

The Federal Courts of Appeals, Unpublished Decisions, and the “No-Citation Rule”

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INTRODUCTION

In 1964, the Judicial Conference of the United States recommended limiting the publication of court opinions to decrease the workload of federal courts.¹ It is unknown exactly what was stated at the conference since it operates as a closed session, no public record is kept, and the Freedom of Information Act does not cover it.² But the conference did reveal that the number of published opinions was increasing, and that this was becoming a tremendous burden on federal courts to maintain their administrative facilities.³ Almost a decade later, after another dramatic increase in the courts of appeals’ cases, the policy of limiting the publication of opinions became generally accepted by all federal circuits.⁴ Consequently, about eighty percent of all opinions issued by the federal courts of appeals today are designated as unpublished.⁵

Limiting the publication of opinions was not the only method used to facilitate the reduction of the federal court workload. Eventually, federal courts also adopted “no-citation” rules, which either limit or prohibit citation to unpublished opinions.⁶ In effect, the rules prevent attorneys from relying on cases that are not published in the federal reporters,⁷ even if those court opinions could support their client’s cause of action. The no-citation rules sparked much criticism and constitutional debate over the years. The controversy ultimately induced the Judicial Conference in 2005 to propose Federal Rule of Appellate Procedure 32.1, which was recently adopted by the Supreme Court.⁸ The rule allows lawyers to cite unpublished opinions issued on or after January

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1. JUDICIAL CONFERENCE OF THE U.S., REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964) [hereinafter 1964 JUDICIAL CONFERENCE].

2. Citizens for Judicial Accountability, Appeals-Federal Court, <http://www.judicialaccountability.org/appealsfederalcourt.htm> (last visited Jan 30, 2006).

3. See 1964 JUDICIAL CONFERENCE, *supra* note 1; see also Anne Coyle, Note, *A Modest Reform: The New Rule 32.1 Permitting Citation to Unpublished Opinions in the Federal Courts of Appeals*, 72 *FORDHAM L. REV.* 2471, 2471 (2004).

4. JUDICIAL CONFERENCE OF THE U.S., REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 12 (1974); See also Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 *J. APP. PRAC. & PROCESS* 251, 253–57 (2001).

5. Mark Hansen, *Citing of Unpublished Opinions Endorsed*, 4 *ABA J. EREPORT* 40 (Sept. 30, 2005), <http://www.abanet.org/journal/ereport/s30unpub.html>.

6. *E.g.*, 2D CIR. R. 0.23; 7TH CIR. R. 53(b)(2)(iv); 9TH CIR. R. 36-3(a)–(b).

7. Note that although a federal court opinion is designated as “unpublished,” it is still accessible through publicly available electronic databases or through the court clerk’s office.

8. Proposed Rule 32.1 provides, “A court may not prohibit or restrict the citation of

1, 2007 in federal courts nationwide.⁹ If unaltered by Congress, the rule will take effect beginning in 2007.

Rule 32.1 is a significant step toward remedying the adverse effects of the no-citation rules. However, by not prohibiting federal courts from disallowing attorneys to cite to opinions before 2007, the proposed rule is severely limited.¹⁰ In other words, attorneys in federal circuits that strictly limit citation to unpublished opinions will not benefit from Rule 32.1 if the unpublished decision that they rely upon came before 2007. Because of this substantial limitation, some of the constitutional problems of the no-citation rules remain.

This Note provides a broad overview of the history of unpublished opinions, the no-citation rules, and the constitutional attacks on the rules. Part I discusses the purposes of appellate courts and usefulness of written opinions. Part II looks at the court caseload crisis, the responses to it, and the connection between unpublished decisions and the no-citation rules. Part III explains the purposes behind the no-citation rules and review arguments made for and against them. This Note ultimately argues that because of the 2007 limitation, Rule 32.1 will not prevent the no-citation rules from violating the Constitution, particularly the First Amendment. Therefore, the no-citation rules should be abolished in their entirety, allowing lawyers to cite all prior published decisions.

I. THE PURPOSES OF APPELLATE COURTS AND OPINIONS

Article III of the Constitution provides that “[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States.”¹¹ Congress is empowered to create federal courts to review and to take a second, independent look at potential errors made by powerful single-court judges.¹² Written court of appeals opinions facilitate this review, not only by resolving the particular disputes between litigants, but also by advancing and clarifying the state of the law.¹³ Court of appeals opinions establish precedents that guide and rectify lower court decisions.

federal judicial opinions, orders, judgments, or other written dispositions that have been (i) designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like; and (ii) issued on or after January 1, 2007.” FED. R. APP. PROC. 32.1, available at <http://www.supremecourtus.gov/orders/courtorders/frac06.pdf>.

9. *Id.*; Tony Mauro, *Court Opinions No Longer Cites Unseen*, LEGAL TIMES, Sept. 26, 2005, at 8; see also Hansen, *supra* note 5.

10. Some have also criticized Rule 32.1 as being a “modest reform,” since “[i]t takes no position on whether, or under what circumstances, courts should issue unpublished opinions . . . [or] suggest what weight courts should accord to unpublished opinions.” Coyle, *supra* note 3, at 2475.

11. U.S. CONST. art. III, § 2.

12. See 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, 248 (1998); see also Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 941 (1989).

13. See Carpenter, *supra* note 12, at 248.

In providing written opinions, "it is a basic principle of the administration of justice that like cases should be decided alike."¹⁴ "[W]hen an appellate court changes, modifies, or affirms a principle or rule of law, the clear impact on our common law system justifies a written opinion in which the court explains its reasons"¹⁵ Even when the court merely resolves a particular dispute and does nothing else, written opinions serve to ensure the judges' decisions are well thought-out, and not immune from public criticism.

Some argue that although opinions that serve only to resolve particular disputes should be written, they still should not be published.¹⁶ This way, the "unimportant" cases do not "clog up the reporters which contain the 'real' common law."¹⁷ Selective publication separates the important opinions from the "valueless" ones, decreases publication costs, and promotes judicial efficiency.¹⁸ But even if these reasons are true, unpublished and uncitable opinions are still seen by many as secretive, incidentally reducing the judiciary's accountability to the public.¹⁹ In a fair legal system, it is important that the law be applied consistently in similar cases. A citable opinion "dispels the perception of the judiciary as a self-regulating, secret society."²⁰ It is significant both to fulfill the courts' primary functions and to disseminate to the public reasons why the court decided the case the way it did, even if the content of the opinion goes only to the merits of the case.

