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A Call for Uniformity in Appellate Courts' Rules Regarding Citation of Unpublished Opinions

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COMMENT

A CALL FOR UNIFORMITY IN APPELLATE COURTS' RULES REGARDING CITATION OF UNPUBLISHED OPINIONS

INTRODUCTION

Richard Loritz II filed a habeas corpus petition in the United States District Court for the Southern District of California. The district court denied the petition, and the Ninth Circuit affirmed the lower court's decision in an unpublished opinion. Loritz then brought a pro se suit against the Ninth Circuit, challenging the constitutionality of its rule prohibiting citation to unpublished decisions. The District Court for the

1 Loritz v. Terhune, No. 01-56539, 2002 WL 31802538 (9th Cir. Dec. 2, 2002).

Habeas corpus is a writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal. *Black's Law Dictionary* 314 (2d Pocket ed. 2002).

The writ of habeas corpus, by which the legal authority under which a person may be detained can be challenged, is of immemorial antiquity. After a checkered career in which it was involved in the struggles between the common-law courts and the Courts of Chancery and the Star Chamber, as well as in the conflicts between Parliament and the crown, the protection of the writ was firmly written into English law by the Habeas Corpus Act of 1679. Today it is said to be 'perhaps the most important writ known to the constitutional law of England . . . .' Charles Alan Wright, *The Law of Federal Courts* § 53, at 350 (5th ed. 1994) (quoting Secretary of State for Home Affairs v. O'Brien, [1923] A.C. 603, 609).

2 Loritz, 2002 WL 31802538.

3 Loritz v. United States Ct. of App. for Ninth Circuit, 382 F. 3d 990, 991 (9th Cir. 2004); The Ninth Circuit's Citation of Unpublished Dispositions or Orders Rule states in relevant part:

Unpublished dispositions and orders of this court may not be cited to or by the courts of this circuit, except in the following circumstances. (i) They may be cited to this Court or to or by any other court in this circuit when relevant under the
Southern District of California granted a motion to dismiss for lack of Article III standing. Loritz appealed, and the Ninth Circuit moved for summary affirmance.

The appellate court held that Loritz did not allege an injury-in-fact sufficient to establish standing to challenge the constitutionality of the rule, because the allegations did not involve a personal violation, but rather a violation of others' rights. Loritz argued that he was, in fact, harmed by the inability of future litigants to cite his case because, by prohibiting future citation to his case, the court eliminated the need to reconcile it with established circuit authority. Loritz argued, therefore, that the court denied him his constitutionally guaranteed rights to due process. In his concurrence, Judge Beam reasoned that Loritz had, in fact, alleged actual injury sufficient to establish standing when he claimed that by declining to publish its opinion in his habeas case, the Ninth Circuit had avoided the requirement of following precedent, which would have dictated a favorable result. Arguably, Loritz should have been found to have standing, in which case the court could have examined whether maintaining a body of "unpublished," uncitable opinions violates procedural due process.

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* Loritz, 382 F.3d 990, 991.
* Id. at 992. (This case was decided by three judges: The Honorable Phyllis A. Kravitch, Senior Circuit Judge, United States Court of Appeals for the Eleventh Circuit; the Honorable C. Arlen Beam, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit; and the Honorable Robert E. Cowen, Senior Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation. Id. at 991).
* Id at 991-92. Article III standing to invoke federal jurisdiction requires a showing that: (1) the plaintiff has suffered an injury-in-fact, (2) the injury is fairly traceable to the challenged action of the defendant, and (3) the injury is likely to be redressed by a favorable decision. Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832, 863 (9th Cir. 2003).
* Id.
* Loritz, 382 F.3d at 993 (Beam, J., concurring).
* See Appellant's Opening Brief, 2004 WL 1763145.
Currently, there is a split among the federal courts of appeals over whether to allow citation to unpublished opinions.\textsuperscript{11} To address this lack of uniformity, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, which drafts federal court rules, proposed Federal Rule of Appellate Procedure 32.1, which would mandate that all courts of appeals allow citation of unpublished opinions.\textsuperscript{12} Rule 32.1 does not, however, dictate a level of precedential value for the reviewing court to assign to such opinions when cited.\textsuperscript{13} This Comment explores the history of appellate court rules forbidding the citation of unpublished opinions ("no-citation rules"), the current debate among the circuits about whether to allow citation to unpublished opinions, and the implications of proposed Appellate Rule 32.1. This Comment suggests that proposed Rule 32.1 should incorporate a requirement that courts apply persuasive value to unpublished opinions when cited. Such a rule would increase uniformity among the circuits regarding citability and ensure that appellate courts provide all people their constitutional right to due process.

This Comment is divided into seven parts. Part I provides an overview of the current practice concerning citation of unpublished opinions, including a look at how unpublished opinions came into existence, the types of opinions currently published, and the courts' reasoning for limiting citation of unpublished opinions.\textsuperscript{14} Part II describes the variations on precedential value an opinion could receive and describes the no-citation rules by circuit.\textsuperscript{15} Part III discusses the debate between the Eighth and the Ninth Circuits — the two most vocal circuits on the issue of citability.\textsuperscript{16} Part IV deconstructs the reasoning behind no-citation rules.\textsuperscript{17} Part V examines the possibility that no-citation rules violate due process rights.\textsuperscript{18} Part VI explores proposed Appellate Rule 32.1, which would prohibit appellate

\textsuperscript{12} Id.
\textsuperscript{13} Id.
\textsuperscript{14} See infra notes 21-71 and accompanying text.
\textsuperscript{15} See infra notes 72-92 and accompanying text.
\textsuperscript{16} See infra notes 93-123 and accompanying text.
\textsuperscript{17} See infra notes 124-141 and accompanying text.
\textsuperscript{18} See infra notes 142-182 and accompanying text.
courts from restricting citation of judicial opinions, and argues that the proposed rule change is a step in the right direction but is not enough. Finally, Part VII concludes by stating that if we hope to establish a more uniform appellate system, not only must we consistently allow citation to unpublished opinions, but we must also dictate a precedential value to be applied to unpublished opinions when cited.

