

CONSTITUTIONALITY OF “NO-CITATION” RULES

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I. INTRODUCTION

Most federal appellate courts designate a large percentage of their opinions “unpublished,” stripping them of some, or more often all, of their precedential value.¹ According to the Administrative Office of the United States Courts, seventy-eight percent of federal appellate decisions in 1999 were placed into this phantom zone.² Moreover, over half of these federal courts have promulgated rules prohibiting citation to and courtroom discussion of their unpublished opinions.³ The courts adopt these “no-citation” rules ostensibly to protect classes of litigants and the courts themselves from being prejudiced by the fact that so many opinions are unreported. These no-citation rules, however, raise serious constitutional issues that the courts and commentators have not adequately or squarely addressed.

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1. See 1st Cir. R. 36 (2000); 2d Cir. R. 0.23 (1994); 3d Cir. I.O.P. 5.1-5.8 (2000); 4th Cir. I.O.P. 36(a)-(c), 36.3 (1995); 5th Cir. R. 47.5 (1999); 6th Cir. R. 206, I.O.P. 206 (1998); 7th Cir. R. 53 (2000); 8th Cir. I.O.P. IV B, App. I (2000); 9th Cir. R. 36-1 to 36-6 (1995); 10th Cir. R. 36.1-36.3 (1999); 11th Cir. R. 36-1 to 36-3 (2000); D.C. Cir. R. 36 (2000); Fed. Cir. R. 47.6 (1999).

2. *Judicial Business of the United States Courts: 1999 Annual Report of the Director* 49, tbl. S-3 (available at <<http://www.uscourts.gov/judbus1999/supps.html>>).

3. See 1st Cir. R. 36(b)(1), 36(b)(2)(F) (2000); 2d Cir. R. 0.23 (2000); 3d Cir. I.O.P. 5.8 (2000); 7th Cir. R. 53(b)(2)(iv) (2000); 8th Cir. I.O.P. IV B (2000); 9th Cir. R. 36-3 (2000); Fed. Cir. R. 47.6(b) (2000). Some of these rules allow citation to unpublished cases in related cases for purposes of establishing *res judicata*, collateral estoppel, or law of the case.

In *Anastasoff v. United States*,⁴ a panel of the court held that the Eighth Circuit's rule allowing the discretionary designation of opinions as "not for publication" and as nonprecedential violated basic axioms as to the nature and limits of the judicial power under Article III and therefore was unconstitutional. We applaud the panel's pointed examination of a practice that has largely escaped the constitutional scrutiny it deserves.

However, we believe that the reasoning of the Eighth Circuit panel's opinion does not necessarily provide the full or even the correct explanation for the constitutional infirmities in nonpublication rules and their attendant no-citation rules. We note some of our reservations below.⁵ This article, however, is

4. 223 F.3d 898 (8th Cir. 2000), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (en banc). This article was commenced prior to both of the Eighth Circuit's rulings in *Anastasoff*.

5. Judge Richard S. Arnold's welcome and thoughtful opinion in *Anastasoff* is critically dependent on the proposition that it is unconstitutional for one appellate court panel to render a decision in conflict with that of a prior panel in the same court. *Anastasoff*, 223 F.3d at 904. There may be reason to question this holding. To be sure, all of the circuits have stated that their panels are bound by the decisions of prior panels and that past panel decisions can only be overruled en banc. See e.g. *In re Jaylaw Drug, Inc.*, 621 F.2d 524, 527 (2d Cir. 1980); 3d Cir. I.O.P. 91 (2000). This rule is sometimes called the "law-of-the-circuit" rule or the "rule of interpanel accord." E.g. *U.S. v. Burgos*, 94 F.3d 849, 860 (4th Cir. 1996). Law-of-the-circuit rules make sense, of course, because adherence to them reduces the potential for conflicting decisions within a particular circuit. Until the Eighth Circuit panel's decision in *Anastasoff*, no circuit had granted its law-of-the-circuit rule constitutional status. Cf. *LaShawn v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (holding that "the law-of-the-circuit doctrine is derived from legislation and from the structure" of the circuit court system). It is unclear, at best, whether such rules can be justified squarely on constitutional grounds. The judicial system established by Article III has been designed to *permit* collateral courts to be in conflict: Circuit courts are not regarded as bound by the decisions of other circuits, and district courts in a particular circuit do not regard the decisions of other district judges in that (or any other circuit) as binding. Convenience and prudence may dictate the law-of-the-circuit rule, but it may well lack constitutional status. See *U.S. v. Valencia*, 669 F.2d 37, 37 (2d Cir. 1981) (VanGraafeiland, J., dissenting) ("Although it is unusual for one panel to acknowledge that it is overruling another, a panel may overturn precedent implicitly by simply ignoring it.") (internal citations omitted). Moreover, at least one author has suggested that federal courts can deny a case precedential value by virtue of their power in equity. Evan Schultz, *Gone Hunting: Judge Richard Arnold of the 8th Circuit Has Taken Aim at Unpublished Opinions, but Missed His Mark*, Leg. Times 78 (Sept. 11, 2000).

Our analysis, moreover, leads us to conclude that the most pernicious aspect of non-publication rules lies in the courts' further efforts to prohibit appellants from talking or arguing about unpublished decisions. As Judge Arnold put it, "[C]ourts are saying to the bar: 'We may have decided this question the opposite way yesterday, but this does not bind us today, and, what's more, you cannot even tell us what we did yesterday.'" *Anastasoff*,

limited to the following issue: Assuming, *arguendo*, that some or all court rules permitting opinions to be designated as non-precedential are constitutional, can the additional citation prohibition—often justified as a necessary adjunct to a policy of limited publication—pass constitutional muster? For two basic reasons, we think it cannot.

First, citation prohibitions interfere with a litigant's First Amendment right of speech and petition. By preventing courtroom citation and discussion of relevant and often important historical facts—i.e., the issuance of an opinion resolving a dispute on specific facts and for stated reasons—citation prohibitions diminish a litigant's ability to petition and advocate his cause before the federal judiciary. Under prevailing constitutional criteria, governmental restraints on speech and petition are valid only if the proscribed speech is

no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.⁶

Yet, as shown below, the countervailing social interest in order and morality assertedly served by citation prohibitions is minor, at best.

On the other hand, by prohibiting discussion of its own opinions, a court labors under a self-inflicted judicial amnesia that obscures the richness and history of its jurisprudence. Citation prohibitions prevent aggrieved persons from bringing whole categories of facts to the attention of the branch of government charged with resolving disputes. At the same time, such rules undermine the credibility of and respect for the judicial system, as they constitute powerful tools that busy courts can and do use to limit their accountability.

Importantly, non-publication and no-citation rules have not been limited in their application to cases involving mundane facts or legal principles that are unquestionably well settled. The irony is that such rules would be unnecessary to deal with such

223 F.3d at 904. Stated otherwise, the evils condemned by Judge Arnold, in terms of designating various decisions as non-precedential, may well be adequately ameliorated by doing away with citation prohibitions.

6. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

cases, because, by definition, they would rarely be cited anyway. Rather, the appellate courts have been using the no-publication and no-citation rules with increasing frequency in cases raising issues of first impression that are of major public and legal significance.⁷

Second, as addressed in Section IV, citation prohibitions violate the separation of powers and are ultra vires the federal courts' Article III powers. Courts have the inherent power to issue rules of practice and procedure that promote the just and prompt disposition of the cases before them. Such rules may affect the location, speed, or cost of a case, but not its disposition. By this authority courts can, for example, require that litigants' briefs be double-spaced or even dismiss a case on forum non conveniens grounds. Citation prohibitions, however, weaken a fundamental tool of courtroom advocacy—the unfettered citation to and discussion of historical facts and, arguably persuasive, even if non-binding, pronouncements and writings. Instead of promoting the fair disposition of cases, no-citation rules can interfere with their fair disposition, and, as such, may be promulgated, if at all, only by the legislative branch. It is the purpose of this article to fill in the analytical gaps from prior discussions of this issue, and specifically, to provide a framework for appreciating the reasons why these rules should be revoked as unconstitutional under the First Amendment and Article III. First, we will look at the history of no-citation rules.

II. HISTORY OF NO-CITATION RULES

Judge Arnold's opinion in *Anastasoff* is remarkable for its portrayal of our judicial system as guilty of the same kinds of ill-conceived miscalculations that the courts daily unveil in the context of administrative agencies and large corporations. The

7. See *infra* nn. 64-75 and accompanying text. A recent example is the Federal Circuit's designating as nonprecedential, nonpublishable, and noncitable, its decision to hear an interlocutory appeal in a case challenging a practice known as "submarine patenting" that has long vexed and been of great interest to the patent bar. See *Symbol Techs., Inc. v. Lemelson Med., Educ. & Research Found., Ltd. Partn.*, 2000 WL 1300430 (Fed. Cir. Sept. 1, 2000). Indeed, it would not be inconsistent with the historical practice of that appellate court to designate the opinion it may reach as nonprecedential as well.

federal judiciary is obviously subject to the same bureaucratic susceptibilities as other large organizations. A peek into the evolution of no-citation rules illustrates this point. The well-intended rules emerged from a judicial system characterized by dispersed authority, limited public accountability, and lack of a core of management responsibility.

Most commentators trace the no-citation rules of the various federal appellate courts back to the Judicial Conference of the United States ("Judicial Conference").⁸ In 1964, the Judicial Conference, citing "the rapidly growing number of published opinions . . . and the ever increasing practical difficulty and economic cost of establishing and maintaining accessible private and public law library facilities," adopted a resolution asking federal court judges to "authorize the publication of only those opinions which are of general precedential value."⁹

Picking up on the Judicial Conference's cue, in 1971 the Federal Judicial Center ("Center") observed in its Annual Report that there was "widespread agreement that too many opinions are being printed and published."¹⁰ The Center took two steps to address the situation. First, in 1971, it brought together distinguished lawyers, law professors, and judges to form the Advisory Counsel on Appellate Justice ("Advisory Counsel") to study the appellate process. Second, in 1972, the Center recommended to the Judicial Conference that it ask each circuit to review its publication practices and modify them to reduce the number of published opinions and, significantly, to restrict citation to these unpublished decisions.¹¹ The Judicial Conference adopted these recommendations and forwarded them

8. See e.g. Donna Stienstra, *Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals* (Fed. Jud. Ctr. 1985). There have been intermittent calls to restrict the publication of decisions, however, since the 1930s. E.g. William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167, 1168-69 nn. 12-13 (1978).

9. Stienstra, *supra* n. 8, at 5-6 (quoting *Reports of the Proceedings of the Judicial Conference of the United States* 11 (1964)).

10. Federal Judicial Center, *Annual Report* 7-8 (1971).

11. Board of the Federal Judicial Center, *Recommendation and Report to the April 1972 Session of the Judicial Conference of the United States on the Publication of Courts of Appeals Opinions* (1972).

to the circuits, requesting that the circuits respond with plans for limiting the publication of opinions.