II. THE INCREASE IN CASELOAD AND RESPONSES TO THE CRISIS

This Part looks at the court caseload crisis and the responses to it. Section A discusses factors contributing to the crisis, such as population, crime, and diversity jurisdiction. The Subsections then highlight the responses to the crises, including changes in judicial staff, the policy of not publishing opinions, and the no-citation rule.

A. Court Overload

Since the 1960s, several factors have contributed to a significant increase in the federal caseload. First, the courts of appeals' caseload began to drastically expand in the 1960s, correlating with changes in the population.²¹ From 1964 to 1984, the caseloads of the United States District Courts grew by 202 percent.²² Between 1952

14. RUPERT CROSS & J.W. HARRIS, *PRECEDENT IN ENGLISH LAW* 3 (4th ed. 1991).

15. Carpenter, *supra* note 12, at 248.

16. *See e.g.*, Carpenter, *supra* note 12, at 249 n.25 (quoting RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 122 (1985)) ("[M]any appeals that formerly would have been decided with a full opinion . . . are now decided with an unpublished opinion. These are not frivolous appeals; one-line treatment ['affirmed,' for example] would be inappropriate. They call for an opinion and they get it, but it is not published.").

17. *Id.* at 249.

18. *Id.*

19. *Id.*; *see also infra* note 23 and accompanying text.

20. *Id.* at 248.

21. Richard B. Hoffman & William M. Lucianovic, *Long Ranch Planning: A Reality in the Judicial Branch*, 44 AM. U. L. REV. 1599, 1601 (1995).

22. Roger J. Miner, *Federal Courts at the Crossroads*, 4 CONST. COMMENT. 251, 252

and 1982, as the nation's population increased by fifty percent, appeals to the circuit courts increased by over 800 percent.²³ From the 1990s to 2005, the federal court caseload has continued to drastically increase.²⁴

A second factor contributing to the increase in federal caseloads is new statutory rights, such as prisoner petitions, civil rights, social security claims, and labor law claims.²⁵ Third, the increasing caseload can be attributed to the retention of diversity jurisdiction, which many argue should be abolished.²⁶ A study by the Federal Judicial Center in 1988 found that diversity jurisdiction cost the federal government \$131 million (one-tenth of the federal judicial budget in 1988) and consumed the equivalent of the workload of 193 district judges and 22 appellate court judges.²⁷ The Federal Courts Study Committee recommended abolishing most diversity jurisdiction, partly because it accounted for one-fourth of the cases in district courts and one-half of the civil trials.²⁸ Fourth is crime. Interestingly, the Federal Courts Study Committee stated that "the federal courts' most pressing problem—today and for the immediate future—stems from the unprecedented number of federal narcotics prosecutions."²⁹ Drug cases have grown by more than 280 percent since 1980.³⁰ Fifth, miscellaneous factors, such as broad judicial interpretations of constitutional and statutory provisions, a great increase in the number of lawyers, free legal services for indigent criminal defendants, more educated citizens, and increased prosperity in the United States.³¹

Although many of the factors contributing to the increase in caseload are highly desirable, they have placed immense pressure on the courts of appeals to process cases efficiently. Those factors also raise an underlying normative question—how much is the legal profession and society willing to sacrifice in order to accommodate the ever-increasing caseload? Accommodating the caseload has already led to several significant judicial and public consequences, to which we turn next.

1. Expansion in Judicial Staff

Judges' legal staffs have greatly increased over the years to help judges respond to the increasing caseload.³² Among the increased staff members are law clerks, staff attorneys, visiting judges, secretaries, and other legal personnel. But this increase in staff has not been accomplished without criticism. Some have described the process as

(1987).

23. *Id.*

24. See Administrative Office of the U.S. Courts, Federal Courts Caseload, <http://www.uscourts.gov/library/statisticsalreports.html> (last visited Jan. 4, 2006).

25. Miner, *supra* note 22, at 252–53.

26. See, e.g., Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reform*, 92 HARV. L. REV. 963, 966 (1979) (arguing that abolishing diversity jurisdiction would decrease the federal caseload).

27. FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 41 (1990); See also Debra L. Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119 (2003).

28. FEDERAL COURTS STUDY COMMITTEE, *supra* 27, at 38–39.

29. *Id.* at 36.

30. *Id.*

31. Miner, *supra* note 22, at 255; see also POSNER, *supra* note 16, at 59–93.

32. JONATHAN M. COHEN, INSIDE APPELLATE COURTS: THE IMPACT OF COURT ORGANIZATION ON JUDICIAL DECISION MAKING IN THE UNITED STATES COURTS OF APPEALS 3 (2002).

“bureaucratization,”³³ disapproving of the judiciary’s reliance on law clerks and staff members to help it operate.³⁴

However, there is nothing new about judges employing staff members to help them fulfill their judicial role. As early as 1875, Justice Horace Gray of the Massachusetts Supreme Judicial Court employed a law clerk.³⁵ Over time, obtaining law clerks became common practice, and Congress authorized the employment of staff members to assist judges.³⁶ Law clerks and other legal staff have become an integral part of the legal system, positively impacting the judiciary by facilitating judges in performing their many duties.

2. The Unpublished Opinion

The “unpublished opinion” policy is another method to decrease the workload of the courts.³⁷ The policy arguably provides several benefits. First, judges save time by not being required to prepare the opinion for publication.³⁸ When a decision is published, the judge must write for a general audience and elucidate every important aspect of the case. However, an unpublished opinion has a more limited audience, allowing the judge to write a truncated set of facts and employ a shorthand analysis of the parties’ arguments.³⁹ Second, litigants have access to a quicker judicial result, instead of being delayed for the opinion to be published.⁴⁰ Third, it saves money.⁴¹ Clients save money because attorneys spend less time researching cases with little or no precedential value. Also, libraries, firms, and other legal entities save money by not being required to purchase more books filled with “irrelevant” cases.⁴²

These justifications, by themselves, are not sufficient to limit the publication of opinions. A standard must be used to determine which opinions will be published and which opinions will not. Each court of appeals has its own criteria, but generally, an opinion will be published if it:

- (a) Establishes a new rule of law, alters, or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked;

33. *Id.*

34. *Id.* at 9.

