

2004

A Modest Reform: The New Rule 32.1 Permitting Citation to Unpublished Opinions in the Federal Courts of Appeals

Anne Coyle

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Anne Coyle, *A Modest Reform: The New Rule 32.1 Permitting Citation to Unpublished Opinions in the Federal Courts of Appeals*, 72 Fordham L. Rev. 2471 (2004).

Available at: <https://ir.lawnet.fordham.edu/flr/vol72/iss6/6>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

A MODEST REFORM: THE NEW RULE 32.1 PERMITTING CITATION TO UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS

Anne Coyle*

INTRODUCTION

In 1964 the Judicial Conference of the United States¹ (“Judicial Conference”) recommended that federal appellate courts publish “only those opinions which are of general precedential value.”² The conference report cited the rapidly growing number of published opinions and the increasing practical difficulty of maintaining library facilities as justification for limiting publication.³ It was not until eight years later—after seeing a dramatic increase in federal appellate caseloads⁴—that the Judicial Conference directed the circuits to develop individual plans for selective publication of opinions.⁵ By

* J.D. Candidate, 2005, Fordham University School of Law. I would like to thank Professor Marc M. Arkin for her legal insights and my family for their love and support.

1. The chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit comprise the Judicial Conference, which is authorized by Congress to study the operation and effect of the general rules of federal practice and procedure, and to make recommendations for any changes necessary to promote fairness and judicial efficiency. 28 U.S.C. § 331 (2004).

2. U.S. Judicial Conference, Report of the Proceedings of the Judicial Conference of the U.S. 11 (1964) [hereinafter Report of the Judicial Conference 1964].

3. *Id.*

4. For a discussion of the expansion of the federal appellate caseload since the 1960s, see Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 Brook. L. Rev. 685, 692-94 (2000); David Greenwald & Frederick A. O. Schwarz, Jr., *The Censorial Judiciary*, 35 U.C. Davis L. Rev. 1133, 1145-47 (2002). For a discussion of the history of the fear of proliferating case law, see Kirt Shuldberg, Comment, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 Cal. L. Rev. 541, 545-46 (1997).

5. U.S. Judicial Conference, Report of the Proceedings of the Judicial Conference of the U.S. 33 (1972) [hereinafter Report of the Judicial Conference 1972].

1974, every federal appellate court had adopted rules limiting publication.⁶

Selective publication plans are based on the premise that producing an opinion of publishable quality requires a judge to invest much more time and effort than does drafting an opinion that merely explains a decision for the benefit of the litigants.⁷ Thus, the publication of opinions that serve no law-making function, but merely apply clearly established law to the facts at hand, is argued to waste judicial resources.⁸ Selective publication plans typically limit publication to opinions that rule on an issue of first impression, modify a previously announced rule, reverse a published decision of an agency or district court, or create a conflict with another circuit.⁹

Judicial opinions not selected for publication are generally referred to as “unpublished” opinions; advances in technology, however, have rendered this term a misnomer.¹⁰ “Unpublished” opinions are now made available in book form through West’s Federal Appendix, online through Westlaw and LEXIS, and, by federal law, as of December 17, 2004, all opinions rendered by a federal court must be posted on the court’s own website.¹¹ The term “unpublished” should therefore be understood to mean designated by the rendering court as “not for publication” or “non-precedential” and not published in an official federal reporter.¹²

6. See, e.g., Donna Stienstra, *Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals 5-14* (1985) (recounting the history of the development of selective publication plans in the federal courts of appeals). Although district courts rarely issue published opinions, district court publication and citation practices are outside the scope of this Note. See K.K. DuVivier, *Developments and Practice Notes, Are Some Words Better Left Unpublished?: Precedent and the Role of Unpublished Decisions*, 3 J. App. Prac. & Process 397, 400 n.8 (2001) (noting that on average a federal district judge selects only four to six opinions per year for publication). The practice of issuing unpublished district court opinions is not controversial; indeed, commentators have been concerned exclusively with publication of appellate opinions. The proposed amendment to the Federal Rules of Appellate Procedure concerning citation to unpublished opinions applies only to the federal courts of appeals. See *infra* notes 34, 35, and accompanying text.

7. Federal Judicial Center, *Standards for Publication of Judicial Opinions: A Report of the Committee on Use of Appellate Court Energies of the Advisory Council on Appellate Justice 3* (1973) (stating that “the judicial time and effort essential for the development of an opinion to be published for posterity and widely distributed is necessarily greater than that sufficient to enable a judge to provide a statement so that the parties can understand the reason for the decision”).

8. See Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 Mich. L. Rev. 940, 942 (1989).

9. See, e.g., D.C. Cir. R. 36(a)(2).

10. See, e.g., Shuldberg, *supra* note 4 *passim*.

11. E-Government Act of 2002, Pub. L. No. 107-347, § 205(a), 116 Stat. 2899, 2913 (2003).

12. See Memorandum from Judge Samuel A. Alito Jr., Chair, Advisory Comm. on App. Rules, to Judge Anthony A. Scirica, Chair, Standing Comm. on Rules of Pract.

The vast majority of cases terminated on the merits¹³ in the federal courts of appeals result in unpublished opinions.¹⁴ From October 1, 2001, to September 30, 2002, approximately eighty-one per cent of cases resolved on the merits in the federal courts of appeals were disposed of by unpublished opinions.¹⁵ Although some scholars criticize the practice of selective publication of appellate opinions,¹⁶ the accompanying “no-citation rules” are the most controversial aspect of the practice.¹⁷ Perhaps the most fundamental technique practiced by a party attempting to persuade a court to rule in her favor involves citing, in a brief or at oral argument, prior cases that articulate legal rules or reasoning that bear favorably on the party’s case.¹⁸ Cases with binding precedential authority have the highest value to litigants, but parties frequently cite cases (and other legal and non-legal sources) for their persuasive value. In federal circuit courts, all published opinions stand as binding precedent within the circuit unless overruled *en banc* or by the Supreme Court.¹⁹ No-citation rules forbid or disfavor the citation of unpublished appellate opinions to the rendering circuit courts (and in some cases to all courts²⁰) except in related cases for purposes of *res judicata*, collateral estoppel, and law of the case.²¹ No-citation rules deprive unpublished opinions of binding precedential value in unrelated cases, and the strictest no-citation rules prevent the use of unpublished opinions even for their persuasive value.²²

& Proc. 28-29 (May 22, 2003) at <http://www.uscourts.gov/rules/app0803.pdf> [hereinafter Advisory Committee Report].

13. A judgment on the merits is “delivered after the court has heard and evaluated the evidence and the parties’ substantive merits.” Black’s Law Dictionary 1119 (7th ed. 1999).

14. Administrative Office of United States Courts, 2002 Annual Report of the Director: Judicial Business of the United States Courts 39 (2003), available at <http://www.uscourts.gov/judbus2002/tables/s03sep02.pdf> [hereinafter 2002 Annual Report].

15. *See id.*

16. *See generally* Robel, *supra* note 8; Martha J. Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 Am. U. L. Rev. 757 (1995); Johanna S. Schiavoni, *Who’s Afraid of Precedent?: The Debate over the Precedential Value of Unpublished Opinions*, 49 U.C.L.A. L. Rev. 1859 (2002).

17. *See infra* Part II.

18. For a discussion of the deeply rooted common law practice of citing prior decisions, see Lance A. Wade, Note, *Honda Meets Anastasoff: The Procedural Due Process Argument Against Rules Prohibiting Citation to Unpublished Judicial Decisions*, 42 B.C. L. Rev. 695, 700-07 (2001).

19. For a discussion of how circuit panels create binding precedent, see Cooper & Berman, *supra* note 4, at 719-23.

20. *See* 2d Cir. R. 0.23 (prohibiting the citation of unpublished Second Circuit opinions in any court); *see also infra* note 173 and accompanying text.

21. *See, e.g.*, 7th Cir. R. 53(b)(2)(iv).

22. *See id.*; 2d Cir. R. 0.23; 9th Cir. R. 36-3(a); Fed. Cir. R. 47.6(b).

Currently only the Third and Eleventh Circuits allow citation of unpublished opinions without restriction.²³ The D.C. Circuit allows unrestricted citation of unpublished opinions issued after January 1, 2002,²⁴ but prohibits citation of unpublished opinions issued prior to that date.²⁵ Four circuits forbid citation in unrelated cases.²⁶ Five circuits disfavor citation, but allow reference when an unpublished opinion has “precedential” or “persuasive” value on a material issue and no published opinion would serve as well.²⁷

The controversy surrounding citation of unpublished opinions intensified following *Anastasoff v. United States*.²⁸ In that case, an Eighth Circuit panel held, in an opinion written by Judge Richard S. Arnold, that the circuit’s rule denying precedential effect to unpublished opinions exceeded the bounds of the power granted to the judiciary under Article III of the U.S. Constitution.²⁹ On rehearing en banc, the Eighth Circuit vacated the panel’s decision, leaving the constitutional issue unresolved.³⁰ The following year, the Ninth Circuit reached a contrary conclusion in *Hart v. Massanari*.³¹ There, Judge Alex Kozinski concluded that rules that allow courts to issue nonprecedential opinions are both constitutionally sound and essential to the functioning of the modern judiciary.³²

These cases ignited a vigorous debate among scholars about the proper treatment of unpublished opinions.³³ The Judicial Conference’s Advisory Committee on Appellate Rules (“Advisory Committee”) attempted to resolve the controversy by approving an amendment (“New Rule 32.1”) to the Federal Rules of Appellate Procedure (“FRAP”) that would allow unrestricted citation to unpublished opinions.³⁴ New Rule 32.1 only addresses the issue of

23. See 3d Cir. R. 28.3; 11th Cir. R. 36-2. However, the Third Circuit itself will not cite an unpublished opinion. See 3d Cir. IOP 5.7.

