33. *Id.* at 904; see n. 41 *infra* and accompanying text.

34. The issue was the scope of the “mailbox rule” for filing federal tax refund claims. See *Anastasoff*, 223 F.3d 898.

35. 223 F.3d at 900. Judge Arnold’s opinion was vacated as moot when the Government acceded to the contrary decision of another circuit. *Anastasoff v. United States*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

36. See Alex Kozinski & Stephen Reinhardt, *Please Don’t Cite This!* 20 Cal. Law. 43 (June 2000); Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. App. Prac. & Process 219 (1999).



historically-based constitutional requirement of binding precedent. The modern concept of binding precedent required two conditions, reliable case reports and a settled hierarchy of courts, that were not in place until at least the mid-nineteenth century, Judge Kozinski points out.<sup>37</sup> When the Constitution was drafted, then, it was “emphatically not the case that all decisions of common law courts were treated as precedent binding on future courts unless distinguished or rejected.”<sup>38</sup> Judge Kozinski’s panel thus declines to follow *Anastasoff* and holds the Ninth Circuit’s no-citation rule constitutional.<sup>39</sup>

Fascinating as this historical duel is, the opinions by Judge Arnold and Judge Kozinski deal with only one variety of precedent. That word can mean many things; “binding” precedent is only one of those things, and arguably not the most important for the current debate. Although the categories overlap and the lines blur, one can identify at least five species of precedent that may be relevant to this discussion.

### *B. The Spectrum of Precedent*

1. *Binding precedent.* “Binding” precedent is what the shouting is about in *Anastasoff* and *Hart*. It is the rule, as stated by Judge Kozinski, that a court’s decision “must be followed by courts at the same level and lower within a pyramidal judicial hierarchy.”<sup>40</sup> By virtue of the words “at the same level,” this formulation incorporates in the concept of binding precedent the law-of-the-circuit rules, existing in all circuits, which mandate that only the en banc court can overrule a panel decision.<sup>41</sup>

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37. 266 F.3d at 1164 n. 10 (quoting R.M.W. Dias, *Jurisprudence* (2d ed., Butterworth 1964)).

38. *Id.* at 1167.

39. The court also held that the rule (9th Cir. R. 36-3) had been violated, but declined to impose sanctions in view of the attorney’s good-faith constitutional challenge. 266 F.3d at 1180. Attorneys who henceforth cite unpublished cases in the Ninth Circuit presumably cannot expect such leniency, at least not from Judge Kozinski. *But cf. U.S. v. Rivera-Sanchez*, 222 F.3d 1057, 1063 (9th Cir. 2000) (court asks counsel to submit list of unpublished opinions superseded by its decision and cites them in its opinion, “[t]o avoid even the possibility that someone might rely upon them”).

40. 266 F.3d at 1168.

41. *See e.g. Hart*, 266 F.3d at 1171 (“[T]he first panel to consider an issue sets the law not only for all the inferior courts in the circuit, but also future panels of the court of appeals.”); *U.S. v. Humphrey*, 2002 U.S. App. LEXIS 6984 (6th Cir. 2002), at \*71 (“It is

Accordingly, an unpublished opinion recognized under a particular circuit's rules as "precedent"—which can happen in the D.C. Circuit<sup>42</sup>—and possibly one recognized as having "precedential value"—which can happen in the Fourth and Sixth Circuits<sup>43</sup>—may become binding precedent for other panels in that circuit.<sup>44</sup>

2. *Overrulable precedent.* "Overrulable" precedents are decisions the court ordinarily will follow under *stare decisis*, but may overrule if sufficient reasons present themselves. The category typically includes earlier decisions of the same court. Some kinds of precedents, even from the same court, can be overruled more readily than others. The Supreme Court's summary dispositions, for example, receive "less deference" from the Court than its decisions made "after briefing, argument, and a written opinion."<sup>45</sup> Under the law-of-the-circuit rule, on the other hand, overruling is restricted; one circuit panel cannot overrule another panel's decision.

3. "*Precedent,*" or "*precedential value.*" In the third category are simply "precedents," or cases having "precedential value." These are omnibus terms whose meaning can run the

axiomatic that a court of appeals must follow the precedent of prior panels within its own circuit."); Salem M. Katsch & Alex V. Chachkes, *Constitutionality of "No-Citation" Rules*, 3 J. App. Prac. & Process 287, 288 n. 5 (2001).

42. See *supra* nn. 11, 20. The D.C. Circuit expressly permits lawyers to argue that an unpublished disposition is "binding precedent," or at least "precedent." See *supra* n. 11. In the Fifth Circuit, unpublished opinions issued before January 1, 1996, likewise "are precedent." See *supra* n. 11 and text accompanying n. 20.

