

## THE UNPUBLISHED, NON-PRECEDENTIAL DECISION: AN UNCOMFORTABLE LEGALITY?

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In August 2000, the Eighth Circuit ruled in *Anastasoff v. United States*<sup>2</sup> that its rule prohibiting the use of unpublished decisions as precedent represents an impermissible expansion of the judicial power emanating from Article III of the United States Constitution.<sup>3</sup> This decision was ultimately vacated as moot by the Eighth Circuit en banc,<sup>4</sup> but the issue concerning the validity of rules regarding unpublished decisions remains a viable one. Criticism regarding unpublished decisions and their use as precedent has been widespread since the rules evolved

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

3. 223 F.3d at 898.

4. 235 F.3d at 1056. In *Anastasoff*, a taxpayer claimed she was due a refund of overpaid federal tax. 223 F.3d at 899. The government argued that the claim was not timely, basing this position on an unpublished decision of the Eighth Circuit, *Christie v. United States*, No. 91-2375MN (8th Cir. Mar. 20, 1992). *Anastasoff*, 235 F.3d at 1055. A three-judge panel of the Eighth Circuit concluded that Eighth Circuit rule restricting the use of unpublished decisions was unconstitutional and therefore the court was bound by *Christie*. *Anastasoff*, 223 F.3d at 905. Prior to the en banc review, the government refunded the taxpayer's claim. *Anastasoff*, 235 F.3d at 1055. Also, while the case was before the three-judge panel, the Second Circuit decided *Weisbart v. United States*, 222 F.3d 93 (2000), a decision which was in direct conflict with *Christie*. The three-judge panel had considered itself without the proper authority to adopt *Weisbart*, thereby overruling *Christie*, a decision which would only be proper for the en banc panel to make. *Anastasoff*, 235 F.3d at 1055. Finally, prior to the en banc hearing, the Internal Revenue Service issued an Action on Decision announcing the acquiescence of the government in the rule of *Weisbart* regarding the timeliness of taxpayer filings. *Id.* Consequently, at the en banc hearing the court concluded that the case was moot because the claim had been refunded to the taxpayer and the government's position no longer rested on an unpublished decision. *Id.* The court noted, "The controversy over the status of unpublished opinions is, to be sure, of great interest and importance, but this sort of factor will not save a case from becoming moot. We sit to decide cases, not issues . . ." *Id.* at 1056.

approximately twenty years ago.<sup>5</sup> In this essay, the author traces the initial problem which gave rise to the limited publication/restricted citation rules, the variety of rules in place today at the circuit level, and the various criticisms of and justifications for the rules. The author then examines the original *Anastasoff* opinion, which declared such citation restrictions unconstitutional, and particularly the specific legal basis cited by the *Anastasoff* court. The author then proposes alternate legal theories that may address the legality of rules restricting the citation of unpublished decisions. The author concludes that the rules are certainly offensive to a perception of fairness and raise serious questions under Article III, the equal protection and due process clauses, and the statutory right to appellate review. Consequently, the legality of the rules merits consideration by the United States Supreme Court.

## I. THE PROBLEM

The original problem the unpublished decision rule was designed to address was the volume crisis in the federal appellate courts.<sup>6</sup> The 1990 Federal Court Study Committee began its discussion of the problems facing appellate courts with the following remark: "However people may view other aspects of the federal judiciary, few deny that its appellate courts are in 'crisis of volume' . . . ."<sup>7</sup> While the federal district courts have experienced significant increases in volume,<sup>8</sup> the concerns regarding volume have centered on the appellate courts because the rate of increase at the appellate level is higher and "there is a

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5. See generally Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C. L. Rev. 235 (1998); Martha J. Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?* 44 Am. U. L. Rev. 757 (1995); William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167 (1978).

6. See generally Thomas E. Baker, *Rationing Justice on Appeal: The Problems of the U.S. Courts of Appeals* 31-32 (West 1994).

7. *Id.* at 31 (citing *Report of the Federal Courts Study Committee* 109 (Apr. 2, 1990)).

8. George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 Mercer L. Rev. 477, 477 (1998) (noting that plaintiffs filed 188,487 cases in the district courts in 1980 and, by 1985, that number had increased to 299,164).

general consensus that increased demand is more difficult to accommodate at the appellate level . . . .”<sup>9</sup> Between 1960 and 1994, filings in the courts of appeals had “soared 1139%.”<sup>10</sup> Parties involved in federal litigation have a statutory right of appellate review.<sup>11</sup> While all do not avail themselves of that right, statistics demonstrate that the ratio of appellants has increased over time.<sup>12</sup>

The increased volume in the appellate courts has a number of negative impacts. First, the workload has significantly increased the time it takes to proceed with a federal appeal.<sup>13</sup> Second, the increased number of appellate decisions arguably increases the time necessary to thoroughly research and write appellate briefs and appellate opinions.<sup>14</sup> Third, proponents of limited publication argue that the sheer number of appellate decisions may ultimately result in confusion of the issues.<sup>15</sup>

9. Christopher F. Carlton, *The Grinding Wheel of Justice Needs Some Grease: Designing the Federal Courts of the Twenty-First Century*, 6 Kan. J.L. & Pub. Policy 1, 1 (1997).

10. Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 Wis. L. Rev. 11, 25.

11. 28 U.S.C. § 1291 (1994).

12. Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 Ohio St. L.J. 177, 183 (1999) (noting that, “in 1945, only one out of forty district court cases were appealed” as opposed to one in eight in 1988).

13. See Baker, *supra* n. 6, at 43-50.

14. See Reynolds & Richman, *supra* n. 5, at 1168-69. The authors cite a 1915 commentator who, in response to increasing numbers of published decisions, complained:

The law library of the future staggers the imagination as one thinks of the multitudes of shelves which will stretch away into the dim distance . . . . One shrinks from the contemplation of the intellectual giants who will be competent to keep track of the authorities and make briefs in those days; they, as well as the judges who pass upon the briefs, must needs be supermen indeed.

*Id.* at 1169 (quoting John B. Winslow, *The Courts and the Papermills*, 10 Ill. L. Rev. 157, 158 (1915)). See also Kirt Shuldberg, Student Author, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 Cal. L. Rev. 541, 546 (1997). Shuldberg acknowledges one judge’s description of the situation almost thirty years ago:

[N]oting the limited capacity of judges and lawyers to research and assimilate the mass of judicial opinions, [the judge] commented that “[t]hose limits are dangerously near at present and in some systems may already be exceeded,” and that “[c]ommon law in the United States could be crushed by its own weight if present trends continue unabated.”