24. D.C. Cir. R. 28(c)(1)(B).

25. D.C. Cir. R. 28(c)(1)(A).

26. See 2d Cir. R. 0.23; 7th Cir. R. 53(b)(2)(iv); 9th Cir. R. 36-3(a); Fed. Cir. R. 47.6(b); see also *infra* note 160 and accompanying text. The Fifth Circuit forbids citation of unpublished opinions issued prior to January 1, 1996. 5th Cir. R. 47.5.3.

27. See 1st Cir. R. 32.3(a)(2); 4th Cir. R. 36(c); 6th Cir. R. 28(g); 8th Cir. R. 28(i); 10th Cir. R. 36.3(B); see also *infra* notes 162-66 and accompanying text. The Fifth Circuit allows citation of unpublished opinions issued after January 1, 1996 for their persuasive value. 5th Cir. R. 47.5.4.

28. 223 F.3d 898 (8th Cir.), vacated as moot en banc, 235 F.3d 1054 (8th Cir. 2000); see also *infra* Part II.

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

30. *Anastasoff*, 235 F.3d at 1054.

31. 266 F.3d 1155, 1180 (9th Cir. 2001).

32. *Id.* at 1160.

33. See *infra* Part II.A.

34. Advisory Committee Report, *supra* note 12, at 28-29. New Rule 32.1 was published and distributed to members of the bench, bar, and general public for comment; the commentary period ended February 18, 2004. Following their Spring 2004 meeting, the Advisory Committee will make a final recommendation to the Standing Committee, which in turn will submit its recommendation to the Judicial

citation: It takes no position on whether, or under what circumstances, courts should issue unpublished opinions; nor does the New Rule 32.1 suggest what weight courts should accord to unpublished opinions.³⁵

This Note argues that although New Rule 32.1 does not completely resolve the no-citation controversy, it is the most practical response in light of all the arguments. Part I summarizes the debate surrounding the treatment of unpublished opinions as it emerged in *Anastasoff* and *Hart*. Part II considers the arguments advanced for and against no-citation rules and introduces the three versions of the proposed amendment to the FRAP considered by the Advisory Committee. Part III analyzes the three versions of the rule in light of the arguments discussed in Part II. This Note concludes that the New Rule 32.1 approved by the Advisory Committee should be enacted because it will promote judicial accountability and litigants' autonomy, but that the Judicial Conference should monitor the issuance of summary orders³⁶ after the enactment of New Rule 32.1.

I. THE CASES

A. *Anastasoff v. United States*

In *Anastasoff*, appellant *Anastasoff* sought review of a district court decision upholding the denial, by the Internal Revenue Service ("IRS"), of her federal tax refund.³⁷ The IRS denied her claim under a statutory provision limiting refunds to taxes paid in the three years prior to the filing of a claim.³⁸ Although she mailed her claim within this period, the IRS received and filed the claim three years and one day after she overpaid her taxes.³⁹ *Anastasoff* argued that she was entitled to her refund under the "mailbox rule," which provides that a claim is received when postmarked.⁴⁰ In an unpublished opinion, a prior Eighth Circuit panel had rejected the same argument as applied

Conference for transmission to the Supreme Court. Congress will then have seven months to reject, modify, or defer the rule, and if it takes no action the rule will take effect as a matter of law. Administrative Office of United States Courts, *The Rule Making Process: A Summary for the Bench and Bar*, at <http://www.uscourts.gov/rules/proceduresum.htm> (last modified Sept. 30, 2003).

35. See Advisory Committee Report, *supra* note 12, at 28.

36. As used in this Note, the term "summary order" denotes a disposition of a case that fails to provide any explanation of the court's application of the facts to the law. See also *infra* Parts II.C.1.-2.

37. *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir.), *vacated as moot en banc* by 235 F.3d 1054 (8th Cir. 2000).

38. *Id.*

39. *Id.*

40. *Id.* The Mailbox Rule, 26 U.S.C. § 7502 (2004), applies only to untimely claims. *Anastasoff's* claim was considered timely, however, under 26 U.S.C. § 6511(a), the statutory provision that measures the timeliness of refund claims. *Anastasoff*, 223 F.3d at 899.

to a claim mailed prior to the three-year bar and received shortly thereafter.⁴¹ Anastasoff contended that the court was not bound by the prior opinion, because Eighth Circuit Rule 28(A)(i) states that unpublished opinions are not precedent.⁴²

The court held that the Eighth Circuit's rule exceeded the "judicial power" granted by Article III of the federal Constitution.⁴³ As Judge Richard Arnold reasoned, the doctrine of precedent, which posits that the "declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties," is inherent in the definition of "judicial power."⁴⁴ By allowing courts to ignore the precedential effect of prior decisions, the Eighth Circuit rule improperly expanded judicial power.⁴⁵

Judge Arnold based his conclusion that Article III incorporates the doctrine of precedent on an originalist interpretation.⁴⁶ He contended that by the time of the framing of the Constitution, adherence to precedent had been established by the writings of Sir Edward Coke and Sir William Blackstone as an "immemorial custom."⁴⁷ Noting that "Coke used precedent . . . [as] his main weapon in the fight for the independence of the judiciary and limits on the king's prerogative rights,"⁴⁸ Judge Arnold further contended that the Framers likewise intended precedent to function as a bulwark against tyranny and as a necessary condition for separation of judicial and legislative powers.⁴⁹

Judge Arnold concluded that although Article III does not mandate rigid stare decisis, judges must justify any departure from precedent; courts may overrule bad precedents, but must explain their reasons for doing so.⁵⁰ Judge Arnold accepted the practice of selective publication insofar as opinions would not be published in a federal reporter, because there was no official reporting system in place at the time of the framing of the Constitution.⁵¹ Nevertheless, Judge Arnold

41. *Anastasoff*, 223 F.3d at 899; see *Christie v. United States*, No. 91-2375 MN, 1992 U.S. App. LEXIS 38446 (8th Cir. Mar. 20, 1992) (per curiam).

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

43. *Id.* at 900. Section 1 of Article III states 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.

44. *Anastasoff*, 223 F.3d at 900 (citing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991); *Cohens v. Virginia*, 19 U.S. 264 (1821)).

45. *Id.*

46. Originalism is a theory of constitutional interpretation that seeks to discover the actual intent of the Framers through their writings and the historical background against which they wrote. See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 133-60 (1990); see also John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 1-11 (1980) (explaining judicial "interpretivism," which seeks the original understanding of the Framers' intentions).

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

48. *Id.* at 900 n.6.

49. *Id.* at 900.

50. *Id.* at 905.

51. *Id.* at 903.

contended, the Framers would not have supported the denial of precedential status to unpublished opinions.⁵²

The Eighth Circuit later vacated the *Anastasoff* decision as moot because the IRS had agreed to refund Anastasoff's claim by the time the court reheard the case en banc.⁵³ Nonetheless, Judge Arnold's opinion provoked an impassioned rebuttal from the Ninth Circuit's Judge Alex Kozinski in *Hart v. Massanari*.⁵⁴

B. Hart v. Massanari

In *Hart*, appellant's counsel cited an unpublished opinion in violation of the Ninth Circuit's no-citation rule, which forbids citation of unpublished opinions for all but related-case uses.⁵⁵ The circuit court ordered counsel to show cause why he should not be disciplined.⁵⁶ The court rejected counsel's argument, which relied on *Anastasoff*, that the Ninth Circuit rule may be unconstitutional.⁵⁷

Judge Kozinski engaged in an originalist interpretation of his own to show that Judge Arnold's originalist analysis misconstrued the Framers' intent.⁵⁸ According to Judge Kozinski, the modern concept of precedent differs from that known to the Framers, and thus cannot inhere in the definition of "judicial Power."⁵⁹ Judge Kozinski's historical analysis posited that common law judges did not make, but rather "found" the law, which existed independently of judges.⁶⁰ Judges considered prior decisions as evidence of what the law was, but remained free to conclude that an existing decision was an incorrect interpretation of the law.⁶¹ Furthermore, the most important sources of law were not judicial opinions, but treatises such as the commentaries of Coke and Blackstone.⁶²

Judge Kozinski contended that precedent in the modern sense of stare decisis did not emerge until the establishment of both a reliable reporting system and a settled judicial hierarchy in the mid-nineteenth

52. *Id.*

53. *Anastasoff v. United States*, 235 F.3d 1054 (8th Cir. 2000).

54. *See Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001).

55. *Id.* at 1158-59. Related-case use includes citing a case for purposes of collateral estoppel, res judicata, law of the case, or factual purposes such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys fees, or the existence of a related case. *See* 9th Cir. R. 36-3.

56. *Hart*, 266 F.3d at 1159.

57. *Id.*

58. *Id.* at 1162-69; *see supra* note 46 and accompanying text.

59. *Hart*, 266 F.3d at 1162-63.

60. *Id.* at 1163-64 (citing Theodore F.T. Plucknett, *A Concise History of the Common Law* 343-44 (5th ed. 1956)). Judge Kozinski wrote: "The idea that judges declared rather than made the law remained firmly entrenched in English jurisprudence until the early nineteenth century." *Id.* at 1165 (citing David M. Walker, *The Oxford Companion to Law* 977 (1980)).

61. *Id.* at 1164.

