BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW

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before the
Advisory Committee on Appellate Rules
Judicial Conference of the United States
Hearing on Proposed Amendments to the Federal Rules of Appellate Procedure
Washington, D.C.
April 13, 2004

I would like to thank the Committee Chair and members of the Committee for permitting me to testify on this important proposed rule change. My name is Jessie Allen, and I am an Associate Counsel in the Democracy Program at the Brennan Center for Justice at NYU School of Law. The Center is a non-profit organization that uses litigation, research, and advocacy to promote full and equal participation in our democracy. The Center advances this goal in part through its Fair Courts Project, which focuses on improving judicial selection processes (including elections), increasing diversity on the bench, and preserving judicial independence and accountability. In opposing attacks on judicial independence, the Center has worked to promote the understanding that independent judges remain institutionally accountable for fair and impartial decisionmaking.

The Brennan Center strongly supports proposed Federal Rule of Appellate Procedure 32.1. We have a dual interest in this rule, as part of our advocacy of fair, independent and accountable court systems, and as frequent litigators in the federal courts. The proposed new rule allowing citation of all federal appellate decisions will allow litigants to argue, "This is what your court – or the court that reviews your court's decisions – did on previous occasions in circumstances similar to mine. You should treat my case the same way."[1] That is not the same thing as making those previous decisions binding on the court. The effect is simply to allow litigants to make the basic argument from consistency. Refusing to hear a party's

[1] *Cf.* Judge Kozinski's explanation that "by citing what a court has done on a previous occasion, a party is saying: This is what that court did in very similar circumstances, and therefore, under the doctrine of stare decisis, this court ought to do the same." Letter Comments from Judge Alex Kozinski, U.S. Court of Appeals for the Ninth Cir., to Judge Samuel A. Alito, Jr., Chairman, Advisory Committee on Appellate Rules 4 (Jan. 16, 2004) [hereinafter Kozinski Comments].

argument for treatment consistent with all of a court's previous judgements creates a problem for judicial accountability and burdens litigants' ability to press their case in ways that raise serious constitutional doubts. We support Proposed Rule 32.1 because it will eliminate those problems.

## I. CITATION, JUDICIAL ACCOUNTABILITY & PUBLIC CONFIDENCE IN THE COURTS

To appreciate the importance of open citation for judicial accountability, and for public confidence in that accountability, consider the current rulemaking from the point of view of non-lawyers. Most Americans would be amazed to learn that a rule guaranteeing open citation is necessary, let alone that it is being contested. If they know anything at all about how courts are supposed to operate, they know that judges look back at their previous rulings when they decide new cases. The idea that most of a court's recent decisions are off limits for discussion in future cases is deeply contrary to the way Americans understand fair court process.

No-citation rules creates a sense of arbitrariness. In circuits that employ them, these rules make it impossible for litigants to argue for consistent treatment with most of the court's recent decisions. Yet, the pursuit of consistent outcomes has long been recognized as a guiding principle of judges' work. "It will not do to decide the same question one way between one set of litigants and the opposite way between another," said Justice Cardozo.[2] The core notion is not dependent on courts' institutional commitment to a specific doctrine of precedent. As Judge Henry Friendly put it, the duty to "act alike in all cases of like nature" is "the most basic principle of jurisprudence."[3] Consistency in adjudication is linked with correctness and predictability, but the core value it expresses is evenhandeness – justice that does not vary depending on who it effects.

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

### A. Rationales for Citation Bans and Responses

Those of us who practice in federal courts know that there are some plausible arguments to be made in favor of no-citation rules. The rules are part of summary procedures

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[2]BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 33 (1921)

[3]Henry Friendly, *Indiscretion about Discretion*, 31 Emory L.J. 747, 757 (1982).

that respond to the heavy case loads that make it impossible currently for appellate judges to issue careful, detailed opinions in every case they decide. Judges use summary procedures for deciding routine cases, and those decisions are often no more than lightly edited memos by clerks and staff attorneys.[4]

Opponents of Proposed Rule 32.1 argue that allowing citation to summary decisions will add no significant information to subsequent adjudication, and will lead to greater inconsistency because these decisions' inaccurate and incomplete descriptions of the applicable law and underlying facts will confuse and misrepresent the court's approach. The concern is that district judges will be misled into erroneous rulings and appellate caselaw will become gummed with ambiguous and inconsistent language.[5] In addition, some judges say that barring citation spares them the time they would otherwise need to take to respond to arguments about inconsistencies in summary decisions, or to try to determine whether the results of these decisions actually implicate the decision in a subsequent case, and, most of all, to craft summary decisions more carefully to accurately reflect the court's reasoning.[6] Indeed, some argue that allowing citation is tantamount to transforming summary decisions into precedents that courts will be forced to follow.[7] There are reasons to question each of these justifications for citation bans.

