

2006

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### Recommended Citation

Anika C. Stucky, *Building Law, Not Libraries: The Value of Unpublished Opinions and Their Effects on Precedent*, 59 OKLA. L. REV. 403 (2017), <http://digitalcommons.law.ou.edu/olr/vol59/iss2/5>

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# Building Law, Not Libraries: The Value of Unpublished Opinions and Their Effects on Precedent\*

## I. Introduction

Over the past ten years, Americans have called on the federal and state judiciaries to settle an increasing number of disputes.<sup>1</sup> Many factors contribute to the rise in case filings, but a rise in criminal appeals and immigration proceeding appeals in the wake of the September 11, 2001, terrorist attacks have demonstrably contributed to the increase.<sup>2</sup> In response, courts have turned to the unpublished opinion as one method of managing the increased caseload. For example, in the twelve-month period ending September 30, 2005, the federal circuit courts filed 29,913 opinions in cases terminated on the merits.<sup>3</sup> Of those opinions, 24,411 were unpublished, representing 81.6% of the total opinions filed.<sup>4</sup> The United States Court of Appeals for the First

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\* The author would like to thank Professor Mary Margaret Penrose for her assistance, advice, and encouragement throughout the author's law school experience, especially during the writing of this comment. Also, the author would like to thank her family for their unfailing love and support. Finally, the author dedicates this comment to the memory of her grandfather, Dale M. Stucky, who introduced her to the fascinating journey that is the study of the law.

1. See U.S. Courts, Federal Court Management Statistics-1997: U.S. District Court - Judicial Caseload Profile, <http://www.uscourts.gov/cgi-bin/cms.pl> (use the "Generate" feature to access the statistics for "ALL DISTRICT COURTS") (last visited July 2, 2006). During the twelve-month period ending September 30, 1995, 281,681 cases were filed in the United States federal district courts. *Id.* Ten years later, the number of filings for the same twelve-month period had risen to 330,721. U.S. Courts, Federal Court Management Statistics-2005: U.S. District Court - Judicial Caseload Profile, <http://www.uscourts.gov/cgi-bin/cmsd2005.pl> (use the "Generate" feature to access the statistics for "ALL DISTRICT COURTS") (last visited July 2, 2006). This represents a 17.4% increase in the number of case filings. Additionally, filings of appeals with the United States courts of appeals have increased 36.7% — from 50,072 in the fiscal year 1995 to 68,473 in 2005. See U.S. Courts, Federal Courts Management Statistics-2005: U.S. Court of Appeals - Judicial Caseload Profile, <http://www.uscourts.gov/cgi-bin/cmsa2005.pl> (use the "Generate" feature to access the statistics for "NATIONAL TOTALS") (last visited July 2, 2006); U.S. Courts, Federal Courts Management Statistics-1997: U.S. Court of Appeals - Judicial Caseload Profile, <http://www.uscourts.gov/cgi-bin/cmsa.pl> (use the "Generate" feature to access the statistics for "NATIONAL TOTALS") (last visited July 2, 2006).

2. U.S. Courts, Judicial Facts and Figures tbl. 2.3, <http://www.uscourts.gov/judicialfacts/figures/Table203.pdf> (last visited July 2, 2006).

3. ADMIN. OFFICE OF THE U.S. COURTS, 2005 ANN. REP. OF THE DIRECTOR: JUD. BUS. OF THE U.S. CTS. 42 tbl. S-3, *available at* <http://www.uscourts.gov/judbus2005/tables/s3.pdf>. This table excludes statistics from the Federal Circuit.

4. *Id.* Of the unpublished opinions, 5211 were written and signed; 18,254 were written, reasoned, and unsigned; and 946 were written, unsigned, and without comment. *Id.*

Circuit led all circuit courts in publication of opinions by publishing 42.8% of its opinions,<sup>5</sup> whereas the Fourth Circuit's practices placed that circuit at the opposite end of the publication spectrum with a publication rate of only 8.2%.<sup>6</sup> With 26.2% of its opinions published, the Tenth Circuit's publication rate was higher than the combined national rate by 7.8%.<sup>7</sup>

Balancing the competing interests of litigants, judges, and the judicial system is difficult and becomes more onerous as caseloads increase. Litigants desire principled resolutions to their disputes based on applicable law.<sup>8</sup> Judges seek to produce well-reasoned opinions that substantially contribute to the jurisdiction's established body of caselaw.<sup>9</sup> The system as a whole, however, strives for a judicially efficient and an economical administration of justice.<sup>10</sup> The former chief judge and current sitting judge of the Sixth Circuit explained the balance simply by stating, "The alternatives basically come down to changing the input to the United States Courts of Appeals or changing the output from them."<sup>11</sup>

One solution for the federal courts is increasing the number of federal judgeships, but several obstacles to such an increase exist. For example, Congress created the circuit courts of appeals pursuant to its power under Article III of the Constitution.<sup>12</sup> As part of this power, Congress controls the number of judges sitting on each court, and the circuits can only encourage Congress to create additional judgeships through the Judicial Conference of the United States (Judicial Conference).<sup>13</sup>

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5. *See id.*

6. *See id.*

7. *See id.*

8. *See Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 107th Cong. 22 (2002) [hereinafter *Hearing*]* (prepared statement of Kenneth J. Schmier, Chairman, Committee for the Rule of Law) (recounting his personal experience in a contract dispute case in California in which the judge issued a ruling and unpublished opinion that seemed contrary to the state of California's contract law at that time).

9. *Id.* at 12 (prepared statement of Alex Kozinski, J., U.S. Court of Appeals for the Ninth Circuit) (noting the difficulty in maintaining a clear and consistent body of caselaw when judges are called upon to decide a tremendous number of cases and the ramifications of an unclear and inconsistent body of caselaw).

10. *See* FED. R. CIV. P. 1; FED. R. CRIM. P. 2; FED. R. APP. P. 2.

11. Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 181 (1999).

12. The Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

13. The purpose of the Judicial Conference is to "make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of

Courts, however, have turned to a seemingly practical solution to cope with increasing caseloads — the use of unpublished opinions. Both state and federal courts have implemented rules governing the publication of opinions and the citation of unpublished opinions in their respective courts.<sup>14</sup> All state appellate systems and each federal circuit have promulgated such rules,<sup>15</sup> but considerable differences exist within the federal system and between the state systems with respect to publication standards, the precedential weight given to unpublished opinions, and practitioners' ability to cite unpublished opinions to a court.<sup>16</sup> These differences fuel debate about the value of unpublished opinions and their effects on the time honored tradition of relying on case precedent.<sup>17</sup>

To understand the debate surrounding unpublished opinions, one must appreciate the true definition of an unpublished opinion. The term "unpublished opinion" is a misnomer.<sup>18</sup> Unpublished opinions are those "that [a] court has specifically designated as not for publication."<sup>19</sup> The term,

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judges to or from circuits or districts where necessary." 28 U.S.C. § 331 (Supp. II 2002). The Chief Justice of the U.S. Supreme Court, as the presiding officer of the Judicial Conference, must submit an annual report to Congress that includes the Judicial Conference's findings regarding the judicial business and its recommendations for legislation. *Id.*

14. See Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. APP. PRAC. & PROCESS 251 (2002).

15. *Id.* This comment focuses on the use of unpublished opinions in Oklahoma; thus the rules of the Oklahoma Supreme Court, Oklahoma Court of Criminal Appeals, and the Tenth Circuit are most relevant to this comment.

16. *Id.* For example, the Seventh Circuit disclaims any precedential value in unpublished opinions and forbids their citation except in very limited circumstance, *id.* at 254, whereas the Eleventh Circuit permits the citation of unpublished opinions as persuasive authority, *id.* at 256. Also, Colorado forbids any citation of unpublished opinions, *id.* at 260, whereas Louisiana permits the citation of all supreme court opinions, *id.* at 266.

17. See Lawrence J. Fox, *Those Unpublished Opinions: An Appropriate Expedience or an Abdication of Responsibility?*, 32 HOFSTRA L. REV. 1215 (2004) (arguing that ethical obligations require judges to produce citable opinions); Martin, *supra* note 11, at 180-81 (advocating for the use of unpublished opinions and limited citation as a means to cope with "too many cases with too little merit"); Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235 (2004); George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477 (1988).

18. Martin, *supra* note 11, at 185 ("These days, 'unpublished opinion' is almost a term of art, because all federal appeals court opinions may be published in some way even if not in the official book reporters.").

19. BLACK'S LAW DICTIONARY 1125 (8th ed. 2004); see also 1ST CIR. R. 36(a) ("[S]ome opinions are rendered in unpublished form; that is, the opinions are directed to the parties but are not otherwise published in the official West reporter . . ."); OKLA. SUP. CT. R. 1.200(b)(5) ("All memorandum opinions, unless otherwise required to be published, shall be marked: 'Not for Official Publication.' . . . Opinions marked Not For Official Publication shall not be published in the unofficial reporter, nor on the Supreme Court World Wide Web site, nor in the

however, erroneously suggests that these opinions are “secret” and not generally available to either the legal community or the general public for inspection and review. Today, unpublished opinions are available through several sources. First, since 2001, West has published in the *Federal Appendix* the opinions of the circuit courts not submitted for official publication in the *Federal Reporter*.<sup>20</sup> Second, Congress enacted legislation in 2002 requiring all federal circuit and district courts to maintain websites permitting “[a]ccess to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format.”<sup>21</sup> Third, unpublished opinions are readily available and searchable on the electronic databases Westlaw and LexisNexis.<sup>22</sup> While unpublished federal opinions are readily available, locating state unpublished opinions proves more difficult. For example, of the six states that comprise the Tenth Circuit,<sup>23</sup> only Utah makes some of the unpublished opinions of its state courts available online.<sup>24</sup>

As part of a legal system based on the principles of adherence to precedent and stare decisis, judges’ opinions are critically important tools used to determine the law. Judicial precedents are “adjudged case[s] or decision[s] of a court of justice, considered as furnishing an example or rule for the determination of an identical or similar case afterwards arising, between the same or other parties, in the same or another court, or a similar question of law.”<sup>25</sup> As such, they provide guidance to judges, lawyers, and the public as to the state of the law. Thus, a judicial tribunal’s determination of the law in

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official reporter.”).

20. The *Federal Appendix* does not contain unpublished opinions from the Eleventh Circuit, as that circuit does not provide the text of its unpublished opinions to publishers. See 11TH CIR. R. 36-2, I.O.P. 6.

21. E-Government Act of 2002, Pub. L. No. 107-347, § 205(a)(5), 116 Stat. 2899, 2913 (codified at 44 U.S.C. § 3501 note (Supp. III 2003) (Federal Management and Promotion of Electronic Government Services)).

22. On Westlaw, the text of unreported federal appellate and district court opinions since 1945 is searchable in separate databases and in comprehensive databases containing the text of all opinions issued by federal appellate and district courts. Similarly, LexisNexis contains databases with the text of unpublished opinions from federal appellate and district courts in a searchable form.

23. The Tenth Circuit is comprised of the United States Court of Appeals in Denver, Colorado, and the United States district courts in Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. 28 U.S.C. § 41 (2000).

24. Internet users can access unpublished court opinions since 1998 for the Utah Court of Appeals at Utah State Courts, Utah Court of Appeals Unpublished Decisions by Name, <http://www.utcourts.gov/opinions/mds/mdname.htm> (last visited July 2, 2006).

25. HENRY CAMPBELL BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS OR THE SCIENCE OF CASE LAW 2 (1912).

a specific case implicates not only the parties immediately before the court, but also other judges and courts and the community as a whole.<sup>26</sup>

The term “precedent” encompasses several different aspects and applications of prior judicial decisions, one of which is *stare decisis*.<sup>27</sup> More specifically, *stare decisis* imposes on a court of last resort a duty “to abide by its own former decisions, and not to depart from or vary them unless entirely satisfied, in the first place, that they were wrongly decided, and, in the second place, that less mischief will result from their overthrow than from their perpetuation.”<sup>28</sup> According to this definition, *stare decisis* is the issue-specific aspect of the doctrine of precedent requiring courts to resolve reoccurring issues consistently.<sup>29</sup> The late Supreme Court Justice William O. Douglas recognized the importance of *stare decisis* in furthering the goals of all involved in the legal system when he commented that “[*s*]tare decisis serves to take the capricious element out of law and to give stability to a society. It is a strong tie which the future has to the past.”<sup>30</sup> In contrast to the more general nature of courts following decisions made in previous cases based on precedent, *stare decisis* mandates a court to decide issues uniformly, absent a clear need to overrule the past precedent on the specific issue. Together, *stare decisis* and precedent form the basis for common law legal systems.

Because the doctrines of precedent and *stare decisis* rest on courts’ past decisions, the designation of opinions as “nonprecedential” and “not for publication” seems to undermine these two doctrines. Nevertheless, when used in accordance with proper publication standards and citation rules, unpublished opinions play an indispensable role in both the federal and state judicial systems by providing more efficiency in overburdened systems without compromising the tradition of precedent that is central to such systems. While the current system has room for improvement, both precedent and unpublished opinions can survive harmoniously, through the use of publication and citation rules designed to reflect both flexibility in the court

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26. *Id.* at 3.

27. *Id.* at 10. The governing rules of each of the five branches of precedent are (1) inferior courts must adhere to the decisions of courts having jurisdiction over them, (2) the decisions of the highest court in a jurisdiction are binding on all lower courts in that jurisdiction, (3) a court of last resort must adhere to the rulings of its past decisions absent a reason for overruling the decision, (4) a court may look to decisions of other courts for guidance in a case for which there is no jurisdictional precedent, and (5) judicial comity requires deference to the decisions of other courts in the interest of consistency. *Id.* at 10-11.

