

NO-CITATION RULES AS A PRIOR RESTRAINT ON ATTORNEY SPEECH

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The federal appellate courts promulgated selective publication and no-citation rules in the 1960's as a means of alleviating the burden of an escalating caseload crisis. Selective publication rules permit courts to designate certain opinions as "unpublished," while no-citation rules bar litigants from citing to, and simultaneously restrict the precedential value of, those opinions. Although these rules have arguably succeeded in their pursuit of judicial economy, courts and commentators have suggested myriad reasons why they may be constitutionally infirm. This Note focuses on the First Amendment implications of no-citation rules. Specifically, it maintains that these rules—which restrict attorneys from communicating certain information (the content of an unpublished opinion) in advance of the time that such communication is to occur (in a brief or at oral argument)—operate as an impermissible prior restraint on attorney speech.

INTRODUCTION

The doctrine of precedent is deeply embedded in the heart of the American legal system and in the mind of every lawyer who practices therein. The notion that courts should attempt to decide cases on the basis of principles established in prior cases is one of the few legal principles that requires no second-guessing, as “[a] more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.”¹ However, the practice of relying on past cases as precedent was altered in the 1960s, when the federal appellate courts adopted selective publication and no-citation rules in order to cope with a mounting caseload crisis.

Selective publication rules allow courts to designate certain opinions as unpublished.² Since the introduction of selective publication rules, the number of unpublished opinions written by federal circuit courts has

1. 3 Joseph Story, Commentaries on the Constitution of the United States § 377 (1833).

2. Although “unpublished” was originally used to denote those opinions that were not printed in case reporters, the term is somewhat of a misnomer today given that most opinions—even those denoted as unpublished—are accessible to the public via Westlaw and Lexis. However, federal circuit courts are not required to make their unpublished opinions available electronically, and two circuits—the Fifth and the Eleventh—currently do not do so. Alison Steiner, *If a Rule of Law Falls in the Fifth Circuit But It Is Not on Westlaw, Does It Make a Sound?*, Fifth Cir. Rep., Nov. 2002, at 27, 27. In addition, the precise meaning given to the term unpublished has been somewhat revised by West Group’s recent creation of the *Federal Appendix*, which catalogues unpublished opinions in bound volumes. See Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the House Comm. on the Judiciary, 107th Cong. 42, 44 (2002) (statement of Arthur D. Hellman, Professor of Law, University of Pittsburgh School of Law) [hereinafter Hellman Statement].

steadily increased, with an overwhelming eighty percent of all federal appellate decisions going unpublished between October 2000 and September 2001.³ Partnered with these selective publication plans are no-citation rules, which prohibit trial participants from citing to unpublished opinions except under specified limited circumstances. The effect of no-citation rules is to restrict—or even reduce to naught—the precedential value of those opinions.⁴ Both selective publication and no-citation rules have been jointly discussed and criticized in recent years, but the two are analytically distinct policies that pose discrete legal issues; this Note will focus chiefly on the First Amendment concerns raised by the latter.

The Eighth Circuit held in 2000 that no-citation rules, which sacrifice adherence to precedent in favor of judicial economy, are an unconstitutional expansion of the judiciary's Article III powers.⁵ One year later, the Ninth Circuit disagreed and upheld the constitutionality of its own no-citation rule.⁶ While the debate within the judiciary has focused primarily on Article III concerns, commentators have contested the constitutionality of no-citation rules on other grounds as well—including claims of due process and equal protection. One angle that has not yet been closely examined by courts or commentators, however, is the possibility that no-citation rules are an impermissible prior restraint on attorney speech. This Note argues that no-citation rules, which forbid all citation to unpublished opinions, tread upon the First Amendment rights of attorneys, and by extension, their clients.

Part I provides background on the rise of selective publication and no-citation rules in the federal appellate courts, and describes the principal normative arguments for and against such rules. Part II briefly discusses the two recent conflicting opinions on this subject—*Anastasoff v. United States*⁷ and *Hart v. Massanari*⁸—as well as the various constitutional challenges that scholars have advanced against no-citation rules. Part III argues that the no-citation rules of several circuits, which flatly proscribe attorneys from communicating certain information (the content of an unpublished opinion) in advance of the time that such communication is to occur (in a brief or at oral argument), constitute an impermissible prior restraint.⁹ This Part ultimately supports a solution that, while still

3. Adam Liptak, Federal Appeals Court Decisions May Go Public, N.Y. Times, Dec. 25, 2002, at A21. The percentage of unpublished opinions varies by circuit, ranging from 60.2% in the Seventh Circuit to 91.5% in the Fourth Circuit. *Id.*

4. The exception to this statement is the recently-amended rule of the D.C. Circuit, which allows all unpublished opinions decided on or after January 1, 2002 to be cited as binding precedent. D.C. Cir. R. 28(c)(1)(B).

5. See *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), vacated as moot on other grounds, 235 F.3d 1054 (8th Cir. 2000) (en banc).

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

7. *Anastasoff*, 223 F.3d at 898.

8. *Hart*, 266 F.3d at 1155.

9. While this Note focuses on the no-citation rules of federal appellate courts, it is important to recognize that the no-citation rules of state courts commit a parallel

mindful of the need for judicial economy, falls comfortably within constitutional bounds.

No-citation rules vary from circuit to circuit. They uniformly allow citation to unpublished decisions to support a procedural claim of res judicata, collateral estoppel, or the law of the case,¹⁰ but otherwise diverge into one of three general categories: those that expressly forbid citation to unpublished opinions (the Second, Seventh, Ninth, and Federal Circuits),¹¹ those that “disfavor” such citations (the First, Fourth, Sixth, Eighth, and Tenth Circuits),¹² and those that openly permit them

constitutional offense because the First Amendment applies to the states through the due process clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). For a survey of states’ selective publication and no-citation rules, see Comm. for the Rule of Law, Notes on Publication Rules of Court for the United States and Federal Circuits, at www.nonpublication.com/states.html (last visited Mar. 20, 2003) (on file with the *Columbia Law Review*).

10. See 1st Cir. R. 32.3(a)(1); 2d Cir. R. 0.23; 4th Cir. R. 36(c); 5th Cir. R. 47.5.3; 6th Cir. R. 28(g); 7th Cir. R. 53(b)(2)(iv); 8th Cir. R. 28A(i); 9th Cir. R. 36-3(b)(i); 10th Cir. R. 36.3(A); D.C. Cir. R. 28(c)(1)(A); Fed. Cir. R. 47.6(b). The only exception is the Third Circuit rule, which does not explicitly address citation of unpublished opinions by litigants, in related or unrelated cases.

11. See 2d Cir. R. 0.23 (stating that unpublished opinions “shall not be cited or otherwise used in unrelated cases”); 7th Cir. R. 53(b)(2)(iv) (“Except to support a claim of res judicata, collateral estoppel or law of the case, [unpublished opinions] shall not be cited or used as precedent.”); 9th Cir. R. 36-3 (stating that unpublished opinions “are not binding precedent . . . [and] may not be cited to or by the courts of this circuit, except . . . when relevant under the doctrine of law of the case, res judicata, or collateral estoppel”); Fed. Cir. R. 47.6(b) (prohibiting citation of any opinion “designated as not to be cited as precedent”). The Third Circuit does not explicitly mention whether citation by litigants to unpublished opinions is permissible or not, but states that the court itself does not cite to its own unpublished opinions as authority. See 3d Cir. I.O.P. 5.7.

12. See 1st Cir. R. 32.3(a)(2) (stating that “[c]itation of an unpublished opinion of this court is disfavored” unless there is no published First Circuit opinion that adequately addresses the issue); 4th Cir. R. 36(c) (“Citation of this Court’s unpublished dispositions . . . is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.”); 6th Cir. R. 28(g) (permitting citation of unpublished decisions only where no published opinion would serve as well, and for purposes of res judicata, collateral estoppel, and law of the case); 8th Cir. R. 28A(i) (declaring that unpublished opinions “are not precedent and parties generally should not cite them” but allowing citation for the purposes of res judicata, collateral estoppel, or “if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well”); 10th Cir. R. 36.3(B)(1)–(2) (“Citation of an unpublished opinion is disfavored. But an unpublished opinion may be cited if: (1) it has persuasive value with respect to a material issue that has not been addressed in a published opinion; and (2) it would assist the court in its disposition.”). The Fifth Circuit has two different rules, one applicable to unpublished opinions issued before January 1, 1996, and one applicable to those published after that date. The former rule disfavors citation to unpublished opinions. See 5th Cir. R. 47.5.3 (“Unpublished opinions issued before January 1, 1996 . . . should normally be cited only when the doctrine of res judicata, collateral estoppel or law of the case is applicable.”). The latter rule openly allows citation to unpublished opinions. See 5th Cir. R. 47.5.4 (“Unpublished opinions issued on or after January 1, 1996 . . . may be cited.”).

(the Fifth, Eleventh, and D.C. Circuits).¹³ This Note argues that rules which impose a blanket prohibition on citation to unpublished opinions—those of the Second, Seventh, Ninth, and Federal Circuits—constitute an impermissible prior restraint on attorney speech, insofar as they bar that speech from being uttered either in a brief or at oral argument.

Recent years have witnessed a trend towards amending the no-citation rules of the federal appellate courts to allow citation to unpublished opinions in certain circumstances; the majority of federal courts of appeals today either openly permit or disfavor, but do not flatly forbid, citation to unpublished opinions. In addition, in 2002, Congress began to hear expert testimony on the subject of no-citation rules, with an eye towards the creation of uniform rules to govern the publication procedures of all federal circuits. The Advisory Committee on the Federal Rules of Appellate Procedure has also endorsed a uniform rule that would allow citation to unpublished opinions under certain specified circumstances.¹⁴ This Note argues that any rules implemented—whether uniform across the federal circuits or tailored to each circuit—may not, consistent with the First Amendment, completely prohibit attorneys from citing to unpublished opinions.

I. BACKGROUND: SELECTIVE PUBLICATION AND NO-CITATION RULES

This Part attempts to situate the debate surrounding selective publication and no-citation rules in its doctrinal and historical contexts. It will first discuss the fundamental concepts of precedent and *stare decisis* and their relation to no-citation rules. It will then map the development of selective publication and no-citation rules, and note the recent calls for reform. Finally, the major normative arguments both for and against these rules will be reviewed.

A. *Precedent and Stare Decisis*

The concept of precedent, borrowed from antecedent legal orders and implemented by the earliest American courts, is older than our judicial system itself.¹⁵ Justice Story affirmed the importance of precedent very early on, declaring:

[T]he principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the con-

13. See 5th Cir. R. 47.5.4 (allowing unpublished opinions issued after January 1, 1996, to be cited as persuasive authority); 11th Cir. R. 36-2 (“Unpublished opinions . . . may be cited as persuasive authority . . .”); D.C. Cir. R. 28(c)(1)(B) (“All unpublished orders or judgments of this court . . . entered on or after January 1, 2002, may be cited as precedent.”).

14. See *infra* notes 50–51 and accompanying text.

15. See Hellman Statement, *supra* note 2, at 44 (“In the Anglo-American legal system, the decisions of appellate courts not only resolve the disputes between the parties immediately before them; they also establish precedents to guide courts and citizens in the resolution of future disputes. That, at least, is the tradition.”).

stant practice under our whole system of jurisprudence
[A]nd it is, and always has been considered, as the great security
of our rights, our liberties, and our property.¹⁶

Adherence to precedent is based on the principle of *stare decisis*, which means, literally, to stand by things decided.¹⁷ This tenet simply directs judges to abide by settled precedent and “reaches its apogee when a single precedent is considered to be a ‘binding’ authority.”¹⁸ *Stare decisis* promotes the core values that legitimate our judicial process—predictability and stability,¹⁹ fairness,²⁰ and principled decision-

16. Story, *supra* note 1, § 377. Story continued, “It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice, or will of particular judges.” *Id.*

17. Black’s Law Dictionary 1414 (7th ed. 1999). This derives from the maxim *stare decisis et non quieta movere*, which means “to abide by the precedents and not to disturb settled points.” 18 James Wm. Moore et al., *Moore’s Federal Practice* ¶ 134.01(1) (3d ed. 2003).

18. Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 *Am. J. Legal Hist.* 28, 29 (1959).

19. The most frequently extolled virtue of *stare decisis* is the need for certainty and predictability in the law, which enables individuals to anticipate the legal implications that may stem from their behavior. Earl Maltz, *The Nature of Precedent*, 66 *N.C. L. Rev.* 367, 368 (1988). As Professor Schauer notes, “[t]he ability to predict what a decisionmaker will do helps us plan our lives, have some degree of repose, and avoid the paralysis of foreseeing only the unknown.” Frederick Schauer, *Precedent*, 39 *Stan. L. Rev.* 571, 597 (1987). This justification for precedent emphasizes an institutional reason—stability in the law—for courts to respect precedent, even if they might have come to a different conclusion had the question been one of first impression.

Perhaps the most prominent example of this position is *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992), where the Court reaffirmed the core holding of *Roe v. Wade*, 410 U.S. 113 (1973). Speaking through Justices O’Connor, Kennedy, and Souter, the Court proclaimed that “to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court’s legitimacy beyond any serious question.” *Id.* at 867; see also *id.* at 861–64 (discussing the overruling of the *Lochner* line of cases and *Plessy v. Ferguson* as justifiably based on changed “facts, or [society’s] understanding of facts”). The *Casey* Court subsequently asserted that a decision to overrule *Roe* would unnecessarily “damage . . . the Nation’s commitment to the rule of law.” *Id.* at 869. Justice Stevens’s partial concurrence similarly observed that “[t]he Court is unquestionably correct in concluding that the doctrine of *stare decisis* has controlling significance in a case of this kind. . . . The societal costs of overruling *Roe* . . . would be enormous.” *Id.* at 912 (Stevens, J., concurring in part and dissenting in part).

The essence of the *Casey* majority’s take on *stare decisis* is that, although the *Roe* decision had engendered tremendous opposition, it had not proved unworkable, the factual and legal underpinnings of the case had not changed, and reliance on the availability of abortion had significantly shaped personal choices. See *id.* at 860. Absent the existence of these factors, the argument runs, it would be deleterious to displace reliance on then-existing legal norms—particularly when that reliance is on a right as central as that guaranteed by *Roe*. See *id.* at 856. *Casey* illustrates the importance of institutional stasis as a fundamental value of our legal system.

20. At the core of this notion of fairness is the principle of equal protection, which aspires to the equal treatment of similarly situated individuals and consistency across cases and the parties involved. Consistent with that notion, similarly situated litigants must be treated alike: “[T]wo incidents adjudicated by the same court, occurring in the same place

making.²¹ As stated by Justice Harlan, the “very weighty considerations” that underlie stare decisis include

the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.²²

No-citation rules have effectively taken unpublished opinions outside the realm of stare decisis. These rules explicitly strip unpublished opinions of any binding precedential force (though the rules of certain circuits do confer varying degrees of nonbinding persuasive value on such opinions),²³ thereby eliminating the requirement that later courts adhere to those decisions. Some scholars have questioned the consequences of this break with the notion of stare decisis, which will be discussed further in Part I.C.2.

B. *The Genesis of Selective Publication and No-Citation Rules*

Judicial decisions were few and far between in colonial America, and as such, published law reports—something we rely on tremendously and take for granted today—did not exist at that time.²⁴ Instead, lawyers typically committed important decisions to memory and depended on trea-

and at the same time, and arising out of facts which are identical except for the identity of the litigants, should be treated equally.” Maltz, *supra* note 19, at 369.

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21. One highly prized value of our judicial system is that society should be governed by “rules of law and not merely the opinions of a small group of men who temporarily occupy high office.” Fla. Dep’t of Health & Rehabilitative Servs. v. Fla. Nursing Home Ass’n, 450 U.S. 147, 154 (1981) (Stevens, J., concurring); see also Pollock v. Farmers’ Loan & Trust Co., 157 U.S. 429, 652 (1895) (White, J., dissenting) (“The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members.”); William Cranch, Preface to 5 U.S. (1 Cranch) iii, iii (1804) (“In a government . . . emphatically stiled [sic] a government of laws, the least possible range ought to be left for the discretion of the judge. Whatever tends to render the laws certain, equally tends to limit that discretion; and perhaps nothing conduces more to that object than the publication of reports.”).

Stare decisis creates the appearance of neutrality because caselaw—when decided within the bounds of stare decisis—is an ostensibly impartial “source of authority to which judges can appeal in order to justify their decisions.” Maltz, *supra* note 19, at 371. However, the appearance of impartiality may be just that—an appearance: “As any law student knows, virtually any judicial decision can be analogized to or distinguished from any other fact pattern.” *Id.* But it can be argued that “one also can identify many cases in which precedent actually seems to influence the result. . . . [B]ecause judges believe that law should be made by reference to ‘neutral’ principles of precedent, those principles in fact have a strong influence on decision making.” *Id.*

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22. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970).

23. See *infra* notes 47–48 and accompanying text.

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24. See Martha J. Dragich, Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?, 44 Am. U. L. Rev. 757, 772 & nn.73–75 (1995) (noting also that the

tises such as those of Blackstone and Coke as a source of legal wisdom and guidance.²⁵ However, both the bench and bar began to grow in the nineteenth century as a result of a spike in litigation, and with that came development in the complexity of the law.²⁶ As a result, states began to publish “official reports” of judicial proceedings,²⁷ and the *Federal Reporter* later started to publish cases in 1894.²⁸

For decades, the *Federal Reporter* continued to publish nearly every judicial opinion written by the federal courts of appeals, without distinguishing between those deemed to have important precedential value and those thought to be of potentially less significance for future courts and litigants.²⁹ However, as the volume of litigation continued to flourish³⁰—resulting in a surge in the number of appeals faced by federal appellate courts—legal professionals were faced with the realization that the “practical limit on lawyers’ and judges’ ability to obtain and assimilate judicial opinions was dangerously near being exceeded”³¹ and that the

earliest case reporters focused almost exclusively on counsels’ arguments rather than on the opinion of the court).

25. *Id.* at 771–72; Drew R. Quitschau, Note, *Anastasoff v. United States: Uncertainty in the Eighth Circuit—Is There a Constitutional Right to Cite Unpublished Opinions?*, 54 Ark. L. Rev. 847, 855 (2002).

26. See Dragich, *supra* note 24, at 772.

27. Suzanne O. Snowden, Note, “That’s My Holding and I’m Not Sticking to It!” Court Rules That Deprive Unpublished Opinions of Precedential Authority Distort the Common Law, 79 Wash. U. L.Q. 1253, 1259 (2001) (also discussing the rise of the West Publishing Company during the nineteenth century). The first known reporters were called Year Books, which were unofficial reports that had been published for centuries in England. *Id.* at 1258. Those books were eventually replaced with unofficial “nominative” reporters, which were compiled by various lawyers from their personal notes about different opinions that had been handed down. *Id.* at 1259. Edmund Plowden published the first nominative case reporter in 1571; this reporter, called *Les Comentaires, ou les Reportes*, was eventually published in the United States, along with other similar reporters. *Id.* The “desire for an ‘American’ common law—separate and distinct from the laws of England—was a major impetus in the widespread adoption of reporters.” *Id.*

28. Boyce F. Martin, Jr., In Defense of Unpublished Opinions, 60 Ohio St. L.J. 177, 184 (1999).

29. See *id.* at 184 & n.27.

30. The surmised causes behind this surge in litigation are numerous. For example, there was an increase in the number of civil laws in the 1960s and 1970s with subsequent private causes of action under those laws—including civil rights laws, environmental laws, and employment laws. David Greenwald & Frederick A.O. Schwarz, Jr., The Censorial Judiciary, 35 U.C. Davis L. Rev. 1133, 1145 (2002). In the criminal realm, the number of appeals mushroomed by over 600% between 1960 and 1983, stimulated “by both the expansion of criminal appellate rights by the Warren Court and the passage of federal legislation appropriating funds for appellate counsel in criminal cases.” *Id.* While circuit court filings between 1934 and 1960 grew at a rate of 0.5% per year, between 1960 and 1983 that growth rate increased to 9%—with the number of annual appeals growing from 4,000 to 29,580 during that time period. *Id.* at 1146. The growth in the number of federal appellate judges did not keep the same pace, however, with the number increasing from 66 to 150 between 1960 and 1995—less than a 3% increase per year—which no doubt contributed to the growing caseload crisis. *Id.*

31. Quitschau, *supra* note 25, at 857.

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common law faced the alarming prospect of being “crushed by its own weight if [the trend] continue[d] unabated.”³²

The Judicial Conference of the United States finally addressed the mounting caseload crisis of the federal courts in 1964, and adopted a resolution that appellate courts publish only those opinions thought to be of “general precedential value.”³³ However, this broad and unstructured proposal essentially fell by the wayside until 1973, when the Advisory Council for Appellate Justice released a report urging appellate courts to apply concrete criteria to determine whether an opinion was publication-worthy.³⁴ The Council proposed that judges, in making such determinations, consider whether the decision: (1) created a new rule of law or altered an existing one; (2) involved a legal issue of continuing public interest; (3) criticized existing law; or (4) resolved an apparent conflict of authority.³⁵ The Council hoped that limiting publication of opinions would preserve judicial resources and reduce costs by increasing the efficiency with which judges produced their opinions.³⁶

In conjunction with the aforementioned criteria, the Council also proposed rules that disallowed citation to unpublished opinions in court papers or arguments in order to further the underlying purpose of selective publication (i.e., judicial economy).³⁷ It was believed necessary to partner such no-citation rules with those of selective publication because

32. Kirt Shuldberg, Comment, Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals, 85 Cal. L. Rev. 543, 546 (1997) (internal quotation marks omitted) (quoting Charles W. Joiner, Limiting Publication of Judicial Opinions, 56 *Judicature* 195, 195 (1972)). Although these fears finally came to a head in the 1970s, they apparently have prompted volume-related concerns “[e]ver since systematic reporting of judicial decisions first began in the 16th century.” Jerome I. Braun, Eighth Circuit Decision Intensifies Debate Over Publication and Citation of Appellate Opinions, 84 *Judicature* 90, 90–91 (2000) (noting that, in 1671, the English Chief Justice Hale described the collection of reported opinions as “the rolling of a snowball, it increaseth in bulk in every age, until it becomes utterly unmanageable”).

33. Judicial Conference of the United States, Admin. Office of the U.S. Courts, Reports of the Proceedings of the Judicial Conference of the United States 11 (1964).

34. See generally Comm. on Use of Appellate Court Energies, Advisory Council for Appellate Justice, Standards for Publication of Judicial Opinions (1973) [hereinafter Advisory Council Report].

35. *Id.* at 15–17.

36. *Id.* at 3. Circuit courts have also responded to burgeoning caseloads by altering their general appellate procedures, both declining to grant oral arguments in a wider range of cases and limiting the amount of time litigants have to argue in front of a panel. Carl Tobias, Comment, *Anastasoff*, Unpublished Opinions, and Federal Appellate Justice, 25 *Harv. J.L. & Pub. Pol’y* 1171, 1173 (2002); see also 4th Cir. R. 34 (providing standards for selection of cases not warranting oral argument); 5th Cir. R. 34 (same); 11th Cir. R. 34 (same); Thomas E. Baker, Rationing Justice on Appeal: The Problems of the U.S. Courts of Appeals 108–17 (1994) (discussing and criticizing federal appellate court procedures regarding oral arguments); William M. Richman & William L. Reynolds, Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition, 81 *Cornell L. Rev.* 273, 279–81 (1996) [hereinafter Richman & Reynolds, *Elitism*] (criticizing limitations on appellate oral arguments).