**1. Summary decisions can sometimes provide important information for subsequent case determinations.**

It is important to remember that the potential information value of summary decisions is not only, and probably not mostly, what the court says it did in any *one* summary decision.

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[4]*See* Kozinski Comments at 5-6.

[5]*See, e.g.*, Judge Kozinski's warnings about the hazards of 9th Circuit summary disposition: "language that is lifted from a bench memo and pasted wholesale into a disposition can provide a veritable goldmine of ambiguity and misdirection. Yet, with the names of three circuit judges attached, lawyers and lower court judges are often reluctant to assign to it the insignificance it deserves." Kozinski Comments at 6. Because these opinions are generally drafted by staff attorneys or law clerks and receive only cursory review from the judges who sign off on the legal result they describe, "Any nuances in language, any apparent departures from published precedent, may or may not reflect the view of the three judges on the panel." *Id.* at 7.

[6]Letter Comments from Chief Judge Haldane Robert Mayer, U.S. Court of Appeals for the Federal Cir., to Judge Samuel A. Alito, Jr., Chairman, Advisory Committee on Appellate Rules 1 (Jan. 6, 2004).

[7]Letter Comments from Judges Coffey, Cudahy, Evans, Kanne, Manion, Posner, Rovner, Williams, and Wood, U.S. Court of Appeals for the Seventh Cir., to Judge Samuel A. Alito, Jr., Chairman, Advisory Committee on Appellate Rules 1 (Feb. 11, 2004) [hereinafter Seventh Cir. Comments].

Currently these uncitable decisions are the vast majority of routine cases decided by their courts. At least of equal interest, then, are the patterns of application of the courts' articulated precedents in numerous recent routine cases. A litigant might want to show the court's application of contested precedents in recent routine cases. Arguing that the court should follow a five-year-old precedent is far easier if one can show that the court has invoked that case in numerous recent decisions, many of which are likely to be uncitable. Conversely, one can more easily distinguish an arguably applicable precedent if it can be shown that the court has generally read that case narrowly in recent routine (uncitable) decisions. The information value of such patterns of precedential application is not dependent on the completeness or precision of the legal and factual exposition in any given case. And it is surely important: it provides insight into how the court has recently applied its precedents in routine cases.

**2. Concerns about judges being misled by poorly articulated summary decisions are probably misplaced.**

Some opponents of Rule 32.1 contend that with open citation, judges are liable to be deceived into putting too much stock in the accidental verbal nuances and poorly selected factual details of summary opinions.[8] But concern about this kind of deception seems misplaced. Who, after all, is better equipped to recognize the limitations of summary opinions than judges on the court that produced them or district judges whose decisions that court reviews. Judges can take or leave these imperfect expressions of routine rulings for what they are worth.

There is another kind of misunderstanding, however, that may result from *preventing* citation of these cases. Summary decisions are typically routine cases whose outcome is relatively easily determined by existing precedent.[9] Thus summary decisions include significantly higher rates of affirmances than the court's precedential caselaw (because the three appellate judges and the district judge who initially decided the case are likely to agree on the proper result). Conversely, reversals of lower court decisions are overrepresented in citable precedent. That skewed result can have substantive ramifications.

Consider, for instance, challenges to criminal convictions or civil jury verdicts based on trial judges' alleged failure to exclude improper evidence. Routine decisions to affirm convictions because trial judges' evidentiary rulings were either correct or harmless will be overrepresented among uncitable summary decisions and underrepresented in citable precedent. Meanwhile the less usual decision to overturn a jury verdict based on wrongly admitted, prejudicial evidence would seem more likely to appear as a citable precedent. That means that a no-citation court's available caselaw will suggest that appellate panels are more

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[8] *See* Kozinski Comments at 2.