35. See JOHN B. OAKLEY & ROBERT S. THOMPSON, LAW CLERKS AND THE JUDICIAL PROCESS: PERCEPTIONS OF THE QUALITIES AND FUNCTIONS OF LAW CLERKS IN AMERICAN COURTS 10–11 (1980); Carpenter, *supra* note 12, at 87.

36. Pub. L. No. 71-373, 46 Stat. 774 (1930).

37. See *supra* notes 1–2 and accompanying text.

38. See Robel, *supra* note 12, at 942.

39. Joseph L. Gerken, *A Librarian’s Guide to Unpublished Judicial Opinions*, 96 LAW LIBR. J. 475, 477 (2004).

40. See *id.* Of course, a court could deliver the result directly to the litigants to avoid delays to the litigants and then later publish the written opinion.

41. See e.g., Kirt Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541, 547–48 (1997) (discussing the assertion that unpublished decisions save money).

42. *Id.*

- (b) Applies an established rule of law to facts significantly different from those in previous published opinions applying the rule;
- (c) Explains, criticizes, or reviews the history of existing decisional or enacted law;
- (d) Creates or resolves a conflict of authority either within the circuit or between the circuit and another circuit;
- (e) Concerns or discusses a factual or legal issue of significant public interest; or
- (f) Is rendered in a case that has been reviewed previously and its merits addressed by an opinion of the United States Supreme Court.
- (g) An opinion may also be published if it: [i]s accompanied by a concurring or dissenting opinion; or reverses the decision below or affirms it upon different grounds.⁴³

Of course, it is constitutionally permissible for courts to not publish opinions. The Framers of the Constitution knew that limited publication of judicial decisions was the rule, not the exception.⁴⁴ Before the ratification of the Constitution, private reporting and official reporting in the United States was almost non-existent.⁴⁵ Therefore, unpublished opinions by themselves do not invoke much antagonism, especially since the opinions are accessible anyway through electronic databases. But it is the unpublished opinion's successor, the "no-citation" rule which invites controversy. If courts issue decisions from the bench, there is no constitutional problem. The problems arise when courts prohibit reference to previously decided decisions.

3. The No-Citation Rule

The no-citation rule is meant to effectuate the objectives of not publishing opinions.⁴⁶ That is, allowing citation would frustrate the purposes of selective publication. The problem with having *only* an unpublished opinion policy is that it does not stop lawyers from finding them and relying on the unpublished decision for valid and binding authority. But aren't opinions supposed to be binding and valid authority?

In any case, after the courts' adoption of selective publication, it was reasoned that judicial efficiency would still be frustrated if the opinions were citable.⁴⁷ It was also "argued that if citation to unpublished decisions were permitted, a market for the opinions would develop."⁴⁸ Legal practitioners and law libraries would need to be constantly updated on these unpublished cases, and this would impose substantial financial costs upon them. Additionally, the no-citation rule prevents the courts from

43. 5TH CIR. R. 47.5.1; *see also* 4TH CIR. R. 36(a), 6TH CIR. R. 206(a)

44. *See* Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800-1850*, 3 AM. J. LEGAL HIST. 28 (1959); *see also infra* notes 55-58 and accompanying text.

45. *See* GRANT GILMORE, *THE AGES OF AMERICAN LAW* 9 (1977).

46. *See* Shulderberg, *supra* note 41, at 549-51; *see also supra* notes 37-39 and accompanying text.

47. *Id.*

48. Shulderberg, *supra* note 41, at 549-50.

making “too much law,” which arguably would make it difficult for attorneys to research all relevant decisions.⁴⁹

The Second, Seventh, Ninth, and Federal Circuits prohibit the citation to unpublished opinions,⁵⁰ while six other circuits discourage it.⁵¹ A typical restrictive no-citation rule provides, “unpublished dispositions and orders of this Court are not binding precedent Unpublished dispositions and orders of this Court may not be cited to or by the courts of this circuit”⁵² The obvious effects of such a rule are (1) it makes unpublished opinions not binding precedent, which means that courts do not have to follow them and (2) it prevents attorneys from relying on such cases. These effects present constitutional problems.

III. THE CONSTITUTIONALITY OF THE NO-CITATION RULE

Do courts have the power to prevent cases from being used by attorneys who are fighting for their clients’ interests? Although this was a subject of great interest when the no-citation rules were first promulgated, an intense debate started when the Eighth Circuit ruled in 2001 that its no-citation rule, insofar as it allowed them to avoid the precedential effect of prior decisions, was unconstitutional.

A. The Eighth Circuit Ruling

In 1996, Faye Anastasoff mailed her tax refund claim to the Internal Revenue Service for taxes paid three years earlier.⁵³ The Internal Revenue Service denied her refund claim under federal statute 26 U.S.C. § 6511(b), which limited refunds to taxes paid over the past three years.⁵⁴ Anastasoff’s claim was received *one day* past the three year cut-off.

In many cases, the “Mailbox Rule” would save claims such as Anastasoff’s, because under that rule, claims are deemed received and filed by the Internal Revenue Service when they are mailed. But 26 U.S.C. § 6511(b) states that claims are received and filed when they actually reach the office of the IRS, which may be several days after the claims were mailed. If Anastasoff’s claim was deemed received when it was mailed under the Mailbox Rule, it would not have been late, and she probably would have won her case. But since the Internal Revenue Service refused to apply the Mailbox Rule, Anastasoff was denied her refund.

49. Gerken, *supra* note 39, at 477.

50. See, e.g., 2D CIR. R. 0.23; 7TH CIR. R. 53(b)(2)(iv); 9TH CIR. R. 36-3(a)–(b).

51. See, e.g., 8TH CIR. R. 28(i) (“[Unpublished opinions] are not precedent and parties generally should not cite them Parties may . . . 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.”); 10TH CIR. R. 36-3 (“Citation of an unpublished opinion is disfavored. But an unpublished opinion may be cited if: (1) it has persuasive value . . . that has not been addressed in a published opinion; and (2) it would assist the court in its disposition.”).