28. *Id.* at 10.

29. See BLACK’S LAW DICTIONARY, *supra* note 19, at 1443 (defining “*stare decisis*” as “[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation”).

30. William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).

system and stability in the body of law. This comment traces the histories of precedent and unpublished opinions in the federal and state judiciaries, with particular focus on the Tenth Circuit and Oklahoma state courts. Further, this comment demonstrates that both concepts have coexisted in the past and can continue to coexist peacefully in the future, balancing the often competing interests of litigants, judges, and the judicial system while preserving the time-honored tradition of precedent.

Part II of this comment examines the history of the doctrine of precedent from its conceptual birth in early Roman law, through its development in the English common law, to its incorporation into the American legal system. Part III chronicles the development of unpublished opinions as a response to the changing nature of the judicial system in the mid-twentieth century. Part IV discusses the modern treatment of unpublished opinions, especially in Oklahoma federal and state courts, through the use of publication standards and citation rules. Part V suggests improvements to the current rules for publication of opinions and citation of unpublished opinions to ensure the perpetuation of precedent in legal systems striving for efficiency.

## *II. Precedent in the American Legal System*

To fully understand the importance of the doctrine of precedent in the American legal system, one must understand its origins. The common law concept of precedent, and *stare decisis* in particular, distinguishes the American legal system from many other historic and modern legal systems, as the “practice of deciding cases by reference and adherence to the past is one of the defining characteristics of Anglo-American jurisprudence and distinguishes our system from the civil law, where judges reason from general principles, not from precedents.”<sup>31</sup> From its origins in ancient Rome, through its refinement in England’s customary system of law, to its modern incarnation in the United States, precedent has guided judicial systems and influenced judicial officials for centuries.

### *A. The Roman Origins of Precedent*

Since the beginning of civilization, judicial decisions have been an important source of law. In fact, written decisions as sources of law precede other sources such as statutes or universally applied rules.<sup>32</sup> It is important to note, however, that these judicial opinions were not an official explication of

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31. Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 44 (2001).

32. BLACK, *supra* note 25, at 14.

the law but merely evidence of judicial custom.<sup>33</sup> Judges applied these customs in difficult cases resembling previously decisions.<sup>34</sup> During the early Roman state, for example, published edicts announcing rules to be applied in subsequent cases helped strengthen judicial custom.<sup>35</sup> This “perpetual edict” was issued by a judicial official, called a praetor, at the commencement of his term of office and remained in force for the duration of his term.<sup>36</sup> Eventually, the custom became a matter of course because “[a]fter the praetorian jurisprudence had assumed a certain scope and fixity, the edict remained substantially the same under successive judges.”<sup>37</sup> The notions embodied in the edicts were not abstract concepts but were instead principles derived from actual controversies presented to judicial officials.<sup>38</sup> Therefore, in one sense, something resembling the modern-day concept of precedent — applying the principles of past cases to similar cases in the future — developed. In another sense, however, this ancient system of judicial custom differed from precedent because judicial adherence to the edict was strictly voluntary and never became part of the formal Roman law.<sup>39</sup>

The influence of Justinian, a sixth-century Roman emperor, significantly impacted judicial custom and its connection to precedent in ancient Rome. In response to the chaotic state of the law brought about by the reliance on past edicts, Justinian compiled a code of laws to govern Rome.<sup>40</sup> To promote a stable body of law, Justinian forbade the publication of secondary resources interpreting laws and imposed severe penalties on the production of such materials.<sup>41</sup> Furthermore, Justinian required that any inconsistencies in his law codes be referred to him for official resolution, as the province of interpreting the laws rested solely with the emperor as opposed to judges.<sup>42</sup> Justinian consolidated the legislative and judicial powers in Rome, for “under the empire, no sharp line of distinction was drawn between judicial and legislative functions; and in point of fact, in the person of the emperor himself, they were very firmly and significantly united.”<sup>43</sup> Justinian believed the use of decisions from the past as guidelines for deciding cases perpetuated erroneous principles of law; so to ensure that this perpetuation did not occur, Justinian stated in one

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33. *Id.* at 15.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 15-16.

38. *Id.* at 16.

39. *Id.* at 16-17.

40. *Id.* at 17.

41. *Id.* at 17-18.

42. *Id.* at 18.

43. *Id.*



of his codes that “judgment must be given not according to examples, but according to the laws.”<sup>44</sup> The changes Justinian made to the system of custom once prevalent in Rome formed the basis of the European civil law societies,<sup>45</sup> whereas a process similar to the earlier customary system of law formed the basis for the English common law.<sup>46</sup>

*B. Establishment of the Common Law in England and the Influence of Sir Edward Coke*

*1. The Resurrection of Customary Law*

While the customary system gave way to a more empirical system in Rome, England resurrected the customary system of law, and it flourished in the English legal system.<sup>47</sup> The common law of today is said to have begun during the reign of Henry II.<sup>48</sup> The common law itself arose not from a set of established rules, but instead, the law emanated from judicial decisions of the past.<sup>49</sup>

Prior to the commencement of Henry II’s reign in the mid-twelfth century, localities in England had established their own local laws, not through legislation, but through unwritten custom,<sup>50</sup> and the local courts, as opposed to the national King’s Court, had the task of administering these laws.<sup>51</sup> With his enormous power over the English system of justice,<sup>52</sup> Henry II united England under a common system of laws administered through the King’s Court.<sup>53</sup> The law that Henry II’s judges administered was unknown until announced in their decisions, even though most of this law is thought to have been once a part of the local courts.<sup>54</sup> When discrepancies between customs of local courts surfaced, the king’s judges had the duty to resolve the conflict

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44. *Id.* at 20-21 (quoting Code Just. 7.45.13 (Justinian 529)).

45. *Id.* at 21.

46. *Id.* at 16.

47. Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 444 (1996).

48. WILLIAM F. WALSH, A HISTORY OF ANGLO-AMERICAN LAW 57 (2d ed. 1932) (noting that “[t]he reign of Henry II marks the dividing line between the ancient customary law . . . and the common law as we understand it today”).

49. BLACK, *supra* note 25, at 24.

50. WALSH, *supra* note 48, at 57-58.

51. *Id.*

52. *Id.* at 59 (“To understand what Henry accomplished, we must remember that his power as a law administrator was practically unlimited. He stood as the source of all justice, and his court was simply his instrument for doing justice among his people.”).

53. *Id.* at 61-62.

54. *Id.* at 64.

and declare the law of the land.<sup>55</sup> Resolution was effectuated under the discretion of the judges:

[Judges] took the raw material of the customary law, selected what was good, rejected what was bad, and created out of it all a system of law for the nation which was distinctly new, though based on the customs of the past and grounded on fundamental principles or legal concepts which in most cases can be traced back to the Anglo-Saxon period, in other cases to Roman law.<sup>56</sup>

The compilation and reconciliation of the customary laws of England's individual counties and localities instituted by Henry II formed a legal structure truly common to all Englishmen. Against this backdrop the doctrine of stare decisis must be interpreted.<sup>57</sup>

Because the common law relied heavily on past decisions of judges, its further development mandated an established system of recording. For judges to adhere to precedent, they needed a tangible record of previous cases from which to discern the proper precedent. The *Year Books* provided the first such record. The English *Year Books* contained one of the earliest accounts of English judicial decisions.<sup>58</sup> First appearing in the thirteenth century, the *Year Books* served as a record of all court cases and lasted through the mid-sixteenth century.<sup>59</sup> Early in their history, the *Year Books* recorded pleading information about cases, arguments made, and even some commentary,<sup>60</sup> but the *Year Books* usually did not contain the opinions of the court.<sup>61</sup> Even without the court's official opinion, however, lawyers compiled the *Year Books* and used them to discern precedents for later cases.<sup>62</sup> Although the *Year Books* were important to the development of common law, they were not the origin of stare decisis,<sup>63</sup> mostly because the failure to record actual court opinions hindered their use as binding authority in a court of law.<sup>64</sup> Toward the end of the *Year Books*' existence, however, the shift from oral pleadings to written pleadings permitted a more thorough analysis of the substantive issues of a particular case.<sup>65</sup> This transition "made the Year Books a more

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55. *Id.*

56. *Id.*

57. *Id.*

58. Healy, *supra* note 31, at 56-58.

59. WALSH, *supra* note 48, at 71; Healy, *supra* note 31, at 58.

60. Healy, *supra* note 31, at 58.

61. *Id.*

62. WALSH, *supra* note 48, at 71.

63. Healy, *supra* note 31, at 58.

64. *Id.* at 59.

65. *Id.* at 60.

fertile source of case law, and judges and lawyers began to cite precedents more frequently.”<sup>66</sup>

It is important to note, though, that at no point during this time did judges feel bound by the caselaw discernible from the *Year Books*.<sup>67</sup> Judges became aware of the ways in which they shaped the law, “[b]ut they did not think their power as judges was restrained by precedent.”<sup>68</sup> When confronted with a precedent they disliked, judges did not usually distinguish the case before them from the unfavorable precedent;<sup>69</sup> instead, judges simply ignored the precedent and ruled according to their own views about the correct application of justice or reason in the particular case.<sup>70</sup> Thus, the cases contained within the *Year Books* had only persuasive, not binding, authority.<sup>71</sup>

Eventually, the modern version of reporters replaced the *Year Books* as the method of recording the common law.<sup>72</sup> The *Year Books*, however, marked the common law’s first attempt to record the proceedings of early English courts and proved to be a useful tool for lawyers to discern trends in the law, even if the *Year Books* did not serve as an authoritative source of binding precedent.

## 2. *The Influence of Sir Edward Coke*

The next set of law reports introduced the modern notion of precedent. Mainly named for their authors, these new reporters contained the facts of cases and statements of counsel and judges, as well as commentary by the author of the reporter.<sup>73</sup> These new reporters helped establish procedural customs to be followed by successive judges.<sup>74</sup> Sir Edward Coke, Chief Justice of the Court of Common Pleas from 1606 to 1613 and Chief Justice of the King’s Bench from 1613 to 1616,<sup>75</sup> was instrumental in ushering in the modern view of precedent and securing its place in legal history and practice.<sup>76</sup> Coke published a thirteen-volume treatise of past cases of the courts, known

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66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 60-61.

70. *Id.* at 61.

71. Berman & Reid, *supra* note 47, at 445.

72. WALSH, *supra* note 48, at 71.

73. Berman & Reid, *supra* note 47, at 446.

74. *Id.*

75. Healy, *supra* note 31, at 62.

76. Berman & Reid, *supra* note 47, at 446-47 (“It was Sir Edward Coke (1552-1634) more than any other person, and perhaps more than all others put together, who established the authority of rules on the basis that they had been previously enunciated by courts of common law.”).

simply as *The Reports*.<sup>77</sup> Coke regarded the rules in pre-Tudor cases as important and designed his reports as an authoritative source on those cases.<sup>78</sup> Even though Coke's reports presented one of the best methods of utilizing the doctrine of precedent, difficulties arose because Coke often altered the language of cases to coincide with his own views of the law.<sup>79</sup> Coke's personality and the comprehensive nature of *The Reports*, however, lent credibility to Coke's work and forced lawyers to recognize and cite precedent for the first time.<sup>80</sup>

In addition to *The Reports*, Coke further solidified the notion of precedent in England by using the *Year Books* to cite cases challenging King James I's position as the head of English law.<sup>81</sup> Coke waged a battle with the King by citing ancient precedents to contradict the validity of acts of the King.<sup>82</sup> During one challenge to the King's ability to hear cases himself, Coke, in response to an argument that only reason was needed to decide cases, asserted "that what was needed to decide cases was not natural reason, which anyone could possess, but an 'artificial Reason and Judgment of Law, which requires long Study and Experience before that a man can attain to the cognizance of it.'"<sup>83</sup> With this statement, precedent became the center of common law, and the authority to decide cases shifted from the King to the judiciary alone.<sup>84</sup>

Even though Coke forced lawyers and judges to acknowledge the importance of precedent, its acceptance was not without trepidation. English judges feared "that strict adherence to past decisions would undermine one of the common law's most important features — its flexibility."<sup>85</sup> During the seventeenth century, English jurists regarded this flexibility as the common law's greatest strength at a time when other European nations were adopting law codes based on the more rigid and fixed Roman civil law.<sup>86</sup> Coke also embraced the notion of adaptability in the common law and believed that judges should constantly reexamine and strive for clearer applications of the law by applying the law to new matters before the courts.<sup>87</sup> Further, Coke believed that the law should be continually tested over time to ensure its

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77. Healy, *supra* note 31, at 62.

78. Berman & Reid, *supra* note 47, at 447.

79. *Id.*; see also Healy, *supra* note 31, at 64.

80. Healy, *supra* note 31, at 63.

81. *Id.*

82. *Id.*

83. *Id.* at 64 (quoting CATHERINE DRINKER BOWEN, *THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE* 304-05 (1957)).

84. *Id.*

85. *Id.* at 65.

