

The Censorial Judiciary

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Under the federal circuit courts' nonpublication policies, appellate judges designate for exclusion from the Federal Reporter approximately 80% of the opinions they write. Under their companion "no-citation" rules, judges prohibit lawyers from referring to these "unpublished" opinions in their briefs and arguments.

Dissatisfaction with the policies and rules is widespread. Academics question whether unpublished opinions lack any material of citable value, and some find the concept of a nonprecedential appellate opinion a contradiction in terms. Practitioners resent the loss of the opportunity to support arguments with unpublished cases and labor under ethical dilemmas the rules create. Moreover, some practitioners suspect that noncitable opinions conceal the result-driven nature of certain appellate decisions.

This Article criticizes the no-citation rules. The rules violate the First Amendment's guarantees of freedom of speech and of the right to petition for redress of grievances. They also diminish confidence in adjudication, eliminate checks on judicial power, and result in government waste because there is no persuasive reason why taxpayers should pay for the production of opinions they cannot use as precedents. This Article calls for their repeal.

To address the caseload pressures that originally motivated the no-citation rules, this Article proposes a measure significantly different from those previously advanced. Unlike other commentators, the authors do not recommend increasing the number of judges. Nor do the authors recommend that judges prepare published opinions in every case. The primary

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The authors gratefully acknowledge the helpful comments of Frank Barron, Elie Jerome Benveniste, Norman Dorsen, Ward Farnsworth, John R. Hupper, Jane Jihyun Jaang, Burke Marshall, Richard A. Posner, Paul Rosenthal, Stuart Shapiro, Bruce Taggart, Kevin Teruya and Allan Tulchin on prior drafts, and thank the librarians of Cravath, Swaine & Moore for their assistance.

recommendation is that appellate judges dispose of appeals that would presently generate uncitable opinions through oral opinions that, if transcribed, could be cited. This practice — which English courts of appeal and federal district courts follow — strikes a workable compromise and has other benefits as well.

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It is a strange feature of American government that the body entrusted with protecting the right of free expression is itself a habitual censor of speech. Stranger still that the speech that is censored is not the speech of a subversive minority, but instead that body's own official pronouncements. In this country, for more than a quarter of a century, the federal appellate judiciary has adhered to a set of policies and rules designed to ensure that the names and content of well over half of the opinions its courts release each day can never be uttered in those courts' presence.

We are referring to the federal appellate judiciary's nonpublication policies and their companion "no-citation" rules. Under the former, the federal appellate judges specifically designate for exclusion from the bound volumes of the Federal Reporter approximately 80% of the opinions they write. Under the latter, the judges prohibit advocates from referring to such "unpublished" or "unreported" cases in their briefs and oral arguments. Similar rules exist in most states.¹ The consequences to the lawyer of violating "no-citation" rules can range from disregard of the cited opinions to reprimand or even sanction.

The nonpublication policies and no-citation rules came about in response to the sharp increase in the appellate caseload that began during the 1960s and continued until the middle of the last decade. In the mid-1970s, the courts adopted these policies and rules so that they could save time by issuing less polished, less elaborate written opinions and dispose of the myriad insubstantial appeals that dogged the appellate dockets. Today, the overwhelming majority of all federal appeals are disposed of in this fashion. But dissatisfaction with the policies and rules is widespread. Academics question whether unpublished opinions are indeed as insignificant as their authors assert, and some find the concept of a nonprecedential appellate opinion a contradiction in terms. Practitioners, sharing those views, bristle at the loss of the opportunity to bolster legal arguments by reference to unpublished cases and labor under ethical dilemmas the rules create, not only for the advocate but for the counselor as well. Moreover, practitioners harbor suspicions that noncitable opinions are used to paper over poorly reasoned, result-driven outcomes. Nonetheless, the rules continue to find steadfast defenders among their judicial sponsors, who assert that if unpublished opinions could be cited, they would lose

¹ See, e.g., Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. APP. PRAC. & PROCESS 251 (2001); Keith H. Beyler, *Selective Publication Rules: An Empirical Study*, 21 Loyola U. L.J. 1, 3-7 (1989).

the time savings that accrue from nonpublication. They fear that knowing that nonpublished opinions could be cited back to them would cause them to lavish as much attention on drafting nonpublished opinions as they do in composing published, precedential opinions.

In this Article, we criticize the no-citation rules and argue that the rules should be repealed, if not invalidated on First Amendment grounds. While the nonpublication policies are merely irrelevant anachronisms in an age in which even “unpublished” opinions have permanent places on electronic databases and public internet sites, the no-citation rules are something far worse. They censor expression and advocacy, in violation of the First Amendment’s guarantees of the freedom of speech and of the right to petition for redress of grievances. They diminish lay and professional confidence in appellate adjudication and eliminate checks on judicial power, of which there are few at the appellate level. They also result in government waste because there is no persuasive reason why taxpayers should pay public servants to write essays explaining why litigants have lost their appeals, if members of the public cannot use those works as precedents to help guide future behavior and resolve future disputes.

Significantly, none of our criticisms turns upon the much-debated but perhaps indeterminate question whether unpublished opinions “deserve” to be published. Our own sense from reading these opinions and from our own experience as practitioners and former law clerks to circuit judges² is that unpublished opinions generally (though not always) arise out of appeals that are as legally uninteresting as their drafters assert. Nonetheless, the ill effects from the no-citation rules that we identify here are the same, and the arguments we advance for their eradication equally valid, whether or not noncitable opinions contain material of jurisprudential value. If anything, our argument that public judicial resources should not be expended in the preparation of noncitable opinions is stronger if the substance of these opinions is thin.

Although we join the chorus of practitioners, scholars and a handful of judges who have criticized the no-citation rules, our chief proposal for reform is significantly different from those previously advanced. Unlike other commentators, we do not recommend an increase in the number of judges. Nor do we believe that judges should be required to prepare full-blown signed opinions in every case. Even if that were desirable —

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and we are not sure it would be — that is, in the current environment, an impractical and irresponsible suggestion. There are simply too many appeals to permit that approach. Rather, our primary recommendation is that appellate judges resurrect the practice of disposing of certain appeals through oral opinions delivered extemporaneously from the bench. We believe that this practice — a practice with historical roots and that English courts of appeal and federal district courts still follow — strikes a workable compromise and brings with it other benefits as well.

I. THE NON-PUBLICATION POLICIES AND NO-CITATION RULES

A. *The Non-Publication Policies*

Approximately 80% of the caseload of the federal appellate courts is resolved by means of “unpublished” opinions.³ The term “unpublished” means that the court has designated the opinion for exclusion from the bound volumes of the Federal Reporter, the official reporter for the federal courts of appeals. The Federal Reporter presently comprises over 1,500 volumes.

Whether an opinion is published or unpublished is governed by policies maintained by the individual courts of appeals. In some circuits, these policies take the form of formal standards that call for publication of opinions only when certain enumerated conditions are met. The Fourth Circuit’s standards are fairly typical:

Opinions delivered by the Court will be published only if the opinion satisfies one or more of the standards for publication:

- i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or
- ii. It involves a legal issue of continuing public interest; or

³ Leonidas Ralph Mecham, Administrative Office of the United States Courts, *Judicial Business of the United States Courts* (2001), Table S-3, available at <http://www.uscourts.gov/judbus2001/tables/s03sep01.pdf>. These figures are approximate because the United States Court of Appeals for the Federal Circuit does not release statistics on its unpublished opinions to the Administrative Office. Telephone interview with David Sellers, Assistant Director Public Affairs, Administrative Office of the United States Courts (Jan. 18, 2002). At the Federal Circuit’s Annual Judicial Conference in 1999, the Chief Judge reported that 68% of that court’s opinions issued during 1998 were uncitable. *Proceedings of the Sixteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 193 F.R.D. 263, 266 (Apr. 6, 1999).

- iii. It criticizes existing law; or
- iv. It contains a historical review of a legal rule that is not duplicative; or
- v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.⁴

In other circuits, publication is withheld if the opinion does not “add[] significantly to the body of law,”⁵ does not “require application of new points of law that would make the decision a valuable precedent,”⁶ or if “no jurisprudential purpose would be served by a written opinion.”⁷

Although unpublished opinions are not published in bound volumes of the Federal Reporter, the opinions are not hidden. Hard copies of the opinions are maintained at the clerk’s offices and most of the circuits release them for inclusion on the Westlaw and Lexis databases. In recent years, unpublished opinions have become even more accessible. Many circuits post the text of these “unpublished” opinions on their public websites, and recently, in September 2001, the West Publishing Company began publishing “unpublished” opinions in hardbound volumes, complete with keyed headnotes. Volume 1 of the “Federal Appendix” — identical in its look and faux-leather-bound feel to a Federal Reporter volume — was released in September 2001. By the end of 2001, the series had reached Volume 14.

B. *The No-Citation Rules*

The main effect of the designation of an opinion as “unpublished” is to make it subject to rules, promulgated by the courts of appeals themselves, that govern reference to those opinions. These rules are generally referred to as “no-citation rules.” They fall into two general classes: those in which citation is forbidden and those in which it is strongly disfavored or restricted.

⁴ 4TH CIR. R. 36(a). *See also* D.C. CIR. R. 36(a)(2); 1ST CIR. R. 36(b)(1); 5TH CIR. R. 47.5.1; 6TH CIR. R. 206; 7TH CIR. R. 53(c); 8TH CIR. R. App. I (Plan for Publication of Opinions); 9TH CIR. R. 36-2.

⁵ FED. CIR. R. 47.6(b).

⁶ 10TH CIR. R. 36.2.

⁷ 2D CIR. R. 0.23.

1. Citation Forbidden

In six of the circuits, no-citation rules take the form of an outright prohibition on reference to unpublished opinions in briefs and arguments.⁸ Each circuit phrases its rules somewhat differently. First Circuit Rule 36(b)(2)(E) states, "Unpublished opinions may be cited only in related cases. Only published opinions may be cited otherwise." Federal Circuit Rule 47.6 provides that opinions designated for nonpublication "must not be employed or cited as precedent." Ninth Circuit Rule 36-3(b) states that unpublished opinions "may not be cited to or by the courts of this circuit." The gist of the rules is the same: citing unpublished opinions to the appellate court that issued them is a violation of the rules of that court that may subject the advocate to discipline.

The rules of some of the circuits are even more far-reaching. In the D.C. and Seventh Circuits, advocates are forbidden from citing the unpublished opinions of those courts and the unpublished opinions of other courts if those courts would themselves forbid citation.⁹ And the Second Circuit, apparently concerned that other courts may not give its own no-citation rule such "full faith and credit," instructs that its unpublished opinions "shall not be cited or otherwise used in unrelated cases before this *or any other court*."¹⁰ Thus, it would appear that an attorney subjects himself to discipline in the Second Circuit if he mentions one of that court's summary orders in another circuit court, a district court in another circuit, a state court, or, for that matter, a court of another country.¹¹ Rules in other circuits apply not only to advocates

⁸ See 1ST CIR. R. 36(b)(2)(E); 2D CIR. R. 0.23; 7TH CIR. R. 53 (b)(2)(IV); 9TH CIR. R. 36-3(b); D.C. CIR. R. 28(c); FED. CIR. R. 47.6. All the rules permit citing unpublished opinions to establish *res judicata*, collateral estoppel, law of the case, or to invoke other procedural doctrines in procedurally related cases.

The D.C. Circuit recently amended its no-citation rule to permit citation to all cases decided after January 1, 2002. D.C. CIR. R. 28(c)(1)(B). However, citation to all unpublished opinions from earlier years remains subject to a strict no-citation rule. *Id.* R. 28(c)(1)(A). Therefore, it is still appropriate to classify the D.C. Circuit as a strict no-citation circuit. At least for the near future, the overwhelming majority of its unpublished opinions remain uncitable.

⁹ D.C. CIR. R. 28(c) ("The same rule applies to unpublished dispositions of district courts, and to unpublished dispositions of other courts of appeals if those appellate courts have a rule similar to this one."); 7TH CIR. R. 53(e) ("... no unpublished opinion or order of any court may be cited in the Seventh Circuit if citation is prohibited in the rendering court.").

¹⁰ 2D CIR. R. 0.23 (emphasis added).

