To: Texas Rules of Appellate Procedure SCAC Subcommittee

From: Frank Gilstrap

Date: October 6, 2000

Re: Will the Eighth Circuit's *Anastasoff* decision affect the Texas rule concerning unpublished opinions?

On August 11, 2000, the combined committee[1] proposed to amend appellate rule 47.7 as follows:

> Opinions not designated for publication by the court of appeals have no precedential value ~~and must not be cited as authority by counsel or by a court~~. but may be cited as persuasive authority by counsel or by a court.

TEX.R.APP.P. 47.7 (proposed August 11, 2000). While this proposal relaxes the prohibition against citing unpublished opinions, it continues to deny precedential value to such opinions.[2]

Eleven days later, on August 22, a panel of the Eighth Circuit held that a similar Eighth Circuit rule violates Article III of the United States Constitution. *Anastasoff v. United States*, 223 F.3d 898, 86 A.F.T.R.2d 2000-5724 (8th Cir. 2000). If this decision is upheld, either en banc or by the United States Supreme Court, then

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[1] The combined committee consists of the Rules Committee of the Appellate Section of the State Bar of Texas and the Texas Rules of Appellate Procedure SCAC Subcommittee.

[2] See generally David M. Gunn, *Unpublished Opinions Shall Not Be Cited as Authority: The Emerging Contours of Texas Rule of Appellate Procedure 90(i),* 24 ST. MARY'S L.J. 115, 128 (1992) (history of unpublished opinions in Texas).

constitutional doubts may also be raised as to the similarly worded Texas rule 47.7. It's difficult to foresee all the arguments that might eventually be raised against the Texas rule. But it seems prudent to consider *Anastasoff* at this juncture and to understand the constitutional issues involved.

The case

Faye Anastasoff (ah·nah·STAH·soff) sued the United States to obtain a refund of overpaid federal income tax. Under the Internal Revenue Code, she had three years to file a claim for a refund. She mailed her refund claim before the three-year deadline, but the government received it one day late. The case turned on whether her claim would be considered timely under the Internal Revenue Code's "mailbox rule." [3]

On appeal, the United States cited *Christie v. United States*, No. 91-2375 MN (8th Cir. March 20, 1992)(unpublished), where an Eighth Circuit panel had held that the mailbox rule would not apply. Under the Eighth Circuit rules, the *Christie* opinion would not be binding precedent, because it was unpublished. The Eighth Circuit rule on unpublished opinions reads as follows:

> <u>Unpublished opinions are not precedent</u> 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

[3] *Anastasoff*, slip op. at 1-2.

> on a material issue and no published opinion of this or another court would serve as well.

8TH CIR. R. 28A(i)(emphasis added). The *Anastasoff* litigants did not brief the constitutional validity of this rule,[4] and the panel raised the issue sua sponte.[5]

The *Anastasoff* panel decided that the Eighth Circuit rule was unconstitutional; therefore the "mailbox rule" issue was controlled by the unpublished *Christie* opinion.[6] The panel based its constitutional ruling on the first sentence of Article III, which reads as follows:

> The 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 (emphasis added).

The panel concluded that the doctrine of precedent was implied in "the 'judicial power' delegated to the courts in Article III."[7] The panel reached this conclusion by examining the Framers' original intent. It noted that "[t]he doctrine of precedent was

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[4] Appellant's Petition for Rehearing En Banc, at 3 (8th Cir. 2000)(No. 99-3917 EM).

[5] *Id.* at 2. Judge Arnold, who authored *Anastasoff*, had previously suggested the Article III argument. See Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J.APP. PRAC.& PROCESS 219 (1999).

[6] *Anastasoff*, slip op. at 14.

