



2001

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Recommended Citation

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<https://scholar.smu.edu/smulr/vol54/iss4/14>

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FEDERAL RULES OF PUBLICATION-
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UNCONSTITUTIONAL-ANASTASOFF V.
UNITED STATES, 223 F.3D 898
(8TH CIR. 2000)

*Catherine K. Rentzel**

THE Eighth Circuit Court of Appeals recently shocked the legal community by finding a commonplace non-publication rule unconstitutional in *Anastasoff v. United States*, a seemingly bland “Mailbox Rule” case.¹ Rule 28A(i), the rule governing unpublished opinions in the Eighth Circuit, allows a court to disregard precedent set in those opinions.² According to *Anastasoff*, this practice removes a limitation on the judiciary intended by the Constitution’s framers and imposed from the beginnings of our legal system.³ The implications of this decision could potentially reach as far as the Supreme Court. Rules allowing unpublished opinions to be disregarded as authority have been in place since 1964 and are relatively entrenched in the U.S. judiciary. While the Eighth Circuit boldly and wisely declared Rule 28A(i) unconstitutional, *Anastasoff* omits many pressing policy concerns in favor of a more temperate, but weaker, approach.

The facts of the case are deceptively simple. On April 13, 1996, Faye Anastasoff, the plaintiff and appellant, mailed her refund claim for taxes paid on April 15, 1993, to the Internal Revenue Service.⁴ The IRS balked at this request, citing 26 U.S.C. § 6511(b), a rule which limits refunds to those claims filed within three years of the tax payment.⁵ The claim,

* The author would like to thank Cathy Rentzel, Chris Rentzel, Sarah Rentzel, Martha Hardwick, Chad Robinson and Gabe Vazquez, for their support and assistance during the writing of this article.

1. *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000).
2. *Id.* at 899 (citing 8TH CIR. R. 28A(i)).
3. *Id.* at 900.
4. *Id.* at 899.
5. *Id.*

though mailed within the required time period, did not actually arrive at the IRS offices until April 16, 1996, one day past the three-year time limit.⁶

Anastasoff filed suit in federal district court, alleging that under the "Mailbox Rule," 26 U.S.C. § 7502, her refund claim had arrived on time.⁷ However, the IRS responded that the "Mailbox Rule," which measures time of receipt based on the date of posting, did not apply.⁸ The IRS argued that the "Mailbox Rule" only governed situations in which the claim itself was not timely, and the court had determined that Anastasoff's claim was received on time.⁹ Anastasoff argued that the rule's purpose was to relieve taxpayers from responsibility for the post office's mistakes.¹⁰ Most importantly, Anastasoff claimed that an unpublished opinion decided in 1992 did not bind the court according to Eighth Circuit Rule 28A(i).¹¹

The district court ruled in favor of the IRS.¹² It held that the "Mailbox Rule" only applied to claims that were untimely.¹³ Both parties agreed that the claim was "timely" under 26 U.S.C. § 6511(a), so, under the court's analysis, Anastasoff's claim was not subject to the "Mailbox Rule." In reaching this conclusion, the court did not draw from the matter of the 1992 case, *Christie v. United States*, which was directly on point.¹⁴ As Rule 28A(i) required, the court did not regard the unpublished opinion as precedent.¹⁵

The Eighth Circuit Court of Appeals echoed the district court's analysis, but it relied on *Christie* as mandatory authority in spite of its unpublished status.¹⁶ *Christie* held that the "Mailbox Rule" would not apply to a late tax refund.¹⁷ After quickly striking down the plaintiff's claim as an overextension of the "Mailbox Rule," the court departed from the issue immediately at hand to declare the use of unpublished opinions unconstitutional.¹⁸ Rule 28A(i), which allowed and regulated these unpublished opinions, "purports to confer on the federal courts a power that goes beyond the 'judicial,'" according to the court.¹⁹ By concealing potential precedents in unpublished opinions, courts release themselves from the controls of the past intended by the framers. Ultimately, *Anastasoff* is a landmark opinion because of its holding on unpublished opinions; for

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

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

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

12. *Id.*

13. *Id.*

14. *Id.* (citing *Christie v. United States*, No. 91-2375MN, 1992 U.S. App. LEXIS 38446 (8th Cir. Nov. 20, 1997)).

15. *Id.*

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

17. *Id.*

18. *Id.*

19. *Id.*

both this article and the future, the “Mailbox Rule” portion of the opinion is insignificant in comparison.