[9] In at least one no-citation circuit, the Ninth, there are significant numbers of dissents, but it is still likely that most of these cases are relatively uncontroversial.

willing to overturn jury verdicts for evidentiary trial errors than they actually are. In effect it represents the court's precedents on evidentiary exclusion as more stringent than they actually are. That is a kind of distortion that might be hard for district judges in the circuit to recognize. And it could certainly play to the disadvantage of parties who want to argue in support of verdicts being appealed, but find that many of the appeals court's most recent decisions upholding verdicts are uncitable.

### 3. Uncitable decisions appear not to be limited to cases whose outcomes are legally obvious.

Though the majority of uncitable summary decisions affirm the appealed judgments, they are by no means limited to affirmances, and some even carry dissents. In the first two months of this year, 15 of the Ninth Circuit's uncitable cases carried dissents and many more reversed or vacated at least part of the decisions they reviewed. It is hard to accept that none of these disputed cases "[e]stablishes, alters, modifies or clarifies a rule of law."[10] The claim might be that in each case the difference of judicial opinion was either simple error or solely about the application of the law to specific facts. But if the law was clear, why the dispute?

Moreover, we need not decide whether an appellate panel's reversal of a district judge's decision was based on a new interpretation of the legal standard or a correction of its application to recognize that such a reversal is important for future litigants and courts deciding their cases. Consider the following example.

In an uncitable disposition of an appeal by a habeas petitioner, Donny Picazo, the Ninth Circuit panel disagreed with a district judge's holding (affirming a magistrate judge's conclusion) that the wrongful admission of expert evidence in Picazo's trial was harmless error.[11] The appellate court found the evidence prejudicial, reversed the judgment below and remanded the case for the district judge to grant the writ. The appellate panel agreed with the district and magistrate judges that testimony by the state's police expert that Picazo intended to kill the person he shot at for the benefit of his gang, was a violation of Picazo's due process rights because "[a] witness is not permitted to give a direct opinion about the defendant's guilt or innocence."[12] But the appellate judges disagreed with the district and magistrate judges' conclusion that the unconstitutionally admitted testimony was harmless.

Applying the well-known legal standard for harmless error articulated by the Supreme Court in *Brecht v. Abrahamson*,[13] the appellate judges held that "[g]iven the evidence in the

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[10] 9TH CIR. R. 36-2(a).

[11] Picazo v. Alameida, 2004 WL 326399 (9th Cir. 2004).

[12] *Id.* at *1, *quoting* United States v. Lockett, 919 F.2d 585, 590 (9th Cir. 1990).

[13] 507 U.S. 619 (1993).

record, it is likely that [the expert's] testimony had a substantial and injurious effect on the jury's verdict."[14] The magistrate and district judges, who had denied the writ below, plainly disagreed with the three appellate judges about *Brecht*'s application to the facts of Picazo's conviction. Regardless whether their disagreement was error or a legitimate difference in legal interpretation, how does preventing a subsequent district court judge from hearing about Picazo's successful appeal help keep the applicable harmless error standard clear? Even assuming that the recitation of the facts and reasoning in this summary decision are incomplete, district judges hearing subsequent petitions are better off with the limited information in this case than without it.

### B. What Will Follow if Courts Must Allow Citation?

Many opponents of proposed Rule 32.1 predict bad consequences for both courts and litigants if busy circuits are forced to lift their citation bans. But these predictions seem tenuous.

#### 1. Making summary decisions citable does not make them binding.

Unquestionably, allowing summary decisions to be cited means that the court contemplates that those decisions could have some precedential or persuasive value. But it does not follow that citing those cases automatically makes them binding on subsequent panels or on district judges. The baseline norm of consistent treatment is related to, and overlapping with the doctrine of binding judicial precedent, but it is not equivalent to that doctrine, at least not as that doctrine is generally understood to apply in the federal courts of appeals today. A litigant may quite coherently ask to be treated consistently with the court's previous summary decisions without asserting that the panel of judges adjudicating her claim is bound to follow those decisions, like it or not.