I. BACKGROUND AND RATIONALE OF “UNPUBLISHED OPINIONS”

A. HOW UNPUBLISHED OPINIONS CAME INTO EXISTENCE

In 1894, the Federal Reporter began reporting the cases of the United States Courts of Appeals. By 1915, concerns over the number of published opinions began to mount. This growing concern prompted the Federal Judicial Center, a study group established by Congress to recommend improvements in judicial administration, to hold a Judicial Conference to address the publication issue when it convened in the mid-1960s. The Judicial Conference of 1964 decided that courts should publish only those opinions that are of general precedential value and authorized by the judges of the courts of appeals and the district courts. The stated reason for this change was “the rapidly growing number of published opinions of the courts of appeals and the district courts of the United States,” and “the ever increasing practical difficulty and economic cost of establishing and maintaining accessible private and public law library facilities.” Over time, each circuit responded to this recommendation by developing and implementing “procedures for

19 See infra notes 183-207 and accompanying text.
20 See infra notes 208-211 and accompanying text.
21 Boyce F. Martin, Jr., In Defense of Unpublished Opinions, 60 Ohio St. L.J. 177, 184 (1999).
23 Id. (citing William L. Reynolds & William M. Richman, The Nonprecedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals, 78 Colum. L. Rev. 1167, 1168-69 nn.12-13 (1978)).
25 Reynolds supra note 23, at 11.
reducing the number of published opinions. However, initial attempts at regulation failed to reduce the mounting number of published opinions. This prompted the Federal Judicial Center to recommend that each circuit individually review its publication practices, make modifications aimed at reducing the number of opinions published, and restrict citation of unpublished decisions. By 1974, each circuit had submitted plans to the Judicial Conference as to how it would limit publication of appellate court opinions.

B. Types of Opinions Currently Published

1. Publication Rate by Case Type

Some types of cases are more likely to be published than others based on the area of law. For example, appellate judges deem complex civil rights cases and antitrust cases important and most often grant such cases detailed consideration. However, some judges consider other types of cases more routine and publish these types of cases at a much lower rate. Types of cases falling into the more routine category include prison inmate petitions and Social Security disability litigation. Thus, some people have better access to case law and relevant fact patterns to predict the outcome of their own pending cases than do others, depending on the type of cases they have.

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27 Id.
26 Id.
27 Id.
27 Id.
27 Id.
27 Id. at 497.
2. Publication Rate by Circuit

The number of opinions chosen for publication varies substantially by circuit.35 For example, the Eighth and Tenth Circuits have similar criteria for publication, yet during the first six months of 2000, the Eighth Circuit published at a rate of forty-four percent, whereas the Tenth Circuit only published at a rate of twenty percent.36

The disparity is even more striking when it comes to habeas corpus cases.37 The purpose of federal habeas review is to “assure that when a person is detained unlawfully or in violation of his constitutional rights he will be afforded an independent determination by a federal court of the legality of his detention.”38 In a habeas corpus case, a person’s freedom is at stake. Over the same six-month period noted above, the Eighth Circuit published fifty-seven percent of its habeas corpus case opinions, compared to an eleven-percent publication rate in the Tenth Circuit.39

Even in the same circuit, there is considerable variation among judges in their definitions of what constitutes a publication-worthy opinion.40 These differing rates of publication strongly suggest that predicting the precedential value of a particular opinion may be much more problematic than one would expect.41

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36 Id. The Eighth Circuit’s publication rate was 44.35 percent. Id. The Tenth Circuit’s publication rate was 20.83 percent. Id.
37 Id. A habeas corpus is a writ employed to bring a person before a court, most frequently to ensure that the party’s imprisonment or detention is not illegal. Black’s Law Dictionary, 728 (8th ed. 2004). In addition to being used to test the legality of an arrest or commitment, the writ may be used to obtain review of (1) the regularity of the extradition process, (2) the right to or amount of bail, or (3) the jurisdiction of a court that has imposed a criminal sentence. Id.
38 United States ex rel. Radich v. Criminal Court of New York, 459 F.2d 745, 748 (2d Cir.1972).
39 Mead, supra note 35, 597.
40 Songer, supra note 26, at 313.
41 Gerken, supra note 30, at 496.
3. Publication Upon Request

Some courts' rules permit a party to request publication of an unpublished opinion. In the Seventh Circuit, a person does not have to be a party to request an unpublished opinion to be published. The Seventh Circuit rule mandates that the request be submitted as a motion indicating why the opinion is consistent with the court's criteria for publication.

Similarly, the Fourth Circuit requires that counsel may cite reasons and move for publication of an unpublished opinion. This rule has been interpreted to mean counsel for one of the parties can submit a motion requesting publication. In practice, however, not all lawyers know they can request publication. As a result, frequent litigants might "stack the precedential deck by routinely requesting the court to publish decisions that benefit their litigation posture."48

C. COURTS' REASONING FOR LIMITING CITATION OF UNPUBLISHED OPINIONS

Approximately eighty percent of all federal courts of appeals decisions are deemed "unpublished" and thus are not incorporated into the Federal Reporter, the federal courts of appeals' official reporter. These "unpublished opinions" have no, or limited, precedential value. However, despite their "unpub-
lished” designation, these opinions are often posted on courts’ websites, accessible through on-line services such as Westlaw and LEXIS, and published in print in Westlaw’s Federal Appendix, a case-reporter series consisting of “unpublished decisions” from appellate courts.51

Judges and court staff usually support no-citations rules, while attorneys and academicians usually oppose them.52 Proponents of no-citation rules give three main reasons for opposing citation to unpublished opinions: (1) added time and diminished quality; (2) unequal access among legal practitioners; and (3) the creation of too many precedents.53