¹¹ But note that the ABA Committee on Ethics and Professional Responsibility has opined that it is ethical for a lawyer to cite an unpublished opinion to a court that permits

but to federal judges as well. The Seventh Circuit's no-citation rule prohibits "cit[ation] or use as precedent (a) in any federal court within the circuit in any written document or in oral argument; or (b) *by any such court for any purpose*," and the Ninth Circuit's rule, quoted above, similarly purports to bind all judges within the circuit.¹²

2. Citation Strongly Disfavored and/or Restricted

Four other circuits follow a somewhat less restrictive approach.¹³ In these circuits, unpublished opinions have no precedential value and citation to them is "disfavored" and discouraged.¹⁴ However, if an advocate believes that no other published opinion of any court will serve as well, the advocate may cite the unpublished opinion.¹⁵ Thus, in these circuits, the unpublished opinion has status comparable to that of daughters of monarchs in Tudor England: they may govern, but only if there is no citable "son." The three remaining circuits permit citation to unpublished opinions without regard to whether there are published cases available,¹⁶ but the Fifth¹⁷ and Eleventh permit advocates only to urge them for their limited "persuasive" value, and the latter only grudgingly at that.¹⁸ Only the Third Circuit permits advocates to cite

use of such opinions, even if the issuing court prohibits use in other courts. *See American Bar Association, Citing of Unpublished Opinions Where Court Rules Prohibit Such Usage*, ABA Formal Op. 94-386R (Aug. 6, 1994, revised Oct. 15, 1995).

¹² On at least one occasion, the Supreme Court has cited and relied upon unpublished circuit court opinions. *See Rose v. Hodges*, 423 U.S. 19, 21 n.3 (1975) (per curiam). In dissent, Justice Brennan asked whether the Supreme Court itself was obliged to abide by the relevant circuit's no-citation rule. *Id.* at 23-24 n.2 (Brennan, J., dissenting).

¹³ *See* 4TH CIR. R.36(c); 6TH CIR. R. 28(g); 8TH CIR. R. 28A(i); 10TH CIR. 36.3(b).

¹⁴ *E.g.*, 8TH CIR. R. 28A(i) ("Unpublished opinions are not precedent and parties generally should not cite them."); 6TH CIR. R. 28(g) ("Citation of unpublished decisions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored . . .").

¹⁵ *E.g.*, 8TH CIR. R. 28A(i) ("Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well.").

¹⁶ *See* 3D CIR. R. 28.3; 5TH CIR. R. 47.5.3, 47.5.4; 11TH CIR. R. 36-2.

¹⁷ The Fifth Circuit's rule is a bit more complex:

Unpublished opinions issued *before* January 1, 1996, are precedential. 5TH Cir. R. 47.5.3. Therefore, citation thereto is permitted. *Id.* "However, because every opinion believed to have precedential value is published, such an unpublished opinion should normally be cited only when the doctrine of *res judicata*, collateral estoppel or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like)." *Id.*

Unpublished opinions issued on or after January 1, 1996 are not precedential, but they may be cited. 5TH CIR. R. 47.5.4.

¹⁸ *See* 11TH CIR. R. 36-3 IOP 5 ("Reliance on unpublished opinions is not favored by

unpublished opinions whenever and however they wish. But perhaps hoping to set a good example, it refrains, as a matter of policy, from citing them itself.¹⁹

C. History

How did these rules come about? Accounts of their development generally begin with the 1964 Federal Judicial Conference.²⁰ At that conference, the judges resolved:

That the judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value and that opinions authorized to be published be succinct.²¹

The conference report cited two reasons for the resolution: first, "the rapidly growing number of published opinions of the courts of appeals and the district courts of the United States," and, second, "the ever increasing practical difficulty and economic cost of establishing and maintaining accessible private and public law library facilities."²² Although (mostly unsuccessful) efforts at curtailing publication had occurred in the Fifth and Third Circuits in the late 1940s,²³ the 1964 resolution marked the first expression of concern about the proliferation of opinions by the federal judiciary as a whole.

the court.").

¹⁹ 3D CIR. R. APP. I, IOP 5.8 ("Because the court historically has not regarded unreported opinions as precedents that bind the court, as such opinions do not circulate to the full court before filing, the court by tradition does not cite to its unreported opinions as authority.").

²⁰ E.g., Deborah J. Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 75-76 (2001); William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 577-78 (1981); Donna Stienstra, *Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals* 5-6 (Federal Judicial Center 1985).

²¹ REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 11 (1964) [hereinafter PROCEEDINGS]. Between 1960 and 1983, the estimated average length of appellate majority opinions went from 2,863 words to 4,020. RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985) [hereinafter, FEDERAL COURTS '85].

²² PROCEEDINGS, *supra* note 21, at 11.

²³ William L. Reynolds & William M. Richman, *The Non-Precedential Precedent - Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1169 n.17 (1978).

In 1971, limited publication received another spur. In that year, the four year old Federal Judicial Center, a study group established by Congress to recommend improvements in judicial administration,²⁴ noted in its annual report that there was "widespread consensus that too many opinions are being printed or published or otherwise disseminated."²⁵ The following year, the Center's Board recommended to the Judicial Conference that it instruct the circuits to adopt procedures for publication of only some of the opinions they issued and to promulgate rules forbidding citation to the remaining, unpublished opinions.²⁶ In response to the recommendation, the Judicial Conference, at its October 1972 meeting, asked each circuit to formulate a limited publication plan.²⁷ By the time the Judicial Conference met again in spring 1974, the Judicial Conference had received proposed plans from each circuit,²⁸ and over the next few years the plans went into effect.²⁹

We will consider the asserted justifications for the no-citation rules shortly but first it is appropriate to consider separately the justifications for nonpublication. The overarching justification for nonpublication was the perception on the part of the judges that simply too many opinions were being published. As Judge Charles Joiner wrote in 1972:

[I]t is plain to every lawyer, every judge, and to most law students that many opinions are written that do not merit publication. Often, the matter decided has no potential effect upon our knowledge of the law or its development, yet it results in a written opinion that takes time and energy the judges could better spend in more

²⁴ *Id.* at 1170 n.18.

²⁵ *Id.* at 1169-70.

²⁶ *Id.* at 1170.

²⁷ *Id.*

²⁸ *Id.* at 1171. By the beginning of 1973, the D.C., First, Seventh, Ninth, and Tenth Circuits all had nonpublication policies and/or no-citation rules in effect. FEDERAL JUDICIAL CENTER, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS: A REPORT OF THE COMMITTEE ON USE OF APPELLATE COURT ENERGIES OF THE ADVISORY COUNCIL ON APPELLATE JUSTICE 29-37 (1973) [hereinafter FEDERAL JUDICIAL CENTER]. In a published opinion, the Fourth Circuit expressed its preference that unpublished opinions not be cited. *Jones v. Superintendent*, 465 F.2d 1091, 1094 (4th Cir. 1972).

²⁹ During this time, another group took up study of the limited publication issue as well. In 1973, the Committee on Use of Appellate Court Energies of the Advisory Council on Appellate Justice, a group of distinguished judges, academics and lawyers, issued a report whose centerpiece was a "Model Rule on Publication of Judicial Opinions." FEDERAL JUDICIAL CENTER, *supra* note 28, at 22-23. The model rule was the template for many of the limited publication policies that the circuit courts adopted after the 1974 Judicial Conference. Compare *id.* with 4TH CIR. R. 36(a), 5TH CIR. R. 47.5.1, 6TH CIR. R. 206, and 8TH CIR. R. APP. I ¶ 4.

attentively considering and developing resolution of significant issues in other cases.³⁰

Nonpublication would help address that waste of time and energy because judges would “no longer sense quite the same need to polish the prose and to monitor each phrase as they do with opinions which are intended for general distribution.”³¹

But the costs of superfluous publication were not just wasted judge-hours. Advocates of nonpublication also contended that the proliferation of precedents made legal research too time consuming for lawyers:

The burden on the lawyer is commensurate with that of the judge in terms of accountability in preparing his cases. The endless search for factual analogy requires immense expenditure of time and funds that can result in reliance upon quirks rather than upon careful rationalization and application of the developing law.³²

It also resulted in higher overhead costs, as lawyers were required to purchase and shelve an ever increasing sprawl of case reporters.³³

Perhaps, however, the most serious threat posed by promiscuous publication was that it could compromise the integrity of the common law by making it increasingly likely that judges, unable to digest the burgeoning volumes of case law, would inadvertently make inconsistent rulings. The following excerpt from Judge Joiner’s 1972 article illustrates this strain of argument:

Unlimited proliferation of published opinions constitutes a burden and threat to a cohesive body of law. . . . There are limits on the capacity of judges and lawyers to produce, research and assimilate the sheer mass of judicial opinions. These limits are dangerously near at present and in some systems may already be exceeded. . . . Common law in the United States could be crushed by its own weight if present trends continue unabated.³⁴

³⁰ Charles W. Joiner, *Limiting Publication of Judicial Opinions*, 56 JUDICATURE 195, 195 (1972).

³¹ Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change 50* (1975) (Senator Roman Hruska, Chair) [hereinafter *Hruska Report*].

³² FEDERAL JUDICIAL CENTER, *supra* note 28, at 7.

³³ “The logistical burden for the courts and practitioners has become dangerously heavy. Posting, maintenance, shelving, and librarian services result in time and money costs disproportionate to the value of the materials.” *Id.* at 8.

³⁴ Joiner, *supra* note 30, at 195.

To be sure, Malthusian concerns that the population of precedents was increasing too rapidly were not new in 1972. In a 1915 address, Professor Edward Warren of Harvard Law School complained that a scholar would have to read 180 pages of cases an hour to keep up with the current growth in case law and called for limited publication to slow that growth.³⁵ In the same year, the chief justice of the Wisconsin Supreme Court wrote:

Looking ahead a half century to the time when there shall be two or three times as many inhabitants within our borders and a corresponding increase in our litigation, what are we to expect if the present rate of production of precedents be maintained? The law library of the future staggers the imagination as one thinks of multitudes of shelves which will stretch away into the dim distance, rank upon rank, and tier upon tier, all loaded with their many volumes of precious precedents. One shrinks from the contemplation of the intellectual giants who will be competent to keep track of the authorities and make briefs in those days; they, as well as the judges who pass upon the briefs, must needs be supermen indeed,

and called for limited publication policies similar to those in place today.³⁶

Nor were the concerns unique to the last century or to this country. Two American commentators in 1824 argued that:

The multiplication of reports . . . is becoming an evil alarming and impossible to be borne. . . . Such has been this increase, that very few of the profession can afford to purchase, and none can read all the books which it is thought desirable, if not necessary to possess. By their number and variety they tend to weaken the authority of each other, and to perplex the judgment.³⁷

Lord Coke called for limited publication of English decisions, lest the law books "grow to be like *elephantini libri*, of infinite length, and in mine opinion lose somewhat of their present authority and reverence."³⁸ A century earlier, Sir Matthew Hale, the Lord Chief Justice, reportedly

³⁵ Edward H. Warren, *The Welter of Decisions*, 10 ILL. L. REV. 472, 473 (1916).

³⁶ John B. Winslow, *The Courts and the Papermills*, 10 ILL. L. REV. 157, 158 (1915).

³⁷ E. Bliss & E. White, *The Common Law*, 10 N. AM. REV. 411, 433 (1824), quoted in J. Myron Jacobstein, *Some Reflections on the Control of the Publication of Appellate Court Opinions*, 27 STAN. L. REV. 791, 791 (1975).

³⁸ 2 Coke's Rep. iii-iv (1777), quoted in Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119, 121 (1995).

compared the accretion of case law to “the rolling of a snowball, [that] increaseth in bulk in every age, until it become utterly unmanageable.”³⁹ And Francis Bacon, while he was Lord Chancellor, recommended the exclusion from law reports of cases “merely of iteration and repetition.”⁴⁰

D. The Appellate Caseload “Explosion”

But though concern about unlimited publication was not new in the early 1970s, what was new was the extraordinary growth in the appellate caseload that had given the movement for limited publication its new-found force. As the above-quoted passages and the 1964 Judicial Conference resolution indicate, the primary concern about unlimited publication prior to the 1970s was that it made it hard for judges to stay current with the development of the law. By the 1970s, the judges’ primary concern had become the far more serious one of staying current with their own personal caseloads.