Allowing citation does oblige judges to address, or at least to silently consider, the referenced decisions. Indeed, the central problem of public trust created by the no-citation rules is that they make it appear that judges are ducking that obligation. But the responsibility to consider cited summary decisions for what they are worth does not entail following those decisions, or, even, necessarily, providing detailed explanations of why a court is choosing to diverge from them in a subsequent case.

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[14] *Id.* at *3.

**2. Making summary decisions citable will not necessarily require judges to spend more time writing them.**

Allowing summary decisions to be cited need not mean that judges spend substantially more time on them. As Judge Easterbrook has pointed out, "[i]t has never been true that judges write these orders for the parties and counsel alone, and thus are certain to include more (or less) when strangers can use them; the audience always has included the Supreme Court, which can and does review unpublished decisions."[15] Moreover, these opinions are already publicly accessible in searchable form. Something between a third and half of the attorneys surveyed in the no-citation circuits said they read the courts' unpublished decisions when they come up in their research.[16] Given how widely available and widely read summary opinions are already, allowing their citation may add little to existing pressures to spend time perfecting them.

Some of Judge Easterbrook's colleagues on the Seventh Circuit have voiced concern that "if a lawyer states in its [sic] brief that in our unpublished opinion in A v. B we said X and in C v. D we said Y and in this case the other side wants us to say Z, we can hardly reply that when we don't publish we say what we please and take no responsibility."[17] But their circuit's absolute ban on citation must mean something quite close to that. Putting it somewhat more neutrally, the rule seems to say that because summary decisions are not carefully articulated the court will not deal with them in subsequent cases. It is not clear why it should be institutionally acceptable to take that stance implicitly through a no-citation rule, but not to adopt it openly in response to a litigant's citation of a previous summary decision that a panel wants to depart from or disregard.

**3. Courts are unlikely to replace all their summary decisions with one-word orders if citation is allowed.**

Some judges assert that if citation is allowed, rather than spending more time on summary decisions, they will stop issuing them altogether and decide those cases through one word dispositions: "Affirmed." This is a harder point to answer. One can say, however, that there has been no evidence so far that this is happening in federal circuits that allow citation. Moreover, the one-word approach is clearly untenable in the significant number of summary decisions where the word would be not "affirmed," but "vacated" or "reversed." Without

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[15]Letter Comments from Judge Frank H. Easterbrook, U.S. Court of Appeals for the Seventh Cir., to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure 2 (Feb. 13, 2004)

[16]The numbers were as follows: Second Circuit: 49%, Seventh Circuit: 43%, Ninth Circuit: 47%, and Federal Circuit: 34%. COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, WORKING PAPERS, SURVEY OF APPELLATE COUNSEL, 78 (1998).

[17]Seventh Circuit Comments at 1.

some explanation of the appellate court's reasoning, the district judge whose opinion has just been reversed will not know how to proceed on remand.

It is also worth noting that courts' power and legitimacy is in many ways inextricably bound up with their willingness and ability to present reasoned explanations for their rulings. Federal judges do not represent the popular will the way legislators do. Thus their lawmaking – or law interpreting – authority needs a basis in reasoning or in precedent. A court that declines to explain the grounds for most of its decisions is a court that risks losing the respect and perhaps even the compliance of the people it purports to govern.

#### 4. Some changes in summary decisions that result from making them citable might be beneficial.

The threatened use of one-word affirmances, or a slightly expanded version of this technique, might actually be a beneficial shift. At least where a district court opinion is available online, the appellate panel could usefully affirm "for the reasons stated by the district court." Or courts might jettison the staff memos that apparently are the basis for most summary decisions today, and instead might take to following a more skeletal format that would be more accurate as far as it went. For instance, courts could say something like, "relying primarily on the principles articulated in the following three precedents, we affirm." In some cases this would clearly deprive the parties of the sort of step-by-step explanation summary decisions currently provide. But it would also take care of worries about loose paraphrases of precedential language, while providing some information about the court's applications of its precedents.

Finally, it is not entirely clear that judicial time and attention in no-citation circuits is now optimally divided between citable and uncitable cases. The wide disparity between the time and effort judges currently spend on precedential and summary decisions is justified by the judgment that at least the outcome, if not the reasoning, of summary decisions is thoroughly dictated by existing law. But, at least in the Ninth Circuit, the number of reversals and dissenting opinions in summary decisions cuts against that assertion. Perhaps some additional time should be devoted to those disputed decisions, even if it means spending less time perfecting designated precedential opinions.

