

# HONDA MEETS ANASTASOFF: THE PROCEDURAL DUE PROCESS ARGUMENT AGAINST RULES PROHIBITING CITATION TO UNPUBLISHED JUDICIAL DECISIONS

**Abstract:** Last year's Eighth Circuit decision of *Anastasoff v. United States* drew new attention to the much-debated rules limiting citation to unpublished judicial decisions. The scholarly opinion of Chief Judge Richard Arnold sent a shockwave through the bench, bar, and legal academy by ruling that no-citation rules were an unconstitutional expansion of the federal judiciary's Article III powers. Post-*Anastasoff* scholarly commentary has focused on Article III arguments and remolded policy arguments that were made prior to the decision. Little attention has been paid, however, to the way in which no-citation rules impair constitutional rights of individual litigants. This Note traces the historical practice of using prior judicial decisions in arguments to courts, dating back to thirteenth century England. The author then argues that current rules prohibiting the citation of unpublished decisions remove a deeply-rooted common law procedure, and, therefore, deprive litigants of their procedural due process rights.

## INTRODUCTION

The recent Eighth Circuit decision in *Anastasoff v. United States* (hereinafter "*Anastasoff I*") drew new attention to the much-debated rules limiting opinion publication and citation to unpublished decisions.<sup>1</sup> The scholarly decision of highly regarded Chief Judge Richard Arnold<sup>2</sup> sent a shockwave through the bench, bar and legal academy.<sup>3</sup>

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<sup>1</sup> See 223 F.3d 898 (8th Cir. 2000), *vacated as moot en banc*, 235 F.3d 1054 (8th Cir. 2000).

<sup>2</sup> See Tony Mauro, *Stealth Decisions Under Fire*, LEGAL TIMES, Sept. 4, 2000, at 1. ("Part of the instant weight given to the [*Anastasoff I*] decision stems from the credibility of its author. Once on President Bill Clinton's short list for a Supreme Court appointment, Arnold won the prestigious Devitt Award for Distinguished Service to Justice last year and is well-known throughout the federal bench.")

<sup>3</sup> Numerous news articles and editorials discussing *Anastasoff I* quickly appeared. See, e.g., Reynolds Holding, *Judges' Unpublished Opinions Uncovered*, S.F. CHRON., Sept. 24, 2000 (page unavailable); Kevin Livingston, *8th Circuit: Barring Citation of Unpublished Opinion Unconstitutional*, THE LEGAL INTELLIGENCER, Aug. 25, 2000, at 4; Carolyn Magnuson, *Eighth Circuit Declares Citation Ban Unconstitutional*, TRIAL, Jan. 2001, at 88; Tony Mauro, *Judge Ignites Storm over Unpublished Opinions*, FULTON COUNTY DAILY REPORT, Sept. 5, 2000 (page unavailable); Mauro, *supra* note 2, at 1; Roger Parloff, *It's Time to End the Patently Unfair*

Although limited publication and citation rules had already been the subject of frequent commentary and discussion in the legal community, Judge Arnold added a new twist: the practice was unconstitutional.<sup>4</sup>

Prior to *Anastasoff I*, most of the debate surrounding limited publication and no-citation rules was based on theories of judicial policy, precedential development and governmental transparency.<sup>5</sup> Little attention had been given to the constitutional implications of this widespread practice.<sup>6</sup> Judge Arnold, however, now had the attention of the legal community.<sup>7</sup> Legal publications were quickly filled with stories on *Anastasoff I* and its potential local impact.<sup>8</sup> Leading academics and court-watchers predicted Supreme Court review.<sup>9</sup> Judges and litigants across the country began citing to unpublished decisions in spite of

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*Practice of Selective Publication*, THE AMERICAN LAWYER, Oct. 5, 2000, at 15; Evan Shultz, *Gone Hunting: Judge Richard Arnold of the 8th Circuit Has Taken Aim at Unpublished Opinions, But Missed His Mark*, LEGAL TIMES, Sept. 11, 2000, at 78.

<sup>4</sup> See *Anastasoff I*, 223 F.3d at 905. It is worth noting that Judge Arnold foreshadowed the arguments contained in *Anastasoff I* in an article submitted to the *Journal of Appellate Practice*. See Richard Arnold, *Unpublished Opinion: A Comment*, 1 J. APP. PRAC. & PROCESS 219 (1999).