The American appellate judiciary witnessed a huge increase in caseload during the 1960s, which became greater during the ensuing decades.⁴¹ Various reasons have been supplied for this caseload “explosion.”⁴² The 1960s and 1970s saw a large increase in the number of laws (e.g., civil rights laws, environmental laws, ERISA) and private causes of action thereunder, which increased the caseloads of the district courts and those of the circuit courts in turn.⁴³ Criminal litigation, however, contributed much more to the growth of the appellate caseload than civil. Between 1960 and 1983, the number of criminal appeals grew by 669%,⁴⁴ a growth spurt fueled by both the expansion of criminal appellate rights by the Warren Court and the passage of federal legislation appropriating funds for appellate counsel in criminal cases.⁴⁵ The contribution and complexity of criminal appeals became still greater in the mid-80s, as the passage of the Sentencing Reform Act and the promulgation of the Sentencing Guidelines created an entirely new type

³⁹ Robert L. Black, Jr., *Hide and Seek Precedent: Phantom Opinions in Ohio*, 50 U. CIN. L. REV. 477, 477 (1981) (citing D. MELLINKOFF, *THE LANGUAGE OF THE LAW* 141 (1963)).

⁴⁰ John J. O’Connell, *A Dissertation on Judicial Opinions*, 23 TEMP. L.Q. 13, 14 (1949).

⁴¹ See generally, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 53-86 (1996) [hereinafter, *FEDERAL COURTS ’96*].

⁴² See, e.g., *id.* at 87-123; COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, *FINAL REPORT* 13-17 (1998) [hereinafter, *STRUCTURAL ALTERNATIVES ’98*].

⁴³ *FEDERAL COURTS ’96*, *supra* note 41, at 98-99 & n. 18.

⁴⁴ *FEDERAL COURTS ’85*, *supra* note 21, at 82.

⁴⁵ *FEDERAL COURTS ’96*, *supra* note 41, at 96.

of appeal — challenges to sentencing guideline computations. Sentencing guideline appeals drove the growth in the appellate caseload after 1984⁴⁶ and gave many a complexity that was new to federal criminal law.

Whatever the reasons for the increase in appellate litigation, the raw numbers were breathtaking. Between 1934 and 1960, circuit court filings grew at an average annual rate of only 0.5%.⁴⁷ Between 1960 and 1983, by contrast, the number of appeals filed annually rose from fewer than 4,000 to 29,580, an average annual rate of growth of 9%.⁴⁸ By 1995, the number had climbed further to 49,625.⁴⁹ Even when adjustments are made to account for the fact that many appeals do not require significant judicial attention because they disappear before argument owing to settlement or nonprosecution, the increase was still quite large. The number of appellate “terminations on the merits” — essentially decisions reached based on judicial analysis, rather than settlement or dismissal for procedural reasons — grew from 2,681 in 1960 to 28,167 in 1995.⁵⁰

The increases might not have been cause for concern if the appellate judiciary had expanded to keep up with the caseload growth. That is not what happened. The number of federal appellate judges grew from 66 in 1960 to 150 in 1995, only a two-and-a-half-fold increase, clearly not enough to keep pace with the twelve-fold increase in filings.⁵¹ Accordingly, filings per circuit judge shot up from 57 in 1960 to 331 in 1995,⁵² and the number of terminations on the merits per judge, a rough measure of judicial productivity, went from 40.6 in 1960 to 187.9 in 1995.⁵³ While each appellate judge issued an average of 48 opinions annually in 1960, the figure stood at 168 in 2001.⁵⁴ Nonpublication policies have unquestionably helped to tame the substantial increase in

⁴⁶ *Id.* at 97 (“The continued growth in the appeal rate since 1983 was due entirely to the Sentencing Reform Act of 1984, which greatly expanded the appealability of federal sentences.”).

⁴⁷ *Id.* at 55.

⁴⁸ *Id.* at 59-62. The more than seven-fold increase occurred during a period in which the population increased by only 29%. See U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1982-83, at 6 (103d 1982).

⁴⁹ FEDERAL COURTS '96, *supra* note 41, at 64.

⁵⁰ *Id.* at 72-73, Table 3.6.

⁵¹ *Id.* at 120. The figures exclude judges of the Federal Circuit, which was created in 1982 to hear patent appeals and other specialized appeals.

⁵² *Id.* at 400-01, Table A.4.

⁵³ *Id.* at 74.

⁵⁴ The 1960 figure comes from *id.* at 154, Table 5.3. The 2001 figure comes from Administrative Office of the U.S. Courts, *Federal Court Management Statistics 2001*, available at <http://www.uscourts.gov/cgi-bin/cmsa2001.pl>.

workload. Although the average annual number of opinions per active judge today is 168, the average annual number of signed (i.e., published, non-per curiam) opinions is only 54, roughly the same as in 1960.⁵⁵

II. THE UNEASY CASE FOR THE NO-CITATION RULES

It seems clear that nonpublication has served as a kind of judicial surge protector, permitting the judiciary to maintain a steady output of published opinions despite the sustained spike in its overall caseload. But it remains to consider whether the no-citation rules, promulgated as adjuncts to the nonpublication policies, serve a similar function, and, if they do, whether their value as methods of caseload control justifies the restrictions they impose upon advocacy and expression.

A. "Lost Savings"

The first justification offered for the no-citation rules is that the savings realized through nonpublication would vanish if citation to unpublished opinions were allowed. That justification, which has been advanced since the rules' inception,⁵⁶ has been restated recently with great vigor by one of the rules' staunchest present-day defenders, Judge Alex Kozinski of the Ninth Circuit:

Should courts allow parties to cite to these dispositions, however, much of the time gained would likely vanish. Without comprehensive factual accounts and precisely crafted holdings to guide them, zealous counsel would be tempted to seize upon superficial similarities between their clients' cases and unpublished dispositions. Faced with the prospect of parties citing these dispositions as precedent, conscientious judges would have to pay much closer attention to the way they word their unpublished rulings. Language adequate to inform the parties how their case has been decided might well be inadequate if applied to future cases arising from different facts. And, although three judges might agree on the outcome of the case before them, they might not agree on the precise reasoning or the rule to be applied to future cases. Unpublished concurrences and dissents would become much more common, as individual judges would feel obligated to clarify their

⁵⁵ *Federal Court Management Statistics*, *supra* note 54.

⁵⁶ *See, e.g.*, FEDERAL JUDICIAL CENTER, *supra* note 28, ¶ 3, at 19 ("The absence of a non-citation rule would encourage the inclusion in opinions not designated for publication of facts and details of reasoning, thus frustrating the purposes underlying non-publication."); Reynolds & Richman, *supra* note 23, at 1186.

differences with the majority, even when those differences had no bearing on the case before them. In short, judges would have to start treating unpublished dispositions — those they write, those written by other judges on their panels, and those written by judges on other panels — as mini-opinions. [This] new responsibility would cut severely into the time judges need to fulfill their paramount duties: producing well-reasoned published opinions and keeping the law of the circuit consistent through the en banc process. The quality of published opinions would sink as judges were forced to devote less and less time to each opinion.⁵⁷

Within this defense of the no-citation rules, however, lies a very troubling admission: that in a significant number of cases whose opinions are designated for nonpublication — enough, one must assume, to make Judge Kozinski's argument persuasive — the judges agree on the result but not the reasoning. That is troubling for at least two reasons.

The first, most basic reason is, of course, that judicial decisions are not supposed to be result-driven. The purpose of every judicial opinion is to persuade the litigants and the public at large that the case was not only decided — a one-word decision could do that — but decided according to specific legal principles of impartial application. An opinion that is written succinctly, not because the case is simple but because more extended treatment might expose disagreements among the judges or weak points in their logic, does not serve that goal. It is not impertinent to suggest that no-citation rules eliminate checks on result-driven adjudication. Experienced jurists, such as Judges Richard Posner⁵⁸ and Richard Arnold,⁵⁹ have made this same point. And Patricia Wald of the D.C. Circuit — hardly a court with a reputation for cutting corners — has herself witnessed the phenomenon:

⁵⁷ *Hart v. Massanari*, 266 F.3d 1155, 1178 (9th Cir. 2001).

⁵⁸ FEDERAL COURTS '96, *supra* note 41, at 165, 168. Judge Posner acknowledges the force of the argument that a no-citation rule "encourages judicial sloppiness" and "provides a temptation for judges to shove difficult issues under the rug in cases where a one-liner would be too blatant an evasion of judicial duty." *Id.* However, Judge Posner is a reluctant supporter of nonpublication and no-citation rules. He believes that the inferior quality of nonpublished opinions is not "remediable" under present workload conditions and because "[n]o one should want careless opinions to be published and to be citable as precedents." *Id.*

⁵⁹ Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 223 (1999) ("Again, I'm not saying that [result-driven adjudication] has ever occurred in any particular case, but a system that encourages this sort of behavior, or is at least open to it, has to be subject to question in any world in which judges are human beings.").

I have seen judges purposely compromise on an unpublished decision incorporating an agreed-upon result in order to avoid a time-consuming public debate about what law controls. I have even seen wily would-be dissenters go along with a result they do not like so long as it is not elevated to a precedent.⁶⁰

The second troubling aspect of the lost savings defense is its implicit admission that the appeals whose opinions are selected for nonpublication, ostensibly because they do not raise significant legal issues, are, in fact, occasionally more complex than their designation for nonpublication would suggest. If a case truly fails to “establish[], alter[], modif[y], or clarif[y] a rule of law,”⁶¹ why then can three judges not agree on the appropriate reasoning? If a case is clearly governed by well-established precedent and presents no special facts, what possible need could there be for separate concurrences? If there is, that is itself a strong indication that the case, no matter how trivial it may have seemed on first blush, did not belong on the nonpublication track in the first place. It should not come as a surprise or an embarrassment to judges to discover that early case screening decisions need to be revised as fuller consideration of a case reveals subtleties and difficulties not apparent from a cursory review of the (often inadequate) briefs. But the response to that discovery should not be to cover up the difficulties with a once-over-lightly unpublished opinion, but to discuss and, if possible, resolve them so that future litigants and judges do not have to struggle so much when they confront a similar scenario again.

B. “Unequal Access”

The second justification for the no-citation rules is that if citation to unpublished opinions were permitted, it would place lawyers without access to such opinions at an unfair disadvantage. In the 1970s, this argument was quite popular.⁶² It is an irrelevant anachronism

⁶⁰ Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1374 (1995).

⁶¹ 9TH CIR. R. 36-2(a) (Criteria for Publication).

⁶² Reynolds & Richman, *supra* note 23, at 1187 n. 111 (“This argument is probably the most frequently mentioned aspect of the entire limited publication, no-citation debate.”). See, e.g., *United States v. Joly*, 493 F.2d 672, 676 (2d Cir. 1974); *Jones v. Superintendent*, 465 F.2d 1091, 1094 (4th Cir. 1972); FEDERAL JUDICIAL CENTER, *supra* note 28, at 19 ¶ 1; *Hruska Report*, *supra* note 31, at 51 (“Where opinions are, in fact, not published, access to such opinions may be unequal, favoring those members of the bar with the resources to monitor, acquire and file them.”); PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 36 (1976) (“If these opinions are citable, we have a violation of a fundamental presupposition of our legal

today.⁶³ As noted above, most unpublished opinions have long appeared on Lexis and Westlaw,⁶⁴ where they are searchable to the same extent and at the same cost as published opinions. For lawyers unable to afford Lexis or Westlaw, the opinions are available on the public websites of some circuits.⁶⁵ In addition, West, responding to private demand for unpublished opinions has begun publishing them, complete with syllabi and keynotes, at a cost of \$35 per volume.⁶⁶

Even if unequal access were a significant phenomenon, the “unequal access” argument would nonetheless betray questionable logic. If unpublished opinions do nothing other than apply hornbook law in run-of-the-mill factual settings, what advantage is conferred upon the litigant who, supposedly because of greater resources, has fuller access to this recondite body of law? As one lawyer-critic of the no-citation rules rhetorically asked, “Why should any lawyer in his right mind go to the trouble of finding and citing unpublished opinions which merely reiterate rules and rely on precedents already larding the published reports?”⁶⁷ The “unequal access” argument is also in considerable

order, that the law be knowable and equally accessible to all.”).

