

## PUBLICITY AND THE JUDICIAL POWER

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Imagine a governmental body whose function is to decide, case by case, which of two competitors coming before it shall receive a certain benefit. Imagine further that the body's standard procedure is to flip a coin and then announce, "Heads; this one wins," or "Tails; that one wins."

Based on this description, we can make at least one statement with complete confidence: The body is not an American Article III court. The Constitution grants to the federal courts "jurisdiction" over certain kinds of cases or controversies (itemized by subject matter and parties). "Jurisdiction," it would seem, literally refers to the power to declare or expound (*dictio*) the law (*juris*). The body in question here, however, can do nothing of the sort.

Some may reply that the essence of the judicial power is not to declare law but to dispose of cases. *Dictio*, they may note, can also be translated as "to administer." However, the Romans and their continental successors did not enjoy a separation of powers like ours. Under our Constitution, the choice between common law and continental theories of adjudication is not ambiguous but clear. A "case or controversy" as we know it requires not only proper parties with concrete stakes in the outcome, but also real judging. If all a "court" did was to flip coins and dispose of cases by declaring "P wins" or "D wins," it would not be acting judicially in the Article III sense. The court would neither be reasoning with us nor relying on identified statutes or judicial precedents. Only its purported authority to issue orders could support the decision. But in a constitutional republic, on what can the authority of unelected

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judges rest? Simply on that of those who appointed them? Then how could we call this an “independent” judiciary?

A rule mandating a coin-tossing practice—or, I submit, even one simply forbidding the giving of reasons, and thus defining justice as whatever a court says it is—would violate our shared understanding of what the rule of law means. In comparative law, we called it Qadi justice, something different in kind from law as we know it.

The decision of the Eighth Circuit Court of Appeals in *Anastasoff*<sup>1</sup> invalidated a judicial practice quite different from that described above. Nevertheless, the court’s ruling rested on an understanding of the judicial power close to that advanced here. The case is unusual in two respects: first, as a holding by (a panel of) an appellate court that one of the court’s own procedural rules is unconstitutional; second, in its reliance not on a right of litigants, but on Article III’s conception of the judicial power itself.

While the ground of decision marks this a separation of powers case, most court decisions interpreting the doctrine of separated powers are quite different, in that they pertain to the outer limits of a branch’s power, to the points beyond which its action will invade the prerogatives or usurp the functions granted to another branch. In *Anastasoff*, however, we deal with the question of inherent limits to a branch’s power: the points at which its action simply cannot be recognized as proper to or competent for the branch it is.

There is very little black-letter law on issues of inherent powers, for several reasons. First, the constitutional text is very reticent about the meaning of the terms “legislative,” “executive,” and “judicial,” treating them either as self-evident or as adequately specified by the particular powers granted to each branch. Moreover, the Constitution arguably (and, in the case of Congress, explicitly) leaves to each branch a good deal of discretion with regard to its internal decisionmaking procedures. Second, such questions do not frequently arise, and even less often in a justiciable context. A court is

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

understandably reluctant to declare that an act of another branch was outside the scope of that branch's powers.

There have, of course, been a few celebrated inherent powers cases all the same. Quite unlike *Anastasoff*, most are cases where a newly asserted power, not expressly granted by the Constitution, is claimed to be inherent in a branch's functions because it is essential to its ability to perform those successfully.<sup>2</sup> Rarer still, but more closely on point, are cases such as the delegation doctrine and legislative veto decisions, holding that a branch is, by its inherent nature, disabled from engaging in a certain action or practice.<sup>3</sup> One might call this the doctrine of inherent disabilities.<sup>4</sup>

It is usually easier in terms of comity for a court to declare a limitation on its own power than to declare one on the powers of the other branches. Yet even a ruling of this type may be deemed aggressive and usurpatory by other branches; the classic example was *Marbury*.<sup>5</sup> The courts have also declined on other occasions to behave in ways they regarded as nonjudicial; e.g., refusing to give advisory opinions and refusing to issue decisions that are reviewable and reversible by executive officers.<sup>6</sup> *Anastasoff* falls squarely within this line of cases except for the fact that the rule at issue here was made by the court itself. Yet from the perspective of inherent powers and inherent disabilities, this is clearly an irrelevant distinction. Strong judicial resistance would be expected if another branch

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2. See e.g. *U.S. v. Belmont*, 301 U.S. 324 (1937) (executive agreements); *McGrain v. Daugherty*, 273 U.S. 135 (1927) (congressional investigations); *In re Debs*, 158 U.S. 564 (1895) (presidential order maintenance); *Ex parte Robinson*, 86 U.S. 505 (1873) (judicial contempt power).