52. See, e.g., 9TH CIR. R. 36-3. Note that citation is available in limited circumstances, such as when relevant to collateral estoppel, res judicata, double jeopardy, and other rare situations. *Id.*

53. Anastasoff v. United States, 223 F.3d 898, 899 (8th Cir. 2000).

54. *Id.*

Anastasoff subsequently filed suit, arguing the Court should apply the Mailbox Rule, while the Internal Revenue Service argued that 26 U.S.C. § 6511(b) was the appropriate standard.⁵⁵ Fortunately for the Eighth Circuit Court of Appeals, the Court had already dealt with this exact issue in a prior case. But unfortunately, the case on point was an unpublished decision. Therefore, the case was “not precedent, and parties should not generally cite” to it.⁵⁶

In *Christie v. United States*, which is an unpublished decision, the Eighth Circuit held the Mailbox Rule would not save claims such as Anastasoff’s.⁵⁷ If the Eighth Circuit simply followed *Christie*, then Anastasoff would lose, and the case would be quickly over. But Anastasoff argued that because *Christie* was an unpublished decision, it was not precedent under the Eighth Circuit’s no-citation rule, and the Court could therefore still rule in her favor by ignoring the prior case.⁵⁸

The Eighth Circuit, aware of the injustice and inconsistency that departing from prior rulings (albeit in unpublished decisions) could serve, held “the portion of [the no-citation rule] that declares that unpublished opinions are not precedent is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the ‘judicial’ [power].”⁵⁹

The Court first reasoned that “[i]nherent in every judicial decision is a declaration and interpretation of a general principle and rule of law. This declaration . . . must be applied in subsequent cases to similarly situated parties.”⁶⁰ If the Court was to deviate from applying the same rule to similarly situated parties, the Court would be going beyond the text of its Article III powers (to decide “cases and controversies”) in the Constitution.

Second, the Eighth Circuit reasoned that historically, the Framers of the Constitution stood firmly for the proposition that “it is an established rule to abide by former precedents.”⁶¹ The Court explored how the Framers were concerned about the arbitrary powers of government, stating, “the doctrine of precedent was not merely well established; it was the historic method of judicial decision-making, and well regarded as a bulwark of judicial independence in past struggles for liberty.”⁶² Historically, therefore, judges were limited to determining the law, maintaining the law, and expounding the law.⁶³

Third, the Eighth Circuit provided a “separation of powers” argument, reasoning that “[i]f judges had the legislative power to depart from established legal principles, ‘the subject would be in the bands of arbitrary judges, whose decisions would be then regulated only by their own opinions.’”⁶⁴ The Court also quoted Hamilton, stating,

55. *Id.*

56. 8TH CIR. R. 28(i).

57. *Christie v. United States*, 1992 U.S. App. LEXIS 38446 (8th Cir. Mar. 20, 1992) (per curiam).

58. *See supra* note 46 and accompanying text.

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

60. *Id.* at 899–900 (citation omitted).

61. *Id.* at 900 (quoting 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *69 (1765)).

62. *Id.*

63. *Id.*

64. *Id.* at 901 (quoting 1 BLACKSTONE, *supra* note 61, at *258–59).

“[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound by strict rules and precedents, which serve to define and point out their duty in every particular case that come before them.”⁶⁵ Separation of powers principles therefore limit courts from adopting rules that run counter to the courts’ ascribed powers granted by the Constitution. Some rules, such as the no-citation rule, are better left to the legislature.

Finally, as a policy matter, the Court stated that judges should not be able “to choose for themselves, from among all the cases they decide, those that they will follow in the future, and those that they need not.”⁶⁶ “Those courts are saying to the bar: ‘We may have decided this question the opposite way yesterday, but this does not bind us today, and what’s more, you cannot even tell us what we did yesterday.’”⁶⁷ The Court then concluded by finding Anastasoff’s claim was rejected directly by the unpublished prior decision in *Christie*, and the no-citation rule was unconstitutional in regards to allowing judges to depart from precedent.⁶⁸

B. Responses to Anastasoff

Not long after the Eighth Circuit’s ruling, the *Anastasoff* decision received criticism.⁶⁹ Some scholars argued that *Anastasoff* was simply about “stare decisis” and not precedent—although the Framers intended for judges to be bound by precedent, the Framers did not mean for judges to necessarily be bound by one case.⁷⁰ In any case, the *Anastasoff* decision was soon vacated as moot since the parties ultimately resolved their dispute, and Anastasoff received her refund from the government in full.⁷¹ The Court held that since “the case [had] become moot . . . [t]he constitutionality of that portion of [the rule] which says that unpublished opinions have no precedential effect remains an open question in this Circuit.”⁷²

Although the *Anastasoff* decision was vacated as moot, courts continued to use the decision as persuasive authority. District courts and attorneys cited the *Anastasoff* decision to support their citations to unpublished opinions.⁷³ However, when an

65. *Id.* at 901 (quoting THE FEDERALIST NO. 81, at 531 (Alexander Hamilton) (Modern Library ed., 1938)).

66. *Id.* at 904.

67. *Id.*

68. *Id.*

69. See, e.g., Gregory S. Fisher, *Soundoff: Citing to the Unpublished Opinion*, 10 ARIZ. ATT’Y 8 (Feb. 2004), available at <http://www.westlaw.com> (40-FEB Ariz. Att’y 8).

70. See also *supra* note 59 and accompanying text; Jennifer Adams, Comment, *Law Today, Gone Tomorrow*, 53 BAYLOR L. REV. 659 (2001) (arguing that the no-citation rule violates stare decisis and the intent of the Framers). But see Drew R. Quitschau, Case Note, *Anastasoff v. United States: Uncertainty in the Eighth Circuit—Is there a Constitutional Right to Cite Unpublished Opinions?*, 54 ARK. L. REV. 847, 878 (2002) (“[T]he no-citation rule violates stare decisis Our forefathers never intended the courts to have such unbridled discretion . . . as prescribed by the no-citation rule.”).

71. See *Anastasoff*, 235 F.3d. 1054.

72. *Id.* at 1056.