⁶³ E.g., Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG 2d 17, 18 (2000) (“Between Lexis and Westlaw, internet sites . . . , and networks of attorneys practicing in particular fields, it is the rare opinion that is not disseminated for mass consumption.”); Kirt Shuldberg, Comment, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541, 566 (1997) (“When the limited publication plans were adopted, unpublished opinions were essentially banished from public existence since the bound volumes were the sole source of case law. Technological advances, however, have changed this reality.”).

⁶⁴ See Ronald Jay Cohen, Section on Litigation, American Bar Association, *Report on Recommendation for Publication and Reliance Upon Unpublished Opinions in the Federal Courts of Appeals* 9 (Aug. 2001). The Fifth and Eleventh Circuits do not release their unpublished opinions to Westlaw or Lexis.

⁶⁵ The First, Second, Third, Fourth, and Eighth Circuits make unpublished opinions available on their websites. See First Circuit at <http://www.ca1.uscourts.gov>; Second Circuit at <http://www.ca2.uscourts.gov>; Third Circuit at <http://www.ca3.uscourts.gov>; Fourth Circuit at <http://www.ca4.uscourts.gov>; Eighth Circuit at <http://www.ca8.uscourts.gov>.

⁶⁶ Upon release of the first volume of the Federal Appendix, the First Circuit adopted “Interim Local Rule 36(b)(2)(F),” clarifying that notwithstanding the publication of unpublished First Circuit opinions in the Federal Appendix, the circuit’s no-citation rule remained in effect.

⁶⁷ Gideon Kanner, *The Unpublished Appellate Opinion: Friend or Foe?*, 48 CAL. ST. B.J. 386, 446 n. 75 (1973); see also Mark D. Hinderks & Steve A. Leben, *Restoring the Common in the Law: A Proposal for the Elimination of Rules Prohibiting the Citation of Unpublished Decisions in Kansas and the Tenth Circuit*, 31 WASHBURN L.J. 155, 219 n.423 (1992); Salem M. Katsh & Alex V. Chachkes, *Constitutionality of “No-Citation” Rules*, 3 J. APP. PRAC. & PROCESS 287, 310 n.75 (2001) (“Yet if summary orders indeed added nothing to the law, then it would not matter if they were not uniformly available to all parties.”).

tension with the longstanding laissez-faire approach of the American legal system to selection of counsel of one's choice, which permits litigants to spend as much as they wish in prosecuting or defending actions and does not attempt to handicap the contest by putting caps on the services counsel can provide.⁶⁸

C. "Too Many Precedents"

Defenders of the no-citation rules offer a third argument: that there are simply "too many" precedents. On this view, the bar has more than enough raw material to support any good-faith argument it may wish to make. Issuing more opinions would simply encourage citation to superfluous authorities. This, in turn, it is feared, would waste judges' time in reading them.⁶⁹ Rather than issue an outright ban on dissemination on unpublished opinions — which would plainly violate the First Amendment and exceed judges' authority — the judges hope to achieve the same result by barring their use.⁷⁰

1. Are There "Too Many" Precedents?

Are there in fact "too many" precedents? One must first ask what it means to say that there are "too many" precedents? Too many to read? No one is expected to read them all. Too many to index? Electronic search technology has greatly enhanced the legal profession's ability to locate precedents on point, even in the absence of comprehensive written digests. More than lawyers "need" to construct legal arguments? Judge

⁶⁸ Cf. Boggs & Brooks, *supra* note 63, at 21-22 ("Surely proponents of this 'fairness' rationale cannot mean that the courts ought to adopt Harrison Bergeron-like rules that level the playing field by imposing artificial impediments on lawyers smart enough to follow developments in their field of specialty.").

⁶⁹ Chief Judge Boyce Martin of the Sixth Circuit is a forceful proponent:

Good precedent is good precedent. One does not need to pile on the excess verbiage of string cites to random, minor cases. String cites are largely a product of judges' and clerks' experience on law journals and law firms — tribes in which overkill is an art form. When I read a lengthy string cite in a brief or slip opinion, I often find that I have lost the gist of the argument after fighting through line after line of gobbledygook. I see no need for more published opinions in order to flesh out unneeded string cites.

Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 193 (1999).

⁷⁰ As Judge Philip Nichols, Jr. of the Federal Circuit writes, judges "cannot prevent publication by others, which frequently occurs, although restriction on citation limits the economic gain from doing so." Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909, 911 (1986).

Richard Posner, who is sympathetic to nonpublication policies and favors them on balance, has nonetheless noted that:

[d]espite the vast number of published opinions, most federal circuit judges will confess that a surprising fraction of federal appeals, at least in civil cases, are difficult to decide not because there are too many precedents but because there are too few on point.⁷¹

That there is at least some legitimate demand for the content of unpublished opinions is evidenced, among other things, by West's and Lexis's inclusion of these opinions on their commercial databases, and by the several instances in which courts themselves — including the Supreme Court — have cited them, often in defiance of the applicable no-citation rule.⁷²

Practitioners who appreciate the several functions case citation performs in legal writing will not be surprised that there is a demand for unpublished opinions. Even if the main holding of a case is trite and there are many other cases to the same effect, cases are not cited only for their “binding” force as precedents. A case may be cited for its persuasive authority, for illustrating how law should be applied to a particular fact pattern, or for its helpful, cogent summary of bedrock legal principles. Sometimes lawyers may wish to cite opinions to demonstrate the frequency with which an issue arises, as in, for example, a petition for certiorari. Often it is valuable to cite cases merely restating an established proposition to demonstrate that the proposition is uncontroversial. Quite clearly, however, a lawyer cannot tell a court that a published case has been followed many times and is still “good law” if the cases that cite it are uncitable.⁷³

2. Judges Are Not Necessarily Good Judges of the Value of Their Own Opinions

Even if there were “too many” precedents, that would only be an argument in favor of the no-citation rules if one had confidence that judges are nearly unerring judges of the value of the opinions they write.

⁷¹ FEDERAL COURTS '96, *supra* note 41, at 166. Practitioners agree. See John P. Borger & Chad M. Oldfather, *Anastasoff v. United States and the Debate Over Unpublished Opinions*, 36 TORT & INS. L.J. 899, 902-03 (2001).

⁷² See, e.g., *Rose v. Hodges*, 423 U.S. 19, 21 n.3 (1975) (per curiam); *Giese v. Pierce Chem. Co.*, 43 F. Supp. 2d 98, 103 & n.1 (D. Mass. 1999); *Mohr v. Jordan*, 370 F. Supp. 1149, 1154 (D. Md. 1974); *Durkin v. Davis*, 390 F. Supp. 249, 254 (E.D. Va. 1975); *Curley v. Bryan*, 362 F. Supp. 48, 52 & n.2 (D.S.C. 1973).

⁷³ See *Nichols*, *supra* note 70, at 916.

We say “nearly unerring,” rather than just “good,” because the consequence of not publishing a useful precedent is much greater than the consequence of publishing a redundant, useless one. Although some circuits permit parties to petition to have unpublished opinions published,⁷⁴ many allow only a short time within which to bring such a petition, and some do not have formal provisions for such petitions at all. Hence, if an opinion is improvidently withheld from the published reports, the precedential loss is permanent and irremediable, at least in those circuits with strict no-citation rules.

There is evidence that judges are not unerring judges of the value of their own work product.⁷⁵ To begin with, a wide body of anecdotal evidence suggests that nontrivial opinions have gone unreported. Review of samples of unpublished opinions by scholars and practitioners has yielded a significant number of instances in which, at least according to the reviewers, unpublished opinions merited publication under the applicable circuit standards.⁷⁶ There are instances

⁷⁴ The First, Fourth, Fifth, Seventh, Ninth, Eleventh, D.C. and Federal Circuits entertain petitions to publish unpublished cases. See 1ST CIR. R. 36.2(b)(4); 4TH CIR. I.O.P. 36.5; 5TH CIR. R. 47.5.2; 7TH CIR. R. 53(d)(3); 9TH CIR. R. 36-4; 11TH CIR. R. 36-3 I.O.P.(5); D.C. CIR. R. 36(d); FED. CIR. R. 47.6(c).

Though it lacks a formal rule, the Second Circuit has, on at least two occasions, granted a motion to publish an unreported decision. See *Ottaviani v. State Univ. of N.Y.*, 646 F.2d 21 (2d Cir. 1981) (per curiam); *Cont'l Stock Transfer & Trust Co. v. SEC*, 566 F.2d 373, 374 n.1 (2d Cir. 1977). *Ottaviani* was published upon the motion of one of us (Schwarz), who wished to bring the opinion to the attention of the Supreme Court. The Court was then considering a petition for certiorari in a similar case, *Kremer v. Chem. Constr. Corp.*, 623 F.2d 786 (2d Cir. 1980). The motion requesting permission to cite *Ottaviani* argued that “to prohibit any and all citation and use of a statement of the court raises serious questions under the Due Process clause and the First Amendment, at least in circumstances such as these”. Letter from Frederick A.O. Schwarz, Jr., to Hon. Wilfred Feinberg, Chief Judge, United States Court of Appeals for the Second Circuit (Apr. 27, 1981) (on file with Cravath, Swaine & Moore). The Second Circuit promptly published *Ottaviani*, noting that “there is a split in authority in the circuits. . . .” 646 F.2d at 21. The Supreme Court subsequently granted certiorari in *Kremer*.

⁷⁵ One of the most prominent skeptics is Justice John Paul Stevens, who stated in 1977:

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

Address to the Illinois State Bar Association’s Centennial Dinner 9 (Jan. 22, 1977), quoted in Katsh & Chachkes, *supra* note 67, at 310-11.

⁷⁶ E.g., Advisory Committee on Procedures Concerning Unpublished Dispositions by the United States Court of Appeals for the District of Columbia Circuit (June 8, 1984)

of inter- and intra-circuit splits created by unpublished opinions,⁷⁷ unpublished opinions that avowedly consider issues of first impression,⁷⁸ unpublished opinions later reversed by the Supreme Court,⁷⁹ and at least one instance in which a circuit court declared a federal statute unconstitutional in an unpublished, uncitable opinion.⁸⁰

Statistics bolster the anecdotal evidence. A study from the mid-1980s found that in 1984, 24% of all unpublished opinions were reversals.⁸¹ That may be significant because a reversal reflects a disagreement about the appropriate legal outcome among judges and therefore serves as a rough indicator of the significance of the legal issue addressed in the opinion.⁸² Further, a significant proportion of unpublished opinions contain concurrences or dissents,⁸³ another signal that noteworthy legal issues may have been at stake.⁸⁴ One may also detect the difficulty judges face in applying objective standards to the publication decision in the widely variant frequencies with which the different circuits designate

(concluding that 40% of unpublished D.C. Circuit opinions arguably should have been published under circuit criteria for publication), *discussed in Nat'l Classification Comm. v. United States*, 765 F.2d 164, 173 (D.C. Cir. 1985) (Wald, J., concurring); Reynolds & Richman, *supra* note 23, at 607-11; Comment, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 39 U. PITT. L. REV. 309, 315-40 (1977); Katsh & Chachkes, *supra* note 67, at 308-10 & n.68.

⁷⁷ Katsh & Chachkes, *supra* note 67, at 308 n.67.

⁷⁸ *Id.* at 309 & n.68.

⁷⁹ Boggs & Brooks, *supra* note 63, at 20-21 & n.17, citing *Johnson v. United States*, 529 U.S. 694 (2000); *Sims v. Apfel*, 530 U.S. 103 (2000); *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994); *Houston v. Lack*, 487 U.S. 266 (1988); *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984); *Connick v. Myers*, 461 U.S. 138 (1983); *Moore v. Illinois*, 434 U.S. 220 (1977).

⁸⁰ *United States v. Edge Broad. Co.*, 509 U.S. 418, 425 (1993), *rev'g*, 956 F.2d 263 (4th Cir. 1992) (per curiam) (table), 1992 WL 35795. In his majority opinion, Justice White "deem[ed] it remarkable and unusual that although the [Fourth Circuit] Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished *per curiam* opinion." *Id.* at 425 n.3.