43. See *supra* nn. 18, 19.

44. The Sixth Circuit apparently disagrees. See *Humphrey*, 2002 U.S. App. LEXIS 6984 at \* 71 ("unpublished decision[s] with no binding effect"; "unpublished opinions are not controlling precedent") (citing *U.S. v. Ennenga*, 263 F.3d 499, 504 (6th Cir. 2001); *Salamalekis v. Commr.*, 221 F.3d 828 (6th Cir. 2000)). The explanation could be that in all these cases the court rejected the claim that the particular unpublished opinion cited had precedential value; the cases, however, are categorical in what they say about unpublished opinions. The cases do all use qualifying terms such as "binding" or "controlling" precedent. So the point may be that the Sixth Circuit does not regard "precedential value" as translating into "binding" precedent or as constituting the law of the circuit.

45. See e.g. *Ashland Oil, Inc. v. Caryl*, 497 U.S. 916, 920 n. \* (1990) ("The Court gives less deference to summary dispositions . . ."); *Caban v. Mohammed*, 441 U.S. 380, 390 n. 9 (1979) ("not entitled to the same deference given a ruling after briefing, argument, and a written opinion"); Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* 216 (7th ed., BNA 1993) ("It thus seems fair to say that the whole Court agrees that summary affirmances are entitled to some weight, but to less than fully articulated decisions.").

gamut from binding precedent to mere citable precedent (discussed shortly). Of the eight circuits that allow citation of unpublished opinions, one—the D.C. Circuit—permits their citation “as precedent,”<sup>46</sup> while two—the Fourth and Sixth Circuits—allow that unpublished opinions may have “precedential value” (which may or may not be the same thing).<sup>47</sup>

4. *Persuasive value.* A fourth category comprises cases citable for their “persuasive value.” This somewhat elusive term evidently means persuasive force independent of any precedential claim; the decision must persuade on its own argumentative merits, without regard for its status as a precedent or for any notions of *stare decisis*.<sup>48</sup> The problem is, of course, that the concepts of precedent and persuasiveness are difficult to disentangle. The habit of *stare decisis* is hard-wired into the brains of common law judges. And, other things being equal, it is easier to follow a lead than to blaze one’s own trail. Nonetheless, as Judge Kozinski stresses in *Hart*, “persuasive” authority is a concept familiar to judges and lawyers.<sup>49</sup> Of the eight circuits that allow citation of unpublished opinions, four—the Eighth, Tenth, Eleventh, and Fifth—provide that such opinions are “not precedent,” or “not binding precedent,” but that they may be cited for their “persuasive value.”<sup>50</sup> This presumably has the important effect of denying these opinions the force conferred by the law-of-the-circuit rule, thus allowing

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46. See *supra* n. 11 and accompanying text. The Fifth Circuit also regards unpublished opinions issued before January 1, 1996, as “precedent.” See *supra* n. 21.

47. See *supra* nn. 18, 19, 44.

48. The idea resembles the administrative-law concept of “*Skidmore* deference,” under which an agency’s informal interpretations of its statute are “‘entitled to respect,’ . . . but only to the extent [they] have the power to persuade.” *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); see also *U.S. v. Mead Corp.*, 533 U.S. 218, 227-28 (2001). Justice Jackson stated in *Skidmore* that the weight accorded to the administrative judgment in a particular case “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” 323 U.S. at 140.

49. “[C]ommon law judges knew the distinction between binding and persuasive precedent. The vast majority of precedents at common law were considered more or less persuasive.” 266 F.3d at 1165 n. 13.

50. See *supra* nn. 21-24.

them to be overruled—or simply rejected as unpersuasive—by subsequent panels of the same circuit.

5. *Citable precedent*. Last comes citable precedent. This term means only that the case may be cited, with the weight to be given it left open. Minimal as the concept may seem, the ability to cite a case is, of course, precisely what is at stake in no-citation rules. The ABA's recent resolution, for example, urges only that the federal appeals courts "[p]ermit citation" to unpublished opinions.<sup>51</sup> Given the habit of *stare decisis* and the attraction of following a path already broken, I would say that, if opinions may be cited, they will be followed more often than if they may not be. Judge Kozinski memorably disagrees.<sup>52</sup> Be that as it may, the concept of citability may have important symbolic value in a system of law based on precedent, value essential to respect for the law and to the rule of law itself. Judge Kozinski in *Hart* has usefully articulated the rationale for citability, grounding it on a court's obligation to "acknowledge[] and consider[]" prior decisions.<sup>53</sup>

Precedent thus is a rich palette. In depicting unpublished opinions as "precedents," one needs to consider the broad range of colors that may be applied.

### III. THE BACKHANDED IMPACT OF *HART*: NO-CITATION RULES AT THE BAR OF THE COMMON LAW

The key issue today is not whether unpublished opinions must be binding precedents; it is whether they may be cited at all. The central split among the circuits, for example, is not over binding precedent. Of the eight circuits that permit citation, only one (the D. C. Circuit) explicitly contemplates "binding precedent"; two (the Tenth and Eleventh) state that unpublished opinions are *not* "binding precedent[s]"; while another two (the Fifth and Eighth) deny that they are even "precedents."<sup>54</sup> The

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51. *See supra* nn. 4-5 and accompanying text.

52. "Citing a precedent is, of course, not the same as following it; 'respectfully disagree' within five words of 'learned colleagues' is almost a cliché." *Hart*, 266 F.3d at 1170.

