

**THE RIGHT TO CITE:
WHY FAIR AND ACCOUNTABLE COURTS
SHOULD ABANDON NO-CITATION RULES**

JESSIE ALLEN

**JUDICIAL
INDEPENDENCE
SERIES**

**BRENNAN CENTER
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ACKNOWLEDGMENTS

This paper was prepared under the auspices of the Brennan Center's Democracy Program. The Center is grateful for the generous support provided for its Fair Courts Project by the Carnegie Corporation of New York, the Joyce Foundation, and the Open Society Institute. Tricia Beckles, Laura Molton, and Sarah Samis provided research assistance for this report. The statements made and views expressed in this publication are solely the responsibility of the Brennan Center.

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EXECUTIVE SUMMARY

In many courts across the country, no-citation rules bar discussion of most of the judges' recent routine decisions. Four federal appellate courts – the second, seventh, ninth, and Federal circuits – and more than 20 state courts forbid lawyers and lower courts from citing the appellate courts' summary decisions, which these courts designate “nonprecedential.” Many other jurisdictions do not bar citation, but assert that such summary decisions are not binding precedent. In the federal courts of appeals such rules now cover the vast majority of routine rulings – over 80 percent of cases decided in 2003. Perversely, these rules allow litigants to cite virtually every source *except* recent decisions by the judges who will decide their case. Citation bans may have been justified when they covered a small number of case reports that were genuinely unpublished. But in today's world of searchable computer databases, no-citation rules are bad policy and may be unconstitutional. An emerging trend toward allowing open citation of all court decisions should be supported by the American bench and bar. In particular, proposed Federal Rule of Appellate Procedure 32.1 should be adopted, as should pending state court reforms.

■ RATIONALES FOR NO-CITATION RULES

Some judges and commentators say no-citation rules promote [judicial efficiency](#) and [coherent caselaw](#). Bans on citation allow judges to use quickly drafted summary opinions in cases they regard as routine and redundant, without fear that they will later have to account for any discrepancies between those summary decisions and published precedents. That's efficient, the judges say, because they don't have to spend time perfecting explanations of routine cases, and it stabilizes precedent by preventing inadvertent variations on previous rulings from becoming part of precedential caselaw.

■ PROBLEMS WITH NO-CITATION RULES

However they are justified, citation bans lead to four main problems. These rules:

- remove an important source of judicial accountability;
- suppress information that is sometimes useful for determining the outcome of subsequent cases;
- constrain litigants' arguments in ways that raise concerns about due process and freedom of speech; and
- alter American courts' traditional precedential practices.

[Judicial accountability](#): No-citation courts use these rules to avoid being confronted with their own previous decisions, and thus to avoid having to justify

conflicts between hastily articulated previous rulings and the court's considered decision in a new case. It is not necessarily wrong to accept inconsistency among applications of legal rules. But it is an accountability problem when the judges who are producing summary opinions assert both that they have a duty to explain inconsistencies in the outcomes and reasoning of their rulings and that lawyers and trial court judges should be prevented from discussing these rulings so that appellate judges will not have to explain inconsistencies.

Suppressing Information: The potential information value of summary decisions in a future case is not only, and probably not mostly, what the court says it did in any one previous case. At least of equal interest are the patterns of application of the court's articulated precedents in recent routine cases. The information value of such patterns is not dependent on the completeness or precision of the legal and factual exposition in any given case, and it surely provides some insight into the court's views on an issue.

Distorting Precedent: No-citation rules can skew existing precedent. Distortions can come from structural factors, especially the disproportionate numbers of affirmances in summary opinions and the corresponding concentration of reversals in precedent. Within a given legal area, the split between uncitable affirmances and fully citable reversals may change the overall picture of how a court applies its precedents. For instance, routine affirmances of criminal convictions over evidentiary challenges are less likely to be citable than the occasional reversal of a verdict for improperly admitted, prejudicial evidence. Looking only to citable cases in this area, then, could make an appellate court's exclusionary rules and standards of review appear harsher than they are in practice. Moreover, high rates of reversal and dissent in some courts' uncitable cases suggest that no-citation rules sometimes keep legally significant rulings out of precedential caselaw. And, in spite of the rules, judges and lawyers continue to read and refer to uncitable cases.

Due Process and Free Speech Implications: The right to be heard that is the heart of due process includes a right to present reasons why government should not take a proposed action. One persuasive reason might well be the action's inconsistency with previous government decisions. The basic norm of consistency does not cease to operate just because a court declares most of its cases nonprecedential. But no-citation rules effectively forbid litigants to argue for treatment consistent with the court's summary decisions. In a legal culture that strongly associates consistency with fairness and correctness, that prohibition is not trivial. When courts refuse to consider their available previous decisions, they restrict litigants' due process right to be heard and their First Amendment right "to petition the government for a redress of grievances" in order to serve questionable government interests.

Distorting Precedential Practice: No-citation rules split case adjudication from legal interpretation, making the court's ruling and the precise reasoning for that

ruling two separate enterprises. The rules privilege consistent written explanations of the law over consistency of application. This is contrary to the traditional common-law notion that authoritative interpretations of legal rules evolve out of the rules' application to multiple factual scenarios. And the rules eliminate the reciprocal nature of precedent, making no-citation courts' practice look more like that of civil law courts, which apply a limited set of legal rules in cases whose decisions do not feed back into the rules themselves. Such changes are not necessarily bad; but they should be recognized and discussed openly.

■ OPEN CITATION IS WORKABLE AND FAIR.

Upon examination, a number of the most common arguments against open citation turn out to be false:

- Open citation doesn't make all cases binding, because it is perfectly coherent to ask judges to consider previous decisions without requiring them to follow all those decisions.
- Now that computer research is the norm, open citation doesn't add appreciably to lawyers' research duties or overburden litigants with fewer resources.
- Nor does open citation necessarily force judges to significantly change the way they write summary decisions. Judges can keep summary decisions short, and avoid one-word orders, if they stick to referencing the precedents that they believe decide the case.
- Open citation does not confuse lower courts or precedential caselaw or make the words of clerks and staff attorneys more authoritative: judges know how to differentiate summary decisions from binding precedents and can use summary decisions for what they are worth without relying on them as precedents. At the same time courts must face the fact that when judges endorse summary rulings, the language of those rulings becomes the official words of courts, whether or not they were written by a judge and reviewed by the rest of the court.

■ CONCLUSION

Outdated no-citation rules should be abolished. Proposed Federal Rule of Appellate Procedure 32.1, mandating open citation, should be adopted. Judges, bar associations, and litigators should push for examination and reform of no-citation rules in the state courts and individual federal circuits that still impose these bans.

INTRODUCTION

Sensible policies sometimes outlive their usefulness and become obsolete and even harmful. No-citation rules are a case in point. These rules ban discussion – or citation – of courts’ summary decisions. In the 1970s, courts had a good reason to prohibit lawyers from basing their arguments on the courts’ unpublished summary opinions. The reason for the rules was equity. Because summary opinions were not available in law libraries, rules barring their citation were needed to prevent institutional litigants, like the U.S. Department of Justice, or large law firms that specialized in certain legal areas, from amassing private collections of these unpublished decisions and gaining an advantage over litigants and advocates who had no access to them. At the time, uncitable summary opinions were a small minority of courts’ cases.

Thirty years later, two developments have changed this picture. With computerized databases, summary opinions have become widely available in searchable form. Courts now put these “unpublished” decisions on Westlaw and Lexis, the internet, and publicly accessible court websites. Second, courts’ use of the summary opinions that no-citation rules cover has grown dramatically. Eight out of 10 cases decided by federal courts of appeals go by summary order.¹ The figures vary for individual courts, but the bottom line is that no-citation rules now cover most of the routine cases in the jurisdictions where they are used. About half the state appellate courts impose no-citation rules, as do four of the busiest and most influential federal courts of appeals. Under these rules, the Ninth Circuit forbade citation to 84 percent of its judges’ decisions made in 2003.² In the Second Circuit, 75 percent of case decisions were off limits, and in the Seventh Circuit, 57 percent.³

Now that summary opinions are so widely used and so widely available, it no longer makes sense to prohibit their discussion in later cases. In no-citation courts, lawyers can cite to decisions made in other countries and other centuries but not to most of the decisions made last week by the very judges who will decide their case. The rules forbid trial judges from relying on, or even discussing, most of the decisions by the court that reviews their rulings. Prohibiting citation to available decisions in recent routine cases unnecessarily undermines judicial accountability, suppresses legal analyses that may be useful in subsequent decisionmaking, and may distort precedential caselaw. Not only are today’s citation bans questionable policy, they may be unconstitutional. These rules raise real concerns about the constitutional guarantees of due process and free expression. Unsurprisingly, then, no-citation rules are the subject of a growing controversy.