86. *Id.*

87. *Id.* at 66.

relevance to the experiences of the past and the needs of the future.<sup>88</sup> Coke's views about the flexibility of the common law reaffirmed his beliefs in the importance of precedent, because "[u]nder his view, . . . attention to precedent was vital because it facilitated the continual accretion of knowledge. But a rigid approach to precedent would halt this process and fix the law in place, with no hope of further improvement."<sup>89</sup>

The tension between the adherence to precedent and the flexibility in the common law persisted from Coke's death in 1634 through the eighteenth century.<sup>90</sup> Two reasons existed for this persistence. First, judges still believed in natural law and the idea that natural law supplied universal principles that could not be changed by precedents that conflicted with those principles.<sup>91</sup> English jurists reconciled natural law and precedent by stating that decided cases were not the law themselves, but only evidence of the law.<sup>92</sup> Second, poor reports of judges' decisions in cases prevented the wholehearted acceptance of precedent in the seventeenth and eighteenth centuries.<sup>93</sup> Omissions of "unimportant" and "wrongly decided" cases and the existence of gross inaccuracies in those included in a reporter made judges reluctant to follow precedent.<sup>94</sup> By the close of the eighteenth century, a reliable system of law reports had not yet emerged in England, and English judges still did not feel obligated to strictly adhere to precedent.<sup>95</sup> At the same time, the emerging American judicial system was facing challenges similar to those confronting England in the establishment of a system of common law based upon precedent.

### *C. Establishing Precedent in an Emerging Nation*

When the English colonized North America, they did not adhere wholeheartedly to the English common law. Upon their first arrival in the seventeenth century, magistrates in some colonies applied the law of God, reason, or equity in the absence of controlling express law.<sup>96</sup> Magistrates examined the English common law but viewed it only as an illustration of foreign law and applied it only when it had been explicitly adopted by colonial

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88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 67. Natural law is "[a] philosophical system of legal and moral principles purportedly deriving from a universalized conception of human nature or divine justice rather than from legislative or judicial action." BLACK'S LAW DICTIONARY, *supra* note 19, at 1055.

92. Healy, *supra* note 31, at 67.

93. *Id.* at 68.

94. *Id.* at 68-69.

95. *Id.* at 72-73.

96. WALSH, *supra* note 48, at 86-90.

statute.<sup>97</sup> Maryland, Virginia, and the Carolinas adopted a type of common law distinct from the formalistic common law applied in England.<sup>98</sup> Instead of relying on volumes of recorded decisions handed down by English legal professionals to establish a body of common law, the early American common law was facilitated by untrained judicial officers without experience as attorneys or judges.<sup>99</sup> Because of the lack of trained officials, the colonial law's defining characteristic was informality. This characteristic illustrates the nexus between the law of reason and early colonial law: "[I]ts popular informal character, with courts of laymen generally consisting of several persons administering customary law according to the general sense of reason and justice of the community as expressed in the sense of reason and justice of the magistrates or judges who decided the cases."<sup>100</sup> The informality stemmed directly from "[t]he special needs of a newly-settled country with a homogenous population in each colony . . . without lawyers or English law books."<sup>101</sup>

By respecting the informal common law that emerged in the colonies, early American Supreme Court justices recognized the differences between England and America and considered these differences when making their decisions.<sup>102</sup> Examining the common law of England and its place in American law, Justice Story said that "[t]he common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation."<sup>103</sup> Therefore, no rule of English common law was incorporated into the American common law unless the legislature or prior judicial official found relevance and value for the English rule in America.<sup>104</sup>

Cognizant of its special needs, the American judicial system proceeded to establish workable doctrines of common law and precedent. The United States' lack of an official judicial reporting system arose as a great obstacle in the path toward the development of an American common law through which precedent could be applied.<sup>105</sup> Despite this obstacle to development,

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97. *Id.*

98. *Id.* at 90.

99. *Id.*

100. *Id.* at 91.

101. *Id.*

102. *See* Van Ness v. Pacard, 27 U.S. (2 Pet.) 137, 144 (1829).

103. *Id.* (explaining the development of the law of property and the applicability of English common law property rules regarding landlord and tenants in America).

104. WALSH, *supra* note 48, at 94.

105. *See* Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 34 (1959).

discussion regarding the need for reporters is not present in the records of the first Congress, which met in 1789.<sup>106</sup> Additionally, there is no record of discussion about a reporter system among the Justices of the Supreme Court during its first three terms.<sup>107</sup> In 1791, however, after three terms with empty dockets, the Supreme Court heard oral arguments in its first case, and legal practitioners recognized the need for an official system for reporting the decisions of the Court.<sup>108</sup> The daunting task of developing a reporting system first fell to Alexander Dallas.

*1. The Tenuous Early Volumes of the Reports*

Dallas, a Jamaican-born and English-educated member of the Philadelphia bar, had been publishing the *Reports*, which contained decisions of the Pennsylvania and Delaware courts.<sup>109</sup> His *Reports* were so well received by colleagues and the bench that Dallas's first volume of the *Reports* is regarded as the first volume of the *United States Reports*, despite the absence of any Supreme Court case.<sup>110</sup> With his *Reports*, Dallas attempted to aid legal professionals by distilling the basic points of law emanating from each case.<sup>111</sup> In addition, Dallas compiled an index of cases cited by the courts, a feature not seen in any other prior case reporter.<sup>112</sup> Recognizing the link between reporting and precedent, Dallas's "innovation [of the citing indices] . . . [met] the needs of a post-Revolutionary bar hungry for precedent; and the relative brevity of the index reveals what a pioneering effort it was."<sup>113</sup>

While Dallas's early volumes were an important step in establishing a workable foundation to which courts could turn for precedent, they were not without error. Many factors, including lack of funding, contributed to certain volumes of Dallas's *Reports* being characterized by delay and incompleteness.<sup>114</sup> Often, new volumes were not published and did not reach the public for several years after the Court's decisions were rendered,<sup>115</sup> and this delay "was

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106. Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1294 (1985).

107. *Id.*

108. *Id.* at 1294-95.

109. *Id.* at 1295-96.

110. *Id.* at 1296 ("But for one important volume of Connecticut cases by Ephraim Kirby, which preceded it by barely a year, Dallas' initial volume would stand indisputably as the first comprehensive publication of American law reports, federal, state or colonial.").

111. *Id.* at 1299.

112. *Id.*

113. *Id.*

114. *Id.* at 1300-01.

115. *Id.* at 1301 (noting that the second and fourth volumes of Dallas's work were published five and seven years, respectively, after the date of the last decision published in the volume).

a major hindrance to those hungry for information concerning the jurisprudence of the highest federal tribunal, particularly its appellate practice.”<sup>116</sup> In addition to the delay at the time of publishing, subsequent analysis of Dallas’s *Reports* has revealed the *Reports*’ incompleteness. Scholars disagree about the level of incompleteness, with claims of omitted cases ranging between 10% and 50% of the Court’s total cases.<sup>117</sup> All agree, however, that the question is “not *whether* but *to what extent*” the *Reports* are incomplete.<sup>118</sup> Dallas’s *Reports*, although not completely reliable, assisted in overcoming a large hurdle — the lack of recorded judicial decisions — in the path of a developing judiciary.

Building on the foundation laid by Dallas, William Cranch assumed the role of reporting the decisions of the Supreme Court and sought to improve the quality by which decisions were reported.<sup>119</sup> Cranch’s volumes contained summaries of the arguments presented by counsel as well as the indices begun by Dallas.<sup>120</sup> Also, Cranch supplemented the decisions with appendices composed of information that he viewed as useful to practitioners.<sup>121</sup> While these features contributed to the usefulness of the *Reports*, Cranch’s tardiness in reporting decisions rendered many of the *Reports*’ useful features obsolete.<sup>122</sup> The years-long delays between the Court’s issuance of a decision and its publication by Cranch “necessarily diminished, in many instances almost to the vanishing point, the immediate impact that the Court’s actions might otherwise have been expected to have on the bar and the public at large.”<sup>123</sup> In 1815, the Court’s dissatisfaction with Cranch reached its pinnacle as Cranch had yet to publish the Court’s opinions decided as far back as its February 1810 term, rendering those 131 opinions unavailable to other legal professionals.<sup>124</sup> Without providing notice of the current trends in the law and the present interpretations of the laws by the nation’s highest judicial officials, Cranch’s *Reports* stalled the growth of precedent because an accurate recording of the law was not available for use by attorneys or other courts.

Unfortunately, other modes of communicating information about the state of the law to attorneys and judges sitting on other courts proved unreliable as well. In addition to the shortcomings in timeliness and accuracy of the

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116. *Id.* at 1302.

117. *Id.* at 1303.

118. *Id.*

119. *Id.* at 1308.

120. *Id.*

121. *Id.*

122. *Id.* at 1308-10.

123. *Id.* at 1310.

124. *Id.* at 1319.



*Reports*, newspaper accounts of Supreme Court decisions were also inadequate to significantly further the doctrine of precedent in the United States.<sup>125</sup> For example, when the Court issued its opinion in *Marbury v. Madison*,<sup>126</sup> some newspapers printed the text of the opinion, but others printed only a small portion of the opinion.<sup>127</sup> Also, the newspaper attention given to the landmark decision focused not on Chief Justice Marshall's establishment of judicial review but on the court's foray into presidential powers.<sup>128</sup> Thus, the newspapers ignored the crux of the opinion in this important case.<sup>129</sup> In an era when judges sought to establish and develop a body of law based upon previously decided cases, "[t]he unavailability of accurate and full newspaper accounts of the decisions of the Supreme Court made the prompt publication of Cranch's *Reports* essential. His chronic inability to accomplish that objective became a source of considerable dismay to leading members of the profession, including the Justices themselves."<sup>130</sup> In general, the *Reports* of Dallas and Cranch began the process of recording cases, a process necessary for the development of precedent, but their tardiness, incompleteness, and

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125. *Id.* at 1311.

126. 5 U.S. (1 Cranch) 137 (1803).

127. Joyce, *supra* note 106, at 1311.

128. *Id.*; see also PAUL BREST, SANFORD LEVINSON, J.M. BALKIN & AKHIL REED AMAR, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 81 (4th ed. 2000) ("In 1803, when *Marbury* was decided, public attention focused on the [sic] whether the (Federalist) Court would claim the power to restrain the conduct of the (Republican) executive. . . . In any event, given the highly charged political atmosphere of the day, the fact that the Court struck down an act of Congress was a decidedly secondary issue to whether the Court would directly challenge executive authority, order injunctive relief, and, in effect, provoke a full-scale constitutional-institutional crisis.").

129. The enduring characteristic of Justice Marshall's opinion in *Marbury* is the announcement of the Court's power of judicial review. See William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1 (1969). As Justice Marshall stated in the opinion:

If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

*Marbury*, 5 U.S. (1 Cranch) at 177-78.

130. Joyce, *supra* note 106, at 1311.

inaccuracies greatly inhibited the establishment of a strong and reliable recording system.

## 2. *Wheaton's Establishment of a Reliable Reporter*

The appointment of Justice Joseph Story to the Supreme Court in 1811 brought a vigilant advocate of accurate reporting to the bench.<sup>131</sup> Justice Story was “keenly aware of the advantages of prompt, accurate reporting and deeply interested in the promotion of a national jurisprudence.”<sup>132</sup> Justice Story entered into a mentoring relationship with Henry Wheaton, Cranch’s eventual successor, and the relationship between the two men proved mutually beneficial.<sup>133</sup> As a federal circuit judge, Justice Story developed an interest in admiralty law and desired the establishment of case precedent in the field.<sup>134</sup> To accomplish this daunting task, Justice Story elicited Wheaton’s help to publish the admiralty opinions that Story decided as a circuit judge.<sup>135</sup> The result, Wheaton’s *Digest of the Law of Maritime Captures and Prizes*, quickly received great praise from legal professionals as it provided extensive analysis of the state of admiralty law in the United States and in several foreign jurisdictions.<sup>136</sup> Dissatisfied with Cranch’s work, Wheaton’s relationship with Justice Story and the acclaim for his earlier work led the Justices of the Supreme Court to appoint Wheaton as the Court’s official reporter in 1816.<sup>137</sup>

From his appointment as the official reporter, Wheaton brought vigilance and dedication not exhibited by his predecessors to the reporting of the Supreme Court’s decisions.<sup>138</sup> Wheaton threw himself into the work of the Court, attending sessions of the Court six days per week, receiving only rare visits from his wife or his friends, and becoming a part of the intimate circle of the Justices.<sup>139</sup> These circumstances created an auspicious environment for Wheaton to overcome the problems that plagued the *Reports* under Dallas and Cranch.<sup>140</sup> Initially, Wheaton appeared poised to publish a volume of the *Reports* within mere months of the completion of the Supreme Court’s

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131. *Id.* at 1312 n.123

132. *Id.* at 1312.

133. *Id.* at 1313.

134. *Id.* at 1316.

135. *Id.* at 1317.

136. *Id.* at 1317-18 (noting that Wheaton garnered immediate commendation for the *Digest* from the Attorney General of the United States and Justice Story).

137. *Id.* at 1320-21.

138. *See id.* at 1321.

139. *Id.* Wheaton’s relationship with the Justices included Wheaton dining with the Justices and even becoming Justice Story’s roommate in Washington, D.C. *Id.* at 1322.

140. *Id.* at 1324.

February 1816 term.<sup>141</sup> Unfortunately, Wheaton's inability to secure an acceptable publisher resulted in a seven-month delay in publication and subjected him to increased scrutiny and skepticism,<sup>142</sup> but "[f]ortunately for Wheaton, the publication of the *Reports* for the 1816 Term prior to the commencement of the 1817 Term answered all doubts regarding the wisdom of the Court in appointing a new Reporter."<sup>143</sup> Apart from this initial struggle for Wheaton, his subsequent volumes of the *Reports* generally became available during the summer following each term.<sup>144</sup> By publishing the *Reports* in a timely manner, Wheaton conquered the obstacle of delay that plagued his predecessors.