53. "So long as the earlier authority is acknowledged and considered, courts are deemed to have complied with their common law responsibilities." *Id.* at 1170.

54. *See supra* nn. 11, 20-24.

battle is over citability. Judicial defenders circle their wagons around the no-citation feature of the rules,<sup>55</sup> while many critics aim their arrows at only that feature.<sup>56</sup> Emblematic of the debate is Judge Arnold's widely-quoted comment in *Anastasoff*: "[S]ome forms of the non-publication rule even forbid citation. Those courts are saying to the bar: 'We may have decided this question the opposite way yesterday, but this does not bind us today, and, what's more, you cannot even tell us what we did yesterday.'" <sup>57</sup>

Judge Kozinski in *Hart*, while rejecting the claim that unpublished opinions must be binding precedents, goes further and upholds the Ninth Circuit's rule banning citation of those opinions.<sup>58</sup> This issue indeed was presented; the validity of the no-citation rule, as applied to a citation carrying no claim of binding authority, was the question raised by the facts of *Hart*.<sup>59</sup> Judge Kozinski concentrated, however, on the binding-authority

55. *E.g.* Kozinski & Reinhardt, *supra* n. 36 at 43; Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 Ohio St. L.J. 177, 196 (1999).

56. *E.g.* Katsh & Chachkes, *supra* n. 41; Stephen R. Barnett, "Unpublished" Judicial Opinions in the United States: Law Or Not? 2 European Bus. Org. L. Rev. 429, 434-437 (2001). The claim that no-citation rules violate the First Amendment by prohibiting litigants from telling the court about a prior court decision, *see* Katsh & Chachkes, *supra* n. 41, at 289, draws support from *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533 (2001). The Court there struck down, under the First Amendment, a Congressional prohibition against the use of LSC funds in cases involving an effort to "amend or otherwise challenge existing welfare law." *Id.* at 537. Calling the ban "inconsistent with the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case," the Court declared that the enactment under review, in its attempt to "prohibit the analysis of certain legal issues and to truncate presentation to the courts, . . . prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power." *Id.* at 545.

57. 233 F.3d at 904.

58. 9th Cir. R. 36-3 (unpublished dispositions "are not binding precedent" and "may not be cited").

59. The attorney whose citation of an unpublished Ninth Circuit opinion precipitated Judge Kozinski's ruling in *Hart* was not citing that opinion as precedent, at least not in the sense of asking the court to follow it, but was using it to illustrate his statement that "[t]he Ninth Circuit has not explicitly ruled on the issue before this court." *See* Appellant's Brief at 13 n. 6, *Hart v. Massanari, sub nom. Hart v. Apfel*, filed Dec. 13, 1999 (*citing Rice v. Chater*, No. 95-35604, 1996 WL 583605 (9th Cir., Oct. 9, 1996) (reported in *Decisions Without Published Opinions*, 98 F.3d 1346 tbl. (9th Cir. 1996)). Judge Kozinski did not consider arguments of history or common law practice that might make the rule unconstitutional in prohibiting the mere citation of an unpublished opinion, which the attorney in *Hart* was doing, as distinct from application of the rule to deny an unpublished opinion the force of binding precedent, which was not involved in *Hart*.

question,<sup>60</sup> and almost as an afterthought<sup>61</sup> addressed the rule's ban on citation.<sup>62</sup> At this point, moreover, his argument (to which I'll return) exchanged history and constitutional principle for wholly prudential considerations.

Nevertheless, much of what Judge Kozinski says in his discussion of binding precedent seems quite relevant to no-citation rules. Backhandedly, Judge Kozinski provides a fresh and cogent rationale for regarding those rules as inconsistent with the common law tradition and with modern federal practice. In the course of arguing that the principle of "strict binding precedent"<sup>63</sup> is not constitutionally compelled, Judge Kozinski goes a long way toward demonstrating that the principle of citable precedent may be.

Consider two examples:

(1) In his discussion of history and the Constitution, Judge Kozinski writes:

*While we agree with Anastasoff that the principle of precedent was well established in the common law courts by the time Article III of the Constitution was written, we do not agree that it was known and applied in the strict sense in which we apply binding authority today . . . . The concept of binding case precedent, though it was known at common law, was used exceedingly sparingly. For the most part, common law courts felt free to depart from precedent where they considered the earlier-adopted rule to be no longer workable or appropriate.*

*Case precedent at common law thus resembled much more what we call persuasive authority than the binding authority which is the backbone of much of the federal judicial system today.*<sup>64</sup>

Judge Kozinski thus appears to say that "the principle of precedent was well established" when the Constitution was

60. Together, the terms "binding authority" and "binding precedent" appear forty-five times in the twenty-two page opinion.

61. On page twenty of the twenty-two-page opinion.

62. 266 F.3d at 1178.

63. *Id.* at 1164.