Shortly thereafter, in 1973, the Advisory Counsel published a report, described by one commentator as the “seminal document in the movement toward an official policy of limiting publication,”¹² that proposed a model rule for nonpublication and recommended the adoption of an associated prohibition on citation to unpublished decisions.¹³ By 1974, all the circuits had responded to the Judicial Conference with their own plans for implementation of the Advisory Counsel’s recommendations.¹⁴ Although the various plans were hardly uniform, as had been the Counsel’s hope, it conditionally accepted them.¹⁵

Shortly thereafter, the Commission on Revision of the Federal Court Appellate System, a body that Congress created to study problems relating to the appellate courts, held hearings on the circuits’ plans for nonpublication and citation to unpublished opinions.¹⁶ This commission, often called the Hruska Commission after its chairman, Senator Roman L. Hruska, heard testimony from judges, attorneys, and law professors.¹⁷ A review of the testimony reveals that, although the circuits’ nonpublication plans proved relatively uncontroversial,¹⁸ the proposed no-citation rules were not. Specifically, testifying witnesses identified an equity-of-access dilemma: If citation of

12. Daniel N. Hoffman, *Nonpublication of Federal Court Opinions*, 6 Justice Sys. J. 405-06 (1981).

13. Federal Judicial Center, *Standards for Publication of Judicial Opinions: A Report of the Committee on Use of Appellate Court Energies of the Advisory Counsel on Appellate Justice* (1973).

14. Stienstra, *supra* n. 8, at 8.

15. *See id.* at 8-9.

16. Pub. L. No. 92-489, 86 Stat. 807 (1972), as amended by Pub. L. No. 93-420, 88 Stat. 1153 (1974), in *Hearings before the Commission on Revision of the Federal Court Appellate System, Second Phase*, vol. 1 (1974) & vol. 2 (1975); *see also* Stienstra, *supra* n. 8, at 9 n. 21.

17. *See* Stienstra, *supra* n. 8, at 9.

18. *See id.* at 9-10:

A majority of the legal community agreed that not every case warrants a published opinion, and it was clear to many that limiting the number of opinions published could bring substantial relief to both the judiciary and the bar. Proponents of this position noted that limited publication would reduce the pressure on judges to write polished prose and the burden of restating the facts, as well as reduce the costs attorneys incur in purchasing the reports and in researching an ever-increasing body of law.

unpublished opinions were permitted, then resource-poor attorneys would be at a disadvantage, unable to access the large body of case law physically located only at the courthouse. Yet if citation of unpublished opinions were prohibited, then the circuits risked creating a "hidden body of law" that, even if not actually cited, would be "known and possibly relied upon by judges and some litigators but unknown to the majority of the bar."¹⁹

It is at this point that the process became the victim of a lack of clear leadership. In its final report in 1975, the Hruska Commission appeared to reject the asserted basis for such rules:

Whether or not unpublished opinions may be cited by litigants, judges may feel the obligation to maintain consistency between cases presenting essentially the same legal issues. For the judges to attempt consistency by examining their own prior judgments, while denying counsel the right to cite such cases compounds the difficulties, whether counsel's purpose is to distinguish the cases or to urge that they be followed. In addition, there are some who consider it undesirable and indeed improper for a court to deny a litigant the right to refer to action previously taken by the court.²⁰

Nonetheless, the Hruska Commission did not make a final recommendation. Instead, it passed the ball back to the Judicial Conference, calling it the "appropriate forum" for the resolution of these issues.²¹

The Judicial Conference, however, did not return to these issues until 1978, when it issued its final statement on the circuits' plans. Not only did it miss the constitutional issues obviously raised by the proposals, it clearly did not wish to take on any kind of real leadership role. It essentially did nothing, stating:

At this time we are unable to say that one opinion publication plan is preferable to another, nor is there a sufficient consensus on either legal or policy matters, to enable us to recommend a model rule. We believe that

19. *See id.* at 10-11.

20. Commn. on Revision of the Fed. Ct. App. Sys., *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 259 (1975).

21. *Id.*

continued experimentation under a variety of plans is desirable.²²

Since 1978, the Judicial Conference has been silent on this issue.

In 1990, the Federal Courts Study Committee, a fifteen-member panel appointed by Chief Justice Rehnquist at the direction of Congress, briefly returned to this debate. It recommended that the Judicial Conference should again “review policy on unpublished court opinions in light of increasing ease and decreasing cost of database access.”²³

Since the Judicial Conference’s last words on the issue in 1978, practitioners have intermittently opposed no-citation rules. In 1983, two bar panels—the Federal Bar Counsel’s Committee on Second Circuit Courts and the Committee on Criminal Law of the Association of the Bar of the City of New York—commented on the Second Circuit’s Rule 0.23, which prohibits citation to unpublished opinions.²⁴ The former, in a short report, wrote that “the rule should not be abolished” but proposed an amendment authorizing citation of summary orders.²⁵ The latter, in a lengthy report, concluded that “[t]he excessive use of unpublished and uncitable opinion undermines the ability of the Court to fulfill its vital function” and recommended that the Second Circuit allow citation to unpublished opinions.²⁶ In 1998, another committee of the Association of the Bar of the City of New York, this time the Committee on Federal Courts, made its opposition to the Second Circuit’s no-citation rule known.²⁷

Moreover, practitioners have sought judicial review of no-citation rules. The United States Supreme Court has twice passed on opportunities to rule on the constitutionality of no-citation rules. In *Do-Right Auto Sales v. United States Court of*

22. Subcommittee on Fed. Jurisdiction of the Committee on Ct. Admin., *Opinion Publication Plans in the United States Courts of Appeals* 10-13 (Jud. Conf. of U.S. 1978).

23. Federal Courts Study Committee, *Report of the Federal Courts Study Committee* 130-31 (Apr. 2, 1990); see also Federal Courts Study Committee, *Working Papers and Subcommittee Reports, July 1, 1990* vol. 1, 83-93 (1990); Federal Courts Study Committee, *Working Papers and Subcommittee Reports, June 1, 1990* vol. 2, 97 (1990).

24. See 2 Bar Panels Ask Change in Second Circuit Court Rule: City Bar, Federal Bar Council Committees, 189 N.Y. L.J. 1 (May 20, 1983) (reprinting in full the reports of both bar panels).

25. *Id.*

26. *Id.*

27. Committee on Federal Courts, *Report of the Committee on Federal Courts on the Second Circuit’s Rule Regarding Citation to Summary Orders* (July 17, 1998).

Appeals for the Seventh Circuit,²⁸ petitioners sought review of the Seventh Circuit's ruling striking their citation of an unpublished decision. The Supreme Court, however, denied leave to file petitions for writs of mandamus and prohibition. In *Bowder v. Director, Department of Corrections of Illinois*,²⁹ the Court granted certiorari on several issues, including the propriety of a circuit's no-citation rule, but did not address the rule in its decision.³⁰

It has largely been the academic community that has questioned the two-tiered system of case law.³¹ But the

28. 429 U.S. 917 (1976).

29. 434 U.S. 257 (1978).

30. *Id.* at 258, 259 n. 1. In *Jones v. Superintendent, Va. State Farm*, 465 F.2d 1091 (4th Cir. 1972), the circuit court addressed a closely related topic: whether its memoranda of decision (summary orders on pro se appeals) could be denied precedential value. The court held that they could be, conceding that

any decision is by definition a precedent, and . . . we cannot deny litigants and the bar the right to urge upon us what we have previously done. But because memorandum decisions are not prepared with the assistance of the bar, we think it reasonable to refuse to treat them as precedent

Id. at 1094. Unfortunately, the Fourth Circuit did not elaborate just why "any decision is by definition a precedent." *Id.*; see also *People v. Valenzuela*, 86 Cal. App. 3d 427, 443 (2d Dist. 1978) (Jefferson, J., dissenting) (defending California's no-citation rule).

31. E.g. Paul D. Carrington et al., *Justice on Appeal* 35-41 (West 1976); Keith H. Beyler, *Selective Publication Rules: An Empirical Study*, 21 Loy. U. Chi. L.J. 1 (1989); Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?* 50 S.C. L. Rev. 235, 247-48 (1998) (listing twenty-three reasons why the practice of issuing unpublished and uncitable decisions is bad); Martha 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, 802 (1995); David Dunn, Student Author, *Unreported Decisions in the United States Courts of Appeals*, 63 Cornell L. Rev. 128 (1977); Paul Marcotte, *Unpublished but Influential*, 77 ABA J. 26 (Jan. 1991); Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. Mich. J.L. Reform 119, 120 (1994); Richard L. Neumeier, *Unpublished Opinions: Their Threat to the Appellate System*, 17 Brief 22, 40 (Spring 1988); Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 Am. U. L. Rev. 909, 928 (1986); William L. Reynolds & William M. Richman, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273, 284 (1996); William L. Reynolds & William M. Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 Duke L.J. 806, 809; William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167, 1205 (1978); Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Court of Appeals*, 87 Mich. L. Rev. 940, 946 (1989); Philip Shuman & Alan Gelfand, *The Use of Local Rule 21 in the Fifth Circuit: Can Judges Select Cases of "No Precedential Value"?* 29 Emory L.J. 195

academics' consistent criticism of nonpublication and no-citation rules has rested almost exclusively on policy grounds rather than constitutional ones. Two authors have suggested in passing that citation prohibitions may violate the First Amendment,³² but there has been no extensive analysis of why that might be so. Similarly, there have been glancing assertions in two publications that no-citation rules unconstitutionally undermine *stare decisis*—the basic rationale of Judge Arnold's decision in *Anastasoff*.³³ However, we submit that this argument skirts the more fundamental issues.³⁴ Finally, although two articles have suggested that citation prohibitions and nonpublication rules may offend the separation of powers,³⁵ both fail to put forward the most compelling arguments.³⁶ We will

(1980); Stienstra, *supra* n. 8, at 5; *see also Natl. Classification Comm. v. U.S.*, 765 F.2d 164, 173 n. 2 (D.C. Cir. 1985) (Wald, J., writing separately) (discussing various criticisms of the practice of issuing unpublished opinions); *but see* Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 Ohio St. L.J. 177 (1999).

32. Carpenter, *supra* n. 31; Neumeier, *supra* n. 31.

33. *See* Arthur B. Spitzer & Charles H. Wilson, *The Mischief of the Unpublished Opinion*, 21 Litig. 3 (Summer 1995); Neumeier, *supra* n. 31.

34. Simply, collateral *stare decisis* is a principle with no teeth. Courts need not follow the precedent set by a collateral court, and rarely feel constrained to do so when the relevant precedent is logically unsound. *See Payne v. Tennessee*, 501 U.S. 808, 828 (1991) ("Although adherence to the doctrine of *stare decisis* is usually the best policy, the doctrine is not an inexorable command. This Court has never felt constrained to follow precedent when governing decisions are unworkable or badly reasoned, particularly in constitutional cases, where correction through legislative action is practically impossible.") (discussing direct *stare decisis*) (internal citation omitted); *Smith v. Allwright*, 321 U.S. 649, 665 (1944) ("[W]hen convinced of former error, this Court has never felt constrained to follow precedent.") (discussing direct *stare decisis*).

35. *See* William M. Richman & William L. Reynolds, *The Supreme Court Rules for Reporting of Opinions: A Critique*, 46 Ohio St. L.J. 313, 320 (1985); Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 Harv. Civ. Rights-Civ. Libs. L. Rev. 109 (1995).