*Id.* (quoting Charles W. Joiner, *Limiting Publication of Judicial Opinions*, 56 Judicature 195, 195-96 (1972)).

15. See Martin, *supra* n. 12, at 177. Martin quotes Justice McReynolds from sixty years ago: “In my view, multiplied judicial utterances have become a menace to orderly administration of the law. Much would be gained if three-fourths (maybe nine-tenths) of

Finally, one judge has argued that the increase has had a negative impact on the quality of work considered by the courts, commenting that "too high a percentage of litigants are appealing . . . . The stream of cases coming onto our docket, therefore, has become larger and more diluted in merit."<sup>16</sup>

## II. THE SOLUTION

In 1964, the Judicial Conference authorized the appellate courts to issue opinions not designated for publication.<sup>17</sup> Publication of opinions was authorized only when the opinion was of "general precedential value."<sup>18</sup> In 1971, the Federal Judicial Center suggested that unpublished opinions not be cited.<sup>19</sup> The circuit courts were asked to develop rules regarding the publication of opinions.<sup>20</sup> By 1974, there were a variety of different practices regarding publication of opinions and the citation of those designated not for publication.<sup>21</sup> At that time the Conference characterized the situation as one of "11 legal laboratories accumulating experience" and determined that "the possible rewards of such experimentation [were] so rich" that the system should be allowed to continue without interference.<sup>22</sup>

Generally, the circuits have issued rules circumscribing the publication of opinions based on two assumptions: (1) that certain opinions "serve no lawmaking function"<sup>23</sup> and (2) that

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[the opinions] published in the last twenty years were utterly destroyed. Thousands of barren dissertations have brought confusion, and often contempt." *Id.* (quoting *Thatch v. Livingston*, 56 P.2d 549, 549-50 (Cal. Dist. App. 2d Dist. Div. 2 1936)).

16. *Id.* at 183.

17. Baker, *supra* n. 6, at 127.

18. *Id.*

19. See Reynolds & Richman, *supra* n. 5, at 1169-70.

20. *Id.* at 1170.

21. *Id.* at 1171-72.

22. *Id.* at 1172 n. 29.

23. Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 Mich. L. Rev. 940, 941-42 (1989). The author notes that "appellate opinions serve two primary functions: first, to resolve particular disputes between litigants" and "second, to advance the state of the law in some manner." *Id.* at 941. Selective publication plans assume that decisions which do not serve the latter purpose should not be published. *Id.* However, "appellate opinions serve a host of other purposes: to supervise the lower courts, for instance, or to provide a mechanism for interested or disinterested observers to keep track of how an agency is administering a statute." *Id.* at 941-42. She notes that the policies underlying limited

publishing decisions “is costly in a number of ways.”<sup>24</sup> A decision with precedential effect, warranting publication, generally does one or more of the following:<sup>25</sup>

- \* establishes a new rule of law;
- \* alters, modifies, clarifies or explains an existing rule of law;
- \* contains a reasoned criticism or questioning of existing law;
- \* resolves or identifies an apparent conflict of authority, either within the circuit or between the circuit and another, or creates a conflict between the circuit and another;
- \* draws attention to a rule of law that appears to have been generally overlooked;
- \* applies an existing rule of law in a novel factual context, differing materially from those in previously published opinions of the court applying the rule;

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publication plans fail to “consider the plans’ impact on these purposes.” *Id.* at 942. Commentators have acknowledged that the rules regarding limited publication are based on three premises: First, some opinions do not serve the lawmaking function and therefore do not merit publication; second, publication is costly, including the costs of producing and consuming judicial opinions; and third, appellate judges can effectively determine which decisions serve only the dispute resolution and not the lawmaking function. *See Reynolds & Richman, supra* n. 5, at 1182-85; *see also Baker, supra* n. 6, at 119-20: “[T]he very writing of an opinion reinforces the decisionmaking and ensures correctness.” Baker concludes, “In the balance of interests involved, the value of self-restraint provided by writing deserves greater weight than the value of efficiency gained through decision by edict.” Baker, *supra* n. 6, at 120-21.

24. Robel notes that judges, like other published authors, must spend additional time on published decisions “to express that resolution felicitously, to shore it up with citations to authority at every turn, and to anticipate in writing possible criticisms of the opinion.” Robel, *supra* n. 23, at 942. In addition to the burden of writing borne by the court, the litigant suffers the cost of delay while the opinion is being written and “everyone suffers from added costs associated with increasingly large volumes of the *Federal Reporter*. . . .” *Id.* Notwithstanding these costs, the author ultimately concludes that the rules that attempt to curtail use of the unpublished opinion are failing and that advantages enjoyed by litigants with disproportional access to unpublished decisions are exacerbated by selective publication plans. *Id.* at 955-59.

25. *See* Jerome I. Braun, *Eighth Circuit Decision Intensifies Debate over Publication and Citation of Appellate Decisions*, 84 *Judicature* 90 (2000). Braun constructed a “model rule” by studying the rules regarding publication and citation of unpublished decisions found in the twelve territorial circuits and the nine states that have rules on the subject. *See id.* at 93.

- \* contributes significantly to the legal literature by reviewing the legislative, judicial, administrative or electoral history of an existing rule of law;
- \* interprets a rule of state law in a way conflicting with state or federal precedent interpreting the state rule;
- \* is a case of first impression in the court with regard to the substantial issue it resolves;
- \* concerns an issue of substantial or continuing public interest or importance; or
- \* will otherwise serve as a significant guide to the bench, bar or future litigants.

Even without such properties, an opinion should be published if it:

- \* reverses, modifies, or denies enforcement, on substantive grounds, of a lower court or administrative agency decision, or affirms it on a substantive ground different from those set forth below;
- \* certifies a question of law to a state supreme court, or applies the answer;
- \* is by the court sitting en banc; or
- \* when the case has been reviewed, and its merits addressed, by an opinion of the United States Supreme Court.<sup>26</sup>

In addition, “[m]ost rules provide that the publication decision is to be determined by a majority of the deciding panel. . . . Some courts provide for partial publication where a part of the opinion meets the publication standards and the rest does not. . . .”<sup>27</sup>

A corollary to the rules limiting publication is restriction of citation to unpublished decisions. Restricting citation to unpublished decisions is necessary because the objectives underlying limited publication, “reduced cost and increased judicial efficiency,” would be frustrated if citation to unpublished decisions were permitted.<sup>28</sup> “[A] market for these

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26. Braun, *supra* n. 25, at 93.