3. See e.g. *INS v. Chadha*, 462 U.S. 919 (1983) (legislative veto); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (lack of inherent presidential power); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (delegation of congressional powers).

4. Additional arguments of this tenor are possible, though not well supported by precedent. For example, one could argue that, because legislation is inherently general in scope, *infra* n. 11 and accompanying text, private bills are not proper legislative acts. Cf. *Oregon v. Smith*, 494 U.S. 872 (1990) (less stringent review for "laws of general application"); *INS v. Chadha*, 462 U.S. 919 (1983) (Powell, J., concurring). One could also argue that certain executive orders and actions constitute making law, not executing it.

5. *Marbury v. Madison*, 5 U.S. 137 (1803).

6. See *Hayburn's Case*, 2 U.S. 409 (1792); *Letter of Chief Justice Jay and Associate Justices to President Washington*, in John Jay, *The Correspondence and Public Papers of John Jay* vol. III, 487-88 (Henry P. Johnston ed., G.P. Putnam's Sons 1890) (advisory opinions).

forbade them to explain themselves, but the issue pertains more to the impact of the rule than to its source.

The phenomenon at the root of the problem in *Anastasoff* is that for about thirty years, the federal courts of appeals have been struggling to accommodate their decisionmaking practices to an exponential growth in the quantity of law, unmatched by commensurate growth in the size and staffing resources of the judiciary. Some observers see this growth as threatening to completely overwhelm the judiciary's ability to decide cases efficiently. Responsive innovations in the various circuits have included, among other things, dispensing with oral argument, summary decisions without opinion, and opinions prepared on a "not for publication" basis. In connection with the last of these practices, many circuits have provided in addition that an "unpublished" opinion may not be cited, or, in the Eighth Circuit's more qualified language, is "not precedent and parties generally should not cite [it]," unless a decision has "persuasive value" and there is no equivalent published opinion.<sup>7</sup>

While some objections to these innovations question the validity of their pragmatic rationale,<sup>8</sup> objections in principle

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7. 8th Cir. R. 28A(i) (West Group 2000).

8. Since I first looked twenty years ago at the issues concerning nonpublication of appellate court opinions, see Daniel Hoffman, *Nonpublication of Federal Appellate Court Opinions*, 6 Justice System J. 405 (1981), much has been written and the relevant guidelines and practices have evolved. Still, the main questions I raised at that time are very pertinent: How substantial are the measurable benefits and costs, respectively, of these practices? How persuasive is the argument that, even if the benefits exceed the costs, the practices are nevertheless unacceptable in principle?

On the empirical questions there may be relatively little new to say. Whatever common sense may suggest, I demonstrated that, as of 1980, no substantial benefit was evident from the available statistics. Review of subsequent literature indicates that no one has yet assumed the burden of demonstrating such a benefit. While the circuits still vary greatly in the proportion of dispositions accompanied by published opinions, as well as in the overall speed of dispositions, and while many of the circuits have significantly changed one or both of those dimensions, no clear-cut correlation between the two statistics has yet been shown, either for circuits or for individual judges. The ostensible benefits in terms of judicial efficiency remain merely that—ostensible. That the new practices are positively indispensable is a completely ungrounded empirical claim. Meanwhile, a number of studies have supplied additional reports of abuses and further evidence that the formal guidelines do not in fact guide judicial decisions and do not ensure that significant lawmaking precedents will be published. See e.g. Donald R. Songer, Danna Smith & Reginald S. Sheehan, *Nonpublication in the Eleventh Circuit: An Empirical Analysis*, 16 Fla. St. U. L. Rev. 963 (1989); Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, 61 L. & Contemp. Probs. 157 (1998).

were also quick to surface, and some were couched in constitutional terms. Different critics have deployed First Amendment (right to petition), Due Process (fair hearing), and Equal Protection arguments to establish that litigants and attorneys are entitled to have full and equal access to the law and to inform the court of precedents they deem helpful to their cases, unobstructed by judicial resort to unexplained judgments or by unpublished or noncitable opinions. While I find much merit in these arguments, I shall not delve into them here, since *Anastasoff* rests directly on the interpretation of Article III.<sup>9</sup>

Are these new, efficiency-driven court procedures consistent with Article III? One important way to expound on the meaning of “judicial power” or “jurisdiction” is to revisit the fundamental reason we have a separate judicial branch in the first place: the concept of the rule of law. To combine the judicial with the legislative or the executive power, says Publius, is the essence of tyranny.<sup>10</sup> The laws must be general in their language and effect, say Locke and other theorists.<sup>11</sup> Laws require application and interpretation; that the state of nature lacks impartial arbiters for this purpose is one of the major reasons to establish a government. Hence the most essential attribute of the judicial process and the most essential aspect of “good behavior” for a judge is neutrality. Because judges are human and have their own personal/partisan interests and preferences, they contribute to the legitimacy of the state only if their judgments are rendered not according to the judge’s personal will, but according to law. That the decision is made according to law, moreover, must be demonstrable—not taken on faith.