There is a trend away from citation bans in both state and federal courts. Recently, four federal circuits have altered their practices.

- The Third Circuit joined the majority practice of issuing “unpublished” opinions to legal publishers for availability online, while continuing to allow open citation.

PROPOSED FEDERAL RULE OF APPELLATE PROCEDURE 32.1 CITING JUDICIAL DISPOSITIONS

(a) Citation Permitted.

A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been designated as “unpublished,” “not for publication,” “nonprecedential,” “not precedent,” or the like.

(b) Copies Required.

If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.*

**Agenda book of the Advisory Committee on Appellate Rules, 4-8 Table IV-A (April 18, 2005) (on file with the Secretary of the Federal Judicial Council Advisory Committee on Appellate Rules)*

- The District of Columbia Circuit changed its rule forbidding citation to unpublished decisions and declared instead that these cases “may be cited as precedent.”⁴
- The First Circuit did away with its ban on citation of “unpublished” decisions, asserting instead that “[t]he court will consider such opinions for their persuasive value but not as binding precedent.”⁵
- Until 2004, the Eleventh Circuit withheld its summary opinions even from electronic publication. When it began to publish its summary decisions online, in compliance with the E-Government Act of 2002, which requires all federal courts to post their decisions on court websites in searchable form, it did so without adopting a citation ban.

NO-CITATION COURTS

FEDERAL

U.S. Court of Appeals for the Second Circuit (Connecticut, New York, Vermont)

U.S. Court of Appeals for the Seventh Circuit (Illinois, Indiana, Wisconsin)

U.S. Court of Appeals for the Ninth Circuit (Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, Washington)

U.S. Court of Appeals for the Federal Circuit (Nationwide jurisdiction of certain subject matter, including international trade, government contracts, and patents)

As a result, nine of the thirteen federal appellate courts now *allow* citation. Moreover, since 2001, seven states – Alaska, Iowa, Kansas, North Carolina, Texas, Utah, and West Virginia – have eliminated bans on citation of summary opinions.⁶

In 2004, the Federal Judicial Council’s Advisory Committee on Appellate Rules, which is charged with overseeing and recommending new procedural rules for the Federal Courts of Appeals, proposed a rule change that would require all federal appellate courts to allow citation to all their decisions, even if they are designated unpublished or nonprecedential. Vocal opposition from some judges on the remaining no-citation courts, and others, led the Judicial Council’s Standing Committee to table the proposed rule mandating open citation. In spring 2005, the Committee on Appellate Rules reconsidered the rule and again approved it. The rule was forwarded to the Standing Committee with a recommendation that it be sent to the whole Judicial Council for a vote. Two states – Illinois and Hawaii – are likewise considering proposed rule changes that would allow open citation. The outcome of these efforts for reform will affect both the rights of litigants and the nature of the legal process in American courts.

RATIONALES FOR NO-CITATION RULES

There are two primary reasons courts give for imposing no-citation rules: judicial efficiency and maintaining coherent legal precedent.

■ JUDICIAL EFFICIENCY

Allowing or requiring judges to write summary, nonbinding decisions in routine cases saves time. It lets judges to keep up with appellate dockets that have expanded exponentially over the past several decades, and makes it possible for them to concentrate their opinion-writing time on a minority of cases they consider jurisprudentially important. As a group of Second Circuit judges explained, there are “enormous efficiencies derived from the ability to dispose of the legal issues in a case succinctly without engaging in the painstaking work of ensuring that all of the relevant facts and analyses are sufficiently fleshed out to effectuate the decision’s proper precedential effect.”⁷ Judges can spend time carefully crafting a few new precedential opinions if they write summary decisions in most of their routine cases.

Judges who defend no-citation rules contend they need those rules to ensure their summary decisions will not be treated as binding precedents. The Second Circuit judges explained that summary decisionmaking is acceptable “only when the authoring judge has confidence that short-hand statements, clearly understood by the parties, will not later be scrutinized for their legal significance by a panel not privy to the specifics of the case at hand.”⁸ If lawyers can cite to summary decisions, the judges argue, even if those decisions remain officially “nonprecedential,” judges will feel duty bound to deal with their reasoning and results and to explain departures from them in subsequent decisions. They may also feel compelled to spend more time perfecting summary decisions in the first place. “Language that might be adequate when applied to a particular case might well be unacceptable if applied to future cases raising different fact patterns,” says Judge Kozinski of the Ninth Circuit.⁹ This will either slow down the process, delaying justice, or take time away from the more difficult and significant cases that create new precedents.

■ MAINTAINING COHERENT CASELAW

By barring citation of their nonprecedential summary opinions, courts also ensure that the sometimes poorly articulated explanations in those cases do not introduce inconsistencies into precedential caselaw. According to Judge Kozinski, Ninth Circuit summary decisions are often no more than lightly edited memos by clerks and staff attorneys. Thus they may have little to do with the actual reasons for the judges’ ruling: “Any nuances in language, any apparent departures from published precedent, may or may not reflect the view of the three judges on the panel.”¹⁰ Opponents of open citation contend that summary decisions are of no real use in subsequent adjudications, and will lead to greater inconsistency

NO-CITATION COURTS

STATE

Alabama
 Arizona
 Arkansas
 California
 Colorado
 District of Columbia
 Florida
 Hawaii
 Idaho
 Illinois
 Indiana
 Kentucky
 Louisiana
 Maryland
 Massachusetts
 Missouri
 Montana
 Nebraska
 Nevada
 New Hampshire
 Pennsylvania
 Rhode Island
 South Carolina
 South Dakota
 Washington
 Wisconsin

because these decisions' inaccurate and incomplete descriptions of the applicable law and underlying facts may misrepresent the court's approach. The concern is that district judges will be misled into erroneous rulings, and appellate caselaw will become gummed with ambiguous and inconsistent language. "Language that is lifted from a bench memo and pasted wholesale into a disposition can provide a veritable goldmine of ambiguity and misdirection. Yet, with the names of three circuit judges attached, lawyers and lower court judges are often reluctant to assign to it the insignificance it deserves."¹¹ This isn't just a matter of professional pride. Incoherent legal rulings contribute to uncertainty and unease in the real world.

PROBLEMS WITH NO-CITATION RULES

The time and work pressures judges face are real. And every conscientious and efficient worker prioritizes some tasks over others. So what is wrong with rules that make overworked judges more comfortable issuing summary opinions in relatively easy cases so that they can take time writing the important precedential opinions?

The answer begins with the incredulity most non-lawyers express when they first hear about these rules. The idea that most of a court's recent decisions are off limits for discussion in future cases is deeply contrary to the way Americans understand fair court process. If they know anything at all about how courts are supposed to operate, people know that judges look back at their previous rulings when they decide new cases. Part of public willingness to be governed by judges' rulings comes from an understanding that courts are constrained to rule consistent with previous decisions – or at least to justify departures. No-citation rules create a sense of arbitrariness.

In courts that employ them, these rules make it impossible for litigants to argue for treatment consistent with most of the judges' recent decisions. Yet, the pursuit of consistent outcomes has long been recognized as a guiding principle of judges' work. "It will not do to decide the same question one way between one set of litigants and the opposite way between another," said Justice Cardozo.¹² The core notion is not dependent on courts' institutional commitment to a specific doctrine of precedent. As Judge Henry Friendly put it, the duty to "act alike in all cases of like nature" is "the most basic principle of jurisprudence."¹³ Consistency in adjudication is linked with correctness and predictability, but the core value it expresses is evenhandedness – justice that does not vary depending on who it affects.