27. *Id.*

28. Shuldberg, *supra* n. 14, at 549.

opinions [would] develop,” and judges would accordingly have to spend more time on the opinions.<sup>29</sup> Moreover, it is possible that wealthier litigants would be unfairly advantaged if citation to unpublished decisions were permitted, as they could more easily bear the increased costs of research.<sup>30</sup>

### III. THE CRITICISM

There has been an enormous amount of controversy regarding the practice of issuing unpublished decisions that cannot be cited as precedent.<sup>31</sup> The foremost appears to be the arguable effect the practice has on judicial accountability.<sup>32</sup> The fear is that “[t]yranny [will flourish] when the law is unwritten . . . . Written law, on the other hand, allows for a check of the government and gives the citizens a method to review the government’s application of the law.”<sup>33</sup> Judges may act arbitrarily or use the practice to avoid publicly issuing the difficult, complicated or unpopular decision.<sup>34</sup> Providing a public, written opinion for each decision provides litigants and

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29. *Id.* at 549-50.

30. See Reynolds & Richman, *supra* n. 5, at 1185-87.

31. See Baker, *supra* n. 6, at 125-27.

32. See *id.* at 128-29. Baker notes:

Law, and appellate decisionmaking as a pure form of law, is and always will be more an art than a science. To understand fully what is being decided and why, one must know how and why the court’s political power is being exercised. The court should feel obliged to explain itself to the candid reader.

*Id.* at 129; see also William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273, 282-283 (1996). Richman and Reynolds write:

When a judge makes no attempt to provide a satisfactory explanation of the result, neither the actual litigants nor subsequent readers of an opinion can know whether the judge paid careful attention to the case and decided the appeal according to the law or whether the judge relied on impermissible factors . . . .

*Id.*

33. Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. Mich. J.L. Reform 119, 128 (1994). Martineau concludes, however, that there are sufficient restrictions on judicial decisionmaking to allay fears of judicial unaccountability. “American appellate systems . . . have many built-in protections to prevent against this irresponsibility without mandatory publication of opinions.” *Id.* at 132.

34. Carpenter, *supra* n. 5, at 254-56 (“Using an uncitable, unpublished opinion to dodge sensitive issues or to delay confronting a conflict within the court is possible. Moreover, uncitable, unpublished opinions may keep questionable decisions out of the glare of academic and professional review.” (footnote omitted)).

society the power to monitor the development and application of the law. The electronic availability of unpublished decisions undermines the assumption that a decision designated not for publication can be written with less regard for public scrutiny. "Publication is a signal to litigants and observers that a court has nothing to hide, that the quality of its work in a case is open for public inspection."<sup>35</sup> Moreover, "[w]ritten opinions encourage judges to produce well-reasoned, well-written decisions because they subject judges' conclusions to public scrutiny. This leads to better, more consistent opinions because it holds judges accountable to the public which they serve."<sup>36</sup>

It can be argued that these criticisms reflect a cynical distrust of the judiciary. Moreover, concerns regarding accountability can be addressed by reference to practical "constraints" on the exercise of judicial power.<sup>37</sup> As a practical matter, most judicial decisions are made by a panel of judges who must come to some form of agreement on the result.<sup>38</sup> If one of the judges chooses to disagree and to issue a dissenting opinion, under most rules "both the majority and the dissenting opinions qualify for publication" status.<sup>39</sup> Moreover, judicial accountability at the appellate level is enhanced by the possibility of further review by an en banc panel or a higher court. Further, the experience in the trial court systems, which operate without a publication requirement, has shown no greater potential for judicial irresponsibility attributable to lack of formal, published opinions.<sup>40</sup>

Finally, to the extent that there are serious misgivings regarding a particular decision, the fact that it is unpublished does not necessarily mean that the opinion is inaccessible or unobtainable. Unpublished opinions can be quite lengthy and well reasoned<sup>41</sup> (clearly undermining the primary stated

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35. Reynolds & Richman, *supra* n. 5, at 1190.

36. Carpenter, *supra* n. 5, at 248.

37. See generally Martineau, *supra* n. 33, at 129-32.

38. *Id.* at 129.

39. *Id.*

40. *Id.* at 130.

41. Not according to some authors. Richman and Reynolds comment, "It should come as no surprise that unpublished dispositions are . . . dreadful in quality. . . . The primary cause lies in the absence of accountability and responsibility . . . . Moreover, a judge's



objective of saving time), and they are accessible through means including Westlaw, LEXIS, the circuit web site, or request to the clerk of courts.<sup>42</sup> Thus, the opinions, while not provided to the traditional reporter services, are not “secret” and are therefore subject to review by the public.<sup>43</sup> It is noteworthy that this response, that the opinions are available and therefore subject to review, undermines the very objective of the system and gives rise to additional criticisms regarding limitations on citation.<sup>44</sup>

Another criticism of the rules is that they undermine the appellate process. A litigant is denied the possibility of effective review by a higher court when the resolution of his or her case goes unpublished.<sup>45</sup> If an opinion has been designated as having no precedential value, the Supreme Court is less likely to grant review of an issue that arguably has no impact on future litigants.<sup>46</sup> Moreover, barring the citation of unpublished opinions makes it difficult to discern an inconsistency between

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mastery of the case is reduced when she does not publish.” Richman & Reynolds, *supra* n. 32, at 284.

42. See generally Robel, *supra* n. 23.

43. See Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. App. Prac. & Process 219, 220 (1999). Judge Arnold explains that “unpublished” does not mean “secret.” It simply means that the opinion is not transmitted to a legal publisher; it is nonetheless available to the public. *Id.* at 219-20. Carpenter holds a different view:

What else, but a secret, is an unpublished opinion wrapped up in a no-citation rule? The process itself is a secret, and now the decision, the decisionmakers, and their reasons are a secret to everyone but the parties. Moreover, if a decision cannot be concealed within a no-citation rule, then the parties face the danger of a court simply affirming or reversing, keeping its reasoning safely hidden in the judicial vault. This does not sound like the customary click and clack of American courthouse machinery; it sounds more like the clang of a door being closed.