62. *Id.* at 1165.

century.⁶³ Prior to that time, he argued, the common law was based on custom, which allowed flexibility for the law to evolve with the changing circumstances of society.⁶⁴ Judge Kozinski suggested that the Framers would not have intended to strip the law of its flexibility through a regime of rigid stare decisis.⁶⁵

Judge Kozinski further contended that rules that allow courts to issue nonprecedential opinions do not free courts from the doctrine of precedent, but rather are a means of dealing with precedent in the context of a modern legal system.⁶⁶ He distinguished the constitutional limitations imposed by the “Cases or Controversies” provision of Article III, which specifies the scope of the federal judiciary’s jurisdiction,⁶⁷ from its grant of “judicial Power,” which he claimed has never been interpreted to limit the administrative power of the federal courts.⁶⁸ Judge Kozinski noted that many practices common in the federal courts have no clear constitutional foundation.⁶⁹ Because none of these practices have been held subject to any limitation inherent within “judicial Power,” Judge Kozinski concluded that the practice of issuing nonprecedential opinions should not be singled out for such treatment.⁷⁰

II. THE COMMENTARY

Although *Anastasoff* attracted some supporters of Judge Arnold’s analysis,⁷¹ the weight of commentary rejected Article III as a basis for

63. *Id.* at 1164 n.10 (citing R.W.M. Dias, *Jurisprudence* 30-31 (2d ed. 1964)).

64. *Id.* at 1167.

65. *Id.*

66. *Id.* at 1160.

67. The “Cases or Controversies” provision enumerates which cases may properly be adjudicated in the federal courts. U.S. Const. art. III.

68. *Hart*, 266 F.3d at 1159.

69. *Id.* at 1160.

Among [these practices] are the practices of issuing written opinions that speak for the court rather than for individual judges, adherence to the adversarial (rather than inquisitorial) model of developing cases, limits on the exercise of equitable relief, hearing appeals with panels of three or more judges and countless others that are so much a part of the way we do business that few would think to question them.

Id. at 1160-61.

70. *Id.*

71. See Kenneth Anthony Laretto, Note, *Precedent, Judicial Power, and the Constitutionality of “No-Citation” Rules in the Federal Courts of Appeals*, 54 *Stan. L. Rev.* 1037, 1044-50 (2002) (arguing that Article III incorporates a doctrine of binding precedent insofar as the interpretation of written law is concerned); Drew R. Quitschau, Note, *Anastasoff v. United States: Uncertainty in the Eighth Circuit—Is There a Constitutional Right to Cite Unpublished Opinions?*, 54 *Ark. L. Rev.* 847, 867-69 (2002) (arguing that the Eighth Circuit’s no-citation rule is an unconstitutional expansion of Article III power); Suzanne O. Snowden, Note, *“That’s My Holding and I’m Not Sticking To It!” Court Rules that Deprive Unpublished Opinions of Precedential Authority Distort the Common Law*, 79 *Wash. U. L.Q.* 1253, 1269-70

declaring nonprecedential opinions unconstitutional.⁷² Indeed, the Advisory Committee did not even consider any version of the New Rule 32.1 that would prohibit courts from issuing nonprecedential opinions.⁷³ Nonetheless, at least one critic took issue with Judge Kozinski's view that the doctrine of precedent permitted courts to ignore prior cases.⁷⁴

Although *Anastasoff* and *Hart* addressed the constitutionality of denying unpublished opinions precedential effect, rather than the constitutionality of forbidding citation of unpublished opinions,⁷⁵ the ensuing debate among commentators has focused primarily on citation. Accordingly, Parts II.A. and II.B. provide a summary of the arguments advanced for and against no-citation rules. Part II.C. examines the possible effects of permitting citation to unpublished opinions and introduces the three versions of the New Rule 32.1 considered by the Advisory Committee.

A. Arguments for No-Citation Rules

Supporters of no-citation rules contend that these rules are necessary to ensure the smooth functioning of the federal circuits because judges would otherwise spend too much time drafting unpublished opinions.⁷⁶ They further contend that to preserve a level playing field between institutional litigants and those with fewer

(2001) (arguing that nonprecedential opinions violate the doctrines of precedent and stare decisis).

72. See *Symbol Techs., Inc. v. Lemelson Med.*, 277 F.3d 1361, 1367-68 (Fed. Cir. 2002) (adopting Judge Kozinski's reasoning in *Hart*); see also 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, 356-60 (2001) (critiquing Judge Arnold's historical analysis); Jeffrey O. Cooper, *Citability and the Nature of Precedent in the Courts of Appeals: A Response to Dean Robel*, 35 Ind. L. Rev. 423, 427 (2002) (contending that Judge Arnold erroneously constitutionalized horizontal stare decisis); Jon A. Strongman, Comment, *Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value is Unconstitutional*, 50 U. Kan. L. Rev. 195, 211-15 (2001) (concluding that due process, not Article III, provides a constitutional basis for requiring that unpublished opinions be accorded precedential value).

73. See generally Advisory Committee Report, *supra* note 12.

74. See, e.g., Cooper, *supra* note 72, at 428 (arguing that ignoring prior cases creates at least the appearance of arbitrary decision making).

75. See *supra* Part I. Judge Arnold found the denial of precedential effect to unpublished opinions unconstitutional, irrespective of the fact that citation was permitted (though disfavored) under the Eighth Circuit rule. *Anastasoff v. United States*, 223 F.3d 898, 900 (8th Cir.), *vacated as moot en banc*, 235 F.3d 1054 (8th Cir. 2000). After concluding that Article III posed no barrier to issuing nonprecedential opinions, Judge Kozinski addressed only the policy reasons for, but not the constitutionality of, forbidding citation to unpublished opinions. *Hart v. Massanari*, 266 F.3d 1155, 1176-80 (9th Cir. 2001).

76. See *infra* notes 79-90 and accompanying text.

resources, all parties should be prohibited from bringing unpublished opinions to the attention of the courts.⁷⁷

1. No-Citation Rules Are Necessary to Promote Judicial Efficiency

The argument most frequently advanced in favor of no-citation rules is that they promote judicial efficiency.⁷⁸ This argument has two parts: 1) unpublished opinions are necessary to the efficient operation of federal appellate courts, and 2) no-citation rules are necessary to preserve the efficiencies gained by selective publication.

a. *Why Unpublished Opinions Are Necessary*

In *Hart*, Judge Kozinski argued that circuit courts depend on selective publication to develop “a coherent and internally consistent body of caselaw to serve as binding authority for themselves and the courts below them.”⁷⁹ In drafting a precedential opinion, a judge must do a number of things that make the process much more time consuming than writing a nonprecedential opinion.⁸⁰ The judge must sift through and state all the relevant facts while excluding those that are irrelevant; consider all relevant legal rules and policy implications; provide an explanation as to why the court is selecting one of several potentially applicable rules; and phrase the rule with precision and regard for its future application to other constellations of facts.⁸¹ Judge Kozinski wrote: “Writing a precedential opinion, thus, involves much more than deciding who wins and who loses in a particular case. It is a solemn judicial act that sets the course of the law for hundreds or thousands of litigants and potential litigants.”⁸²

No one disputes that federal appellate courts lack the resources to draft precedential opinions in each and every case that comes before them.⁸³ Writing limited opinions that serve only to inform litigants of the rationale behind the court’s decision conserves judicial resources and makes it possible for courts to publish opinions of the requisite quality in appropriate cases.⁸⁴ Judge Kozinski insisted that this practice does not lead to arbitrary decision-making because “formal publication guidelines and judges’ enforcement of them through their

77. See *infra* notes 91-96 and accompanying text.

78. See, e.g., *Hart*, 266 F.3d at 1177; see also Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions*, Cal. Law., June 2000, at 43-44.

79. *Hart*, 266 F.3d at 1176.

80. *Id.*

81. *Id.* at 1176.

82. *Id.* at 1177.

83. *Id.*

84. *Id.*

interactions with each other, keep judges honest in deciding whether or not to publish.”⁸⁵

b. *Allowing Citation to Unpublished Opinions Undermines the Purpose of Selective Publication*

Judge Kozinski further argued that allowing parties to cite unpublished dispositions defeats the purpose of selective publication.⁸⁶ If opinions written merely to explain to litigants how their cases have been decided may be cited as precedent, conscientious judges will necessarily spend more time crafting them.⁸⁷ Furthermore, if judges agree on the result but not the reasoning of a decision, they will generally join an opinion that cannot be cited as precedent.⁸⁸ In the absence of a no-citation rule, however, they are more likely to concur or dissent.⁸⁹ Essentially, Judge Kozinski argued that judges would treat unpublished dispositions as mini-opinions, thereby preventing them from devoting the necessary time to producing opinions of publishable quality and keeping the law of the circuit consistent.⁹⁰

2. No-Citation Rules Promote Unfairness to Litigants

Another defense of no-citation rules is based on the claim that because unpublished opinions are not equally accessible to all litigants, repeat litigants, such as the federal government or insurance companies, may gain an unfair advantage by collecting and using these opinions.⁹¹ Forbidding citation is supposed to level the playing field.⁹²

Assuming a decrease in judicial efficiency, one commentator argues that abolishing no-citation rules would unfairly disadvantage litigants with fewer resources because they have less ability to withstand delays in the adjudication of their cases.⁹³ In civil cases, injured parties—for instance, tort plaintiffs without resources to pay their medical bills—would be pressured to settle on less favorable terms rather than endure protracted litigation.⁹⁴ Habeas corpus cases would be delayed,

85. *Id.* at 1177 n.35 (quoting Stephen L. Wasby, *Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish*, 3 J. App. Prac. & Process 325, 331 (2001)).

86. *Id.* at 1178.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* A disposition is the court's final determination of the case. Black's Law Dictionary 484 (7th ed. 1999). An opinion is the court's written explanation of its decision, usually including a statement of facts, points of law, and rationale. *Id.* at 895.

91. See, e.g., Stienstra, *supra* note 6, at 20 n.40.

92. *Id.* at 21.