<sup>5</sup> See, e.g., Martha J. Dragich, *Will the Federal Courts of Appeals Perish if they Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat*, 44 AM. U. L. REV. 757 (1995); Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This! Why We Don't Allow Citation to Unpublished Decisions*, CALIFORNIA LAWYER, June 2000, at 43; Boyce Martin, *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177 (1999); William Reynolds & William Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978) (hereinafter "Reynolds & Richmond"); William Reynolds & William Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981); Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vactur*, 30 HARV. C.R.-C.L. L. REV. 109 (1995); see also Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: a Reassessment*, 28 U. MICH. J.L. REFORM 119, 126 n. 39 (1994) (discussing policy arguments for and against practice of limited publication and no-citation rules and citing more than twenty pieces of scholarly commentary on subject).

<sup>6</sup> See David Dunn, Note, *Unreported Decisions in the United States Courts of Appeal*, 63 CORNELL L. REV. 128, 141–45 (1977). To my knowledge, this is the only piece of scholarship specifically questioning the constitutionality of rules prohibiting citation and limiting opinion publication.

<sup>7</sup> See *infra* notes 8–11 and accompanying text.

<sup>8</sup> See, e.g., Eron Berg, *Unpublished Decisions: Routine Cases or Shadow Precedents?*, WASH. STATE BAR NEWS (Dec. 2000); John P. Berger & Chad Oldfather, *The Uncertain Status of Unpublished Opinions*, 57 BENCH & B. MINN. 36 (Dec. 2000); J. Wylie Donald & Pamela Key, *Practicalities and Unpublished Decisions*, N.J. L.J. Dec. 4, 2000 (page unavailable).

<sup>9</sup> See Mauro, *supra* note 2, at 1.

prohibitive local rules.<sup>10</sup> Scholarly articles in legal journals and law reviews quickly appeared.<sup>11</sup> A drumbeat for the abolition of these rules was building.

Then the march toward abolition was slowed. While rehearing the *Anastasoff I* decision en banc, the Eighth Circuit was persuaded by the government's argument that the underlying tax case had become moot.<sup>12</sup> According to Eighth Circuit procedure, the original panel decision—*Anastasoff I*—was thus vacated.<sup>13</sup> Judge Arnold, however, writing for the en banc court, maintained, "[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."<sup>14</sup> Indeed, the constitutionality of similar rules remains an open question throughout the federal judiciary.<sup>15</sup>

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<sup>10</sup> See, e.g., *Mass. Hous. Fin. Agency v. Evora*, No. CIV.A.99-12669-WGY, 2000 WL 1738701, at \*6 n.3 (D. Mass. 2000); *Luciano v. U.S.*, No. 00-CV-1725(FB), 2000 WL 1597771 at \*1 (E.D.N.Y. 2000); *Dwyer v. Kislak Mortg. Corp.*, 13 P.3d 240, 244 (Wash. Ct. App. 2000) (finding litigant's violation of court's rule prohibiting citation to unpublished decision worthy of \$500 sanction). Nowhere was this citation rule more ignored than the Eighth Circuit, where *Anastasoff I* had binding precedential effect. See *U.S. v. Goldman* 228 F.3d 942, 944 (8th Cir. 2000); *Conant v. City of Hibbing*, 131 F. Supp. 2d 1129, 1133 n.2 (D. Minn. 2000); *U.S. v. Carrillo*, 123 F. Supp. 2d 1223, 1247 (D. Colo. 2000); *Snell v. Allianz Life Ins. Co. of North America*, No. Civ. 97-2784 RLE, 2000 WL 1336640 at \*7 n.8 (D. Minn. 2000); *In re Arzt*, 252 B.R. 138, 142-43 (B.A.P. 8th Cir. 2000); *In re Norkus*, 256 B.R. 298, 305 (Bankr. S.D. Iowa 2000).

<sup>11</sup> See Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG 2d 17 (2000); Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71 (2001); Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81 (2000); Recent Case, *Constitutional Law—Article III Judicial Power—Eighth Circuit Holds That Unpublished Opinions Must Be Accorded Precedential Effect—Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), 114 HARV. L. REV. 940 (2001) (hereinafter "Recent Case").