Carpenter, *supra* n. 5, at 236.

44. See *infra* nn. 74-78 and accompanying text.

45. See Richman & Reynolds, *supra* n. 32, at 283-84. The authors note, first, that lack of a detailed explanation makes it difficult for a reviewing court to consider an issue and second, that the Supreme Court is not likely to grant discretionary review to a case that the lower court thought not worthy of a published opinion. *Id.*; see also Carpenter, *supra* n. 5, at 256. Carpenter explains that the effect of the limited publication/restricted citation rules is to remove the check on appellate court power inherent in Supreme Court review: “Selective publication and no-citation rules create a potentially dangerous situation because ‘they tend to leave some of the most powerful persons in the country accountable (with regard to at least part of their work) to no one—not even to themselves or to each other.’” *Id.* (citing Reynolds & Richman, *supra* n. 5, at 1204).

46. See Reynolds & Richman, *supra* n. 5, at 1202-03.

panels of the same circuit, or between circuits.<sup>47</sup> An unpublished decision may not effectively set forth the basis for a lower court's opinion, which therefore undermines effective review by the higher court.<sup>48</sup> Worse, a court can rely on the rationale of another "unpublished opinion, without disclosing the source of its reasoning."<sup>49</sup> Finally, "legal consumers," defined as "the bench, the bar, the scholars, and the public," are less likely to pay "critical" attention to unpublished decisions, further undermining the likelihood of Supreme Court attention.<sup>50</sup>

As a threshold matter, proponents of the limited publication/restricted citation rules argue that "'hard as it is for academia to believe, the nonprecedent is really not a precedent.'"<sup>51</sup> The criticism regarding the appellate process fails to acknowledge that, where a result is contrary to published authority, the complaining litigant need only bring that fact to the attention of the reviewing court by "pointing out the discrepancy" to the higher court.<sup>52</sup> Further, proponents contend, an unpublished decision likely does not "show a conscious disregard of the published case law. At most, unpublished opinions will show lack of awareness of the accepted published law, but that unawareness is best attributed not to the deciding courts' schemes but to the failure of counsel to bring it to the courts' attention."<sup>53</sup> If a result is contrary to published precedent, it is likely due to the court's interpretation that the precedent is "inapplicable to the present case."<sup>54</sup>

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47. See David Dunn, Student Author, *Unreported Decisions in the United States Courts of Appeals*, 63 Cornell L. Rev. 128, 140 (1977). The author notes that conflicts may develop between unreported decisions which could go undetected. *Id.* Worse, any attempt to address this dilemma in the form of indexing or categorizing unreported decisions effectively creates an underground body of law that is within the courts' attention but to which it should pay no attention. *Id.*

48. See Reynolds & Richman, *supra* n. 5, at 1203. The authors note that "less comprehensive and less thoughtful opinions make it more difficult for the Court to determine exactly what the lower court has done." *Id.*

49. Martineau, *supra* n. 33, at 133.

50. Reynolds & Richman, *supra* n. 5, at 1203.

51. Martin, *supra* n. 12, at 181 (quoting Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 Am. U. L. Rev. 909, 914 (1986)).

52. Martineau, *supra* n. 33, at 133.

53. *Id.*

54. *Id.* at 133-34. "If the assumption is that judges are dishonest, it does not follow that they are foolish enough not to cover their tracks." *Id.* at 134.

Critics of the system also question the ability, and the authority, of the courts to determine which cases have precedential value. As a practical matter, the concept of precedential value is a fluid concept—what may not have precedential value on a given day may assume great significance in light of developments in the law. Judges are not capable of anticipating the facts of future disputes or the effect of a published decision in an area of law.<sup>55</sup> The precedential value of a case is usually established early in the decision-making process.<sup>56</sup> This, critics argue, undermines the process itself because

an early decision not to publish may affect not only the form in which the final decision is rendered, but also the actual reasoning or result. . . .

. . . .

Limited publication and citation rules require judges to determine in advance the rule of law that will emerge from a case, and then to determine the effect of their decisions on the development of the law. Because our common law system emphasizes the importance of facts in each case, judges hardly can hope to predict the facts of future disputes . . . There is no such thing as the “mere application of a rule, for every case constitutes a needed reaffirmation and/or extension, at least temporarily, of the rule.”<sup>57</sup>

Consequently, the rationale underlying the precedential value is critically flawed. In fact, the determination that a case

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55. Reynolds & Richman, *supra* n. 5, at 1192. The authors rely on Justice Stevens to demonstrate that an author of an opinion is “uniquely ill-suited” to make a determination about the precedential effect of a decision: “[A] rule which authorizes any court to censor the future citation of its own opinions rests on a false premise. Such a rule assumes that an author is a reliable judge of the quality and importance of his own work product.” *Id.* n. 128 (quoting the remarks of Justice Stevens to the Illinois State Bar Association’s Centennial Dinner in 1977).

56. Martineau, *supra* n. 33, at 134; see Robel, *supra* n. 23, at 954. Robel also reveals that publication decisions are made routinely on the basis of subject matter and on recommendation of judicial staff. Robel, *supra* n. 23, at 953-54. She notes “that judges rarely disagree with the initial decision to decide an appeal on the briefs” offered by the litigants. *Id.* at 954. That decision is largely based on an initial screening by the staff, and “staff determinations may be guided largely by the subject matter of the opinion.” *Id.* at 953-54.