Undoubtedly judges on courts that ban citation of their summary decisions remain individually committed to the goal of deciding like cases alike and to applying precedent in a consistent manner. But no-citation rules make it harder for courts to produce case-by-case consistency in the application of precedents to specific facts, and they do away with the most significant institutional pressure for achieving that consistency. Moreover, the rules create the impression that judges are seeking to avoid being confronted with the consequences of their own previous decisionmaking. That avoidance seems strange on several counts.

First, as a practical matter, it seems odd that someone trying to convince a decisionmaker to do – or not to do – something would be forbidden from talking about previous decisions that decisionmaker has made under similar circumstances. You would think most decisionmakers would want to be reminded of what they had decided when faced with a similar problem. Even if you're going to work through the problem from scratch again, you'd likely want at least to check your conclusion against the result you got the last time you considered the

same question. In addition, lawyers traditionally are free to discuss any source they believe would support their arguments. Appellate briefs cite newspaper articles, web pages, and opinions from long ago and far away. The only source courts prohibit are their own decisions that are labeled “nonprecedential.” It seems perverse that the one exception to the tradition of open reference is the courts’ own opinions.

More fundamentally, to American ears there is something very odd, not to say offensive, about a government official refusing to consider her own previous decisions. Even if these uncitable summary opinions are exempt from the special doctrine of judicial precedent, it still seems strange in a democracy founded on the rule of law to prohibit people from confronting government decisionmakers with previous official decisions and arguing for consistent treatment.

It is hard for courts to insist that lawyers pretend that a large body of decisions, readily indexed and searched, does not exist. Lawyers can cite everything from decisions of the Supreme Court to “revised and extended remarks” inserted into the Congressional Record to op-ed pieces in local newspapers; why should the “unpublished” judicial orders be the only matter off limits to citation and argument? It implies that judges have something to hide.

Judge Frank H. Easterbrook, U.S. Court of Appeals for the Seventh Circuit, Letter Comments to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure, Judicial Conference of the United States (Feb. 13, 2004)

Together these concerns point to four problems that result from the use of no-citation rules:

- No-citation rules remove an important source of judicial accountability;
- No-citation rules suppress information that is sometimes useful for determining the outcome of subsequent cases;
- No-citation rules constrain litigants’ arguments in ways that raise concerns about due process and freedom of speech; and
- No-citation rules alter American courts’ traditional precedential practices in ways that have gone largely unacknowledged.

■ **NO-CITATION RULES UNDERMINE JUDICIAL ACCOUNTABILITY.**

No-citation rules do not protect secrets. The decisions lawyers are forbidden to mention are published and available in searchable form to the general public as well as to future litigants. If judges aren’t barring citation to hide their summary opinions, what’s the problem? In a nutshell, it’s that judges use no-citation rules to hide from their own decisions.

In circuits that allow citation, judges can be confronted with their previous decisions and asked to rule accordingly in the case now before them. Assuming that those decisions are not part of the special doctrine of “binding” precedent, judges are then free to respond however they choose. They may issue a new decision that is fully or partially or not at all consistent with their previous opinions. They may rely on their earlier reasoning, distinguish it as for some reason inapplicable in the current matter, say they have changed their minds, or pass over it in silence. But they must consider the previous decision. They cannot proceed as if it does not exist.

In opposition to the proposed new Federal Rule of Appellate Procedure mandating open citation, some Seventh Circuit judges wrote a letter explaining why they did not want to be confronted with the summary decisions now covered by their court's no-citation rule. Their explanation spells out the judicial accountability issue in straightforward terms. The judges explained that if a lawyer says "that in our unpublished opinion in *A v. B* we said *X* and in *C v. D* we said *Y* and in this case the other side wants us to say *Z*, we can hardly reply that when we don't publish we say what we please and take no responsibility."¹⁴ The problem is that their circuit's ban on citation must mean something quite like that. Putting it more neutrally, a no-citation rule says that because summary decisions are not carefully articulated the court will not deal with them in subsequent cases. But that is just what the Seventh Circuit judges want to avoid saying to a lawyer who cites a summary decision. It is not clear why it should be institutionally acceptable to take that stance implicitly through a no-citation rule, but not to adopt it openly in response to a litigant's citation of a previous summary decision that a panel wants to depart from or disregard.

The Seventh Circuit judges want to avoid saying that they choose not to rule in accord with a previous summary order because the opinion in that case was written quickly and does not really reflect the considered views of the court. If it would sound strange for judges to say that to someone appearing before them, that must be because we still believe that judges are accountable for the reasoning in all the decisions their courts issue – including summary orders. Judge Kozinski contends, however, that "[a]ny nuances in language, any apparent departures from published precedent, may or may not reflect the view of the three judges on the panel – most likely not – but they cannot conceivably be presented as the view of the Ninth Circuit Court of Appeals."¹⁵

If judges have little to do with the reasoning in their courts' summary orders, that is not necessarily a problem. Some people may be discouraged to learn that judges on some courts have no input on the explanations they issue for a majority of their decisions. Others may think this is a perfectly good allocation of judicial time and energy. Courts are not required to give every case the same attention. It certainly seems reasonable for judges to rule quickly in routine cases, applying well-known legal principles to common situations to get results they recognize as right based on long experience with similar controversies. The optimal division of judicial time between routine and exceptional cases, just how summary the courts' summary procedures ought to be, and the right balance between quality and efficiency are all open to question. But, as the Seventh Circuit judges recognized, whatever procedures lead to a court order, there is a problem if the people who signed the order take no responsibility after the fact. Judges are not the only decisionmakers who rely heavily on input from their staff. But, nowhere else do we leave public officials free from accountability for work they delegate to subordinates.

As for consistency, it is not necessarily bad policy to free decisionmakers to focus only on the case at hand and to ignore other similar cases. This is in fact the way

many administrative agencies proceed. Where the aim is the fair administration of benefits in a massive bureaucratic system, consistency among like cases may not be a realistic aspiration. Under the model of “bureaucratic justice,” articulated by Professor Jerry Mashaw, the goal is to avoid gross errors in individual results and to evenly distribute marginal errors, that is, to wind up with about as many erroneous grants of benefits as mistaken denials.¹⁶ But consistency is an important norm in traditional, individualized adjudication – as practiced, or at least aspired to, in American courts of general jurisdiction.¹⁷ One of the implications of appellate courts’ reliance on uncitable nonbinding opinions, then, may be that judges should view themselves more as arbiters of bureaucratic rationality than as dispensers of individual justice.

No-citation rules surely lead to decreased consistency in the application of legal precedents in individual cases. Even assuming all cases are decided consistent with the legal principles embodied in existing precedent, keeping judges in the dark about summary decisions that apply those principles to specific fact patterns is bound to lead to divergent applications. Yet courts still seem to want their summary decisions to be consistent with one another. Otherwise, they would not be so concerned about being confronted with summary opinions using reasoning counter to their view of the case at hand.

There is not necessarily anything unjust or wrong with accepting some level of inconsistency among applications of legal rules. But there is an accountability problem when the judges who are producing summary opinions assert *both* that they have a duty to explain inconsistencies in the outcomes and reasoning of their rulings *and* that lawyers and trial court judges should be prevented from discussing these rulings so that appellate judges will not have to explain any inconsistencies that arise. We do not demand perfect consistency in the application of the law. Judges can responsibly defend a standard of consistency and accuracy in their summary opinions that is below that of their work in published precedents. But if they believe their summary opinions fail to meet minimum standards, they are not entitled to defend that substandard workproduct by passing rules that prevent their being confronted with it. In the words of the Seventh Circuit judges, when judges issue summary opinions, they cannot simply “say what [they] please and take no responsibility.”

Surely courts are obligated to produce a standard of judicial reasoning good enough to make it worthy of *consideration* in a subsequent case with similar facts. Until the current controversy around the proposed new rule mandating open citation in the federal courts of appeals, no one had ever seriously questioned that courts’ summary opinions do meet that standard. In defense of their no-citation rules, some judges have resorted to hyperbolic characterizations of their summary dispositions as unfit for consumption by lawyers and district judges. It is possible that those descriptions are exaggerated. But whatever standard governs courts’ summary decisions, citation bans should not be used to avoid confronting these rulings. As Judge Edward Becker of the Third Circuit puts it, “How can we

say to members of our profession – and remember that we work for them and their clients and the public, not vice versa – that they cannot cite to us what we have said?...[W]e can at least think about it, and we cannot do that if the cases are not cited to us.”¹⁸

■ NO-CITATION RULES SUPPRESS USEFUL INFORMATION.