73. See Leane C. Medford, *Anastasoff v. U.S.: The Continuing Controversy over the Precedential Effect of Unpublished Opinions*, 20-9 AM: BANKR. INST. J. 26 (Nov. 2001); *McGuinness v. Pepe*, 150 F. Supp. 2d 227 (D. Mass. 2001); *Encore Video Inc. v. City of San*

attorney in the Ninth Circuit cited to an unpublished decision, the Ninth Circuit Court of Appeals ordered counsel to show cause as to why he should not be disciplined for violating the no-citation rule.⁷⁴ The attorney argued that the Ninth Circuit's rule, which is similar to the Eighth Circuit's, may be unconstitutional. The attorney relied on *Anastasoff* as persuasive authority. The Ninth Circuit repudiated the Eighth Circuit's holding and held that the no-citation rule is constitutional in all aspects.

The Ninth Circuit began its analysis by stating "*Anastasoff* may be the first case in the history of the Republic to hold that the phrase 'judicial Power' encompasses a specific command that limits the power of the federal courts."⁷⁵ The Court essentially argued throughout its opinion that (1) the text of the Constitution, in particular the "judicial Power," does not contain any limitation on the courts; and (2) historically, "most decisions of the federal courts were not viewed as binding precedent," and the Framers never would have viewed non-precedential decisions as "inconsistent with the exercise of judicial power."⁷⁶ The Court concluded by finding the no-citation rule was not unconstitutional, stating "unlike the [Eighth Circuit], we are unable to find within Article III of the Constitution a requirement that all case dispositions and orders issued by appellate courts be binding authority."⁷⁷

C. Arguments For and Against the No-Citation Rule

This Section provides a very brief description of various arguments made for and against the no-citation rule. They are divided into the following: (1) historical arguments, (2) textual arguments, (3) separation of powers arguments, (4) policy arguments, (5) due process arguments, and (6) First Amendment arguments. Many of these arguments can be easily manipulated to come out one way or another and thus are not proper indicators of the constitutionality of the no-citation rule. The First Amendment argument, on the other hand, when analyzed in light of the Supreme Court's doctrine in context-based and context-neutral regulations, points more strongly to the unconstitutionality of the no-citation rule. Therefore, Section D will treat the First Amendment argument separately and in more detail because of the peculiar constitutional concerns it raises.

First, the historical analysis can lead to the conclusion that either the no-citation rule does or does not violate the Constitution. The court in *Anastasoff* relied partly upon this method of analysis. The Eighth Circuit reasoned that the Framers intended for judges to abide by prior precedents, adhere to *stare decisis*, and be limited in the way judges reach decisions.⁷⁸ But the Ninth Circuit in *Hart*, which also relied partly on

Antonio, 200 WL 33348240 (W.D. Tex. Oct. 2, 2000), *rev'd*, 310 F.3d 812 (2002), *superseded*, 330 F.3d 288 (2003) (arguing that the unpublished decision rule of the Fifth Circuit is similar to the Third Circuit, and since the court's decision could have been supported by an unpublished decision, the rule should be re-examined).

74. *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001); 9TH CIR. R. 36-3(a)-(b) ("Unpublished dispositions and orders of this Court are not binding precedent . . . [and generally] may not be cited to or by the courts of this circuit.").

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

76. *Id.* at 1163.

77. *Id.* at 1180.

78. *Anastasoff*, 223 F.3d, at 901.

history, concluded the exact opposite as did the Eighth Circuit.⁷⁹ Perhaps this is due to the ambiguity of what the Framers actually thought, since they reasoned differently many times about the same issues.

Second, the textual arguments based on the Constitution suffer from the same deficiency as the historical arguments when it comes to the no-citation rule. As already seen, the Eighth Circuit argued that the no-citation rule goes beyond the judicial power of Article III. The Ninth Circuit concluded the exact opposite. “[W]e are unable to find within Article III of the Constitution a requirement that all case dispositions and orders issued by appellate courts be binding authority.”⁸⁰ Since the text of the Constitution does not explicitly say courts can adopt a no-citation rule, nor that they cannot, the textual argument can be used to support two opposite conclusions.

The third argument concerns the separation of powers. Some argue that it is simply not the courts’ job to promulgate rules such as the no-citation rule.⁸¹ Rules that are this restrictive are better left to members of Congress, who are elected representatives, not judges. Although this argument is not as malleable as the two previous, it can at least be downplayed. As the Ninth Circuit pointed out, courts adopt procedures and rules all the time. Taking away this power would make the courtroom chaotic. Further, a court would be abdicating its authority if it did not respond adequately to judicial needs with necessary rules. However, as explained below, the no-citation rule is not a necessary rule, and judicial efficiency would not be compromised without it.

Policy arguments are the fourth type. At one end is the argument suggesting that the no-citation rule gives judges the power to be arbitrary and conceal what they do,⁸² while the rule also adversely affects litigants relying on unpublished decisions. It is not fair today for the courts to depart from principles they declared valid yesterday. One commentator suggested, “Our forefathers never intended the courts to have such unbridled discretion.”⁸³ Also, the Eighth Circuit asserted that courts who declare they are not bound by unpublished cases are essentially telling the public that they have the power to decide one case in one direction for one party and then give the opposite result on a similar set of facts to another party the next day.⁸⁴ Justice and consistency demand much more, and the no-citation rule goes too far.

But, on the other hand, the fact remains that courts are in crisis. There are far too many cases for judges to deal with, most of which are irrelevant to the present issue. Here, judges do perform quality work in their task and diligently work to ensure that like cases are decided alike. Further, judges are still accountable to the public since all opinions are accessible in the court clerks’ office or through electronic databases. Academics, attorneys, and litigants are free to criticize the court for an inappropriate ruling. Attorneys are well-served by unpublished opinions because they do not have to sort through a mountain of unnecessary opinions to find relevant cases. And the public is also well-served because tax money is saved; the opinions that do change the law and could affect them are published.

79. *Hart*, 266 F.3d at 1164.

80. *See Hart*, 266 F.3d 1155.

81. *See, e.g., Anastasoff*, 223 F.3d, at 899.

82. *See Carpenter, supra* note 12.

83. *See Quitschau, supra* note 70, at 878.

84. *See supra* note 58 and accompanying text.