37. See Advisory Council Report, *supra* note 34, at 18–21.

unpublished opinions were meant solely for the parties involved in the litigation, and the precision of the legal writing, reasoning, and detail contained within was thought to be of lesser quality than opinions written for publication.³⁸ No-citation rules were also thought to promote fairness in the world of selective publication, in order to “dispel[] any suspicion that institutional litigants and others who might have ready access to collections of unpublished opinions had an advantage over other litigants without such access.”³⁹ This argument is less compelling today, though, because the term “unpublished” is now somewhat of a misnomer: many, though not all, circuits make their unpublished opinions publicly available via Westlaw, Lexis, or the *Federal Appendix*.⁴⁰

In response to the Advisory Council’s report, the federal circuits have since adopted their own selective publication and no-citation rules.⁴¹ As of the early 1990s, over sixty percent of federal appellate decisions were not published.⁴² Today, approximately eighty percent of the cases decided by the federal courts of appeals go unpublished.⁴³

As noted, no-citation rules vary from circuit to circuit, and each falls into one of three general categories: those that forbid citation to unpublished opinions (the Second, Seventh, Ninth, and Federal Circuits),⁴⁴ those that disfavor such citation (the First, Fourth, Sixth, Eighth, and Tenth Circuits),⁴⁵ and those that permit it (the Fifth, Eleventh, and D.C.

38. Limited publication and no-citation rules were meant to “serve as a sorting device, separating the wheat from the chaff.” Shuldberg, *supra* note 32, at 551.

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39. Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the House Comm. on the Judiciary, 107th Cong. 5, 7 (2002) (statement of Judge Samuel A. Alito, Jr., U.S. Court of Appeals for the Third Circuit; Chair, Advisory Committee on the Federal Rules of Appellate Procedure) [hereinafter Alito Statement].

40. *Id.*; see also *supra* note 2.

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41. The selective publication rules of each circuit employ a common theme: if, in the presiding judge’s opinion, a case is unlikely to have future precedential value, the judge is permitted to deal with that case by writing an unpublished opinion. The exact standards, of course, vary by circuit. For instance, the Second Circuit’s standard is whether any “jurisprudential purpose would be served by a written opinion.” 2d Cir. R. 0.23. The Third, Tenth, and Federal Circuits all set forth similar tests. See 3d Cir. I.O.P. 5.5.3; 10th Cir. R. 36.1; Fed. Cir. R. 47.6(b). Other circuits, by contrast, have developed more specific criteria, such as those proposed by the Advisory Council (i.e., whether the opinion establishes a new rule of law, involves an issue of continuing public interest, criticizes existing law, or resolves an apparent conflict of authority). See 1st Cir. R. 36(b)(1); 4th Cir. R. 36(a); 5th Cir. R. 47.5.1; 6th Cir. R. 206; 7th Cir. R. 53(c)(1); 8th Cir. R. 47B; 9th Cir. R. 36-2. No-citation rules also vary by circuit. See *infra* notes 44–48 and accompanying text.

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42. See Mark D. Hinderks & Steve A. Leben, Restoring the Common in the Law: A Proposal for the Elimination of Rules Prohibiting the Citation of Unpublished Decisions in Kansas and the Tenth Circuit, 31 Washburn L.J. 155, 158 (1992).

43. Hellman Statement, *supra* note 2, at 44.

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

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

Circuits).⁴⁶ In addition, although the initial goal of selective publication rules was to deprive all unpublished opinions of any precedential value, the rules of some circuits now permit judges to confer a certain degree of persuasive authority upon an unpublished opinion of their own court if they so choose;⁴⁷ the D.C. Circuit even grants such opinions precedential authority when cited.⁴⁸ This Note contends that only those rules that explicitly prohibit citation to unpublished opinions—those of the Second, Seventh, Ninth, and Federal Circuits—face a First Amendment barrier.⁴⁹

C. *Calls for Reform*

The public debate over no-citation rules has been long and pronounced; in recent months it has become all the more salient with the commencement of governmental scrutiny of the topic, which may well lead to reform of the current scheme. In an effort to create a uniform procedure regulating no-citation rules, alterations to the current rules have been proposed at various times throughout the past decade. In January 2001, the Department of Justice suggested specific language to the Advisory Committee on the Federal Rules of Appellate Procedure that would accomplish just that.⁵⁰ The Advisory Committee endorsed a new

46. See 5th Cir. R. 47.5.4; 11th Cir. R. 36-2; D.C. Cir. R. 28(c)(1)(B).

47. The fact that a circuit may allow citation to unpublished opinions does not mean that the circuit automatically confers precedential authority upon such opinions. For example, the Third Circuit rule states that “[t]he court by tradition does not cite to its not precedential opinions as authority.” 3d Cir. I.O.P. 5.7. Thus, even though parties potentially may be permitted under the text of the rule to cite to unpublished opinions, the court itself nevertheless refuses to cite to such opinions, thus denying them any meaningful precedential value.

In the four circuits that forbid citation to unpublished opinions in unrelated cases—the Second, Seventh, Ninth, and Federal—unpublished opinions are not granted any authority, precedential or persuasive. See 2d Cir. R. 0.23; 7th Cir. R. 53(b)(2)(iv); 9th Cir. R. 36-3; Fed. Cir. R. 47.6(b). By contrast, the First, Eighth, Tenth, and Eleventh Circuits all grant persuasive authority to unpublished opinions. See 1st Cir. R. 32.3(a)(2); 8th Cir. R. 28A(i); 10th Cir. R. 36.3; 11th Cir. R. 36-2. The Fifth Circuit grants unpublished opinions issued after January 1, 1996 persuasive authority, while unpublished dispositions issued before that date may not be cited unless considerations of *res judicata*, collateral estoppel, or the law of the case apply. See 5th Cir. R. 47.5.3–4. The Fourth and Sixth Circuit rules are vague with respect to whether a citable unpublished opinion has precedential or persuasive value, each stating that if a party believes that an unpublished opinion has precedential value in relation to a material issue in the case, it may be cited. See 4th Cir. R. 36(c); 6th Cir. R. 28(g). No mention is explicitly made in either rule, however, of whether a future court is to treat that citation as strictly binding; that decision is likely to ultimately be made by a presiding judge presented with such a citation.

48. See D.C. Cir. R. 28(c)(1)(B) (conferring precedential authority on all unpublished opinions entered after January 1, 2002). However, all unpublished dispositions issued prior to January 1, 2002, may not be cited for persuasive or precedential value, unless considerations of *res judicata* or the law of the case apply. *Id.* 28(c)(1)(A).

49. See *infra* Parts III.C.2–3.

50. Alito Statement, *supra* note 39, at 9. This proposal allows citation to an unpublished opinion if: “(1) it directly affects a related case, e.g., by supporting a claim of

rule at its November 2002 meeting that would implement a uniform rule allowing citation to unpublished opinions.⁵¹ However, whether uniform publication rules will eventually be accepted and applied across all federal circuits remains an open issue, as both the Supreme Court and Congress must approve the rule before it can be adopted.⁵² And, as Judge Alito, Chair of the Advisory Committee, noted during recent congressional hearings, the question of “[w]hether the benefits of uniform procedures governing citation of opinions outweigh the flexibility of local procedures is subject to no easy answer.”⁵³ Various dissenting voices have recently weighed against the creation of uniform rules, including a number of federal appellate judges.⁵⁴

Congress has also taken initial steps in examining this issue. On June 27, 2002, the House Subcommittee on Courts, the Internet, and Intellectual Property heard testimony from a number of individuals on the

res judicata or collateral estoppel, or (2) ‘a party believes that it persuasively addresses a material issue in the appeal, and that no published opinion of the forum court adequately addresses the issue.’” *Id.* It also requires that any document that cites an unpublished opinion have attached to it a copy of that opinion. *Id.* However, “[t]he proposal takes no position on the precedential value of an ‘unpublished’ opinion and does not dictate whether or to what extent a court should designate opinions as ‘unpublished.’” *Id.*

51. Stephanie Francis Cahill, Don’t Issue Citations for Citation; Court Committee: Courts Should Allow Citing Unpublished Opinions, ABA J. eReport, Dec. 13, 2002, at <http://www.abanet.org/journal/ereport/d13unpub.html> (on file with the *Columbia Law Review*). In its November 2002 meeting, the Committee determined that the imposition of a uniform rule allowing citation to unpublished opinions would “expand the sources of insight and information that can be brought to the attention of judges and make the entire process more transparent to attorneys, parties, and the general public.” *Id.*

52. *Id.* Any proposal must go through lengthy procedures in order for a rule to be amended or a new rule to be adopted. See Fed. Rules of Practice and Procedure Admin. Office of the U.S. Courts, Federal Rulemaking—The Rulemaking Process: A Summary for the Bench and Bar, at <http://www.uscourts.gov/rules/proceduresum.htm> (last visited Mar. 25, 2003) (on file with the *Columbia Law Review*). First, the Advisory Committee develops and suggests the recommended change. Next, the proposed amendment or rule must be published for public comment (usually allowing a six-month window for comment). After the comment period, the Advisory Committee must revise the rule, if necessary, based on the comments received and then pass the rule on to the Standing Committee for final recommendations. Once approved by the Standing Committee, the proposed change is then submitted to the Judicial Conference for approval, and if endorsed by the Conference, the rule is sent up for Supreme Court review. Finally, if the Court approves the rule, Congress is allowed a seven-month statutory period in which it may enact legislation to modify or reject the proposed change. *Id.*

53. Alito Statement, *supra* note 39, at 9.

54. For instance, Chief Judge Edward Becker of the Third Circuit said, “[T]he criteria for determining when an opinion should be legended ‘not precedential’ should be a matter for the respective Courts of Appeals.” Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the House Comm. on the Judiciary, 107th Cong. 24, 24 (2002) (statement of Kenneth Schmier, Chairman, Committee for the Rule of Law) (quoting Chief Judge Becker). And Judge Wilfred Feinberg of the Second Circuit said, “I also feel that any attempt to specify uniform, national criteria for ‘unpublished’ opinions—would be unwise.” *Id.* (quoting Judge Feinberg).

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subject of no-citation rules—including Judge Samuel Alito, Jr. of the Third Circuit;⁵⁵ Judge Alex Kozinski of the Ninth Circuit;⁵⁶ Arthur Hellman, former Deputy Executive Director of the Commission on Revision of the Federal Court Appellate System;⁵⁷ and Kenneth Schmier, Chairman of the Committee for the Rule of Law. The purpose of these hearings was to consider the creation of uniform rules to govern the publication procedures of all federal circuits.

D. *Costs and Benefits of Selective Publication and No-Citation Rules*

1. *Prudential Arguments in Favor of Selective Publication and No-Citation.* — The merits of selective publication and no-citation rules have been debated for decades. The purported benefits of these rules are threefold, all of which turn on the enhanced efficiency that flows from reduced volume. First, proponents of these rules contend that selective publication yields greater judicial economy and productivity, because writing unpublished opinions—which are intended for the eyes of the parties to the litigation only—takes less time and uses fewer judicial resources than preparing published opinions.⁵⁸ According to one commentator, “if judges do not have to spend time crafting publishable opinions for every case, then dockets will move along faster.”⁵⁹ And, as stated by one judge, “[s]omehow there has to be a system where you can decide a case without all the difficulty of a published opinion. Memo opinions are nice because you don’t have to make sure that all your i’s are dotted and t’s are

55. Judge Alito is the chairperson of the Advisory Committee on the Federal Rules of Appellate Procedure, but was speaking here on behalf of the Judicial Conference of the United States.

56. Judge Kozinski was the author of *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001), one of the leading cases in this area, discussed further *infra* Part II.A.

57. Professor Arthur Hellman teaches at the University of Pittsburgh School of Law. He has organized and participated in a number of studies of the federal appellate courts (including an analysis of the innovations of the Ninth Circuit and a study of unresolved intercircuit conflicts) and served on the Ninth Circuit Court of Appeals Evaluation Committee.