64. *Id.* at 1174-1175 (citations omitted) (emphasis added); *see also id.* at 1165 n. 13 ("[C]ommon law judges knew the distinction between binding and persuasive precedent. The vast majority of precedents at common law were considered more or less persuasive. . . .").

written, but that it “resembled much more what we call persuasive authority” than it did “binding authority.” Does this not suggest that a principle akin to persuasive authority may have been embodied in Article III, or at least in the “common law traditions” that federal courts follow?<sup>65</sup> Given the distinguished common law pedigree that Judge Kozinski credits to the principle of persuasive authority, one might have expected him to consider that principle before upholding a rule that prohibits lawyers from citing court decisions they claim to be persuasive. While Judge Kozinski writes that “common law judges knew the distinction between binding and persuasive precedent,”<sup>66</sup> he himself seems to rub out that distinction.

(2) In discussing the common law tradition, Judge Kozinski writes:

Federal courts today do follow some common law traditions. When ruling on a novel issue of law, they will generally consider how other courts have ruled on the same issue.

. . . .

Citing a precedent is, of course, not the same as following it; “respectfully disagree” within five words of “learned colleagues” is almost a cliché. . . . While *we would consider it bad form to ignore contrary authority by failing even to acknowledge its existence*, it is well understood that—in the absence of binding precedent—courts may forge a different path than suggested by prior authorities that have considered the issue. *So long as the earlier authority is acknowledged and considered, courts are deemed to have complied with their common law responsibilities.*<sup>67</sup>

When a rule prohibits citation of unpublished opinions, does that not require courts to “ignore contrary authority by failing even to acknowledge its existence”? If an earlier authority cannot be cited to the court, it cannot be “acknowledged and considered” by the court; hence, it would

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65. See 266 F.3d at 1169 (“Federal courts today do follow some common law traditions.”).

66. *Id.* at 1165 n. 13.

67. *Id.* at 1169-1170 (emphasis added).

seem, courts have not “complied with their common law responsibilities.” It is hard to see why these considerations of judicial responsibility should not have been considered in *Hart* as bearing on the validity of the Ninth Circuit’s no-citation rule.

The case against no-citation rules asks not that unpublished opinions be regarded as binding precedents, or as precedents at all in the normative, *stare decisis* sense. It asks only that they be acknowledged and considered.<sup>68</sup> This obligation serves the ends of fairness and consistency, assuring that the prior decision not be rejected without on-the-record consideration and explanation. It is a lesser requirement than the “burden of justification” that Judge Arnold considers necessary for overruling a prior decision.<sup>69</sup> But it serves the same purpose, assuring that when the law changes, it does so “in response to the dictates of reason, and not because judges have simply changed their minds.”<sup>70</sup> It is one thing to tell a litigant she lost her case because the court reconsidered and rejected a prior opinion that was in her favor; it is another thing to tell her she lost her case under a rule that barred her lawyer from telling the court about that prior opinion. As Judge Kozinski says, it is “bad form to ignore contrary authority by failing even to acknowledge its existence.”<sup>71</sup> Why is it bad form? Because, at bottom, it disrespects the principle of precedent on which our court-made law is based, and hence dishonors the rule of law itself. Judge Kozinski’s articulation of the need to “acknowledge and consider” prior decisions thus provides an apt and cogent rationale for rejecting no-citation rules.<sup>72</sup>

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68. On this point Judge Kozinski and Judge Arnold seem to agree. Judge Arnold rejects the courts’ message that “you cannot even tell us what we did yesterday,” while Judge Kozinski insists that earlier authority be “acknowledged and considered.” See *Anastasoff*, 223 F.3d at 904; *Hart*, 266 F.3d at 1170.

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

70. *Id.*

71. *Hart*, 266 F.3d at 1170.

72. The relevant difference can be seen in two recent cases in which federal appeals panels refused to follow unpublished opinions, provoking dissents based on *Anastasoff*. In *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315 (5th Cir. 2001), *rehearing en banc denied*, 256 F.3d 260 (2001), a Fifth Circuit panel held that DART was not an arm of the State of Texas for purposes of Eleventh Amendment immunity, in the face of three prior unpublished dispositions to the contrary. The unpublished opinions were cited to the panel, under the Fifth Circuit rule allowing citation as “persuasive authority,” *see supra* n. 21, and the panel discussed them in a lengthy footnote, finding them unpersuasive. 242 F.3d at



#### IV. VANISHING TIME: THE KOZINSKI DEFENSE OF NO-CITATION RULES

When Judge Kozinski ultimately moves in *Hart* from whether unpublished opinions are binding authority to whether they are citable, he departs from his earlier consideration of history, common law practice, and “persuasive precedent” and makes an argument that is wholly prudential. “Should courts allow parties to cite to these dispositions,” Judge Kozinski writes, “much of the time gained [from not having to write precedential opinions in every case] would likely vanish.”<sup>73</sup> In support of this conclusion Judge Kozinski offers two arguments, one based on the additional time that judges (and their staffs) assertedly would need to produce opinions worthy of citation, the other stressing the extra time that judges and lawyers assertedly would need to research and process those opinions once produced. Both are legitimate concerns—especially for the Ninth Circuit, with the highest case volume of any federal circuit.<sup>74</sup> Both concerns, however, appear exaggerated.