⁸¹ Stienstra, *supra* note 20, at 42. A study of all appellate opinions issued between 1986 and 1993 concerning unfair labor practices under the NLRA found that 7.15 percent of all unpublished opinions reversed determinations of the NLRB. Merritt & Brudney, *supra* note 20, at 113-14.

⁸² Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 310 (1990) ("If the case involves, as the criteria suggest, the straightforward application of clear and well settled precedent which is not in need of any published explanation by the courts of appeals, then the correct decision and the correct basis of decision should be obvious to any person who is well trained in the law.").

⁸³ Stienstra, *supra* note 20, at 44 (stating that 11.3% of unpublished opinions issued in 1984 contained separate opinions). *E.g.*, *McLatchey v. Parson (In re Lazy Acres Farm, Inc.)*, 1997 WL 809968 (6th Cir. Dec. 18, 1997), *discussed in Boggs & Brooks, supra* note 63, at 21.

⁸⁴ Katsh & Chachkes, *supra* note 67, at 307 & n. 65.

opinions for publication.⁸⁵ The variances do not appear to arise out of the slightly different criteria the circuits use under their publication policies.⁸⁶ Similarly telling is the finding that judges within the same circuit differ greatly in the frequency with which the appeals they hear result in published opinions.⁸⁷ Because case assignment is random, it is difficult to explain that result if the judges, notwithstanding their temperamental and philosophical bents, are nonetheless adhering to the same objective standards for publication.⁸⁸

III. THE CASE AGAINST THE NO-CITATION RULES

At the end of the day, whether or not judges accurately distinguish between opinions that have future value as citable precedents and those that do not may be an unanswerable question, mired in sampling error and subjectivity.⁸⁹ The timeless opinion for the ages for one reader may, for another, resolve an appeal that was appropriately put out of its misery with the least possible fanfare. Despite the ability of commentators to cull from the body of unpublished opinions a significant number that arguably should have been published, the overwhelming sense one gets from reading a bulk of unpublished opinions en masse is that they are generally fairly unremarkable stuff. But either way, it is fair to ask why taxpayers are paying for this prose if they cannot cite it for whatever value it may have, small or large?⁹⁰

⁸⁵ In 2001, the percentage of opinions that were not published ranged from 60% (7th Circuit) to 91% (4th Circuit). See Mecham, *supra* note 3; see also Merritt & Brudney, *supra* note 20, at 85-86.

⁸⁶ At least in the late 1970s, there was no discernible correlation between the content of a circuit's publication standards and the frequency with which appeals resulted in published opinions. Reynolds & Richman, *supra* note 20, at 588-90 & n.47; see also Borger & Oldfather, *supra* note 71, at 913 (discussing publication rates between 1986 and 1993 of opinions concerning unfair labor claims).

⁸⁷ Nichols, *supra* note 70, at 924 ("Some appellate judges like to see their own deathless prose in published format, while others much prefer the unpublished mode, and are perfectly happy with assignments to put out decisions for nonpublication by the dozens."); Songer, *supra* note 82, at 312-13 (demonstrating large differences in rates of participation in appeals that resulted in published opinions); Wald, *supra* note 60, at 1376 ("In my own D.C. Circuit, the wide gap between the number of published and unpublished opinions written by different judges gives pause.").

⁸⁸ Songer, *supra* note 82, at 310.

⁸⁹ Cf. Reynolds & Richman, *supra* note 20, at 607 (noting difficulties of assessing whether large sample of opinions individually make 'new law'); Songer, *supra* note 82, at 309.

⁹⁰ The law dedicates judicial opinions to the public domain. See 17 U.S.C. § 101 (defining "work of the United States Government"); *id.* § 105 (excluding works of the United States Government from copyright protection).

This is not a flippant question. To be sure, the benefits of public dispute resolution — the reduction of private violence, the smooth functioning of a contract-based economy, and the protection of property — amply justify the full public subsidy of the courts. But public dispute resolution in and of itself does not necessarily require written opinions⁹¹ or even rights of appeal.⁹² Still less does public dispute resolution necessarily require written opinions produced at public expense. One could easily imagine, at least in private civil cases, a regime under which court costs included extra user-based fees for written opinions, which litigants could either accept or decline to pay.

No, to justify the free provision of written opinions to litigants, it is not enough simply to cite the need for a system of courts. Courts could easily dispense with written opinions and litigants probably would not miss them very much. As Landes and Posner have observed, “most litigants do not anticipate a recurrence of the same or even of similar issues in future litigation to which they will be parties, and from their standpoint the precedent produced by the current litigation is a worthless by-product of dispute resolution.”⁹³ The more convincing reason for society’s incurring the cost of written judicial opinions is that the exposition and refinement of the law that occur through the issuance of reasoned opinions have significant and potentially long-lasting public benefits. Reasoned written opinions enable people to learn what the law is and to act in accordance with it. Reasoned written opinions also help

⁹¹ It is not a compelling argument that it is necessary to provide a written opinion to a losing appellate litigant so that he may seek review from a higher court, at least in the federal system. The Supreme Court hears argument in astonishingly few instances. See William H. Rehnquist, *2000 Year-End Report on the Federal Judiciary* (2001) available at <http://www.supremecourtus.gov/publicinfo/year-end/2000year-endreport.html> (reporting that during 1999 Term, 7,377 cases were filed but only 83 were argued in Supreme Court). To require the preparation of opinions merely to facilitate review by the Supreme Court seems greatly disproportionate to the likely benefits of that review, particularly, when, as we explain below, a fully reviewable record can be created even without written opinions.

⁹² The popularity of arbitration attests to the viability of a system that features neither. Although arbitration agreements occasionally contain provisions requiring arbitrators to issue written opinions and occasionally provide for more searching appellate review, e.g., *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997), that is not the norm.

⁹³ William M. Landes and Richard A. Posner, *Legal Precedent: Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 271 (1976). This insight is confirmed by our experience as litigators. Although repeat-players in litigation, such as certain major corporations, advocacy groups, and nearly all governments, may take great interest in the content of the opinions that resolve their cases, most other litigants do not share that interest. The winning party generally cares only for the judgment or result, and an opinion provides cold comfort to the loser, who rarely finds the reasoning persuasive.

resolve future disputes by providing precedents for decisions.⁹⁴ As Cardozo wrote, “[t]he labor of judges would be increased almost to the breaking point if . . . one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.”⁹⁵ Those purposes — the derivation of the efficiencies that come from public reliance on precedent and from citation thereto — fully justify the production of written opinions at public expense.

Those purposes, however, are obviously thwarted when the opinion cannot be cited. In such instances, members of the public cannot reasonably rely upon the opinion as a guide for future conduct, nor can judges consider it as a guide for decision in later cases. Consider a lawyer counseling a client concerning a proposed course of action. If the only legal authority on point is a noncitable case that permits the conduct, what advice can the lawyer properly give?⁹⁶ Or what if the noncitable opinion forbids the conduct? Can the lawyer tell the client that he or she is safe to proceed because an adversary could not cite a case that has prohibited it?⁹⁷ What if, during litigation, a lawyer asserts that an old precedent has never been followed? If the case has in fact been followed many times, albeit in uncitable opinions withheld from publication because they merely “restate” the law, is his or her adversary expected to remain mute and thereby deprive the court of information helpful in evaluating the vitality of the case? These scenarios present awkward ethical problems.⁹⁸ They also illustrate the utter worthlessness of noncitable opinions to the public at large. Taxpayers are well within their rights to ask why they are paying for them.

But the pernicious effects of the no-citation rules go beyond the loss of public benefits for which the public has paid. By prospectively rejecting the doctrine of stare decisis in the overwhelming majority of appeals, the no-citation rules diminishes the accountability of life-tenured officials

⁹⁴ RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 358-59 (1990).

⁹⁵ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921).

⁹⁶ See, e.g., *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, 260-61 (5th Cir. 2001) (Smith, J., dissenting from denial of rehearing en banc) (overruling unpublished opinion conferring Eleventh Amendment immunity on transit authority). “What is the hapless litigant or attorney . . . to do? . . . Competent counsel reasonably would have concluded, and advised his or her client, that it could count on Eleventh Amendment immunity. . . . One can only wonder what competent counsel will advise the client now.” *Id.* at 261.

⁹⁷ See, e.g., *Hinderks & Leben*, *supra* note 67, at 212-13 (stating that neither lawyer nor client may rely on uncitable decisions).

⁹⁸ See American Bar Association, *supra* note 11 (concluding that ethics rules bar citation of unpublished opinions to court that forbids it).

already subject to few, if any, checks on their power.⁹⁹ And even if that concern seems overstated, rules that say to losing litigants that although their cases have been decided fairly and correctly according to established legal rules, the judges do not necessarily wish to apply those same rules in future cases cannot engender confidence in the judicial system.

That problem seems particularly acute in specific classes of appeals that generate unpublished opinions with disproportionate frequency, such as appeals from denials of prisoner pro se petitions and from rulings in civil rights and social security cases, which typically pit “underdog” plaintiff-appellants against institutional or government defendant-appellees.¹⁰⁰ It is generally believed that these appeals — particularly the pro se prisoner petitions — are overwhelmingly weak and often frivolous. One does not need to reject that common wisdom, however, to have concerns about the routine resolution of these appeals through unpublished opinions.

For one thing, the very fact that meritless appeals arise so frequently in these areas may signify the need for additional opinions, even opinions that merely restate and reemphasize prior holdings. Clearly the precedential opinions that exist are not getting the message across. Additional concerns are the specter of two-track justice¹⁰¹ and a concern, voiced even by judges themselves, that the consignment of such appeals to the unpublished track may result in the appearance of “knee-jerk” justice.¹⁰² We are not aware of any evidence to suggest that the high affirmance rate in these appeals stems from anything other than their lack of merit. It would seem to us, however, that appellants who may, rightly or wrongly, perceive themselves as disenfranchised, marginalized victims of bureaucracies or the “establishment” — the stereotypical appellants in such appeals — are precisely the types of litigants whose confidence in the system of justice is apt to be most undermined by the issuance of opinions that announce in bold face at

⁹⁹ See Rehnquist, *supra* note 91.

¹⁰⁰ See Reynolds & Richman, *supra* note 20, at 621-24 (noting comparatively low publication of opinions resolving certain types of litigation, including prisoners’ petitions and social security cases); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 295 (1996) (stating that courts are less likely to publish opinions in social security or civil rights cases or prisoners’ petitions); Songer, *supra* note 82, at 310, 313 (stating that identity of parties should not determine publication); Wald, *supra* note 60, at 1376 (stating that certain types of appeals generate unpublished opinions more frequently than others).

¹⁰¹ *E.g.*, Richman & Reynolds, *supra* note 100, at 595-97.

¹⁰² *E.g.*, Wald, *supra* note 60, at 1374; Reynolds & Richman, *supra* note 20, at 623-24.

their outset that the judges never want to hear about these cases ever again. It may well be that no opinion, no matter how carefully reasoned and written, would give these litigants confidence in the results of appeals they invariably lose. But if so, why do judges prepare noncitable opinions in these cases? Because the opinions cannot be cited by future litigants, their only ostensible purpose is to assure losing parties that their appeals received full consideration. These opinions, however, with their boilerplate incantations that the appeal lacks merit, that the district court did not “abuse its discretion,” and that the court finds “no reversible error”¹⁰³ do not serve that purpose very well at all. As Judge Wald has wittily remarked of these opinions, “The message comes through clearly to the losing party: ‘You never had a real chance, and we have gone to the least possible trouble to tell you why.’”¹⁰⁴

IV. THE CONSTITUTIONAL INFIRMITIES OF THE NO-CITATION RULES

The uneasy case for the no-citation rules is harder still because of their constitutional infirmities.

A. Article III and *Anastasoff v. United States*

In recent years, the constitutional attack on no-citation rules has focused upon whether federal judges may, consistently with their judicial role, disregard uncitable, nonprecedential opinions in later cases. The argument, raised first as a question in a 1999 article by Judge Richard Arnold,¹⁰⁵ later became the basis for the Eighth Circuit’s invalidation of its own rule permitting designation of opinions as nonprecedential. In *Anastasoff v. United States*,¹⁰⁶ Judge Arnold, writing for the Eighth Circuit, held that declining to follow the holdings of prior cases because those cases were designated as nonprecedential exceeded the proper exercise of the “judicial power” that Article III vests in the federal courts.¹⁰⁷ According to *Anastasoff*, when judges disregard the holdings of prior appellate cases they arrogate to themselves legislative

¹⁰³ E.g., *Clausen v. North Central Blood Servs.*, 1 Fed. Appx. 566, 566 (8th Cir. 2001) (*per curiam*) (no “abuse of discretion”); *Rhem v. Britain*, 1 Fed. Appx. 137 (4th Cir. 2001) (“no reversible error”). Cf. *Reynolds & Richman*, *supra* note 20, at 601-03.