36. Slavitt asserts, without citation:

In addition to undermining the appearance of justice, nonpublication interferes with the separation of powers between the judicial and political branches. Because nonpublication often hides the actual state of the law, it may substantially reduce the possibility of legislative reversal.

Slavitt, *supra* n. 35, at 133. However, no court has held that, nor does the author offer any analysis to support his assertion that "hiding the actual state of the law" interferes with the separation of powers. Indeed, as discussed below, the court can issue its decision orally, without a written opinion, which is an act that quite legitimately "hides the actual state of the law" far more than any citation prohibition.

Richman and Reynolds, on the other hand, give a more detailed critique. They assert that "a common law court that is not bound by its own decisions has, in some sense, ceased

now look at the First Amendment and Article III and discuss why the no-citation rules should be revoked as unconstitutional.

III. FIRST AMENDMENT

The first of the two reasons that no-citation rules are unconstitutional is that they violate the First Amendment. The First Amendment issues raised by no-citation rules can be viewed from the perspective of the Petition Clause or the Free Speech Clause. The analysis proceeds identically under both. The Petition Clause of the First Amendment states that Congress shall make no law abridging "the right of the people peaceably . . . to petition the Government for a redress of grievances."³⁷ The Supreme Court has held that this right extends to all departments of the government and includes the "right of access to the courts."³⁸ This First Amendment

to act purely as a court and may be exercising power that is decidedly nonjudicial." Richman & Reynolds, *supra* n. 35, at 321. Generally, it is true that courts follow precedent while, in contradistinction, the legislature has almost unfettered freedom to ignore precedent (save constitutional constraints). Yet, as discussed above, a court is not acting improperly (or like a legislature) when it rules contrary to a collateral court. It may be more troubling that no-citation rules permit trial courts to ignore an unpublished appellate mandate.

Nonetheless, for two reasons, a trial court that rules contrary to an uncitable appellate decision is not exercising a "decidedly legislative function." First, a trial court is still highly constrained from acting like a legislature: It is still bound by the published common law and by statutory law. Second, and more important, any aberrant trial court decision is still subject to review by an appellate court that itself is not constrained to follow the decisions of collateral courts—so if the trial court's putatively "legislative" opinion is indeed illegitimate, it will be reversed. Thus the argument that a trial court acts like a legislature when it issues an opinion contrary to an uncitable appellate decision is belied by the fact that such a court acts no more like a legislature than does one that commits reversible error, an act that cannot itself be condemned as unconstitutional.

37. U.S. Const. amend. I.

38. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *Crowder v. Sinyard*, 884 F.2d 804, 811 (5th Cir. 1989); see also *Pizzolato v. Perez*, 524 F. Supp. 914 (E.D. La. 1981); *In re N.C. Trading*, 586 F.2d 221 (Cust. & Pat. App. 1978). Courts have also located as the source of this right of access to the courts in "the Privileges and Immunities Clause of Article IV, section 2, and the Due Process Clauses of the Fifth and Fourteenth Amendments." *Monsky v. Moraghan*, 127 F.3d 243, 246 (2d Cir. 1997); see also *Simmons v. Dickhaut*, 804 F.2d 182, 183 (1st Cir. 1986) (listing several sources of authority for right of access to courts). These other sources of authority are implicated when the state interferes with access through the courts in ways other than the strict suppression of speech, such as the alleged destruction of materials useful in a prisoner's appeal. See *Morello v. James*, 810 F.2d 344, 345-47 (2d Cir. 1987).

right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression . . . this right is implicit in “[t]he very idea of government, republican in form.”³⁹

Thus, where government action allegedly interferes with the right of petition through the suppression of speech, the claim is “generally subject to the same constitutional analysis” as a freedom of speech claim.⁴⁰

The Court’s decision in *Cox Broadcasting Corporation v. Cohn*⁴¹ is instructive and illustrates the relevant constitutional criteria. In *Cox*, the father of a deceased rape victim brought an action against a broadcasting company and others to recover damages for an invasion of the father’s right of privacy. The invasion, the father alleged, occurred when the television broadcasting company, in contravention of a Georgia statute, identified his daughter as the victim when covering her rapist’s trial. The Court found, however, that the father’s action could not proceed. It held that a state may not, consistent with the First Amendment (as applied through the Fourteenth Amendment),

39. *McDonald v. Smith*, 472 U.S. 479, 482 (1985) (quoting *U.S. v. Cruikshank*, 92 U.S. 542, 552 (1876)) (internal citations omitted).

40. *Wayte v. U.S.*, 470 U.S. 598, 610 n. 11 (1985); see also *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993); *Day v. South Park Indep. Sch. Dist.*, 768 F.2d 696, 701 (5th Cir. 1985) (“[Petitioner] assumes that, when a government employer deals with its own employees, the protection afforded by the petition clause is entirely discrete from and broader than the shield afforded by the other clauses of the first amendment, a premise that is undermined by the Supreme Court’s repeated references to these clauses as being overlapping.”); *Gray v. Lacke*, 885 F.2d 399, 412 (7th Cir. 1989) (“[C]ourts analyze an alleged violation of the petition clause in the same manner as any other alleged violation of the right to engage in free speech. Therefore, in deciding whether a public employer has wrongfully deprived an employee of his right to petition the government, our inquiry must begin with whether the petition touched upon a matter of public concern by looking at the content, form, and context of the petition.”) (internal citations omitted); *Belk v. Town of Minocqua*, 858 F.2d 1258, 1261 (7th Cir. 1988) (“To accept petitioner’s claim of absolute immunity would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable and there is no sound basis for granting greater constitutional protection to statements made in a petition . . . than other First Amendment expressions.”) (quoting *McDonald*, 472 U.S. at 479); *Hoffmann v. Mayor of Liberty*, 905 F.2d 229, 233 (8th Cir. 1990) (“While we recognize that the right of petition can be exercised differently from the right of free speech, as the first amendment is implicated in this case, we conclude that the petition clause provides no lesser or greater guarantee of free expression than the speech clause.”).

41. 420 U.S. 469 (1975).

impose sanctions on the accurate publication of a rape victim’s name obtained from judicial records that are open to public inspection.⁴²

The Georgia statute’s cause of action for invasion of privacy imposed a sanction on “pure expression,” defined as “the content of a publication—and not conduct or a combination of speech and nonspeech elements.”⁴³ The government may proscribe “pure expression,” the Court held, only in certain limited situations. That is—as the Court had established in 1942 and has repeated in numerous opinions thereafter—the government may impose sanctions for expressions made in defiance of social values and morality.⁴⁴

In *Cox Broadcasting*, because the “social value” of the targeted expression outweighed the “social interest” served by an invasion of privacy statute, the state legislation could not survive First Amendment scrutiny.⁴⁵

Federal court no-citation rules are, quite clearly, acts of government that are directly subject to First Amendment scrutiny.⁴⁶ They target the content of expression. To be constitutional, the “social interest in order and morality” served by no-citation rules must outweigh their “social value as a step to truth.”⁴⁷ Yet, as will be shown below, citation prohibitions utterly fail this balancing test. The target expression, the discussion of unpublished cases, is hardly of “slight social

42. *Id.*

43. *Id.* at 495.

44. *See id.* (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (footnote omitted)); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992); *Texas v. Johnson*, 491 U.S. 397, 430 (1989) (Rehnquist, C.J., dissenting); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986); *McDonald*, 472 U.S. at 487 (Brennan, J., concurring); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504 (1984).

45. *Cox*, 420 U.S. at 495.

46. *See In re R.M.J.*, 455 U.S. 191, 206-07 (1982) (holding Missouri rule restricting lawyer advertising to certain categories of information and sometimes certain language unconstitutional; lawyer’s advertising was not misleading, and restriction was not reasonably necessary to further substantial interest); *Bates v. State Bar of Arizona*, 433 U.S. 350, 379, 384 (1977) (holding Arizona rule banning attorney advertising unconstitutional; “proffered justifications” for rule given by state bar were inadequate to justify “suppression of all advertising by attorneys”); *see also* 21 C.J.S. *Courts* § 126 (1990) (“A court [rule] is subject to limitations based on reasonableness and conformity to constitutional and statutory provisions, and their validity will be tested by the same standards applicable to statutes.”).

47. *Cox*, 420 U.S. at 495.

value.”⁴⁸ At the same time, the “social interest in order and morality”⁴⁹ is at best only marginally served by no-citation rules. Because citation rules dampen pure expression, the “social interest in order and morality” served by no-citation rules must be weighed against the “social value as a step to truth”⁵⁰ of the expression sanctioned.

*A. The Asserted Justifications for the No-Citation Rules, in
Terms of Furthering the Interest in Social Order,
Are Weak at Best*

Courts and commentators have offered three rationales for citation prohibitions:⁵¹

- (1) *necessity* (without such rules, the purposes of selective publication would be frustrated);
- (2) *lack of clarity* (unpublished memoranda and opinions should not be cited because they may not disclose fully the rationale of the court’s decision); and
- (3) *otherwise unfair* (only litigants with deep pockets can access unpublished decisions, thus without the rule, smaller firms and solo practitioners would be disadvantaged).

These three justifications appear wholly inadequate to support the imposed preclusion of speech. Each justification is discussed in turn below.

*1. No-Citation Rules Are Not Necessary to Implement the
Alleged Benefits of Selective Publication Policies*

Commentators generally cite four purposes of selective publication of unpublished opinions:⁵²

48. *Id.*

49. *Id.*

50. *Id.*

51. See Martineau, *supra* n. 31, at 145; Kirt Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 Cal. L. Rev. 541, 549-50 (1997); 1st Cir. R. 36 (2000).

52. See Martin, *supra* n. 31, *passim*; Martineau, *supra* n. 31, at 120; Nichols, *supra* n. 31, at 928.

(1) *conservation of judicial resources* (lawyers and courts can spend less time wading through duplicative or unimportant decisions);

(2) *increased court productivity* (it takes significant time to write a full decision, and courts simply could not write full decisions in all cases);

(3) *reduction of costs* (courts and lawyers need not spend money buying case reporters that are full of unimportant decisions); and

(4) *greater emphasis to published opinions* (decisions should only be necessary where the court establishes a new rule of law; expands, alters, or modifies an existing rule; involves a legal issue of continuing public interest; criticizes existing law; or resolves a conflict of authority).

For the most part, however, even accepting these arguments as legitimate, no-citation rules do not appear necessary to give them effect.