<sup>12</sup> See *Anastasoff v. United States*, 235 F.3d 1054 (8th Cir. 2000) (hereinafter "*Anastasoff II*"). Since the time that *Anastasoff I* was decided, the Third Circuit Court of Appeals reached an opposite conclusion on the underlying tax issue involved in the *Anastasoff I* litigation. See *Weisbart v. United States*, 222 F.3d 93 (3rd Cir. 2000). The Internal Revenue Service adopted an institutional position in accordance with *Weisbart*. See *Anastasoff II*, 235 F.3d at 1054-55. Having adopted this position, the IRS recognized they no longer had a valid claim against Ms. Anastasoff and paid her claim with interest. See *id.* Therefore, at the time of the en banc rehearing, the government was able to argue successfully that there was no longer a dispute requiring judicial resolution. See *id.*

<sup>13</sup> See *id.* at 1056.

<sup>14</sup> *Id.*

<sup>15</sup> See *Schmier v. U.S. Court of Appeals*, No. C-00-4076 VRW, 2001 WL 313583, at \*4 (N.D. Cal. 2001); *Amgen, Inc. v. Hoechst Marion Roussel, Inc.*, 126 F. Supp. 2d 69, 136 (D. Mass. 2001); *MacNeill Eng'g Co. v. Trisport, Ltd.*, 126 F. Supp. 2d 51, 58 (D. Mass. 2001); *Alvarenga-Villalobos v. Reno*, No. C-00-4291 VRW, 2000 WL 1897302 at \*3 (N.D. Cal. 2000); *Carrillo*, 123 F. Supp. 2d at 1247; *Luciano*, 2000 WL 1597771 at \*1.

While the vacatur of *Anastasoff I* no longer makes the decision the force it once was, the debate has been successfully reinvigorated.<sup>16</sup> The continued commentary and judicial action has focused on Article III constitutional arguments and remolded policy arguments that were made pre-*Anastasoff*.<sup>17</sup> Like the earlier scholarly debate, however, new commentary has failed to consider how the rules impair constitutional rights of individual litigants.<sup>18</sup> This Note will focus on the contention that rules which prohibit the citation of unpublished decisions remove a deeply-rooted common law procedure and, therefore, deprive litigants of their procedural due process rights.<sup>19</sup>

An example of how the inability to cite unpublished authority might impair a litigant's procedural due process rights may be illustrative. Consider the following hypothetical.<sup>20</sup> Congress passes a new criminal statute. In an attempt to enforce the new law, the U.S. Attorney charges a defendant for conduct which, although borderline, likely falls within the purview of the statute. It is a close case, the defendant arguing that the legislature did not intend that he be prosecuted for the offenses with which he is charged. The court, however, disagrees with defendant's contention and allows the trial to proceed. Defendant is convicted and sentenced to jail. Six months pass and defendant appeals. During the time in which his appeal is being prepared, the federal circuit court of appeals for his jurisdiction decides a pair of cases relating to the statute. The first case, published in *Federal Reporter, Third Edition*, is quite similar to his own, and, as in his case, the applicability of the statute is upheld. However, in the second case, which is found in the court clerk's office, a different panel of the court interprets the applicability of the new statute directly opposite to the first case.

A young associate working for the defendant finds the latter case and announces the good news to the partner for whom she is work-

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<sup>16</sup> See *supra* notes 8-11 and accompanying text.

<sup>17</sup> See Price, *supra* note 11, at 81; Recent Case, *supra* note 11, at 940.

<sup>18</sup> See Price, *supra* note 11, at 81; Recent Case, *supra* note 11, at 940.

<sup>19</sup> See *supra* notes 235-332 and accompanying text. For the purposes of this Note, I am focusing on the no-citation rules of the Federal Circuit Courts of Appeals. I do this primarily because of the wide and varying scope of state court rules. However, the topics and arguments discussed in this Note are likely as applicable to state courts as they are to federal courts. Many state court no-citation rules, therefore, also likely violate procedural due process.

<sup>20</sup> This hypothetical is largely a fiction of my imagination. However, the case of *Goodlet v. Commonwealth*, introduced me to the potential implications of no-citation rules in the criminal context and evidences the plausibility of this hypothetical. See 825 S.W.2d 290 (Ky. Ct. App. 1992).

ing. Her excitement turns to dejection, however, as the partner informs her that although the holding and reasoning of the unpublished opinion would be quite helpful, under circuit rules it may not be cited in the brief that will be submitted to the court. The dejected associate is baffled: "Do you mean one person goes to jail for an action for which another goes free? And we can't even make the court aware of this inequity by citing the case in our brief?"

One can imagine countless variations of this hypothetical in which litigants are deprived of life, liberty or property without the ability to cite to favorable unpublished decisions. They could appear in both the civil and criminal context. The rules could inhibit corporations and individuals, plaintiffs and defendants.