Fifth are due process arguments. Opponents of the no-citation rule urge that since the Supreme Court has held that “abrogation of deeply-rooted common law procedure, without an adequate replacement or justification, is violative of procedural due process[.]” then so too does the no-citation rule.⁸⁵ When the Supreme Court looks at deeply-rooted common law procedures, it carefully examines English and American legal history.⁸⁶ It has been argued that a review of legal history indicates that litigants have long been able to cite to previously decided decisions, regardless of whether an opinion was published or not.⁸⁷ Here, since barring attorneys from using previously decided cases usurps the common law tradition and since there is not an adequate replacement of the tradition, the relatively new citation rule violates due process.⁸⁸

The counterargument is that under the common law, judges have never been barred from limiting citation, even if they never exercised that power. A New Jersey statute, enacted in 1799, forbade citation of English cases, commentaries, and expositions of common law.⁸⁹ Further, there is nothing in the common law to suggest that attorneys were completely free to cite any case they want, without limit to the amount of cases. If case briefs submitted to the court must be limited in pages, then cites must necessarily be limited, albeit indirectly.

D. The First Amendment Analysis

First Amendment guarantees make the constitutionality of no-citation rules extremely doubtful. This is because the government is restricting speech that is used to address a legal right. Perhaps even more unfortunate is that the speech the government is restricting is speech that originated from the government. That is, courts are prohibiting or constraining the very speech that they themselves wrote and mandated. There is no obvious reason to prohibit this speech, since it is not deemed a threat to society. Attorneys are simply attempting to use government speech to advocate the cause of their clients. Unfortunately, attorneys are restrained by the no-citation rule. The First Amendment limits this restraint.

This Section explains the Supreme Court’s First Amendment analysis as applied to both content-based and content-neutral regulations. As discussed below in the Subsections, the Supreme Court utilizes a test called the “O’Brien Analysis” to analyze whether the government violates a First Amendment right. The first part of the O’Brien test inquires into whether a government restriction is “content-based.” If the restriction is content-based, the Court applies “strict scrutiny,” unless the restriction targets a category of unprotected speech (for example, obscenity is content-based speech that is not protected by the First Amendment). But if the speech is protected by the First

85. See 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, 717 (2001) (discussing the due process argument and how the Supreme Court analyzes English and American history to find due process violations); Jennifer Adams, *Law Today, Gone Tomorrow*, 53 BAYLOR L. REV. 659, 680 (2001).

86. *Id.*

87. *Id.*

88. *Id.*

89. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 22 (1977).

Amendment (for example, political speech), then strict scrutiny applies, which makes it very unlikely the government restriction will be upheld.

However, a government restriction on speech may be “content-neutral.” The distinction between content-based and content-neutral restrictions makes a significant difference, because “content-neutral” restrictions have more of a chance to be upheld than “content-based restrictions.” For a law to be treated as content-neutral, the government interest behind the law must be unrelated to the suppression of free expression (for example, if the government bans public nudity in a particular area not because of its disdain for the message that nudity will convey, but because the government thinks that crime will increase as a result of the nudity, the ban is content-neutral). For the reasons stated below, the no-citation rule is probably content-neutral, not content-based. But its content-neutral status does not prevent it from violating the Constitution.

1. Content-Based Restrictions

The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech.”⁹⁰ At its plain meaning, the First Amendment appears simple and unqualified. However, “all” speech is clearly not protected (e.g., bribery, perjury, agreement to commit murder).⁹¹ The question is what type of speech is protected, and what type of speech is not.

In general, when the government regulates speech, it regulates through either content-based or content-neutral restrictions.⁹² A content-based regulation is a regulation that is related to the communicative impact of speech. For example, in *Simon & Schuster v. Members of the New York State Crime Victims Board*, the state of New York passed a law to prevent serial murderers and criminals from writing and profiting from books about their crimes and victims.⁹³ The Supreme Court unanimously invalidated the statute, stating “[T]he government’s ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace The [State] law is such a content-based statute. It singles out . . . and it is directed only at works with a specified content.”⁹⁴ Because the law was content-based, the court went on to apply strict scrutiny, finding it unconstitutional.⁹⁵

90. U.S. CONST. amend. I.

91. See *infra* notes 104–11 and accompanying text (discussing categories of unprotected speech).

92. See generally Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987) (elucidating the Supreme Court’s doctrine on content-based and content-neutral restrictions). Alternatively, some have proposed looking at the no-citation rule as a prior restraint. See, e.g., Marla Brooke Tusk, *The No-Citation Rules as Prior Restraint on Attorney Speech*, 103 COLUM. L. REV. 1202 (2003).

93. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991).

94. *Id.* at 116.

95. *Id.*

As stated above, “what level of scrutiny applies is determined by whether the [prohibition] is related to the suppression of expression.”⁹⁶ When the Court employs strict scrutiny, the government must show (1) that it has a compelling interest for regulating speech and (2) that it has adopted a necessary means of regulation (or in other words, the regulation must be narrowly tailored).⁹⁷ Content-based restrictions are treated with more scrutiny than content-neutral laws because they discriminate based on the message of certain types of expression.⁹⁸ As the Court stated in *Texas v. Johnson*, “[when] expression [is] restricted because of the content of the message . . . [w]e must subject the State’s asserted interest . . . to the most ‘exacting scrutiny.’”⁹⁹ Another example of the Court applying strict scrutiny to content-based restrictions is *Cohen v. California*, where the defendant was observed in the Los Angeles County Courthouse wearing a jacket bearing the words “fuck the draft.”¹⁰⁰ Cohen was convicted of violating a California law which prohibited “maliciously and willfully disturb[ing] the peace . . . or person [by] offensive conduct.”¹⁰¹ The Court held that “the State certainly lacks power to punish Cohen for the underlying content of the message”¹⁰² The Court went on to state that “[t]hose in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities by simply averting their eyes.”¹⁰³ The Court in subsequent cases applied this same exacting standard to laws and regulations based on speech content, especially those dealing with political speech.

It would be remiss not to point out at this stage of the analysis that some content-based restrictions are not protected by the First Amendment, and therefore the Supreme Court will not invoke strict scrutiny. Some forms of speech are deemed unprotected because they are harmful to society. For example, the government can place restrictions on “incitement.”¹⁰⁴ Briefly, incitement is content-based speech intended to produce unlawful conduct that is clearly likely to present an immediate danger.¹⁰⁵ “Fighting words” are another example of categorically unprotected speech.¹⁰⁶ For example, in *Chaplinsky*, a Jehovah’s Witness distributed literature on the street while denouncing all religion.¹⁰⁷ When a crowd became hostile towards Chaplinsky, a police officer escorted him away to the City Marshal. An argument ensued between Chaplinsky and the Marshal, and Chaplinsky called the Marshal a “God damned

96. *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 278 (2000).