## II. PROHIBITING LITIGANTS FROM ARGUING FOR TREATMENT CONSISTENT WITH MOST OF A COURT'S RECENT DECISIONS RAISES SERIOUS CONSTITUTIONAL DOUBTS.

A constitutional challenge to no-citation rules would be an uphill legal battle under current standards. But neither a due process nor a right to petition claim against these rules should go by summary order. Considering the due process implications of citation bans is especially worthwhile because the analysis articulates in constitutional terms the intuitive sense of unfairness and arbitrariness often expressed when people first learn about no-citation rules.

### A. The Basic Due Process Argument: Consistency Is Associated with Fairness and Correctness in Government Decisionmaking.

The idea that fairness entails consistency runs through both formal moral philosophical theories and homespun expressions of values. As Frederick Schauer has observed, "Whether expressed as Kantian universalizability, as the decisions that people would make if cloaked in a Rawlsian veil of ignorance about their own circumstances, or simply as The Golden Rule, the principle emerges that decisions that are not consistent are, for that reason, unfair, unjust, or simply wrong."[18] Among other things, the idea of consistency has a central place in the constellation of concepts that we call "rule of law." The basic idea is that consistency indicates a neutral application of principles, regardless of who is affected. Thus, part of how we evaluate the fairness or arbitrariness of government decisions is by judging their consistency with other government actions in similar situations. In modern adjudication, the norm of consistency is, of course, most fully embodied in the doctrine of precedent. But it does not cease to operate at a more basic level simply because a court announces that most of its decisions are "non-precedential."

#### 1. Consistency in administrative law

Federal caselaw reviewing agency action recognizes the importance of consistency as a hallmark of fairness, an indication that a government decision is correct, and necessary component of governmental predictability. There are two basic ways that the law of administrative procedure and review makes consistency a factor in assessing the validity of government action. First, through the doctrine of *Skidmore* deference,[19] a reviewing court considers consistency with previous agency actions in determining how skeptically to treat a challenged agency decision. Second, in a more substantive manner, and in various contexts, the cases treat consistency as an index of a challenged agency decision's correctness, and of its legal regularity.

Though *Skidmore* has been limited, the role of consistency as a factor in the court's review of agency judgements has survived the watershed *Chevron*[20] decision, and continues to be active today.[21] Indeed, in *Chevron* itself the Court applied this principle, finding it

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[18]Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571, 594 (1987).

[19]Named for the Supreme Court case that first articulated it, *Skidmore v. Swift & Co*., 323 U.S. 134 (1944), the doctrine determines that a court's deference to an administrative judgment "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 140.

[20]*Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[21]*See United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001).

necessary to rationalize the varying interpretations that the agency gave to the legislation in question by explaining that they did not indicate an inconsistent view of the act, but that the agency had "consistently interpreted it flexibly."[22]

Beyond questions of deference, the caselaw on administrative review sometimes looks to consistency as part of a substantive evaluation of the correctness of an agency decision. A well-recognized administrative law principle requires remand of any agency decision that diverges without explanation from a settled course of agency action. The emphasis here is on providing reasons for the new course. So it is not the case that agencies must always consider, let alone defer to, their previous decisions. Nevertheless, the caselaw on this principle articulates a relationship between consistency with past decisions and correctness. "A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress."[23] An agency's decisions, then, create "at least a presumption that those policies will be carried out best if the settled rule is adhered to."[24] Thus, in the administrative context, consistency is clearly associated with correctness, and, conversely, a decision inconsistent with settled practice is presumptively wrong.