Judge Kozinski first argues that if unpublished opinions could be cited, “conscientious judges would have to pay much closer attention to the way they word their unpublished rulings. Language adequate to inform the parties how their case has been

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318-319 n. 1. Three judges dissented from the denial of rehearing en banc, saying the court should “revisit the questionable practice of denying precedential status to unpublished opinions.” 256 F.3d at 260 (Smith, Jones & DeMoss, JJ., dissenting).

In *Symbol Technologies, Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361 (Fed. Cir. 2002), a divided panel upheld a defense of laches to a claim of patent infringement, contrary to two prior non-precedential opinions of the Federal Circuit. (The court “reluctantly” permitted those opinions to be discussed despite the Circuit’s no-citation rule, see 277 F.3d at 1370 (Newman, J., dissenting).) While the defendant argued that the court was bound by those opinions, citing *Anastasoff*, the majority agreed instead with Judge Kozinski in *Hart*. It thus concluded: “[W]e decline to consider” the opinions. 277 F.3d at 1368. The dissenting judge agreed that the opinions were not binding, but found them worth considering at some length. 277 F.3d at 1370.

While *Williams* and *Symbol* both declined to follow unpublished opinions, they differ crucially. The Fifth Circuit considered the opinions and rejected them, while the Federal Circuit “decline[d] to consider” them. The Federal Circuit’s failure even to acknowledge and consider the opinions was, in Judge Kozinski’s term, “bad form,” *Hart*, 266 F.3d at 1170; it may also have been unconstitutional. See *Katsh & Chachkes*, *supra* nn. 41, 56; *Velasquez*, 531 U.S. at 545.

73. 266 F.3d at 1178.

74. And especially for Judge Kozinski, whose superb published opinions are worth all the time he can put into them.

decided might well be inadequate if applied to future cases arising from different facts.”<sup>75</sup> Further, “[w]ithout comprehensive factual accounts and precisely crafted holdings to guide them, zealous counsel would be tempted to seize upon superficial similarities between their clients’ cases and unpublished dispositions.”<sup>76</sup> This exaltation of judges’ language not only harks back to Legal Realism, as Judge Danny J. Boggs and Brian P. Brooks have pointed out.<sup>77</sup> It also ignores what we all were taught in the first year of law school:<sup>78</sup> that the law is not what the judges *say*—that’s dictum; it’s what they *decide*. Although imprecise language indeed may mask the true facts of a case, law clerks and staff attorneys are good at stating facts—they do it often enough in published opinions—and lawyers and judges have abundant experience in distinguishing cases on their facts. When a lawyer cites an unpublished opinion, it is less likely to be because of its language than because the facts of that case are closer to those in the case before the court than are the facts of any case decided with a published opinion.<sup>79</sup> As Judge Richard Posner, himself a backer of no-citation rules, has conceded: “Despite the vast number of published opinions, most federal circuit judges will confess that a surprising fraction of federal appeals, at least in civil cases, are difficult to decide not because there are too many precedents but because there are two few on point.”<sup>80</sup> When a lawyer finds one of those few precedents on point, why shouldn’t she be allowed to tell the court about it?

Judge Kozinski further predicts that court time will be lost because “publishing redundant opinions will multiply significantly the number of inadvertent and unnecessary conflicts,” since “different opinion writers may use slightly different language to express the same idea.”<sup>81</sup> And under the

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75. 266 F.3d at 1178.

76. *Id.*

77. Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 Green Bag 2d 17, 22 (2001).

78. Even, I’m told, at Yale.

79. Circuit rules so require. See e.g. 4th Cir. R. 36(c) (allowing citation of unpublished opinion only if “there is no published opinion that would serve as well”).

80. Richard A. Posner, *The Federal Courts: Challenge and Reform* 166 (Harvard U. Press 1996).

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

law-of-the-circuit rule, “conflicts—even inadvertent ones—can only be resolved by the exceedingly time-consuming and inefficient process of en banc review.”<sup>82</sup>

Whatever the apparent conflicts in judicial language, though, circuit judges surely are expert at distinguishing cases on their facts. (Take a look at almost any unsuccessful petition for rehearing en banc.) And for true intra-circuit conflicts involving unpublished opinions, en banc review is not the only remedy. Others are—as I’ll consider shortly—(a) making unpublished opinions citable for their “persuasive” value only, and (b) lifting the law-of-the-circuit rule for unpublished opinions, so they can be overruled by subsequent panels in published opinions.<sup>83</sup>

Furthermore, any diversion of judicial time that might originally have resulted from allowing citation of unpublished opinions may already have occurred, thanks to the availability of those opinions on line, in LEXIS and Westlaw, and now in West’s *Federal Appendix*. Indeed, the entire controversy over unpublished opinions may be laid at the feet of LEXIS, Westlaw, and the Internet, with their technological capacity to make everything available; the issue would not have come up, at least not with anything like its present force, in the world of books.<sup>84</sup> With the online cat now out of the bag, judges know