Prior to the 1970s, litigants were never deprived of the ability to cite to cases of any kind—published or unpublished.<sup>21</sup> It was not until the enactment of no-citation rules in the 1970s that citation prohibitions took effect.<sup>22</sup> This Note argues that by removing a litigant's ability to cite to previously decided cases, many Federal Circuit Courts of Appeal violate procedural due process.<sup>23</sup>

Section I of this Note will review the historical practice of citation to judicial decisions, going back more than seven hundred years.<sup>24</sup> This section will detail the practice of citing to previous judicial decisions in pre-American English law and will then show how the English practice was adopted by early American courts and continued until the 1970s.<sup>25</sup> Section II will focus on the reasons precipitating the citation bans and the circumstances surrounding their enactment.<sup>26</sup> This section will also discuss cases that have challenged the constitutionality of no-citation rules.<sup>27</sup> Section III will discuss *Honda Motor Co. v. Oberg*, which found an abrogation of the traditional common law procedure for review of punitive damages to be violative of procedural due process.<sup>28</sup> Finally, Section IV argues by analogy that removal of the deeply-rooted practice allowing citation to prior cases, like the removal of the deeply-rooted common law procedure in *Honda*, violates procedural due process.<sup>29</sup>

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<sup>21</sup> See *infra* notes 30–111 and accompanying text.

<sup>22</sup> See *infra* notes 112–141 and accompanying text.

<sup>23</sup> See *infra* notes 235–332 and accompanying text.

<sup>24</sup> See *infra* notes 30–111 and accompanying text.

<sup>25</sup> See *infra* notes 30–111 and accompanying text.

<sup>26</sup> See *infra* notes 112–141 and accompanying text.

<sup>27</sup> See *infra* notes 142–187 and accompanying text.

<sup>28</sup> See 512 U.S. 415 (1994); *infra* notes 188–235 and accompanying text.

<sup>29</sup> See *infra* notes 235–332 and accompanying text.

## I. THE LONG HISTORY OF CITING PRIOR JUDICIAL DECISIONS

A. *Pre-American English Practice*

Relying upon the holdings and reasoning of previous judicial decisions when arguing to the court has a long history in English law.<sup>30</sup> Past cases have been urged on the court for centuries, even during times when cases appeared only in loosely collected "Year Books" and not law reports.<sup>31</sup> At no time prior to the American Revolution did English courts prevent litigants from citing or referencing previous judicial decisions in their arguments to courts.<sup>32</sup>

Beginning in the thirteenth century and continuing into the middle of the fifteenth century, the common law of England was recorded in *Year Books*.<sup>33</sup> The origin and precise purpose of early *Year Books* are uncertain.<sup>34</sup> One theory is that *Year-Books* began when lawyers annotated their "books of procedure"—the books they used to guide them in the pleading of their cases—to keep them up to date as new decisions were rendered.<sup>35</sup> Another theory is that the *Year Books* were kept by law students and junior lawyers who were taking notes in furtherance of their desire to learn pleading and procedure.<sup>36</sup> Regardless, it is clear that the *Year Books* were unofficial, not intended to be comprehensive records of the common law, and not meant to establish binding precedents.<sup>37</sup> Cases notated in the *Year Books*, however, were frequently referenced by the bench and bar in argument of subsequent cases:

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<sup>30</sup> Arguing legal reasoning and judicial conclusions from past cases is, of course, a vital component of the modern doctrine of stare decisis. See Price, *supra* note 12, at 94-99; Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595-602 (1987). For the purposes of this article, however, whether past cases are binding on the court is irrelevant. The argument set forth in this Note focuses on the ability of litigants to cite past judicial decisions for any purpose, binding or persuasive.

<sup>31</sup> See *infra* notes 33-56 and accompanying text.

<sup>32</sup> See *infra* notes 33-56 and accompanying text.

<sup>33</sup> See WALKER & WALKER'S ENGLISH LEGAL SYSTEM 82 (Richard Ward ed., 8th ed. 1998); PERCY H. WINFIELD, THE CHIEF SOURCES OF ENGLISH LEGAL HISTORY 145-59 (1925).

<sup>34</sup> See WALKER & WALKER'S, *supra* note 33, at 82.

<sup>35</sup> See T.F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 268 (5th ed. 1956).

<sup>36</sup> See WALKER & WALKER'S, *supra* note 33, at 82; Harold J. Berman & Charles Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 438, 445 (1996); see also J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 205 (3d ed. 1990).