The argument that unpublished opinions allow courts and the bar to save time otherwise spent reviewing duplicative or unimportant cases is only slightly furthered by citation prohibitions. It is true that citation prohibitions allow lawyers and courts to ignore unpublished opinions with the confidence that they have not overlooked binding precedent. There are two reasons, however, why this concern is minimal. First, for many issues, there are few on-point but uncitable appellate decisions, so the time it takes to review these decisions is short. For the most part, the myth that there exist great batches of redundant unpublished appellate cases is true only in certain discrete areas of law where meritless cases are litigated even to appeal—e.g., cases involving prisoners and social security claimants.⁵³ Yet even if these cases were citable, courts and practitioners would not waste their time plowing through them for subtle shades of precedent, but would understand, guided by experience or treatises, that the case law is well settled. Second, in practice, citation prohibitions hardly ease the case-review burden on the

53. See Federal Courts Study Committee, *Report March 12, 1990* 86 (“[S]ome categories of appeal—particularly those involving aliens, prisoners, and social security claimants—are decided in published opinions only infrequently.”); Robel, *supra* n. 31, at 955 (“[U]npublished opinions tend to cluster in subject-matter areas.”).

prudent practitioner. Practitioners often review uncitable cases to mine them for new ideas. A prudent lawyer also reviews unpublished cases, lack of precedential value aside, because they indicate how the appellate court has ruled in the past and thus might rule in the future. Moreover, it behooves counsel to review unpublished opinions because they still may influence a court that reads (or remembers deciding) them itself.⁵⁴ Thus, citation prohibitions may further slightly the conservation of judicial resources, but this justification for citation prohibitions is weak.

The second argument—that unpublished opinions increase court productivity—is not materially forwarded by citation prohibitions. A court may be more inclined to issue a short opinion (intended only for the parties at bar) where it is sure that future parties could not cite it; in these circumstances, a court in its opinion may assume familiarity with the facts or issue an opinion limited to a single, very narrow point of law. Alternatively, a court may feel less compelled to carefully review its choice of language when future courts will not be interpreting a decision. For two reasons, however, citation prohibitions are not *necessary* to keep such abbreviated or less-than-perfectly worded opinions from being misunderstood by posterity. First, a court can, with nothing more than a sentence or two, explain the boundaries of its opinion. A court can, for example, state that “familiarity with the facts is assumed,” or it can warn that the opinion is not to be interpreted beyond the limited legal issue addressed therein. Second, in the unlikely event that an appellate court finds itself unable to craft such an

54. See *Mohr v. Jordan*, 370 F. Supp. 1149, 1154 (D. Md. 1974) (“In citing these three Memorandum Decisions, this Court is aware . . . that memorandum decisions ordinarily should not be treated as precedent However, here . . . all [memoranda] flatly hold[] that [the law] requires the crediting of time spent in jail.”); *Curley v. Bryan*, 362 F. Supp. 48, 52 n. 2 (D.S.C. 1973) (“The court cites *Gatling*, an unreported memorandum decision, with some trepidation. . . . [W]hile *Gatling*, in the strictest sense, may not have stare decisis control over the instant case, this court thinks the principle stated there remains valid and should be applied to the case at bar.”) (internal citations omitted); *Durkin v. Davis*, 390 F. Supp. 249, 254 (E.D. Va. 1975) (“Although the Court is mindful of the Fourth Circuit’s admonition that memorandum decisions are not to be accorded precedential value, the legal trend evinced by these four memorandum decisions . . . leads the Court to the conclusion that it is now the law in this circuit.”) (internal citations omitted). In 1976, the Fourth Circuit amended its rules, allowing unpublished dispositions to have precedential value. 4th Cir. R. 18(d) (1982) (now 36(c) (1995)). See *infra* n. 58.

abbreviated opinion, it need not issue an opinion at all (an act that would spare even more judicial resources). "[T]he courts of appeals . . . have wide latitude in their decisions of whether or how to write opinions,"⁵⁵ and thus a "litigant's right to have all issues fully considered and ruled on by the appellate court does not equate to a right to a full written opinion on every issue raised."⁵⁶ If, in fact, a decision in a particular case is obvious and clearly based on well-settled law, the opinion can and should be briefly stated, and there should be no basis for worry that citation of such an opinion will cause confusion or unduly burden subsequent tribunals, if we assume, as we can, the existence of a judiciary that is by and large quite competent. If the ostensible concern has to do with redundant opinions on well-settled issues, only the most incompetent of judiciaries would require a no-citation rule as a useful, let alone necessary tool to prevent confusion and inefficiency.

55. *Taylor v. McKeithen*, 407 U.S. 191, 194 n. 4 (1972); see also *Lego v. Twomey*, 404 U.S. 477, 482 n. 6 (1972) (reviewing court of appeals' summary affirmance without comment on its summary nature); *Taylor*, 407 U.S. at 195-96 (Rehnquist, J., dissenting) (criticizing majority's disparaging reference to fact that Fifth Circuit did not write opinion because, dissent recognized, a court of appeals need not do so).

56. *Furman v. U.S.*, 720 F.2d 263, 264-65 (2d Cir. 1983); *U.S. v. Garza*, 165 F.3d 312, 314 (5th Cir. 1999); *U.S. Surgical Corp. v. Ethicon*, 103 F.3d 1554, 1556 (Fed. Cir. 1997). Indeed, "Rule 36 of the Federal Rules of Appellate Procedure . . . expressly contemplates that some appeals will be decided without an opinion." *Furman*, 720 F.2d at 264. *Furman* cites Rule 36:

The notation of a judgment in the docket constitutes entry of the judgment
If a judgment is rendered without an opinion, the clerk shall prepare, sign and enter the judgment following instruction from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment.

Id. (omission in original). The fact that courts may rule without written opinion, however, has not been free from criticism. See e.g. Christopher F. Carlton, *The Grinding Wheel of Justice Needs Some Grease: Designing the Federal Courts of the Twenty-First Century*, 6 Kan. J.L. & Pub. Policy 1, 9-10 (1997) (writing, a bit hyperbolically, that "the practice of allowing a decision without a written opinion has been uniformly condemned by commentators and lawyers"); Nathan Dodell, *On Wanting to Know Why*, 2 Fed. Cir. B.J. 465 (1992). Of course, as noted by Judge Weinstein of the Eastern District of New York,

[A]n articulated discussion of the factors, legal, factual or both, which lead the Court to one rather than to another result, gives strength to the system, and reduces, if not eliminates, the easy temptation or tendency to ill-considered or even arbitrary action by those having the awesome power of almost final review.

Mildner v. Gulotta, 405 F. Supp. 182, 219 (E.D.N.Y. 1975) (Weinstein, J., dissenting), *aff'd*, 425 U.S. 901 (1976) (quoting *NLRB v. Amalgamated Clothing Workers of Am.*, 430 F.2d 966, 972 (5th Cir. 1970)).

The third purpose behind unpublished decisions—that they reduce costs (by reducing the size of published case reporters)—is not furthered by citation prohibitions. Simply, it is the act of designating a decision as unpublished and non-precedential that keeps an opinion out of the reporters; no-citation rules do nothing to reduce the size of reporters. Moreover, in this age of Westlaw and Lexis, those lawyers who are concerned about the expense of reporters need not buy them.

Finally, the fourth purpose behind unpublished opinions—that they give greater emphasis to published opinions—is also not served by citation prohibitions. What gives emphasis to an opinion is the appellate court's designation of it as "unpublished" or "published."⁵⁷ When a court designates an opinion as unpublished, no further sign is needed to convey the message the opinion is not binding and does not carry the precedential weight of a published one. In sum, no-citation rules are not necessary to give effect to the purposes of selective publication in any significant way.

2. No-Citation Rules Are Not Necessary to Overcome the Asserted Lack of Clarity in Unpublished Case Law

The second purported purpose of citation prohibitions—that unpublished memoranda and opinions should not be cited because they do not fully disclose the rationale of the court's decision—seems likewise unsound. As discussed above, courts are fully capable of treating summary decisions on well-settled points with the appropriate, diminished amount of precedential deference. Indeed, several federal appellate courts allow citation to unpublished opinions,⁵⁸ and the Supreme Court has never

57. The terms "published" and "unpublished" are something of a misnomer, since all decisions of the courts of appeals are, strictly speaking, published.

58. 4th Cir. R. 36(c) (1995) (citation to unpublished opinions "disfavored," but allowed, with "precedential value," when "there is no published opinion that would serve as well"); 5th Cir. R. 47.5.3 & 47.5.4 (1999) (unpublished opinions issued on or after January 1, 1996 are not precedent but may be cited as persuasive authority; unpublished opinions issued before January 1, 1996, however, "should normally be cited only when the doctrine of res judicata, collateral estoppel or law of the case is applicable"); 6th Cir. I.O.P. 22.1-22.6 (repealed 1998) (citation to unpublished cases "disfavored," but allowed nonetheless); 10th Cir. R. 36.3 (1999) (citation to unpublished opinion "disfavored," but allowed if "(1) it has persuasive value with respect to a material issue that has not been

promulgated a no-citation rule. The courts in general could take their nod from the Supreme Court, which pragmatically treats its own summary decisions as precedent, albeit precedent with less weight than a decision supported by a full, written opinion.⁵⁹

3. No-Citation Rules Are Not Necessary to Level the Playing Field as between Litigants with Unequal Economic Power

The third purported purpose of citation prohibitions is that, without them, smaller firms and solo practitioners would be unfairly disadvantaged. This argument is based on the fact that unpublished decisions are not put in reporters, and therefore, in theory, are only available to those lawyers with the resources to continually access the large body of precedent physically located only in the courthouse. This theory misjudges the impact of no-citation rules on the small firm and solo practitioner bar, and it also fails to take account of the revolution in computerized and Internet data resources.

It should be noted at the outset that nonpublication rules may actually *increase* the advantage that big firms have. If only big firm lawyers have access to unpublished cases, then only those lawyers can mine those cases for ideas, language, and argument. "[B]ecause the opinions are most often distributed *only* to parties and judges, the frequent litigants will have unique access to a useful source of information known only to them and the judges before whom they appear."⁶⁰

More importantly, with the almost universal use of CD-ROM libraries and on-line resources such as Lexis and Westlaw (and to an increasing degree free Web resources), these fairness

addressed in a published opinion; and (2) it would assist the court in its disposition"); 11th Cir. 36.2 (2000) (unpublished opinions "may be cited as persuasive authority").

59. See *Caban v. Mohammed*, 441 U.S. 380, 390 n. 9 (1979); *Meek v. Pittenger*, 421 U.S. 349, 366-67 n. 16 (1975); *Edelman v. Jordan*, 415 U.S. 651, 671 (1974) ("[T]hese three summary affirmances obviously are of precedential value Equally obviously, they are not of the same precedential value as would be an opinion of this Court treating the question on the merits"); *Richardson v. Ramirez*, 418 U.S. 24, 53 (1974); George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 Mercer L. Rev. 477 (1988). The Fifth Circuit has taken this approach on occasion. See *Peters v. U.S.*, 9 F.3d 344, 346 (5th Cir. 1993) (relying on unpublished precedent); *Hodges v. Delta Airlines, Inc.*, 4 F.3d 350, 355 (5th Cir. 1993) (considering court to be bound by unpublished case because "unpublished opinions [are] binding precedent").

60. Robel, *supra* n. 31, at 955.

concerns are largely outdated. “Unpublished” cases are hardly that: They are available to all through various electronic or other means.⁶¹ This factor led the Federal Courts Study Committee in 1990 to point out that “inexpensive database access and computerized search techniques may reduce inequality problems [of unpublished decisions] enough to warrant revisiting the issue [of publication].”⁶²

In sum, pulling this discussion back into the relevant First Amendment context, the “interest in order and morality” served by citation prohibitions seems unquestionably minor. The various circuits do not need no-citation rules to keep order in their courts. These rules do little to forward the reasons proffered for their existence; to verify this assertion, one need look no further than the fact that numerous courts have successfully gotten by without them.