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82. *Id.*

83. Judge Kozinski sees yet another drain on judicial time under a citable-opinion regime resulting from an increase in dissenting and concurring opinions: “Although three judges might agree on the outcome of the case before them, they might not agree on the precise reasoning of the rule to be applied to future cases,” and hence “[u]npublished concurrences and dissents would become much more common.” 266 F.3d at 1178. A survey of Volume 27 of the *Federal Appendix* (the latest one available as I write) yields the following figures. Among the 220 cases reported from circuits where citation is permitted, there were four dissents or concurrences, representing 1.8 percent of the cases. Among the 149 cases reported from circuits where citation of unpublished cases is banned, there were likewise four dissents or concurrences, representing 2.7 percent of the cases. The “citable” circuits thus had a *lower* rate of dissenting or concurring opinions than the “noncitable” circuits. Further, among the eighty-two cases reported from the Ninth Circuit, there were four dissents or concurrences, or 4.9 percent. The only other dissents or concurrences were from the (citable) Fourth and Sixth Circuits, which had two such opinions each (among forty-five and 116 reported cases, respectively). The rates of dissenting or concurring opinions thus were 4.4 percent in the Fourth Circuit and 1.7 percent in the Sixth—both figures lower than the 4.9 percent in the noncitable Ninth Circuit. Although admittedly limited, these data are inconsistent with Judge Kozinski’s hypothesis that making the opinions citable increases the rate of dissents and concurrences.

84. I owe this observation to Bob Berring.

that their opinions, designated for publication or not, are going to be read, collected, and analyzed.<sup>85</sup> In most federal circuits, moreover, they may be cited. Since the sky has not fallen in those circuits, one may conclude that allowing citation not only recognizes a technological *fait accompli*, but need not produce the dire results that Judge Kozinski fears.

Judge Kozinski's second argument is based on the resources assertedly needed to research and process the unpublished opinions if they are citable. "[A]dding endlessly to the body of precedent—especially binding precedent—can lead to confusion and unnecessary conflict," he writes.<sup>86</sup> The primary victims would be lawyers and their clients:

Cases decided by nonprecedential disposition generally involve facts that are materially indistinguishable from those of prior published opinions. Writing a second, third or tenth opinion in the same area of the law, based on materially indistinguishable facts, will, at best, clutter up the law books and databases with redundant and thus unhelpful authority. Yet once they are designated as precedent, they will have to be read and analyzed by lawyers researching the issue, materially increasing<sup>87</sup> the costs to the client for absolutely no legitimate reason.

If a case involves facts "materially indistinguishable" from those of prior published opinions, one wonders in the first place why it was appealed.<sup>88</sup> And if it was, one wonders why a lawyer—wanting to make her best arguments and facing a page limit on briefs—would cite the unpublished opinion instead of a published one.<sup>89</sup> In any event, the law books and legal databases

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85. See *U.S. v. Rivera-Sanchez*, 222 F.3d 1057, 1063 (9th Cir. 2000) ("While our present circuit rules prohibit the citation of unpublished memorandum dispositions, [citation omitted] we are mindful of the fact that they are readily available in on line legal databases such as Westlaw and Lexis"); Katsh & Chachkes, *supra* n. 41, at 301-302 ("[I]n practice, citation prohibitions hardly ease the case-review burden on the prudent practitioner.").

86. 266 F.3d at 1179.

87. *Id.*

88. See Katsh & Chachkes, *supra* n. 41, at 301 ("[T]he myth that there exist great batches of redundant unpublished appellate cases is true only in certain discrete areas of law where meritless cases are litigated even to appeal—e.g., cases involving prisoners and social security claimants," and even if those cases were citable, courts and practitioners "would understand . . . that the case law is well settled").

89. Especially since such citation likely would violate a circuit rule. See *supra* n. 79.

already are “clutter[ed] up” with unpublished opinions, which many lawyers now routinely research whether they are citable or not.<sup>90</sup> And it seems not insignificant that lawyers themselves tend to be strongly opposed to no-citation rules.<sup>91</sup>

While Judge Kozinski's fears thus seem overstated, they do give pause. This is especially so for the Ninth Circuit, which issues some 4,100 unpublished opinions per year.<sup>92</sup> But that is not so many more than the 3,500 issued by the Eleventh Circuit, or the 3,200 by the Fifth—opinions that in both circuits are citable.<sup>93</sup> With eight circuits now allowing citation, the burden of proof would seem to lie with those who say that citability cannot be acceptably managed.

## V. WHAT PRECEDENTIAL FORCE FOR UNPUBLISHED OPINIONS?

If unpublished opinions are to be citable, the question remains, what degree of “precedential” force should they carry? I see three possibilities: (1) binding precedent, fully subject to the law-of-the-circuit rule and thus overrulable only by the en banc court; (2) “persuasive” authority that is “not precedent,” and hence not subject to the law-of-the-circuit rule; and (3) a new “overrulable” status based on lifting the law-of-the-circuit rule to allow panel overruling of a prior panel's unpublished opinion, but only if the second panel does so in a published opinion.