While Wheaton's timeliness elevated the status of his volumes of the *Reports* over those of Dallas and Cranch, Wheaton also had to improve upon the completeness and accuracy lacking in his predecessors' volumes. Wheaton's first challenge to the creation of a complete record of the Supreme Court's business arose when he decided to provide only an outline of the arguments of counsel instead of including the arguments in full.<sup>145</sup> This choice, driven by a desire to maintain a manageable body of work, irked many of the distinguished members of the Supreme Court bar.<sup>146</sup> Although he continued to provide only outlines, Wheaton appeased the bar by seeking their help in developing the outlines to include in the *Reports*,<sup>147</sup> and "[i]n due course, the bar became so confident of Wheaton's talent and good will that it dismissed its former anxieties and entrusted matters willingly into his hands."<sup>148</sup> Wheaton further confronted the tension between completeness and manageability in using his discretion to omit cases altogether from the *Reports*.<sup>149</sup> In making those decisions, Wheaton recognized that some cases turned on questions of fact, not interpretations of law, and would not meaningfully add to the body of precedent.<sup>150</sup> Omitting cases without

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141. *Id.* at 1324-25. The February 1816 term concluded on March 21, 1816, and by early May, Wheaton "had completed his work in preparing the opinions, abstracts and arguments of counsel for the press." *Id.* at 1325.

142. *Id.* at 1325, 1327.

143. *Id.* at 1327.

144. *Id.* at 1328.

145. *Id.*

146. *Id.* A few of those distinguished members included Daniel Webster, Henry Clay, William Pinkney, Samuel Dexter, William Wirt, David B. Ogden, Richard Rush, Thomas Addis Emmett, and Robert Goodloe Harper. *Id.*

147. *Id.* at 1328-29.

148. *Id.* at 1329.

149. *Id.*

150. *Id.*

precedential value continued virtually uncriticized throughout Wheaton's term as the Supreme Court's official reporter.<sup>151</sup>

While Wheaton may have taken liberties with the completeness of the *Reports*, he took no liberties with the accuracy of the information included. Wheaton meticulously reviewed copies of the proof sheets in an effort to avoid even the smallest of errors.<sup>152</sup> Wheaton recognized the importance of an accurate compilation of the state of the law, noting:

It is a duty which [the Reporter] owes to the Court, to the profession, and to his own reputation, to maintain the fidelity of the Reports, which are received as authentic evidence of the proceedings and adjudications of this high tribunal. If they are not to be relied on in this respect, they are worthless.<sup>153</sup>

With a timely, complete, and accurate portrayal of the proceedings before the nation's highest court, Wheaton overcame the obstacles previously hindering the establishment of a reliable set of reporters to which legal professionals could turn to analyze precedent. Wheaton continued in his capacity as the official reporter for the Supreme Court until 1827,<sup>154</sup> when the drudgery of producing the *Reports*<sup>155</sup> and the lack of financial gain from the endeavor<sup>156</sup> prompted Wheaton to accept an appointment from President John Quincy Adams as *chargé d'affaires* to Denmark.<sup>157</sup>

Following Wheaton's improvements to the reporting system, Richard Peters, Jr., Wheaton's successor, brought an entrepreneurial spirit to the pursuit of recording the precedents of the Court.<sup>158</sup> Unlike his predecessors who added appendices and marginal notes to the opinions of the Court, Peters did not view his role as one of "rationalizing and improving the law through his own erudite contributions."<sup>159</sup> Instead, Peters successfully attempted to

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151. *Id.*

152. *Id.* at 1329-30. When he reviewed Wheaton's first volume of the *Reports*, Justice Story, a meticulous man himself, found just five typographical errors in the entire volume and no errors in substance. *Id.* at 1330. The only error in substance found in Wheaton's volumes is in a concurring opinion in *Ramsay v. Allegre*, 25 U.S. (12 Wheat.) 611, 614 (1827) (Johnson, J., concurring) — the very last case in the very last volume of Wheaton's tenure as the reporter. Joyce, *supra* note 106, at 1330.

153. Joyce, *supra* note 106, at 1330.

154. *Id.* at 1351.

155. *Id.* at 1349.

156. *Id.* at 1340 ("Altogether, his twelve years of labor as Reporter brought him, from the sale of rights to his publications, a mere \$9900.").

157. *Id.* at 1350.

158. *Id.* at 1351-52.

159. *Id.* at 1352.

transform the business of the Court into a financial enterprise, and “[i]n seeking to exploit that potential, he was to increase dramatically the profession’s access to the Court’s decisions, both at the practical level of decreased expense and as a matter of legal doctrine.”<sup>160</sup> With an affordable copy of the *Reports*, lawyers and other judges could begin to analyze the nation’s emerging precedent for the dual purposes of properly counseling clients about the state of the law and of bolstering arguments by citing to specific cases on point. Even though history remembers Wheaton as the originator of a reliable and complete set of reports,<sup>161</sup> “Peters’ genius lay in his recognition that there existed in the new nation a substantial and as yet untapped market for reports of the decisions of the Supreme Court, ready to be exploited if only the cost of obtaining them could be reduced dramatically. This, Peters accomplished.”<sup>162</sup> The accomplishments of both Wheaton and Peters permitted public and judicial access to a reliable record of judicial decisions and, in turn, facilitated the use of precedent in the American judicial system.

#### *D. Precedent’s Importance in Oklahoma*

Because of the work accomplished by the early court reporters, especially Wheaton and Peters, precedent became and has remained a central element of judicial decision making in the United States. Both state and federal courts in Oklahoma recognize the importance of precedent, and particularly *stare decisis*, in deciding cases.<sup>163</sup> In *In re Smith*,<sup>164</sup> the Tenth Circuit firmly stated that it is “bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court.”<sup>165</sup> In *In re Smith*, a three-judge panel of the Tenth Circuit heard a case in which the “[r]espondent was ordered to show cause why he should not be . . . disciplined for filing frivolous appeals” in a number of cases.<sup>166</sup> The panels that heard the original appeals at issue had determined that the appeals were, in fact, frivolous.<sup>167</sup> Faced with this initial finding, the panel in *In re Smith* felt

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160. *Id.*

161. *Id.* at 1388 (“Wheaton’s appointment in 1816 effectively brought an end to the old system by the introduction of complete, meticulous and timely reports unlike any that had gone before.”).

162. *Id.* at 1389.

163. *See, e.g.*, *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000); *United States v. Nichols*, 169 F.3d 1255, 1261 (10th Cir. 1999); *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) (*per curiam*); *Phillips v. Okla. Tax Comm’n*, 1978 OK 34, ¶ 48, 577 P.2d 1278, 1285-86.

164. 10 F.3d 723.

165. *Id.* at 724.

166. *Id.*

167. *Id.*

bound by the determinations of the previous panels regarding the frivolous nature of the appeals and proclaimed that the principles of stare decisis and precedent mandated the same finding in the case before it.<sup>168</sup> The Tenth Circuit's opinion in *In re Smith* stated the circuit's belief in the importance of abiding by the decisions of previous judges and reaffirmed the importance of precedent in the law of the circuit.

Again, in *United States v. Meyers*<sup>169</sup> the Tenth Circuit reaffirmed its commitment to following the precedent established by prior circuit cases. In *Meyers*, the court explicitly declared which parts of an opinion bind a later court when it stated that “[t]he precedent of prior panels which this court must follow includes not only the very narrow holdings of those prior cases, but also the reasoning underlying those holdings, particularly when such reasoning articulates a point of law.”<sup>170</sup> With this language, the Tenth Circuit reiterated its belief in the importance of precedent and informed the legal profession of the circuit's commitment to follow not only the holdings of previous cases, but also the reasoning judges used in deciding those previous cases. Both *In re Smith* and *Meyers* illustrate that the Tenth Circuit has a documented belief in the value of precedent and seeks to adhere to this important judicial doctrine whenever possible.

The Oklahoma state courts share the Tenth Circuit's belief in the value of precedent. The Oklahoma Supreme Court addressed its views concerning the importance of precedent in *Rodgers v. Higgins*.<sup>171</sup> When confronted with an argument advocating the overruling of a previously decided and settled case, the court found no compelling reason to do so.<sup>172</sup> In making this decision, the court stated that “*stare decisis* means to abide by decided cases. This time-honored rule ‘serves to take the capricious element out of law’ and give it stability. . . . Unless precedents are ‘palpably bad,’ judicial surgery in upsetting them must be avoided.”<sup>173</sup> This case illustrates the important role that precedent has assumed in the state judiciary and the judiciary's belief in the inherent value of previously decided cases in establishing a stable and just system of law in Oklahoma.

The Oklahoma Court of Criminal Appeals has also recognized the importance of precedent in criminal law jurisprudence. That court has acknowledged its duty “to promote health in the administration of the law,”<sup>174</sup>

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168. *Id.*

169. 200 F.3d 715 (10th Cir. 2000).

170. *Id.* at 720.

171. 1993 OK 45, 871 P.2d 398.

172. *Id.* ¶ 31, 871 P.2d at 413.

173. *Id.* ¶ 28, 871 P.2d at 412 (quoting Douglas, *supra* note 30, at 736).

174. *Ex parte Lewis*, 85 Okla. Crim. 322, 335, 188 P.2d 367, 378 (Okla. Crim. App. 1947).

a goal that “can be attained only by an honest endeavor to eliminate bad precedents, as well as to establish good precedents.”<sup>175</sup> The court, however, was careful to recognize the distinctions between the needs of the criminal law and the needs of the civil law.<sup>176</sup> Precedent and stare decisis are important in the criminal law, but “[t]he doctrine of stare decisis is not the sacred tenet in criminal law that it rightfully is in civil law.”<sup>177</sup> Even though the nature of criminal law may diminish the importance of precedent, the Oklahoma Court of Criminal Appeals has recognized that precedent plays a role in promoting a healthy administration of the law.

The opinions of federal and state courts in Oklahoma expressly indicate that judges in the state regard the doctrine of precedent highly. Precedent, and the application of consistent legal holdings and reasoning in like cases using stare decisis, ensures the maintenance of a coherent and cohesive body of law from which Oklahoma practitioners discern the state of the law. From its early roots in Roman customs, its enhancement in the English common law through the scholarly work of Sir Edward Coke, and its solidification as a pillar of the American judicial system through the peerless work of Henry Wheaton, the use of prior judicial actions as a means to decide subsequent cases has assumed a prominent role in the courts of this state and courts across the country. Especially in England and America, a written record of the proceedings before a court and their outcomes was the impetus for a truly workable and applicable doctrine of precedent, but with the proper publication and citation standards, unpublished opinions can ease the burden on those charged with maintaining official court publications while promoting a manageable and cohesive body of caselaw in the jurisdiction.

### *III. The History of Unpublished Opinions*

With the number of published opinions and the number of reporters recording these opinions rapidly increasing, “[o]ne response of American courts to the unmanageable growth of law reports has been to limit the publication of their decisions.”<sup>178</sup> In its 1964 annual report, the Judicial Conference addressed some of the problems associated with the rapid growth in the work of the federal courts.<sup>179</sup> The Judicial Conference noted the increase

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175. *Id.* at 335-36, 188 P.2d at 378.

176. *Id.* at 336, 188 P.2d at 378 (noting that rooting out bad precedents and replacing them with good precedents is particularly important in the criminal law).

177. *Id.*

178. Weaver, *supra* note 17, at 478.

179. See generally JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1964) (discussing the increase in caseloads for certain courts, the need for more judges and courts, and the increase in the number of opinions

in the sheer “number of published opinions” in both the district and circuit courts and the economic and practical difficulties of maintaining libraries housing all of these opinions.<sup>180</sup> In response, the Judicial Conference adopted a resolution stating, “[t]hat the judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value and that opinions authorized to be published be succinct.”<sup>181</sup> This resolution set in motion a series of events that led to the present-day concept of unpublished opinions. The process was further facilitated in 1971 when the Federal Judicial Center encouraged federal courts to implement a system limiting publication of opinions.<sup>182</sup> Accordingly, all federal circuits and many state appellate courts developed standards for the publication of opinions.<sup>183</sup>

In 1990, the Federal Courts Study Committee of the Judicial Conference recommended the establishment of an additional committee.<sup>184</sup> In light of the technological advances since the Judicial Conference made its original recommendation regarding unpublished opinions, this new committee was charged with studying the continuing need for unpublished opinions.<sup>185</sup> Rather than study problems related to nonpublication and noncitation policies, the Judicial Conference’s Advisory Committee on the Federal Rules of Appellate Procedure (Advisory Committee) was asked to solicit proposals for amendments to the Federal Rules of Appellate Procedure.<sup>186</sup> Thus, in 1998, the Advisory Committee conducted a survey of chief circuit judges to determine the need, if any, for a uniform policy regarding the citation and publication of judicial opinions.<sup>187</sup> The survey revealed the chief judges’ lack of enthusiasm for a national, uniform policy.<sup>188</sup> In 2001, however, the Department of Justice submitted specific rule language to the Advisory Committee to establish uniform standards for “the citation of unpublished opinions,” and the submission prompted the Advisory Committee’s devoted reexamination of the value of uniform rules regarding unpublished opinions.<sup>189</sup>

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being published).