B. Unpublished Case Law Is Not Without Substantial Value as a Step to Truth

Even assuming the existence of substantial justifications for no-citation rules, they nonetheless will not survive First Amendment challenge unless the benefits outweigh the “social value [of the banned speech] as a step to truth.”⁶³ Apparently, no-citation rules were originally justified on the assumption that the appellate courts would only designate as unpublished those cases in which no new law is established, no law is expanded, altered, or modified, and no existing law is criticized. Under such circumstances, there should be no occasion or reason to cite such cases for any purpose, and the prospect of large firms nonetheless citing them and imposing costs and uncertainty on less well-heeled litigants and on the courts would understandably cause concern.

61. See Shuldberg, *supra* n. 51, at 549-51.

62. Federal Courts Study Committee, *Working Papers and Subcommittee Reports, July 1, 1990* vol. 2, 98 (1990). Further, a circuit court could implement, as some have, measures to otherwise rectify this theoretical inequity. If it does not already, a circuit could put its unpublished rulings in a simple index and make the unpublished decisions available in full in easily accessible repositories of judicial opinions open to all practitioners.

63. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

The fact is, however, that almost from their outset the nonpublication and no-citation rules have been used to bury decisions that under no circumstances can be considered trivial and mundane repetitions of blackletter law. Nor, in any event, has redundancy or repetition ever served as a justification for the prohibition of speech.

As noted earlier, the right of the courts to designate certain opinions as “unpublished” is not the focus of this article. For present purposes, we assume, *arguendo*, that courts may properly deny an opinion some or all its power to bind subsequent courts as *stare decisis*. These assumptions, however, by no means warrant a no-citation rule.

1. Many Unpublished Decisions Are Unique

One of the most fundamental problems with the “harmless error” argument—that no-citation rules are justified because they hide only redundant opinions—is that it speaks in theoretical terms that conflict with actual practice. The prior unpublished Eighth Circuit opinion that the *Anastasoff* panel held it was constitutionally bound to follow *was a case of first impression under the federal tax law*.⁶⁴ And there are numerous unpublished opinions with concurrences and even dissents, indicating that not even the judges of the appellate court found the issues before them uncontroversial.⁶⁵ Unpublished reversals,

64. See *Anastasoff*, 223 F.3d at 899 (citing *Christie v. U.S.*, No. 91-2375MN (8th Cir. Mar. 20, 1992)).

65. See *Pantojas v. Sec. of Health & Human Servs.*, 961 F.2d 1565 (table), 1992 WL 104943 at *3 (1st Cir. May 19, 1992) (Selya, J., dissenting) (finding “the opinion of the court below . . . more persuasive”) (internal citation omitted); *Wheatley v. U.S.*, 201 F.3d 439 (table), 1999 WL 1080121 at *3 (4th Cir. Nov. 30, 1999) (King, J., dissenting) (“the majority has overbroadly applied the ‘Good Samaritan’ defense”); *U.S. v. May*, 202 F.3d 270 (table), 1999 WL 1253078 at *4 (6th Cir. Dec. 17, 1999) (Moore, J., dissenting) (citing decisions of other circuits and stating, “I do not believe that the government has met its burden of [proof]”); *Gomez v. DeTella*, 139 F.3d 901 (table), 1998 WL 60387 at *5 (7th Cir. Feb. 6, 1998) (Rovner, J., dissenting) (implying that majority did not “pay close attention” to evidentiary line between likelihood of guilt and reasonable doubt); *Boston v. Bowersox*, 1999 WL 1143680 (8th Cir. Nov. 26, 1999) (Heany, J., dissenting) (stating that jury selection process of county may be unconstitutional); *Alfaro-Rodriguez v. INS*, 203 F.3d 830 (table), 1999 WL 1091990 at **4-5 (9th Cir. Dec. 2, 1999) (Ferguson, J., dissenting) (petitioner should not have been denied asylum); *Winters v. Transamerica Ins. Co.*, 194 F.3d 1321 (table), 1999 WL 699835 at *6 (10th Cir. Sept. 9, 1999) (Brorby, J., dissenting) (“I strongly disagree” that insurance coverage was appropriate); *O’Connell v. Sec. of Health & Human Servs.*, 217 F.3d 857 (table), 1999 WL 1039699 at *2 (Fed. Cir.

most of which serve as unique clarifications of the law—had the point of law at bar been uncontroversial and straightforward, the district court probably would not have gotten it wrong—also cannot be termed redundant.⁶⁶ Moreover, there are even unpublished cases that are clearly inconsistent with published cases of the same circuit.⁶⁷

Nov. 1, 1999) (Plager, J., dissenting) (stating that a section of the Vaccine Act “violates the Presentment Clause of the Constitution”).

66. See e.g. *Quilichini-Paz v. Ramirez-Soto*, 187 F.3d 622 (table), 1998 WL 1085764 at *2 (1st Cir. Dec. 4, 1998) (per curiam) (district court erred in finding that appellant was not an arm of Puerto Rico for the purpose of Eleventh Amendment immunity); *Demarco v. Sadiker*, 199 F.3d 1321 (table), 1999 WL 1024696 at **1-3 (2d Cir. Nov. 8, 1999) (district court improperly granted summary judgment when it should have instead allowed for discovery on qualified immunity defense); *Mayer v. City of Hackensack Constructions Bd. of App.*, 193 F.3d 514 (table) (3d Cir. Sept. 22, 1999) (no information on decision beyond disposition—reversed); *Girardi v. Heep*, 203 F.3d 820 (table), 2000 WL 1287 at **4-5 (4th Cir. Dec. 30, 1999) (in opinion with dissent, appellant found to have been denied due process by court below); *Jones v. American Council*, 196 F.3d 1258 (table) (5th Cir. Sept. 21, 1999) (no information on decision beyond disposition—reversed); *U.S. v. Dover*, 201 F.3d 441 (table), 1999 WL 1204794 (6th Cir. Dec. 7, 1999) (in extensive decision with dissent, reversing “willful obstruction of justice” sentence enhancement of defendant found guilty of bank fraud); *Braxton v. Amoco Oil Co.*, 202 F.3d 272 (table), 1999 WL 1256565 at *1 (7th Cir. Dec. 22, 1999) (in extensive decision, reversing summary judgment granted against plaintiff who had claimed that his union breached a duty of fair representation and his employer breached a collective bargaining agreement); *Hyatt v. Gammon*, 187 F.3d 641 (table), 1999 WL 627573 at *1 (8th Cir. Aug. 16, 1999) (district court erred in finding timely filed petition untimely); *Lucido v. Compreview, Inc.*, 205 F.3d 1351 (table), 1999 WL 1253221 at *1 (9th Cir. Dec. 22, 1999) (reversing because district court did not afford parties opportunity to brief or argue issue appealed); *Janssen v. Cobe Laboratories, Inc.*, 201 F.3d 448 (table), 1999 WL 1063836 at *1 (10th Cir. Nov. 24, 1999) (in extensive opinion in employment discrimination case, finding that the district court improperly granted summary judgment and costs to defendant); *Olsen v. U.S.*, 196 F.3d 1260 (table) (11th Cir. Sept. 24, 1999) (no information on decision beyond disposition—reversed in part, vacated in part); *Liberty Mut. Ins. Co. v. Lumbermen’s Mut. Cas. Co.*, 172 F.3d 919 (table), 1999 WL 66032 at *1 (D.C. Cir. Jan 20, 1999) (district court erred by not sending attorneys’ fees question to jury and by not granting a motion to dismiss of two parties); *Manchak v. Chem. Waste Mgt., Inc.*, 217 F.3d 860 (table), 1999 WL 1103364 at *1 (Fed. Cir. Dec. 6, 1999) (district court erred in its construction of claims of patent at issue “and thereby improperly found both literal and equivalent infringement”).

67. Compare *U.S. v. Holland*, 510 F.2d 453 (9th Cir. 1975) (published opinion in which “founded suspicion” for investigatory stop treated as question of law), with *U.S. v. Alvarez-Garcia*, No. 74-2789 (9th Cir. Jan 28, 1975) (unpublished opinion where “founded suspicion” was treated as finding of fact), and *U.S. v. Johnson*, No. 74-2552 (9th Cir. Mar. 12, 1975) (unpublished opinion in which there was confusion as to whether “founded suspicion” should be reviewed as finding of law or finding of fact); see also James N. Gardner, *Ninth Circuit’s Unpublished Opinions: Denial of Equal Justice*, 61 ABA J. 1224 (1975) (cataloging inconsistent Ninth Circuit unpublished decisions from 1974 and 1975).

In addition to the prior Eighth Circuit decision at issue in *Anastasoff*, Westlaw abounds with other unpublished cases of first impression.⁶⁸ Such cases leave a district court with two equally unattractive choices.⁶⁹ The district court can, as some have, expressly follow an unpublished decision—even in the face of its lack of precedential value⁷⁰ and citation prohibitions.⁷¹

68. See e.g. *U.S. v. English*, 173 F.3d 852 (table), 1999 WL 123556 at *1 (4th Cir. March 9, 1999) (addressing as matter of first impression—indeed, a matter on which the circuits are split—circumstances under which sentencing under youthful offender statute is an adult conviction under Sentencing Guidelines); *Ronald Mayotte & Assoc. v. MGC Bldg. Co.*, 149 F.3d 1184 (table), 1998 WL 385905 at **1-3 (6th Cir. July 1, 1998) (affirming, but recognizing that district court was the first to deny attorney's fees to a prevailing plaintiff in copyright case because of responsible behavior on part of attorneys in discovery process); *Hampton v. American Plumbing & Sewer, Inc.*, 95 F.3d 1154 (table), 1996 WL 479227 at *1 (7th Cir. Aug. 21, 1996) (addressing as matter of first impression whether Fair Labor Standards Act § 216(b) allows recovery of fees for nontestimonial expert services); *Pelican State Supply Co. v. Cushman, Inc.*, 39 F.3d 1184 (table), 1994 WL 587042 at *1 (8th Cir. Oct. 27, 1994) (“[W]e must predict how the Nebraska Supreme Court would decide this case of first impression under Nebraska law.”); *Moore v. Security-Connecticut Life Ins. Co.*, 139 F.3d 906 (table), 1998 WL 78916 at *6 (9th Cir. Feb. 19, 1998) (predicting state law: “Although the California Supreme Court’s position is unclear, we think that that court would decline [appellant’s] invitation to apply the general rule . . .”); *Medina v. Pacheco*, 161 F.3d 18 (table), 1998 WL 647784 at **4-5 (10th Cir. Sept. 14, 1998) (predicting, as matter of first impression, how New Mexico’s courts would resolve question of whether intentional tort survives unrelated death of plaintiff); *Bruning v. Hirose*, 1998 WL 690851, 48 U.S.P.Q.2d 1934 (Fed. Cir. Sept. 29, 1998) (recognizing that issue of appropriate burden of proof addressed by court was matter of first impression).