In addition, if agencies ignore contradictory past decisions when they decide similar issues in new contexts, those previous decisions cease to "check arbitrary agency action."[25] Here we return to the association of inconsistency with arbitrariness and the problems no-citation rules create for judicial accountability and public confidence in the courts. It is one thing for judges to say they are not bound by a previous ruling. It is another to assert, as the no-citation rules do, that judges will cover their ears when someone tries to tell them that their recent summary rulings demonstrate a pattern of decisionmaking that runs contrary to the ruling being appealed. The refusal even to consider whether previous summary rulings should inform the decision before them smacks of arbitrariness, and "[t]he touchstone of due process is protection of the individual against arbitrary action of government."[26]

**2. No-citation courts' responses are unpersuasive.**

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[22]467 U.S. at 863. *See, Good Samaritan Hosp. v. Shalala*, 508 U.S. 402 (2001) ("The consistency of an agency's position is a factor in assessing the weight that position is due.") *Id.* at 417.

[23]Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 807 (1973).

[24]*Id*. at 808.

[25]Shaw's Supermarkets, Inc. v. National Labor Relations Bd., 884 F.2d 34, 41 (1st Cir. 1989).

[26]Wolff v. McDonnell, 418 U.S. 539, 557 (1974).

Of course, the courts' response is that they are not *arbitrarily* disregarding their previous summary decisions. Those decisions should be disregarded, no-citation courts say, because in some important ways they are not full-fledged judicial decisions and because they are so deeply flawed that they offer no valid information about the judicial decisions that they represent.

If it were true that summary decisions were not really official decisions of the courts, that would be a good reason to disregard them. In *Hart v. Massanari*, the case in which the Ninth Circuit upheld its own practice of issuing nonbinding uncitable opinions, the court explained that a summary disposition is "more or less, a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the court's decision."[27] The problem is that the Ninth Circuit's summary dispositions are otherwise treated as official court judgments whose results command obedience every bit as much as the court's designated precedents. Thus the judgments in such cases must be the sorts of government decisions against which other judgments can be tested.[28]

Advocates of no-citation rules are thrown back, then, on their second reason for preventing any discussion of most of a court's recent decisions. Summary decisions, they say, are so poorly articulated that they do not actually communicate their own results in a meaningful or useful way.[29] But if summary decisions are actually so error ridden or fictional that they provide *no* useful information about the court's decisions, then one wonders how much good they do the parties to whom they are ostensibly addressed, and the courts' decision to publish them further is incomprehensible. Presumably they are published to alleviate concerns about private law and to provide a way for interested members of the public to review the court's decisions. But if they provide enough information to serve as a source of institutional accountability, why isn't that information potentially useful to judges adjudicating subsequent cases?

**3. Due process doctrines**

In recent decades, the Supreme Court has taken several different doctrinal approaches

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[27]266 F.3d 1155, 1178 (9th Cir. 2001).

[28]In support of his court's no-citation rule, Judge Kozinski of the Ninth Circuit has stressed the extent to which the summary dispositions it covers are the work of staff attorneys and law clerks. They only "appear to have been written . . . by three circuit judges," Kozinski Comments at 2, he says and because these decisions get no meaningful *en banc* review, they cannot be truthfully represented as the view of the full court. *Id.* at 6-7. Again, though, it cannot be that the results of these cases are not judgements of the court.

[29]Ninth Circuit uncitable opinions "have zero precedential value," argues Judge Kozinski, "no inference may be drawn from the fact that the court appears to have acted in a certain way in a prior, seemingly similar case." Kozinski Comments at 4.

to procedural due process claims. Because it is unclear which of these the Court would apply to a challenge to citation bans, and because the different doctrines each illuminate different policy aspects of the bans, it is worth considering them individually.

**a. *Fundamental fairness and common-law tradition***

In the context of both civil and criminal adjudication, the Supreme Court has looked to whether a challenged procedure diverges from common law tradition, and whether it violates a "recognized principle of 'fundamental fairness'."[30] This approach is highly protective of procedures that can be identified as traditional: "If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it."[31] Though conformity with common law tradition does not end the due process inquiry it provides a heavy presumption of rectitude.[32] On the other hand, divergence from common law may trigger a presumption of unconstitutionality. Striking down Oregon's procedures for judicial review of punitive damages awards, the Court explained that the state's "abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause."[33] Thus, under the fundamental fairness approach, most of the action is in determining whether citation bans conform with traditional common law process.