1. Concern Over Added Time and Diminished Quality

The Judicial Conference’s 1964 recommendation to restrict publication to opinions with precedential value arose out of concern for the rapidly growing number of published opinions.54 Since the inception of the “unpublished opinion” rules there have coexisted rules restricting citation of unpublished opinions in appellate briefs.55 The committee stated, “The absence of a no-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,” implying that the reason behind no-citation rules is to shorten the description of case-specific facts and reasoning in non-published opinions.56

In 2003, over sixty thousand cases were appealed to the federal courts of appeals.57 Supporters of no-citation rules contend that an unpublished opinion requires considerably less time and effort to compose than a published opinion on the

51 Id.
52 Greenwald, supra note 28, at 1135.
53 Id. at 1147-51.
56 Id.
57 Judicial Caseload Indicators, at http://www.uscourts.gov/caseload2004/front/judbus03.pdf (last visited January 25, 2005). The actual number of cases was 60,661 (this figure excludes the Federal Circuit).
same issue. This is because preparing an opinion for publication requires a judge to detail the facts of the case for a general audience, as well as to include detailed questions presented. The purpose is to ensure that when a lawyer incorporates the opinion in future case analysis, there is no confusion concerning the issues and facts leading to the court's decision. When an opinion is prepared for non-publication, only the parties are the intended audience, and the judge need not explain in great detail. It often takes only a few hours to write an opinion for non-publication, but it may take a number of days to write an opinion for publication. Considering the heavy case load on an already burdened appellate court system, the task of preparing more opinions for publication may seem daunting.

The Ninth Circuit's Judge Kozinski, one of the staunchest supporters of the no-citation rule, has recently articulated this justification:

Faced with the prospect of parties citing these dispositions as precedent, conscientious judges would have to pay much closer attention to the way they worded 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 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

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59 See Alex Kozinski & Stephen Reinhardt, Please Don't Cite This! Why We Don't Allow Citation to Unpublished Dispositions, California Lawyer, June 2000. One of the largest supporters of no-citation rules is 9th Circuit Judge Kozinski. Id.
60 Id.
61 Id.
62 Id.
63 Id.
en banc process. The quality of published opinions would sink as judges were forced to devote less and less time to each opinion.\(^64\)

Thus, Judge Kozinski’s view is that allowing citation of unpublished opinions will jeopardize the quality of published opinions because judges will distribute their time more evenly over their entire case load rather than focusing their efforts on published opinions.\(^65\)

2. Unequal Access Among Legal Practitioners

The second justification for the no-citation rule is that if citation to unpublished opinions were permitted, it would place lawyers without access to such opinions at an unfair disadvantage and lawyers at larger firms, with the resources to research and compile unpublished opinions, at a distinct advantage.\(^66\)

While this argument was quite popular in the 1970s, it is less persuasive today because most unpublished opinions are available on LEXIS and Westlaw to the same extent as published opinions.\(^67\)

3. The Creation of Too Many Precedents

A third argument for rules against citation to unpublished opinions is the concern that it will lead to too many precedents.\(^68\) This argument, still employed today, was one of the Judicial Conference’s original arguments for creating “unpublished” opinions.\(^69\) The Judicial Conference report shows that much of the concern was the difficulty in continuing to organize and catalog an ever-increasing number of opinions.\(^70\)

\(^64\) Hart v. Massanari, 266 F.3d 1155, 1178 (9th Cir. 2001).

\(^65\) Id.


\(^68\) Greenwald, supra note 28, at 1152-53.


\(^70\) Id.
logical advances in the legal field in recent years make this argument seem anachronistic.\footnote{Greenwald, supra note 28, at 1149-50.}

II. BREAKDOWN OF CITABILITY

A. PRECEDENTIAL VALUE – WHAT DOES IT MEAN?

"Precedential value" is a term whose meaning can range from binding precedent to mere citable precedent.\footnote{Stephen R. Barnett, From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules, 4 J. App. Prac. & Process 1, 9 (2002).} "Binding precedent" means that a court's decision "must be followed by courts at the same level and lower within a pyramidal judicial hierarchy."\footnote{Id.} "Overrulable precedent" applies to decisions the court ordinarily will follow under stare decisis but may overrule if sufficient reasons to do so become evident; this category typically includes earlier decisions of the same court.\footnote{Id.} "Persuasive" authority may be cited, but it must persuade on its own argumentative merits, without regard for notions of stare decisis.\footnote{Id.} "Citable precedent" means that the case may be cited, with the court deciding the appropriate precedential weight to apply.\footnote{Id.}

B. CITABILITY BY CIRCUIT

Citability rules among the courts of appeals lack uniformity.\footnote{Anne Coyle, A Modest Reform: The New Rule 32.1 Permitting Citation to Unpublished Opinions in the Federal Courts of Appeals, 72 Fordham L. Rev. 2471, 2489 (2004).} Since 1964, circuits have adopted different rules governing the citation of unpublished opinions.\footnote{See, e.g., 1st Cir. R. 36(F); 2d Cir. R. 0.23; 7th Cir. R. 53(b)(2)(iv).} In more recent years, an increasing number of circuits have begun to allow citation to unpublished opinions.\footnote{Stephen R. Barnett, Development and Practice Note: No-Citation Rules Under Siege: A Battlefield Report and Analysis, 5 J. App. Prac. & Process 473, 479-80 (2003).} With varying degrees of restriction, nine of the thirteen circuits now permit citation to unpublished opinions.\footnote{Id. at 493.}
The circuits that allow citation to unpublished opinions are the First, Third, Fourth, Fifth, Sixth, Eighth, Tenth, Eleventh, and D.C. Circuits. The Third and Eleventh Circuits allow unrestricted citation to unpublished opinions. The District of Columbia Circuit allows unrestricted citation of unpublished opinions dated after January 1, 2002, but prohibits citation of unpublished opinions dated before 2002. The Fifth and the Eleventh Circuits state that unpublished opinions are not precedent but may be cited as persuasive authority. The Fourth, Sixth, and Eighth Circuits allow an unpublished decision to be cited when there is no published case on point. The Tenth Circuit provides that an unpublished opinion may be cited if it "has persuasive value with respect to a material issue that has not been addressed in a published opinion" or if "it would assist the court in its disposition." However, when