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90. See Katsh & Chachkes, *supra* n. 41, at 301-302 (observing that prudent practitioners research uncitable cases “to mine them for new ideas,” because they indicate how a court has ruled in past and thus might rule in future, and because they “still may influence a court that reads (or remembers deciding) them itself”).

91. See ABA Resolution, *supra* n. 4; see also Kozinski & Reinhardt, *supra* n. 36, at 43 (“At bench and bar meetings, lawyers complain at length about being denied this fertile source of authority. Our Advisory Committee on Rules of Practice and Procedure, which is composed mostly of lawyers who practice before the court, regularly proposes that memdispos be citable. When we refuse, lawyers grumble that we just don't understand their problem”). A court official in a circuit in which unpublished opinions are not citable reports “a lot of clamor” to allow citation. Telephone Interview with circuit official (May 8, 2002). (Of course, the lawyers may just want to pad their bills, but that seems a questionable conclusion for a court to draw *a priori*.)

92. *Judicial Business of the United States Courts*, *supra* n. 26.

93. *Id.* It is true that they are not posted online or given to legal publishers. But they are citable by rule and, apparently, cited in practice. See *supra* nn. 12, 21, 24, 28.

1. Unpublished opinions, in my view, should not be regarded as binding precedents, or otherwise as equivalent to published opinions. Judge Kozinski has shown in *Hart* that the Constitution does not require that all precedents be viewed as binding. Of the eight circuits that allow citation of unpublished opinions, none treat them as full-fledged, first-class, binding precedents. All eight circuits discourage citation of these opinions, and four of the eight—the Fifth, Eighth, Tenth, and Eleventh Circuits—declare that they are “not precedents” and may be cited only for their “persuasive” value.

Treating unpublished opinions as second-class precedents—but, of course, citable ones—is readily defended. Just as the Supreme Court gives “less deference” to its summary dispositions than to cases decided with briefing, argument, and a full opinion,<sup>94</sup> no reason appears why a court of appeals may not devote less of its time and attention to a designated class of opinions and accordingly treat those opinions as having less precedential weight than others. The legitimate caseload concerns support at least this much adjustment of judicial technique. And there is little danger of deception or surprise in allowing citation. An “unpublished” opinion, even when published in the *Federal Appendix*, wears a scarlet “U”; no one should be surprised to discover that it carries less authority than a “published” opinion.<sup>95</sup>

2. If citable unpublished opinions are not to be binding precedents, some way must be found to free them from the law-of-the-circuit rule, which says a panel opinion is binding on all subsequent panels. The easiest way out would appear to lie in the approach presently taken by the Fifth, Eighth, Tenth, and Eleventh Circuits; these courts declare unpublished opinions to be “not precedent” (or “not binding precedent”) and citable only for their “persuasive” value. Under this regime, the law-of-the-circuit rule apparently does not apply to unpublished

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94. See *supra* n. 45.

95. See *supra* n. 9 (citation restrictions in *Federal Appendix*). Indeed, citation of unpublished opinions makes clear their unpublished status and avoids confusion that may otherwise result. Cf. *Rivera-Sanchez*, 222 F.3d at 1063 (citing unpublished opinions superseded by court’s (published) decision “[t]o avoid even the possibility that someone might rely upon them”).

opinions, because they are not “precedents.”<sup>96</sup> The “persuasive authority” approach thus enables a circuit panel to reject an unpublished opinion as unpersuasive—with reasons, of course—without having to take the case en banc or otherwise to formally overrule the opinion. This approach can claim an extensive historical and common law pedigree, as Judge Kozinski demonstrates in *Hart*. It also has a familiar administrative-law analogue in *Skidmore* deference.<sup>97</sup> In sum, there is much to be said for the persuasive-authority approach.

3. The other approach would accord unpublished opinions “precedential” status that requires overruling, but would lift the law-of-the-circuit rule to let subsequent panels overrule them. In the D. C. Circuit, which now allows citation of unpublished opinions “as precedent,” and possibly in the Fourth and Sixth Circuits, which allow citation for “precedential value,” it apparently follows today that an unpublished opinion found to meet these tests becomes the law of the circuit and hence cannot be overruled by another panel.<sup>98</sup> The proposed approach would alter the law-of-the-circuit rule to allow a citable unpublished opinion to be overruled by a subsequent panel, as long as the subsequent panel did so in a published opinion.

A circuit apparently would have power to revise its rules this way. While it has been suggested that the law-of-the-circuit rule rests on constitutional,<sup>99</sup> or at least statutory,<sup>100</sup> compulsion,

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96. See *In re: United States of America*, 60 F.3d 729, 732 (11th Cir. 1995) (cited unpublished opinion is “not law of this circuit and will not be binding on any future panel”). (The Eleventh Circuit’s Rule 36-2, allowing citation as “persuasive authority,” see *supra* n. 24, was in effect in 1995. Telephone Interview with 11th Cir. official (May 7, 2002)).