180. *Id.* at 11.

181. *Id.*

182. 1971 FED. JUD. CTR. ANN. REP. 7-8.

183. *See* Serfass & Cranford, *supra* note 14, at 253-85.

184. *Hearing, supra* note 8, at 7 (prepared statement of Samuel A. Alito, Jr., J., U.S. Court of Appeals for the Third Circuit, and Chair, Advisory Committee on the Federal Rules of Appellate Procedure).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*



The discrepancy between the results of the 1998 survey of chief circuit judges and the proposal by the Department of Justice highlights the varying attitudes toward the use of unpublished opinions among distinguished members of the profession. A study of the two leading cases reveals that the recommendation by the 1964 Judicial Conference and the ensuing move toward embracing unpublished opinions continues to serve as a source of intra-judiciary debate. Two judges, Judge Richard Arnold of the Eighth Circuit and Judge Alex Kozinski of the Ninth Circuit, have been the most visible participants in this debate and have reached differing conclusions about the constitutionality of rules limiting the publication of opinions and the precedential value of a citation to an unpublished opinion.

*A. The Eighth Circuit's Rejection of Limited Publication as an Unconstitutional Expansion of Judicial Power and a Threat to Precedent*

Judge Arnold, in *Anastasoff v. United States*,<sup>190</sup> declared the Eighth Circuit's rule on limited publication unconstitutional. In *Anastasoff*, the petitioner sought a tax refund for overpaid federal income taxes,<sup>191</sup> but the argument on which petitioner relied was rejected previously by the Eighth Circuit in *Christie v. United States*,<sup>192</sup> an unpublished opinion of the court.<sup>193</sup> Judge Arnold used his opinion in *Anastasoff* to declare the Eighth Circuit rule pertaining to the precedential value of unpublished opinions - a rule similar to that of the other circuit courts - unconstitutional.<sup>194</sup> The rule struck down by Judge Arnold provided:

Unpublished opinions are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well . . . .<sup>195</sup>

In striking down the rule as unconstitutional, Judge Arnold held that "the portion of Rule 28A(i) that declares that unpublished opinions are not

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190. 223 F.3d 898 (8th Cir. 2000), *vacated as moot en banc*, 235 F.3d 1054 (8th Cir. 2000).

191. *Id.* at 899.

192. No. 91-2375MN, 1992 U.S. App. LEXIS 38446 (8th Cir. Mar. 20, 1992) (per curiam).

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

194. *Id.*

195. *Id.* (quoting 8TH CIR. R. 28A(i)). While Judge Arnold struck the Eighth Circuit rule down in *Anastasoff*, his opinion was later vacated as moot, so the rule still stands in the Eighth Circuit. See *infra* text accompanying notes 215-21.

precedent is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the ‘judicial.’”<sup>196</sup> Judge Arnold took a very narrow and strict view of stare decisis and precedent by arguing that the principles of stare decisis and precedent emanated from the Constitution and were intended to limit the power of the judiciary.<sup>197</sup> Such limitation, according to Judge Arnold, facilitated the separation of the judicial and legislative branches.<sup>198</sup> Further, “‘depart[ing] from’ established legal principles” constituted legislating from the bench, which judges lack the power to do.<sup>199</sup>

Central to Judge Arnold’s argument was the phrase “judicial power” found in Article III of the Constitution.<sup>200</sup> Article III provides that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>201</sup> Judge Arnold argued that the doctrines of precedent and stare decisis were inherent in the phrase “judicial power” referenced in Article III and imposed a limitation on this “judicial power.”<sup>202</sup> Judge Arnold surmised that allowing judges to ignore this mandate through the use of nonprecedential opinions was an improper expansion of the judicial power.<sup>203</sup> Therefore, requiring judges to adhere to *all* the past decisions of their respective courts protected the separation of powers between the three branches of government and facilitated the proper role of the court — applying established principles in like cases.<sup>204</sup>

Judge Arnold’s opinion in *Anastasoff* has drawn criticism from many sources.<sup>205</sup> His view of legal history espoused in the opinion is most vulnerable to attack. Judge Arnold claimed “the doctrine of precedent was not merely well established; it was the historic method of judicial decision-making, and well regarded as a bulwark of judicial independence in past

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

197. *Id.* at 900.

198. *Id.* at 901-02.

199. *Id.* at 901.

200. *Id.* at 903 (“We conclude therefore that, as the Framers intended, the doctrine of precedent limits the ‘judicial power’ delegated to the courts in Article III.”).

201. U.S. CONST. art. III, § 1.

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

203. *Id.* Judge Arnold also stated that “[t]he judicial power to determine law is a power only to determine what the law is, not to invent it.” *Id.* at 901.

204. The Supreme Court has long held that the three branches of government are distinct and have their own functions. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Speaking specifically of the judiciary, Chief Justice Marshall stated that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Id.* at 177.

205. *See, e.g.*, *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001); R. Ben Brown, *Judging in the Days of the Early Republic: A Critique of Judge Richard Arnold’s Use of History in Anastasoff v. United States*, 3 J. APP. PRAC. & PROCESS 355 (2001).

struggles for liberty.”<sup>206</sup> This view fails, however, to take into account the history of the common law in the United States. As previously mentioned,<sup>207</sup> the doctrine of precedent in England — where the doctrine was more strictly adhered to than in colonial United States — did not develop simultaneously with the common law. Instead, the perfection of a reporting system accepted as accurate was necessary before precedent became a workable doctrine in the English legal system. When this system of the common law was imported to the United States, early Americans changed and adapted it to reflect the differences between an established, time-honored system in England and a new, emerging system in the United States. In order for the common law to meet the needs of a nascent democracy,

First, judges often did pick and choose which English statutes and common law precedents were binding within their states. Second, judges took it upon themselves to use the customs of the common citizens of the states as an alternative source of law to the common law. Third, even those judges who looked to the common law as the source of American law felt that the judicial power included the right to decide whether an American statute complied with the common law.<sup>208</sup>

Because judges had wide latitude to decide which statutes and precedents to import from the English common law, precedent was not as established and central to the Constitution as Judge Arnold argued. Additionally, “[t]he state judiciary in the early Republic did not feel bound to follow the common law if the common law did not fit the conditions of the Republic.”<sup>209</sup> The discretion granted to early American judges contradicts Judge Arnold’s contention that precedent was a well-established notion implicit in the Framers’ drafting of Article III.

Additionally, Judge Arnold’s insistence that the failure to use unpublished opinions for precedential purposes violates the separation of powers is equally vulnerable to attack.<sup>210</sup> An early nineteenth-century example from Pennsylvania contradicts Judge Arnold’s belief and questions the soundness of his conclusion.<sup>211</sup> In 1807, the Pennsylvania legislature recognized and approved the state judiciary’s power to determine which statutes to import

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

207. *See supra* Part II.

208. Brown, *supra* note 205, at 359.

209. *Id.* at 368.

210. *See generally Anastasoff*, 223 F.3d at 901.

211. Brown, *supra* note 205, at 366-67.

from England into the law of that state.<sup>212</sup> After the state judiciary determined what laws were in force, a federal judge chose to ignore the established Pennsylvania precedent and to reconstruct Pennsylvania law, reasoning that custom and usage had incorporated certain principles into the Pennsylvania law that the Pennsylvania Supreme Court had expressly excluded from that state's common law.<sup>213</sup> These events in Pennsylvania indicate that the precedential weight of judicial opinions has not always been considered central to the separation of powers and is thus not implicit in Article III. Because a member of the Pennsylvania judiciary, and not the Pennsylvania legislature, decided which statutes were in effect in the state, "[i]n Pennsylvania, . . . the doctrines of precedent and separation of powers did not spring fully formed into existence after 1789," thus contradicting the notion that the use of precedent limits judges' Article III judicial power.<sup>214</sup> Because the notion of precedent as a tool to facilitate the separation of powers was not realized until after the drafting of the Constitution, the "judicial power" referenced by the Framers in Article III cannot be said to apply to that particular notion of precedent. Therefore, Judge Arnold's view that the separation of powers cannot support a system of nonprecedential, unpublished opinions is not historically supported.

While Judge Arnold's *Anastasoff* opinion declared unconstitutional the Eighth Circuit's rule giving unpublished opinions limited precedential weight, the decision is not likely the last word on the subject. Four months after issuing *Anastasoff*, Judge Arnold issued another opinion in *Anastasoff v. United States*<sup>215</sup> (*Anastasoff II*), in which he vacated his earlier decision.<sup>216</sup> After the issuance of the original decision, *Anastasoff* filed a petition for rehearing en banc and urged the Eighth Circuit to abandon the unpublished *Christie* opinion on which the United States relied.<sup>217</sup> Nevertheless, the Eighth Circuit, in Judge Arnold's *Anastasoff II* opinion, granted the petition for rehearing en banc, declared the case moot, and vacated its previous judgment and opinion based on action taken by the Internal Revenue Service in the months between the issuance of the original opinion and the rehearing.<sup>218</sup> The appellant argued that the importance of resolving the issues surrounding

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212. *Id.* at 367.

213. *Id.*

214. *Id.*

215. 235 F.3d 1054 (8th Cir. 2000), *vacating as moot en banc* 223 F.3d 898 (8th Cir. 2000).

216. *Id.* at 1056.

217. *Id.* at 1055.

218. *Id.* at 1055-56.

unpublished opinions should save the case from being declared moot.<sup>219</sup> Even though Judge Arnold rejected this argument, he made clear that:

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, and whether unpublished opinions have precedential effect no longer has any relevance for the decision of this tax-refund case.<sup>220</sup>

Although Judge Arnold vacated his earlier decision on technical grounds,<sup>221</sup> Judge Arnold reiterated that “[t]he constitutionality of that portion of Rule 28A(i) which says that unpublished opinions have no precedential effect remains an open question in this Circuit.”<sup>222</sup>

*B. The Ninth Circuit’s Acceptance of Unpublished Opinions as an Inherent Judicial Tool for Managing Precedent in Light of Increasing Caseloads*

In contrast to the rules of the Eighth Circuit, the constitutionality of the Ninth Circuit’s rule concerning the precedential value of unpublished opinions is not an open question. In *Hart v. Massanari*,<sup>223</sup> the Ninth Circuit was also confronted with a case in which unpublished opinions assumed a central role. In *Hart*, the appellant cited an unpublished opinion in his opening brief to the court in violation of a Ninth Circuit rule prohibiting the general citation of unpublished opinions.<sup>224</sup> The Ninth Circuit ordered the appellant to show cause as to why he should not be disciplined for violating the rule.<sup>225</sup> In response, the appellant relied on *Anastasoff* to question the constitutionality of the Ninth Circuit’s rule, which was similar to the rule stricken by Judge

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219. *Id.* at 1056.

220. *Id.* Ironically, it appears that Judge Arnold was forced to abandon his prior ruling that stressed the importance of prior rulings (i.e., precedent).

221. By disposing of *Anastasoff II* on the technical issue of standing, Judge Arnold remained consistent with the principles upon which he decided the original case. The judicial power delegated by Article III — so central to Judge Arnold’s argument — mandates that federal judges decide only actual cases and controversies before them. U.S. CONST. art. III, § 2; *see also Buchanan v. Evans*, 423 U.S. 963, 968 (1976) (“The grant of judicial power in Art. III of the United States Constitution limits federal courts to cases and controversies, and a dispute about the constitutionality of a statute which is no longer in effect is moot in the classical sense.”). Where the case or controversy has become moot, proper protocol requires that the judgment and opinion be vacated. *Anastasoff II*, 235 F.3d at 1056.

222. *Id.*

223. 266 F.3d 1155 (9th Cir. 2001).

224. *Id.* at 1158-59.

225. *Id.* at 1159.

Arnold.<sup>226</sup> In writing the opinion resolving the show-cause order, Judge Kozinski took a more expansive view of precedent and attempted to place the principles of precedent and the use of unpublished opinions in the modern legal context when he said:

We believe that *Anastasoff* overstates the case. Rules that empower courts of appeals to issue nonprecedential decision do not cut those courts free from all legal rules and precedents; if they did, we might find cause for alarm. But such rules have a much more limited effect: They allow panels of the courts of appeals to determine whether future panels, as well as judges of the inferior courts of the circuit, will be bound by particular rulings. This is hardly the same as turning our back on all precedents, or on the concept of precedent altogether. Rather, it is an effort to deal with precedent in the context of a modern legal system, which has evolved considerably since the early days of common law, and even since the time the Constitution was adopted.<sup>227</sup>

In *Hart*, Judge Kozinski challenged the assertions of Judge Arnold and defended the use of limited precedential status and publication standards as a necessary part of a growing and overburdened judiciary.<sup>228</sup>

First, Judge Kozinski critiqued Judge Arnold's view of Article III.<sup>229</sup> With the phrase "judicial power" being "more likely descriptive than prescriptive," Judge Kozinski questioned its limiting effect.<sup>230</sup> Judge Kozinski interpreted the phrase "judicial power" referenced in Article III as describing what judges must do to comply with their constitutional mandates.<sup>231</sup> According to Judge Kozinski, judges must decide only cases and controversies and must comply with the requirements of due process, jury trials, and other specific constitutional provisions, and by doing so, judges successfully exercise their judicial powers.<sup>232</sup> Unlike Judge Arnold, Judge Kozinski took an expansive

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226. *Id.* Some minor differences exist between the rules of the two circuits. The Ninth Circuit rule states that unpublished opinions are not binding precedent, whereas the Eighth Circuit rule states that they are not precedent. *Id.* at 1159 n.2. Compare 9TH CIR. R. 36-3(a) with 8TH CIR. R. 28A(i). Also, the Ninth Circuit rule prohibits citation in almost all cases, whereas the Eighth Circuit rule allows citation of an unpublished opinion as persuasive authority when no other published opinion would serve the purpose. *Id.* at 1159 n.2. Compare 9TH CIR. R. 36-3(b) with 8TH CIR. R. 28A(i).