97. *Id.*

98. See generally KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 984–96 (5th ed. 2004) (providing a general overview of the Supreme Court’s First Amendment doctrine).

99. See *Texas v. Johnson*, 491 U.S. 397 (1989); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434 (“If the regulation [is] content-based, it would be considered presumptively invalid and subject to strict scrutiny.”).

100. *Cohen v. California*, 403 U.S. 15 (1971).

101. *Id.* at 16.

102. *Id.* at 18.

103. *Id.* at 21.

104. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

105. *Id.*

106. See *supra* note 102 and accompanying text.

107. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

racketeer” and a “damn Fascist.” The Court unanimously upheld New Hampshire’s prosecution of Chaplinsky under the state’s prohibition of “fighting words.”¹⁰⁸ Other categories of unprotected content-based speech include libel,¹⁰⁹ obscenity,¹¹⁰ and child pornography.¹¹¹

Does the Supreme Court’s categorization analysis apply to the no-citation rule? It does not. This is because although courts prohibit or restrict the use of a certain category of cases (i.e., unpublished opinions), this prohibition is (1) not deemed immoral and harmful to society, as the other forms of speech mentioned above; and (2) not labeled by the Court as “unprotected”—unlike the other unprotected categories. Therefore, we must deal with the Court’s methodology in handling content-based restrictions that target protected speech.

The Supreme Court applies the O’Brien test in analyzing whether the First Amendment has been violated by content-based restrictions.¹¹² The O’Brien test is basically a balancing test. This balancing test is used because the Court recognizes that the government may have a legitimate interest in regulating speech, but at the same time, this interest may intrude upon an individual’s legitimate interest to exercise free expression. Because strict scrutiny is applied to content-based restrictions, the balance usually tips in favor of the litigant, not the government. For example, in *Simon & Schuster* (also discussed above),¹¹³ the State impeded criminals from writing and profiting from books about their crimes. The Court recognized the State had a legitimate interest in restricting the speech, stating “the State . . . has an undisputed compelling interest in ensuring that criminals do not profit from their crimes.”¹¹⁴ But the Supreme Court also found that a legitimate First Amendment right is at stake, and the law “singles out . . . and it is directed only at works with a specified content.”¹¹⁵ After balancing the different interests at stake against one another, the Court applied strict scrutiny and found the restriction unconstitutional since it was not a necessary means (or narrowly tailored) of regulation.¹¹⁶

Some argue that the no-citation rule violates the First Amendment because it imposes a *content-based* restriction on speech without a compelling state interest.¹¹⁷

108. *Id.* at 569.

109. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). Note however, that only the most malicious forms of libel are unprotected. *Id.*

110. *Roth v. United States*, 354 U.S. 476 (1957).

111. *Osborne v. Ohio*, 495 U.S. 103 (1990).

112. *See Texas v. Johnson*, 491 U.S. 397 (1989); *Clark v. Comty. for Creative Non-Violence*, 468 U.S. 288 (1984); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *United States v. O’Brien*, 391 U.S. 367 (1968). In the case of *O’Brien*, O’Brien was convicted for burning his Selective Service certificate to protest the military draft. A two track analysis was adopted in this case to analyze content-based and content-neutral regulations by the government. The Supreme Court employed this two-track analysis in all other major First Amendment cases.

113. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991).

114. *Id.* at 119.

115. *Id.* at 116.

116. *Id.* at 123.

117. *See, e.g., Quitschau, supra* note 70, at 875 (explaining various arguments, including the First Amendment, which would declare the no-citation rule unconstitutional).

According to this argument, the no-citation rule is a government regulation aimed at the content or communicative impact of speech.¹¹⁸ The content that the government is aiming at is the case or opinion itself, which is a record of how the court previously decided a case.¹¹⁹ Since the restriction is based on the content of the cases, the Court will employ strict scrutiny, which requires a compelling state interest.¹²⁰ The First Amendment interest is unquestionably significant, since a party is attempting to rely on a court's prior decision to win his or her case.¹²¹ The degree of the governmental abridgment of this interest is great because certain cases are barred almost absolutely, with rare exceptions. The litigant cannot refer to the content in those cases. The governmental interest at stake is judicial efficiency. But since the Court has held that judicial efficiency is not enough for a compelling interest,¹²² it is not enough to survive strict scrutiny, which makes the no-citation rule unconstitutional.¹²³

But is the no-citation rule content-based? As we have seen, content-based restrictions limit communication because of the message the communication conveys.¹²⁴ The message that a case conveys, which an attorney is attempting to cite, is a message about what the court hearing the case has previously reasoned and decided. But are courts really aiming at the content of those cases? Most likely, as will be explained below, the courts are not concerned about the content of those cases and therefore do not even want to hear what is in them. Recall, the main reason that courts decide not to publish opinions and make them uncitable is for judicial economy.¹²⁵ These reasons are unrelated to the content of those cases.

2. Content-Neutral Restrictions

A content-neutral restriction is a restriction that is not related to the suppression of ideas. The restrictions here limit expression without regard to the content or communicative impact of the message conveyed.¹²⁶ Examples of content-neutral

118. *Id.*

119. *Id.*

120. *See supra* notes 79–80 and accompanying text.

121. We are not dealing here with cases that are completely unrelated to the clients' case. We are dealing with cases that litigants believe will either be a decisive factor in the court's determination or a persuasive source that will facilitate the court's decision. As Salem Katsh and Alex Chachkes pointed out, "Courts retain the ability to sanction lawyers for frivolous conduct, including, in an extreme case, the abusive citation of irrelevant decisions." Salem M. Katsh & Alex V. Chachkes, *Developments and Practice Notes: Constitutionality of "No-Citation" Rules*, 3 J. APP. PRAC. & PROCESS 287, 321 (2001).