Judicial independence and neutrality are the fundamental motivations for Article III. Practices that undermine these virtues, whether externally or internally imposed, are at the least

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9. Some of the arguments are adumbrated in the articles cited *supra* n. 8; others were sketched in recent discussions, prompted by *Anastasoff*, on a listserv to which the author subscribes.

10. No. 47: *Madison*, in Alexander Hamilton, James Madison, & John Jay, *The Federalist Papers* 300-308 (Clinton Rossiter ed., Penguin Group 1961).

11. John Locke, *The Second Treatise of Civil Government and a Letter Concerning Toleration*, ch. 11, ¶ 134f (J.W. Gough ed., Basil Blackwell 1947); Jean Jacques Rousseau, *The Social Contract and Discourses*, Book II, ch. VI, 69-75 (G.D.H. Cole trans., E.P. Dutton & Co. 1950).

in tension with that Article. “No one shall judge his own cause”: The “judgment” of an admittedly partial judge would be no judgment at all, and it would be the clear duty of a higher court to vacate it. And the “judgment” of a judge who made no analysis of the case, but only flipped a coin? Likewise. And the “judgment” of a judge who declares, “I have reasons, but I won’t tell them to you?” Or how about, “Here are my reasons, and don’t cite me any contradictory precedents, or I’ll hold you in contempt?” Or, finally, “Here are my reasons, but this judgment is not precedential and may not be cited in the future?” While these cases are not identical, they are troubling in closely related ways.

If the lower court has simply given no reasons, an appellate court can remand the case for that purpose; but, if the law is sufficiently clear to the appellate court, it may not need to do so. A court of final decision, however, because it has the last word, must provide that word in order to incorporate the case into the body of law. A nonprecedential decision, because it will not be so incorporated, is not law.

Given the dearth of black-letter law, it would be no great surprise if some readers of this essay said, “But that’s a policy argument—not a constitutional argument.” These readers, whose objection relies on an understanding of the difference between law and politics, must think they can recognize when law runs out. Hence, they should be the first to demand a constitutionally adequate explanation for every judicial act—an explanation that takes that act from the realm of will into the realm of law.

We know we are in the presence of law not by the building, the robes, or the library, but by the reasons given and the discourse of which those reasons are a part. To say that no reason—no debatable reason—is needed, is to cease to say what the law is.

“It is emphatically the power and the duty of the judicial department to say what the law is.”<sup>12</sup> In making declarations that lack precedential authority *ab initio*—whatever the exact scope

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12. *Marbury v. Madison*, 4 U.S. 137, 177 (1803).

of that authority may be when actually exercised—judges are not acting judicially.<sup>13</sup>

Law is inherently a matter of public record, available to all who wish or need to know it.<sup>14</sup>

Hence the non-citation rule violates Article III.

At the heart of every constitutional problem involving the role and powers of the judiciary is the distinction between law and politics.<sup>15</sup> The judiciary exists to provide a good—the rule of law—that politics itself cannot provide, because to permit the “political branches” to interpret the laws would create a potential for tyranny. For this design to be viable, courts must be seen as apolitical.

This reasoning entails the need for a constitutional doctrine of the law/politics distinction: not only do courts not decide questions in their nature political,<sup>16</sup> nor succumb to interference with their independence by the political branches; neither do they use methods of deciding that are in their nature inherently nonlegal.

A political decision is often an act of will or, as Sunstein puts it, “naked preference.”<sup>17</sup> A legal decision, in contrast, is an elaboration/application of principles (or of precedents which articulated those principles). So, to be manifestly a decision according to law, a judicial decision must, at a minimum, identify the principles/precedents on which it is based. In the case of judicial decisions, in other words, we must know not only who won, but also what the reasons were.