<sup>37</sup> See Berman & Reid, *supra* note 36, at 445; PLUCKNETT, *supra* note 35, at 344.

There are quite frequent cases in the Year Books where we find judges or counsel mentioning previous decisions. They seem generally to quote from memory; sometimes they give us the names of the parties, but not always. . . . the citation of a case in point may perhaps be persuasive enough for counsel to think it worth while, but it is certainly not in the least degree binding.<sup>38</sup>

In the middle of the fifteenth century, the English legal system ceased using *Year Books* and began to rely on private legal reporters to document common law developments in law reports.<sup>39</sup> Initially these early law reports were quite similar in nature and quality to the existing *Year Books*, but soon the quality improved as the reporters became more detailed and comprehensive in their treatment of the arguments of counsel and judgments of the court.<sup>40</sup> A noteworthy example of an early law report is the famous work *Coke's Reports*, penned by Sir Edward Coke, which became so dominant in the English legal community that it became known simply as "the Report"—a distinction that remains true today.<sup>41</sup> These early law reports, although not official, were the primary source of the common law and contained cases and arguments of law commonly cited by advocates in arguments to the court.<sup>42</sup> In fact, it was at the time Coke wrote his reports [1572–1616] that citation to precedents became particularly common.<sup>43</sup>

Between 1751 and 1772, *Burrow's Reports* contained the cases of the Court of the Kings Bench.<sup>44</sup> These reports are considered to be

<sup>38</sup> PLUCKNETT, *supra* note 35, at 344–45; see CARLETON K. ALLEN, LAW IN THE MAKING 181–82 (5th ed. 1951) ("[T]here is respectable evidence that at least as early as the last quarter of the thirteenth century the practice of citation [of past cases] was frequent in the legal profession . . . [Year Book] [d]ecisions are cited often enough to show that Bench and Bar consider them a relevant part of argument."); WALKER & WALKER's, *supra* note 33, at 82 (noting that in 1310 and 1312, judges deciding cases relied on decisions ten and twenty five years old respectively); see also WINFIELD, *supra* note 33, at 145–54. In fact, the name "Year Book" itself derives from the a method of citation—by regnal year—to the books used by bench and bar. See *id.* The value of *Year Book* cases is evidenced by the fact that they are still cited in modern English courts. See PLUCKNETT, *supra* note 35, at 345.

<sup>39</sup> See BERMAN & REID, *supra* note 36, at 445; WARD, *supra* note 33, at 82.

<sup>40</sup> See WALKER & WALKER's, *supra* note 33, at 83.

<sup>41</sup> See BERMAN & REID, *supra* note 36, at 447; DANIEL R. COQUILLETTE, THE ANGLO-AMERICAN LEGAL HERITAGE 314 (1999).

<sup>42</sup> See PLUCKNETT, *supra* note 35, at 349; WALKER & WALKER's, *supra* note 33, at 83.

<sup>43</sup> See BERMAN & REID, *supra* note 36, at 44; PLUCKNETT, *supra* note 35, at 349; WINFIELD, *supra* note 33, at 154.

<sup>44</sup> See WALKER & WALKER's, *supra* note 33, at 83.

the first in the modern pattern, including headnotes and clearly separated sections for the judgment of the court and the arguments of counsel.<sup>45</sup> Not contemporaneous with the decisions, *Burrow's Reports* were soon followed by *Term Reports*, covering the years 1785–1800, which were contemporaneous.<sup>46</sup> All of these reporters, though unofficial, were citable authority in their day, and remain so to the present.<sup>47</sup>

Law reports dichotomized in England during the late eighteenth century into “authorized” and “unauthorized” reports.<sup>48</sup> Judges gave authorized reporters free access to official court papers, thus allowing them to produce a more comprehensive report of judicial proceedings.<sup>49</sup> Some judges would also review the reports developed by authorized reporters and make edits prior to their publication.<sup>50</sup>

Along with the distinction of being an authorized report came the status of exclusive citation—the privilege that only decisions therein may be cited to the court.<sup>51</sup> This distinction was hollow, however, because if a lawyer wished to argue to the court a decision not appearing in an authorized report, he could vouch for the case appearing in an unauthorized or unpublished report.<sup>52</sup> Once counsel attested to the case, the court would automatically accept its validity.<sup>53</sup> This practice existed long before the creation of authorized reports, dating back to the earliest *Year Book* decisions.<sup>54</sup> Thus, although authorized reports of the late eighteenth century were given citation preference by the courts, there was no class of judicial decisions that could not be cited in arguments to the court.<sup>55</sup>

In summary: (1) English litigants have been able to cite to the reasoning or holding of any case previously decided by an English court since the thirteenth century; (2) the practice of arguing previous cases to the court existed long before there were legal reporters collecting and memorializing judicial decisions; (3) citation to all prior decisions continued after reporters began documenting cases in

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<sup>45</sup> See *id.*

<sup>46</sup> See *id.*

<sup>47</sup> See *id.*

<sup>48</sup> See XV W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 248.