93. See Daniel B. Levin, Case Note, *Fairness and Precedent*, 110 Yale L.J. 1295, 1301 (2001) (discussing *Anastasoff*).

94. *Id.* at 1300-01.

unfairly disadvantaging criminal defendants.⁹⁵ Furthermore, the increased time, energy, and money necessary to make use of unpublished opinions, even when the opinions are available electronically, would particularly disadvantage poor, pro se, and public-interest litigants and public defenders.⁹⁶

The arguments in favor of no-citation rules are premised on the belief that judicial efficiency would necessarily decline in the face of free citation to unpublished opinions. Critics of the rules dispute this premise. The next part provides a summary of critics' arguments against no-citation rules.

B. Arguments Against No-Citation Rules

Critics of no-citation rules find the efficiency and unfairness arguments unpersuasive. Selective publication adequately addresses the requirements of judicial efficiency, they argue, without prohibiting citation of unpublished opinions.⁹⁷ Furthermore, the widespread availability of unpublished opinions and the time saved by electronic research minimizes unfairness to litigants.⁹⁸

1. No-Citation Rules Are Not Essential to a Selective Publication Regime

The American College of Trial Lawyers attacked Judge Kozinski's efficiency argument because he failed to offer any evidence or authority to demonstrate that those circuits that allow citation to unpublished opinions have suffered the adverse consequences he predicted.⁹⁹ Judge Kozinski cited no empirical evidence that the Fourth, Sixth, Eighth, and Tenth Circuits,¹⁰⁰ all of which release their unpublished opinions for online publication and permit counsel to cite them, spend more time preparing their unpublished opinions than do the anti-citation circuits that release unpublished opinions for internet

95. *Id.* at 1301.

96. *Id.*; see also William R. Mills, *The Shape of the Universe: The Impact of Unpublished Opinions on the Process of Legal Research*, 22 N.Y.L. Sch. J. Int'l & Comp. L. 59, 71-75 (2003) (asserting that circuit court websites contain only a small fraction of their unpublished opinions and that neither Westlaw nor LEXIS has compiled an exhaustive database of unpublished opinions from any federal circuit); *infra* note 110.

97. See, e.g., Cooper & Berman, *supra* note 4.

98. See, e.g., Shuldberg, *supra* note 4, at 559-60.

99. William T. Hangley, *Opinions Hidden, Citations Forbidden: A Report and Recommendations of the American College of Trial Lawyers on the Publication and Citation of Nonbinding Federal Circuit Court Opinions*, 208 F.R.D. 645, 689-90 (2002); see also *supra* Part II.A.1.

100. Since *Hart* was decided, both the First and D.C. Circuits have modified their rules to allow citation. See 1st Cir. R. 32.3(a)(2); D.C. Cir. R. 28(c).

publication.¹⁰¹ Nor did Judge Kozinski demonstrate that the quality of reporter published opinions in the former group of circuits is lower, or that significantly less time is invested in those opinions, than in the anti-citation circuits.¹⁰²

Judge Kozinski's argument also assumed that if the Ninth Circuit's no-citation rule was abolished, the court would be inundated with briefs citing unpublished opinions.¹⁰³ He presented no evidence, however, that other circuits have been overwhelmed with such citations.¹⁰⁴ Moreover, the American College of Trial Lawyers concluded, it is illogical to think that counsel will rely on unpublished opinions—possibly irritating the court and squandering limited space—unless no published opinion bears on the issue.¹⁰⁵

The Advisory Committee noted that permitting citation should not undermine the efficiency gained by use of unpublished opinions because these opinions are already cited in other fora, read, discussed, and have even been reversed by the Supreme Court.¹⁰⁶ If such scrutiny has not already eroded efficiency gains, permitting citation of unpublished opinions is not likely to do so either, provided the courts are not required to treat unpublished opinions as binding.¹⁰⁷

2. No-Citation Rules Are Not Necessary to Promote Fairness

In addition to rejecting the efficiency argument, critics argue that the availability of unpublished opinions through West's Federal Appendix, Westlaw and LEXIS online,¹⁰⁸ and, imminently, all of the circuit courts own websites,¹⁰⁹ greatly alleviates concerns over unequal access.¹¹⁰ Furthermore, electronic research makes it much easier to

101. The anti-citation circuits are the Second, Seventh, Ninth, and Federal Circuits. Hangle, *supra* note 99, at 689-90.

102. *Id.*

103. *Id.* at 690.

104. *Id.*

105. *Id.*

106. See Advisory Committee Report, *supra* note 12, at 33 (citing *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002) (reversing an unpublished decision of the Federal Circuit); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (reversing an unpublished decision of the Second Circuit)).

107. Advisory Committee Reports, *supra* note 12, at 33. An opinion designated as "unpublished," even if actually published in West's Federal Appendix or on the internet, would be treated as non-binding, while a "published" opinion would be binding. See *supra* notes 10-12 and accompanying text.

108. Except for those rendered by the Fifth and Eleventh Circuits, which must still be obtained from the courts themselves. See Hangle, *supra* note 99, at 654-55.

109. See *supra* note 11 and accompanying text.

110. See generally Shuldberg, *supra* note 4. But see Mills, *supra* note 96, at 70-75. The First, Second, Third, Fourth, Fifth, Eighth, and Tenth Circuits post unpublished opinions on their websites. See <http://www.ca1.uscourts.gov/> (last visited Mar. 24, 2004); <http://www.ca2.uscourts.gov/> (last visited Mar. 30, 2004); <http://www.ca3.uscourts.gov/> (last visited Mar. 30, 2004); <http://www.ca4.uscourts.gov/> (last visited Mar. 24, 2004); <http://www.ca5.uscourts.gov/> (last visited Mar. 30, 2004);

locate relevant precedent despite the great and ever-increasing number of opinions.¹¹¹

Moreover, repeat litigants already use unpublished opinions to their advantage even without citing them in litigation.¹¹² One survey of the heads of six federal government offices responsible for appellate litigation showed that unpublished opinions are circulated to attorneys within the offices and filed for future office reference.¹¹³ The survey also revealed that the offices used unpublished opinions in making litigation and settlement decisions and writing briefs, as well as in determining whether to appeal.¹¹⁴

In addition to taking issue with the arguments in support of no-citation rules, critics contend that no-citation rules wreak a variety of harms on the legal system. Critics of no-citation rules fall into two camps. One camp argues that prohibiting citation of unpublished opinions harms litigants, attorneys, and the integrity of the legal system; a rule allowing unrestricted citation, while recognizing the court's power to accord the opinion whatever weight it deems appropriate, would satisfy these critics.¹¹⁵ The other camp takes the more extreme position that denying precedential effect to appellate opinions (at least within the rendering circuit) poses a risk of arbitrary judicial action; these critics demand a rule that in addition to permitting citation, requires courts to consider unpublished opinions binding.¹¹⁶

3. No-Citation Rules Violate Due Process by Subjecting Individuals to Arbitrary Judicial Action

Critics who argue that denying unpublished opinions binding precedential effect results in arbitrary judicial action invoke the constitutional guarantee of procedural due process.¹¹⁷ Due process,

<http://www.ca8.uscourts.gov/> (last visited Mar. 24, 2004); <http://www.ca10.uscourts.gov/index.cfm> (last visited Mar. 24, 2004). The Sixth, Seventh, Ninth, Eleventh, D.C., and Federal Circuits do not currently post unpublished opinions. See <http://www.ca6.uscourts.gov/> (last visited Mar. 30, 2004); <http://www.ca7.uscourts.gov/> (last visited Mar. 30, 2004); <http://www.ca9.uscourts.gov/> (last visited Mar. 30, 2004); <http://www.ca11.uscourts.gov/> (last visited Mar. 30, 2004); <http://www.cadc.uscourts.gov/> (last visited Mar. 30, 2004); <http://www.fedcir.gov/> (last visited Mar. 30, 2004).

111. See generally Shuldberg, *supra* note 4.

112. Robel, *supra* note 8, at 955-59.

113. See *id.* at 957-59.

114. See *id.*

115. See generally Greenwald & Schwarz, *supra* note 4.

116. See, e.g., Dragich, *supra* note 16, at 797-800; see also Strongman, *supra* note 72, at 211.

117. See Strongman, *supra* note 72, at 211. The Due Process Clause of the Fifth Amendment states "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V; see also Wade, *supra* note 18, at

which essentially requires fairness of process, protects litigants from arbitrary judicial action. Critics claim that selective publication and no-citation rules allow courts to ignore or contradict previous decisions without justification.¹¹⁸ One commentator offered the Fifth Circuit case *Williams v. Dallas Area Rapid Transit*¹¹⁹ as an example of such arbitrary judicial action.¹²⁰ There, the Fifth Circuit held that Dallas Area Rapid Transit (“DART”) lacked immunity as a governmental unit of the state of Texas,¹²¹ a holding that directly conflicted with the same court’s previous unpublished disposition of *Anderson v. Dallas Area Rapid Transit*.¹²²

In *Anderson*, a former employee sued DART, alleging employment discrimination under the Civil Rights Act.¹²³ The district court found that DART, as a political subdivision of the state of Texas, was immune from suit under the Eleventh Amendment.¹²⁴ The Fifth Circuit affirmed the district court’s ruling in an unpublished decision,¹²⁵ which lacked precedential value under Fifth Circuit Rule 47.5.4.¹²⁶ One year later, *Williams* presented the same issue to the district court. Relying on *Anderson*, the district court held that DART was immune from suit under the Eleventh Amendment.¹²⁷ The Fifth Circuit reversed, holding that DART possessed no such immunity,¹²⁸ and rejecting *Anderson* as unpersuasive for failing to properly examine Eleventh Amendment immunity.¹²⁹ Judge Smith, dissenting from the denial of rehearing en banc, questioned the

722 (arguing that the abrogation of a deeply rooted common law practice violates due process).

118. See Strongman, *supra* note 72, at 212.

119. 242 F.3d 315 (5th Cir. 2001).