¹⁰⁴ Wald, *supra* note 60, at 1373.

¹⁰⁵ Arnold, *supra* note 59.

¹⁰⁶ 223 F.3d 898 (8th Cir. 2000).

¹⁰⁷ “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may, from time to time, ordain and establish.” U.S. CONST. art. III, § 1, cl. 1.

power in violation of the doctrine of separation of powers. That is because a fundamental distinction between legislative and judicial power is that while legislators can depart from established legal principles for any reason or none at all, judges cannot.¹⁰⁸ If judges depart from the law as expounded in earlier cases, they must do so either because they reasonably conclude that that law is not applicable (“distinction”) or that the law was mistaken and should be changed (“overruled”). On this theory, ignoring the holding of a prior case without attempting to distinguish the case or explaining why it should be overruled is an unconstitutional cop-out.

Anastasoff's reasoning strikes a chord because it purports to provide a constitutional mooring for the intuition that judges should treat similarly situated litigants similarly unless there is a good reason not to. *Stare decisis* is a notoriously flexible concept,¹⁰⁹ but if it means anything, it means that the outcome of a case should not turn on whether a prior case was sufficiently “interesting” to merit publication. But as reasonable as that position may be as a matter of jurisprudence, the argument that Article III's vesting of “judicial power” in the federal courts constitutionalizes that position places a heavy load on the relevant constitutional language. After all, the language of Article III merely confers “judicial power” on a body; it does not purport to define or limit how that power may be exercised. Although the argument that conferring “judicial power” upon the federal courts limits that power by implication to power one can reasonably characterize as “judicial,”

¹⁰⁸ *Anastasoff* had a strange, short life. On rehearing en banc, the Eighth Circuit, per Judge Arnold, vacated *Anastasoff* as moot because, subsequent to the filing of *Anastasoff*'s petition for rehearing, the IRS paid her claim in full, thereby disposing of the case. *Anastasoff v. United States*, 235 F.3d 1054, 1055 (8th Cir. 2000) (en banc). Eleven days after *Anastasoff* had been vacated, the court issued a published opinion in *United States v. Langmade*, in which it relied upon the vacated opinion in *Anastasoff* for the proposition that “unpublished decisions are binding precedent that district courts in this circuit must follow.” 8th Cir. Slip. Op. No. 00-2019 (Dec. 29, 2000, withdrawn Jan. 2, 2001), available at <http://www.ca8.uscourts.gov/opndir/00/12/002019P.pdf>. A few days later, the court withdrew *Langmade* and issued a new opinion, one purged of any reference to *Anastasoff*. See *United States v. Langmade*, 236 F.3d 931 (8th Cir. 2001); *Borger & Oldfather*, *supra* note 71, at 907-08.

It is unclear why the original opinion was vacated as moot because the case settled only after that opinion was rendered. Settlement after an opinion is rendered does not generally justify vacatur of the opinion. To the contrary, several courts have refused, against the wishes of the litigants, to vacate lower court decisions in cases that have settled pending appeal. See generally, e.g., *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 30 n.2 (1993) (per curiam).

¹⁰⁹ See generally, e.g., Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643, 644-46 (2000).

“judicial power,” as that term is used in the Constitution, does not necessarily mean power constrained by modern concepts of stare decisis. Judge Arnold marshaled impressive scholarship to suggest that the Framers understood judicial power in precisely this way, but, as the two cases rejecting *Anastasoff* have demonstrated, there is sufficient scholarship pointing in other directions to make that conclusion tentative at best.¹¹⁰ In particular, the ad hoc nature of case reporting in the eighteenth century and the unclear hierarchical relationships of English courts prior to the middle of the nineteenth century¹¹¹ make the premise upon which *Anastasoff*'s reasoning rests — that the Framers would have considered the issuance of an uncitable, unprecedential opinion an illegitimate exercise of judicial power — open to reasonable question.

That question does not become any easier if one moves away from the originalist approach that has dominated the debate over *Anastasoff* thus far and instead asks what a more modern understanding of federal “judicial power” would suggest about whether federal appellate judges have the power to issue nonprecedential decisions. The very intensity of the debate that the now-vacated *Anastasoff* has set off attests to the lack of any consensus within the legal community even today whether the exercise of “judicial power” necessarily requires judges to adhere to stare decisis in the most rigid sense (i.e., all opinions are precedents, no matter how they are designated), or whether an exception can be made for the four-fifths of all federal appellate cases that appellate judges have specifically exempted from that doctrine's scope.

B. The First Amendment

The simpler and stronger argument is that no-citation rules violate the First Amendment. Several commentators have questioned the constitutionality of the no-citation rules under the First Amendment,¹¹² and the Supreme Court, in 1976, fielded a First Amendment challenge to

¹¹⁰ See *Hart v. Massanari*, 266 F.3d 1155, 1160-69 (9th Cir. 2001) (disagreeing with *Anastasoff*); *Symbol Techs., Inc. v. Lemelson Med.*, 277 F.3d 1361, 1367-68 (Fed. Cir. 2002); Thomas R. Lee and Lance S. Lehnhof, *The Anastasoff Case and the Judicial Power to 'Unpublish' Opinions*, 77 NOTRE DAME L. REV. 135, 136 (2001) (stating that Judge Arnold “held that the 8th Circuit rule on unpublished opinions was unconstitutional”).

¹¹¹ See *Hart*, 266 F.3d at 1164-66 (noting that lack of clear hierarchy of common law courts was an impediment to applying doctrines of strict binding precedent).

¹¹² See *Hinderks & Leben*, *supra* note 67, at 215-19 (discussing First Amendment arguments for and against no-citation rules); *Katsh & Chachkes*, *supra* note 67, at 297-300 (stating that no-citation rules violate First Amendment Free Petition Clause and Free Speech Clause).

a no-citation rule, but it rejected the challenge without comment.¹¹³ A more recent legal challenge to the Ninth Circuit's no-citation rule foundered on standing grounds: the lawyer challenging the rules had not in fact tried to cite any unpublished opinions or been sanctioned for citing them so he could not demonstrate that the rule had injured him.¹¹⁴ But with opposition to the no-citation rules growing amongst lawyers,¹¹⁵ it seems to be only a matter of time before a procedurally proper test case is brought.¹¹⁶

1. The Free Speech Clause

The argument that no-citation rules abridge the freedom of speech is straightforward. Legal argument is speech¹¹⁷ and the no-citation rules abridge that form of speech by prohibiting or discouraging arguments of

¹¹³ *Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit*, 429 U.S. 917 (1976). *Do-Right Auto Sales* sought a writ of mandamus against the Seventh Circuit for having struck a citation to an unpublished opinion from the petitioner's appellate brief. *Id.*

In *Browder v. Director, Illinois Dep't of Corrections*, 434 U.S. 257, 258 n.1 (1978), the petitioner challenged the Seventh Circuit's authority to issue nonprecedential opinions, but the Court's holding that the Seventh Circuit lacked jurisdiction to reverse an order releasing him from custody obviated the challenge. *Id.* See also Note, *Unreported Decisions in the United States Courts of Appeals*, 63 CORNELL L. REV. 128, 143 n. 103 (1977). The petitioner in *Browder* did not challenge the Seventh Circuit's nonpublication policy on First Amendment grounds. Brief for Petitioner at 50-56, *Browder* (No. 76-5325) ("A Federal Court of Appeals Lack the Power to Withhold Any of its Opinions from Publication and to *a Priori* Deprive Such Opinions of Precedential Value."). An amicus curiae brief submitted by the Chicago Council of Lawyers did present such a challenge, but the brief argued only that nonpublication infringed the public's First Amendment right to obtain information about judicial decisions, not that noncitation violated an advocate's freedom of expression. See Brief of Amicus Curiae Chicago Council of Lawyers, at 45-49, *Browder* (No. 76-5325).

¹¹⁴ *Schmier v. United States Court of Appeals for the Ninth Circuit*, 136 F. Supp. 2d 1048, 1052 (N.D. Cal. 2001), *aff'd*, 279 F.3d 817, 820 (9th Cir. 2002).

¹¹⁵ Last year, the American Bar Association called for abolition of no-citation rules. See Cohen, *supra* note 67. Committees of the Association of the Bar of the City of New York have also criticized the rules on several occasions. See Katsh & Chachkes, *supra* note 67, at 294 nn.24, 27 (citing bar committee reports opposing Second Circuit's no-citation rule). There is even a website, maintained by the "Committee for the Rule of Law," devoted to abolition of nonpublication policies and no-citation rules. See COMMITTEE FOR THE RULE OF LAW, MISSION STATEMENT, available at <http://www.nonpublication.com/CRLmission.htm>.

¹¹⁶ *Schmier*, 279 F.3d at 825 ("Given the wide range of interest shown in the debate about unpublished opinions, . . . it is only a matter of time before the theoretical questions raised by *Schmier's* complaint are all properly presented and resolved.").

¹¹⁷ See *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) ("By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression under which courts must depend for the proper exercise of the judicial power.").

a certain type.¹¹⁸ That conclusion is the same whether one classifies the rules as “content-neutral” or “content-based” restrictions on expression.

a. Content-Neutral

Content-neutral restrictions on expression are valid if they “further an important or substantial government interest” and do so through restrictions that are “no greater than is essential to the furtherance of that interest.”¹¹⁹ No-citation rules satisfy neither requirement. The judicial interest in being spared from briefs citing unpublished cases is slight, for it is hard to see how exposure to such briefs could significantly interfere with the work of the judiciary, particularly if the cited cases are as pedestrian as the standards for nonpublication would require. As Judge Tatel of the D.C. Circuit has written, “any risk of harm from citing [uncitable] judgments is minimal so long as the court abides by Rule 36, reserving abbreviated dispositions for cases where existing precedent dictates the result.”¹²⁰ Moreover, even if there were a significant interest, there is clearly a less restrictive alternative: the judges may disregard citations to the nonpublished opinions, just as they may disregard citations to district court opinions or other noncontrolling authority. First Amendment law recognizes that even if speech is offensive, it is generally preferable to place the burden on the nonspeaker not to listen or to cover his ears, rather than to censor the speaker.¹²¹ That principle seems all the more forceful in a setting in which the speech is not offensive and in which the audience is not “captive” in any meaningful sense. Judges are neither required nor expected to read every case lawyers may cite.¹²²

¹¹⁸ *E.g.*, that *X v. Y* (unpublished) supports P’s position.

¹¹⁹ *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) (citation omitted).

¹²⁰ David S. Tatel, *Some Thoughts on Unpublished Decisions*, 64 GEO. WASH. L. REV. 815, 817 (1996).

¹²¹ See *City of Houston v. Hill*, 482 U.S. 451, 472 (1987) (“The First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive.”); *Erznoznik v. Jacksonville*, 422 U.S. 205, 209-11 (1975) (stating that in the absence of “narrow circumstances,” such as the viewer’s “captivity,” the “burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes.” (quoting *Cohen v. California*, 403 U.S. 15, 21 (1970))).

¹²² “Nothing in the First Amendment or in this Court’s case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals’ communications on public issues.” *Minn. Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 285 (1984).