Perhaps surprisingly, this is rather a difficult determination to make. Although the formal citation bans themselves are clearly a modern creation, arguably their effect of making only certain decisions available for citation restores a situation that existed for centuries before the adoption of universal official case reporting. One commentator stresses that early English lawyers – and early American lawyers, too – were allowed to cite to all previous judicial decisions.[34] The Ninth Circuit has pointed out, however, that up until the late 18th Century, few judicial decisions were reported and available for citation.[35] If one is focused on

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[30]Medina v. California, 505 U.S. 437, 448 (1992), *quoting* Dowling v. United States, 493 U.S. 342, 352 (1990).

[31]Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 17 (1991).

[32]For at least one member of the Court, a practice found to comport with common law tradition that does not otherwise violate the Bill of Rights is *per se* all the process that is due. *See*, 499 U.S. at 24-25 (Scalia, J., concurring in the judgment).

[33]Honda Motor Co. v. Oberg, 512 U.S. 415, 430 (1994).

[34]Lance A. Wade, Honda *Meets* Anastasoff: *The Procedural Due Process Argument Against Rules Prohibiting Citation to Unpublished Judicial Decisions*, 42 B.C. L.. Rev. 695, 722-23 (2001).

[35]266 F.3d at 1165-69.

the practical availability of reported cases, no-citation rules arguably recreate that traditional situation, or at least do not diverge from it dramatically. But the traditional reality did not include the idea that judges could refuse to hear discussion of cases they had chosen to decide and report in summary fashion. For many American lawyers, it would be hard to find a principle of justice more firmly rooted in tradition and conscience than an advocate's freedom to call to a judge's attention the court's previous decisions.

**b.** ***Arbitrary or disproportionate restrictions***

Due process doctrines relevant to no-citation rules may also be found in cases challenging other limits on what a litigant may present in court. In the context of a criminal trial, the Supreme Court has held that "restrictions on a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve."[36]

The wholesale ban on citing summary decisions is arguably disproportionate to its purpose of promoting judicial efficiency and clarity in precedential caselaw. Such bans may prevent discussion of a previous decision that apparently closely duplicates the facts of the case at issue even if little other authority exists. Moreover, citation bans exclude information that has little to do with the reliability of individual case descriptions, like patterns of application of disputed precedents. And such bans exclude material whose quality courts are uniquely capable of evaluating on an individual basis.

**c.** ***Balancing benefits and burdens under*** **Mathews v. Eldridge**.

A three-part balancing test first articulated in an administrative context is worth considering here, because the Court has sometimes used it to evaluate process in civil litigation. Under *Mathews v. Eldridge*,[37] a court balances 1) "the private interest that will be affected by the official action"; 2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and 3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural

[36]Rock v. Arkansas, 483 U.S. 44 (1987). In *Rock*, the Supreme Court reviewed Arkansas's evidentiary rule excluding a homicide defendant's hypnotically refreshed testimony. The Court noted that a criminal defendant's right to testify in her own behalf has several constitutional sources, including the due process clause. The Court listed the Sixth Amendment's Compulsory Process Clause, guaranteeing the defendant's right to call "witnesses in his favor"; the Fifth Amendment's guarantee against compelled testimony; and the guarantee of due process under the Fourteenth Amendment. *Id.* at 51-53.

[37] 424 U.S. 319 (1976)

requirement would entail."[38]

In a challenge to the no citation rules, the first factor in the *Matthews* test – "the private interest that will be affected by the official action" – will be variable, but generally significant. It will depend on what is at stake in the underlying lawsuit. In criminal or habeas proceedings a litigant may stand to lose his liberty, or even his life.[39]

Evaluating the second *Matthews* factor, the risk of erroneous deprivation under the no-citation rules, raises the key question of how to define error in this context. There are two questions, really. First, is it part of the definition of a correct outcome that the case is decided in accord with other like cases? Second, even if a correct outcome is judged only in terms of the just application of broad legal principles to the facts at hand, are judges more likely to reach the correct result if they have access to all their court's decisions in factually similar cases, even hastily written, cursory decisions not intended to create binding precedent?

Taking the second question first, even if a correct result is defined solely as the application to the case at hand of the court's designated precedents, suppressing information about the court's decisionmaking in similar nonprecedential cases could increase erroneous outcomes. Particularly if a court had recently decided a series of cases with similar facts and a consistent approach and outcome, the presumption is that those cases were correctly decided. Thus knowledge of their results would presumably help the court to make the correct decision in a subsequent case with very similar facts. Where there is just a single, poorly articulated decision whose facts are difficult to decipher, attempts to conform subsequent decisions to the analysis in that case would likely confuse the issue. But the fact that in some situations summary decisions might be unhelpful, or counterproductive, does not mean they are never valuable.