120. See Strongman, *supra* note 72, at 212-13.

121. *Williams*, 242 F.3d at 322.

122. 180 F.3d 265 (5th Cir. 1999) (per curiam) (table), *cert. denied*, 528 U.S. 1062 (1999); see also Strongman, *supra* note 72, at 212-13.

123. *Anderson v. Dallas Area Rapid Transit*, No. CA3:97-CV-1834-BC, 1998 U.S. Dist. LEXIS 15493, at *2 (N.D. Tex. Sept. 29, 1998), *aff’d*, 180 F.3d at 265 (per curiam).

124. *Id.* at *24; see also Strongman, *supra* note 72, at 213.

125. *Anderson*, 180 F. 3d at 265; see also Strongman *supra* note 72, at 212-13.

126. 5th Cir. R. 47.5.4. The Rule provides:

Unpublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney’s fees, or the like). An unpublished opinion may, however, be persuasive. An unpublished opinion may be cited, but if cited in any document being submitted to the court, a copy of the unpublished opinion must be attached to each document.

Id.

127. *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315, 318 (5th Cir. 2001).

128. *Id.* at 322.

129. *Id.* at 318 n.1.

fundamental fairness of the contradictory treatment of DART in the two cases.¹³⁰

4. No-Citation Rules Undermine Judicial Legitimacy

An idea closely related to due process concerns is the claim that no-citation rules undermine judicial legitimacy.¹³¹ Proponents of this argument tend to disfavor not only no-citation rules, but also selective publication.¹³² One commentator identified five virtues of the precedential system: stability, certainty, predictability, consistency, and fidelity to authority.¹³³ The commentator argued that selective publication and no-citation rules undermine these virtues by promoting decisions within a circuit and developing a secret body of law.¹³⁴

At the core of the judicial legitimacy argument is the belief that cases that make law, and therefore deserve publication, are swept under the rug.¹³⁵ Commentators have cited *Christie v. United States*¹³⁶ and *Anderson*¹³⁷ as two such examples of cases of first impression that nevertheless were designated not for publication.¹³⁸ In another instance, noted by the American College of Trial Lawyers, the Federal Circuit held that the Patent Act of 1952 had not eliminated the defense of prosecution laches but refused to discuss two Federal

130. *Id.* at 263 (Smith, J., dissenting). Judge Smith wrote:

What is the hapless litigant or attorney, or for that matter a federal district judge or magistrate judge, to do? The reader should put himself or herself into the shoes of the attorney for DART. That client is told in May 1999, by a panel of this court in *Anderson*, that it is immune, on the basis of a "comprehensive and well-reasoned opinion." Competent counsel reasonably would have concluded, and advised his or her client, that it could count on Eleventh Amendment immunity.

Then, in March 2000, in the instant case, a federal district judge, understandably citing and relying on the circuit's decision in *Anderson*, holds that "[i]t is firmly established that DART is a governmental unit or instrumentality of the state of Texas." In February 2001, however, a panel, containing one of the judges who was on the *Anderson* panel, reverses and tells DART that, on the basis of well-established Fifth Circuit law from 1986, it has no such immunity. One can only wonder what competent counsel will advise the client now.

Id. at 261 (modification in original); see also *infra* Part III.

131. See, e.g., Dragich, *supra* note 16, at 775-81.

132. See *id.*; see also Robel, *supra* note 8, at 959-62; Schiavoni, *supra* note 16, at 1877-88.

133. Dragich, *supra* note 16, at 777-81.

134. *Id.* at 785-91.

135. See Hangley, *supra* note 99, at 680-84.

136. No. 91-2375 MN, 1992 U.S. App. LEXIS 38446, at *1 (8th Cir. Mar. 20, 1992) (per curiam). *Christie* was the unpublished opinion cited by the appellant in *Anastasoff*. See *supra* Part I.A.

137. 180 F.3d 265 (5th Cir. 1999) (per curiam) (table), *cert. denied*, 528 U.S. 1062 (1999).

138. See, e.g., Hangley, *supra* note 99, at 674-75.

Circuit unpublished opinions that held the opposite and had been relied on by practitioners for fifteen years.¹³⁹

Although defenders of no-citation rules maintain that unpublished opinions involve rote application of law to facts, commentators point out that cases are withheld from publication when judges agree on the reasoning but not on the result.¹⁴⁰ Judge Kozinski admitted as much in *Hart v. Massanari*.¹⁴¹ If three judges cannot agree on the reasoning in a case, the commentators argue, the case probably requires more than a routine analysis and should at the very least be subject to discussion, if not accorded binding status.¹⁴²

Another critique of no-citation rules, based on First Amendment concerns, focuses not on due process or judicial legitimacy but rather on the restraint of litigants' ability to press their cases.¹⁴³ Proponents of this argument accept the practice of selective publication but reject the attendant no-citation rules.¹⁴⁴

5. No-Citation Rules Violate the First Amendment's Free Speech and Free Petition Clauses

Some commentators contend that rules prohibiting the citation of unpublished opinions constitute an impermissible content-based restriction of speech that violates the First Amendment's Free Speech Clause.¹⁴⁵ These commentators claim that no-citation rules target the content of expression and, therefore, cannot survive First Amendment scrutiny because they fail to advance a compelling governmental

139. See *Symbol Techs., Inc. v. Lemelson Med.*, 277 F.3d 1361 (Fed. Cir. 2002), discussed in Hangle, *supra* note 99, at 681-82.

140. See Greenwald & Schwarz, *supra* note 4, at 1148-49; Hangle, *supra* note 99, at 681.

141. 266 F.3d 1155, 1178 (9th Cir. 2001). Judge Kozinski wrote:

[A]lthough three judges might agree on the outcome of the case before them, they might not agree on the precise reasoning or the rule to be applied to future cases. Unpublished concurrences and dissents would become much more common, as individual judges would feel obligated to clarify their differences with the majority, even when those differences had no bearing on the case before them. In short, judges would have to start treating unpublished dispositions—those they write, those written by other judges on their panels, and those written by judges on other panels—as mini-opinions.

Id.; see also *supra* Part II.A.1.b.

142. See Greenwald & Schwarz, *supra* note 4, at 1148-49; see also Hangle, *supra* note 99, at 683; Cooper & Berman, *supra* note 4, at 741-43 (discussing the value in according unpublished circuit court opinions less precedential weight but arguing for free citation to unpublished opinions).

143. See Greenwald & Schwarz, *supra* note 4, at 1161-66; see also Salem M. Katsh & Alex V. Chachkes, Developments and Practice Notes, *Constitutionality of "No-Citation" Rules*, 3 J. App. Prac. & Process 287, 289, 306 (2001).

144. See Greenwald & Schwarz, *supra* note 4, at 1136; see also Katsh & Chachkes, *supra* note 143, at 288-89.

145. See Greenwald & Schwarz, *supra* note 4, at 1161-65.

interest by the most narrowly tailored means available.¹⁴⁶ Assuming the necessity of selective publication, there are less restrictive means available to effect its purpose: Judges may refuse to accord precedential weight to unpublished opinions.¹⁴⁷ No-citation rules are not essential to the fair administration of justice.¹⁴⁸ At best, no-citation rules save the court time that it would spend reviewing unpublished opinions.¹⁴⁹ While rules that penalize frivolous legal arguments are justified as a necessary means of preventing abuse of the judicial process, rules that “forbid the truthful communication of relevant information to a governmental body solely because certain members of that body *might* find it bothersome to consider” are not.¹⁵⁰

These commentators further argue that the no-citation rules violate the Free Petition Clause.¹⁵¹ The Free Petition Clause guarantees the right “to petition the Government for a redress of grievance[s],”¹⁵² and, as the Supreme Court has held, includes the “right of access to the courts.”¹⁵³ No-citation rules impair a litigant’s ability to present her “grievances” to a federal appellate court effectively.¹⁵⁴ For example, where a district court may have decided a case differently than it would have if confronted with an unpublished appellate opinion on point, the Free Petition Clause requires that the reviewing court permit a litigant to argue that the reasoning of the unpublished opinion is persuasive.¹⁵⁵

Even assuming no-citation rules do not violate the First Amendment,¹⁵⁶ commentators argue that they cause a hardship to practitioners, who must navigate a Byzantine system of rules and risk sanction if they mistakenly cite an unpublished opinion in the wrong circumstances.¹⁵⁷

146. *See id.* at 1164. The Supreme Court applies a “strict scrutiny” test to content-based restrictions of speech: The restriction must advance a compelling governmental interest using the least restrictive means available. *Id.*

147. *Id.* at 1165.

148. Katsh & Chachkes, *supra* note 143, at 320.

149. *Id.* at 321.

150. Greenwald & Schwarz, *supra* note 4, at 1164-65.

151. *See id.* at 1165-66; *see also* Katsh & Chachkes, *supra* note 143, at 297.

152. U.S. Const. amend. I.; *see also* Greenwald & Schwarz, *supra* note 4, at 1165.

153. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *see also* Katsh & Chachkes, *supra* note 143, at 297.

154. *See* Greenwald & Schwarz, *supra* note 4, at 1166.

155. *Id.*

156. The Supreme Court rejected a First Amendment challenge to a no-citation rule without comment in 1976 but has not since confronted the issue. *Do-Right Auto Sales v. U.S. Court of Appeals for the Seventh Circuit*, 429 U.S. 917 (1976). Petitioner “sought a writ of mandamus against the Seventh Circuit for having struck a citation to an unpublished opinion from the petitioner’s appellate brief.” Greenwald & Schwarz, *supra* note 4, at 1162 n.113.

157. *See, e.g.*, Hangle, *supra* note 99, at 653.