227. *Hart*, 266 F.3d at 1160.

228. *See id.* at 1166-80.

229. *Id.* at 1160-61.

230. *Id.* at 1161.

231. *Id.*

232. *Id.*

view of the phrase “judicial power” and saw it as empowering the judiciary to react to changes over time instead of restricting the judiciary to an inaccurate history.<sup>233</sup>

One such reaction is the unpublished opinion. Unpublished opinions fall within a larger category of judicial practices used by federal and state courts across the nation without any constitutional basis.<sup>234</sup> Courts across the country employ practices promoting the efficiency of the court such as policies pertaining to the issuance of written opinions, the availability of equitable relief, and the hearing of appeals by a panel of judges, to name a few, and these practices are not founded upon constitutional prescriptions.<sup>235</sup> Judge Kozinski’s hesitation to recognize a limiting effect of “judicial power” stemmed from the danger he perceived in giving constitutional status to a custom of the courts.<sup>236</sup> Bestowing constitutional status on such customs would not allow aspects of the law to change when change is needed or desired.

Second, Judge Kozinski challenged Judge Arnold’s view of judicial history and its role in the development of a strict doctrine of precedent. Judge Kozinski asserted:

[I]n order to follow the path forged by *Anastasoff*, we would have to be convinced that the practice in question was one the Framers considered so integral and well-understood that they did not have to bother stating it, even though they spelled out many other limitations in considerable detail.

. . . .

The Constitution does not contain an express prohibition against issuing nonprecedential opinions because the Framers would have seen nothing wrong with the practice.<sup>237</sup>

With external sources, such as treatises and reports compiled by lawyers and students, being the primary sources of law during the early history of English law, it is difficult to state that strict adherence to the decisions in prior cases has been in the forefront of English and American legal history. Further, Judge Kozinski directly contradicted Judge Arnold’s view of the nature of precedent in American legal history by stating that “[c]ontrary to *Anastasoff*’s

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233. *Id.* at 1163.

234. *Id.* at 1160-61.

235. *Id.*

236. *Id.* at 1163 (“One danger of giving constitutional status to practices that existed at common law, but have changed over time, is that it tends to freeze certain aspects of the law into place, even as other aspects change significantly.”).

237. *Id.*

view, it [is] emphatically not the case that all decisions of common law courts were treated as precedent binding on future courts unless distinguished or rejected.”<sup>238</sup> Rather, custom formed the basis of the common law and was sensitive to the needs of changing circumstances.<sup>239</sup> The modern concept of binding precedent did not arise until the nineteenth and early twentieth centuries; therefore, Judge Arnold’s view that binding precedent emanates from the Constitution does not comport with historical record.<sup>240</sup> Nevertheless, Judge Kozinski agreed with Judge Arnold to a limited extent by stating that “[w]hile 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.”<sup>241</sup>

Third, Judge Kozinski placed the unpublished opinion and binding authority in the context of the modern judicial system to show that the concepts are important to judicial efficiency. The number of cases brought before appellate courts has increased rapidly and exponentially.<sup>242</sup> Judge Kozinski explained that because appellate courts generally lack discretionary review, unpublished and nonprecedential opinions allow appellate judges to select a manageable number of cases in which to make a meaningful contribution to the established law.<sup>243</sup> This quasi-discretionary review provides a resolution to all disputes heard by the court but does so in a way that promotes efficiency.<sup>244</sup> Because an unpublished opinion is essentially a letter from a court to parties familiar with the facts of their case, the language of an unpublished opinion is often inadequate to be applied to future cases arising from different facts.<sup>245</sup> Further expounding his position regarding judicial efficiency, Judge Kozinski also argued that a proliferation of binding precedential opinions causes massive problems in the modern legal system.<sup>246</sup> Attaching binding precedential status

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238. *Id.* at 1167.

239. *Id.*

240. *Id.* at 1175.

241. *Id.* at 1174.

242. *See supra* notes 1-3 and accompanying text.

243. *Hart*, 266 F.3d at 1177.

244. *See id.*

245. *Id.* at 1178.

246. *Id.* at 1179; *see also Hearing, supra* note 8, at 13 (prepared statement of Alex Kozinski, J., U.S. Court of Appeals for the Ninth Circuit) (“In short, we would have to start treating the 130 unpublished dispositions for which we are each responsible and the 260 unpublished dispositions we receive from other judges as mini-opinions. We would also have to pay much closer attention to the unpublished dispositions written by judges on other panels — at the rate of ten per day. Obviously, it would be impossible to do this without neglecting our other responsibilities.”).



to all opinions leads to confusion and conflict,<sup>247</sup> while also increasing the burden on the court and on lawyers trying to compile and interpret multiple opinions.<sup>248</sup> According to Judge Kozinski, requiring all opinions, published and unpublished, to carry precedential weight not only increases the burden on the court system, it is also unnecessary:

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.<sup>249</sup>

Therefore, the imposition of a publication requirement would undermine the federal judiciary's efficiency goal by requiring judges to spend more time writing what has already been adequately written.

In summary, Judge Kozinski argued that judges who issue unpublished and nonprecedential opinions are not exceeding their constitutional duty to exercise judicial power.<sup>250</sup> Judge Kozinski argued that history did not support the *Anastasoff* position asserting that the Framers intended for the doctrine of binding precedent to be implicitly included in Article III.<sup>251</sup> Rather, history suggests that, at the framing of the Constitution, common law and precedent were viewed as flexible doctrines, and the modern concept of binding precedent did not emerge until well after ratification of the Constitution.<sup>252</sup> Finally, Judge Kozinski illustrated the need for unpublished and nonprecedential opinions in an ever-growing legal system.<sup>253</sup> While the Eighth and Ninth Circuits have battled with the constitutionality and prudence of unpublished opinions and their effect on the doctrine of precedent, the biggest challenge to the Tenth Circuit's rules regarding unpublished opinion may come not from litigation, but from an act of Congress.

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

248. *See id.*

249. *Id.*

250. *Id.* at 1180.

251. *Id.* at 1162-69. As part of his argument countering Judge Arnold's view of binding precedent being inherent in the "judicial power" phrase of Article III, Judge Kozinski explained that "[t]he Constitution does not contain an express prohibition against issuing nonprecedential opinions because the Framers would have seen nothing wrong with the practice." *Id.* at 1163.

252. *Id.* at 1167-78.

253. *Id.* at 1176-79.

*IV. Rules Governing the Use of Unpublished Opinions in Oklahoma  
Federal and State Courts*

As a part of the Tenth Circuit, Oklahoma federal courts adhere to Tenth Circuit rules regarding publication and citation of opinions,<sup>254</sup> but state courts in Oklahoma have their own rules regarding publication and citation.<sup>255</sup> Furthermore, Oklahoma's bifurcated appellate system assigns jurisdiction over civil appeals to the Oklahoma Supreme Court and jurisdiction over criminal appeals to the Oklahoma Court of Criminal Appeals.<sup>256</sup> One of the consequences of this bifurcated system is a discrepancy between citation and publication rules before Oklahoma's highest courts.<sup>257</sup> Even though discrepancies exist, the rules of each court strive to balance the interests of the litigants with the interests of the administration of justice as applied in the respective courts.

*A. The Tenth Circuit Rules and the Proposed Changes*

Unpublished opinions carry limited weight in the Tenth Circuit.<sup>258</sup> The

254. The Tenth Circuit's publication standards are found in Rule 36.2 of the Tenth Circuit's Rules. *See* 10TH CIR. R. 36.2. The Tenth Circuit's rules regarding the citation of unpublished opinions are found in Rule 36.3. *See id.* 36.3.

255. The rules governing publication and citation in the Oklahoma Supreme Court and the Oklahoma Court of Civil Appeals are found in Rule 1.200. *See* OKLA. SUP. CT. R. 1.200. The rules governing publication and citation in the Oklahoma Court of Criminal Appeals are found in Rule 3.5. *See* OKLA. CT. CRIM. APP. R. 3.5.

256. OKLA. CONST. art. VII, § 4.

257. *Compare* OKLA. SUP. CT. R. 1.200(b)(5) (allowing citation of unpublished opinions only in a very narrow set of circumstances) *with* OKLA. CT. CRIM. APP. R. 3.5(C)(3) (permitting citation of unpublished opinions whenever citation of a published opinion would not serve the purpose).

258. The Tenth Circuit Rules pertaining to the issuance of published opinions and their precedential value and to the citation of unpublished opinions provide that:

**36.1 Orders and judgments.** The court does not write opinions in every case.

The court may dispose of an appeal or petition without written opinion. Disposition without opinion does not mean that the case is unimportant. It means that the case does not require application of new points of law that would make the decision a valuable precedent.

**36.2 Publication.** When the opinion of the district court, an administrative agency, or the Tax Court has been published, this court ordinarily designates its disposition for publication. If the disposition is by order and judgment, the court will publish only the result of the appeal.

10TH CIR. R. 36.1-.2. Furthermore, the rule pertaining to the citation of unpublished opinions provides:

**36.3 Citation of unpublished opinions/orders and judgments.**

(A) **Not precedent.** Unpublished orders and judgments of this court are not binding precedents, except under the doctrines of law of the case, res

circuit rules state that written opinions will not be issued in every case, but the absence of a written opinion is not a statement about the case's importance.<sup>259</sup> Disposition of a case without written opinion simply "means that the case does not require application of new points of law that would make the decision a valuable precedent."<sup>260</sup> Additionally, the Tenth Circuit assigns limited precedential value to these opinions by adopting a rule stating "[u]npublished orders and judgments of [the Tenth Circuit] are not binding precedents, except under the doctrines of law of the case, res judicata, and collateral estoppel."<sup>261</sup> Combining the language of these two rules, it becomes clear that the Tenth Circuit publishes only those cases which significantly add to the body of caselaw in the circuit.

Further, the citation of unpublished opinions is generally disfavored.<sup>262</sup> If two conditions are met, however, the circuit permits citation of unpublished opinions. First, the unpublished opinion must have "persuasive value with respect to a material issue that has not been addressed in a published opinion."<sup>263</sup> Second, the citation of the unpublished opinion must "assist the court in its disposition."<sup>264</sup> By imposing these two conditions on citation, the Tenth Circuit attempts to curtail the unnecessary citation of unpublished opinions by lawyers while providing a check on the circuit's adherence to its own standards. Because the circuit publishes opinions that it considers to be valuable precedent, the condition permitting citation of an unpublished opinion to support an issue not addressed in a published opinion aids the circuit in internally monitoring its publication standards and ensuring that all opinions of valuable precedent are indeed published.

While the Tenth Circuit currently enforces its own rules regarding unpublished opinions, the Tenth Circuit may soon be forced to adhere to a

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judicata, and collateral estoppel.

**(B) Reference.** Citation of an unpublished decision is disfavored. But an unpublished decision may be cited if:

- (1) it has persuasive value with respect to a material issue that has not been addressed in a published opinion; and
- (2) it would assist the court in its disposition.

**(C) Attach copy.** A Copy of an unpublished decision must be attached to any document that cites it. If an unpublished decision is cited at oral argument, the citing party must provide a copy to the court and the other parties.

*Id.* 36.3.

259. *Id.* 36.1.

260. *Id.*

261. *Id.* 36.3(A).

262. *Id.* 36.3(B).

263. *Id.* 36.3(B)(i).

264. *Id.* 36.3(B)(ii).

proposed change in the Federal Rules of Appellate Procedure establishing a national policy concerning the use of unpublished opinions in all federal courts. In response to the debate concerning the citation of unpublished opinions and the differences among circuit rules, the Judicial Conference proposed a change to the Federal Rules of Appellate Procedure.<sup>265</sup> Proposed Rule 32.1 forbids a federal court from prohibiting “the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like; and (ii) issued on or after January 1, 2007.”<sup>266</sup> The text of the rule implicates only the citation of unpublished opinions but not the weight of precedential value to assign when such opinions are cited. The committee notes accompanying the proposed rule — prepared by the Judicial Conference’s Advisory Committee — shed light on the precedential value of the citation. According to the notes, the Advisory Committee understands the proposed rule to mean that “a court of appeals may not prohibit a party from citing an unpublished opinion of a federal court for its persuasive value or for any other reason.”<sup>267</sup> This committee note indicates that unpublished opinions will become persuasive precedent upon adoption of the rule. Thus, a party may cite an unpublished opinion to bolster its argument, but a court is not bound to follow the decision or reasoning in the unpublished opinion.