69. Some circuits, however, have rules that allow counsel to petition to convert an unpublished case into a published one. The circuit courts hearing motions to publish are as follows: 1st Cir. (R. 36.2(b)(4)); 4th Cir. (I.O.P. 36.5); 5th Cir. (R. 47.5.2); 7th Cir. (R. 53(d)(3)); 9th Cir. (R. 36-4); 11th Cir. (R. 36-2 I.O.P.(5)); D.C. Cir. (R. 36(d)); Fed. Cir. (R. 47.8(c)). These rules allowing counsel and others to petition for a case’s publication do not save no-citation rules from constitutional infirmity. If the Constitution requires that all cases be citable, then there is no justification for rules that allow the court discretion to deny counsel that right. These rules thus only serve to force counsel to waste resources and, possibly, offend the court before which counsel appears by criticizing the court’s decision not to publish. Moreover, citation prohibitions also offend the separation of powers, and these rules do nothing to mitigate that ill.

70. See e.g. *Giese v. Pierce Chem. Co.*, 43 F. Supp. 2d 98, 103-04 n. 1 (D. Mass. 1999) (“When a district court chooses to follow an unpublished opinion, it further explicates its own analysis—always a desirable result—by reference to legal reasoning it considers persuasive albeit not binding. That is what the Court has done here.”); *Mohr v. Jordan*, 370 F. Supp. 1149, 1154 (D. Md. 1974); *Curley v. Bryan*, 362 F. Supp. 48, 52 n. 2 (D.S.C. 1973); *Durkin v. Davis*, 390 F. Supp. 249, 254 (E.D. Va. 1975); see also discussion *supra* n. 54.

71. *People v. Valenzuela*, 86 Cal. App. 3d 427, 439 (2d Dist. 1978) (Jefferson, J., dissenting) (recognizing that this case was not the first in which the Appellate Department of the Superior Court has authorized citation of an unpublished opinion, contrary to the pertinent citation prohibitions).

The second choice is for the district court to inform counsel, as in the case of a Wisconsin district court, that it is obliged to ignore that a higher court had ruled a certain way when faced with the same question.⁷² Yet to do so, as another district court noted, “place[s] the Court in the untenable position of looking to the format of the decision rather than to the ultimate fact that the decision is signed by three learned judges of the Court.”⁷³ Secret law is abhorrent to our system of justice, and our courts should not be required to blind themselves to relevant historical fact.

As Chief Judge Holloway of the Tenth Circuit Court of Appeals has written, “[W]e [judges] are not in as informed a position as we might believe. Future developments may well reveal that the [unpublished] ruling is significant indeed.”⁷⁴ Similarly, in a frank moment, the Second Circuit has admitted its own fallibility, writing that there are circumstances under which its decision not to publish “may not be in the public interest.”⁷⁵ Also, as Justice Stevens of the United States Supreme Court observed in an address before the Illinois State Bar,

[A no-citation rule] assumes that an author is a reliable judge of the quality and importance of his own work product. If I need authority to demonstrate the invalidity of that assumption, I refer you to a citizen of Illinois who gave a brief talk in Gettysburg, Pennsylvania that he did not expect to be long remembered. *Judges are the last persons*

72. *U.S. v. Erving*, 388 F. Supp. 1011, 1017 (W.D. Wis. 1975).

73. *Herndon v. Superintendent, Virginia State Farm*, 351 F. Supp. 1356, 1358 (E.D. Va. 1972). There is other, anecdotal evidence of unpublished opinions acting as de facto authority. See Marcotte, *supra* n. 31, at 26.

74. *Re Rules of U.S. Ct. App. for Tenth Cir., Adopted Nov. 18, 1986*, 955 F.2d 36, 38 (10th Cir. 1992) (Holloway, C.J., dissenting).

75. *Continental Stock Transfer & Trust Co. v. SEC*, 566 F.2d 373, 374 n. 1 (2d Cir. 1977) (“We express our appreciation to the [parties] for having brought to our attention the considerations which justify publication of our opinion in the instant case . . . [W]e welcome the views of counsel in the unusual situation where failure to publish our opinion may not be in the public interest.”). Indeed, the language of the Second Circuit’s no-citation rule, Local Rule 0.23, is itself a tacit admission of the court’s fallibility. Rule 0.23 cites as its *raison d’être* the following: “Since [unpublished summary orders] do not constitute formal opinions of the court and are unreported or not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases . . .” Yet if summary orders indeed added nothing to the law, then it would not matter if they were not uniformly available to all parties.

*who should be authorized to determine which of their decisions should be long remembered.*⁷⁶

The theoretical justification for no-citation rules—that they pertain to points of law as clear as day versus night—is manifestly in conflict with what our courts have been doing.

2. All Opinions Add to the Common Law and Have Persuasive Value

As Chief Judge Holloway noted, “Each ruling, published or unpublished, involves the facts of a particular case and the application of law—to the case. Therefore all rulings of [the] court are precedents.”⁷⁷ With each published opinion, future litigants have less latitude in arguing the dissimilarity of their own fact-patterns. That is, the sheer number of a particular type of case may add weight to the principle for which the cases stand. The very assumption upon which no-citation rules are built—that there is a garbage dump of unimportant decisions—is incorrect. Again, if it were correct, there would be no incentive to cite them, and there would be no need for a rule to prohibit citation.

Moreover, even in the unlikely event that a case’s fact-pattern is *identical* to that found in a previous opinion, a new, citable opinion cannot be said to be bereft of any importance. Not all “settled” points of law are equally unshakable. Additional decisions, even if repetitive and obvious, add to the depth and stability of the legal principles treated therein.⁷⁸

3. Unpublished Decisions Are Historical Facts

Individually and in the aggregate, unpublished cases can convey unique information about a court, about particular judges and, most importantly, about the disposition of prior, similar

76. Justice John Paul Stevens, *Address to the Illinois State Bar Association’s Centennial Dinner* 9 (Jan. 22, 1977) (emphasis added).

77. *Re Tenth Cir. Rules*, 955 F.2d at 37 (Holloway, C.J., dissenting).

78. The Committee on Criminal Law of the Association of the Bar of the City of New York made this argument in 1983, when it issued a report criticizing the Second Circuit’s Rule 0.23, which prohibits citation to unpublished opinions. This report—which raises the very constitutional issues addressed in by this article—is reprinted in *2 Bar Panels Ask Change in Second Circuit Court Rule*, 189 N.Y. L.J. 1 (May 20, 1983).

cases. By outlawing even the mention of such cases, the courts inflict on themselves an artificial amnesia that weakens the richness and influence of their jurisprudence. It is undoubtedly for these reasons that most jurists would be shocked if the United States Supreme Court ever adopted a citation prohibition that barred litigants from speaking about past rulings, even its summary opinions. Such rules opted for by circuit courts of appeals should invoke the same reaction.⁷⁹ Citation prohibitions do nothing less than prevent litigants and their counsel from discussing pertinent facts before the branch of government most intimately concerned with them.⁸⁰

An unpublished opinion can serve as the best or only written record of an appellate court's historical treatment of an issue. It is ironic that a litigant remains free to cite to sources ranging from foreign decisions⁸¹ to the Code of Hammurabi,⁸² which may have their own unique relevance in the proper circumstance, yet is unable to inform an appellate court about its own history. Similarly, no court would prohibit citation to the published opinions of a sister circuit. Although not binding on the parties at bar, those opinions can show trends in the common law and authoritative approval of legal principles otherwise unsettled locally.

79. Although the rulings of a federal appellate court, which must hear every appeal, do not always carry the same gravitas as the rulings of the Supreme Court, which has the discretion to hear only the most significant of cases, the opinions of both are important public events and can be distinguished in this regard only by degree, not kind.

80. Another systematic problem with citation prohibitions exists: No-citation rules may negatively affect the quality of judicial decisionmaking. See 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, 598-626 (1981); Reynolds & Richman, *supra* n. 8, at 1199-1204.

81. See *e.g.* *Washington v. Glucksberg*, 521 U.S. 702, 710 n. 8 (1997) (stating that "in almost every western democracy it is a crime to assist a suicide," and citing a Canadian case that discusses assisted-suicide provisions in Austria, Spain, Italy, the United Kingdom, the Netherlands, Denmark, Switzerland, and France).

82. See *Furman v. Georgia*, 408 U.S. 238, 333 n. 41 (1972) (citing the Code of Hammurabi for historical perspective on retributive justice).

C. On Balance, the Suppression of Discourse Concerning Unpublished Case Law in the Course of Judicial Proceedings Violates Petitioners' Rights under the First Amendment

The "social value" of the discussion of unpublished opinions is great: Many of these opinions are unique windows on the shifting boundaries of the common law. All unpublished decisions have persuasive value and, as such, can add to the rhetorical impact of a litigant's legal argument. And, perhaps most important, all unpublished decisions are historical facts, facts that may be relevant to a litigant's case. As discussed above, the countervailing "social interest in order and morality"⁸³ served by citation prohibitions seems minor, at best. Accordingly, it is unclear how no-citation rules can possibly be thought justifiable when balanced against First Amendment values and criteria.

Several objections to this conclusion can be imagined, although they ultimately fail. First, it may be argued that no-citation rules do not offend the First Amendment because one is still free to discuss uncitable cases outside the courtroom. However, as the United States Supreme Court has long held, "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."⁸⁴ And there is no more appropriate place for the discussion of the holdings of a court than before that court.

Nor can the government justify no-citation rules as proper "time, place or manner" restrictions. Such regulations must be implemented without regard to the content of the speech.⁸⁵ A no-

83. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975).

84. *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939); see also *Spence v. Washington*, 418 U.S. 405, 411 n. 4 (1974) (per curiam) (noting that although prohibition's effect may be minimal, a person "is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place") (quoting *Schneider*, 308 U.S. at 163).

85. See e.g. *Linmark Assoc., Inc. v. Willingboro*, 431 U.S. 85 (1977) (ordinance banning "for sale" and "sold" signs for purpose of stemming flight of white homeowners from racially integrated town invalidated; ordinance concerned with content of speech); *Madison Joint Sch. Dist. v. Wisconsin Empl. Rel. Commn.*, 429 U.S. 167, 176 (1976) ("[W]hen the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech.").

citation rule directly and improperly targets the content of a litigant's speech—the discussion of unpublished cases—and thus cannot be justified as a proper “time, place or manner” restriction.

Furthermore, there is no principled reason to distinguish the courtroom as a forum for the expression of opinion from a more traditional forum in which the First Amendment unquestionably applies, like a soapbox in a public park. The audiences may be different—that is, the general public as opposed to one judge or a panel of judges—but the courtroom is a public forum.