6. The Need for Uniformity in the Courts of Appeals

The American College of Trial Lawyers described the current patchwork of no-citation rules as “confusing, perilous, and getting worse.”¹⁵⁸ The Advisory Committee noted that the rules place a special hardship on attorneys who practice in more than one circuit.¹⁵⁹

There are three categories of citation rules currently in force in the circuits. The first category, adopted by the Second, Seventh, Ninth, and Federal Circuits, forbids citation of unpublished opinions, except in related cases for purposes of *res judicata*, collateral estoppel, and law of the case.¹⁶⁰ Opinions issued by the D.C. Circuit prior to January 1, 2002, also fall within this category.¹⁶¹

The second category of rules disfavors but allows citation where counsel believes (1) an unpublished disposition has “precedential” or “persuasive” value with regard to a material issue in the case at hand, and (2) there is no published opinion that would serve as well.¹⁶² The First, Fourth, Sixth, Eighth, and Tenth Circuits all fall within this group;¹⁶³ the Fourth and Sixth Circuits allow citation for the opinion’s full “precedential value,” while the First, Fifth, Eighth, and Tenth Circuits limit citation to the opinion’s “persuasive” value.¹⁶⁴ It is far from clear what the Fourth and Sixth Circuits mean by “precedential” value; indeed, an opinion is designated not for publication precisely because a panel has determined the opinion does not establish, alter, modify, clarify, or explain a rule of law.¹⁶⁵ “Persuasive” means that

158. *Id.* at 647.

159. See Advisory Committee Report, *supra* note 12, at 31.

160. 2d Cir. R. 0.23; 7th Cir. R. 53(b)(2)(iv); 9th Cir. R. 36-3(a); Fed. Cir. R. 47.6(b).

161. D.C. Cir. R. 28(c)(1)(A).

162. See 1st Cir. R. 32.3(a)(2); 4th Cir. R. 36(c); 6th Cir. R. 28(g); 8th Cir. R. 28(i); 10th Cir. R. 36.3.

163. 1st Cir. R. 32.3(a)(2); 4th Cir. R. 36(c); 6th Cir. R. 28(g); 8th Cir. R. 28(i); 10th Cir. R. 36.3.

164. 1st Cir. R. 32.3(a)(2); 4th Cir. R. 36(c); 6th Cir. R. 28(g); 8th Cir. R. 28(i); 10th Cir. R. 36.3. The Fifth Circuit rules differ depending on the date of the decision: One rule forbids citation to unpublished opinions issued prior to January 1, 1996, which nevertheless are considered precedent; the other permits citation to opinions published thereafter, which are not precedent. 5th Cir. R. 47.5(3); 47.5(4). The Fifth Circuit does not release unpublished opinions for publication in West’s Federal Appendix or for online publication in Westlaw or LEXIS. Hangle, *supra* note 99, at 654.

165. See, e.g., 4th Cir. R. 36(a). The Rule provides:

Opinions delivered by the Court will be published only if the opinion satisfies one or more of the standards for publication: i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or ii. It involves a legal issue of continuing public interest; or iii. It criticizes existing law; or iv. It contains a historical review of a legal rule that is not duplicative; or v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.

the reasoning of the unpublished opinion should apply to the case currently before the court on the strengths of its own merits, apart from any precedential claim.¹⁶⁶

The third category, including the Third and Eleventh Circuits, as well as the D.C. Circuit with regard to its opinions issued on or after January 1, 2002, does not impose restrictions on the circumstances in which a party may cite an opinion.¹⁶⁷ The Eleventh Circuit considers unpublished opinions merely persuasive, and the Third Circuit fails to specify how it will treat unpublished opinions.¹⁶⁸ D.C. Circuit Rule 28(c)(1)(B) states that unpublished opinions issued on or after January 1, 2002, may be cited as precedent, but Rule 36(c)(2) states that a panel's decision to issue an unpublished disposition means it believes the opinion lacks precedential value.¹⁶⁹ "In other words," one commentator wrote, in the D.C. Circuit "non-reporter published opinions may or may not be circuit binding."¹⁷⁰

The American College of Trial Lawyers contends that the confusion does not end with the question of citing the circuits' own opinions; practitioners are further burdened by rules that purport to govern the conduct of lawyers in remote fora.¹⁷¹ The Second Circuit prohibits citation of its unpublished opinions in unrelated cases "before this or any other court."¹⁷² The Seventh and Ninth Circuits' no-citation rules explicitly prohibit the citation of their unpublished opinions by or to district courts within their respective circuits.¹⁷³ Other circuits are silent on the territorial reach of their no-citation rules.¹⁷⁴ The Seventh and D.C. Circuits forbid attorneys from citing opinions if citation would be prohibited in the rendering court.¹⁷⁵ The American College of Trial Lawyers proposed that this unduly burdensome and confusing

166. See Stephen R. Barnett, *From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. App. Prac. & Process 1, 11 (2002).

167. 3d Cir. R. 28.3; 11th Cir. R. 36-2; D.C. Cir. R. 28(c)(1)(A) (prohibiting citation to unpublished dispositions prior to January 1, 2002 except for *res judicata*, collateral estoppel, and law of the case). The Eleventh Circuit continues to withhold all its unpublished opinions from LEXIS and Westlaw. See Hanglely, *supra* note 99, at 654.

168. 11th Cir. R. 36-2; 3d Cir. R. 28.3. In December 2001, when the Third Circuit decided to begin releasing its unpublished opinions to Westlaw and LEXIS, Chief Judge Becker stated that: "The court will continue to observe Internal Operating Procedure 5.8, which provides that the court will not cite to non-precedential opinions as authority." Hanglely, *supra* note 99, at 654 (quoting Press Release, Third Circuit Court of Appeals (Dec. 5, 2001)).

169. D.C. Cir. R. 28(c)(1)(B), 36(c)(2).

170. Hanglely, *supra* note 99, at 657.

171. *Id.* at 658.

172. 2d Cir. R. 0.23; see also Hanglely, *supra* note 99, at 658.

173. 7th Cir. R. 53(b)(2)(iv); 9th Cir. R. 36-3(b); see also Hanglely, *supra* note 99, at 659.

174. See Hanglely, *supra* note 99, at 659.

175. 7th Cir. R. 53(e); D.C. Cir. R. 28(c)(2); see also Hanglely, *supra* note 99, at 659.

system be replaced by a uniform rule allowing citation to unpublished opinions for their persuasive value.¹⁷⁶

Despite the flaws in the no-citation regimes, at least one commentator suggested that abolishing no-citation rules could ultimately make matters worse by causing courts to issue more summary orders and oral opinions.¹⁷⁷

C. Possible Effects of Allowing Citation

1. Oral and Per Curiam Summary Orders

Critics who suggest that judges improperly use unpublished opinions to dispose of difficult cases and that unpublished opinions sometimes address novel issues or conflict with existing law, disapprove of summary orders.¹⁷⁸ The precedential value (even in the merely persuasive sense) of a summary order cannot be known because the court gives “only the result and not the reasoning.”¹⁷⁹ A summary order cannot be scrutinized for its soundness and consistency with other precedents.¹⁸⁰ Thus, expanded use of summary orders would worsen the problems caused by selective publication and no-citation rules, with the further disadvantage that the litigants would receive no explanation for the court’s decision.¹⁸¹

Oral opinions, on the other hand, provide reasoned explanations to litigants.¹⁸² One article argued that oral opinions should replace unpublished opinions in certain circumstances and that all other opinions should be published.¹⁸³ In cases in which the result is clearly dictated by well-established precedent—those cases in which unpublished opinions are supposed to be issued—judges should deliver reasoned oral opinions extemporaneously from the bench.¹⁸⁴ The authors cited an experiment in which the American Academy of Judicial Education assembled twenty-six appellate judges, who were presented with bench memoranda and record materials from an actual appeal.¹⁸⁵ After hearing oral arguments, the judges completed a

176. See Hangle, *supra* note 99, at 647.

177. See, e.g., Laretto, *supra* note 71, at 1053-54 (arguing that reformers should be wary of causing courts to issue fewer written opinions).

178. See, e.g., Dragich, *supra* note 16, at 763-64, 785-88. Dragich defines a summary disposition as a judgment of affirmance or reversal absent an explanation of the court’s reasoning. *Id.* at 763.

179. *Id.* at 793.

180. See *id.* at 776.

181. See Laretto, *supra* note 71, at 1054.

182. See Greenwald & Schwarz, *supra* note 4, at 1169, 1172.

183. *Id.*

184. *Id.* at 1169.

185. *Id.* at 1172 (citing Daniel J. Meador, *Toward Orality and Visibility in the Appellate Process*, 42 Md. L. Rev. 732, 742-44 (1983)).

questionnaire about the experience.¹⁸⁶ Twenty-four judges said that they believed it would have been feasible to announce decisions from the bench immediately after arguments or within a few minutes thereafter.¹⁸⁷

Oral opinions could be recorded and provided to the parties in digital format or cassette, and posted on the court's website.¹⁸⁸ The opinions could be transcribed, and, though citable, the authors contend that their informal nature would make them "less forceful precedents than their written counterparts."¹⁸⁹

Oral decision making is already common in federal district courts.¹⁹⁰ If used in the courts of appeals, the authors submit, it will further spare judges the time and energy they spend writing unpublished opinions, time that can be used to write opinions for publication.¹⁹¹ Parties will not be restrained from citing any prior decisions, resources will not be wasted writing opinions of no value, and judges will not be forced to create binding precedent in every case.¹⁹²

2. Are Judges More Likely to Use Oral and Per Curiam Summary Orders in the Absence of No-Citation Rules?

During the Advisory Committee meeting that ultimately resulted in approval of the New Rule 32.1, one committee member argued, "[i]f the Ninth Circuit were forced to permit citation of its nonprecedential opinions, the court would likely issue many fewer such opinions and many more one-word orders."¹⁹³ Although Judge Kozinski's fear of unleashing a flood of citations to unpublished opinions may be exaggerated,¹⁹⁴ even the perception that this will occur may cause some judges to dispose of more cases through oral opinions and per curiam summary orders.¹⁹⁵

A review of the statistics on the use of such dispositions in the federal courts of appeals shows that these dispositions are relatively rare, even in circuits that permit citation to unpublished opinions; nor does there appear to be a significant statistical correlation between

186. *Id.*

187. *Id.*

188. *Id.* at 1169.