This is not true in the same sense for legislative and executive decisions. We indeed have a clear right to know just what we are commanded to do. Voters and lobbyists may indeed petition for explanations, and hold officials politically accountable if not satisfied. But we cannot say that an unexplained law or executive order is null and void. The absence of reasons often becomes most troublesome precisely when a court is asked to interpret the law or order and finds that

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13. Cf. *Hayburn's Case*, 2 U.S. 409 (1792).

14. Lon L. Fuller, *The Morality of Law* (Yale U. Press 1964).

15. This topic is a major focus of Daniel N. Hoffman, *Our Elusive Constitution: Silences, Paradoxes, Priorities* (SUNY Press 1997).

16. *Luther v. Borden*, 48 U.S. 1 (1849); *Marbury*, 4 U.S. at 177.

17. Cass R. Sunstein, *The Partial Constitution* 25 (Harvard U. Press 1993).

silence a hindrance. Occasionally, a court may even weigh the absence of legislative “findings” against the law’s constitutionality.<sup>18</sup> But courts have never imposed a formal requirement that the legislature state reasons. Elected officials may take emergency actions of dubious legality and “throw themselves on their country” for political vindication.<sup>19</sup> Courts tend to abstain from such cases, or find that the action was ultimately ratified by political means.<sup>20</sup>

In contrast, judicial requirements that administrative orders be supported by reasons are common.<sup>21</sup> Quite aware that these requirements greatly facilitate judicial review, courts are not deterred by separation of powers concerns from imposing them on subordinate executive agencies. Yet here the common justification is certainly not the inherent requirements of Article II. It is either the due process right of the litigant or the Article III imperative of the court itself.

One major difference between the branches is that, at least in theory, the sovereign people have opportunity to ascertain, judge, and correct, by interest articulation and voting, what the legislature and the chief executive have done. Court decisions are not corrigible in the same sense, though by more arduous, indirect routes they may be. In the particular case of an unexplained judgment, we can determine only who won—but what are we to do then? Seek to amend the statutes involved in the case? But how? Seek to impeach the judge? But on what ground?

Law is by nature a public thing: *res publica*. In researching issues of governmental secrecy years ago, discovering a State Department memorandum titled “Secret Statutes of the United States”<sup>22</sup> came as a shock. How could there be such laws? The memorandum dated from the post-World War I period, and the motive for its production never became clear. The secret statutes reported were from the pre-War of 1812 era, and authorized

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18. *E.g. U.S. v. Lopez*, 514 U.S. 549 (1995).

19. A.M. Schlesinger, Jr., *The Imperial Presidency* 35 (Popular Library 1974) (quoting a statement from Thomas Jefferson regarding the Louisiana Purchase).

20. *E.g. The Prize Cases*, 67 U.S. 635 (1863). For more on judicial acquiescence in presidential stretches of power, see Hoffman, *supra* n. 15.

21. *E.g. Clay v. U.S.*, 403 U.S. 698 (1971).

22. D.H. Miller, *Secret Statutes of the United States* (USGPO 1918).



President James Madison to occupy Spanish West Florida without a public declaration of war. This unsavory episode—a day that lives in infamy?—does little to enhance the reputation of the Father of our Constitution. Even if one thought there might be cases where the president, with his responsibilities for national security, must and may act in secret, the executive ought not to involve the other branches in such nefarious action.<sup>23</sup> Neither the legislature nor the courts can properly do this. The capacity and penchant of the executive for secrecy is precisely what makes it the most dangerous branch.<sup>24</sup> When Congress closes its doors, it is still a legislature, but its work product is not law until it is available to the public. Nor, in general, is that of a court.<sup>25</sup>

“Available to the public” is an ambiguous phrase. What is the teaching of history here? Does the fact that a given sort of publicity was not practiced—indeed was impossible—two hundred years ago mean that it cannot be mandatory now that it is possible? How specific is the standard implicit in Article III?

*Anastasoff* explains that, before the era of widespread publication, “the record of the judicial proceedings and decision alone”<sup>26</sup> or “decisions . . . established only by memory or by a lawyer’s unpublished memorandum”<sup>27</sup> or “[a] manuscript note”<sup>28</sup> could be and were used as precedents when nothing better was available. Judging from the use in early congressional debates of similarly ill-documented legislative, executive, and judicial “precedents,”<sup>29</sup> this contemporary judicial practice must have been equally fraught with confusion, unfairness, and potential deceit.

Is there then a clear-cut constitutional rule as to judicial publicity? There is, of course, a right to a public trial.<sup>30</sup> As for appeals, *Anastasoff* argues simply that, although publication of

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23. Cf. *Korematsu v. U.S.*, 323 U.S. 214 (1944) (Jackson, J., dissenting).