[7] *Id.* at 10.

well-established by the time the Framers gathered in Philadelphia" [8] and that, under the 18th century view, "the judge's duty to follow precedent derives from the nature of the judicial power itself." [9] Because "[t]he Framers accepted this understanding of judicial power . . . and the doctrine of precedent implied in it," [10] they viewed the doctrine of precedent as constitutional in nature, unlike "[m]odern legal scholars [who] tend to justify the authority of precedent on equitable or prudential grounds." [11] Since the doctrine of precedent was implied in Article III's "judicial power," the Eighth Circuit rule was unconstitutional because it allowed the court "to avoid the precedential effect of [its] prior decisions," thereby "expand[ing] the judicial power beyond the bounds of Article III." [12]

The court stressed that it was not "creating some rigid doctrine of eternal adherence to precedence." [13] Cases can still be overruled and precedent can still be changed "if the reasoning of the case is exposed as faulty, or if other exigent circumstances justify it." [14] But a court must state its <u>reasons</u> for departing from precedent. Judges may not <u>arbitrarily</u> confer precedential authority on some cases and not on others

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[8] *Id.* at 4 (citing MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780 8-9 (1977); J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 227 (1990); WILLIAM HOLZWORTH, CASE LAW, 50 L.Q.R. 180 (1934); 1 WILLIAM W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *69 (1765)).

[9] *Anastasoff*, slip op. at 5-6.

[10] *Id.* at 7.

[11] *Id*. at 5.

[12] *Id.* at 4.

[13] *Id.* at 12.

[14] *Id.* at 12-13.

"without any reason to differentiate the cases." [15] Because it allows the court "complete discretion to determine which judicial decisions will bind [it] and which will not," the Eighth Circuit rule gives judges powers that exceed the limits of Article III.[16]

Finally, the panel noted that Article III does not require that all opinions be published, at least in the literal sense. Courts can still decide that an opinion "[is] not important enough to take up pages in a printed report." [17] But all opinions "ought to have precedential effect, whether published or not." [18]

The significance of *Anastasoff*

Until now, the debate over unpublished opinions has involved only policy arguments.[19] *Anastasoff*, however, promises to add an overriding constitutional factor. If

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[15] *Id.* at 13.

[16] *Id.*

[17] *Id.* at 11.

[18] *Id.* at 11-12.

[19] See Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions*, 50 S.C. L. REV. 235 (1998); Boyce F. Martin, *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177 (1999); William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981); William L. Reynolds & William M Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978); Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Governmental Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989); George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477 (1988); David Dunn, Note, *Unreported Decisions in the United States Courts of Appeals*, 63 CORNELL L. REV. 128 (1977); Pamela Foa, Comment, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 39 U. PITT, L. REV. 309 (1977); David W. Holman, *Is an Unpublished Opinion Still an Opinion*, THE APPELLATE ADVOCATE 3 (Spring 2000); Gideon Kanner, *The Unpublished Appellate Opinion: Friend or Foe*, 48 CAL. ST. B.J. 386 (1973); Arthur B. Spitzer & Charles H. Wilson, *The Mischief of the Unpublished Opinion*, LITIGATION, Summer 1995; Donna Stienstra, Federal Judicial Center, *Unpublished Dispositions:*

Anastasoff is upheld by the Supreme Court, the federal circuits will no longer be able to decide that some opinions will be precedent and that others will not. All opinions will have precedential value. Since every federal circuit has a rule similar to Eighth Circuit Rule 28A(i),[20] the consequences will be significant. Professor Laurence Tribe believes that en banc or Supreme Court review of *Anastasoff* is "fairly likely, especially in light of the enormous practical consequences" of the opinion.[21] But the significance of *Anastasoff* goes beyond the debate over unpublished opinions.

The *Anastasoff* opinion involves the nature and extent of the "judicial power" under Article III (which the panel addressed at length) and the separation of powers (which the panel mentioned only in passing).[22] These issues are the subject of a debate among legal scholars. This debate has been prompted by federal statutes that limit both jurisdiction and precedent in habeas corpus and immigration litigation[23] and by

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Problems of Access and Use in the Courts of Appeals (1985). See also Gunn, *Unpublished Opinions*, 24 ST. MARY'S L.J. at 125-126 & nn.49-54 (1992).