122. *See Reed v. Reed*, 404 U.S. 71, 76 (1971) (stating the interest in "reducing the workload on probate courts" is not weighty enough to survive even heightened scrutiny); *see also Vlandis v. Kline*, 412 U.S. 441, 459 (White, J., concurring) ("[It is] obvious . . . as the Court's assessment of the weight and value of the individual interest escalates, the less likely it is that mere administrative convenience . . . will be sufficient to justify what otherwise would appear to be irrational discriminations.").

123. *See supra* note 97 and accompanying text.

124. *See Young v. American Mini Theatres*, 427 U.S. 50 (1976).

125. *See supra* notes 46–49 and accompanying text.

126. *See generally* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987).

restrictions include bans on noisy speeches near hospitals, bans on billboards in certain areas, and limits on campaign contributions.¹²⁷

Some content-neutral restrictions may have an incidental effect on the message of some speech, but that effect does not change the restriction's content-neutral status. For example, in *City of Erie v. Pap's A.M.*,¹²⁸ a city banned public nudity. Although some individuals had the content of their messages suppressed by the ban on nudity, the Supreme Court reasoned that government restriction on public nudity should be evaluated under the O'Brien test as a content-neutral restriction. The Court found that although the content of speech was incidentally affected, the law actually aimed at "combat[ing] the negative secondary effects associated with nude dancing establishments,"¹²⁹ such as "violence, public intoxication, prostitution, and other serious criminal activity."¹³⁰ In other words, the government did not concern itself about the content of the nudity being displayed, but about the negative effects associated with public nudity. The city was therefore allowed to prohibit nudity since the Court held that the city had a substantial governmental interest.

For the government to impose a *content-neutral* regulation, the government must satisfy an ad hoc balancing test requiring (1) a substantial government interest and (2) effective means of achieving that interest. These two elements are weighed against the importance of the First Amendment interest at stake (that is, an individual's interest in a particular form of expression, such as political speech) and the degree of abridgment of that interest (that is, whether a person is entirely prevented from expressing him or herself or just in certain circumstances).¹³¹

The no-citation rule is far more likely to be content-neutral than content-based. This is because the rule is not related to the suppression of ideas or the substance of those cases; it does not matter whether the cases the attorney wants to cite deal with certain subjects such as discrimination, free speech, or taxes. Unpublished decisions are equally unciteable, regardless of the messages conveyed in those cases.

Even if the content of those unciteable cases were incidentally affected, we have seen that if the government aims at something besides the content of the cases, the regulation will still be held content-neutral.¹³² Here, the government is aiming at saving resources. Since the government is not aiming at content, the no-citation rule is content-neutral.

Since the no-citation rule is content-neutral, the only questions are whether the government has a substantial interest in judicial economy, whether its means are effective, and whether this interest intrudes too much upon First Amendment expression. Although some may be troubled by applying this lower standard of scrutiny, the government is still likely to lose under this standard. First, if the government interest is to save judicial resources, the no-citation rule does not serve this purpose. A study by the Federal Judicial Center in 2005 indicated that many federal judges, predicated on their experience, did not think that allowing citation would

127. *Id.* at 48.

128. 529 U.S. 277 (2000).

129. *Id.* at 291.

130. *Id.* at 297.

131. *United States v. O'Brien*, 391 U.S. 367 (1968).

132. *See City of Erie*, 529 U.S. 277.

increase their workload.¹³³ Other scholars have also shown that the no-citation rule does nothing to further ease the workload of appellate courts because the same volume of cases still arises.¹³⁴ The rule does not save time in the research and writing because judges and legal staff must still provide quality research and analysis to decide the cases which are not citable.¹³⁵ Therefore, the no-citation rule is not effective in facilitating judicial economy.

Once you balance the government's interest in judicial economy, which is only served minutely, if at all, against the First Amendment interest of litigants to cite cases, the balance tips in favor of the First Amendment interest. Cases that are cited many times determine the outcome of the current case. A litigant has a strong interest in winning his or her case. A substantial number of attorneys would cite to unpublished opinions if court rules allowed them.¹³⁶ This is because citing certain unpublished decisions could dictate the outcome, as demonstrated by *Anastasoff*¹³⁷ and by district courts and attorneys that continue to rely on unpublished decisions.¹³⁸ Almost all would agree that there are various alternatives that the courts could employ to better judicial economy without imposing significant costs on the litigants.¹³⁹ Therefore, because the no-citation rules intrude too much upon First Amendment expression without effectively serving their purpose, they are unconstitutional.

CONCLUSION

The federal courts of appeals are overburdened by increasing caseloads. The courts' increasing caseload led to a significant expansion of judicial staff and unpublished opinions. Attorneys' reliance on these unpublished opinions led to the no-citation rules. But if the object of the courts is to reduce its workload, it seems very questionable whether the no-citation rules serve this purpose. This makes the no-citation rules constitutionally problematic, especially under a First Amendment analysis. Rule 32.1 does not prevent the no-citation rules from violating the Constitution because courts can still prohibit the citation of cases decided before 2007. Therefore, the no-citation rules should be abolished in their entirety.

133. THE FEDERAL JUDICIAL CENTER, CITATIONS TO UNPUBLISHED OPINIONS IN THE FEDERAL COURTS OF APPEALS: PRELIMINARY REPORT 3 (2005), [http://www.fjc.gov/public/pdf.nsf/lookup/Citation1.pdf/\\$File/Citation1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Citation1.pdf/$File/Citation1.pdf).

134. See 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, 727 (explaining the ineffectiveness of the no-citation rule); see also Katsh & Chachkes, *supra* note 121, at 320–21 (commenting on the ineffectiveness of the no-citation rule).

135. See Katsh & Chachkes, *supra* note 121, at 321 (arguing that when some courts have allowed citation to some unpublished opinions, it did not increase the courts' workload).

136. THE FEDERAL JUDICIAL CENTER, *supra* note 133, at 15.

137. See *supra* notes 52–56 and accompanying text.

138. THE FEDERAL JUDICIAL CENTER, *supra* note 133, at 21–45.

139. See, e.g., Quitschau, *supra* note 70, at 876 (commenting that an "increase in clerkships and judgeships would be just as effective and would not burden the rights of the litigants by preventing citation of unpublished decisions"); see also DANIEL J. MEADOR & JORDANA S. BERNSTEIN, *APPELLATE COURTS IN THE UNITED STATES* (1994) (providing an overview and discussion of reforms).