57. See Martineau, *supra* n. 33, at 134 (quoting Pamela Foa, Student Author, *A Snake in the Path of the Law: The Seventh Circuit’s Non-Publication Rule*, 39 U. Pitt. L. Rev. 309, 312 (1977)).

does not raise a new issue does not necessarily diminish its importance. There is a “value [in] accumulations of decisions in an area” for many reasons: One, repeated “affirmations [create] stability” for attorneys by providing prior precedent, and two, additional applications of a legal principle help “flesh out a precedent. . . .”<sup>58</sup> Further, a change in the law may not arise as a result of a *new* issue, but because the *same* issue continues to arise.<sup>59</sup> Since the doctrine of stare decisis is dependent upon availability of published opinions, the limited publication rules undermine the development of the common law.<sup>60</sup>

Proponents of the unpublished opinion contend that judges are in the best position to make a determination regarding the future precedential value of a case. As one proponent noted: “Federal appellate judges are in the best position” to determine which cases rise to the level of lawmaking and if judges are trusted sufficiently to decide a case, “[w]hy can’t [they] be trusted enough to then make the ancillary decision whether it should be published?”<sup>61</sup>

Stare decisis and the American common law system have never required the publication of all decisions. The modern system has its roots in England, which has never required publication of all appellate decisions.<sup>62</sup> In fact, in England only a small percentage of the appellate decisions are published, and the American rules restricting publication are therefore closer to the English model.<sup>63</sup> The idea that, because each case has a different set of facts, it therefore represents unique precedent,

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58. *Id.* at 136.

59. Reynolds & Richman, *supra* n. 5, at 1190 (noting “the accumulation of a large number of routine decisions on a discrete point may suggest to courts, practitioners, or scholars that problems exist in that area, problems that may require doctrinal reform”).

60. See Dragich, *supra* n. 5, at 773, 782 (observing that “[t]he development of the strict doctrine of stare decisis is tied directly to the availability of reliable case reports, upon which the doctrine is utterly dependent”). Dragich advises that “the availability of the facts and analysis of prior cases is vital to the process of applying the law to current cases. Knowledge of the result alone is not enough to support the process of legal reasoning.” *Id.* at 782-83 (footnote omitted).

61. Martin, *supra* n. 12, at 192.

62. Baker, *supra* n. 6, at 125; see Martineau, *supra* n. 33, at 136-37.

63. See Martineau, *supra* n. 33, at 136-37.

overstates the meaning of precedent<sup>64</sup> and obliterates the concept of stare decisis:

If all cases are different because their facts are different, there can be no precedent. The doctrine of stare decisis assumes that some opinions do make law that is valid *beyond* the narrow facts of the individual case. Limited publication and citation rules reflect this assumption and seek to publish only those opinions that can fairly be said to make law.<sup>65</sup>

Since unpublished decisions are not intended to be accessible, they do not serve the ends of predictability the doctrine of stare decisis was intended to provide. In fact, “[t]he use as precedent of an unpublished opinion, to which even the average man with counsel does not have access, would make the law capricious and unpredictable.”<sup>66</sup>

Another criticism of the limited publication rules is that they fail to achieve their desired objective of maximizing court and litigant resources by reducing the time spent writing opinions.<sup>67</sup> Studies that have examined whether the limited publication rules increase judicial productivity have been inconclusive.<sup>68</sup> Further, because some unpublished decisions are

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64. “The theory of precedent depends, for its ideal operation, on the existence of a comfortable number of precedents, but not too many.” Shuldberg, *supra* n. 14, at 561 (quoting Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 *Yale L.J.* 1037, 1041 (1961)). Other commentators, however, see no problem in there being ample case law:

The notion that full publication will damage the cohesiveness of law has intuitive appeal: inability of the bench and bar to deal with ‘too much’ case law will result in an amorphous mass leading to confusion and inconsistency . . . . It is difficult to understand, however, how merely cumulative opinions threaten the cohesiveness of the common law; they should, if anything, make research and discernment of a principle easier, since there will be more cases elaborating a principle, and some of those cases will be more recent as well.

Reynolds & Richman, *supra* n. 4, at 1190.

65. Martineau, *supra* n. 33, at 137.

66. Weaver, *supra* n. 8, at 485-86 (concluding that unpublished decisions, because of their lack of “promulgation,” should not be considered precedent).

67. Robel, *supra* n. 23, at 942-43.

68. See e.g. William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 *U. Chi. L. Rev.* 581, 593-626 (1981). In another article, Professors Richman and Reynolds report that they found “scant correlation . . . between publication rates and circuit productivity.” Richman & Reynolds, *supra* n. 32, at 286 n. 64. Moreover, the authors believe that if judges use unpublished opinions to reach decisions inconsistent with published authority, the practice could have:

lengthy and thoroughly reasoned and supported, it is questionable whether courts are maximizing the potential time savings in the context of limited publication. Finally, critics argue that litigants' research would be enhanced by additional authority that elaborates on a legal principle.<sup>69</sup>

As a related matter, critics of the rule argue that the accessibility justifications have been undermined by technological advancements.<sup>70</sup> The restrictions on citation were originally designed to prevent certain litigants, primarily institutional litigants, from gaining an unfair advantage over those with less access to unpublished decisions.<sup>71</sup> However, the unfair advantage exists and the fact that institutional litigants have access to a vast "shadow body of law" gives them a decisive advantage.<sup>72</sup> Moreover, the no-citation restriction should force a court to disregard its own opinions, but this does not always happen. Unpublished decisions are "locked away in the institutional memories of the courts that produce them, where they often wield a silent but powerful influence over future decisions."<sup>73</sup> Eliminating the citation restrictions would force those parties to acknowledge the source of their arguments

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perverse caseload consequence. . . . An attorney might take an appeal that she otherwise would not take in the hope that the court will recognize the justice of her client's position and reverse the judgment in an unpublished decision—one that contains little reasoning and no precedential value.

*Id.*

69. See Reynolds & Richman, *supra* n. 5, at 1204:

The notion that full publication will damage the cohesiveness of law has intuitive appeal: inability of the bench and bar to deal with 'too much' case law will result in an amorphous mass leading to confusion and inconsistency . . . . It is difficult to understand, however, how merely cumulative opinions threaten the cohesiveness of the common law; they should, if anything, make research and discernment of a principle easier, since there will be more cases elaborating a principle, and some of those cases will be more recent as well.

70. See Shuldberg, *supra* n. 14, at 544 (noting that "limited publication/no citation plans . . . are tied to an older, less powerful and less interactive means of communication, and . . . the applicability of these plans [has changed under the] circumstances of today's digital world").

71. Robel, *supra* n. 23, at 955.

72. Carpenter, *supra* n. 5, at 250; see Robel, *supra* n. 23, at 955 (noting that "the limited distribution plans currently operating assure that the people with unusual access to these opinions will be the same litigants who enjoy a variety of other institutional advantages in litigation: the frequent litigants").