Ironically, precedent itself controlled the Eighth Circuit Court of Appeals’ view that opinions, whether published or unpublished, should be binding authority. Judge Richard Arnold, writing for the court of appeals,²⁰ began his opinion by citing the venerable *Marbury v. Madison*,²¹ along with another case from the early 1800s, *Cohens v. Virginia*.²² These cases establish that because law has a cumulative effect, opinions of the future must correlate to opinions of the past.²³ Arnold looked next to original intent, asserting that the eighteenth century writings of Blackstone and Coke informed the framers’ notions of how judicial power would be checked. According to Blackstone, judges are “not delegated to pronounce a new law, but to maintain and expound the old.”²⁴ Arnold pointed out that both James Madison and Alexander Hamilton’s writings support his claim, as Hamilton wrote in *The Federalist No. 78* that “it is indispensable that [judges] should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them. . . .”²⁵

Although the theories of precedent in *Anastasoff* are steeped in history, the need to follow precedent remains today. Rule 28A(i) gives the courts the power to pick and choose which cases they will follow, and that, the Eighth Circuit says, expands judicial power beyond acceptable limits.²⁶ Judicial holdings are intended to be “based on reason, not fiat.”²⁷ Notably, *Anastasoff* points out that not all opinions must be published, but insists that all must be binding as precedent.²⁸ Of course, as with published opinions, unpublished opinions may be overruled, but courts should be held accountable for their past decisions.²⁹ Precedent provides a strong foundation for *Anastasoff*, but the Eighth Circuit should have supported its opinion through policy rationale.

20. Arnold had written a journal article about a year before *Anastasoff* was decided detailing his concerns about unpublished opinions. Richard S. Arnold, Essay, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS. 219, 220 (1999). He said the topic “disturb[ed] [him] so much that it [was] hard to know where to begin discussing it.” *Id.* at 222. Interestingly, his article took on a much more strident tone than did *Anastasoff*. While he cited very old legal authority in *Anastasoff*, he relied solely on newer material and policy rationale in his journal article. Whether he could not resist the irony of using venerable precedent to protect precedent in his opinion or was merely attempting to use unassailable authority is uncertain. However, *Anastasoff* would probably be more persuasive to other courts had it incorporated some of the journal article’s reasoning.

21. *Anastasoff*, 223 F.3d at 899-900 (citing *Marbury v. Madison*, 2 L. Ed. 60 (1803)).

22. *Id.* at 900 (citing *Cohens v. Virginia*, 5 L. Ed. 257 (1821)).

23. *Id.* at 900.

24. *Id.* at 900 (quoting 1 SIR WILLIAM W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (1975)).

25. *Id.* at 902 (quoting THE FEDERALIST NO. 78, at 510 (Alexander Hamilton) (Modern Library ed., 1938)).

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

27. *Id.* at 904.

28. *Id.*

29. *Id.*

Anastasoff would have been a stronger opinion had it attacked the primary reason for the use of unpublished opinions: efficiency.³⁰ Courts have not been troubled by the potential unconstitutionality of the non-publication rules in the last thirty-five years and the Eighth Circuit missed its opportunity to explain why these constitutional concerns now outweigh high-volume cost concerns. Had the Eighth Circuit placed itself on the cutting edge of legal technology by discounting efficiency as a worry from a bygone era, other circuit courts might now find it easier to follow its lead. As *Anastasoff* cast non-publication solely as a constitutional issue, other courts might bristle at the suggestion that they had missed such a glaring error in their own systems and, thus be much less receptive to change. Also, evaluating its rule change as a product of the changing times rather than a sudden realization of a long-term wrong would make the Eighth Circuit's tardiness in handing down this ruling seem more understandable.

In fact, technology *has* altered the legal profession, and the Eighth Circuit should have noted that the handling of unpublished opinions has much less impact on efficiency in modern times, rendering Rule 28A(i) much less necessary. Selective non-publication was originally intended to cut costs, as headnoting, citing, and printing expenses were passed on to clients through lawyers who bought the reporters containing the opinions.³¹ Currently, even unpublished opinions are published on-line, so this cost-cutting rationale is invalid.³² However, a judge may save time with non-publication: a minimal amount of reasoning must be written into the case if it will not be cited as precedent, and perfect clarity for the future is unnecessary.³³ Without publication as a means of quality control, though, judges spend less time on the writing of the opinions.³⁴ As any writer can attest, writing helps to isolate inconsistencies in one's reasoning and can even change the writer's mind, especially in the case of a court opinion.³⁵ The result may be less reasoned decision-making, and efficiency in the courts is not worth that sacrifice.³⁶

Because of the ways in which non-publication impacts the precedential system, it has actually been responsible for hindering progress rather than promoting efficiency, a point which the Eighth Circuit also neglected to mention. Under Rule 28A(i) and similar rules,³⁷ a court is able to prede-

30. Arnold, 1 J. APP. P. PR. at 221.

31. Marion Oliver, *Rule 90: The Limited Publication Controversy*, TEX. TECH L. REV. 929, 940 (1995).

32. *Id.* at 952.

33. Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 HARV. C.R.-C.L. L. REV. 109, 124 (1995); see also Weirich v. Weirich, 867 S.W.2d 787, 788 (Tex. 1993) (Justice Enoch, writing for the Supreme Court of Texas, cited cost-cutting as his primary reason for supporting the practice of using unpublished opinions).

34. Slavitt, 30 HARV. C.R.-C.L. L. REV. at 125.

35. *Id.*

36. *Id.*

37. For example, the precedential value of unpublished opinions is limited in the First Circuit by 1ST CIR. R. 36(2)(F), in the Fifth Circuit by 5TH CIR. R. 47.5.4, and in the Sev-

termine which opinions will be *available* as precedent, draining potentially important cases of their legal authority.³⁸ Removing cases from the precedential domain severely handicaps a lawyer's ability to rely on the volume of cases for greater impact and to understand the trends in a court's decision-making.³⁹ If, for example, ten cases have been decided in the same way and nine are unpublished, both attorney and court may not realize that a clear answer to the question at hand exists before going through an expensive and time-consuming lawsuit.⁴⁰ Thus, rather than improving the efficiency of the court system, non-citation rules could actually strain the court system by causing courts to reestablish the same rules multiple times.

Finally, *Anastasoff* includes a quotation by Justice Joseph Story in which he speaks of the value of precedent and the "tyranny and arbitrary power" of judges that take over when it is not followed.⁴¹ But this is not merely a theory set out in a historical text, and the Eighth Circuit should have mentioned some examples of what has already occurred, even if not singling out specific courts.⁴² For example, non-publication may conceal issues from public view entirely. California hid behind non-publication when it left an anti-abortion activists' rights case unpublished.⁴³ Also, in *Johnson v. Knable*, the Fourth Circuit took the bold step of granting homosexuals enhanced protection under the Equal Protection Clause.⁴⁴ While the low profile of an unpublished opinion allowed the Fourth Circuit to expand more protection to homosexuals, it also robbed it of its precedential value and likely kept it from being reviewed by the Supreme Court.⁴⁵ As an unpublished opinion may not be cited as precedent, it will not be held up to frequent review by the courts and may quietly fade away.⁴⁶

Many lawyers have experienced that most hollow of victories: finding the perfect case which, however, happens to be unpublished. Rules al-

enth Circuit by 7TH CIR. R. 53(c)(2). Many other circuits limit the use of unpublished decisions in like manner.

38. Arnold, 1 J. APP. P. PR. at 223.

39. Charles Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy*, 50 S.C. L. REV. 235, 250-251 (1998).

40. This phenomenon is especially problematic in the case of higher courts, where it is imperative that the court give guidance to the lower courts on difficult issues. *Id.* at 248.

41. *Anastasoff*, 223 F.3d at 904.

42. The Eighth Circuit might have given some examples of how "repeat players" in the court system use non-publication to their advantage, spending resources to make sure that key negative opinions do not become precedent. Carpenter, 50 S.C. L. REV. at 252-253. However, given the Eighth Circuit's unconstitutionality argument, it was more concerned with abuse of the system by the judiciary.

43. Slavitt, 30 HARV. C.R.-C.L. L. REV. at 128. *Id.* at 129.

44. *Id.* at 110 (citing *Johnson v. Knable*, No. 88-7729, WL 119136 (4th Cir. Oct. 31, 1988)).

45. *Id.*

46. As the public already has such a distrust for the judiciary as a counter-majoritarian institution, removing layers of judicial review could have a devastating effect on the American legal system. Slavitt, 30 HARV. C.R.-C.L. L. REV. at 130.

lowing selective publication are widespread in the U.S.,⁴⁷ and this opinion, the first of its kind, could send shockwaves through the legal community. Even though *Anastasoff* did not discuss many issues that would defeat any efficiency justification advanced against claims of unconstitutionality, other courts know they exist through critics' writings. *Anastasoff* may have provided just the type of publicity this issue needs, and litigation over non-publication will likely occur in other circuit courts in the near future. The results of this litigation will likely be varied; for every judge that agrees with the Eighth Circuit, there will be one who is clinging to non-publication as a source of power. If circuits split, the Supreme Court will be grappling with the issue of non-publication in a few short years. *Anastasoff*, written in the Supreme Court's complex code of high-minded constitutional principles, could be a blueprint of the future Court's opinion.

47. In Texas, Rule 47.7 (formerly Rule 90) of the Texas Rules of Appellate Procedure allows non-publication. TEX. R. APP. P. 47.7. Unpublished opinions may be cited in court, but not as binding authority. This rule has stirred up controversy, which ultimately forced the Supreme Court of Texas to discuss publication in *Weirich v. Weirich*, 867 S.W.2d 787 (Tex. 1993). Presumably, the Eighth Circuit Court of Appeals would find that standard, too, unconstitutional, but the Texas Supreme Court has allowed the rule to stand.