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81 Id.
82 See 3d Cir. R. 28.3; 11th Cir. R. 36-2. However, the Third Circuit itself will not cite an unpublished opinion. See 3d Cir. IOP 5.7.
83 See D.C. Cir. R. 28(c)(12)(B) (unpublished decisions issued on or after January 1, 2002, "may be cited as precedent"). But cf. D.C. Cir. R. 36(c)(2) ("a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition").
84 See 5th Cir. R. 47.5.3 (unpublished opinions issued before January 1, 1996, "are precedent," but "because every opinion believed to have precedential value is published," unpublished opinions "normally" should not be cited); 5th Cir. R. 47.5.4 (unpublished opinions issued on or after January 1, 1996, are "not precedent"); such opinions "may, however, be persuasive" and may be cited); 11th Cir. R. 36-2 (unpublished opinions "not considered binding precedent" but may be cited as persuasive authority); see also 11th Cir. R. 36-3, I.O.P. 5 ("opinions that the panel believes to have no precedential value are not published,") and "[r]eliance on unpublished opinions is not favored by the court").
85 See 4th Cir. R. 36(c) (citation of unpublished opinions "disfavored," but "[i]f counsel believes, nevertheless, that an unpublished disposition . . . has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited"); 6th Cir. R. 28(g) (citation of unpublished opinions "disfavored," but "[i]f counsel believes, nevertheless, that an unpublished disposition . . . has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited"); 8th Cir. R. 28(A)(i) (unpublished opinions "are not precedent and parties generally should not cite them," but parties may do so if the opinion has "persuasive value on a material issue and no published opinion of this or another court would serve as well").
86 See 10th Cir. R. 36.3 (unpublished decisions "not binding precedents" and their citation is "disfavored," but unpublished decision may be cited if it has "persuasive value with respect to a material issue that has not been addressed in a published opinion" and if it would "assist the court in its disposition").
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cited, the unpublished opinion is merely persuasive and not binding precedent. 87

The circuits still prohibiting citation to unpublished opinions are the Second, Seventh, Ninth, and Federal Circuits. 88 The Federal Circuit provides that an unpublished opinion may not be cited as precedent, but the rule is silent on whether such an opinion may be cited as persuasive authority. 89 The Second Circuit's rule prohibits citation of written statements attached to summary orders. 90 The Seventh Circuit states that unpublished orders "shall not be cited or used as precedent." 91 The Ninth Circuit states that unpublished opinions are "not binding precedent" and "may not be cited." 92

III. DEBATE BETWEEN THE EIGHTH AND NINTH CIRCUITS

Individual circuits govern the policies and make the decisions as to whether opinions are considered published or unpublished. 93 A debate among the circuits about citing unpublished opinions is heating up. 94 The debate began with Chief Judge Richard Arnold's ground-breaking Eighth Circuit opinion in Anastasoff v. United States in 2000, which was quickly followed by Judge Alex Kozinski's Ninth Circuit opinion in Hart v. Massanari in 2001. 95 Through these opinions, these two well-known judges debated whether no-citation rules were an unconstitutional expansion of the federal judiciary's Article III powers. 96 Until Anastasoff, the common arguments against the no-citation rules focused on issues of judicial policy, accessibil-

87 Id.
88 Barnett, supra note 79, at 476.
89 Fed. Cir. R. 47.6(b) (2003).
90 2d Cir. R. 0.23 (2003).
92 9th Cir. Rule 36.3 (2003). The Ninth Circuit has a provisional exception that allows citation of unpublished opinions in petitions for rehearing or rehearing en banc and in requests to publish opinions, solely for the purpose of showing a conflict between panel opinions. Id. (In the Ninth Circuit dispositions not intended for publication are called "orders" or "memoranda." Rule 36-1. Rule 36-3 is entitled "Citation of Unpublished Dispositions or Orders.")
93 Id.
94 Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000); Hart, 266 F.3d 1155; See Barnett, supra note 79.
95 Anastasoff, 223 F.3d 898; Hart, 266 F.3d 1155.
ity, and precedential development. Judge Arnold in Anastasoff took the debate into the constitutional realm.

A. ANASTASOFF V. UNITED STATES

In Anastasoff v. United States, Fay Anastasoff sued the IRS when it denied her a tax refund. After losing in the district court, she appealed to the Eighth Circuit, arguing that the court should find that her request for a tax refund was timely because it had been mailed before the expiration of the refund period. In response, the IRS cited Christie v. United States, an unpublished Eighth Circuit tax procedure decision that held the so-called mailbox rule inapplicable. Anastasoff argued that the Eighth Circuit was not bound by the unpublished decision in Christie, despite the fact that it had decided a similar issue of first impression under federal tax law, but should instead adopt the opposite holding of Weisbart v. United States – a published opinion from the Second Circuit. A panel of the Eighth Circuit, in an opinion by Judge Arnold, relied on the IRS’s citation of unpublished Christie v. United States and held its own no-citation rule unconstitutional.