24. See generally Daniel N. Hoffman, *Governmental Secrecy and the Founding Fathers: A Study in Constitutional Controls* (Greenwood Press 1981).

25. Of course, a procedural step such as issuing a warrant is quite different from the final disposition of a case.

26. *Anastasoff*, 223 F.3d at 901 n. 9 (citing Blackstone).

27. *Id.* at 903.

28. *Id.* at 903 n. 14.

29. See *supra* n. 25.

30. U.S. Const. amend. VI.

opinions was neither mandatory nor standard practice in the Founding period, court decisions, published or not, were viewed as inherently precedential. The holding, accordingly, is not that publication is required, but that unpublished decisions are as precedential and as binding as published ones. "Binding" is not fully elaborated, but according to Eighth Circuit practice, only the court en banc has authority to overrule a circuit precedent. A full theory of "bindingness" is not necessary to deal with the extreme case of ipso facto nonprecedentiality.

A reference to the alternative practice of issuing summary dispositions with no opinion at all—a practice which some think the rule of *Anastasoff* would increase—suggests that the court did not go far enough. To hold the legislature or executive accountable, it may be sufficient to describe what they did and assess the consequences—without necessarily having to know the motivation. If a law harms me, I am entitled to try to change it, regardless of the reasons behind its passage. But there is an important sense in which judicial decisions cannot be evaluated without regard to the reasoning behind them—precisely because they stand not just as ad hoc orders but as precedents, to be judged by rule-oriented and not act-oriented standards. Courts—especially appellate courts—must give reasons.

If a court decision is announced as nonprecedential or simply unexplained, there can scarcely be any remedy except for appeal to a higher court. It is true that unpublished decisions can, in principle, be appealed; certiorari has on occasion been granted, and reversals do occur.<sup>31</sup> On one occasion, the Supreme Court noted its consternation that a court of appeals decision affirming the invalidation of a federal statute had not been published.<sup>32</sup> But even if it is not absolutely decisive, the "nonprecedential" label cannot but burden an appellant's prospects for success in the appeal. Likewise, making an important decision noncitable burdens the prospects of litigants in future cases. Perhaps there is a First Amendment right to discuss these in the press and argue their legal relevance in that forum, but that is not the forum in which the law is supposed to work itself clean.

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31. *E.g. Hughes v. Rowe*, 449 U.S. 5 (1980); *Browder v. Director, Dept. of Corrections of Illinois*, 434 U.S. 257 (1978); *Taylor v. McKeithen*, 407 U.S. 191 (1972).

32. *U.S. v. Edge Broad.*, 509 U.S. 418 (1993).

How much must we be told to enable us to understand what the law is, according to which the conflict has been resolved? “Affirmed in light of the precedent, *P v. D*” might conceivably suffice. But “Affirmed, Rule 51” cannot suffice, because rule 51, which simply permits summary dispositions, is not a rule of substantive law. It does not even pretend to explain why this plaintiff, or those similarly situated, are entitled to prevail. At most, it suggests that the court has deliberated and, for unknown reasons, has determined that such is the case.

To apprehend the decision as founded in or supported by law, one must either have reasons or fall back on blind faith. Suppose we require a statement of reasons. How far are we to go? The extreme would be a Herculean requirement<sup>33</sup> that the court demonstrate not only that the decision is supported by *some* law, but that it is coherent with the seamless web—with all the law there is. Here, as the law exponentially grows in quantity, the task of the courts would indeed become impossible, at least unless they could rely on a presumption that the few authorities they do cite are in turn consistent with all the law there is.

Nonsense upon stilts? It is hard to see how we could ever have total confidence in the law’s coherence. But one thing is certain: The freedom of litigants to call to our attention and to the courts’ attention any precedents and principles they deem inconsistent with the result advocated by the other side is a necessary condition for having the confidence we need. Otherwise there is no sufficient check, scrutiny, or accountability.

There is, in the final analysis, a profound contradiction between the discursive logic of the rule of law and the authoritarian logic of bureaucratic efficiency. Moreover, this is not—cannot be—one of the many tensions our Constitution accepts as unavoidable and tries to negotiate.<sup>34</sup>

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33. See generally Ronald Dworkin, *Law’s Empire* (Belknap Press 1986).

34. Cf. *supra* n. 17.

To do so would end by reducing popular sovereignty to a symbolic embellishment of law's violence.<sup>35</sup> This would be a radically different Constitution from the one we thought we had.

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35. Cf. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4 (1983).