A comparison of speech concerning trial proceedings and the in-court discussion of unpublished cases is instructive. The Supreme Court has held that the discussion of trial proceedings is “of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.”⁸⁶ Indeed, the trial plays such a central role to our government that the First Amendment protects the right of “[t]hose who see and hear what transpired [and allows those persons to] report it with impunity.”⁸⁷ The First Amendment guarantees the press the ability to report trial proceedings with impunity because only a well-informed citizenry can properly fine-tune the mechanisms of democracy. The discussion of an appeal and the resulting appellate opinion—the judiciary branch's distilled summary of the trial and its discussion of a federal district court judge's purported errors—should be as unfettered before the judiciary as the proceedings of a trial in the press. For all the abstract power invested in the citizenry to keep the government working, on a more immediate level, it is the courts that enforce individual rights, and the judiciary cannot effectively protect those rights when the discussion before it is subject to censure based on the content of the information. The suppression of truthful facts about the court in the courtroom is just as incompatible with our constitutional system as the suppression of truthful facts about the court outside the courtroom.⁸⁸

86. *Cox*, 420 U.S. at 495.

87. *Id.* at 492 (citing *Craig v. Harney*, 331 U.S. 367, 374 (1947) (emphasis omitted)).

88. Nor can no-citation rules be defended as a means of regulating lawyer conduct. The rules apply to citizens appearing pro se as well as to state-licensed lawyers. In any event, the fact that lawyers enjoy the privilege of practicing law does not provide a constitutional

While certainly not unfathomable, it is nonetheless unsettling to witness how the judicial branch—which we count on to preserve basic constitutional values on a daily basis—could have so easily fallen victim to the same types of bureaucratic pressures that often lead to misguided decisionmaking, particularly given that their no-citation rules conflict with the very charter the courts are entrusted to uphold.

IV. SEPARATION OF POWERS

First Amendment aside, commentators have sensed that courts, in radically departing from the practice of allowing a litigant to cite to all their past opinions, have stepped beyond their rule-making authority. It is this unease that has led commentators, and recently the panel in *Anastasoff*, to criticize no-citation rules as improperly undermining the principle of stare decisis and, by doing so, interfering with the separation of powers.⁸⁹ Although these criticisms, in the end, may not prove persuasive, citation prohibitions do indeed interfere with the separation of powers, not because they deny unpublished case law any precedential value, but because the courts lack the power under Article III to limit the substance of the non-frivolous arguments that litigants choose to advance before them.

A. *Under Article III, the Power of Federal Courts to Engage in Rulemaking Is Limited*

Federal appellate courts cite two sources of authority to promulgate local rules. Primarily, federal courts cite Title 28 section 2071 of the United States Code, which allows them to “prescribe rules for the conduct of their business.”⁹⁰ Yet courts

basis for suppressing their speech in the prosecution of their clients' claims or defenses. *Newport, Ky. v. Iacobucci*, 479 U.S. 92, 102 n. 6 (1986) (“Even 23 years ago it was ‘too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.’”) (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)).

89. See *supra* nn. 33-36.

90. 28 U.S.C. § 2071 (1994) states, in relevant part:

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be

also invoke, independent of legislative authority, their “inherent power” to regulate courtroom procedure.⁹¹ As will be shown below, the former is subsumed within the scope of the latter, and neither supplies the necessary authority for a no-citation rule.

Although federal courts have been invoking their inherent power for two hundred years, this source of authority has been described as “nebulous”⁹² and its bounds as “shadowy.”⁹³

consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.

Section 2072 gives the United States Supreme Court “power to prescribe rules of practice and procedure.” 28 U.S.C. § 2072(a) (1994). See also Fed. R. Civ. P. 83(a) (1994), which applies to the district courts:

Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. A local rule shall be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. §§ 2072 [United States Supreme Court’s power to prescribe rules of practice and procedure] and 2075 [bankruptcy rules]. A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

91. See *Fisher v. Pace*, 336 U.S. 155, 159 (1949) (“[T]he inherent power of courts to punish contempts . . . is not open to question.”); *U.S. ex rel. Carapa v. Curran*, 297 F. 946, 955 (2d Cir. 1924) (“The federal courts undoubtedly possess certain powers not immediately derived from statute, but which necessarily result from their very nature”); see also 21 C.J.S. *Courts* § 126 (1990) (“While courts are very generally authorized by constitutional or statutory provisions to make their own rules for the regulation of their practice and procedure, it is also generally stated that courts have inherent or plenary authority to make their own rules.”); 20 Am. Jur. 2d *Courts* §§ 43-45 (1995) (discussing inherent powers of courts); Roscoe Pound, *The Rule-Making Power of the Courts*, 12 ABA J. 599 (1926); but see Jack B. Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 Colum. L. Rev. 905, 929-30, 944-61 (1976) (rulemaking power of federal courts is appropriately viewed as legislative delegation; addressing local rules).

92. See Robert E. Rodes et al., *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure* 179 n. 466 (Fed. Jud. Ctr. 1981).

93. Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 Colum. L. Rev. 480, 485 (1958). As the Third Circuit has accurately recognized in *Eash v. Riggins Trucking Inc.*, 757 F.2d 557 (3d Cir. 1985) (en banc):

The conceptual and definitional problems regarding inherent power that have bedeviled commentators for years stem from several factors. First, perhaps because federal courts infrequently resort to their inherent powers or because such reliance most often is not challenged, very few federal cases discuss in detail the topic of inherent powers. More importantly, those cases that have employed inherent power appear to use that generic term to describe several distinguishable court powers. To compound this lack of specificity, courts have relied occasionally on precedents involving one form of power to support the court’s use of another.

Id. at 561-62 (citing, inter alia, Felix Frankfurter & James M. Landis, *Power of Congress over Procedure in Criminal Contempts in “Inferior” Federal Courts—A Study in*

Nonetheless, courts appear to invoke it in three discrete yet related ways.

First, courts invoke their inherent authority to protect from legislative encroachment judicial activities deemed indefeasibly vested in the judicial branch.⁹⁴ Such inherent authority is grounded in the separation of powers.⁹⁵ Thus, courts have relied on this species of inherent power to void legislation requiring a written opinion in every case;⁹⁶ to declare a hearing schedule;⁹⁷ to deny a court the power to issue its mandate until a prescribed period of time after the judgment has elapsed, even if this renders the judgment meaningless;⁹⁸ and to provide for the automatic disqualification of judges simply upon the application of a party.⁹⁹ However, because this brand of inherent authority is never invoked to justify an affirmative court action such as the promulgation of a local rule, it has no bearing on the propriety of citation prohibitions.

Second, courts regularly invoke the term "inherent power" to encompass those powers "necessary to the exercise of all others."¹⁰⁰ Thus, courts invoke this second species of inherent power to justify actions *essential* to the administration of justice¹⁰¹ or functioning of the judiciary.¹⁰² Accordingly, this species of authority "may be regulated within limits not precisely defined," but "the attributes which inhere in that power and are inseparable from it can neither be abrogated nor

Separation of Powers, 37 Harv. L. Rev. 1010, 1023 (1924); Tyrrell Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 Wash. U. L.Q. 459, 473-74 (1937)).

94. See Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. Pa. L. Rev. 1, 33 (1958).

95. *Id.* at 33; see also *U.S. v. Klein*, 80 U.S. 128, 147 (1871).

96. *Vaughan v. Harp*, 4 S.W. 751 (Ark. 1887).

97. *Atchison, Topeka & Santa Fe Ry. Co. v. Long*, 251 P. 486 (Okla. 1926).

98. *Burton v. Mayer*, 118 S.W.2d 547 (Ky. 1938).

99. *State ex rel. Bushman v. Vandenberg*, 280 P.2d 344 (Or. 1955) (en banc).

100. *E.g. Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (the contempt sanction is "[t]he most prominent" of the inherent powers) (quoting *U.S. v. Hudson*, 11 U.S. 32, 34 (1812)); see also *Ex parte Terry*, 128 U.S. 289, 303 (1888).

101. *Michaelson v. U.S. ex rel. Chicago*, 266 U.S. 42, 65 (1924) ("[T]he power to punish for contempts is inherent in all courts It is essential to the administration of justice.").

102. *Levine v. U.S.*, 362 U.S. 610, 616 (1960); see also *Cooke v. U.S.*, 267 U.S. 517, 539 (1925) (attorney held in contempt for sending judge letter containing derogatory language towards judge); *Myers v. U.S.*, 264 U.S. 95, 103 (1924).

rendered practically inoperative.”¹⁰³ Courts have frequently relied on this second species of inherent power to impose contempt sanctions,¹⁰⁴ to “act sua sponte to dismiss a suit . . . and enter [a] default judgment” for failure to prosecute a case,¹⁰⁵ or, less frequently, “to file restrictive pre-filing orders against vexatious litigants.”¹⁰⁶

Third, courts have invoked their “inherent power” to prescribe such rules of practice, pleading, and procedure “to secure the just and prompt disposition of cases.”¹⁰⁷ The United States Court of Appeals for the Fifth Circuit noted that this species of inherent power is

rooted in the notion that a federal court, sitting in equity, possesses all of the common law equity tools of a Chancery Court (subject, of course, to congressional limitation) to process litigation to a just and equitable conclusion.¹⁰⁸

So, for example, the Supreme Court has held that a federal court has the inherent power to appoint an auditor to aid in its decisionmaking.¹⁰⁹ This third species of inherent power has also

103. *Michaelson*, 266 U.S. at 66; *see also Cammer v. U.S.*, 350 U.S. 399, 404 (1956); *Anderson v. Dunn*, 19 U.S. 204, 227-28 (1821) (congressional enactment of contempt statute “can only be considered either as an instance of abundant caution, or a legislative declaration, that the power of punishing for contempt shall not extend beyond its known and acknowledged limits”).

104. *E.g. Roadway*, 447 U.S. at 764 (“[A] judge must have and exercise [contempt sanctions] in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court.”) (quoting *Cooke*, 267 U.S. at 539) (internal citation omitted); *Levine*, 362 U.S. at 615 (“[T]he power to convict for criminal contempt has been deemed an essential and inherent aspect of the very existence of our courts.”); *Fisher*, 336 U.S. at 159 (“[T]he inherent power of courts to punish contempts . . . is essential to preserve their authority and to prevent the administration of justice from falling into disrepute.”); *Ex parte Terry*, 128 U.S. at 289.

105. *John’s Insulation, Inc. v. L. Addison & Assoc., Inc.*, 156 F.3d 101 (1st Cir. 1998) (internal citations omitted).

106. *Weissman v. Quail Lodge Inc.*, 179 F.3d 1194, 1197 (9th Cir. 1999).

107. *Schlesinger v. Teitelbaum*, 475 F.2d 137, 141-42 (3d Cir. 1973); *see also Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962); *Ex parte Peterson*, 253 U.S. 300, 314 (1920); *Dabbs v. Cutler*, 19 F.3d 18, 1994 WL 64671 (6th Cir. Mar. 1, 1994).

108. *ITT Community Dev. Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978) (internal citation omitted); *cf. Hall v. Cole*, 412 U.S. 1, 5 (1973) (federal courts possess “inherent equitable power”); *Johnston v. Marsh*, 227 F.2d 528, 531 (3d Cir. 1955) (“Our Federal judiciary has consistently recognized that at common law this inherent power existed.”).