The Judicial Conference met and approved the proposed Rule 32.1 and transmitted the rule, with recommendation for approval, to the United States Supreme Court on November 29, 2005.<sup>268</sup> Then, on April 12, 2006, the Supreme Court approved the rule submitted by the Judicial Conference and transmitted the rule to Congress.<sup>269</sup> Before December 1, 2006, Congress has the ability to enact legislation modifying or abolishing the proposed Rule 32.1.<sup>270</sup> Absent such legislation, the Tenth Circuit’s Rule 36 will become obsolete, as it creates a direct conflict with the proposed rule by generally disfavoring and prohibiting the citation of unpublished opinions. Even though proposed Rule 32.1 has been recommended for adoption by the Judicial Conference and the Supreme Court, practitioners still debate the usefulness

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265. See Revised Memorandum from Judge Samuel A. Alito, Chair, Advisory Comm. on Appellate Rules, to Judge David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure 2 (Oct. 7, 2005), available at <http://www.uscourts.gov/rules/Reports/AP10-2005.pdf>.

266. *Id.* at 1.

267. *Id.* at 2-3.

268. U.S. Courts, Federal Rulemaking, <http://www.uscourts.gov/rules/index.html#supreme> 0406 (last visited July 2, 2006).

269. *Id.*

270. *Id.*

and value of the rule.<sup>271</sup> Nevertheless, if adopted by Congress, proposed Rule 32.1 will impose on the Tenth Circuit, as well as other federal circuit courts, a uniform approach regarding the citation of unpublished opinions for all opinions issued after January 1, 2007.

*B. Oklahoma Supreme Court Rules*

The Oklahoma Supreme Court has adopted publication and citation rules similar to the Tenth Circuit rules.<sup>272</sup> The Oklahoma Constitution directs the Oklahoma Supreme Court to establish rules for the form of its opinions and the opinions of the intermediate Oklahoma Court of Civil Appeals.<sup>273</sup> Consistent with this obligation, the Oklahoma Supreme Court has adopted rules governing the publication and citation of its opinions.<sup>274</sup> All Oklahoma Supreme Court opinions are to be prepared and issued in memorandum form, without a formal published opinion, unless the opinion:

- (1) Establishes a new rule of law or alters or modifies an existing rule;
- (2) Involves a legal issue of continuing public interest;
- (3) Criticizes or explains existing law;
- (4) Applies an established rule of law to a factual situation significantly different from that in published opinions of the courts of this state;
- (5) Resolves an apparent conflict of authority; or
- (6) Constitutes a significant and non-duplicative contribution to legal literature:
  - (a) by an historical review of the law; or
  - (b) by describing legislative history.<sup>275</sup>

Publication of opinions occurs only when one of these criteria is met.<sup>276</sup>

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271. See Mary S. Diemer, *Unpublished Federal Opinions May Become Uniformly Citable*, LITIG. NEWS, Jan. 2006, at 7 (comparing the divergent views of two prominent appellate attorneys on a uniform citation policy).

272. Compare OKLA. SUP. CT. R. 1.200 with 10TH CIR. R. 36.1, 36.3.

273. OKLA. CONST. art. VII, § 5.

274. Rule 1.200 of the Oklahoma Supreme Court Rules governs the publication and citation of opinions and the precedential weight afforded unpublished opinions. See OKLA. SUP. CT. R. 1.200.

275. *Id.* 1.200(a)(1)-(6).

276. *Id.* 1.200(b)(1). The decision as to whether one of the publication criteria has been met is left to a majority vote of the justices participating in the decision. *Id.* 1.200(b)(4). Additionally, a party or other interested person who believes that an unpublished opinion has substantial precedential authority may make a motion to the court asking for publication of the opinion. *Id.* 1.200(b)(2).

Further, the Oklahoma Supreme Court gives no precedential authority to its unpublished opinions and generally forbids citation to them in any materials submitted to that court or any other court.<sup>277</sup> Under a very narrow set of circumstances, however, the Oklahoma Supreme Court permits citation to an unpublished opinion. Citations to unpublished opinions are permitted only to establish claims of *res judicata*, collateral estoppel, or law of the case.<sup>278</sup>

The implication of such a strict rule against the citation of unpublished opinions has ramifications beyond the Oklahoma Supreme Court itself. As indicated in the title of Rule 1.200, “Opinions of the Supreme Court and the Court of Civil Appeals,” and in the stated scope of the rules, these citation and publication rules apply to the Oklahoma Court of Civil Appeals as well.<sup>279</sup> According to its rules, the Oklahoma Supreme Court forbids citation of its unpublished opinions not only by and to the Oklahoma Supreme Court, but also by and to any other state or federal court.<sup>280</sup> Because of the stricter citation rules of the Oklahoma Supreme Court, unpublished opinions of the Oklahoma Supreme Court are not as readily available as unpublished opinions from the Tenth Circuit.<sup>281</sup> Access to these unpublished opinions is limited by a rule requiring that “[o]pinions marked Not For Official Publication shall not be published in the unofficial reporter, nor on the Supreme Court World Wide Web site, nor in the official reporter.”<sup>282</sup> Because of the limited availability of unpublished opinions of the Oklahoma Supreme Court and the Oklahoma Court of Civil Appeals, permissive citation would unjustly favor those who possess the time, energy, and resources to scour the records of the Oklahoma Supreme Court to find an unpublished opinion believed to be on point.

### C. Oklahoma Court of Criminal Appeals Rules

The Oklahoma Court of Criminal Appeals has the same power to establish the form and precedential value of its decisions as the Oklahoma Supreme Court.<sup>283</sup> The Oklahoma legislature, however, mandates that all opinions of the Court of Criminal Appeals be in writing and recorded in the journal of the court.<sup>284</sup> Like the Oklahoma Supreme Court, the Oklahoma Court of Criminal

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277. *Id.* 1.200(b)(5).

278. *Id.*

279. *Id.* 1.1(b), 1.200.

280. *Id.* 1.200(b)(2).

281. Unpublished opinions of the Tenth Circuit are published in the *Federal Appendix* and are available on Westlaw and LexisNexis. See *supra* notes 20-22 and accompanying text.

282. OKLA. SUP. CT. R. 1.200(b)(5).

283. OKLA. CONST. art. VII, § 5.

284. 22 OKLA. STAT. § 1071 (2001).

Appeals does not assign binding authority to its unpublished opinions.<sup>285</sup> In contrast to the Oklahoma Supreme Court, however, parties may cite unpublished opinions to the Court of Criminal Appeals “provided counsel states that no published case would serve as well the purpose for which counsel cites it, and provided further that counsel shall provide opposing counsel and the Court with a copy of the unpublished opinion.”<sup>286</sup>

In *Johnson v. State*,<sup>287</sup> the Oklahoma Court of Criminal Appeals considered a challenge to the court’s practice of issuing unpublished summary opinions.<sup>288</sup> The petitioner argued that such a practice in his case deprived him of his due process rights and indicated that the court failed to properly review his case.<sup>289</sup> In response, the court noted that all opinions issued by the Oklahoma Court of Criminal Appeals were required to be in writing, and such a requirement ensured that his case was thoroughly examined and reviewed, thereby providing petitioner adequate protection.<sup>290</sup> The court did not dismiss petitioner’s claim without consideration, nor did the court believe that the petitioner’s claim lacked importance.<sup>291</sup> The court merely acted in accordance with its rules by issuing an unpublished summary opinion containing the court’s rationale, rather than issuing a fully reasoned and citable published opinion of precedential value. The court also noted that “[t]here is no state or federal constitutional right to an opinion which contains a full compendium of legal citations to each issue raised.”<sup>292</sup> The lack of such a right permits courts to establish systems of publication and citation that strive to balance the needs of the litigants in resolving disputes and the needs of the judicial system in promoting efficiency. Finally, the court addressed the policy reasons for issuing unpublished summary opinions when it stated:

There is currently a major concern that the quality of justice is being diminished by backlog at all levels of appellate criminal work, and that this backlog in turn contributes to a lack of finality of judgment in our law. It therefore is incumbent upon this Court to dispose of cases as expeditiously as possible, while remaining cognizant that no case is as important to an individual as the one

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285. OKLA. CT. CRIM. APP. R. 3.5(C)(3).

286. *Id.*

287. 1993 OK CR 11, 847 P.2d 810.

288. *Id.* ¶ 1, 847 P.2d at 810.

289. *Id.* ¶¶ 1-2, 847 P.2d at 810-11.

290. *Id.* ¶ 6, 847 P.2d at 811.

291. *Id.* ¶ 5, 847 P.2d at 811 (“Summary opinions of this Court carefully set out each proposition of error alleged by appellant all of which are thoroughly reviewed. A decision to reject a given proposition is conscious and not inadvertent.”).

292. *Id.* ¶ 7, 847 P.2d at 811.

which concerns him or her. To that end, we have determined that unnecessary verbiage and redundant literary exercises are counter-productive. As a result, this Court has officially adopted the summary opinion format, for use when appropriate, to ensure a prompt and just disposition of the matters filed before it. In each case that comes before this Court, we thoroughly consider the entire record before us on appeal, including the original record, transcripts and all the authority and arguments contained in the briefs of the parties. This thorough consideration is reflected in language set forth in each summary opinion.<sup>293</sup>

*Johnson* illuminates the reasoning behind the limited publication rules and reassures litigants appearing before the Oklahoma Court of Criminal Appeals that their appeals will be fairly adjudicated regardless of whether the court issues a full, published opinion in the case. Moreover, the subject matter over which the Oklahoma Court of Criminal Appeals has jurisdiction highlights the importance of the court's thorough and careful consideration of cases before it, as the court's decisions greatly affect a person's liberty. As such, petitioners to the Oklahoma Court of Criminal Appeals should be confident that their cases will be given due attention and thoughtful consideration. Allowing petitioners to cite unpublished opinions in some circumstances gives petitioners the opportunity to bring all supporting authority to the court's attention, even if the authority is unpublished. Doing so reassures the petitioner that the court has availed itself of all of the relevant and applicable caselaw regarding the appeal while the court maintains a system of general limited publication.

Along with the Tenth Circuit and Oklahoma Supreme Court, the Oklahoma Court of Criminal Appeals has instituted rules governing publication and citation of its opinions. These rules, at both the federal and state level, facilitate the balancing of the goals of the litigants, the judges, and the judicial system and allow judges of those courts to craft a coherent body of caselaw for their respective jurisdictions. Through their rules regarding the publication and citation of opinions, the Tenth Circuit, the Oklahoma Supreme Court, and the Oklahoma Court of Criminal Appeals demonstrate the commitment of courts to judicial efficiency and a principled resolution of disputes.

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293. *Id.* ¶ 8, 847 P.2d at 811-12.



*V. Oklahoma's Use of Unpublished Opinions to Achieve Judicial Harmony*

Judicial decisions serve two main purposes. First, they resolve disputes between parties in a present case before a court.<sup>294</sup> Second, they establish rules of law to be applied by judges in successive cases.<sup>295</sup> Unpublished opinions play a critical role in achieving the delicate balance between these two purposes for which the judiciary constantly strives, and limiting the precedential status of these unpublished opinions actually contributes to their usefulness. Resolving disputes at the appellate level is a laborious process. Judges scour briefs submitted by the parties, review the record of the lower court, read relevant authorities, and often hear oral arguments before crafting an opinion in a particular case.<sup>296</sup> Issuing well-written, published precedential opinions is vital to apprise legal professionals and the public of the state of the law, but writing such opinions takes an enormous amount of time.<sup>297</sup> Nevertheless, published opinions are essential to this country's common law system of precedent. In crafting a published opinion, judges must:

[S]et forth the facts in sufficient detail so lawyers and judges unfamiliar with the case can understand the question presented. At the same time, [the opinion] must omit irrelevant facts that could form a spurious ground for distinguishing the opinion. The legal discussion must be focused enough to dispose of the case at hand, yet broad enough to provide useful guidance in future cases. Because [judges] normally write opinions where the law is unclear, [they] must explain why [they] are adopting one rule while rejecting others. [They] must also make sure that the new rule does not conflict with precedent, or sweep beyond the questions fairly presented.<sup>298</sup>

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294. Robert A. Leflar, *Sources of Judge-Made Law*, 24 OKLA. L. REV. 319, 319 (1971); Weaver, *supra* note 17, at 481; *see also* *Hearing*, *supra* note 8, at 8 (prepared statement of Samuel A. Alito, Jr., J., U.S. Court of Appeals for the Third Circuit, and Chair, Advisory Committee on the Federal Rules of Appellate Procedure).

295. Leflar, *supra* note 294, at 319; Weaver, *supra* note 17, at 481; *see also* *Hearing*, *supra* note 8, at 8 (prepared statement of Samuel A. Alito, Jr., J., U.S. Court of Appeals for the Third Circuit, and Chair, Advisory Committee on the Federal Rules of Appellate Procedure).

296. *See* *Hearing*, *supra* note 8, at 13 (prepared statement of Alex Kozinski, J., U.S. Court of Appeals for the Ninth Circuit); Martin, *supra* note 11, at 182.

297. *Hearing*, *supra* note 8, at 13 (prepared statement of Alex Kozinski, J., U.S. Court of Appeals for the Ninth Circuit) ("Writing twenty [published] opinions a year is like writing a law review article every two and a half weeks; joining forty [published] opinions is like commenting on an article written by someone else nearly once every week.").

298. *Id.*

With the caseloads of courts continually increasing,<sup>299</sup> spending the time it takes to write such an opinion on all of the cases that appear before the court would only exacerbate the backlog that exists at all levels of the judiciary.<sup>300</sup> Further, requiring that all opinions be published, and thus requiring this fastidious wording, would also likely bring “an across-the-board lessening of quality, because judicial resources would be stretched even further, and we would see scores of remarkably brief and uninformative, but nonetheless ‘published,’ opinions.”<sup>301</sup> A body of caselaw built on such a shaky foundation clutters and distorts the source from which precedents must be gleaned. Avoiding an unstable foundation of the law, and instead crafting a cohesive, manageable foundation in which unpublished opinions have a proper role, has both practical and policy-driven incentives. These incentives serve to promote the two purposes of judicial opinions — settling disputes between parties and establishing precedent to guide subsequent cases. Adopting a system of unpublished opinions does not frustrate these two purposes when publication standards are promulgated with these purposes in mind.