189. *Id.* at 1169-70.

190. *Id.* at 1171.

191. *Id.* at 1172.

192. *Id.*; *see id.* at 1155-56, 1170.

193. *See* Minutes of the Fall 2002 Meeting of the Advisory Committee on Appellate Rules, 36-37, Nov. 18, 2002, at <http://www.uscourts.gov/rules/minutes/app1102.pdf> [hereinafter, Advisory Committee Minutes].

194. *See supra* notes 99-104 and accompanying text.

195. This term refers to unsigned opinions that do not expound upon the law as applied to the facts or state the reasons for the result. *See* 2002 Annual Report, *supra* note 14, at tbl. s-3; *see also* Greenwald & Schwarz, *supra* note 4, at 1168.

more lenient citation regimes and frequency of oral and per curiam summary orders.¹⁹⁶ Of 27,758 cases terminated on the merits in the circuit courts during the year ending September 30, 2002 (excluding the Federal Circuit), the courts issued only twenty-six oral opinions.¹⁹⁷ It is interesting to note that the Sixth Circuit, which has one of the more lenient citation rules,¹⁹⁸ rendered all twenty-six of these opinions.¹⁹⁹ It is difficult to draw any conclusions from this fact, however, because none of the other circuits that allow citation issued oral opinions.²⁰⁰

The circuit courts issued per curiam summary orders with greater frequency, in 1,181 of 27,758, or roughly four per cent of cases.²⁰¹ The Eighth Circuit, which allows but disfavors citation of unpublished opinions, issued per curiam summary orders at the highest rate, in thirty-two per cent of all cases terminated on the merits; the First and Fourth Circuits, whose rules are similar to the Eighth Circuit's, never disposed of cases in that manner.²⁰² Of the other circuits that permit, but disfavor, citation to unpublished opinions, the Fifth Circuit issued per curiam summary orders in one per cent of cases, and the Tenth Circuit issued only one per curiam summary order.²⁰³ The D.C. Circuit, which allows unrestricted citation to unpublished opinions issued after January 1, 2002, never issued per curiam summary orders; the Eleventh Circuit, which permits free citation of unpublished opinions, issued per curiam summary orders in nine per cent of its cases.²⁰⁴ Of the circuits that prohibit citation, the Second Circuit issued no per curiam summary opinions; the Ninth Circuit disposed of less than one per cent, and the Seventh Circuit disposed of four per cent of their cases without signed, explanatory opinions.²⁰⁵

D. *The Proposed Amendment to FRAP*

The weight of commentary arguing against no-citation rules ultimately led to the Advisory Committee's consideration of a uniform rule permitting citation to unpublished opinions.²⁰⁶ The Advisory Committee considered three alternative rules before voting

196. See 2002 Annual Report, *supra* note 14, at tbl. s-3.

197. *Id.*

198. The Sixth Circuit allows unpublished opinions to be cited for their "precedential" value (if there is no published opinion that would serve as well). See *supra* note 162 and accompanying text.

199. See 2002 Annual Report, *supra* note 14, at tbl. s-3.

200. See *id.*

201. See *id.*

202. See *id.*; see also *supra* note 163 and accompanying text.

203. See 2002 Annual Report, *supra* note 14, at tbl. s-3; see also *supra* note 163 and accompanying text.

204. See 2002 Annual Report, *supra* note 14, at tbl. s-3; see also *supra* notes 167, 168.

205. See 2002 Annual Report, *supra* note 14, at tbl. s-3; see also *supra* note 160.

206. See Advisory Committee Report, *supra* note 12.

to approve Alternative B as New Rule 32.1.²⁰⁷ This Note now describes each alternative.

1. Alternative A

Alternative A specifically authorizes courts of appeals to designate an opinion as nonprecedential. It provides that:

An opinion designated as non-precedential may be cited for its persuasive value, as well as to support a claim of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees, or a similar claim. A court must not impose upon the citation of non-precedential opinions any restriction that is not generally imposed upon the citation of other sources.²⁰⁸

The Advisory Committee ultimately rejected Alternative A because members believed that to endorse nonprecedential opinions would be tantamount to taking sides in the debate over the constitutionality of nonprecedential opinions.²⁰⁹ The Committee thought it would be inappropriate to use a procedural rule to embrace one side of the constitutional controversy.²¹⁰

2. Alternative C

Alternative C mirrors the category of rules that disfavors but permits citation to unpublished opinions in limited circumstances.²¹¹ In addition to use in related cases,

[a]n opinion designated as non-precedential may be cited for its persuasive value regarding a material issue, but only if no precedential opinion of the forum court adequately addresses that issue. Citing non-precedential opinions for their persuasive value is disfavored.²¹²

3. Alternative B

Alternative B does not specifically authorize the designation of opinions as nonprecedential, but in other respects is identical to Alternative A.²¹³ The Advisory Committee voted to approve

207. See Advisory Committee Minutes, *supra* note 193, at 23-39.

208. Advisory Committee Minutes, *supra* note 193, at 23.

209. See *id.* at 35.

210. See *id.*

211. See *supra* notes 24-26 and accompanying text; see also Advisory Committee Minutes, *supra* note 193, at 31.

212. Advisory Committee Minutes, *supra* note 193, at 32.

213. *Id.* at 28.

Alternative B with some textual revisions.²¹⁴ As published for comment, the New Rule 32.1 reads:

(a) Citation Permitted. No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.

(b) Copies Required. A party who cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database must file and serve a copy of that opinion, order, judgment, or other written disposition with the brief or other paper in which it is cited.²¹⁵

One commentator criticized the New Rule 32.1 for failing to unambiguously preserve the circuits’ individual choices of what weight to accord unpublished opinions.²¹⁶ Professor Stephen R. Barnett of the University of California, Berkeley, suggested that the language, “No prohibition or restriction may be imposed upon the citation of [unpublished] judicial opinions” could be interpreted to mean that rules limiting the precedential weight of citation of unpublished opinions impermissibly restrict citation of these opinions.²¹⁷ Furthermore, Professor Barnett contended that although the Advisory Committee Notes criticized rules that disfavor citation of unpublished opinions, it is not clear that such rules would qualify as “restrictions” under the New Rule 32.1.²¹⁸

Professor Barnett also argued that the circuits should remain free to keep in place rules disfavoring citation to unpublished opinions.²¹⁹ To this end, and for the sake of simplicity, Barnett proposed an alternative rule, which would provide: “Any opinion, order, judgment, or other disposition by a federal court may be cited to or by any court.”²²⁰

As the arguments for and against allowing citation to unpublished opinions show, the primary conflict between the opposing sides concerns litigant autonomy and judicial accountability on the one hand, versus judicial autonomy on the other hand.

214. *Id.* at 39.

215. See Advisory Committee Report, *supra* note 12, at 28-29. The Committee Notes define “generally imposed” as restrictions that apply to all sources, such as citation format. See *id.* at 32.

216. See Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. App. Prac. & Process, 473, 490-91 (2003).

217. *Id.* at 490.

218. *Id.* at 491.

219. *Id.* at 496-97.

220. *Id.* at 491.

III. A PRAGMATIC SOLUTION

New Rule 32.1 attempts to forge a compromise between critics and supporters of no-citation rules. The Advisory Committee rejected both the broadest and narrowest alternative formulations in favor of a rule that strikes a balance between litigant and judicial autonomy. This part analyzes each of the alternatives considered by the Advisory Committee in light of the arguments for and against no-citation rules presented in Part II. Of course, none of the alternatives considered by the Advisory Committee would satisfy all critics or supporters of the no-citation rules. For those who contend that to deny binding precedential effect to federal appellate opinions violates the Constitution or threatens judicial legitimacy, the New Rule 32.1 does not go far enough.²²¹ On the other side of the spectrum, any uniform rule that permits citation of unpublished opinions will antagonize those who equate citation with diminishing judicial efficiency.²²² This part argues that although it fails to address the potential for increasing use of summary orders (thus undermining judicial accountability), Alternative B is, nonetheless, the most pragmatic solution in light of the arguments enumerated in Part II. If the New Rule 32.1 is ultimately enacted, the Judicial Conference should resolve to study patterns of summary orders in the circuits, and to take further action if there is a dramatic increase in the issuance of such orders.