58. Martin, *supra* note 28, at 190; see also Alex Kozinski & Stephen Reinhardt, *Please Don’t Cite This!*, Cal. Law., June 2000, at 43, 44. Judges Kozinski and Reinhardt argue that judges would neglect their other responsibilities if all opinions had to be of publishable quality:

We write opinions in only 15 percent of the cases already and may well have to reduce that number. Or we could write opinions that are less carefully reasoned. Or spend less time keeping the law of the circuit consistent through the en banc process. . . . None of these are palatable alternatives, yet something would have to give.

Id.

59. 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, 249 (1998) (noting also that “[f]ewer published decisions mean fewer volumes for libraries to purchase”).

crossed.”⁶⁰ For instance, when a judge knows that an opinion will not be published, she may not take the time to carefully recite the facts of the case because the parties involved are already intimately familiar with them.⁶¹ It is often unnecessary in an unpublished opinion for a judge to deal with all of the arguments made by each side in the case; instead, she may choose to focus exclusively on the dispositive issues.⁶² In addition, a judge may not take as much care to avoid using vague language in the opinion that litigants in other cases may attempt to seize upon in subsequent cases.⁶³

Second, some proponents of selective publication rules assert that they improve the quality of the limited number of published opinions by allowing judges to take greater care with cases that involve new or important questions of law.⁶⁴ One federal circuit judge has argued that appellate judges “must devote more time to an opinion that changes the law or clarifies it in an important way (and may thus affect many litigants in future cases) than to an opinion that simply applies well-established law to specific facts (and thus affects solely the litigants at hand).”⁶⁵

Third, those who support these rules further maintain that unpublished opinions serve as “precedent-savers”⁶⁶ by not “muddying the water with a needless torrent of published opinions” and bestowing more emphasis on those opinions that are actually published and citable.⁶⁷ One

60. Sheree L. K. Nitta, Note, *The Price of Precedent: Anastasoff v. United States*, 23 U. Haw. L. Rev. 795, 805 (2001) (quoting Chief Judge James Burns of the Hawaii Intermediate Court of Appeals).

61. Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 Harv. C.R.-C.L. L. Rev. 109, 123–24 (1995).

62. *Id.* (“Because unpublished opinions serve no future purpose, judges need only provide a minimal indication of the reasoning that a fully explicated opinion would have followed.”). However, one study done in the late 1970s found that one in every seven unpublished federal appellate decisions had reversed the trial court. *Id.* at 126–27. As a result, future courts and litigants will not have access to the reasoning behind those reversals; these parties will arguably suffer the loss of the insights and resolution that could result from prior adjudication.

63. *Id.* at 124.

64. Nitta, *supra* note 60, at 806. The lack of precedential authority of unpublished opinions certainly gives judges less incentive to spend time and effort writing such opinions. According to Judge Richard Posner, “[Nonpublication] is sort of a formula for irresponsibility. . . . Most judges, myself included, are not nearly as careful in dealing with unpublished decisions.” William Glaberson, *Limited Reviews by Courts Raise Legal Rights Concerns*, *Portland Oregonian*, Mar. 14, 1999, at A5 (quoting Judge Posner). Unpublished opinions have also been described as being “dreadful in quality.” Richman & Reynolds, *Elitism*, *supra* note 36, at 284. In addition, it has been argued that unpublished decisions render judges less accountable for their opinions, thus leading to decisions that are not as well-reasoned: “The author of a bad opinion cannot hide behind the shield of anonymity Judges who cannot be held individually responsible either for the reasoning or the result have far less incentive to insure that they ‘get it right.’” *Id.* at 283.

65. Alito Statement, *supra* note 39, at 8.

66. Douglas A. Berman & Jeffrey O. Cooper, *In Defense of Less Precedential Opinions: A Reply to Judge Martin*, 60 *Ohio St. L.J.* 2025, 2041 (1999).

67. Martin, *supra* note 28, at 192.

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federal circuit court judge asserted that one “reason behind the selective publication policy is that it is wrong to ask . . . scholars to read opinions that merely labor the obvious[,] . . . rehashing conclusions already reached in authoritative decisions of the same court.”⁶⁸

2. *Prudential Arguments Against Selective Publication and No-Citation Rules.* — On the other side of the debate, critics of these rules question the proposition that certain opinions lack precedential value, and instead take the position that *all* judicial opinions have some degree of precedential import. As stated by Judge Richard Arnold of the Eighth Circuit:

[T]here are many cases that look like previous cases, and that are almost identical. . . . [H]owever, it is possible to think of conceivable reasons why the [cases] can be distinguished, and when a court decides that it cannot be, it is necessarily holding that the proffered distinctions lack merit under the law. This holding is itself a conclusion of law with precedential significance.⁶⁹

There is much concern among scholars about a system in which judges have unqualified discretion to decide whether or not a decision should serve as precedent, especially because there is no sound basis on which judges can divine today which decisions will be important in the future. As a result, it is argued, decisions that might have precedential value often go unpublished.⁷⁰ As one state court judge has acknowledged, “[w]hen we make our *ad hoc* determination that a ruling is not significant enough for publication, we are not in as informed a position as we might believe. Future developments may well reveal that the ruling is significant indeed.”⁷¹

Selective publication and no-citation rules are also claimed to impede “responsible judicial decisionmaking” by shielding certain opinions from the requirements of *stare decisis*, thereby undermining courts’ obli-

68. Philip Nichols, Jr., *Selective Publication of Opinions: One Judge’s View*, 35 *Am. U. L. Rev.* 909, 916 (1986).

69. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 *J. App. Prac. & Process* 219, 222–23 (1999); see also 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, 579 (1981) (noting that “all decisions make law, or at least contribute to the process, for each shows [prospective litigants] how courts actually resolve disputes”). Frederick Schauer notes:

The traditional perspective on precedent . . . has . . . focused on the use of yesterday’s precedents in today’s decisions. But in an equally if not more important way, an argument from precedent looks forward as well, asking us to view today’s decision as a precedent for tomorrow’s decisionmakers. Today is not only yesterday’s tomorrow; it is also tomorrow’s yesterday. A system of precedent therefore involves the special responsibility accompanying the power to commit the future before we get there.

Schauer, *supra* note 19, at 572–73.

70. See Arnold, *supra* note 69, at 224; Nitta, *supra* note 60, at 815.

71. Nitta, *supra* note 60, at 814.

gation to develop and explain the law.⁷² If a judge desires that a case come out a certain way but cannot fully justify that decision under existing law, she might be tempted to simply decide the case in an unpublished opinion and “sweep[] the difficulties under the rug.”⁷³ These rules accordingly reduce the accountability of the courts of appeals and aid in the creation of an “underground” body of law, which is accessible to the public via Westlaw, Lexis, or the *Federal Appendix*, yet “disavowed by the very judges who are producing it.”⁷⁴ There is even some speculation that, because the Supreme Court is less likely to grant certiorari to an appeal from an unpublished opinion, appellate judges may decide controversial cases via unpublished opinions simply to insulate those decisions from Supreme Court review.⁷⁵

Finally, critics of no-citation rules assert that “unpublished” and “unprecedented” are analytically distinct concepts; even if courts decide that a case is not worthy of publication, it should have no bearing on the authoritative weight of that decision.⁷⁶ This difference between nonpubli-

72. 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, 1200 (1978); Shuldberg, *supra* note 32, at 552–53.

73. Arnold, *supra* note 69, at 223. Judge Arnold does not go so far as to accuse judges of actually doing this, but observes that the temptation may exist. *Id.*

74. *Id.* at 225.

75. Slavitt, *supra* note 61, at 127 (“Because an unpublished opinion cannot be cited as precedent, the Supreme Court is hesitant to devote its limited resources to reviewing a case that will have little future effect.”). Slavitt points to *Johnson v. Knable*, No. 90-7388, 1991 U.S. App. LEXIS 12125 (4th Cir. May 28, 1991), as a prime example of this phenomenon. *Id.* at 110, 128–29. The plaintiff in *Johnson*, a prison inmate, was denied a job in the prison’s education department and sued the prison, alleging that he was turned down due to his sexual orientation. The Fourth Circuit held that the prison officials may have violated the plaintiff’s equal protection rights if they did, in fact, discriminate against him on the basis of his sexual orientation. This issue was one of first impression in the Fourth Circuit, and this decision presumably created new legal precedent within the circuit; however, the decision was unpublished.

The claim is made that the decision in *Johnson*, a case that “arguably would have made homosexuality subject to strict scrutiny review under the Equal Protection Clause,” was intentionally unpublished by the Fourth Circuit in an attempt to “hide [a] controversial decision[]” and “shield” that decision from Supreme Court review. *Id.* at 128 (also noting that the decision not to publish the opinion in *Johnson* “enabled the Fourth Circuit to chart a more progressive course than it ordinarily would have taken”).

Although reducing the chances of Supreme Court review by withholding publication is a compelling argument against selective publication, it is important to note that the Supreme Court has, in fact, granted certiorari to appeals from unpublished decisions. See, e.g., *Twentieth Century Fox Film Corp. v. Entm’t Distrib.*, No. 00-56703, 2002 U.S. App. LEXIS 7426 (9th Cir. Apr. 19, 2002), cert. granted, 123 S. Ct. 816 (2003); *Rural Tel. Serv. Co. v. Feist Publ’ns, Inc.*, No. 88-1679, 1990 U.S. App. LEXIS 25881 (10th Cir. Mar. 8, 1990), cert. granted, 498 U.S. 808 (1990).

76. See, e.g., *Anastasoff v. United States*, 223 F.3d 898, 904 (8th Cir. 2000) (noting that “[t]he question presented here is not whether opinions ought to be published, but whether they ought to have precedential effect, whether published or not.”).

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cation and precedence leaves room for reform of no-citation rules, which will be discussed further in Part III.D.⁷⁷

II. RECENT CASES AND COMMENTARY ON NO-CITATION RULES

This Part will explore the predominant doctrinal arguments leveled against no-citation rules. Section A will turn to the courts to explore two recent opinions that diverge on whether no-citation rules contravene Article III of the Constitution. Section B will then review alternative doctrinal arguments—relying on the due process and equal protection clauses—advanced by commentators against the constitutionality of these rules.

A. *The Battle of the Circuits and Article III*

Two recent judicial decisions have addressed the constitutionality of no-citation rules.⁷⁸ In *Anastasoff v. United States*, Judge Richard Arnold sent shockwaves through the legal community when he announced that the Eighth Circuit's no-citation rule was unconstitutional.⁷⁹ The question before the court in *Anastasoff* was whether the mailbox rule should apply to the plaintiff's tax refund claim, which was mailed before, but received after, the filing deadline.⁸⁰ The Eighth Circuit had been presented with a similar set of facts eight years prior in *Christie v. United States*, in which the court rejected a similar claim in an unpublished opinion.⁸¹ The plaintiff in *Anastasoff* maintained that the court was not bound by *Christie* because it was an unpublished decision and consequently not considered

77. In addition, no-citation rules may be both under- and over-inclusive. If the interest that supports no-citation is protecting the process from "infection" by scantily-reasoned opinions to which insufficient attention has been devoted, there surely are published opinions—which can be cited—that have precisely the same flaws. Conversely, there are, no doubt, unpublished opinions that are, by some standard, "adequately" reasoned and to which appropriate attention has been paid, yet are verboten to cite.

78. Another case challenging the constitutionality of no-citation rules (on the grounds that they violate Article III, the First Amendment, and the due process and equal protection clauses) recently arose in the Ninth Circuit, but was dismissed—without consideration of the merits—for lack of standing. See *Schmier v. United States Court of Appeals for the Ninth Circuit*, 279 F.3d 817 (9th Cir. 2002). However, the *Schmier* court noted:

Given the wide range of interest shown in the debate about unpublished opinions, and assuming that parties with personal stakes in live controversies will properly raise the issue with the federal courts, we think it is only a matter of time before the theoretical questions raised by *Schmier*'s complaint are all properly presented and resolved.