By contrast, we believe there is at least an expectation, if not a requirement, that

b. Content-Based

As it happens, however, we think the better view is that no-citation rules should be judged under the more stringent standard that applies to content-based restrictions. While no-citation rules may seem content-neutral on first blush as they apply to all unpublished opinions to the same extent, that neutrality is deceptive. The no-citation rules permit citation to an opinion only if the authors of that opinion endorsed the content of the opinion as a precedent when they released it. If so, the no-citation rules permit the citation and any arguments based on the opinion; if not, they are censored. Thus, because the “very basis for the regulation is the difference in content” between published and unpublished opinions, no-citation rules are more properly classified as content-based restrictions on speech.¹²³

Content-based restrictions on speech are rarely valid. They are (to use the lingo of constitutional law) subject to “strict scrutiny,” a legal test that can be met only if the restrictions serve compelling governmental interests and employ the least restrictive means to effectuate those interests.¹²⁴ No-citation rules do not pass these tests. These are not rules that protect against physical or psychological harm, such as rules forbidding child pornography, or economic loss, such as rules prohibiting fraud or libel. Nor can no-citation rules be analogized to rules penalizing frivolous arguments, which, though they unquestionably restrict the content of legal argument, nonetheless pass First Amendment muster.¹²⁵ Rules against frivolous arguments are necessary means of protecting courts and private litigants from the abuse and expense of patently worthless lawsuits.¹²⁶ In contrast, no-citation

judges will read briefs submitted to them and will listen to oral arguments. Accordingly, brief page limits and oral argument time limits are appropriate content-neutral “time” and “manner” restrictions that serve the important governmental interest in the orderly and fair allocation of limited judicial resources among litigants. The government has a legitimate interest in ensuring that the speech of some does not drown out the speech of others, *see* *United States v. Harriss*, 347 U.S. 612, 625 (1954), which it might if litigants could present filibustering arguments and file briefs of unlimited length.

¹²³ *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 429 (1993); *see also* *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (discussing tests of content neutrality).

¹²⁴ *See, e.g., First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978).

¹²⁵ *See* *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983) (stating that frivolous litigation does not enjoy First Amendment protection); *see generally* Carol Rice Andrews, *The First Amendment Problem With the Motive Restrictions in the Rules of Professional Conduct*, 24 J. LEGAL PROF. 13, 64-65 (2000) (discussing governmental interest in ensuring that frivolous claims do not consume judicial resources).

¹²⁶ Federal courts lack jurisdiction over frivolous cases. *See, e.g., Walters v. Edgar*, 163 F.3d 430, 433 (7th Cir. 1998) (“a frivolous suit does not engage the jurisdiction of the federal

rules forbid the truthful communication of relevant information to a governmental body solely because certain members of that body *might* find it bothersome to consider that information. Again, even if that were a compelling governmental interest, a less restrictive means of furthering that same interest exists: judges may disregard the citations. There is no need for censorship.

Nor is it a persuasive reply that no-citation rules are not censorious because they permit the citation, publication, or discussion of the cases in media other than legal briefs.¹²⁷ The mere fact that a restriction on speech forecloses expression through only one medium does not insulate that restriction from invalidation under the First Amendment if the forbidden medium is a particularly important one for that expression.¹²⁸ Legal briefs and arguments are indisputably important media for the communication of ideas about judicial opinions.

2. The Free Petition Clause

The same arguments that support a challenge to no-citation rules under the free speech clause also support a challenge under the First Amendment's free petition clause. The free petition clause guarantees the right "to petition Government for a redress of grievances." That right is "cut from the same cloth" as the right of free speech¹²⁹ and is, in a sense, simply an application of the right of free speech in the specific context of speech requesting action from governmental bodies — political speech in perhaps its purest form. Federal courts are governmental bodies before which the right to petition applies.¹³⁰ Hence, the only interpretive question is whether no-citation rules impair the presentation to federal courts of "grievances."

They clearly do. Regardless of whether one accepts *Anastasoff's* view that a judge may not disregard the holdings of prior unpublished cases,

courts").

¹²⁷ Judge Kozinski made this argument at a debate in April 2001. See Appellate Practice Section, Bar Association of San Francisco, *Unpublished Decisions: Caught Between Scylla and Charybdis* 45-46 ("You can publish an unpublished decision in the San Francisco Examiner. You can put it online on a web page. You can tattoo it to your chest. You can write articles about it. You can't do it in a brief. . . . But that is not a First Amendment issue.") (Apr. 24, 2001) available at <http://www.nonpublication.com>.

¹²⁸ See *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) (city cannot bar residents from posting signs on front lawns even though residents remained free to convey "their desired messages by other means, such as hand-held signs, letters, handbills, flyers, telephone calls," etc.).

¹²⁹ *McDonald v. Smith*, 472 U.S. 479, 482 (1984).

¹³⁰ See *Bill Johnson's Restaurants*, 461 U.S. at 741.

it is nonetheless fair to describe any instance in which a court has done that or may do that imminently as a "grievance." It may not be a meritorious grievance, to be sure. The case may not in fact control, or its designation as nonprecedential may, contrary to *Anastasoff*, have reflected a proper exercise of the "judicial power" so that disregarding it now is legitimate. But the mere fact that, for example, a district court judge, faced with a situation similar to that discussed in an unpublished opinion, nonetheless acted differently than he would have had he been aware of or chosen to follow the unpublished opinion is a bona fide "grievance." The free petition clause would therefore require a reviewing court to permit a litigant to inform the court of the discrepancy and to argue that the reasoning of the unpublished opinion is more sound.

V. PROPOSALS FOR REFORM

The conclusion that the no-citation rules are unconstitutional seems inescapable, and even if it were not, their many other drawbacks would counsel against their retention. We recognize, however, the gravity of the problem they attempt to address and the need to offer a workable alternative. The workload of the federal appellate judiciary is enormous, and it is unrealistic to expect 179 individuals,¹³¹ even individuals as qualified and hard-working as federal appellate judges, each to author up to 498 polished, detailed, signed opinions a year.¹³² Even judges of such Olympian productivity as Richard Posner and Frank Easterbrook author only between 75 and 90 opinions annually, and the average judge, together with his or her three to four law clerks, writes only 54 published majority opinions each year.¹³³

A. More Judges?

The most obvious solution would be simply to increase the number of federal judges, and responsible critics of the no-citation rules have made this proposal.¹³⁴ That is not, however, an advisable or easy solution to implement. The budget of the federal judiciary has already increased

¹³¹ 28 U.S.C. § 44(A) (2000).

¹³² Federal Court Management Statistics, *supra* note 54 (terminations on the merits per active circuit judge).

¹³³ *Id.*; FEDERAL COURTS '96, *supra* note 41, at 154, Table 5.3.

¹³⁴ See, e.g., *Anastasoff v. United States* 223 F.3d 898, 904 (8th Cir. 2000); Richman & Reynolds, *supra* note 100.

ten-fold, in real terms, over the past forty years,¹³⁵ and there are far too many more pressing social needs today to justify another several-fold increase or to make one politically feasible. Even the judges themselves do not want more judges.¹³⁶ They complain that increasing the number of judges would make the courts less congenial, less cohesive, and more bureaucratic,¹³⁷ and would make the en banc rehearing process unwieldy.¹³⁸

Nor is it advisable to keep the number of judges constant but to increase the number of law clerks and other parajudicial personnel each judge supervises. Today, circuit judges are entitled to as many as four clerks¹³⁹ (up from one in 1960), and receive additional help from permanent staff attorneys, who also help draft opinions.¹⁴⁰ To add more clerks would make judges' responsibilities less judicial and more managerial.¹⁴¹ The efficiencies that could, in theory, be derived from an increase in opinion-drafting manpower would at some point be drowned by the inefficiency of having only a single judge available to interview, hire, and train these recent law school graduates and to edit their work.¹⁴² Moreover, much of the beauty and value of the clerkship experience is that it permits a young lawyer at the threshold of a career to enjoy a fairly close working relationship with a successful and experienced member of the legal profession. Much of that would be lost if the clerk

¹³⁵ FEDERAL COURTS '96, *supra* note 41, at 129.

¹³⁶ See, e.g., Richman & Reynolds, *supra* note 100, at 299 *et seq.* ("The Judicial Establishment has consistently lobbied *against* the single most obvious solution to the caseload glut — the creation of additional judgeships." (Emphasis in original)).

¹³⁷ See, e.g., *id.* at 323-25.

¹³⁸ FEDERAL COURTS '96, *supra* note 41, at 133-34.

Judges frequently express the concern that increasing the number of judges would reduce their prestige. E.g., Richman & Reynolds, *supra* note 100, at 336-39; Howard T. Markey, *On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand*, 33 S.D. L. REV. 371, 374-75 (1988); *Lumberman's Cas. Co. v. Elbert*, 348 U.S. 48, 59 (1954) (Frankfurter, J., concurring). It might, but we do not believe that the pool of qualified individuals who want to be appellate judges because of the opportunities judging provides for interesting, varied legal work and public service would be significantly reduced if the prestige of the office were lower. See Richman & Reynolds, *supra* note 100, at 337-38.

¹³⁹ In fact, if the judge can make do without a secretary, the judge may hire five clerks. Letter from Richard A. Posner to David Greenwald (Jan. 22, 2002) (on file with authors) ("In this electronic age, a judge can do quite nicely with no secretary, and then if he wants have five clerks.").

¹⁴⁰ FEDERAL COURTS '96, *supra* note 41, at 139. The Seventh Circuit, for example, employs 20 staff attorneys, "which is almost two per judge." Letter from Richard A. Posner to David Greenwald, *supra* note 139.

¹⁴¹ Carrington, *supra* note 62, at 48; Markey, *supra* note 138, at 378-79.

¹⁴² FEDERAL COURTS '96, *supra* note 41, at 140, 188; Markey, *supra* note 138, at 381-82.

became only one of a large handful of judge's helpers.

B. Other Opinion Formats

For this reason, responsible, realistic suggestions for reform must assume that the size of the federal judiciary remains more or less constant. On that assumption, available options are limited to changes in the way opinions are produced. We consider two such possible changes here. Although neither is perfect and both are inferior, in our view, to simply allowing advocates to cite any and all opinions, whether published or unpublished,¹⁴³ they both strike us as more sensible and constitutional approaches to an admittedly difficult problem than the current regime of court-sponsored censorship.

1. Per Curiam Opinions

One suggestion would be for judges to make greater use of per curiam, unsigned opinions in lieu of unpublished, uncitable opinions. The per curiam opinion — generally a short opinion issued by the court (hence the name) and not by a particular member — is used commonly by the Supreme Court when it wishes to issue an opinion which, though citable, is tacitly understood to be a less significant precedent than a signed opinion.¹⁴⁴ Prior to nonpublication policies, a far greater percentage of the circuit courts' caseload was disposed of in this way. In 1962, 21% of all written opinions were per curiam opinions. By 1994, the percentage had dropped to 6%,¹⁴⁵ suggesting that many of the functions traditionally performed by per curiam opinions have been taken over by the noncitable opinion. Presumably, the per curiam opinion can take up those functions once again. This proposal balances the public interest in obtaining citable opinions and the individual's First Amendment right to cite them, with judges' interests in issuing less elaborate opinions in run-of-the-mill appeals.¹⁴⁶ It also has the advantage of simplicity. It could easily be implemented by simply amending the current nonpublication policies of the courts to call for a per curiam opinion in instances where an unpublished opinion is now appropriate.

¹⁴³ As the D.C. Circuit has recently done on a prospective basis. See *supra* note 8.

¹⁴⁴ FEDERAL COURTS '96, *supra* note 41, at 173.

¹⁴⁵ *Id.* at 173-74.

¹⁴⁶ The 1975 Hruska Commission Report proposed use of per curiam opinions as a means of addressing the caseload crisis. *Hruska Report*, *supra* note 31, at 51. See also David L. Walther, *The Noncitation Rule and the Concept of Stare Decisis*, 61 MARQ. L. REV. 581, 591 (1978).

2. Oral Opinions

A far more meaningful proposal would be to change the way in which many opinions are delivered. A fallacy common to many of the judicial defenses of the no-citation rules, both the passionate¹⁴⁷ and the lukewarm,¹⁴⁸ is that the courts face a Hobson's choice between unpublished, uncitable written opinions on the one hand and one-word opinions — "Affirmed," "Reversed" — on the other. If those were in fact the only alternatives, then we would agree that the current regime of unpublished opinions is preferable to a regime under which judges issue one-word, oracular pronouncements.¹⁴⁹ But the choice is not between the lesser of these two evils. There is at least one other option.