[20] See Appellant's Petition for Rehearing En Banc, at 5 (citing D.C.CIR.R. 16; 1ST CIR.R. 36(b)(2); 2D CIR.R. 0.23; 3d Cir. IOP 6.2; 4TH CIR.R. 36(c); 5TH CIR.R. 47.5.3 & 47.5.4; 6th Cir.R. 206(c); 7TH CIR.R. 53(b)(2)(iv) & 53(e); 9TH CIR.R. 36.3; 10TH CIR.R. 36.3; 11TH CIR.R. 36.2; FED.CIR.R. 47.6).

[21] Tony Mauro, *Stealth Decisions Under Fire,* LEGAL TIMES, Sept. 2000 at 1. See also *United States v. Goldman*, 2000 W.L. 1448518 (8th Cir., Sept. 29, 2000)(following *Anastasoff*).

[22] *Anastasoff*, slip op. at 7. In this regard, the panel ignored 28 U.S.C. §§ 2071-2074, in which Congress delegated rule-making power to the federal courts.

[23] See, e.g., Evan Camminker, *Allocating Judicial Power in a "Unified Judiciary"*, 78 TEX. L. REV. 1513 (2000); Evan Camminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994); Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445 (1998); Exordium, *Suspension and Supremacy, Jurisdiction and Judicial Power and Habeas Corpus after AEBPA and IIRIIA*, 98 COLUM. L. REV. 695 (1998).

proposals to strip federal courts of jurisdiction in other kinds of cases.[24] These larger issues must be considered in any attempt to predict the outcome of the *Anastasoff* controversy. Such an attempt, however, will not be made here. Rather, the constitutional validity of *Anastasoff* will be assumed.

Can the *Anastasoff* holding bind Texas courts directly?

Article III only applies to federal courts, not to state courts.[25] Therefore, the *Anastasoff* ruling will not apply directly to Texas courts unless their failure to treat unpublished opinions as precedent violates rights guaranteed by the Fourteenth Amendment. While Professor Tribe sees due process and equal protection arguments in this area,[26] it's not yet clear what those arguments might be.[27]

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[24] See, e.g., Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535 (2000).

[25] *United States v. Egelah*, 173 F.Supp. 206, 209 (D. Alaska Terr. 1959) ("Art. III, Sec. 1 of the Constitution of the United States . . . relates only to 'the Judicial Power of the United States,' relating solely to the federal courts."). See *Clements v. LULAC*, 800 S.W.2d 948, 951 n.2 (Tex.App.—Corpus Christi 1990, no writ)("[T]his action is brought in State courts under the State Constitution and laws. Thus, we are not constrained by the standing requirement applicable to federal courts under Article III of the U.S. Constitution.").

[26] Steve France, *Right to Cite: 8th Circuit Nixes No Precedent Rule*, ABA JOURNAL, Oct. 2000, at 24.

[27] Cf. *In re Rules of the United States Court of Appeals for the Tenth Circuit Adopted Nov. 18, 1986,* 955 F.2d 36, 37 (10th Cir. 1992) (Holloway, J., concurring and dissenting.) ("No matter how insignificant a prior ruling might appear to us, any litigant who can point to a prior decision of the court and demonstrate that he is entitled to prevail under it should be able to do so as a matter of essential justice and fundamental fairness. To deny a litigant this right may well have overtones of a constitutional infringement because of the arbitrariness, irrationality, and unequal treatment of the rule."); *Jones v. Superintendent, Virginia State Farm*, 465 F.2d 1091, 1094 (4th Cir. 1972)("We believe that our screening procedures and disposition by unreported memorandum decisions accords with due process and our duty as Article III judges, but we confess its imperfection."); *Worldcom Network Services, Inc. v. Thompson*, 698 N.E.2d 1233, 1242 (Ind.Ct.App. 1998) ("[D]ue process rights were not violated when this court issued a memorandum rather than a