Anastasoff hinged on whether the unpublished decision in Christie was precedent in the Eighth Circuit. The court held that Eighth Circuit Rule 28A(i), which provides that unpublished opinions are not precedent and are not to be cited, “purports to expand the judicial power beyond the bounds of Article III and is therefore unconstitutional,” because it gives more power to the courts than the Framers of the Constitution origi-

97 Id.
98 Id.
99 Anastasoff, 223 F.3d at 899.
100 Id.
101 Christie v. United States, No. 91-2375MN, 1992 U.S. App. LEXIS 38446 (8th Cir. Mar. 20, 1992) (affirming the decision of the district court, which granted the government’s motion for summary judgment in the taxpayer’s action that sought a tax refund).
102 Weisbart v. United States, 222 F.3d 93 (2d Cir. 2000) (holding plaintiff’s refund claim enjoyed the benefit of the mailbox rule and was deemed to have been timely filed. Because the mail date was within three years of the date when plaintiff was deemed to have paid his withheld employment taxes, he could recover any overpayment included in those taxes.)
103 Anastasoff, 223 F.3d at 899.
104 Id.
The court asserted that “[t]he Framers thought that, under the Constitution, judicial decisions would become binding precedents in subsequent cases.” The court additionally noted that because of another Eighth Circuit rule—that a panel’s decision cannot be overruled by another panel, but only by the court en banc—its panel was required to follow the Christie decision.

Immediately after the Anastasoff decision was published, legal publications and law review articles appeared discussing the potential impact of the Eighth Circuit’s decision. Judges and litigants across the country began citing to unpublished opinions despite local court rules prohibiting such citation. Academics predicted review by the Supreme Court.

Rehearing the Anastasoff decision en banc, the Eighth Circuit decided that the underlying tax case had become moot and the original Anastasoff decision was vacated. Judge Arnold, writing for the en banc court in the second Anastasoff opinion, maintained that “[t]he constitutionality of that portion of Rule 28A(i) which says that unpublished opinions have no precedential effect remains an open question in this Circuit.” Although vacated as moot, the panel decision in Anastasoff “con-
continues to have persuasive force" according to Judge Kozinski in Hart v. Massanari.\footnote{Hart, 266 F.3d at 1159.}

B. **HART V. MASSANARI**

In Hart v. Massanari, a lawyer cited an unpublished Ninth Circuit opinion in violation of the circuit’s no-citation rule and then defended his violation, arguing that the rule was unconstitutional under Anastasoff.\footnote{Id.} Judge Kozinski, who, like Judge Arnold, had previously written extra-judicially on the subject of no-citation rules, refuted the claim of a historically based constitutional requirement of binding precedent presented in Anastasoff.\footnote{Id.; see Kozinski, supra note 58; Richard S. Arnold, Unpublished Opinions: A Comment, 1 J. App. Prac. & Process 219 (1999).} Writing for the three-judge panel, Kozinski pointed out that binding precedent requires establishing both reliable case reports and a settled judicial hierarchy.\footnote{Barnett, supra note 72 at 9.} Without these two requirements it “could not be known which decisions were binding”; however, these requirements were not in place until the middle of the nineteenth century.\footnote{Id. at 1167.} “Contrary to Anastasoff’s view,” wrote Kozinski, “it was emphatically not the case that all decisions of common law courts were treated as precedent binding on future courts unless distinguished or rejected.”\footnote{Id. at 1180. The court also held that the rule (9th Cir. R. 36-3) had been violated, but declined to impose sanctions in view of the attorney’s good-faith constitutional challenge. Id. Attorneys who henceforth cited unpublished cases in the Ninth Circuit presumably cannot expect such leniency, at least not from Judge Kozinski. Id. But cf. U.S. v. Rivera-Sanchez, 222 F.3d 1057, 1063 (9th Cir. 2000) (asking counsel to submit list of unpublished opinions superseded by its decision and cites them in its opinion, “[t]o avoid even the possibility that someone might rely upon them”).} The Ninth Circuit panel therefore declined to follow Anastasoff and held the Ninth Circuit’s no-citation rule constitutional.\footnote{Id. at 1167.}

The recent debate between the Eighth and the Ninth Circuits addresses whether Article III of the Constitution empowers a court to determine the appropriate precedential value to apply to an unpublished opinion.\footnote{Hart, 266 F.3d at 1167; Barnett, supra note 72, at 8.} Both circuits agreed that the Framers’ intent must be examined to determine the consti-
tutionality of the no-precedent rules. The two circuits concluded differently, and the question remains open. Limited in scope, the exchange between the circuits addressed only one aspect of the constitutionality of no-citation rules. The question remains whether no-citation rules violate the due process rights of parties who want to cite to an opinion deemed "unpublished" or whose case might actually be decided differently, as Loritz argues of his own case, if the court had been required to publish its opinion.

IV. DECONSTRUCTING THE REASONING BEHIND NO-CITATION RULES

A. INADEQUATE COURT RESOURCES?

In Hart, Judge Kozinski stated that he opposes allowing citation to unpublished opinions because it would require more time and effort by judges to explain "with precision" why the decision was rendered as it was and provide "due regard to how it will be applied in future cases." As legal scholars David Greenwald and Frederick Schwarz assert, there is something wrong with the current court system if it is unable to provide every litigant a thorough, well-laid-out decision in every case. Perhaps the argument is an indication that the troubled court system lacks the resources to keep up with the times. A lack of resources hardly constitutes a valid reason for not publishing or not allowing citation of unpublished opinions. If the problem is that judges lack the time they need to dedicate to each opinion they write, perhaps the answer is to increase the number of judges.

Judge Kozinski’s theory that “conscientious judges would have to pay much closer attention to the way they word their unpublished rulings” ignores the fact that law is not created

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122 Id.; Barnett, supra note 72, at 8.
123 Id.
124 Hart, 266 F.3d at 1178.
125 Greenwald, supra note 28, at 1174.
126 Id.
127 Id. at 1147-49.
128 Id. at 1166-67.
from judges’ dicta, but rather, from judges’ case holdings.\textsuperscript{129} Furthermore, the most likely reason for a lawyer to cite an unpublished opinion is not for the language of the unpublished opinion, but rather because the facts of the unpublished case are closer to those in the case before the court than are the facts of any published decision.\textsuperscript{130}

Moreover, any judicial time-saving once experienced by restricting citation of unpublished opinions may already have vanished with the increased availability of unpublished opinions through on-line services such as Westlaw and LEXIS.\textsuperscript{131} Conscientious judges should know that due to technological advances in the legal field, all of their opinions — "published" and "unpublished" — will be read, analyzed, and catalogued.\textsuperscript{132}

B. UNEQUAL ACCESS?

The argument that better funded attorneys would be at a greater advantage because of resources available to them to compile unpublished opinions is another anachronistic argument. Westlaw and LEXIS have responded to private demand for unpublished opinions by publishing them complete with syllabi and keynotes.\textsuperscript{133} For lawyers unable to afford LEXIS or Westlaw, the opinions are also available on some circuits’ public websites.\textsuperscript{134} In fact, in two years every court of appeals will be required by law to post all of its decisions, including unpublished opinions, on its website.\textsuperscript{135} This increased access to unpublished opinions places legal practitioners on equal footing with regard to access to courts’ opinions.