73. Carpenter, *supra* n. 5, at 250.

and allow opposing counsel the opportunity to effectively respond.

Proponents of the rules argue there is an enormous time savings in issuing a decision not for publication.<sup>74</sup> They acknowledge that the opinions are accessible electronically, but highlight the additional resources expended in reviewing the additional decisions, both by the bar and the courts.<sup>75</sup> Regarding accessibility and fairness, proponents of the rules reason that the persuasive value of an unpublished decision to a litigant is “marginal at best.”<sup>76</sup> By definition, the unpublished decision is not persuasive as it fails to meet general precedential criteria. “In fact, judicious use of unpublished opinions gives greater emphasis to those that are published. It separates the diamonds from the dross . . . .”<sup>77</sup> Many proponents further believe that the solution is not to afford unlimited citation access to litigants, but to further ratchet the rules regarding citation and use of unpublished decisions.<sup>78</sup>

Criticism of the limited publication and citation restriction rules has been well documented. One critic of the rules is Judge Richard S. Arnold of the Eighth Circuit who, in 1999, published an article questioning the practice of issuing unpublished decisions.<sup>79</sup> In the article, Judge Arnold questioned whether the rules addressing the precedential value of unpublished opinions represented a violation of Article III of the United States Constitution. Judge Arnold noted:

Article III of the Constitution of the United States vests “judicial power” in the Supreme Court and in such inferior courts as Congress may from time to time ordain and establish. We can exercise no power that is not “judicial.”

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74. See Martin, *supra* n. 12, at 189-91. Judge Martin notes that unpublished decisions are shorter because they need not include “exhaustive discussions of the law” or extensive recitation of fact. *Id.* at 190. Also, the unpublished decision is less time consuming because it need not be as extensively researched. *Id.*

75. See Martineau, *supra* n. 33, at 144-45. The author notes that “[w]hether done in books or computer databases, legal research takes time, and time is money. The more opinions available to research, the more time the research takes, and the greater the cost.” *Id.* at 145.

76. *Id.* at 138 (noting that “[w]ithout citation, the unpublished material has no more persuasive force than if its proponent were its creator”).

77. Martin, *supra* n. 12, at 191.

78. See generally, Martineau, *supra* n. 33, at 145-148.

79. Arnold, *supra* n. 43, at 219.

That is all the power that we have. When a governmental official, judge or not, acts contrary to what was done on a previous day, without giving reasons, and perhaps for no reason other than a change of mind, can the power that is being exercised properly be called “judicial”? Is it not more like legislative power, which can be exercised whenever the legislator thinks best, and without regard to prior decisions? In other words, is the assertion that unpublished opinions are not precedent and cannot be cited a violation of Article III?<sup>80</sup>

This statement proved to be a precursor to the first decision challenging the legality of the limited publication/restricted citation rules, *Anastasoff v. United States*.<sup>81</sup>

#### IV. THE REACTION

In an extraordinary judicial response to the limited publication/restricted citation rules, a panel of the Eighth Circuit held in *Anastasoff* that Article III of the U.S. Constitution prohibits non-precedential decisions.<sup>82</sup> While the decision was ultimately vacated as moot,<sup>83</sup> the opinion sets forth persuasive judicial reasoning regarding this lingering unresolved question. Writing for the panel, Judge Arnold reasoned that “[i]nherent in every judicial decision is a declaration and interpretation of a general principle or rule of law.”<sup>84</sup> Further, the Framers intended that the declaration of law inherent in each judicial decision was authoritative and provided a limitation on the judicial power delegated to the courts under Article III.<sup>85</sup> Accordingly, the Eighth Circuit rule which designates unpublished decisions as non-precedential effectively allows the court to avoid the effect of its prior decisions and constitutes an impermissible expansion of Article III power.<sup>86</sup>

The original *Anastasoff* opinion was grounded in a review of the history of precedent and its relationship to the authority of

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80. *Id.* at 226.

81. 223 F.3d 898, *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

82. *Id.* at 899.

83. *Anastasoff*, 235 F.3d at 1056.

84. 223 F.3d at 899.

85. *Id.* at 900 (citing U.S. Const. Art. III, § 1, cl. 1).

86. *Id.*



the courts under Article III. Judge Arnold provides an historical overview of the American doctrine of precedent, noting that, while “[m]odern legal scholars tend to justify the authority of precedents on equitable or prudential grounds,”<sup>87</sup> the eighteenth century notion of precedent was “derive[d] from the nature of the judicial power itself.”<sup>88</sup> He continues: “The judicial power to determine law is a power only to determine what the law is, not to invent it. Because precedents are the ‘best and most authoritative’ guide of what the law is, the judicial power is limited by them.”<sup>89</sup> Arnold reviewed American legal tradition, quoting Alexander Hamilton to conclude that “[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedent, which serve to define and point out their duty in every particular case that comes before them . . . .”<sup>90</sup> Moreover, “early Americans demonstrated the authority which they assigned to judicial decisions by rapidly establishing a [comprehensive reporting system] in the years following the ratification of the Constitution.”<sup>91</sup>

Arnold specifically noted that American legal tradition does not require the publication of every opinion: “Courts may decide, for one reason or another, that some of their cases are not important enough to take up pages in a printed report.”<sup>92</sup> Further, *Anastasoff’s* ruling that Article III prohibits a court from designating a case as non-precedential should not be construed to create “some rigid doctrine of eternal adherence to precedents.”<sup>93</sup> Arnold acknowledged that some cases can and should be overruled, but when this occurs, the court bears the “burden of justification. . . . In this way, the law grows and changes, but it does so incrementally, in response to the dictates of reason, and not because judges have simply changed their minds.”<sup>94</sup>

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87. *Id.* at 901 (footnote omitted).

88. *Id.* (footnote omitted).

89. *Id.* (citation omitted).

90. *Id.* at 902 (quoting Alexander Hamilton, *The Federalist No. 78* 510 (Modern Library ed., 1938)).

91. *Id.* at 903 (citations omitted).

92. *Id.* at 904.

93. *Id.*

94. *Id.* at 904-05.