97. See *supra* n. 48.

98. But see Sixth Cir. cases cited *supra* n. 44.

99. See *Katsch & Chachkes*, *supra* n. 41, at 288 n. 5 (pointing out that *Anastasoff* assumes law-of-circuit rule is constitutionally required and refuting that assumption).

100. The court in *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996), described the law-of-the-circuit rule as “derived from legislation and from the structure” of the federal circuits. But the court’s quotation of 28 U.S.C. § 46(c), stating that the circuits normally sit in panels, or divisions, of “‘not more than three judges,’” and its quotation of the Revision Notes to 28 U.S.C. § 46, stating that “the ‘decision of a division’ is the ‘decision of the court.’” 87 F.3d at 1395, do not appear to make the case. The Revision Notes state that the new statutory language “preserves the interpretation established by” *Textile Mills Sec. Corp. v. Commr.*, 314 U.S. 326 (1941)—which held that circuits may sit en banc, and not only in three-judge panels. But, the Notes continue, the new language provides normally for three-judge panels and “makes the decision of a division, the

neither appears to be the case.<sup>101</sup> And such modification would promote, not subvert, the rule's purpose of avoiding intra-circuit conflicts: As between two conflicting panel decisions, it would be clear which one governed—the one that was published. Panels thus would not have to resort to finespun factual distinctions or aggressive claims of dictum in order to avoid the force of an unpublished precedent with which they disagreed. They could simply overrule it, if willing to do so in a published opinion. Such an approach also accords with the responsibilities of law-making. If the issuing panel did not consider its decision important enough to publish and make into law, why should that panel's opinion be binding on another panel which, having duly considered it, comes out differently and *is* willing to make its opinion into law? As between the two panels, the one that is consciously making law, that is willing to put its precedential money where its mouth is, ought to prevail.

Lifting the law-of-the-circuit rule thus seems desirable for circuits in which citable unpublished opinions are regarded as “precedents” and thus might invoke the rule. It might well also be done by circuits taking the “persuasive”-authority approach. While that approach allows a panel to deem a prior, unpublished panel opinion “unpersuasive” without overruling it, there will be cases in which the subsequent panel thinks the prior opinion should be formally overruled.<sup>102</sup> When a panel desires to overrule an unpublished opinion by a published one, it should not have to go en banc.

For circuits deciding between “persuasive” authority and “precedent,” the “persuasive” approach might be better for large circuits, where volume argues for giving less weight to unpublished authority. For any circuit, moreover, the

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decision of the court, unless rehearing in banc is ordered.” The issue to which this quotation was directed thus was the size of the panel in which the judges would sit, three judges or en banc, and not the relationship between panels. The Court's concern in *Textile Mills*, paraphrased in *LaShawn A.*, that “[w]ere matters otherwise, the finality of our appellate decisions would yield to constant conflicts within the circuit,” 87 F.3d at 1395, was expressed in support of the Court's holding that en banc courts were permissible. See *Textile Mills*, 314 U.S. at 335. The statement was not made in support of an argument that en bancs could be avoided by application of the law-of-the-circuit rule.

101. See *supra* nn. 99-100.

102. Cf. *Rivera-Sanchez*, 222 F.3d at 1063 (unpublished opinions affected by decision not citable but court nonetheless lists them as “superseded”).



“persuasive” approach has the virtue of providing a brighter line, one making clear that unpublished opinions, though citable, are in a class by themselves, and thus reducing the uncertainty involved in having different levels of “precedential” authority.

## VI. CONCLUSION

Judge Kozinski’s opinion in *Hart* shoots down *Anastasoff*’s claim that unpublished opinions must be binding precedents, but simultaneously demonstrates that they must be citable. The arguments of history and common law tradition that Judge Kozinski invokes, particularly his insistence that earlier authority be “acknowledged and considered,” confirm the essential role of precedent in our law and undermine the case for no-citation rules. Advancing technology is compelling the same result. In all but two federal circuits, unpublished opinions now are available not only on line, but also in West’s *Federal Appendix*, a published reporter of unpublished opinions that is worthy of *Alice in Wonderland*. It is no wonder that a majority of the federal circuits, recognizing reality, now allow citation of their unpublished opinions.

While rules permitting citation of these decisions thus seem inevitable, it does not follow that unpublished opinions should be treated as binding precedents, or as precedents at all in the *stare decisis* sense. They may be citable only for their “persuasive” value. And even where they are regarded as precedents, the circuits should lift their law-of-the-circuit rules so that unpublished opinions may be overruled by published panel opinions. The better choice, probably, is to treat unpublished opinions as citable only for their persuasive value.

Whatever the degree of deference to be accorded unpublished opinions, the arguments for making them citable seem likely to carry the day. These arguments combine the claims of fairness, due process, public access, and respect for law itself with a new technological reality that is transforming the terms of the debate. As it becomes increasingly difficult to use the term “unpublished” with a straight face, the necessary replacement becomes the candid “uncitable.” The power of courts to issue uncitable opinions is difficult to defend, and the task will only get harder as the opinions become more

accessible. Powerful as the federal courts may be, they cannot hold back this wave.