One such constitutional argument involves the arbitrary nature of a court's decision to publish or not publish. *See supra* p.4. Yet, the *Anastasoff* panel ignored the fact that most courts do not have "complete discretion," at least in theory, to publish or not publish. Every federal circuit has adopted standards for deciding when an opinion should be published,[28] as has Texas.[29] Thus, it might be possible to avoid an *Anastasoff* challenge by amending those "Standards of Publication" so that a court's decision not to publish will be less arbitrary, or at least by requiring a court to state its reasons for not publishing.[30]

Finally, because we are dealing with appeals, there may not be any due process issue at all. The Supreme Court has repeatedly held that, "[t]he Due Process Clause of the Fifth Amendment does not establish any right to an appeal." [31]

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published opinion."); *Goodlet v. Commonwealth*, 825 S.W.2d 290, 29 (Ky.Ct.App. 1992)(While "the no citation rule allows one to manipulate the appellate system so as to effect a particular result," there was no deprivation "of any constitutionally guaranteed right.").

[28] D.C. Cir.R. 36(a)(2); 1st Cir.R. 36(b); 2d Cir.R. 0.23; 3d Cir.R.IOP 5.1; 4th Cir.R. 36(a); 5th Cir.R. 47.5; 6th Cir.R. 206; 7th Cir.R. 53(c); 8th Cir.R. IV-B & App.-I; 9th Cir.R. 36-2; 10th Cir.R. 36.2; 11th Cir.R. 36-3 IOP 5; Fed. Cir.R. IOP 9-10.

[29] TEX.R.APP.P. 47.4.

[30] Cf. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex.1986)(requiring intermediate courts to state reasons for reversing on grounds of factual sufficiency).

[31] *United States v. MacCollum*, 426 U.S. 317, 323 (1976)(plurality). Accord *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)(plurality)("[A] State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all." (citation omitted)); *Luckenbach S.S. Co. v. United States*, 272 U.S. 533, 536 (1926)("[A]n appellate review is not essential to due process of law, but is a matter of grace."); *McKane v. Durston,* 153 U.S. 684, 687 (1894)("A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law. It is wholly within the discretion of the state to allow such a review."). But see *Griffin*, 351 U.S. at 18. (If an appeal is allowed, then the procedure must meet the

Is the doctrine of precedent required by the Texas Constitution?

Anastasoff is premised on the first sentence of Article III of the United States Constitution. *See supra* p.3. This same language appears in the Texas constitution as follows:

> The judicial power of this State shall be vested in one Supreme Court and one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law.

TEX. CONST. art.V, § 1 (emphasis added). Almost identical language has appeared in every constitution since the founding of the Republic.[32] To decide whether the Texas constitution's "judicial power" includes the doctrine of precedent one could follow the historical approach of the *Anastasoff* court. That is, one could determine the original intent of the framers of the Texas constitution by examining available historical

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requirements of equal protection.). Note also TEX.R.APP.P. 1.1 (Appellate rules also govern "post-trial procedures and trial courts in criminal cases.").

[32] See TEX.CONST. OF 1869, art. V, §1 ("The Judicial power of this State shall be vested in one Supreme Court, in District Courts, and in such inferior courts and magistrates as may be created by this Constitution, or by the Legislature under its authority."); TEX. CONST.OF 1866, art. IV, § 1 ("The Judicial power of this State shall be vested in one Supreme Court, in District Courts, in County Courts, and in such Corporation Courts, and other inferior Courts or tribunals as the Legislature may from time to time ordain and establish."); TEX.CONST. OF 1861, art. IV, § 1 ("The Judicial power of this State shall be vested in one Supreme Court, in District Courts, and in such inferior courts as the Legislature may from time to time ordain and establish."); TEX. CONST. OF 1845, art. IV, § 1 ("The judicial power of this State shall be vested in one Supreme Court, in District Courts, and in such inferior courts as the legislature may from time to time ordain and establish."); REPUB.TEX.CONST. OF 1836, art. IV, § 1 ("The judicial powers of the government shall be vested in one Supreme Court, and such inferior courts as the Congress may, from time to time, ordain and establish.").