Beyond questions of governmental accountability, there are pragmatic reasons to allow open citation and discussion of all available judicial opinions. Of course, if summary opinions really are as flawed as has sometimes been suggested in the heat of the citation controversy, they provide *no* useful information about how judges came to rule as they did and should be suppressed. But then they provide no real value to the parties whose cases they describe and should not be issued in the first place. Assuming instead that these opinions provide some explanatory information of variable quality about the decisions they report, that information is potentially useful to decisionmakers – both trial and appellate judges – in future cases. Citation bans currently deprive judges of the court of appeals’ analyses in all summary decisions.

These uncitable decisions are the majority of routine cases decided by their courts. The potential information value of summary decisions in a future case is not only, and probably not mostly, what the court says it did in any *one* previous case. At least of equal interest are the patterns of application of the court’s articulated precedents in its recent routine cases. Arguing that the court should follow a five-year-old precedent is far easier if one can show that the court has invoked that case in numerous recent decisions, many of which are likely to be uncitable. Summary decisions might also demonstrate that a precedential case involving different facts has been applied in circumstances similar to those at issue. Conversely, one can more easily distinguish an arguably applicable precedent if it can be shown that the court has read that case narrowly in recent routine (uncitable) decisions. The information value of such patterns of precedential application is not dependent on the completeness or precision of the legal and factual exposition in any given case. And it is surely important: it provides insight into how the court has recently applied its precedents in routine cases.

Some defenders of no-citation rules contend that trial judges are liable to be deceived into putting too much stock in the accidental verbal nuances and poorly selected factual details of summary opinions.¹⁹ But concern about this kind of deception seems misplaced. Who, after all, is better equipped to recognize the limitations of summary opinions than trial judges whose decisions that court reviews? District judges can take or leave these imperfect expressions of routine rulings for what they are worth. And, in the aggregate, they may have considerable predictive power. Keep in mind that we are talking about the majority of cases and, according to the rules themselves, nearly all of an appellate court’s routine applications of existing law.

While I understand the potential problem caused by allowing parties or courts to cite unpublished opinions, it is difficult to understand why opinions, frequently of considerable substance, should be characterized as “unpublished” or “unreported” merely because they are not included in the printed reporters. To label them as such is at the least a misnomer, if not a poor reason to deprive the lower courts of the use and guidance of the wisdom of the higher courts.

Gomez v. Kaplan,
2000 WL 1458804, *9
(S.D.N.Y. Sept. 29, 2000)

■ NO-CITATION RULES MAY DISTORT PRECEDENT.

There is no evidence that judges use no-citation rules to bury unpopular results. Nor could they. After all, summary decisions of most courts are published on-line in searchable formats. Nor is there any reason to suspect that no-citation rules, or the underlying choice to make a case a citable precedent or an uncitable “unpublished” order, have been used to ideologically shape legal precedents. To the contrary, one of the few empirical studies to test for such a problem, concluded that “strategic behavior has little impact on publication decisions.”²⁰ Even if judges are not using no-citation rules strategically to contravene precedent, however, the rules can still distort precedential caselaw.

■ CONCENTRATING AFFIRMANCES IN UNCITABLE SUMMARY DECISIONS CAN SHAPE PRECEDENT.

Distorting effects flow from the fact that uncitable decisions are not a random sample of all the courts’ cases. Summary decisions are typically routine cases whose outcome is relatively easily determined by existing precedent. Thus summary decisions include significantly higher rates of affirmances than the court’s precedential caselaw (because the appellate judges and the lower court judge who initially decided the case are likely to agree on the proper result). Conversely, reversals of lower court decisions are overrepresented in citable precedent. That skewed result can have substantive ramifications.

Consider, for instance, challenges to criminal convictions based on trial judges’ alleged failure to exclude improperly obtained evidence. Routine decisions to affirm convictions, because trial judges’ evidentiary rulings were either correct or harmless, will be overrepresented among uncitable summary decisions and underrepresented in citable precedent. Meanwhile, the less usual decision to overturn a jury verdict based on wrongly admitted, prejudicial evidence would seem more likely to appear as a citable precedent. That means that a no-citation court’s available caselaw will suggest that appellate panels are more willing to overturn criminal jury verdicts for evidentiary trial errors than they actually are. In effect, it represents the court’s precedents on evidentiary exclusion as more stringent than they actually are. It also misrepresents the appellate court’s standard of review by putting into precedential caselaw a disproportionate number of reversals for abuse of discretion.

This is a kind of distortion that might be hard for district judges in the circuit to recognize. And it could certainly play to the disadvantage of prosecutors who want to argue in support of verdicts being appealed, but find that many of the appeals court’s most recent decisions upholding verdicts are uncitable. There appears to be no empirical work that has either challenged or confirmed that such a distortion is taking place, but as a matter of logic, it is hard to see how it could not be happening.

Similar effects have been observed empirically. One of the few empirical studies of summary opinions, which reviewed unfair labor practice claims, found a disturbing pattern. The study showed that among the cases decided in favor of unions, judges who had previously been attorneys for management were more likely to issue nonprecedential summary decisions in cases in which unions prevailed.²¹ Importantly, the study's authors believe that this imbalance was not strategic. It wasn't that these judges were anti-union overall and trying to bury pro-union decisions. In fact, the former management attorneys were somewhat more likely than other judges to rule in favor of unions.²² The study authors concluded instead that a non-strategic preference for summary decisions overall was manifesting itself more strongly in cases with pro-union results because of structural factors.²³ Again the imbalance likely results from the fact that uncitable summary opinions – by definition uncontroversial decisions – include a disproportionate number of affirmances.

The study authors explain that in the overwhelming majority of unfair labor practice rulings appealed, the labor board ruled for the union. In uncontroversial cases suitable for summary opinions, it is likely that appeals judges will agree with the labor board, resulting in an affirmance. Putting these two tendencies together, routine labor practice appellate decisions suitable for summary decisions include disproportionate numbers of pro-union cases (*i.e.*, affirmances of the pro-union decisions below).²⁴ Appellate judges, then, exercise the most discretion over whether to issue an uncitable summary opinion or a citable precedent in pro-union affirmances. Thus an overall preference for summary opinions might well manifest itself more strongly among such cases. The study authors hypothesize that judges who are former management attorneys have an overall preference for summary dispositions because of their greater familiarity with labor law. That is, these judges see more of the labor cases they decide as routine (and thus appropriate for uncitable summary disposition) than their colleagues who know less about labor law.²⁵

Though this disparity likely does not result from strategic political choices, it is not necessarily benign. As the study authors point out, the trend here seems to mean that precedential caselaw on unfair labor practices contains disproportionately few decisions by the judges with the most expertise in labor law. The courts' use of summary decisions for routine cases thus has the unintended, and ironic, result that the judges with the least knowledge of labor law disproportionately influence labor precedent.²⁶ If the summary decision rules create that pattern, the no-citation rules solidify it. For the no-citation rules are designed to protect precedent from the summary descriptions of routine applications of precedents. No-citation rules apparently protect labor law from the influence of its routine application by judges who know the most about this area of the law.

Moreover, no-citation rules may entrench this anti-expert bias throughout caselaw. Judges who know more about a subject are less likely to perceive a given decision in that area as noteworthy. The more familiar a judge is with the

precedents in a given legal area, then, the more likely that she will see a subsequent decision applying precedent in that area as appropriate for an uncitable summary order. Of course judges who are experts in these fields will recognize the truly novel cases. But there is a range of decisions that could go either way: into the citable legal precedent or out with the uncitable summary chaff. The labor law study suggests that in such middling cases decisions by more knowledgeable judges are more likely to be made uncitable.

■ ■ UNCITABLE DECISIONS APPEAR NOT TO BE LIMITED TO CASES WITH LEGALLY ROUTINE OUTCOMES.

There is also reason to think that a significant number of uncitable judicial decisions should never have been classified as routine and nonprecedential. Though the majority of uncitable summary decisions affirm appealed judgments, those decisions are by no means limited to affirmances, and some even carry dissents. A review of all the cases decided in a two-month period by the Second, Seventh and Ninth Circuits revealed both surprising numbers of reversals and surprising variations among these no-citation courts' practices regarding reversals and dissents. Tables 1 and 2 summarize those findings.