In lieu of reasoned written opinions, appellate judges could deliver reasoned (or well-enough reasoned) oral opinions. In cases in which the result was clear, dictated by well-known, well-established precedent, and in which preparation of a full-blown written opinion would be overkill — in short, precisely those in which uncitable opinions are supposed to be prepared today — the members of the panel could instead deliver their opinion extemporaneously, perhaps immediately after argument, perhaps at a later sitting of the court,¹⁵⁰ or perhaps even via conference call in open court. The opinion would be recorded, and could be e-mailed in digital format to the parties, mailed to the parties as a cassette, and/or posted on the court's website as a playable audio file. The opinions could also be transcribed for an appropriate fee upon request of the parties. Transcribed opinions would be citable, but their

¹⁴⁷ E.g., Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This: Why We Don't Allow Citation to Unpublished Dispositions*, CALIFORNIA LAWYER June 2000, at 43; Martin, *supra* note 69, at 181-83.

¹⁴⁸ FEDERAL COURTS '96, *supra* note 41, at 169; Wald, *supra* note 60, at 1374.

¹⁴⁹ As it happens, the Fifth and Eleventh Circuits occasionally issue one-word affirmances despite the widespread condemnation of that practice. One interesting defense of the practice comes from a circuit judge who has sat on these courts' panels as a visiting judge:

"[T]he real reason [for one-word affirmances] . . . is that the case presents no genuine appealable issue and the parties who initiated the appeal should have known this and probably did. Invocation of the rule is thus a rebuke for misuse of the appellate process, but administered with true Southern courtesy."

Nichols, *supra* note 70, at 920.

¹⁵⁰ That would be the appropriate setting for the oral deposition of pro se prisoner appeals, which are generally resolved without oral argument. Pro se prisoner appeals presently comprise 27% of the federal appellate docket and the opinions resolving them make up a large portion of the unpublished opinions prepared each year. Mecham, *supra* note 3, at Table S-4.

informal nature would inevitably make them, in the vast majority of cases, less forceful precedents than their written counterparts.

Although the proposal may strike some as novel, we are not the first to propose it as a means of controlling appellate caseloads. A 1968 article by Chief Judge Lumbard of the Second Circuit proposed that judges dictate oral opinions from the bench in appeals that would otherwise generate per curiam opinions.¹⁵¹ Following up on the suggestion, a congressional commission appointed to recommend changes in federal appellate court procedures noted in its final report that “savings in judicial time become truly dramatic when, for example, judgments are announced from the bench, with the reasoning of the court tape-recorded and available to the litigants and to the public in written form on request.”¹⁵²

As it happens, oral opinion delivery is common in other common law countries. English appellate judges have traditionally delivered most of their opinions orally, and some of the old English opinions most familiar to American lawyers were delivered in just this manner.¹⁵³ The majority of appeals heard in the English Court of Appeal are still disposed of through extemporaneous oral decisions. Though generally not reported, they are nonetheless, upon transcription, citable by advocates to the same extent as written opinions.¹⁵⁴ In Australia, the courts regularly issue oral — or *ex tempore* — opinions. Last year, the Federal Court of Australia (an intermediate federal appellate court, roughly analogous to a federal circuit court) resolved 700 of its 1,897 appeals through *ex tempore* opinions.¹⁵⁵

¹⁵¹ J. Edward Lumbard, *Current Problems of the Federal Courts of Appeals*, 54 CORNELL L. REV. 29, 37-38 (1968) (“After rereading the per curiam opinions of the Second Circuit for the past two years, I see no reason why at least half of them could not have been dictated in open court with some little extra preparation.”).

¹⁵² *Hruska Report*, *supra* note 31, at 50.

¹⁵³ *Raffles v. Wichelhaus*, 2 Hurlstone & Coltman 906 (Ex. 1864) and *Kingston v. Preston*, 2 Doug. 689 (K.B. 1773) (Mansfield, J.) — chestnuts of the first-year contracts course in law school, e.g., JOHN P. DAWSON ET AL., *CONTRACTS: CASES AND COMMENT* 353, 772 (5th ed. 1987) — were both oral opinions, summarized by private barristers.

¹⁵⁴ See ROBERT J. MARTINEAU, *APPELLATE JUSTICE IN ENGLAND AND THE UNITED STATES: A COMPARATIVE ANALYSIS* 104-08 (1990). Opinions rendered by the law lords in the House of Lords are called “speeches.” *Id.* at 104.

¹⁵⁵ Information obtained from the Librarian of the Federal Court of Australia indirectly via the Office of the Commonwealth Director of Public Prosecutions. E-mail of Bruce Taggart to David Greenwald (Jan. 14, 2002) (on file with author).

For an Australian High Court Justice’s perspective on oral opinion delivery, including tips for judges new to the practice, see Michael Kirby, *Ex Tempore Judgments — Reasons on the Run*, 25 WEST. AUST. L. REV. 213 (1995).

The practice has precedent in this country as well. During the first decade of the Supreme Court's existence, the Court reduced few of its opinions to writing.¹⁵⁶ Not until 1834 did the justices systematically file written opinions with the clerk of the Court, and even at that time not all of the Court's opinions were written.¹⁵⁷ Reported opinions from that period and preceding ones came from notes of reporters or lawyers who heard the opinions as they were spoken in court.¹⁵⁸ In the 1960s and 1970s, the Second Circuit regularly issued oral *per curiam* opinions from the bench,¹⁵⁹ and the Sixth Circuit still occasionally resolves appeals orally.¹⁶⁰

However, oral decision making is most widespread today in American federal district courts. It is quite common today for district judges and magistrate judges — no strangers to caseload pressures — to announce rulings on motions extemporaneously from the bench. Pretrial detention orders and criminal sentences — perhaps the most solemn exercises of judicial power — are routinely announced orally. At bail proceedings, magistrate judges explain orally the bases for their findings that individuals present a risk of flight or danger to the community, applying a fairly elaborate set of statutory presumptions. And at federal sentencings, judges explain their often highly complex calculations under the sentencing guidelines from the bench, using notes perhaps, but almost never a prepared text. Transcripts of the proceedings adequately preserve a record for higher court review.

¹⁵⁶ THE OXFORD COMPANION TO THE SUPREME COURT 608 (Kermit L. Hall ed., 1992).

¹⁵⁷ Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on the Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1298 & n.46 (1985).

William Cranch, who assumed his position as the Supreme Court's first official reporter in 1801 before the development of audio recording or sophisticated stenography, expressed relief when the Court adopted the practice of "reducing their opinions to writing in all cases of difficulty or importance" during the early nineteenth century. THE OXFORD COMPANION, *supra* note 156, at 608.

¹⁵⁸ Joyce, *supra* note 157, at 1304.

¹⁵⁹ THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 124 (1994); *Cont'l Stock Transfer & Trust Co. v. SEC*, 566 F.2d 373, 374 (2d Cir. 1977) (noting practice of deciding appeals from bench).

¹⁶⁰ 6TH CIR. R. 36 provides:

In those cases in which the decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition of the case may be made in open court following oral argument. A written judgment shall be signed and entered by the clerk in accordance with the decision of the panel from the bench. Counsel may obtain from the clerk a copy of the transcript of the decision as it was announced from the bench.

Id. In 2001, the Sixth Circuit resolved 30 appeals orally. Mecham, *supra* note 3.

There is little reason to believe that appellate judges could not emulate their colleagues on trial courts. In 1974, the American Academy of Judicial Education performed an experiment in which it assembled 26 active, mostly appellate judges.¹⁶¹ These judges were presented with oral arguments, an eight-page bench memorandum, and record materials (but not briefs¹⁶²) from an actual appeal from a state court rape conviction. After hearing the arguments, the judges were asked to complete a questionnaire including the question, "Do you think it would have been feasible to announce your decision from the bench immediately after the close of argument, or within a few minutes thereafter?" Twenty-four of the twenty-six judges answered "yes."¹⁶³

A variant of this experiment was performed three years later at the 1977 annual meeting to the American Bar Association.¹⁶⁴ At that meeting, Judge Shirley Hufstедler of the Ninth Circuit, Justice Robert Braucher of the Massachusetts Supreme Judicial Court, and Justice Winslow Christian of the California Court of Appeal heard 30 minutes of oral argument based on an actual criminal appeal and then retired to confer. Fifteen minutes later they returned and unanimously reported that they would feel comfortable rendering a reasoned decision from the bench, which they did.¹⁶⁵

The conclusion to be drawn from these experiments should hold particularly true for appeals resolved today through unpublished opinions. If such appeals are as rote as the nonpublication designation would suggest, then it should be feasible for circuit judges to address the issues they raise in a brief oral presentation, thereby saving the time associated with drafting, editing, circulating, and proofing a written opinion. If no member of a panel feels confident to do so, that would itself suggest that the issues the appeal presents merit closer examination through a written opinion. And if only some issues are simple enough to be resolved orally, while the rest require further consideration, the simpler issues can be disposed of on the spot and a written opinion on the others can be released later. That mode of partial oral disposition might facilitate post-argument settlement, which would, in turn, further reduce the courts' opinion-writing workloads.

¹⁶¹ See Daniel J. Meador, *Toward Orality and Visibility in the Appellate Process*, 42 MD. L. REV. 732, 742-44 (1983).

¹⁶² *Id.* One purpose of the experiment was to determine whether oral argument could serve as an adequate substitute for written briefs.

¹⁶³ *Id.* at 744.

¹⁶⁴ *Id.* at 745-46.

¹⁶⁵ *Id.*

There may be other benefits, besides speed and efficiency, to be obtained from oral opinions. Oral opinions bring with them the opportunity to put a face on justice and to give it a voice. They would allow lawyers and the public to see how the judicial mind works as it works. They would also perhaps satisfy a desire on the part of litigants and their counsel to interact directly with their decision makers¹⁶⁶ by hearing the reasons for decisions explained from the judges' own mouths and in the judges' own words, not through the screens of a ghostwritten opinion released months later. Judges might even enjoy the experience of delivering their opinions orally as they shed their role as editors of the prose of recent law graduates and recapture their traditional role as direct and immediate exponents of common law. The experiment is worth trying.

CONCLUSION

Some defenders of the no-citation rules have referred to published opinions as if they were refined commodities, whose quality would suffer if judges had to produce them in every case. For one, the published opinions are "wheat," the unpublished, "chaff";¹⁶⁷ for another, published opinions are "diamonds" or "gold" and unpublished, "dross."¹⁶⁸ The metaphor of the published opinion as a valuable, even precious, commodity, may be apt, but if so, the no-citation rules are restrictions on the output of those commodities and should be condemned as such. The law does not permit producers of a commodity to agree to limit the number of items they produce on the pretext that the limits allow production of a higher quality good overall. Why then permit courts — the makers of precedents — to bar advocates from referring to certain appellate opinions on the theory that the quality of a subset of opinions — published opinions — would somehow plummet if

¹⁶⁶ See *id.* at 736-37:

Deep within the Anglo-American legal psyche, mixed in with notions about the opportunity to be heard and the concept of due process, is the idea that a litigant and his lawyer should be able to face their judges and communicate directly with them. Nothing else affords the same assurance that the judges in fact have been confronted with the theories and arguments of the parties and have put their minds to the case. The acceptability and the integrity of the judicial process may be heavily affected by such assurance, and only the visible, orally presented appellate proceeding can provide it.

¹⁶⁷ Markey, *supra* note 138, at 372.

¹⁶⁸ Martin, *supra* note 69, at 178, 191.

reference to all were allowed?

Obviously, the analogy goes only so far. But there is nonetheless something unsettling about rules that say to litigants that although their cases were decided correctly, the judges do not want anyone to let their judicial colleagues know what they did; something censorious and upside-down about rules that say to lawyers that although they may cite district court opinions, state court opinions, law review articles, or even nonlegal materials in their briefs, those briefs may subject their authors to professional discipline if they refer to certain writings of the very judges who sit on the court hearing the appeal; something confiscatory about rules that say to members of the public that although they have, through their taxes, paid for the production of an opinion, they may not derive any use from that opinion in subsequent disputes; and something arrogant about rules that confer upon judges the power to determine prospectively what cases will provide useful precedential or persuasive authority in cases years down the line, cases that raise issues the judges, for all their experience and collective wisdom, cannot pretend to foresee. Whatever the "judicial power" under Article III encompasses, regulation of the use of opinions to support legal arguments is not a traditional judicial or governmental function. Citation of legal authority, like other expressive conduct, should be left to the free marketplace of ideas.