\textsuperscript{129} Id.
\textsuperscript{130} Id. at 18.
\textsuperscript{131} Id. at 19.
\textsuperscript{132} Id.
\textsuperscript{133} Greenwald, supra note 28, at 1149.
\textsuperscript{134} Id. at 1150 n.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.ca3uscourts.gov; Fourth Circuit at http://www.ca4uscourts.gov; Eighth Circuit at http://www.ca8uscourts.gov.
C. Too Many Precedents?

It is often judges who don’t want to increase the number of published cases and lawyers who want to increase the number.\(^{136}\) Instead of allowing practitioners to cite a recent unpublished opinion with strikingly similar facts, the no-citation rules force practitioners to cite an older case, a case from a distant court, a case lacking similar facts, or a case in which the opinion is not as well written as the factually on-point unpublished case.\(^{137}\) If there is an unpublished opinion addressing similar facts, as there was in Anastasoff, parties should not be forced to reinvent the wheel or to try to persuade the judges in their circuit by using a case from another circuit for persuasive value; instead, parties should be allowed to cite the on-point unpublished opinion from their own circuit. As the Advisory Committee noted in its notes accompanying proposed Rule 32.1:

It is difficult to justify a system under which the “unpublished” opinions of the D.C. Circuit can be cited to the Seventh Circuit, but the “unpublished” opinions of the Seventh Circuit cannot be cited to the Seventh Circuit. And, more broadly, it is difficult to justify a system that permits parties to bring to a court’s attention virtually every written or spoken word in existence except those contained in the court’s own “unpublished” opinions.\(^{138}\)

Circuit Judge Richard A. Posner, former Chief Judge of the Seventh Circuit, is sympathetic to non-publication policies and on balance favors non-publication and no-citation rules.\(^{139}\) Nonetheless, Judge Posner has noted that “despite 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

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\(^{136}\) Greenwald, supra note 28, at 1137.

\(^{137}\) Id.


\(^{139}\) Id.
many precedents but because there are too few on point." He concedes that citation to unpublished opinions would help practitioners when no on-point published case exists.

V. PROHIBITING CITATION TO UNPUBLISHED OPINIONS MAY DENY A PERSON'S DUE PROCESS RIGHTS

In the en banc decision in Anastasoff, Judge Arnold stated that the constitutionality of applying no precedential effect to unpublished opinions remains an open question. This decision will most likely lead to continued constitutional challenges to the rules prohibiting citation of unpublished opinions. To this point, most of the debate has centered on whether judicial power under Article III of the Constitution allows courts of appeals to determine if and when to apply precedential value to unpublished opinions when cited. However, another constitutional challenge lies just under the surface: whether entirely disallowing citation to unpublished opinions constitutes a denial of parties' Fifth Amendment rights to due process of law.

The Due Process Clause of the Fifth Amendment to the United States Constitution requires that no person be deprived "of life, liberty, or property without due process of law." This clause has a substantive and a procedural aspect. Procedural due process guarantees that people who are deprived of life, liberty, or property, are entitled to a reasonable level of judicial or administrative process. The Supreme Court has usually looked to traditional common-law procedures as the standard for procedural due process. Starting in the late nineteenth century, the Supreme Court considered whether removing a deeply rooted common-law judicial procedure, without adequate replacement, violated litigants' procedural due process rights.

141 Id.
142 Anastasoff, 223 F.3d at 899.
143 Wade, supra note 96, at 717.
144 Barnett, supra note 72, at 8.
145 U.S. Const., amend. V.
146 Wade, supra note 96, at 717.
147 Id.
148 Id.
149 Id.
A. **HONDA v. OBERG**

In *Honda v. Oberg*, the Supreme Court reviewed English and early American legal history to conclude that thorough review of punitive-damage awards was a judicial procedure that was deeply rooted in the common law.\(^{150}\) At issue in *Honda* was a provision of the Oregon Constitution prohibiting judicial review of a punitive-damage award "unless the court can affirmatively say there is no evidence to support the verdict."\(^{151}\) Honda argued that his inability to seek full judicial review, in particular review for excessiveness of an adverse verdict, deprived him of procedural due process.\(^{152}\) The Court held that there was a violation of due process when "a party has been deprived of a well-established common-law protection against arbitrary and inaccurate adjudication."\(^{153}\)

Arbitrary adjudication means that the legal process of resolving a dispute is based merely on individual discretion, specifically determined by a judge, rather than by fixed rules, procedures, or law.\(^{154}\) The Framers' original intent was that judicial decisions would become binding precedents and, over time, the number of precedents would accumulate into a large body of law.\(^{155}\) Alexander Hamilton stated that "to avoid arbitrary discretion in the courts, it is indispensable that [the courts] should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."\(^{156}\) As legal scholar Lance Wade points out, applying the *Honda* procedural due process violation theory to the no-citation rules, one could argue that citing a court's prior decisions is also a well-established common-law protection against arbitrary adjudication; therefore, prohibiting citation of these opinions violates due process.\(^{157}\) Wade argues that the history of lawyers citing to all prior judicial decisions is much more "deeply rooted" in common-law procedures than