The *Anastasoff* opinion is extraordinary insofar as it suggests that all circuits with rules designating unpublished decision as non-precedential have engaged in constitutionally impermissible conduct since the advent of the particular rule. The decision provides litigants across the country authority to cite to unpublished decisions, notwithstanding rules to the contrary. Given *Anastasoff's* reliance on Article III, the decision arguably extends to all Article III courts, thereby impacting district courts and possibly state courts insofar as state court power based on a state constitution is modeled after the federal system. As a result, a Supreme Court review of the issues raised in *Anastasoff* is critical, particularly because there may be additional constitutional challenges to the no-citation rules that the Court should address.

#### V. THE EVALUATION

Clearly, there are a variety of policy considerations that call into question the legitimacy of the limited publication/restricted citation rules. The *Anastasoff* opinion takes the controversy to a higher level, because the three-judge panel took the position that the rules may be invalidated as a matter of constitutional law. This position was based upon an interpretation of Article III. As Judge Arnold explained, the effect of the Eighth Circuit rule was to expand the judicial power to include discretion to limit the precedential effect of decisions.<sup>95</sup> This represents an impermissible expansion of the Article III judicial power.<sup>96</sup> In addition to concerns regarding an impermissible expansion of power beyond Article III, allowing courts to refuse to acknowledge any binding effect of prior decisions raises concerns under the Due Process Clause, the Equal Protection Clause and the statutory right to appeal granted by federal statute.

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95. *Id.* at 905.

96. *Id.*

*A. Due Process*

With regard to due process considerations, the rights protected under substantive due process are not limited to those enumerated in the Constitution.<sup>97</sup> Rather, the rights are “‘those of the very essence of a scheme of ordered liberty’ the abridgment of which would violate ‘a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental . . . .’”<sup>98</sup> Consequently, if *stare decisis* is fundamental to the scheme of ordered liberty under the due process clause, the question becomes whether a limited publication/restricted citation rule deprives litigants the due process of law. Removing an entire category of decisions from consideration certainly appears to do that.

Further, addressing procedural due process considerations, some authors have suggested that the courts recognize “*freedom from arbitrary adjudicati[on]*,”<sup>99</sup> or the right to “*reasoned explanation*,”<sup>100</sup> as liberty interests protected under the Due Process Clause. Moreover, “if due process requires notice and opportunity to be heard before judgment, the opportunity to present ‘*every available defense*’ must include the chance to cite unreported decisions.”<sup>101</sup> As one court has noted, “any decision is by definition a precedent, and . . . we cannot deny litigants and the bar the right to urge upon us what we have previously done.”<sup>102</sup>

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97. See *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (acknowledging that the Court has “regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’ . . . and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed’”) (citations omitted).

98. See e.g. *Dunn*, *supra* n. 47, at 144 (citing *Palko v. Conn.*, 302 U.S. 319, 325 (1937)).

99. William Van Alstyne, *Cracks in “The New Property”: Adjudicative Due Process in the Administrative State*, 62 Cornell L. Rev. 445, 487 (1977) (asserting that “the ideas of liberty and of substantive due process may easily accommodate a view that the government may not adjudicate the claims of individuals by unreliable means”).

100. Robert L. Rabin, *Job Security and Due Process: Monitoring Administrative Discretion through a Reasons Requirement*, 44 U. Chi. L. Rev. 60, 60 (1976). Professor Rabin argues that procedural due process requires a hearing and “an accurate decision . . . assuring that facts have been correctly established and properly characterized in conformity with the applicable legal standard.” *Id.* at 76.

101. *Dunn*, *supra* n. 47, at 144 (footnotes omitted) (emphasis in original).

102. *Jones v. Superintendent*, 465 F.2d 1091, 1094 (4th Cir. 1972).

These issues were raised in *Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit*,<sup>103</sup> a case that challenged the constitutionality of the Seventh Circuit restriction on citation of unpublished opinions.<sup>104</sup> The petitioners challenged the rule restricting citation of unpublished decisions on due process and equal protection grounds,<sup>105</sup> noting that prior published decisions were critical to the stability of the law and predictable enforcement of rules.<sup>106</sup> In its brief in opposition, the Seventh Circuit responded:

[T]he doctrine of stare decisis . . . is a judicially created policy; it is not enshrined in the Constitution. Courts do modify and overrule their prior decisions. By definition, therefore, courts do have authority to determine whether a given decision has value as a precedent for future cases, and correspondingly, whether it should be published to the world.<sup>107</sup>

But if “[a] deciding panel participates in a dialogue that is both backward and forward looking, both inwardly and outwardly directed, and both upwardly and downwardly important,”<sup>108</sup> and an “appellate judgment builds on past decisions and shapes future decisions,”<sup>109</sup> is a litigant no longer entitled to rely on the decisions issued by the appellate court? In *Do-Right*, the Supreme Court denied the petitioners’ motion for leave to file a petition for writs of mandamus and prohibition.<sup>110</sup> The question regarding the constitutionality of no-citation rules in light of stare decisis and its relationship to the due process

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103. 429 U.S. 917 (1976).

104. See Dunn, *supra* n. 47, at 142-44. The petitioners alleged that the rule restricting citation of unpublished decisions constituted “an unlawful prior restraint on freedom of speech, and ‘impinge[d] upon the . . . right to petition the government for redress of grievances’ carrying ‘serious consequences for the fair and equal administration of justice.’” *Id.* at 142 (citations omitted).

105. *Id.* at 143.

106. *Id.* at 143, n. 100.

107. *Id.* at 143 (citing Respondents’ Brief in Opposition to Petitioners’ Motion for Leave to File a Petition for Writ of Mandamus and Prohibition at 25, *Do-Right Auto Sales v. U. S. Ct. App. Seventh Cir.*, 429 U.S. 917 (1976)).

108. Baker, *supra* n. 6, at 121 (citing Thomas E. Baker, *Precedent Times Three: Stare Decisis in the Divided Fifth Circuit*, 35 Sw. L.J. 687, 712-13, 731-34 (1981)).

109. Dunn, *supra* n. 47, at 142-44.

110. *Id.* at 143 n. 102 (citing *Do-Right Auto Sales v. U. S. Ct. App. 7th Cir.*, 429 U.S. 917 (1976)).

clause therefore remains unresolved. Clearly, however, legitimate due process constitutional issues are presented by the citation restrictions.