Id. at 825.

79. 223 F.3d 898, 905 (8th Cir. 2000), vacated as moot on other grounds, 235 F.3d 1054 (8th Cir. 2000) (en banc).

80. The "mailbox rule" states that a contract is regarded as made at the time a letter of acceptance is mailed. 26 U.S.C. § 7502 (2000).

81. No. 91-2375MN, 1992 U.S. App. LEXIS 38446, at *7-*8 (8th Cir. Mar. 20, 1992) (per curiam).

“precedent” under Eighth Circuit Rule 28A(i),⁸² but the court disagreed. Judge Arnold declared that the section of the rule stating that unpublished opinions were not precedent was unconstitutional because it “purport[ed] to confer on the federal courts a power that goes beyond the ‘judicial,’”⁸³ thus expanding the federal judiciary’s powers beyond those enumerated in Article III of the Constitution.⁸⁴

The *Anastasoff* opinion considered the bounds of judicial authority against the backdrop of the well-established doctrine of precedent. The decision traced the origins of precedent back to seventeenth-century England, noting it to be an integral part of judicial decisionmaking that was “well regarded as a bulwark of judicial independence in past struggles for liberty.”⁸⁵ The court further observed that the importance of adhering to precedent was subsequently reaffirmed in colonial America as the principal method of judicial decisionmaking, and as such was a practice both known and embraced by the Framers.⁸⁶ Judge Arnold wrote that the “duty of courts to follow their prior decisions was understood to derive from the nature of the judicial power itself and to separate it from a dangerous union with the legislative power.”⁸⁷ Although nothing about precedent was explicitly written into the Constitution, the Eighth Circuit contended that the Framers were nonetheless aware of its importance and intended for the doctrine to limit the judicial power delegated to the courts by Article III. As a result, the court resolved that the no-citation rule violated an implied command in the Constitution by allowing courts to ignore the limits imposed by the rule of precedent.⁸⁸

One year later, however, the Ninth Circuit rejected the Eighth Circuit’s reasoning and upheld the constitutionality of its own no-citation

82. The Rule provides:

Unpublished opinions . . . are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of *res judicata*, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well.

8th Cir. R. 28A(i).

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

84. Article III declares that the “judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. Const. art. III, § 1.

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

86. *Id.* at 902–03 (“The Framers thought that, under the Constitution, judicial decisions would become binding precedents in subsequent cases. Hamilton anticipated that the record of federal precedents ‘must unavoidably swell to a very considerable bulk . . .’”).

87. *Id.* at 903.

88. *Id.* at 905 (concluding that the rule “expands the judicial power beyond the limits set by Article III by allowing [the court] complete discretion to determine which judicial decisions will bind [it] and which will not”).

rule in *Hart v. Massanari*.⁸⁹ Judge Kozinski asserted that the *Anastasoff* court had “overstate[d] the case.”⁹⁰ He maintained that the purpose of these rules is to “allow panels of the courts of appeals to determine whether future panels, as well as judges of the inferior courts of the circuit, will be bound by particular rulings” and praised such rules as “an effort to deal with precedent in the context of a modern legal system, which has evolved considerably since the early days of common law, and even since the time the Constitution was adopted.”⁹¹ The *Hart* court found *Anastasoff*'s Article III claim to be misguided and argued that the judicial power granted in Article III “is more likely descriptive than prescriptive.”⁹² Judge Kozinski's opinion declined to pronounce all decisions—both published and unpublished—as precedent absent a clear constitutional command to that effect, and challenged the Eighth Circuit's “rigid conception of precedent” by stating that the “overwhelming consensus in the legal community has been that having appellate courts issue nonprecedential decisions is not inconsistent with the exercise of judicial power.”⁹³

B. *Alternative Doctrinal Arguments Against No-Citation Rules*

Many other arguments have been advanced that question the constitutional footing of no-citation rules. Some commentators doubt the soundness of Judge Arnold's argument in *Anastasoff* given the lack of any explicit reference to precedent in the text of Article III (or anywhere else in the Constitution)⁹⁴ and rely instead on other constitutional provisions as support for the proposition that unpublished decisions should have some degree of precedential weight.⁹⁵

89. 266 F.3d 1155 (9th Cir. 2001). The Ninth Circuit's rule states that unpublished opinions “are not binding precedent . . . [and] may not be cited to or by the courts of this circuit, except . . . when relevant under the doctrine of law of the case, *res judicata*, or collateral estoppel.” 9th Cir. R. 36-3(b). It should be noted that the no-citation rules of the Eighth and Ninth Circuits differ in that the Eighth Circuit rule is among those which disfavor citation to unpublished opinions, while the Ninth Circuit rule flatly prohibits it except for the enumerated procedural reasons. This distinction, however, did not play into either court's opinion.

90. *Hart*, 266 F.3d at 1160.

91. *Id.*

92. *Id.* at 1161.

93. *Id.* at 1163 (also challenging the Eighth Circuit's interpretation of the legislative history by stating that the “Constitution does not contain an express prohibition against issuing nonprecedential opinions because the Framers would have seen nothing wrong with the practice”).

94. See, e.g., Jon A. Strongman, Comment, Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value is Unconstitutional, 50 U. Kan. L. Rev. 195, 207–10 (2001) (arguing that Article III is not the source of the constitutional prohibition against selective publication and no-citation rules).

95. *Id.* at 211–22 (arguing that selective publication and no-citation rules violate the Fifth and Fourteenth Amendments).

One strain of criticism of no-citation rules focuses on the Fifth and Fourteenth Amendment guarantee against deprivation of life, liberty, or property without due process.⁹⁶ When a court disallows citation of an unpublished opinion, it withholds from future litigants the ability to rely on the legal reasoning set forth in that opinion, arguably denying the procedural fairness guaranteed by the due process clause.⁹⁷ Some scholars have also noted that courts often recognize “‘freedom from arbitrary adjudicati[on],’ or the right to ‘reasoned explanation,’ as liberty interests” guarded by procedural due process, both of which are arguably violated by a ban on the citation of specified opinions.⁹⁸ Finally, it is maintained, “if due process requires notice and opportunity to be heard before judgment, the opportunity to present ‘every available defense’ must include the chance to cite unreported decisions.”⁹⁹

The Supreme Court held in *Honda Motor Co. v. Oberg* that a litigant’s right to procedural due process is violated if he is denied the use of a “deeply rooted” common law practice without sufficient explanation or provision of an acceptable alternative.¹⁰⁰ This rule may well lend itself to application in the context of no-citation rules, where the prohibition on citation to unpublished opinions denies trial participants the right to partake in the “deeply rooted” common law practice of citing to previously decided cases in order to support their positions.¹⁰¹ The removal of the procedural ability to do so may amount, under the *Honda* line of argument, to a violation of procedural due process and thus create a presumption of unconstitutionality.¹⁰²

Opponents of no-citation rules have also wrapped their censure in the garb of equal protection. This argument is based on the notion that, because unpublished decisions are denied precedential value, there is a strong possibility that similarly situated people will be treated differently by the same court.¹⁰³ In addition, it has been argued that “[s]hortcuts in

96. See U.S. Const. amends. V, XIV, § 1.

97. See Strongman, *supra* note 94, at 212 (“If unpublished opinions are not precedent . . . the court can arbitrarily ignore or even directly contradict its previous decision for any reason or no reason at all. Denying litigants the opportunity to rely on the prior decisions of a court offends the notion of fairness demanded by procedural due process.”).

98. Melissa H. Weresh, *The Unpublished, Non-Precedential Decision: An Uncomfortable Legality?*, 3 J. App. Prac. & Process 175, 193 (2001) (internal citations and emphasis omitted).

99. David Dunn, *Note, Unreported Decisions in the United States Courts of Appeals*, 63 Cornell L. Rev. 128, 145 (1977) (citations omitted) (quoting *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)).

100. See 512 U.S. 415, 432 (1994); Lance A. Wade, *Note, Honda Meets Anastasoff: The Procedural Due Process Argument Against Rules Prohibiting Citation to Unpublished Judicial Decisions*, 42 B.C. L. Rev. 695, 718 (2001).

101. Wade, *supra* note 100, at 722.

102. *Id.* at 722–31.

103. See Strongman, *supra* note 94, at 215. It has been determined that precedent, as a “declaration [and interpretation] of . . . law . . . must be applied in subsequent cases to

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the decision making process limit the likelihood of review of an action disposed of by unpublished decision,” and that some courts will more likely take care in writing published opinions in “‘important’ cases” (including those involving antitrust and securities) and will cast aside the more “‘trivial’ cases” (including those concerning social security or prisoner petitions) with terse, unpublished opinions.¹⁰⁴ It is contended that the impact of these rules has fallen disproportionately on “those most in need of judicial protection, those litigants whose claims raise no systemic law-making concerns, but only the claim that they have been denied justice at the trial court,”¹⁰⁵ thereby triggering equal protection concerns.

III. NO-CITATION RULES AS A PRIOR RESTRAINT

This Note maintains that no-citation rules operate as a prior restraint on attorney speech—a line of analysis that has not received meaningful attention from courts or commentators. The Supreme Court has granted certiorari twice in cases in which it was asked to rule on the constitutionality of no-citation rules.¹⁰⁶ The petitioner in one of those cases, *Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit*, argued that the rule was, among other things, an unlawful prior restraint on freedom of speech.¹⁰⁷ The *Do-Right* Court, however, decided the case on other grounds and never addressed the prior restraint claim.¹⁰⁸

A. Prior Restraints Generally

A prior restraint is any scheme which gives “public officials the power to deny use of a forum in advance of actual expression.”¹⁰⁹ Though defined broadly, the doctrine of prior restraint finds its most frequent application in the context of First Amendment protection for the media, prohibiting restraint on a publication before its release. The Supreme Court first confronted the concept of prior restraint in *Near v. Minnesota*,¹¹⁰ in which the majority opinion harkened back to the renunciation of press censorship in seventeenth-century England and struck down an injunction that precluded publication of articles critical of public officials.¹¹¹ The *Near* Court proclaimed that the “chief purpose” of the First Amendment’s press guarantee clause was to guard against prior re-

similarly situated parties.” *Anastasoff v. United States*, 223 F.3d 898, 900 (8th Cir. 2000) (citing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)).

104. Weresh, *supra* note 98, at 195.

105. *Id.* (quoting *Richman & Reynolds, Elitism*, *supra* note 36, at 295).

106. *Browder v. Dir., Dep’t of Corr.*, 434 U.S. 257, 259 n.1 (1978); *Dunn*, *supra* note 99, at 142 (noting that the constitutionality of no-citation rules was at issue in *Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit*, 429 U.S. 917 (1976)).

107. See *Dunn*, *supra* note 99, at 142.

108. *Do-Right*, 429 U.S. at 917.

109. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975).

110. 283 U.S. 697 (1931).

111. *Id.* at 713–23.

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straints.¹¹² Since then, the American press has enjoyed a remarkable degree of protection against the imposition of prior restraints.¹¹³

In a flood of cases since *Near*, the Court has effectively upheld the presumption against prior restraint, declaring that such restrictions “on speech . . . are the most serious and the least tolerable infringement on First Amendment rights.”¹¹⁴ As such, an aversion to prior restraint is “deeply etched in our law.”¹¹⁵ The Court has found the imposition of ex ante restrictions on the press intolerable in a wide range of cases—from those involving taxation of the press¹¹⁶ to gag orders limiting media coverage of pretrial proceedings.¹¹⁷ In the celebrated *Pentagon Papers* case, the Court rebuffed the government’s attempt to enjoin publication of a classified history of American involvement in the Vietnam War and declared that any attempt at prior restraint carried “a heavy presumption against its constitutional validity.”¹¹⁸ As a result of this presumption, the government is held to a high threshold of justification before it may inflict any such restriction.¹¹⁹

The generally acknowledged prohibition against prior restraint, however, is not absolute; there are instances where the Supreme Court has found certain restraints to be tolerable. Chief Justice Burger noted in *Nebraska Press Association v. Stuart* that the Court “has consistently rejected the proposition that a prior restraint can never be employed.”¹²⁰ One established exception to the presumption against prior restraint is that publication may be enjoined where it would create a clear and present danger to national security.¹²¹ The Court has also rationalized prior re-

112. *Id.* at 713. The Court also alluded to the legacy of aversion to prior restraints in England by citing Blackstone’s declaration that “[t]he liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published.” 4 William Blackstone, *Commentaries* *151.