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151 Id.
152 Wade, *supra* note 96, at 719; *Honda*, 512 U.S. at 430.
153 *Honda*, 512 U.S. at 430.
155 *Anastasoff*, 223 F.3d at 902.
156 Id.
punitive-damage review – the issue examined in *Honda*.\(^{158}\) The *Honda* Court traced the practice of punitive-damage review to the mid-seventeenth century, whereas the practice of citing courts’ earlier decisions dates back to the middle of the thirteenth century.\(^{159}\) The long history of allowing case citation indicates a deeply rooted common-law practice.\(^{160}\) Removing such a procedure is therefore a violation of a person’s rights to procedural due process of law guaranteed under the Fifth Amendment.\(^{161}\)

**B. RICHARD LORITZ’S HABEAS CORPUS APPEAL – DENIAL OF DUE PROCESS?**

The *Loritz* case, noted at the beginning of this article, provides another example of the way the no-citation rules operate to deny a party’s rights to procedural due process.\(^{162}\) In *Loritz v. United States Court of Appeals for the Ninth Circuit*, Loritz brought suit in the District Court for the Southern of California against the Court of Appeals for the Ninth Circuit for issuing the decision in his habeas corpus case as “unpublished.”\(^{163}\) The district court granted the Ninth Circuit’s motion to dismiss on the grounds that Loritz failed to allege injury-in-fact sufficient to establish standing to challenge the constitutionality of the rule allowing the court’s opinion in his case to be “unpublished.”\(^{164}\) On appeal, the Ninth Circuit affirmed the district court’s dismissal.\(^{165}\) The Ninth Circuit held that Loritz’s allegations were speculative and did not involve a personal violation, but rather a violation of others’ rights – the rights of those who may want to cite his case in the future but will be restricted from doing so because it is “unpublished.”\(^{166}\)

*Loritz* takes the procedural due process argument a step beyond the argument articulated in *Honda*.\(^{167}\) Loritz argued that his procedural due process rights were violated because

\(^{158}\) Id. at 723.
\(^{159}\) Id.
\(^{160}\) Id.
\(^{161}\) Id.
\(^{162}\) See *Loritz*, 382 F.3d 990.
\(^{163}\) Appellant’s Opening Brief, 2004 WL 1763145.
\(^{164}\) *Loritz*, 382 F.3d at 992.
\(^{165}\) Id.
\(^{166}\) Id.
\(^{167}\) See Appellant’s Opening Brief, 2004 WL 1763145; see *Honda*, 512 U.S. 415.
his case would have resulted in a different outcome if it had been decided in a published, citable opinion. Loritz declared that “[t]he panel was able to uphold my conviction and create a direct conflict with binding authority” by issuing the opinion as “not for publication.”

The court decided the case by finding that Loritz lacked standing. By so doing, the court disposed of Loritz’s appeal without full consideration of the merits of his claims. Because of this, the issue of whether creating and sustaining a body of “unpublished,” uncitable judicial decisions violates procedural due process remains an unanswered question.

C. TO FOLLOW, OR NOT TO FOLLOW, PRECEDENT

Legal scholars Greenwald and Schwarz assert that “practitioners harbor suspicions that noncitable opinions are used to paper over poorly-reasoned result-driven outcomes.” Greenwald and Schwarz point out that there is something unsettling about rules indicating to litigants that although their cases were decided correctly, the deciding judges do not want to reveal their opinion to their judicial colleagues. In addition, having rules for lawyers that allow them to cite district court opinions, state court opinions, law review articles, and even non-legal materials in their briefs, yet subject them to possible professional discipline if they refer to unpublished appellate court opinions, seems inconsistent. It is difficult to understand why unpublished opinions should be subject to restrictions that do not apply to other sources. These issues raise an important consideration: whether current court no-citation rules are maintaining the reasonable level of judicial and ad-

168 Appellant’s Opening Brief, 2004 WL 1763145.
169 Id.
170 Loritz, 382 F.3d at 992. (Judge Beam’s concurrence asserted that Loritz did, in fact, have standing based on his alleged injury, since his claims were “immediate and particularized” and concerned with his own self-interest.)
171 See Loritz, 382 F.3d 990.
172 Greenwald, supra note 28, at 1135.
173 Id. at 1174.
174 Id.
ministrative processes the Framers intended when drafting the Due Process Clause of the Fifth Amendment.\textsuperscript{176} 

D. UNPUBLISHED CASES: REVERSALS AND OPINIONS WITH CONCURRENCES AND DISSENTS

A study from the mid-1980s found that twenty-four percent of all unpublished opinions were reversals.\textsuperscript{177} The reversal of a case reflects a disagreement about the appropriate legal outcome among judges and serves as a rough indicator of the significance of the legal issue addressed in the opinion.\textsuperscript{178} Further, a significant number of unpublished decisions include a dissenting or concurring opinion.\textsuperscript{179} The inclusion of dissenting and concurring opinions suggests that the issue before the court was not as straightforward as might be expected in a decision deemed to have no precedential value.\textsuperscript{180}

As stated above, due process protects parties from arbitrary and inaccurate adjudication.\textsuperscript{181} When reversals and opinions with concurrences and dissents are issued as unpublished opinions, they are uncitable in some circuits.\textsuperscript{182} Prohibiting practitioners from alerting the court to an existing appellate opinion reversing a lower court opinion or to a case with similar facts to the facts in their case and in which one of three judges on a panel concurred or dissented – meaning the legal issue was not clear-cut – may lead to arbitrary and inaccurate adjudication and may thereby deny a person’s right to due process.

\begin{footnotes}
\item[177] Stienstra, supra note 22, at 5-6.
\item[178] Songer, supra note 26, at 310. (“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.”).
\item[180] Id.
\item[181] Honda, 512 U.S. at 430.
\item[182] Barnett, supra note 79, at 476.
\end{footnotes}
VI. NO-CITATION RULES IN FLUX

There is an urgent need for uniformity in appellate courts regarding the publication of cases, the citation of unpublished opinions, and the precedential value to be applied to an unpublished opinion when cited. Generally, each individual panel of appellate judges makes its own determination about whether an opinion is published. Their decisions are guided by policies maintained by each court of appeals. These diverse rules have been a source of considerable controversy. In the past two years, several circuits have either modified or abolished their no-citation rules. Four circuits still do not allow citation to unpublished opinions under any circumstances.