TABLE 1

REVERSALS IN THE NO-CITATION CIRCUITS IN A TWO-MONTH PERIOD^a

Circuit	Total Cases	Uncitable Cases	Uncitable Rate ^b	Total Reversals	Uncitable Reversals	Reversal Rate ^c	Uncitable Reversal Rate ^d	Reversals Uncitable ^e
2nd	244	164	67%	56	18	23%	11%	32%
7th	184	94	51%	34	2	18%	2%	6%
9th	660	537	81%	114	72	17%	13%	63%

^a January 1, 2004 through March 1, 2004

^b Percent of all cases that are uncitable (*i.e.*, uncitable cases/total cases)

^c Percent of all cases reversed at least in part (*i.e.*, total reversals/total cases)

^d Percent of all uncitable cases that are reversed at least in part (*i.e.*, uncitable reversals/uncitable cases)

^e Percent of all reversals that are uncitable (*i.e.*, uncitable reversals/total reversals)

The first point Table 1 makes clear is that the Ninth Circuit is the leader both in absolute numbers of uncitable reversals and in the proportion of uncitable opinions that report reversals (Uncitable Reversal Rate). In the first two months of 2004, 72 of the Ninth Circuit's uncitable cases reversed or vacated at least part of the decisions they reviewed. Thus in 72 cases the appellate judges disagreed with a district judge or an administrative tribunal about the law or its application. It is hard to accept that none of these disagreements amounts to a decision that "[e]stablishes, alters, modifies or clarifies a rule of law," which should trigger a citable precedential opinion under the Ninth Circuit's own rule.²⁷ If the law was clear, why the dispute? Why so many disagreements in just two months?

TABLE 2

DISSENTS IN THE NO-CITATION CIRCUITS IN A TWO-MONTH PERIOD^a

Circuit	Total Cases	Uncitable Cases	Total Dissents	Uncitable Dissents	Dissent Rate ^b	Uncitable Dissent Rate ^c	Dissents Uncitable ^d
2nd	244	164	2	0	1%	0%	0%
7th	184	94	4	0	2%	0%	0%
9th	660	537	34	15	5%	3%	44%

^a January 1, 2004 through March 1, 2004

^b Percent of all cases that have dissents (*i.e.*, total dissents/total cases)

^c Percent of all uncitable cases that have dissents (*i.e.*, uncitable dissents/uncitable cases)

^d Percent of all dissents that are uncitable (*i.e.*, uncitable dissents/total dissents)

In those same two months, 15 of the Ninth Circuit's uncitable cases carried dissents. When judges on an appellate panel disagree about the correct result, the decision is by definition controversial. Even assuming that the controversy is purely a matter of factual application, how can that application be routine enough to justify making it uncitable? Making conflicting applications both nonprecedential and uncitable effectively postpones the court's decision about which way the legal rule should be interpreted. That is not how uncitable summary decisions are supposed to be used. It also prevents judges deciding future cases in an unsettled legal area from having the benefit of the analyses in these earlier split decisions.

Beyond the raw numbers, Table 1 shows the Ninth Circuit's high *proportion* of reversals that are uncitable. The 72 uncitable reversals don't simply reflect the fact that the Ninth Circuit decides more cases than the other two courts surveyed, and thus has more uncitable reversals along with more of every kind of case. Nor do the numbers reflect a higher rate of reversals in the Ninth Circuit overall. In fact, both the Second Circuit and the Seventh Circuit had higher overall rates of reversal in those two months: 23 percent and 18 percent respectively, compared with the Ninth Circuit's 17 percent. The big difference is the percentage of reversals that are uncitable. In the Ninth Circuit 63 percent of the appellate decisions reversing lower courts were uncitable.

The Ninth Circuit summary reversal rate seems very high. Of course it is still significantly lower than the rate of uncitable cases overall in the Ninth Circuit, which was 81 percent during the two months surveyed. Nevertheless it is remarkable that *most* of the times a Ninth Circuit panel disagreed with all or part of a lower court's ruling, the panel deemed its own view of the disagreement so clearly mandated by existing precedents that there was no need to clarify the caselaw.

The other no-citation courts we surveyed made that judgment much less often, though often enough to be significant. In the Second Circuit, 32 percent of reversals were uncitable, while the Seventh Circuit used uncitable summary decisions

[W]hen Not Precedential Opinions are cited . . . they often have been useful in a number of respects: First, they give us the benefit of the thinking of a previous panel and help us to focus on or think through the issues. For busy judges, that is a great boon. Second, they identify issues on which we should be writing a precedential opinion. When an issue has been dealt with in a Not Precedential Opinion and comes up again, that is a signal that we need to clarify the law precedentially.

*Judge Edward Becker,
U.S. Court of Appeals
for the Third Circuit,
Statement to Advisory
Committee on
Appellate Rules,
April 2004*

in just 6 percent of its decisions reversing all or part of a lower court's ruling. Even if none of these opinions would add new ideas to precedential caselaw, surely some could be used to illuminate and clarify misunderstandings and misperceptions that might recur among district judges and agency decisionmakers. Making them uncitable, however, precludes that possibility.

■ IN PRACTICE, JUDGES CONSIDER AND LAWYERS USE OSTENSIBLY UNCITABLE DECISIONS.

Surveys of lawyers and reported decisions in one circuit strongly suggest that rules against citation do not prevent lawyers and litigants from considering, and sometimes from citing, summary appellate decisions. In a 1998 survey, the majority of lawyers in the federal circuits that now bar citation said that they read uncitable opinions that come up in research for their own cases.²⁸ As Lauren Robel has pointed out, those figures reflect a legal culture that remains wedded to a precedential outlook and thus views all court decisions as building blocks of future decisions.²⁹ Precedent aside, as a matter of common sense it would seem foolish for a lawyer to ignore court decisions in cases similar to the appeal he is handling. The judges he appears before may well remember their previous decisions or may find and read them in their own research. And, whether or not they are designated precedents, earlier decisions are surely one basis for predicting how the decisionmakers will rule in the future cases. As one experienced practitioner points out, it would be very hard to justify failing to confer with a client about a circuit court decision directly contrary to his case just because that decision was covered by a no-citation rule.³⁰ It might well influence whether the client decides to go to trial or settle. If the trial judge knows the case, it is likely to influence her decision. But at the same time, the lawyer is forbidden to mention that decision to the trial judge, or to try to distinguish it.

No-citation rules also forbid district judges from citing summary appellate decisions, and presumably from relying on them. But trial judges have been known to overlook or defy that prohibition. A number of recent decisions by district courts in the Second Circuit discuss appellate decisions covered by the no-citation rule, sometimes accompanied by a critique of the rule and sometimes without comment.³¹ Several judges note the absence of citable authority on issues before them in their cases and express frustration that other relevant decisions are off limits under the rule. Judge Haight observed in one such case that “the [no-citation] rule remains in effect and I must abide by it.”³² Thus, he concluded that although two of the Second Circuit's summary orders were directly on point, they “do little to resolve the present dispute.”³³ In a more recent case, another district judge in the Second Circuit was not so compliant. After observing that there was no precedential authority directly on point for the question before him, Judge Lynch proceeded to cite the summary order in support of his ruling despite the citation ban.³⁴ Still another district judge in the Second Circuit who has cited orders covered by the no-citation rule in several recent opinions declined to discuss the rule directly saying simply “Suffice it to say that I find the views of its critics unassailable.”³⁵

[E]ven in those states that forbid the parties from mentioning unpublished opinions, judges read unpublished opinions and pay attention to them.

McCoy v. Alaska,
80 P.3d 747, 757
(Alaska 2003)

[T]he Second Circuit continues to adhere to its technologically outdated rule prohibiting parties from citing such decisions . . . thus pretending that this decision never happened and that it remains free to decide an identical case in the opposite manner because it remains unbound by this precedent.

Harris v. UFT,
2002 WL 1880391, *1
(S.D.N.Y. Aug. 14, 2002)

■ NO-CITATION RULES CONSTRAIN LITIGANTS IN WAYS THAT IMPLICATE CONSTITUTIONAL PROTECTIONS OF DUE PROCESS AND FREE SPEECH.