113. See *N.Y. Times Co. v. United States*, 403 U.S. 713, 730–31 (1971) (White, J., concurring) (noting “the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system”).

114. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976) (holding order banning reporting on public judicial proceedings an unconstitutional prior restraint).

115. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

116. See *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250–51 (1936) (finding tax on newspaper advertisements an unconstitutional prior restraint).

117. *Neb. Press*, 427 U.S. at 570.

118. *N.Y. Times*, 403 U.S. at 714 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

119. *Id.*

120. *Neb. Press*, 427 U.S. at 570.

121. See, e.g., *Schenck v. United States*, 249 U.S. 47, 52 (1919) (noting lack of First Amendment protection for speech or publication “of such a nature as to create a clear and present danger”); *United States v. Progressive, Inc.*, 467 F. Supp. 990, 1000 (W.D. Wis. 1979) (issuing preliminary injunction on publication of restricted data relating to atomic weaponry, stating that exception to presumption against constitutionality of prior restraints was justified by the possibility of “direct, immediate and irreparable injury” to the nation).

straint in certain cases of obscenity.¹²² Finally, the Court has remarked, in dicta, that the presumption of unconstitutionality accompanying prior restraint may be less forceful in the context of commercial speech because it is “such a sturdy brand of expression”¹²³—perhaps suggesting that regulation in that arena is less apt to create a chilling effect upon speech.

The prior restraint doctrine is theoretically distinct from speech regulations that impose subsequent punishment. The prior restraint/subsequent punishment dichotomy stems from the perceived difference in outcome between stopping a communication before it occurs and imposing a penalty after the communication has taken place.¹²⁴ The most commonly touted justification of the Court’s predilection for subsequent punishment is that prior restraint does not permit certain expression to ever enter the marketplace of ideas, thereby imposing a more significant burden on speech.¹²⁵ Scholars also rationalize the conceptual divide between prior restraint and subsequent punishment through the notion of “adjudication in the abstract”—arguing that because a prior restraint is imposed before expression actually occurs, the determination that such expression is not deserving of First Amendment protection is made in the abstract, without any concrete knowledge of the actual consequences of that expression.¹²⁶

122. See, e.g., *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 62–65 (1976) (upholding licensing and zoning restrictions on adult theaters against prior restraint attack). See generally B. Kay Albaugh, Comment, Regulation of Obscenity Through Nuisance Statutes and Injunctive Remedies—The Prior Restraint Dilemma, 19 Wake Forest L. Rev. 7 (1983) (examining the tension between regulation of obscenity and the prior restraint doctrine); Steven T. Catlett, Note, Enjoining Obscenity as a Public Nuisance and the Prior Restraint Doctrine, 84 Colum. L. Rev. 1616 (1984) (same).

123. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 571 n.13 (1980).

124. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558–59 (1975) (“The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. . . . a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand.”).

125. See *Neb. Press*, 427 U.S. at 559 (“If it can be said that a threat of criminal or civil sanctions after publication ‘chills’ speech, prior restraint ‘freezes’ it”); see also Martin H. Redish, The Proper Role of the Prior Restraint Doctrine in First Amendment Theory, 70 Va. L. Rev. 53, 59 (1984) (noting and subsequently refuting the argument that “[w]hile subsequent punishment may deter some speakers, at least the ideas or speech at issue can be placed before the public.” (internal quotations omitted)).

126. Vincent Blasi, Toward a Theory of Prior Restraint: The Central Linkage, 66 Minn. L. Rev. 11, 49 (1981). For a more complete overview of the arguments in support of the preference for subsequent punishment over prior restraint, see Redish, *supra* note 125, at 59–75. However, others have asserted that there is no coherent basis for the distinction between prior restraint and subsequent punishment, and argue that the two lack any real functional difference. See generally, e.g., Stephen R. Barnett, The Puzzle of Prior Restraint, 29 Stan. L. Rev. 539 (1976); William T. Mayton, Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine, 67 Cornell L. Rev. 245 (1981); Redish, *supra* note 125.

B. *Prior Restraints and Non-Media Defendants: Gentile v. State Bar of Nevada*

Although the term prior restraint is most often used to describe ex ante prohibitions on the press, its application is not limited solely to media defendants. The Court turned its attention to the impact of prior restraints on attorney speech in *Gentile v. State Bar of Nevada*, in which it was faced with a challenge to a state rule that regulated attorney communication to the press about pending proceedings.¹²⁷ The Court ultimately determined that the state rule did not impermissibly infringe upon Gentile's speech rights. Chief Justice Rehnquist's opinion relied on the "officer of the court" doctrine in concluding that regulation of attorney speech in pending cases is inherently less suspect than similar regulation of the press.¹²⁸ The Chief Justice then held, after balancing "the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest" in the speech, that the rule in question was justifiable because it was "designed to protect the integrity and fairness of a State's judicial system" and imposed only "narrow and necessary" restrictions on attorney speech.¹²⁹ However, a different majority of the Court nonetheless struck down the rule as void for vagueness.¹³⁰

Although a majority of the *Gentile* Court agreed that regulation of attorney speech may be subjected to less stringent review than that of media speech, it never clearly defined that lesser standard. The Court only stated that regulation of attorney speech must strike a "constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials."¹³¹ More meaningful guidance for use in other attorney speech cases—involving different, and potentially less weighty, state interests—was not provided. Moreover, it is unclear from the language of *Gentile* whether the Court intended for its prescribed balancing test to find application beyond attorney speech in *pending* cases.

127. 501 U.S. 1030 (1991).

128. See *id.* at 1074. The "officer of the court" doctrine encompasses the belief that "[a]s officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice." *Id.* (quoting *Neb. Press*, 427 U.S. at 601 n.27 (Brennan, J., concurring)).

129. *Id.* at 1073, 1075.

130. *Id.* at 1048. The "majority" opinion was written in part by Justice Rehnquist (who delivered the opinion of the Court with respect to Parts I and II, concluding that the rule at issue struck a constitutionally permissible balance between the First Amendment rights of attorneys and the state's interest in fair trials) and in part by Justice Kennedy (who delivered the opinion of the Court with respect to Parts III and VI, concluding that the rule at issue was void for vagueness).

131. *Id.* at 1075.

C. Prior Restraints and In-Court Speech

While *Gentile* differed from traditional prior restraint cases in that it involved a non-media defendant, it was still typical of the bulk of prior restraint cases in that it implicated out-of-court speech. Although the doctrine has classically been applied to out-of-court utterances, the out-of-court context should not necessarily provide an analytical boundary—especially given the Supreme Court’s particularly broad definition of prior restraint.¹³² This section first maintains that prior restraint analysis should apply with equal force to both in- and out-of-court speech and then argues that no-citation rules impose an impermissible prior restraint on attorney speech.

1. *Applying Prior Restraint Analysis to In-Court Speech.* — There is dictum in *Gentile*—which involved out-of-court attorney statements—that declares a lawyer’s free speech rights to be “extremely circumscribed” within the courtroom.¹³³ But never has a blanket rule been set forth depriving attorneys of *all* protected speech rights in the courtroom,¹³⁴ and the Court has made clear in prior cases that “litigants do not surrender their First Amendment rights at the courthouse door.”¹³⁵ The language in *Gentile* pronouncing an attorney’s speech rights to be bounded within the courtroom should, if anything, only go to the merits of whether an in-court prior restraint is permissible; it should not, on the other hand, be read to foreclose application of prior restraint analysis to in-court speech.

While *Gentile* pronounced attorneys’ in-court speech rights to be circumscribed, it never declared those rights to be nonexistent. In fact, the *Gentile* Court specified particular circumstances under which attorney speech may be curbed, but only provided a single example of an acceptable limitation on *in-court* speech: preventing lawyers from engaging in speech to resist a trial court’s ruling “beyond the point necessary to pre-

132. *Alexander v. United States*, 509 U.S. 544, 550 (1993) (defining prior restraint as “administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur” (emphasis omitted)).

133. *Gentile*, 501 U.S. at 1071.

134. This is so, despite the unsupported contention by Judge Trott of the Ninth Circuit in his concurrence in *Zal v. Steppe*, that “a lawyer properly functioning as such on behalf of a client has no independent First Amendment rights in the courtroom.” 968 F.2d 924, 931 (9th Cir. 1992). Judge Trott references *Gentile* to support this assertion. *Id.* However, *Gentile* does not go further than maintaining that the in-court speech rights of lawyers are “circumscribed.” See *Gentile*, 501 U.S. at 1071. There is clearly a difference between speech rights being circumscribed and such rights not existing at all, and Judge Trott has not backed up his assertion that lawyers lose *all* First Amendment protections when they enter the courtroom with any relevant authority; the dissent in *Zal* is correct when it calls this claim “sweeping dictum.” *Zal*, 968 F.2d at 934 (Noonan, J., concurring in the result in part and dissenting in part); see also *In re Halkin*, 598 F.2d 176, 187 (D.C. Cir. 1979) (“Litigation itself is a form of expression protected by the First Amendment. . . . It is thus indisputable that attorneys and parties retain their First Amendment rights even as participants in the judicial process.”).

135. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 n.18 (1984).

serve a claim for appeal.”¹³⁶ This rule was intended, no doubt, to preserve courtroom decorum and jury impartiality. But such restriction has no direct relevance in the context of no-citation rules, which plainly curb speech without any countervailing interest in securing jury impartiality or preserving courtroom decorum.¹³⁷ Instead, the asserted state interest in no-citation rules—judicial economy—is not one that necessarily rises to the level of the interests *Gentile* sought to protect by allowing restrictions on attorney speech.¹³⁸

2. *No-Citation Rules as a Prior Restraint on Speech.* — As discussed, the term “prior restraint” has been defined rather broadly, encompassing any attempt by a public official (including both administrative and judicial orders) to prevent speech in advance of its actual expression.¹³⁹ Simply put, a no-citation rule is a form of prior restraint—though admittedly not in the most prevalent sense of the term. Although it involves none of the elements of a “classic” prior restraint—i.e., media defendants and out-of-court speech—a no-citation rule clearly prevents attorneys from communicating certain information (the content of an unpublished opinion) in advance of the time that such communication is to occur (in either a brief or at oral argument). It is a clear and simple order that restricts words before they are spoken. As aptly stated by Judge Arnold, “[I]f we decided a case directly on point yesterday, lawyers may not even remind us of this fact. The bar is gagged.”¹⁴⁰

No-citation rules do vary from the typical prior restraint in another regard: the degree and type of sanction that can result from violating the prohibition. Defiance of certain restraints—such as those on publication of material that presents a clear and present danger to national security—may lead to serious punishment for the transgressor, including jail time, fines, or professional censure.¹⁴¹ The potential sanctions stemming from breach of a no-citation rule, though admittedly less severe in some situations, may certainly be considerable under certain circumstances. To begin with, violation of a no-citation rule would likely invoke judicial dismissal of those portions of a brief that reference unpublished opinions. The impact of this penalty could be particularly severe in those instances

136. *Gentile*, 501 U.S. at 1071.

137. The “extremely circumscribed” dictum from *Gentile* does “not address a judicial system where it is perfectly lawful for an attorney to ignore an order of the court if the attorney believes it unconstitutional *and* can successfully show that it is,” and thus is “not a complete guide to the attorney’s right to free speech.” *Zal*, 968 F.2d at 935–36 (Noonan, J., concurring in the result in part and dissenting in part).