In addition, this part of the *Matthews* test clarifies a contradiction in the no-citation courts' position. Even assuming all cases are decided consistent with the legal principles embodied in existing precedent, keeping judges in the dark about summary decisions applying those principles to specific fact patterns will likely lead to greater inconsistencies among those applications. But at the same time the courts want the results of their summary decisions to be internally consistent. Otherwise, they would not be so concerned about being confronted with

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[38]*Id.* at 334. *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) ("Having made access to the courts an entitlement or a necessity, the State may not deprive someone of that access unless the balance of state and private interests favors the government scheme.")

[39]A recent article discusses the special problems of courts' use of unpublished and uncitable opinions in death penalty cases. David R. Dow and Bridge T. McNeese, *Invisible Executions: A Preliminary Analysis of Publication Rates in Death Penalty Cases in Selected Jurisdictions*, 8 Tex. J. C. L & C.R. 149 (2003).

summary opinions with reasoning counter to their view of the case at hand.

The third *Matthews* factor, government interest, takes us back to the rationales courts give for their no-citation rules. Certainly the time and docket pressures federal appellate courts labor under are real, and most members of no-citation courts believe citation bans are necessary to do their job properly. On the other hand, a number of other busy circuit courts get along without such bans. What's more, courts' predictions of the results of allowing full citation are open to question. I am aware of no empirical research, quantitative or anecdotal, showing that courts allowing citation of summary decisions are having trouble keeping up with their caseloads, declining to explain the results in most of their cases or suffering a decline in the quality and clarity of their binding caselaw.

**4. Summing up the due process analysis**

Arguing both from first principles and from doctrine, one can make a plausible case that citation bans unconstitutionally burden a litigant's right to be heard in support of her case. The due process analysis shows that the restrictions no-citation rules place on litigants' arguments seriously implicate the principles of fairness and democratic government the Due Process Clause is interpreted to protect. The arbitrariness many advocates and nonlawyers feel when they learn of no-citation rules can be fleshed out in rigorous due process terms.

**B. No-Citation Rules and the Right to Petition**

The Due Process Clause is not the only source of constitutional challenge to no-citation rules. At a very literal level, those rules implicate the First Amendment's guarantee of the right "to petition Government for a redress of grievances." Federal courts are government institutions to which the right to petition certainly applies, and no-citation rules burden that right. Litigants' inability under the rules to bring to a district judge's attention unpublished appellate cases that conflict with her interlocutory rulings, for instance, limits their ability to petition that judge for redress of a grievance[40] Moreover, in striking down a Congressional ban on using legal services funding to bring constitutional challenges on behalf of indigent clients, the Supreme Court has recognized that the First Amendment bars an attempt to "prohibit the analysis of certain legal issues and to truncate presentation to the courts" which "prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power."[41] The doctrinal analysis of a claim under the First Amendment is quite different from the due process approach described above. But the two analyses end up in the same place: No-citation rules are constitutionally questionable because they impose overly severe restrictions for the sake of questionable government

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[40]*See* David Greenwald & Frederick A. O. Schwarz, Jr., *The Censorial Judiciary*, 35 U.C. Davis L. Rev. 1133, 1165-66 (2002).

[41]*Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001).

interests.

## CONCLUSION

No-citation courts are concerned about muddying up legal precedent with repeated applications in routine factual settings and about saving judicial time for complex, novel cases. But trying to solve these problems by banning citation of most of the court's routine decisions throws out the baby with the bath water. In order to preserve consistent legal rules, citation bans do away with litigants' ability to argue for consistent treatment under those rules. In a democratic society where fairness and correctness in decisionmaking are strongly associated with consistency, courts are institutionally, and possibly constitutionally, responsible for handling their cases in a way that allows litigants to argue for consistent governmental treatment. Open citation is a necessary part of such a plan. We therefore urge this Committee to propose adoption of Federal Rule of Appellate Procedure 32.1.