#### *A. Practical Values of Unpublished Opinions*

Practically, the use of unpublished opinions allows judges to dispose of routine cases in an expeditious manner, because “[u]npublished decisions tend to involve straightforward points of law — if they did not, they would be published.”<sup>302</sup> As several appellate judges have noted, some cases involve the application of well-established law and their resolutions do not meaningfully affect the state of the law.<sup>303</sup> By allowing judges to issue unpublished opinions in such cases, judges are able to focus more of their attention and resources on opinions that establish new precedent or alter settled precedent.<sup>304</sup>

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299. See *supra* note 1 and accompanying text.

300. See *Hearing, supra* note 8, at 8 (prepared statement of Samuel A. Alito, Jr., J., U.S. Court of Appeals for the Third Circuit, and Chair, Advisory Committee on the Federal Rules of Appellate Procedure) (“It would be virtually impossible for the courts of appeals to keep current with their case loads if they attempted to produce such an opinion in every case.”).

301. Martin, *supra* note 11, at 183.

302. *Id.* at 190.

303. *Hearing, supra* note 8, at 8 (prepared statement of Samuel A. Alito, Jr., J., U.S. Court of Appeals for the Third Circuit, and Chair, Advisory Committee on the Federal Rules of Appellate Procedure); *id.* at 10 (statement of Alex Kozinski, J., U.S. Court of Appeals for the Ninth Circuit) (recognizing that some opinions — those that are left unpublished — do not actually shape the law in any meaningful way); Martin, *supra* note 11, at 190 (noting that some issues appear repeatedly before the courts).

304. *Hearing, supra* note 8, at 10 (statement of Alex Kozinski, J., U.S. Court of Appeals for the Ninth Circuit).

Oklahoma federal and state courts recognize the practicality of issuing unpublished opinions and orders. The Tenth Circuit's rule regarding such opinions expressly states that some cases before the court do not contribute anything additional to the state of the law.<sup>305</sup> The Oklahoma Supreme Court's rules recognize this fact as well.<sup>306</sup> The rules establish six criteria, one of which must be satisfied before the court will publish an opinion in a case.<sup>307</sup> Each of the six criteria articulates a condition that would substantially affect the existing body of law.<sup>308</sup> Because all of the court's opinions are unpublished unless one of the six conditions is established,<sup>309</sup> the court implicitly acknowledges that some cases will not significantly alter the law and need not be published. Without spending the time necessary to produce high-quality published opinions on cases that do not add significantly to circuit or state law, Oklahoma courts can redirect their resources to the cases that do have an effect on the state of the law.

Also, both federal and state courts in Oklahoma treat unpublished decisions and opinions as decisions on the merits, thus meeting the requirement that judicial decisions resolve disputes between parties. The Tenth Circuit rules and the Oklahoma Supreme Court rules have provisions for the citation and authority of unpublished opinions when establishing claims of *res judicata*, collateral estoppel, or law of the case.<sup>310</sup> Because the doctrines of *res judicata*,<sup>311</sup> collateral estoppel,<sup>312</sup> and law of the case<sup>313</sup> rest on the proposition that an issue or case has already been settled by a court of proper jurisdiction, a provision allowing the citation of unpublished opinions for the purposes of establishing these doctrines accepts the unpublished opinion as a settlement of the dispute between the litigants. The rules of the Oklahoma Court of Criminal Appeals lack a specific reference to these legal doctrines, but the more general nature of its citation rule permits the citation of unpublished

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305. 10TH CIR. R. 36.1 (stating that, when a case is decided without a written opinion, it "does not require application of new points of law that would make the decision a valuable precedent").

306. OKLA. SUP. CT. R. 1.200(b)(1).

307. *Id.* 1.200(a)(1)-(6).

308. *See id.*

309. *Id.* 1.200(b)(1).

310. 10TH CIR. R. 36.3(A); OKLA SUP. CT. R. 1.200(b)(5).

311. BLACK'S LAW DICTIONARY, *supra* note 19, at 1336-37 (defining "res judicata" as "[a]n issue that has been definitively settled by judicial decision").

312. *Id.* at 279 (defining "collateral estoppel" as "[a] doctrine barring a party from relitigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one").

313. *Id.* at 903 (defining "law of the case" as "[t]he doctrine holding that a decision rendered in a former appeal of a case is binding in a later appeal").

opinions for these purposes anyway.<sup>314</sup> Rules regarding unpublished opinions like those found in Oklahoma federal and state courts promote a practical approach to judicial decision making and do not deny litigants a resolution of their disputes.

The proposed change in the Federal Rules of Appellate Procedure could hinder the practicality of unpublished opinions and, in turn, create an unworkable mess at the federal level. The co-chair of the ABA Section of Litigation's Appellate Practice Committee, Paul J. Watford, thinks that the proposed Rule 32.1 "could create a nightmare for practitioners and trial court judges in the future, as many lawyers may seek to quote holdings from unpublished decisions 'and there is no real way for judges or attorneys to know if the underlying facts of that case make it an appropriate precedent.'"<sup>315</sup> Thus, permitting the citation of unpublished opinions will erode judicial efficiency by dramatically increasing the pool of cases in which lawyers and judges must research in order to formulate legal arguments and perhaps lead to erroneous applications of the law as many opinions in the expanded pool might not necessarily contain language intended to be broadly applicable. In relation to the current system in which each circuit promulgates its own rules, Watford also notes that "[i]t's not that hard to figure out which citation rule to follow, depending upon which circuit you are in."<sup>316</sup> By steering clear of a national policy with respect to the citation of unpublished opinions, each circuit is able to adapt to its own needs with regard to publication and citation rules. The retention of local control promotes a practical and judicially efficient approach to the work of an overburdened judiciary while also allowing judges to closely monitor the cohesiveness of the law of the circuit. Currently, the Oklahoma state courts are sensitive to the needs of all of those involved in the legal system, but the proposed change to the Federal Rules of Appellate Procedure threatens the delicate balance between efficiency and dispute resolution achieved by the Tenth Circuit.

#### *B. Policy Values of Unpublished Opinions*

Policy concerns of maintaining a coherent body of law, from which to determine the state of the law, also favor the use of unpublished opinions even though the unpublished opinions are not precedential themselves. With the number of case filings and the workload of courts constantly increasing, courts

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314. See OKLA. CT. CRIM. APP. R. 3.5(C)(3).

315. Diemer, *supra* note 271.

316. *Id.* (also noting, however, the opinion of Watford's co-chair, Lawrence D. Rosenberg, that "the lack of uniformity among the circuits caused 'confusion and difficulty for courts and judges'" and that upon the adoption of the proposed rule "'you no longer take your legal life into your hands by citing an on-point unpublished decision' in the federal appeals courts").

are forced to decide more cases, and “the vast number of decisions rendered threatens coherence by creating innumerable rulings which are impossible to assimilate.”<sup>317</sup> Furthermore, not all cases filed before a court have equal merit.<sup>318</sup> By allowing judges to choose which of these cases are most helpful in clarifying the law or in departing from established precedent, judges are essentially able to “separate[] the diamonds from the dross.”<sup>319</sup> This practice of evaluating the publication of a case opinion on the basis of the opinion’s ability to add to precedent does not threaten the doctrine of precedent and has been undertaken in the past without substantial criticism.

From the inception of books reporting the proceedings of courts in England, authors of those books have omitted cases for one reason or another.<sup>320</sup> When the reporting system developed in the United States, its incompleteness was a major hurdle to its usefulness.<sup>321</sup> Although, when Wheaton omitted cases that he felt had no precedential value from the *Reports*, his use of discretion in establishing a record of the law went virtually unquestioned.<sup>322</sup>

Today, it is the judges writing the opinions themselves who decide whether a case merits publication, and provisions in the Oklahoma rules at the federal and state level serve as a check on the judiciary in exercising its power to determine which cases become precedential and which do not. For example, the Tenth Circuit disfavors the citation of unpublished opinions.<sup>323</sup> The circuit, however, permits citation to an unpublished opinion if the citation has persuasive value as to a point of law not addressed in a published opinion and the citation will aid the court in rendering its decision on the matter.<sup>324</sup> Permitting citations in this instance allows the court to internally review its own publication decisions. Theoretically, since unpublished opinions do not substantially add to precedent,<sup>325</sup> they should contain no novel applications of law. If the court is confronted with a citation to an unpublished opinion, then the court is forced to examine its adherence to its own rules. By including such a provision, the Tenth Circuit has developed a useful mechanism for the

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317. Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 33 (1996).

318. Martin, *supra* note 11, at 191.

319. *Id.* In responding to those who question whether judges can adequately distinguish the diamonds from the dross, Judge Martin states: “We are trusted sufficiently to decide a case. Why can’t we be trusted enough to then make the ancillary decision whether it should be published?” *Id.* at 192.

320. *See supra* text accompanying note 94.

321. *See supra* text accompanying notes 117, 124.

322. *See supra* text accompanying notes 149-51.

323. 10TH CIR. R. 36.3(B).

324. *Id.* 36.3(B)(1)-(2).

325. *Id.* 36.1.

court to internally monitor its own judges' adherence to the rules of the circuit with respect to the publication of opinions.

Similarly, the Oklahoma Supreme Court crafted its rules to ensure that opinions establishing or modifying precedent are published. Of the three courts addressed in this comment, the Oklahoma Supreme Court has the clearest publication guidelines. One of six criteria *must* be met before the opinion is published, and when the opinion meets one of those criteria, it is published and becomes binding precedent in Oklahoma.<sup>326</sup> These guidelines assist members of the court in making a publication decision. Another provision of the Oklahoma Supreme Court rules also ensures judicial compliance with the rules. The rules allow “[a] party or other interested person” to make a motion requesting the court to publish an unpublished opinion that the party believes has precedential value.<sup>327</sup> This procedure creates an external check on the judiciary by inviting legal professionals to examine the court’s use of its unpublished opinions and bring to light any alleged inconsistencies between the court’s rules and the court’s practice.

Finally, the broader rule promulgated by the Oklahoma Court of Criminal Appeals reflects the differing nature of that court’s jurisdiction. The Oklahoma Court of Criminal Appeals permits citation of unpublished opinions as persuasive authority whenever a party believes that no published opinion suffices to support a particular point.<sup>328</sup> Precedent in the criminal law, however, does not occupy the same revered position that it occupies in the civil law.<sup>329</sup> With a person’s liberty, and sometimes even life, at stake in criminal matters, permitting parties to cite the most similar and most relevant authority available ensures that the court is fully apprised of all relevant information before deciding whether to deprive one of liberty or life. Also, because unpublished opinions may only be cited as persuasive authority,<sup>330</sup> the court still maintains control in the creation of a coherent body of law. Even if the court is confronted with a citation to an unpublished opinion adverse to its binding precedent, it is not required to follow the adverse unpublished opinion.

Throughout its history, the doctrine of precedent has been flexible and adaptive to the needs of the particular era. Because precedent originated with those characteristics, the doctrine survives even when obstacles arise in its developmental path. In Oklahoma, precedent has been critically important and the rules promulgated by courts in Oklahoma strive to protect that revered

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326. OKLA. SUP. CT. R. 1.200(a).

327. *Id.* 1.200(b)(2).

328. OKLA. CT. CRIM. APP. R. 3.5(C)(3).

329. *Ex parte* Lewis, 85 Okla. Crim. 322, 336, 188 P.2d 367, 378 (Okla. Crim. App. 1947).

330. OKLA. CT. CRIM. APP. R. 3.5(C)(3).

doctrine. The provisions of the rules in Oklahoma federal and state courts appear to have been crafted in an effort to balance the protection of precedent with an efficient resolution of disputes. The rules in Oklahoma take into account the differing nature and needs of Oklahoma's courts and ultimately facilitate the achievement of a balance between the litigants, the courts, and the judicial system.

#### *VI. Conclusion*

As the number of cases in the United States continues to rise, federal and state judiciaries face increasing challenges in discharging their judicial duties in an efficient and expeditious manner. With the increasing caseload comes a growing possibility for conflict within the law and a swelling base from which judges and attorneys must decipher the law. Because of this changing characteristic of the judiciary, unpublished opinions have great value. The use of unpublished opinions curbs the strain on court resources while promoting the facilitation of a manageable body of caselaw. Without unpublished opinions, courts would be even more overwhelmed and the legal profession would have many more opinions to evaluate in order to determine the state of the law. By establishing precedent through carefully selected published opinions that make meaningful contributions to the state of the law and by using the unpublished form to apply that existing precedent to subsequent cases, the judicial system achieves a healthy balance between the interests of the litigants in settling disputes and the interests of the judicial system itself in promoting a logical and consistent body of caselaw. Publication and citation rules promulgated with these purposes in mind free judges to focus on building a stable body of caselaw from which to draw precedent instead of forcing judges to fill their libraries with reporter volumes. Because of the internal and external monitoring mechanisms inherent in their rules ensuring publication of cases that do establish new law, the state and federal courts in Oklahoma have succeeded in achieving this delicate balance.

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