138. See *infra* text accompanying notes 145–152.

139. See *Alexander v. United States*, 509 U.S. 544, 550 (1993); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975).

140. Arnold, *supra* note 69, at 221.

141. See *Chi. Council of Lawyers v. Bauer*, 522 F.2d 242, 248 (7th Cir. 1975) (declaring “[p]unishment by contempt” to be “an important attribute of a ‘prior restraint’”); see also 18 U.S.C. § 401 (2000) (conferring authority upon courts of the United States to punish contempt of authority by fine, imprisonment, or both).

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where “bellringer” cases directly on point, much like the one in *Anastasoff* itself, are ignored; the outcome of a case could change as a result. In addition, lawyers who transgress no-citation rules cannot be sure what is personally and professionally in store for them if effective representation of a client demands citation to an unpublished opinion. Consider the bitterly contested lawsuit, where opposing counsel seeks punishment for citation to an unpublished decision merely to achieve a tactical advantage, or the rules-oriented judge who takes umbrage and reports the offending attorney to the bar association—or, even worse, vents his irritation on that attorney’s client instead. These results seem harsh for the mere citation to a previous decision of a court. And common sense suggests that such sanctions will have a significant deterrent effect: faced with potential jail time, fines, or harm to the client, it is unlikely that an attorney will take the risk of citing to an unpublished opinion.

It may be argued that a rule that warns attorneys not to cite to unpublished opinions is not the equivalent of the statement, “You may not speak,” but rather, “If you speak, we will not listen.” This, however, is an issue of semantics—albeit a significant one that evokes the murky distinction between prior restraint and subsequent sanction.¹⁴² Based on the level of personal or professional censure that could accompany a no-citation rule violation, it is unlikely that any attorney would even attempt to speak—irrespective of the fact that the court would refuse to listen—because of the potentially serious repercussions. This type of deterrence leads to the functionally equivalent outcome of a rule that categorically declares, “You may not speak.”

In the end, it is clear that a no-citation rule is a prior restraint that, by its very existence, prevents certain targeted speech from ever occurring. On this premise, the question then becomes whether it is an impermissible restraint within the bounds of the First Amendment.

3. *No-Citation Rules Are an Impermissible Prior Restraint on Speech.* — It is typically thought that “[I]tigation itself is a form of expression protected by the First Amendment,” and, as such, it is “indisputable that attorneys and parties retain their First Amendment rights even as participants in the judicial process.”¹⁴³ However, after *Gentile* it became clear that whatever speech rights attorneys do have are “circumscribed” because “although litigants do not ‘surrender their First Amendment rights at the courthouse door,’ those rights may be subordinated to other interests that arise in this setting.”¹⁴⁴ Any regulation that implicates First Amendment rights must be balanced against the state’s interest in regulating speech; the permissibility of any such restriction will turn on the nature and weight of both the interests the regulation seeks to protect and the asserted speech rights at stake. If such balancing is the measure by which

142. See *supra* notes 124–126 and accompanying text.

143. *In re Halkin*, 598 F.2d 176, 187 (D.C. Cir. 1979).

144. *Gentile v. State Bar*, 501 U.S. 1030, 1073 (1991) (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 n.18 (1984)).

the propriety of a prior restraint on attorney speech is gauged, the restraint imposed by no-citation rules seemingly fails to pass constitutional muster.

The restriction on attorney speech in *Gentile* was unmistakably a prior restraint, but the Court nonetheless approved the rule regulating what attorneys may say about pending proceedings because it was “designed to protect the integrity and fairness of a State’s judicial system, and . . . impose[d] only narrow and necessary limitations on lawyers’ speech.”¹⁴⁵ The regulation at issue in *Gentile* sought to guarantee fair trials by curbing speech that could taint the jury venire and influence the outcome of the trial.¹⁴⁶ The Court ultimately found this restraint on speech permissible because it was narrowly tailored to achieve a compelling governmental objective.

The purported regulatory objective of no-citation rules, on the other hand, is to enhance judicial economy. This interest, though extremely important, does not justify the abridgement of speech imposed by these rules. By denying attorneys the ability to cite to a body of judicial opinions, the interests of justice are certainly not being served. It is unthinkable to compare the state’s interest in protecting fair trials with the interests asserted in the case of no-citation rules, especially because no-citation rules ultimately may operate to deprive litigants of a fair trial. The restriction in *Gentile* was narrow and limited enough to be permissible because it did not pertain to all statements made to the press, but only those that an attorney knew or should have known would be likely to skew the outcome of the trial. The speech restriction embodied by no-citation rules, in contrast, is neither narrow nor limited. It is a broadly sweeping restriction on *all* citation to the vast majority of judicial opinions¹⁴⁷—a limitation on speech that may wind up prejudicing litigants in the end.

Censorship of this nature in the courtroom may severely impair the ability of attorneys to represent their clients. In the recent decision *Legal Services Corp. v. Velazquez*, the Supreme Court underscored the importance of allowing lawyers to “present all the reasonable and well-grounded arguments necessary for proper resolution of [a] case,” and struck down a law that “[sought] to prohibit the analysis of certain legal issues.”¹⁴⁸ *Velazquez* involved a challenge to a funding provision that restricted the arguments attorneys could make to seek relief for indigent welfare clients.¹⁴⁹ While the restriction ultimately was invalidated on a

145. *Id.* at 1075.

146. See *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966) (“Due process requires that the accused receive a trial by an impartial jury free from outside influences.”); *Bauer*, 522 F.2d at 248 (“That courts have the duty to ensure fair trials—‘the most fundamental of all freedoms’—is beyond question.” (quoting *Estes v. Texas*, 381 U.S. 532, 540 (1965))).

147. Only 19.6% of all judicial opinions were actually published between October 1, 2000 and September 30, 2001. Liptak, *supra* note 3.

148. 531 U.S. 533, 545 (2001).

149. *Id.* at 536–37.

separation of powers basis, the Court nonetheless highlighted the notion that attorneys may not be prevented from arguing all possible angles in a case and noted its suspicion about the validity of rules that “truncate presentation” of the law.¹⁵⁰ No-citation rules, however, do just that—and, as a result, impermissibly abridge speech.

The state interest in promulgating no-citation rules also cannot be compared to the asserted interest in *Zal v. Steppe*,¹⁵¹ a notable case involving an alleged prior restraint on in-court attorney speech. In *Zal*, the Ninth Circuit upheld an in limine ban on the in-court use of certain words and phrases by an attorney. The purported state interest behind the rule was the same as that asserted in *Gentile*: preserving the right to a fair trial.¹⁵² It is clear from both *Zal* and *Gentile* that courts are willing to subjugate attorney speech rights, both in and out of the courtroom, when the interests at stake are high enough. When a state regulation restricts First Amendment rights in the name of providing a fair trial, courts may reasonably tip the balance in favor of regulation. But in the case of no-citation rules, where the consequences of permitting the speech in question are categorically less severe, the state interest is insufficient to justify the consequent stifling of speech.

The asserted state interest in regulation of speech is only one half of the balance; the weight of the First Amendment interest in that speech must equally be considered. In the context of no-citation rules, the First Amendment interests are exceedingly strong—particularly because the attorney’s interests are not all that is involved. Attorneys, of course, are not the only victims of no-citation rules; clients fall prey to these restrictions as well, and ultimately suffer as much harm, if not more, as a result of this ban on citation. The client has a direct and immediate, and moreover legitimate, stake in having his attorney speak—a stake that was absent in *Gentile*, where a client can have no legitimate interest in having his side of a case broadcast to the public while that case is still pending.

The First Amendment injury to a lawyer that stems from no-citation rules directly translates into a First Amendment injury to her client.¹⁵³ An attorney speaks at trial or oral argument only for the client. This fact is evidenced by the language used in judicial decisions, when a lawyer makes an argument on behalf of person X: the court does not say “the lawyer for X argues” but instead simply says “X argues.” When the lawyer speaks in this setting, it is as if the client has spoken the words herself.

150. *Id.* at 545.

151. 968 F.2d 924 (9th Cir. 1992), cert. denied, 506 U.S. 1021 (1992).

152. *Id.* at 928–29; see also *supra* text accompanying notes 127–131 (discussing the Court’s reasoning in *Gentile*).

153. *Zal*, 968 F.2d at 935 (Noonan, J., concurring in the result in part and dissenting in part) (arguing that when a lawyer used certain words banned by the court to question a witness, “he was unquestionably functioning on his clients’ behalf. He was not exercising his own First Amendment right. His speech was used for his clients. It is fair to measure his rights by theirs.”).

Indeed, if a person decides to represent herself pro se, wouldn't the harm resulting from a prior restraint on attorney speech automatically inure to the client herself? This reality does not change simply because the client is represented by counsel: when a rule forbids citation to certain opinions of the court, the First Amendment harm is suffered not only by the individual who would have spoken the words, but by the individual for whose benefit the words would have been spoken. Thus, the speech rights of attorneys are not the only rights at stake in the context of no-citation rules. Here, the potential harm to the client lends considerable support to the claim that the speech interests infringed by no-citation rules are particularly weighty.

The asserted state interest in regulating speech through no-citation rules is not compelling enough to outweigh the significant speech interests at stake. Because the balance tips in favor of speech, the imposition of no-citation rules is an impermissible prior restraint that violates attorneys' and their clients' First Amendment rights. Accordingly, the rules of the Second, Seventh, Ninth, and Federal Circuits—all of which flatly prohibit citation to unpublished opinions in unrelated cases—are arguably unconstitutional.¹⁵⁴

D. *A Possible Solution*

In light of the considerations discussed above, the federal judiciary is caught on the horns of a dilemma. There are too many cases and not enough judges to resolve each case with the degree of care preferred for a published opinion. In an attempt to resolve this resource constraint, judges are given the discretion to choose which of their cases will become controlling precedent for the future and which will not. However, as a result of this practical procedure, lawyers in certain circuits are impermissibly restrained from citing to those cases that are deemed "unprecedented," in violation of their First Amendment rights. All of the interests involved in this web are, no doubt, important for many reasons, and any constructive solution must take account of all considerations involved. However, it ultimately seems clear that the balance must weigh in favor of safeguarding constitutionally protected speech rights.

Some commentators have offered a simple solution: hire more judges.¹⁵⁵ However, as has been acknowledged to varying degrees, this

154. This First Amendment issue does not inhere in the rules of those circuits that merely "disfavor" citation to unpublished opinions—those of the First, Fourth, Sixth, Eighth, and Tenth Circuits. See *supra* note 12. Those rules do not categorically forbid citation to unpublished opinions, and, as a result, an attorney will not face sanctions if he chooses to cite to an unpublished opinion.