In addition to their policy drawbacks, citation bans are constitutionally questionable. The underlying practice of issuing nonprecedential opinions was struck down in 2000 by the Eighth Circuit, in *Anastasoff v. United States*.³⁶ The court held that allowing appellate panels to ignore previous panel decisions designated nonprecedential was an unconstitutional expansion of the judicial power conferred by Article III of the U.S. Constitution. Though *Anastasoff* was withdrawn as moot after the case settled, the opinion's analysis has never been repudiated by the Eighth Circuit. A year later, in *Hart v. Massanari*, however, the Ninth Circuit upheld the constitutionality of its own selective use of precedential power, expressly rejecting *Anastasoff*'s analysis. Whatever the constitutionality of courts' use of nonprecedential opinions, there are respectable arguments that rules forbidding their citation offends constitutional guarantees of due process and free expression.

■ DUE PROCESS ARGUMENTS

The “right to be heard” lies at the heart of due process, as it has been conceived by American courts. As Judge Henry Friendly explained, a meaningful right to be heard includes “an opportunity to present reasons why the proposed action should not be taken.”³⁸ No-citation courts refuse to hear litigants argue that the outcomes of their cases should be consistent with the court's previous summary decisions. In a legal culture that associates consistency with fairness and correctness, that is not a trivial prohibition.³⁹

The idea that fairness entails consistency runs through both formal moral philosophical theories and homespun expressions of values. As Frederick Schauer has observed,

Whether expressed as Kantian universalizability, as the decisions that people would make if cloaked in a Rawlsian veil of ignorance about their own circumstances, or simply as The Golden Rule, the principle emerges that decisions that are not consistent are, for that reason, unfair, unjust, or simply wrong.⁴⁰

The idea of consistency has a central place in the constellation of concepts that we call the “rule of law.” The basic idea is that consistency indicates a neutral application of principles, regardless who is affected. Thus, part of how we evaluate the fairness or arbitrariness of government decisions is by judging their consistency with other government actions in similar situations. In adjudication, the norm of consistency is, of course, most fully embodied in the doctrine of precedent. But it does not cease to operate at a more basic level simply because a court announces that most of its decisions are “nonprecedential.”

It is one thing for judges to say they are not bound by a previous ruling. It is

another to assert, as no-citation courts do, that judges will cover their ears when someone tries to tell them that their recent summary rulings demonstrate a pattern of decisionmaking that runs contrary to the ruling being appealed. The refusal even to consider whether previous summary rulings should inform the decision before them smacks of arbitrariness, and “[t]he touchstone of due process is protection of the individual against arbitrary action of government.”⁴¹

In recent decades, the Supreme Court has taken several different doctrinal approaches to procedural due process claims. No-citation rules are questionable under all of them.

Fundamental fairness and common-law tradition. In the context of both civil and criminal adjudication, the Supreme Court has looked to whether a challenged procedure diverges from common law tradition, and whether it violates a “recognized principle of ‘fundamental fairness.’”⁴² Up until the late 18th century, few judicial decisions were reported and available for citation.⁴³ But that traditional reality did not include the idea that judges could refuse to hear discussion of available decisions judges had simply chosen to make unmentionable. For many American lawyers, it would be hard to find a principle of justice more firmly rooted in tradition than an advocate’s freedom to cite the court’s available previous decisions.

Arbitrary or disproportionate restrictions. The Court has sometimes struck down limits on what a litigant may present in court as “arbitrary or disproportionate to the purposes they are designed to serve.”⁴⁴ Today’s wholesale citation bans are disproportionate to their protection of judicial efficiency, because they exclude so much information litigants and trial judges believe is useful and whose variable quality judges are capable of evaluating on an individual basis.

Balancing benefits and burdens under *Mathews v. Eldridge*.⁴⁵ Under *Mathews*, a court balances: (1) “the private interest that will be affected by the official action”; (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”⁴⁶ Evaluating the second and third *Mathews* factors points out how much is lost when no-citation rules suppress decisions in most routine cases. Particularly if a court has recently decided a series of cases with similar facts and a consistent approach and outcome, the presumption is that those cases were decided correctly. Knowledge of their results should help a judge make the correct decision in a subsequent case with similar facts. Certainly the time and docket pressures appellate courts labor under are significant, and many judges on no-citation courts believe citation bans are necessary to do their job properly. But other busy courts get along without such bans. Proponents of

no-citation rules point to no empirical research, quantitative or anecdotal, showing that courts allowing citation of summary decisions are having trouble keeping up with their caseloads or suffering a decline in the quality and clarity of their binding caselaw.

■ NO-CITATION RULES AND FREE SPEECH

At a very literal level, no-citation rules contradict the First Amendment's guarantee of the right "to petition the Government for a redress of grievances."⁴⁷ Federal courts are government institutions to which the right to petition certainly applies, and no-citation rules burden that right. Litigants' inability under the rules to bring to a district judge's attention unpublished appellate cases that conflict with her interlocutory rulings, for instance, limits their ability to petition that judge for redress of a grievance.⁴⁸

Moreover, in striking down a congressional ban on using legal services funding to bring constitutional challenges on behalf of indigent clients, the Supreme Court has recognized that the First Amendment bars an attempt to "prohibit the analysis of certain legal issues and to truncate presentation to the courts" that "prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power."⁴⁹ The Court explained the ban on funding was "inconsistent with the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case."⁵⁰ Plainly there should be no special exemption from that proposition for the argument that a litigant deserves to be treated the same way the court recently treated someone else.

The doctrinal analysis of a claim under the First Amendment is quite different from the due process approaches. But the analyses end up in the same place: No-citation rules are constitutionally questionable because they impose overly severe restrictions for the sake of questionable government interests. It turns out that the disbelief many advocates and nonlawyers express when they first learn of no-citation rules can be fleshed out in constitutional terms.

■ NO-CITATION RULES DISTORT PRECEDENTIAL PRACTICE.

Finally, no-citation rules alter courts' traditional precedential practices in ways that have gone largely unremarked. These changes can be described as three interrelated developments.

■ ■ NO-CITATION RULES SPLIT LEGAL INTERPRETATION FROM CASE ADJUDICATION.

The basis for American courts' power to articulate the law is the courts' power – and duty – to decide individual cases. But no-citation rules split most case decisions entirely away from a court's authoritative statements of law. Not only are most decisions labeled “nonprecedential,” they can never affect later articulations of precedential legal principles because they can never be repeated to the court in subsequent cases. Moreover, as the no-citation courts describe it, the process of articulating the law's application to the facts of the case is entirely separate from the decision of how to rule in the case.

Apart from their practical connection, legal interpretation and individual case adjudication may need to be linked to warrant appointed federal judges' lawmaking in a democracy. A federal court's lawmaking power is conceived as flowing from the court's function of deciding “cases or controversies.”⁵¹ Law made by judges occurs as a kind of secondary effect of resolving legal conflicts.⁵² Unlike legislators, judges are not supposed to begin with an idea of how they want to change the law and then work to make that happen. The idea is that judges are responsive to the cases brought to them, and as a result of deciding those cases, they make law. If judges can decide themselves when to use their law-making power, it begins to look quite disconnected from the business of deciding cases and more like the sort of freewheeling discretion legislators exercise to make law on the questions they believe are important.

■ ■ NO-CITATION RULES SHIFT THE PRECEDENTIAL FOCUS FROM DECIDING ALL CASES CONSISTENTLY TO ARTICULATING CONSISTENT LEGAL RULES.

The process in no-citation courts redirects judges' primary focus from consistent decisionmaking to maintaining a consistent set of precedential rules. No-citation courts put most of their energy into careful articulation of coherent legal rules in a small body of precedential caselaw and do not stop to compare the myriad applications of those rules in routine cases with one another. By forbidding lawyers to tell district judges how the appellate court has applied its carefully articulated precedents in most cases, no-citation courts in effect order district judges to “do as we say, not as we do.” This is a striking reversal of the traditional common law concept that it's not the court's explanation of its decision that is precedential but the court's holding in the case.

■ ■ NO-CITATION RULES ELIMINATE THE RECIPROCAL NATURE OF PRECEDENT.

Banning discussion of most applications of precedent disrupts the reciprocal character of precedential rulemaking. Classically, precedents' practical use feeds back into the precedential rules themselves, clarifying and modifying them.