sources.[33] But those sources are not abundant, and it may be difficult to reach a reliable conclusion using this method. Also, there is no way to foresee where the process will lead. Fortunately, two simpler approaches are available; unfortunately, they lead to opposite conclusions.

The first approach relies on the fact that the language of the Texas constitution and the federal constitution are identical, i.e., the "judicial power . . . shall be vested." Since the framers of the Texas constitution chose language from the United States Constitution, it's reasonable to conclude that they meant for the language to have the same meaning in both constitutions. In 1911, the Court of Criminal Appeals construed a Texas constitutional provision guaranteeing that the accused "shall be confronted by witnesses against him." [34] After noting that this same language is found in every Texas constitution, the federal constitution, and the constitutions of many states, the court concluded that "Texas borrowed or copied this provision from the Constitutions and laws of different governments of the English-speaking people."[35] Citing the "well-known rule of law that when, we adopt a phrase or borrow a provision from the

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[33] See, e.g., *Giles v. Ponder*, 275 S.W.2d 509, 511 (Tex.Civ.App.—San Antonio 1955)(Pope, J.)("When we follow in the footsteps of the early Republic law makers, we can more easily discover their intent."), *aff'd*, *sub nom. Rudder v. Ponder*, 156 Tex. 185, 293 S.W.2d 736 (1956). Under this approach, one would ask whether "[t]he doctrine of precedent was well-established by the time the framers gathered [at Washington-on-the-Brazos]," *Anastasoff*, slip op. at 4, and whether, under the 19th century view, "the judge's duty to follow precedent derives from the nature of the judicial power itself," *Id.* at 5, and whether "[t]he Framers [of the Texas Constitution] accepted this understanding of judicial power." *Id.* at 7.

[34] *Robertson v. State*, 63 Tex.Crim. 216, 142 S.W. 533, 534 (1911)(quoting TEX.CONST. art.I § 10).

[35] *Robertson,* 142 S.W. at 534.

Constitution or laws of another state or country, we adopt that clause for the construction placed thereon by courts of that state or country,"[36] the court concluded that the phrase from the Texas constitution had the same meaning as the identical phrase from the federal constitution. Under this approach, the "judicial power" of the Texas constitution would be the same as the "judicial power" of the federal constitution, and the *Anastasoff* rule would apply in Texas.

The second approach involves the adoption of the common law in Texas. The *Anastasoff* panel viewed the doctrine of precedent as a creation of English law.[37] But the "judicial power" granted to the Texas courts by the 1836 constitution did not come from English law. Before independence, Texas was part of Mexico and subject to the civil law, and the 1836 constitution did not replace the civil law.[38] Rather, it provided that English law would be adopted by legislative act, as follows:

> The Congress shall, as early as practicable, introduce, by statute, the common law of England, with such modifications as are circumstances and their judgment, may require; and in all criminal cases, the common law shall be the rule of decision.

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[36] *Id.*

[37] The panel traced the doctrine of precedent "from the earliest period of English history." *Anastasoff*, slip op. at 4 n.5. It noted that "the authority of precedent had been effective in past struggles of the English people against royal usurpations," *Id.* at 5, and that the Framers of the federal constitution identified the earlier "struggle against the tyranny of the Stuarts . . . with their own [struggle] against King George." *Id.* at 5, n.6.

[38] *Courand v. Vollmer*, 31 Tex. 397, 399 (1868).