109. *Ex parte Peterson*, 253 U.S. 300, 314 (1920). Although the *Peterson* Court called its invocation of this power “essential” to the disposition of the case, in actuality the appointment of an auditor is merely helpful. *Id.* at 312; *see Note, Compulsory Reference in Actions at Law*, 34 Harv. L. Rev. 321, 324 (1921). The long-standing practice of the federal

been invoked as authority to “elect to use” a state mechanism for certification of a question of doubtful state law;¹¹⁰ to grant bail in a situation not dealt with by statute;¹¹¹ to dismiss a suit pursuant to the doctrine of *forum non conveniens*;¹¹² to manage its docket;¹¹³ to stay proceedings;¹¹⁴ to consolidate actions;¹¹⁵ to protect a nonparty from abusive discovery;¹¹⁶ and to justify the adoption of court rules that are consistent with the policies of 28 U.S.C. § 2071—that is, those that prescribe the conduct of court business.¹¹⁷ It is well settled, however, that court rules promulgated under a court’s inherent power are subservient to the supremacy of statutory or constitutional dictates.¹¹⁸

courts of making such appointment has been codified in Federal Rule of Civil Procedure 53 (1994) (providing for appointment of masters to aid jury). See *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 743 n. 1 (6th Cir. 1979).

110. *Weaver v. Marine Bank*, 683 F.2d 744, 747 (3d Cir. 1982).

111. *Johnston*, 227 F.2d at 528, 531; see also *Wright v. Henkel*, 190 U.S. 40, 63 (1903); *In re Gannon*, 27 F.2d 362, 363 (E.D. Pa. 1928).

112. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 502, 507 (1947).

113. *Sherman v. U.S.*, 801 F.2d 1133, 1135 (9th Cir. 1986).

114. *In re NLO, Inc.*, 5 F.3d 154, 157 (6th Cir. 1993).

115. *U.S. v. Louisville & Nashville R.R. Co.*, 221 F.2d 698, 702 (6th Cir. 1955).

116. *Micro Motion, Inc. v. Kane Steel Co.*, 894 F.2d 1318, 1322 (Fed. Cir. 1990).

117. See *Whitehouse v. U.S. Dist. Ct. for Dist. of Rhode Island*, 53 F.3d 1349, 1353, 1362 (1st Cir. 1995) (local rule requiring prosecutors to obtain judicial approval before serving subpoena on attorney to compel evidence concerning client a proper exercise of 28 U.S.C. § 2071 and inherent authority); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 17, 20 n. 6 (2d Cir. 1984) (court rule prohibiting presence of television cameras in courtroom a proper exercise of 28 U.S.C. § 2071 authority and inherent power to regulate courtroom); *In re Sutter*, 543 F.2d 1030, 1037-38 (2d Cir. 1976) (court rule providing for sanctions against counsel, as opposed to client, was properly promulgated under authority of 28 U.S.C. § 2071 and inherent power to “manage[] the court’s business”); *Franquez v. Palomo*, 604 F.2d 1239, 1244-45 (9th Cir. 1979) (“In the absence of procedural rules specifically covering a situation, the court may, pursuant to its inherent power and Rule 83 decision-making power, fashion a rule not inconsistent with the Federal Rules”) (internal citation omitted).

118. See *Carlisle v. U.S.*, 517 U.S. 416, 425-26 (1996) (holding that district court did not have authority to grant an untimely motion for judgment of acquittal; federal courts “may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress. Whatever the scope of this ‘inherent power,’ however, it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure”); *Bank of Nova Scotia v. U.S.*, 487 U.S. 250, 254 (1988) (“[A] federal court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rules of Criminal Procedure In the exercise of its supervisory authority, a federal court ‘may, within limits, formulate procedural rules not specifically required by the Constitution or Congress.’ Nevertheless, it is well established that ‘[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions.’”) (internal citations omitted); *State v. Pavelich*, 279 P. 1102 (Wash.

*B. Citation Prohibitions Are Non-Essential to the
Administration of Justice, Are Substantive in Character, and Are
Promulgated Ultra Vires*

Applying the foregoing framework to the issue of no-citation rules, the key questions appear to be whether such prohibitions are necessary to the exercise of the judicial power, or are rules of practice, pleading, or procedure that secure the just and prompt disposition of cases. We submit that citation prohibitions do neither.

1. Citation Prohibitions Are Not Necessary

Citation prohibitions clearly are not necessary to the exercise of the judicial function. Whatever might be assumed about the possible benefits of no-citation rules, they cannot reasonably be viewed as necessary to the court's basic ability to function. They bear no reasonable relationship, for example, to court rules allowing the imposition of sanctions to maintain order or to dismiss cases for non-prosecution. These and other such rules may be justified as essential to the functioning of a workable judicial system. For this reason, rules that fall into this category are deemed so vital and important that, in the words of the Supreme Court, they can "neither be abrogated nor rendered practically inoperative" by the legislature.¹¹⁹

Rules prohibiting citation to unpublished cases seem manifestly of an altogether different character. As discussed above, even if one assumes the legitimacy and necessity of *nonpublication rules*, which is a fair assumption, *citation prohibitions* are not necessary to give effect to these rules. Of the three justifications for citation prohibitions—that they are necessary to effect nonpublication rules, that citation of unpublished decisions must be stifled to prevent misinterpretation, and that otherwise resource-strapped lawyers would be disadvantaged—only one has potential merit, and only in theory at that. All things being equal, citation prohibitions, in

1929) (court may exercise its inherent power to regulate practice and procedure but not substantive rules).

119. *Young v. U.S. ex rel. Vuitton*, 481 U.S. 787, 799 (1987) (quoting *Michaelson*, 266 U.S. at 66).

limited circumstances, may save counsel and the court time otherwise spent reviewing unimportant cases. That such a benefit can be hypothesized, however, can hardly be viewed as establishing the necessity of such rules to allow the judicial system to function. Courts retain the ability to sanction lawyers for frivolous conduct, including, in an extreme case, the abusive citation of irrelevant decisions. Five circuits have for years allowed citation to unpublished opinions where there is no better precedent available, and these courts do not appear to have suffered for the practice.¹²⁰

2. Citation Prohibitions Are Substantive, Not Procedural

Courts have the power to prescribe rules of practice, pleading, and procedure to secure the just and prompt disposition of cases. A proper exercise of the court's inherent power here does not affect the outcome of a case; rather, it affects collateral aspects of the case such as the location, speed, or cost of the case. So, for example, judicial preference for 14-point type over 12-point type, rules regulating the form and the length of briefs and argument, rules requiring pre-argument mediation, or even a forum non conveniens dismissal in the name of efficiency and economy, are proper exercises of inherent authority because they do not materially affect the outcome of a case.

The Supreme Court's decision in *Doe v. Winn*¹²¹ is illustrative of the limits of this inherent power. In *Winn*, the plaintiff had sued in federal circuit court to eject defendant from certain property and had attempted to offer into evidence a state-certified copy of the relevant land grant or patent. The circuit court, however, excluded the copy from evidence because it was not an original.¹²² The plaintiff appealed, and the Supreme Court reversed. The Court found that under the common law and the law of Georgia, "exemplification under the great seal of the state, was, per se, evidence,"¹²³ and the court below had no authority to alter that rule. It held:

120. *See supra* n. 58.

121. 30 U.S. 233 (1831).

122. *Id.* at 239-40.

123. *Id.* at 241.

However convenient the rule might be to regulate the general practice of the courts, we think, that it could not control the rights of the parties in matters of evidence, admissible by the *general principles of law*.¹²⁴

In this inherent-authority context—as opposed to the unrelated contexts in which a substance-procedure dichotomy is made, as in the *Erie Railroad Company v. Tompkins*¹²⁵ choice-of-law context or the retroactivity context—“matters of evidence” are substantive.¹²⁶ That is, evidentiary rules are not primarily designed to secure the just and prompt disposition of a case; rather, they affect the substantive *outcome* by affecting the substance of the argument before the court.

In this context, it is difficult to articulate a principled distinction between citation prohibitions and rules of evidence. The latter affects what facts may be introduced to the trier of fact. If an evidentiary rule keeps a document out of evidence, the power of the proponent of its admission to persuade the court has been diminished and there is a chance, sometimes marginal and sometimes material, that the outcome of the case will be affected. Thus, the rules of evidence are substantive and must be promulgated by Congress, not by the courts.

Citation prohibitions affect what precedents may be cited on questions of law. As shown above, an unpublished opinion, even if denied its precedential value, can be highly relevant to a case in numerous ways—especially if the unpublished decision addresses an issue of first impression, as in the *Anastasoff* case and other cases noted earlier. To be denied the ability to cite to

124. *Id.* at 243 (emphasis added). Similarly, in *Emerson Elec. Co. v. Davoil, Inc.*, 88 F.3d 1051 (Fed. Cir. 1996), the Federal Circuit found that a district court does not have inherent power to order patentee to file, in a patent reexamination proceeding, papers prepared by alleged infringer.

125. 304 U.S. 64 (1938). Specifically, in characterizing a local rule as substantive rather than procedural, particular care must be taken to tease apart the various lines of cases purporting to make a substantive-procedural distinction. Courts most commonly draw the substantive-procedural line in choice-of-law cases and in retroactivity cases. The characterization of an issue as procedural for one of these purposes, however, cannot be so easily transplanted into a separation of powers context. As the Supreme Court has warned, “The line between ‘substance’ and ‘procedure’ shifts as the legal context changes. ‘Each implies different variables depending upon the particular problem for which it is used.’” *Hanna v. Plumer*, 380 U.S. 460, 471 (1965) (citations omitted); see also *Boyd Rosene & Assoc., Inc. v. Kansas Mun. Gas Agency*, 174 F.3d 1115, 1118 (10th Cir. 1999).

126. See *State v. Pavelich*, 279 P. 1102, 1103 (Wash. 1929) (“Rules of evidence constitute substantive law, and cannot be governed by rules of court.”).

such cases diminishes a litigant's ability to advocate no less than a rule limiting what facts the litigant may introduce into evidence. Instead of promoting the fair or prompt disposition of cases, as a proper exercise of the court's inherent authority does, citation prohibitions have an undeniable capacity to affect the outcome of a case by limiting a litigant's ability to discuss a whole class of judicial decisions. Accordingly, no-citation rules, like rules of evidence, are substantive and must be promulgated, if at all, by Congress, not by the courts.

The Supreme Court has presciently cautioned that the federal courts' "inherent powers must be exercised with restraint and discretion" due to their potency.¹²⁷ In this instance, the courts have not exercised due restraint and discretion, as no-citation rules fall outside the ambit of a court's inherent powers under Article III.

V. CONCLUSION

It must be frankly conceded that for many and perhaps most unpublished opinions, their absence from the body of published case law has wrought no great social harm. Yet this is no different from most trials; almost any given page of trial transcript will be filled with nothing that screams for publication in the name of a better judiciary or a more informed public. Just as the Supreme Court has repeatedly recognized the public's right to publicize the details of any given day of trial, the rights of litigants and counsel to discuss unpublished decisions in court should be no less protected. Whether it is because the federal appellate courts have blinded themselves from hundreds of snapshots from their own history in violation of the First Amendment, or whether it is because they have promulgated rules that interfere with the just disposition of individual cases in contradiction of Article III, the harm wrought by citation prohibitions is tangible. As the circuits become more comfortable with this practice, this harm will only multiply.

127. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991).