No-citation rules prevent that feedback from taking place, so that precedents are unaffected by their applications in individual cases.

The upshot is that when faced with a new case, a no-citation court looks not to most of its previous decisions in similar cases, but to a limited set of legal rulings that it applies in all cases with similar facts, legal rulings that will themselves be unchanged by most of those applications. That court is no longer trying to decide all like cases alike by looking to its decisions in all like cases. Instead it is looking only to a small portion of its previous decisions that are designated precedential and applying the legal rules that can be abstracted from those cases in subsequent decisions that generally do not affect the content of the rules themselves.

Notice that with this shift an avowedly precedential judicial system has come to function very much like the alternative to a precedential system. In most of their adjudications, no-citation courts operate something like a nonprecedential civil-law court, in which a limited set of legal rules created by lawmakers are applied by judges in a wide range of cases that do not affect those legal rules. Undoubtedly a significant part of the shift away from traditional precedential practice is accomplished by the courts' decision to label their summary opinions "nonprecedential." But do not underestimate the importance of no-citation rules to the change. For it is no-citation rules that forbid attorneys to argue for a decision consistent with what the court has done in most of its routine cases and force them instead to argue only from what the court has said in a very limited subset of its decisions. And, practically, it is no-citation rules that keep judges' prior routine decisions out of focus while they decide new cases.

OPEN CITATION IS WORKABLE AND FAIR

Given the problems caused by no-citation rules, it's no wonder that in recent years a number of courts have abolished these rules and returned to the traditional system of open citation. Most federal appellate courts and about half of state courts of appeals now allow open citation. The no-citation holdouts continue to defend their closed system, however, and warn of the dangerous consequences that would flow if open citation were allowed. But their arguments and predictions are misguided.

Open citation does not make all court decisions binding precedents. Unquestionably, allowing summary decisions to be cited means that the court contemplates that those decisions could have some precedential or persuasive value. But it does not follow that citing those cases automatically makes them binding on subsequent panels or on lower court judges. The baseline norm of consistent treatment overlaps the doctrine of binding judicial precedent, but it is not equivalent to that doctrine. Allowing citation does oblige judges *to consider* the referenced decisions. Indeed, the central problem of public trust created by the no-citation rules is that they make it appear that judges are ducking that obligation. But the responsibility to consider cited summary decisions for what they are worth does not entail following those decisions, or, even, necessarily, explaining why a court is choosing to diverge from them in a subsequent case.

Open citation does not mean that lawyers have to read hundreds more cases. It isn't as though lawyers review all available authorities; they treat citable summary decisions as part of the mix of potentially citable material and read those that seem likely to be valuable. Since most research is computer driven now, it is relatively easy to pick which cases in a larger pool seem most potentially valuable. As one Illinois practitioner put it, "In the computer age, it's not a hardship. No one reads all the cases; you go through them quickly, on LEXIS or Westlaw. It's hard to say that there will be no additional work, but there probably won't be much more."⁵³

Open citation does not further disadvantage litigants with few resources. If attorneys, or pro se litigants, do not have computer access, they are already at an extreme disadvantage for efficient litigation; lack of access to citable but nonprecedential opinions will not greatly increase that problem. Moreover, all federal courts by law now publish their summary decisions in searchable form on public websites accessible through public libraries.

One group of litigants could be further disadvantaged: pro se prisoners (who likely do not have access to the internet). For federal litigation, West already publishes courts' summary opinions in hard copy in the Federal Appendix. Prisoners with state law claims may not have access to summary state court decisions. This more limited problem should be addressed.

Open citation does not force judges to spend significantly more time on summary decisions. As Judge Easterbrook has pointed out: “It has never been true that judges write these orders for the parties and counsel alone, and thus are certain to include more (or less) when strangers can use them; the audience always has included the Supreme Court, which can and does review unpublished decisions.”⁵⁴ Moreover, so far as we know, judges on courts that have switched to allow open citation have not begun spending significantly more time on non-precedential summary orders. Judge Becker relates that the Third Circuit has not experienced significant additional drains on judges’ time since it began to allow citation of its summary opinions. “The Judges do not consider [citable summary opinions] a burden,” he writes, and “[t]hey do not take that much time to prepare.”⁵⁵ Summary opinions are not cited with undue frequency, Judge Becker says, and “if a useless case is cited, it does not take long to discover that fact, and the citation is ignored.”⁵⁶ Nor do the judges necessarily feel obligated in their new decision to address every summary opinion cited to them.

Judges need not respond to open citation with one-word decisions. There is no evidence so far that this is happening in courts that allow citation. The one-word approach is clearly untenable in the significant number of summary decisions where the word would be not “affirmed,” but “vacated” or “reversed.” Without some explanation of the appellate court’s reasoning, the trial judge whose opinion has just been reversed will not know how to proceed on remand. Moreover, judges recognize that courts’ power and legitimacy are inextricably bound up with their ability to provide reasons for their rulings. For summary affirmances, a slightly expanded version of the one-word opinion might actually be a beneficial shift from the current summary practice. At least where a district court opinion is available online, the appellate panel could usefully affirm “for the reasons stated by the district court.” Or courts might jettison the staff memos that apparently are the basis for many lengthy summary decisions today, and instead take to following a more skeletal format that would be more accurate as far as it went. For instance, courts could say something like, “relying primarily on the principles articulated in the following three precedents, we affirm.” This would also take care of worries about loose paraphrases of precedential language, while providing some information about the court’s applications of its precedents.

Open citation does not confuse lower court judges. There is no evidence that trial court judges are afraid to assess and reject the reasoning in a nonbinding summary ruling from the appellate court that reviews their decisions. A central task of any common law judge is identifying which rulings are binding and must be followed and which may be considered for their reasoning and then either accepted or rejected. Trial judges *are* confused, and sometimes annoyed, when their own rulings are reversed by summary decisions that they are prohibited from citing in subsequent cases and when they are forbidden to rely on, or even to discuss, summary decisions by their own court of review that appear to decide the issue currently before them. They are also forced by no-citation rules to treat as issues of first impression questions that have been resolved in uncitable opinions.

This Court... finds the [uncitable summary] opinion of a distinguished Second Circuit panel highly persuasive, at least as worthy of citation as law review student notes, and eminently predictive of how the Court would in fact decide a future case such as this one.

Harris v. UFT,
2002 WL 1880391, *1
(S.D.N.Y. Aug. 14, 2002)

Open citation does not make it appear that the inaccurate legal analyses of clerks and staff attorneys are the official views of the court. Citability has nothing to do with an opinion's official status. Whatever the quality of summary opinions, and whoever drafted them, they already *are* the official views of the court that issued them as an explanation for its ruling. Whether an opinion can be cited or not, it is the official ruling of the judges who endorsed it and of the court that makes it binding on the parties whose case it decides.

Open citation does not muddle caselaw and make legal rules more ambiguous. The clarity no-citation rules preserve is a paper clarity only, what one commentator calls a “see no evil” view of the law.⁵⁷ If we want clear and consistent rulings in cases, then, if anything, open citation will help by making judges more aware of the way their court has applied legal rules in various situations. To the extent that open citation reveals inconsistencies of application, it provides an opportunity to harmonize them.

If [summary decisions] rest on legal principles previously established through the opinion-writing process, permitting their citation would do no more than reinforce the court's obligation to follow already-established precedent.

*Judge David S. Tatel,
Some Thoughts on
Unpublished Decisions, 64
Geo. Wash. L. Rev 815, 817
(1996)*

CONCLUSION

It is time for courts' outdated, counterproductive no-citation rules to go. Proposed Federal Rule of Appellate Procedure 32.1 should be adopted to mandate open citation in all federal courts of appeals. The proposed rule reads as follows:

Rule 32.1 Citing Judicial Dispositions

(a) **Citation Permitted.** A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like.

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

The rule would end the practice of barring citation in the four remaining federal courts that still have no-citation rules, and ensure that other circuits do not adopt or revert to a no-citation regime.

The Committee on Appellate Rules and the Standing Committee on Rules of the Judicial Conference of the United States have now approved proposed rule 32.1. The rule has been forwarded to the full Conference, with a recommendation that it be approved at the Conference's September 2005 session. If the Judicial Conference accepts the open citation rule, it will need final approval by the U.S. Supreme Court and Congress before taking effect, at the earliest, in December 2006. The rule deserves active support from the federal bench and bar.