REPUB.TEX.CONST. OF 1836, art. IV, § 13 (emphasis added). But it wasn't until 1840 that the Congress of the Republic enacted a statute adopting "the Common Law of England" as the "rule of decision in this state," [39] a provision that is still in force.[40] It follows, that prior to 1840, "the foundation for judicial system was the civil law." [41] Since the common law and the doctrine of precedent appear to be inseparable,[42] the grant of "judicial power" in the 1836 constitution could not have included the English law's doctrine of precedent. That did not come until four years later when the Congress

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[39] An act to adopt the Common Law of England, to Repeal Certain Mexican Laws, and Regulate the Marital Rights of Parties. 1840 Tex.Gen.Laws 1. 2 H. GAMMEL, LAWS OF TEXAS, 177 (1898)(quoted at *Courand*, 31 Tex. at 399). See generally Robert N. Jones, *A Juris-prudence Better Understood: The Adoption of the Common Law in Texas*, 53 TEX.B.J. 452, 452-453 (1990); 67 Tex.Jur. 3d, *Statutes* § 3.

[40] See TEX.CIV.PRAC & REM.CODE § 5.001 (formerly TEX.REV.CIV.STAT. art. 1 (repealed Acts 1985, 69th leg., ch.959)).

[41] *Courand*, 31 Tex. at 399.

[42] See, e.g., *Grapevine Excavation, Inc. v. Marilyn Lloyds*, 2000 W.L. 890386 at *6 (Tex.2000)(Phillips, C.J., dissenting)("[D]octrine of stare decisis is integral to our common-law system of decision making, promoting efficiency, fairness and legitimacy."); *Alleghany Gen. Hosp. v. N.L.R.B.*, 608 F.2d 965, 969 (3d Cir.1979)("The essence of the common law doctrine of precedent or Stare decises is that the rule of the case creates a binding legal precept. The doctrine is so essential to Anglo-American jurisprudence that it scarcely need be mentioned, let alone discussed at length."); *People v. Johnson*, 488 N.E.2d 439, 449 (N.Y.Ct.App.1985)("In England, where the entire doctrine of stare decisis originated with the birth of the common law . . ."); *Bagedet v. Shepard*, 180 Cal.Rptr. 396, 402 (Cal.Ct.App.1982)("The doctrine of stare decises expresses a fundamental policy of common law jurisdictions . . . .")(quoting 6 Witkin CAL. PROCEDURE (2d ed. 1971 Appeal, § 653, p.4570); *Schiffer v. United Grocers, Inc.*, 989 P.2d 10, 20 (Oregon Sup.Ct. 1999)(Durham, J., concurring)("[T]he ancient doctrine of stare decisis should govern the courts reconsideration of common-law rules and doctrines."); *State v. Burlison*, 583 N.W.2d 31, 36 (Neb.Sup.Ct. 1998)("[T]he doctrine of stare decisis forms the bedrock of our common-law jurisprudence."); *Owens v. Truckstops of America*, 1994 W.L. 115878 at *10 (Tenn. Ct.App. 1994)("The doctrine of stare decisis is at the foundation of our common law system."). See generally *City of Rocky River v. State Employment Relations Bd.*, 539 N.E.2d 103, 106-111 (Ohio Sup.Ct. 1989)(discussion of stare decisis).

adopted the common law—and the doctrine of precedent— by statute.[43] Therefore, the "judicial power" under the Texas constitution is not equivalent to the "judicial power" under the federal constitution, and *Anastasoff* will not apply in Texas.

What are the alternatives?

The Supreme Court can avoid the constitutional controversy altogether by amending the Texas rules to give precedential value to all opinions. But if the Court rejects that course of action, it might be prudent to leave Rule 47.7 unchanged until litigation clarifies the constitutional question. A third alternative would be to modify the current rules to strengthen the standards for publication. *See supra* p.8.

[43] Cf. *Snyder v. Compton*, 87 Tex. 374, 28 S.W. 1061, 1062 (1894)("[I]n this state, . . . the existence of the common law is due to statutory enactment.")