155. See, e.g., Richman & Reynolds, *Elitism*, *supra* note 36, at 297; Alvin B. Rubin, *Views from the Lower Court*, 23 *UCLA L. Rev.* 448, 459 (1976). However, the "Judicial Establishment has consistently lobbied *against* the single most obvious solution to the caseload glut—the creation of additional judgeships." Richman & Reynolds, *Elitism*, *supra* note 36, at 299; see also Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 76 *Judicature* 187, 187–88 (1993) (arguing that the quality of the bench would

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suggestion runs up against the many constraints on our judicial system, including financial limitations and the narrow pool of qualified candidates (not to mention today's partisan political climate, in which it could take years for the Senate to confirm the necessary number of additional judges). If the concern of the judiciary is the amount of time it takes to write full opinions, then there seems to be nothing wrong with the more realistic solution of denoting certain opinions—for instance, those on which judges spend less time because they feel no novel point of law is being decided—as unpublished. Some scholars have noted, however, that “unpublished” often is, but should not automatically be, equated with “unprecedented.”¹⁵⁶ This Note does not challenge that correlation. Instead, the contention here is that “unpublished” should not necessarily be synonymous with “unpersuasive”: litigants should be permitted to cite to unpublished opinions not as binding precedent, but simply as persuasive authority that each court can consider on a case-by-case basis.¹⁵⁷

The mere fact that a decision is deemed unpublished may have value in and of itself for future cases, even if just to serve as an indication that a prior court has already determined the issue to be well settled. Citation to unpublished opinions may be the only means an appellate court has to obtain certain information, if that information has never been confirmed by binding published authority: “Courts do themselves no favors by forbidding litigants from telling later panels about unpublished decisions when awareness of those decisions could help the court to bring greater coherence to the law.”¹⁵⁸ In addition, given the fact that litigants are generally permitted to cite to almost any thinkable source—including de-

decline as a result of the expansion of the number of federal appellate judgeships); Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. Cal. L. Rev. 761, 762–63 (1983) (arguing that nine is the maximum number of appellate judges that can sit in one circuit before compromising the quality of decisionmaking); Gerald B. Tjoflat, *More Judges, Less Justice*, A.B.A. J., July 1993, at 70 (arguing that an increase in the number of federal appellate judges would lead to instability in the law). Indeed, some circuits have passed resolutions asking Congress not to create new judgeships. See Baker, *supra* note 36, at 203 (discussing the actions of the Eleventh Circuit Judicial Council in 1989).

156. See, e.g., Arnold, *supra* note 69, at 220–23; Braun, *supra* note 32, at 91 (“[T]he word ‘unpublished’ has become purely a term of art, actually meaning ‘non-precedential.’”).

157. In essence, this suggestion would allow judges to treat unpublished opinions in a manner comparable to the way in which they treat dicta, “which may be followed if sufficiently persuasive but which are not controlling.” Michael C. Dorf, *Dicta and Article III*, 142 U. Pa. L. Rev. 1997, 2000 (1994) (quoting *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 627 (1935)). This makes sense, given the fact that unpublished opinions and dicta are similar in that they both are not as thoroughly reasoned as controlling precedent. See *id.* (“Dicta are less carefully considered than holdings, and, therefore, less likely to be accurate statements of law.”).

158. See Hellman Statement, *supra* note 2, at 52–53. Professor Hellman also notes that panels may have applied established law to reach a result that could not “readily be deduced from published opinions applying the rule” or the prior panels may have “dealt with recurring but low-visibility issues of procedure or remedies.” *Id.* at 52.

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cisions of inferior courts, overruled decisions, dissenting opinions, legislative history, legal journals, decisions of foreign courts, op-ed pieces, and news stories—it seems odd that the one source lawyers are strictly forbidden to cite is that court’s own past opinions.¹⁵⁹

Because no court can divine today which of its decisions will be important tomorrow, lawyers should be allowed to cite to unpublished decisions, and each court should be permitted to determine, on a case-by-case basis, what degree of weight to afford such decisions; these opinions would not bind the courts, and would thus be *persuasive*, but not *precedential*.¹⁶⁰ If a lawyer cites an unpublished decision that adds little to the case at hand, the court may choose simply to discount the citation (as it might do with a citation to any other poorly reasoned, yet published, opinion). On the other hand, if the unpublished decision does have some bearing on the case before the court, the court may decide to afford it some degree of weight even though the opinion is technically “unpublished.”¹⁶¹

An unpublished opinion is typically one that the author feels will have little future value as precedent; as such, another court may, in the end, decide to count its importance only marginally in coming to a decision in a case. However, it should ultimately be up to the judge presiding over a particular case to determine whether an unpublished decision—because of the issue of law decided, or perhaps because of the particular fact situation that existed, in the prior case—merits any weight at all.¹⁶²

159. *Id.* In fact, what is to prevent an attorney from discussing a judge’s unpublished opinion in a law review article, making it citable, though unprecedential, as persuasive authority for later cases?

160. Stephen R. Barnett, who also recognizes this distinction between “persuasive” and “precedential” in the context of no-citation rules, describes the former as meaning “persuasive force independent of any precedential claim; the decision must persuade on its own argumentative merits, without regard for its status as a precedent or any notions of *stare decisis*.” Stephen R. Barnett, *From Anastasoff to Hart to West’s Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 *J. App. Prac. & Process* 1, 11 (2002). Professor Barnett likens the concept of persuasive value to “the administrative-law concept of ‘*Skidmore* deference,’ under which an agency’s informal interpretations of its statute are ‘entitled to respect,’ . . . but only to the extent [they] have the power to persuade.” *Id.* at 11 n.48 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

161. The D.C. Circuit has recently voted to allow unpublished decisions to be cited as precedent. See *supra* note 48 and *infra* text accompanying notes 169–171. A number of other circuits—the First, Fifth, Eighth, Tenth, and Eleventh—already grant persuasive authority to unpublished opinions. However, other circuits—the Second, Third, Seventh, Ninth, and Federal—do not grant any authority, precedential or persuasive, to unpublished opinions. See *supra* note 47. The recommendation, discussed in this section, of allowing citation and granting persuasive authority to such opinions applies mainly to those circuits. However, this Note also contends that the D.C. Circuit rule goes too far in allotting *precedential* authority to unpublished opinions. See *infra* text accompanying notes 169–171.

162. Of course, a counterargument to this approach is that if judges are permitted to decide on a case-by-case basis whether to confer precedential weight on any decision, it may lead all judges to take more time and care in writing *all* of their opinions on the chance that any opinion might be cited at the discretion of any other judge in their circuit,

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As Judge Arnold has suggested, the solution is “not to require that every opinion be printed in a book, but simply to allow lawyers to cite any opinion that they believe would be helpful, and to acknowledge that judges must respect what they have done in the past”¹⁶³ By conferring some degree of persuasive value on unpublished decisions and allowing them to be cited, courts can avoid infringing on the First Amendment rights of attorneys and their clients while still realizing the benefits of selective publication.¹⁶⁴

Currently, five of the seven circuits that “disfavor” citation to unpublished opinions—the First, Fifth, Eighth, Tenth, and Eleventh—have rules that follow this model. The recently-amended First Circuit rule allows parties to cite to unpublished opinions if no published opinion of that court adequately addresses the issue, and “[t]he court will consider such opinions for their persuasive value but not as binding precedent.”¹⁶⁵ The also recently-amended Fifth Circuit rule, which pertains only to opinions issued on or after January 1, 1996, states that unpublished opinions are not binding precedent, but may be persuasive and may be cited to that effect.¹⁶⁶ The Eleventh Circuit rule similarly declares: “Unpublished opinions are not considered binding precedent . . . [but] may be cited as persuasive authority.”¹⁶⁷ And the Eighth and Tenth Circuit rules both state that unpublished opinions are not precedent, but that parties

thus defeating the initial purpose of selective publication rules—to allow judges to spend less time fine-tuning each opinion.

163. Arnold, *supra* note 69, at 225.

164. Another possible solution to this dilemma would be to allow litigants in future cases to appeal a court’s decision not to publish a previous decision, by arguing that the opinion was wrongly withheld from publication and demonstrating that it would have some type of substantial precedential import for a current case that could not be found in any published precedent of that circuit. Some circuits already do entertain such requests for publication. See, e.g., 9th Cir. R. 36-4; 11th Cir. R. 36-3. Thus, even if a court could not anticipate the legal significance of its decision at the time an opinion was written, this type of collateral attack on the decision not to publish would allow future litigants the possibility of relying on that decision in light of their own circumstances. Of course, one could argue that allowing this type of appeal process—which seemingly would have to be argued to a panel of the same circuit that declined publication in the first place—would fly in the face of the original purpose of no-citation rules: judicial economy.

One compelling counterargument to allowing citation to unpublished opinions—whether as precedential or persuasive authority—stems from the judicial fear that any opinion may somehow, somewhere, later be cited. Because of this fear, judges may be compelled to make unpublished opinions even more summary than they are now, deciding such cases with a simple “Judgment Affirmed” or the like. This would provide even less help than a tersely written unpublished opinion to a party trying to understand why she lost on appeal.

165. 1st Cir. R. 32.3(a)(2).

166. 5th Cir. R. 47.5.4. Note, however, that 5th Cir. R. 47.5.3 grants precedential authority to all opinions issued before January 1, 1996, but only allows citation to such opinions when the doctrines of *res judicata*, collateral estoppel, or the law of the case are relevant.

167. 11th Cir. R. 36-2.

may cite to them if they have persuasive value on a material issue that has not been discussed in a published opinion.¹⁶⁸

This sharply differs from the recently-amended D.C. Circuit rule, which allows citation to unpublished opinions, but confers *binding* precedential status on all such opinions entered on or after January 1, 2002, and allows them to be cited to that effect.¹⁶⁹ The difference between binding precedential and persuasive authority is unquestionably substantial, especially in this circumstance. The sheer fact that an opinion is unpublished warns future litigants to proceed with caution—perhaps because the reasoning behind the opinion is cursory, the wording imprecise, or the facts not set forth in sufficient detail to be of use. The end result is what matters most in unpublished opinions, and scant attention may be paid to the actual language of the disposition.¹⁷⁰ In fact, there is no guarantee that all three judges on a presiding panel even subscribe to the same reasoning or methodology to reach an end result,¹⁷¹ and rarely is detailed evidence provided in these terse opinions as to how a court ultimately came to its conclusion in a case. For this reason, unpublished opinions should never automatically be conferred binding precedential authority. Instead, when an unpublished opinion is cited by a litigant the presiding court should read that opinion to weigh the various considerations—including the soundness of the reasoning behind the opinion, the level of detail with which the facts are provided, and the clarity with which the decision sets forth the factors on which it relied in coming to its conclusion—and then decide on a case-by-case basis what degree of weight to afford to such opinions.

CONCLUSION

No-citation rules face a formidable First Amendment barrier. These rules, which were promulgated as a means of furthering the judicial economy realized by selective publication rules, restrict the expression of particular words before they are spoken by flatly denying lawyers the right to cite to unpublished opinions; as such, they operate as a prior restraint on attorney speech. And while the asserted state interest in no-citation rules is certainly important, it is not nearly compelling enough to outweigh the

168. See 8th Cir. R. 28A(i); 10th Cir. R. 36.3(A)–(B)(1).

169. D.C. Cir. R. 28(c)(1)(B). Note, however, that D.C. Cir. R. 28(c)(1)(A) states that unpublished opinions issued before January 1, 2002 are not to be cited as precedent, but nonetheless may be cited when *res judicata*, collateral estoppel, or the law of the case are applicable.

170. Kozinski & Reinhardt, *supra* note 58, at 44.

171. Judge Patricia Wald of the D.C. Circuit notes:

I have seen judges purposely compromise on an unpublished decision incorporating an agreed-upon result in order to avoid a time-consuming public debate about what law controls. I have even seen wily would-be dissenters go along with a result they do not like so long as it is not elevated to a precedent.

Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 *U. Chi. L. Rev.* 1371, 1374 (1995).

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serious limitation imposed on the speech of attorneys, and by extension, their clients. As presently constructed, the rules of the Second, Seventh, Ninth, and Federal Circuits are not narrowly tailored enough to meet the government's purported end goal without imposing unduly excessive restrictions on speech.

In addition to restricting citation to unpublished opinions, no-citation rules also strip unpublished opinions of precedential value. Although the rules vary from circuit to circuit, the general idea is the same: because the precision of the legal reasoning, writing, and detail contained within such decisions may be substandard, later litigants and courts should not be permitted to rely on those decisions as binding precedent. However, the distinction between binding precedent and persuasive authority makes all the difference here. Allowing litigants to cite to unpublished opinions as persuasive authority makes both legal and logical sense. Legally, the First Amendment hurdle is cleared. And logically, not all unpublished opinions are categorically unworthy of some degree of precedential value, especially because no court can perfectly predetermine which of its decisions will be important for the future. If such citations are classified as persuasive authority, courts will be given the opportunity to weigh for themselves the merits of unpublished opinions on a case-by-case basis.