If the proposed uniform rule is not adopted, the four remaining federal no-citation courts should appoint committees to study the effects of their citation bans and to consider reform. Likewise, state courts should move toward open citation. Local bar associations should hold information sessions and support change.

No-citation rules may have been good policy when they were justified by equity concerns and covered only a small number of marginal decisions. Today they unnecessarily burden litigants' ability to argue for consistent treatment, prevent trial judges from discussing most of the rulings by their reviewing court, and keep appellate judges in the dark about previous applications of precedent.

ENDNOTES

- 1 STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, 2003 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 36 tbl. S-3 (2003).
- 2 *Id.*
- 3 *Id.* The Federal Circuit also bans citation to its summary decisions but does not release figures for the percentage of its decisions that go by uncitable opinion.
- 4 D.C. Cir. R. 28(c)(1)(B).
- 5 1st Cir. R. 32.3(a)(2).
- 6 Stephen R. Barnett, *In Support of Proposed Federal Rule of Appellate Procedure 32.1: A Reply to Judge Alex Kozinski*, 51 Dec. Fed. Law 32, 35 (2004).
- 7 Letter, Comments from Chief Judge John M. Walker, Jr., on behalf of himself and eighteen other judges of the U.S. Court of Appeals for the Second Circuit, to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure 7 (Feb. 11, 2004) (on file with the Secretary of the Federal Judicial Council Advisory Committee on Appellate Rules).
- 8 *Id.*
- 9 Letter, Comments from Judge Alex Kozinski, U.S. Court of Appeals for the Ninth Circuit, to Judge Samuel A. Alito, Jr., Chairman, Advisory Committee on Appellate Rules 4 (Jan. 16, 2004) [hereinafter “Kozinski Comments”] (on file with the Secretary of the Federal Judicial Council Advisory Committee on Appellate Rules).
- 10 *Id.*
- 11 Kozinski Comments, *supra* note 9, at 6.
- 12 BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 33 (1921).
- 13 Henry Friendly, *Indiscretion about Discretion*, 31 Emory L.J. 747, 757 (1982).
- 14 Letter, Comments from nine judges of the U.S. Court of Appeals for the Seventh Circuit to Judge Samuel A. Alito, Jr., Chairman, Advisory Committee on Appellate Rules 1 (Feb. 11, 2004) (on file with the Secretary of the Federal Judicial Council Advisory Committee on Appellate Rules).
- 15 Kozinski Comments, *supra* note 9, at 7.
- 16 JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 82-85 (1983).
- 17 *See id.* at 29-30.
- 18 Judge Edward Becker, U.S. Court of Appeals for the Third Circuit, Statement to Advisory Committee on Appellate Rules 4 (April 13, 2004) [hereinafter “Becker Statement”] (on file with the author).
- 19 *See* Kozinski Comments, *supra* note 9, at 2.
- 20 Deborah J. Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 Vand. L. Rev. 71, 98 (2001). The authors noted that although judges’ political party affiliation has been found previously to predict case outcomes, party affiliation “was not significant in predicting publication.” *Id.*
- 21 *Id.* at 100.
- 22 *Id.* at 101-02.

- 23 *Id.* at 102-03.
- 24 *Id.* at 101-04.
- 25 *Id.* at 103-04.
- 26 *Id.* at 115.
- 27 9th Cir. R. 36-2(a).
- 28 Commission on Structural Alternatives for the Federal Courts of Appeals, *1998 FJC Survey of Appellate Counsel*, in WORKING PAPERS of the Commission on Structural Alternatives for the Federal Courts of Appeals 78, Item 15 (1998).
- 29 Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 *Ind. L. Rev.* 399, 405-06 (2002).
- 30 Lawrence J. Fox, *Those Unpublished Opinions: An Appropriate Expedience or an Abdication of Responsibility?*, 32 *Hofstra L. Rev.* 1215, 1221 (2004).
- 31 *See, e.g.*, *Fernandez v. M & L Milevoi Mgmt.*, 2005 WL524202, *6 (E.D.N.Y. Mar. 7, 2005); *Spira v. Ashwood Financial, Inc.*, 2005 WL 459563, *7 (E.D.N.Y. Feb. 28, 2005); *Denney v. Jenkens & Gilchrist*, 2005 WL 388562, *18 (S.D.N.Y. Feb. 18, 2005); *Madore v. Beaver*, 2005 WL 27536, *8 (W.D.N.Y. Jan. 5, 2005); *Barclay v. Polano*, 2004 WL 2900694, *3 (W.D.N.Y. Dec. 14, 2004); *Patterson v. Immigration and Naturalization Serv.*, 2004 WL 1396627 *2 n.3 (D. Conn. June 15, 2004); *Harris v. United Fed'n of Teachers*, 2002 WL 1880391, *1 n.2 (S.D.N.Y. Aug. 14, 2002); *Gomez v. Kaplan*, 2000 WL 1458804, *8-*9 (S.D.N.Y. Sept. 29, 2000); *Lloyd v. United States*, 2000 WL 804632, *4 (E.D.N.Y. May 18, 2000).
- 32 *Gomez*, 2000 WL 1458804, *9.
- 33 *Id.*
- 34 *Harris*, 2002 WL 1880391, *1 n.2.
- 35 *Lloyd*, 2000 WL 804632, *4 (Judge Glasser).
- 36 223 F.3d 898 (8th Cir.), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (*en banc*)
- 37 266 F.3d 1155 (9th Cir. 2001).
- 38 Henry J. Friendly, *Some Kind of Hearing*, 123 *U. Pa. L. Rev.* 1267, 1281 (1975).
- 39 For a more complete explication of the due process implications of no-citation rules, *see* Jessie Allen, *Just Words? The Effects of No-Citation Rules in Federal Courts of Appeals*, 29 *Vt. L. Rev.* 555 (2005).
- 40 Frederick Schauer, *Precedent*, 39 *Stan. L. Rev.* 571, 594 (1987).
- 41 *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974).
- 42 *Medina v. California*, 505 U.S. 437, 448 (1992) (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)).
- 43 *Hart v. Massanari*, 266 F.3d 1155, 1165-69 (9th Cir. 2001).
- 44 *Rock v. Arkansas*, 483 U.S. 44, 55-56 (1987). In *Rock*, the Supreme Court reviewed Arkansas's evidentiary rule excluding a homicide defendant's hypnotically refreshed testimony. The Court noted that a criminal defendant's right to testify in her own behalf has several constitutional sources, including the Due Process Clause. The Court listed the Sixth Amendment's Compulsory Process Clause, guaranteeing the defendant's right to call "witnesses in his favor"; the Fifth Amendment's guarantee against compelled testimony; and the guarantee of due process under the Fourteenth Amendment. *Id.* at 51-53.
- 45 424 U.S. 319 (1976).

- 46 *Id.* at 334.
- 47 U.S. CONST. Amend. I.
- 48 See David Greenwald & Frederick A. O. Schwarz, Jr., *The Censorial Judiciary*, 35 U.C. Davis L. Rev. 1133, 1165-66 (2002).
- 49 Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 545 (2001).
- 50 *Id.*
- 51 U.S. CONST. art. III, § 2, cl. 1. “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution...to controversies”
- 52 See *Marbury v. Madison*, 5 U.S. 137, 177 (1803).
- 53 Interview by Stephen R. Barnett with Joseph G. Bisceglia, Illinois Bar Assn., in Stephen R. Barnett, *To Cite or Not to Cite: Ask Illinois about Unpublished Cases*, Daily Journal, Oct. 7, 2004 at 4.
- 54 Letter, Comments from Judge Frank H. Easterbrook, U.S. Court of Appeals for the Seventh Circuit., to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure 2 (Feb. 13, 2004) (on file with the Secretary of the Federal Judicial Council Advisory Committee on Appellate Rules).
- 55 Becker Statement, *supra* note 18, at 3.
- 56 *Id.*
- 57 Fox, *supra* note 30, at 1224.
- 58 Agenda book of the Advisory Committee on Appellate Rules, 4-8 Table IV-A (April 18, 2005) (on file with the Secretary of the Federal Judicial Council Advisory Committee on Appellate Rules).

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