### *B. Equal Protection*

Equal protection considerations are also raised in the context of the limited publication/restricted citation rules. Under the equal protection component of the Due Process Clause of the Fifth Amendment, similarly situated federal litigants must be treated similarly.<sup>111</sup> Shortcuts in the decision making process limit the likelihood of review of an action disposed of by unpublished decision. Some authors have concluded that courts are more likely to hear oral argument and issue a published decision in “important” cases (such as antitrust or securities) and are more likely to utilize procedural shortcuts to dispose of “trivial” cases (such as those involving social security or prisoner petitions).<sup>112</sup> Professors Richman and Reynolds note that “[t]he cumulative effect of truncated procedures has a devastating impact on the rights of those most in need of judicial protection, those litigants whose claims raise no systemic law-making concerns, but only the claim that they have been denied justice at the trial court.”<sup>113</sup> In effect, the schema that warrants publication only of cases that serve a law making function, the

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111. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (“Although it contains no Equal Protection Clause as does the Fourteenth Amendment, the Fifth Amendment’s Due Process Clause prohibits the Federal Government from engaging in discrimination that is ‘so unjustifiable as to be violative of due process.’”); *U. S. Dept. Agriculture v. Murry*, 413 U.S. 508, 517 (1973) (Marshall, J., concurring) (“One aspect of fundamental fairness, guaranteed by the Due Process Clause of the Fifth Amendment, is that individuals similarly situated must receive the same treatment by the Government.”).

112. Richman & Reynolds, *supra* n. 32, at 295; see Robel, *supra* n. 23, at 947 (arguing that the limited publication/restricted citation “plans do not operate neutrally with regard to the subject matter of the opinions, so that most of the work of the courts in several subject areas appears only in unpublished form”). Robel further cautions:

[F]requent litigants receive the [unpublished] opinions . . . [T]he advantages of this access are exaggerated because unpublished opinions tend to cluster in subject-matter areas that pit frequent litigants against . . . ‘one-shotters’ [refers to litigants and not the types of cases] . . . [who file] criminal appeals, social security cases, and immigration cases . . . .”

*Id.* at 955.

113. Richman & Reynolds, *supra* n. 32, at 295.

“important” cases, further disenfranchises “poor and powerless” litigants.<sup>114</sup>

Additionally, the methods used by the courts “to discourage use of unpublished decisions . . . do not work. In fact, these methods aggravate and enhance any inherent unfairness the selective publication plans might have.”<sup>115</sup> Providing every litigant full appellate review, including the opportunity for oral argument and a well-reasoned, published opinion, “assur[es] that the complaints of *every* litigant—small or large, rich or poor—are given equal treatment by those most powerful of governmental figures, the judges of the federal courts of appeals.”<sup>116</sup> The procedural shortcuts in place at the appellate level threaten “the American judicial system’s basic guarantee of justice to all in equal measure . . . . Damages caused by the current breach of that promise are severe and incalculable.”<sup>117</sup>

### C. Statutory Right to Appeal

Finally, the legality of restrictions on citations of unpublished decisions may be challenged on a statutory basis. If every litigant has a statutory right to an appeal under 28 U.S.C. § 1291, restricting reliance on prior decisions which are on point and decided by the same appellate court arguably undermines this right.<sup>118</sup> Noting various procedures employed by the appellate courts to respond to the volume crisis, including

114. *Id.* at 296 (warning that “[o]ur judicial system can answer the cynics’ charges of a systematic tilt toward the rich and powerful only if the courts police themselves rigorously and deliver on their sworn promise of equal justice”).

115. Robel, *supra* n. 23, at 955.

116. Richman & Reynolds, *supra* n. 32, at 297.

117. *Id.*

118. The statutory argument may assume constitutional implications if the right to an appeal is constitutionally mandated, as some authors argue. See Harry G. Fins, *Is the Right of Appeal Protected by the Fourteenth Amendment?* 54 *Judicature* 296, 297 (1971) (asserting that “‘equal protection’ . . . requires that once a state establishes avenues of appellate review, ‘these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts . . .’ [Therefore] the right of appeal is . . . protected . . . by . . . the Constitution . . .”); John Leubsdorf, *Constitutional Civil Procedure*, 63 *Tex. L. Rev.* 579, 628-29 (1984); Note, *Screening of Cases in the Federal Courts of Appeals: Practice and Proposals*, 73 *Colum. L. Rev.* 77, 82 (1973) (“Given popular expectations . . . it would be unacceptable, if not unconstitutional, to eliminate the practice of one appeal as of right.”).

selective publication, Professors Richman and Reynolds observe:

Thus, an effective right to appeal error to the circuit courts no longer exists; instead, litigants must petition the staff to obtain access to the judges. In short, despite their statutory and historical role as courts of appeal, the circuit courts have become certiorari courts.<sup>119</sup>

Because decisional shortcuts such as limited publication have the “effect of transforming the courts of appeals into certiorari courts,”<sup>120</sup> the authors conclude:

There is, of course, one significant difference between [the courts of appeals and the Supreme Court.] Congress has authorized the Supreme Court to act as a certiorari court, but has required the courts of appeals to hear every litigant’s appeal as a matter of right. Thus, the transformation of the circuit courts has not only been unwise, but lawless as well.<sup>121</sup>

Clearly, legitimate concerns regarding due process, equal protection, judicial power under Article III and the statutory right to appellate review warrant consideration of the legality of no-citation rules.

## VI. CONCLUSION

The limited citation/restricted citation rules have long been the subject of serious controversy. There is no question that the original impetus for the rules, a crisis of volume at the appellate level, remains a critical concern and has likely worsened in recent years. The contradictory policy considerations relating to the rules involve judicial accountability and efficiency, and the variety of costs to courts, litigants and the bar. Some of the policies that once supported the rules have changed dramatically in relation to technological advances. Challenges to the legality

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119. Richman & Reynolds, *supra* n. 32, at 275. The authors explore three primary methods employed by the appellate courts to respond to the volume crisis, including limitations on oral argument, reductions in the number and length of published decisions and increasing reliance on visiting and senior judges and non-judicial support staff. *Id.* at 278-93.

120. *Id.* at 293.

121. *Id.* at 294 (footnote omitted).

of the rules include the scope of Article III power, due process, equal protection and the statutory right to appellate review. There appears to be no clear resolution when weighing the policy concerns, but clearly the legal implications warrant judicial review. Additional legal questions, including due process and equal protection implications as well as the effect of the rules on the statutory right to appellate review, should also be considered.