A. PROPOSED RULE OF APPELLATE PROCEDURE 32.1

The Advisory Committee on Appellate Rules for the Judicial Conference Standing Committee on Rules of Practice and Procedure (Advisory Committee) has proposed Rule 32.1, which would prohibit the federal circuits from imposing a restriction on citation to unpublished opinions. If it becomes law, Rule 32.1 will be the first national rule to attempt to regulate non-precedential opinions.

The Advisory Committee notes that “[s]ome circuits have freely permitted the citation of ‘unpublished’ opinions for their persuasive value, some circuits have disfavored such citation but permitted it in limited circumstances, and some circuits have not permitted such citation under any circumstances.” The purpose of proposed Rule 32.1 is to attempt to address the

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183 Greenwald, supra note 28, at 1174.
184 Velamoor, supra note 50, at 563.
185 Id.
186 Greenwald, supra note 28, at 1137.
188 See supra notes 87-93 and accompanying text.
need for uniformity among the circuits by providing a uniform rule applicable to all the circuit courts.192

Rule 32.1 went through several modifications to reach its current articulation, which reads:

Citation Permitted. No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.193

In May 2004, the eight-member Advisory Committee approved proposed Rule 32.1 by a vote of seven to one, with one abstention.194 The Advisory Committee then recommended adoption of Rule 32.1 to the Judicial Conference.195 At their June 2004 meeting, the Judicial Conference took no action on Proposed Rule 32.1 and referred the proposal back to the Advisory Committee for further study and consideration.196

At the present time, Rule 32.1 is still under consideration by the Advisory Committee.197 If Rule 32.1 makes it out of the Advisory Committee a second time, the Judicial Conference, upon approval, will transmit the proposed rule to the Supreme Court.198 Approval by the Supreme Court and then ultimately by Congress are the final steps in the process of making proposed Rule 32.1 law.199

When the comment period for proposed Rule 32.1 closed on February 16, 2004, the committee had received more than 400 comments.200 Judicial Conference Rules Committee Member Patrick Schiltz notes that no issue has generated more corre-

192 Barnett, supra note 79, at 474 n.8.
193 Proposed Fed. R. App. P. 32.1(a). (The rule also contains a second subsection.)
195 Id.
196 Id.
197 Id.
198 Id.
199 Id.
200 Babcock, supra note 187, at 33.
spondence to the Advisory Committee over the past six years.\textsuperscript{201} Obviously this is a controversial issue and the debate can be expected to continue.\textsuperscript{202}

B. A STEP IN THE RIGHT DIRECTION, BUT NOT ENOUGH

Proposed Rule 32.1 mandates only that all appellate courts permit parties to cite unpublished opinions in their briefs, which most circuits currently allow anyway.\textsuperscript{203} The rule does not make any determination about the level of precedential value courts should apply to unpublished opinions when cited.\textsuperscript{204} By not taking a stand on what precedential value to apply, Rule 32.1 does not go far enough. If courts of appeal are not required to apply a value to a cited unpublished opinion, proposed Rule 32.1 could lead to continued lack of uniformity in how circuits apply the rules of citation to unpublished opinions and may deny justice seekers their right to due process.\textsuperscript{205}

All of the nine circuits that currently allow citation to unpublished opinions include references in their rules to the type of precedential value to be applied when considering an unpublished opinion.\textsuperscript{206} Rule 32.1 is silent on this issue.\textsuperscript{207} The stated purpose for adding Rule 32.1 to the appellate rules is to provide increased uniformity among the circuits.\textsuperscript{208} In its current form, rather than fostering uniformity among the circuits, proposed
Rule 32.1 could easily lead to a continued lack of uniformity. Without a rule dictating the required precedential value to apply to unpublished opinions, circuits that support the use of unpublished opinions will apply at least persuasive value to unpublished opinions, whereas circuits that do not support the use of unpublished opinions will be free to disregard the cited unpublished opinion entirely. Thus, this rule will only lead to increased uniformity if it incorporates a clause describing the level of precedential value all circuits must apply to unpublished opinions when cited.

VII. CONCLUSION

Nine of the thirteen circuits now allow citation of unpublished opinions.\textsuperscript{209} The Fifth Amendment states that "[n]o person shall be deprived of life, liberty, or property without due process of law."\textsuperscript{210} The current practice of allowing citation to unpublished opinions in some circuits and disallowing it in others was not what the founding fathers intended when they drafted the Fifth Amendment; rather, they meant to provide a fair judicial procedure to all people.\textsuperscript{211}

Whether proposed Rule 32.1 takes the next step to becoming law is now in the hands of the Supreme Court. The rule, which mandates that all circuits allow citation to unpublished decisions, takes a step in the right direction by providing uniform ability to cite the appellate courts’ prior decisions. However, the rule falls short by not dictating a precedential value to be applied to unpublished opinions when cited. Not only should all circuits be required to allow citation to unpublished opinions, as Rule 32.1 will provide, but if we hope to establish a more uniform justice system at the appellate level, we can not continue to deprive parties of a well-established common-law protection against arbitrary and inaccurate adjudication.\textsuperscript{212} Perhaps the best solution is to develop a universal appellate procedure rule allowing citation of unpublished opinions for persuasive authority.

\textsuperscript{209} Barnett, \textit{supra} note 79, at 476.
\textsuperscript{210} U.S. Const. amend. V.
\textsuperscript{211} Id.
\textsuperscript{212} Honda, 512 U.S. at 430.
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