A. *Alternative A*

Alternative A is most palatable to defenders of unpublished opinions because it explicitly endorses their use.²²³ It is also consistent with the original recommendation of the Judicial Conference, namely that the federal circuit courts should refrain from publishing opinions that are not of "general precedential value."²²⁴ Given that no circuit court accords its unpublished opinions binding precedential authority, however, this provision adds little—except possibly some reassurance to judges who worry that eliminating no-citation rules will lead to the abolition of nonprecedential opinions.²²⁵

B. *Alternative C*

Given the predominance of rules that disfavor but permit citation of unpublished opinions in certain circumstances, Alternative C may seem the most natural choice.²²⁶ The Advisory Committee properly concluded, however, that there is no persuasive reason to subject

221. See *supra* Part II.B.3.-4.

222. See *supra* Part II.A.1.b.

223. See Advisory Committee Minutes, *supra* note 193, at 23.

224. See Report of the Judicial Conference 1964, *supra* note 2, at 11.

225. See Advisory Committee Minutes, *supra* note 193, at 35.

226. See *supra* Part II.B.6.

unpublished opinions to citation restrictions that do not apply to other nonprecedential sources.²²⁷ Parties will, as a practical matter, refrain from citing unpublished opinions where binding authority supports a contention.²²⁸ Moreover, restricting citation may spawn satellite litigation over whether a party's citation of a particular opinion was appropriate.²²⁹

C. *Alternative B*

Alternative B adequately addresses most of the arguments advanced against no-citation rules.²³⁰ The rule would remove all restrictions on a party's ability to cite unpublished opinions, thus promoting First Amendment freedoms,²³¹ as well as easing hardships practitioners face in keeping track of the many different restrictions among the circuits.²³² The fact that a court is at liberty to disregard any of its prior decisions remains troubling under the due process and judicial analyses recounted in Parts II.B.3. and II.B.4. Nonetheless, allowing citation to unpublished opinions will minimize the risks of arbitrary judicial action.²³³ Citing an unpublished opinion puts the court on notice that it has previously resolved a case in a particular way, thus presumably, the court will consider whether to treat the prior decision as precedential in a similar factual setting.²³⁴ As long as litigants have the ability to use all prior decisions persuasively, a reviewing court will be less likely to render a decision that is arbitrarily inconsistent with one of its prior opinions.²³⁵

For instance, in *Williams v. DART*,²³⁶ which has been criticized as arbitrary,²³⁷ the Fifth Circuit provided a justification for the apparent inconsistency between its holding and a prior unpublished opinion.²³⁸ The *Williams* court rejected *Anderson v. DART* as unpersuasive for failing to properly examine Eleventh Amendment immunity.²³⁹ Furthermore, the district court's decision turned on a different issue than in *Anderson*—specifically, DART was not a “person” and the plaintiff therefore failed to state a claim under 42 U.S.C. § 1983.²⁴⁰

227. See Advisory Committee Report, *supra* note 12, at 27; see also Barnett *supra* note 216, at 493-97 (analyzing the meaning of “restrictions”).

228. See Barnett *supra* note 216, at 493-497.

229. See *id.*

230. See *supra* Part II.B.

231. See *supra* Part II.B.5.

232. See *supra* Part II.B.6.

233. See *supra* Parts II.B.3.-4.

234. See *supra* Parts II.B.3.-4.

235. See *supra* Parts II.B.3.-4.

236. 242 F.3d 315 (5th Cir. 2001).

237. See *supra* note 120 and accompanying text.

238. See *supra* Part II.B.3.

239. *Williams*, 242 F.3d at 318 n.1 (citing *Anderson v. DART*, No. 3:97-CV-1834-BC, 1998 WL 686782 (N.D. Tex. Sept. 29, 1998)).

240. *Id.*

Thus, the district court's finding that DART was immune was merely erroneous dicta.²⁴¹ The Fifth Circuit's affirmance was not an endorsement of the district court's error, thus *Williams* is not arbitrarily inconsistent with *Anderson*.

Moreover, one consequence of nonpublication—the possibility that a subsequent circuit panel, unaware of a prior published decision, might reach a contrary result in a similar case²⁴²—is diminished when parties are able to bring the earlier disposition to the attention of the court.²⁴³ The technology that makes widespread access to unpublished opinions possible also serves to protect against the development of a secret body of law.²⁴⁴

Furthermore, Alternative B fully addresses the First Amendment argument.²⁴⁵ As long as parties are not restricted in their ability to cite unpublished opinions, neither their freedom of expression nor their freedom to petition the government for redress of grievances is infringed.²⁴⁶ Even if no-citation rules do not violate the First Amendment, it is nonetheless desirable to allow parties to cite prior decisions for whatever value they may have. Courts can use their powers to sanction frivolous arguments if parties abuse freedom of citation by citing unpublished opinions with no relevance.²⁴⁷

In light of the wide accessibility of unpublished opinions, repeat litigants will not gain an unfair advantage if unpublished opinions are citable without restriction.²⁴⁸ Litigants with greater resources will have an advantage over those with fewer resources due to the former's ability to pay for additional research.²⁴⁹ This advantage, however, is no different in nature than the advantages wealthy litigants already gain from their ability to hire the best lawyers and pay for other litigation costs. The argument that inevitable delays will unfairly disadvantage poor litigants is based on the erroneous assumption that free citation will compromise judicial efficiency, which is not likely to occur.²⁵⁰

Although Judge Kozinski's efficiency argument is not borne out by any empirical evidence that allowing citation to unpublished opinions will undermine the operation of the circuit courts,²⁵¹ there is still reason for concern that allowing citation of unpublished opinions may

241. *Id.*

242. *See supra* Part II.B.4.

243. *See supra* Part II.B.3. The Fifth Circuit rule allows unpublished opinions to be cited for their persuasive value. *See supra* note 163 and accompanying text.

244. *See supra* Parts II.B.2, II.B.4.

245. *See supra* Part II.B.5.

246. *See supra* Part II.B.5.

247. *See supra* note 150 and accompanying text.

248. *See supra* Part II.B.5.

249. *See supra* Part II.A.2.

250. *See supra* Parts II.A.2, II.B.1.

251. *See supra* Part II.B.1.

cause judges to issue more per curiam summary orders.²⁵² The best argument for free citation is that there is a category of unpublished opinions that should be published because they address novel issues or modify existing law, and only by allowing citation will these cases come to light, thereby promoting judicial accountability.²⁵³ There is an inherent tension, however, between this argument and the strongest argument against citation—that judges may choose not to explain the reasons for their rulings rather than be confronted with citations to their unpublished opinions. The Advisory Committee did not express concern that the pro-citation rule could lead to an increase in summary orders, and the New Rule 32.1 does not address this tension.

Nonetheless, given the absence of a meaningful correlation between the most lenient citation rules currently in force and rates of oral opinions and per curiam summary orders, it is not likely that these forms of dispositions will skyrocket in response to a uniform rule permitting citation.²⁵⁴ The Judicial Conference should resolve to study the effects of the new rule after it is implemented.²⁵⁵ Although an increase in the delivery of oral opinions may actually improve the administration of justice in the courts of appeals,²⁵⁶ a sharp increase in the use of per curiam summary orders would be cause for alarm.²⁵⁷ The Judicial Conference could then consider adopting uniform guidelines for the issuance of summary orders.

Professor Barnett's criticism of the language of the New Rule 32.1 does not reach the core tension between promoting judicial accountability through free citation on the one hand, and discouraging judges from writing opinions at all in certain types of cases on the other hand. Nonetheless, Professor Barnett made a legitimate point that the term "restriction" is ambiguous.²⁵⁸ Is a local rule *disfavoring* citation a restriction?²⁵⁹ Only to the extent that such a rule forbids citation in certain circumstances (for instance, where counsel fails to show "persuasive value with respect to a material issue that has not been addressed in a published opinion"), Professor Barnett argued, could such a rule be considered a restriction.²⁶⁰ If considered a restriction, the local rule would then be impermissible under the New Rule 32.1.²⁶¹ Other local rules that discourage citation are "merely

252. See *supra* Part II.C.1.

253. See *supra* Part II.B.4.

254. See *supra* Part II.C.2.

255. See *supra* note 1.

256. See *supra* Part II.C.1.

257. See *supra* Part II.C.2.

258. Barnett, *supra* note 216, at 490-91.

259. *Id.*; see also *supra* Part II.B.6.

260. Barnett, *supra* note 216, at 493.

261. *Id.*

hortatory," and therefore do not violate the New Rule 32.1.²⁶² Professor Barnett suggested that requiring circuits to parse and redraft their rules to bring them into conformance with the New Rule 32.1 could diminish the necessary political support from the circuits for its enactment.²⁶³ On the other hand, there is no reason for the local circuit rules to disfavor citation to unpublished opinions. As a practical matter, parties are not likely to cite unpublished opinions unless there is no published, hence binding, case on point; for this reason, citation of unpublished opinions will remain "disfavored" by the parties themselves.²⁶⁴ Moreover, no circuit disfavors citation to other nonbinding legal authorities such as law review articles. Thus, it would be better to interpret, following the Committee Notes, any rule that disfavors or discourages citation as a "restriction," and require the courts to rewrite their rules.²⁶⁵

With regard to according unpublished opinions persuasive value only, it is important to remember that the court's decision of what weight to accord an opinion does not restrict the party who cites the opinion. Parties are free to cite many sources, such as cases, treatises, law review articles, social science research, and newspaper reports, which are not binding precedential authority. Thus, unpublished opinions are treated no differently than these other nonbinding sources.

CONCLUSION

An effective solution to the no-citation controversy must address concerns of litigant autonomy, judicial accountability, and judicial autonomy. The New Rule 32.1 should be adopted as approved because it preserves a balance between these competing ideas by pragmatically allowing litigants to cite all opinions, and giving courts the freedom to choose what weight to accord to unpublished opinions. The Advisory Committee carefully weighed the arguments on both sides of the debate and correctly concluded that allowing citation to unpublished opinions will not decrease judicial efficiency or unfairly disadvantage litigants. A uniform rule permitting citation will simplify federal appellate practice and will alleviate concerns that courts are censoring litigants. Most importantly, it will alter the perception that unpublished opinions develop secret law and subject litigants to arbitrary judicial action. To further advance this goal, the Judicial Conference should study the effect of the New Rule 32.1 after its enactment. If the use of summary orders increases in the circuits that currently prohibit citation of unpublished opinions, the Judicial

262. *Id.*

263. *Id.*

264. *See supra* note 228 and accompanying text.

265. *See* Advisory Committee Report, *supra* note 12, at 32.

Conference should consider adopting uniform guidelines for the issuance of summary orders.

Notes & Observations