<sup>49</sup> See XIII *id.* at 425.

<sup>50</sup> See *id.*

<sup>51</sup> See XV *id.* at 248.

<sup>52</sup> See *id.*

<sup>53</sup> See XV W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 248.

<sup>54</sup> See *id.*

<sup>55</sup> See *id.*



law reports; and (4) if a particular case was not included in the report, a lawyer could vouch for the case and its reasoning and holding could then be used in arguments to the court.<sup>56</sup>

B. *Citation to Previously Decided Judicial Decisions in America from Colonial Times to the Late Twentieth Century*

No published law reports existed in America during the Colonial period.<sup>57</sup> Moreover, early American lawyers rarely relied upon the English reports for sources of law.<sup>58</sup> Rather, the early colonists adopted simplistic legal codes for the administration of justice.<sup>59</sup> However, as the bench and bar began to grow in the Colonies and as the English government more closely monitored the Colonies' actions, English common law was more readily received.<sup>60</sup> Blackstone's *Commentaries* became prevalent in Colonial law practice and the importation of *Burrow's Reports* from England illustrated the value of an organized reporting system.<sup>61</sup>

In 1761, a few colonial lawyers began producing their own law reports.<sup>62</sup> Between that time and the Revolution, at least three members of the bar—Josiah Quincy, Jr., Ephraim Kirby, and Francis Hopkinson—kept reports, though the reports were not published until much later.<sup>63</sup> Some colonial courts also kept their own state reports with cases going back as early as 1658.<sup>64</sup> Like the reports of Quincy, Kirby, and Hopkinson, the state reports also were not published until long after the Revolution.<sup>65</sup> Unaware of these reports, most pre-Revolution colonial lawyers wishing to argue past judicial decisions to

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<sup>56</sup> See *supra* notes 30–55 and accompanying text.

<sup>57</sup> See FREDERICK C. HICKS, *MATERIALS AND METHODS OF LEGAL RESEARCH* 130 (3d ed. 1942); Daniel R. Coquillette, *First Flower—The Earliest Law Reports and the Extraordinary Josiah Quincy Jr.*, 30 *SUFFOLK U. L. REV.* 1, n.3 (1996).

<sup>58</sup> See HICKS, *supra* note 57, at 130 (noting that of the approximately 150 English law reports existing at the time, only about half had been imported to the colonies, and a mere thirty were commonly used); MORTON J. HOROWITZ, *TRANSFORMATION OF AMERICAN LAW, 1780–1860* 4–6 (1977).

<sup>59</sup> See HICKS, *supra* note 57, at 130; HOROWITZ, *supra* note 58, at 4–6.

<sup>60</sup> See HICKS, *supra* note 57, at 130.

<sup>61</sup> See *id.*; DANIEL BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 3–8 (1941).

<sup>62</sup> See Coquillette, *supra* note 57, at 1 n.3.

<sup>63</sup> See *id.* The reports of Kirby and Hopkinson were both published shortly after the revolution in 1789. See *id.* However, Quincy's were not published until they were later discovered in 1865. See *id.*

<sup>64</sup> See HICKS, *supra* note 57, at 132. The first of these state reports was published in 1790, but most remained unpublished until the 1800s.

<sup>65</sup> See *id.*

courts relied on cases included in the English law commentaries and law reports.<sup>66</sup> These lawyers also cited to early cases of the colonial courts, relying on their memories to recall the reasoning or holding of prior judicial decisions.<sup>67</sup>

Following the Revolution, no official reporting system existed for the early American courts, yet American litigants wished to argue the holdings of those courts in subsequent cases.<sup>68</sup> Many lawyers continued to cite to English cases decided prior to 1776, but felt that because America was newly independent, its courts should not rely upon English cases decided after 1776.<sup>69</sup> Courts agreed, and, indeed, after the Revolution, states such as New Jersey, Kentucky, Pennsylvania, and Delaware temporarily prohibited citation to English cases decided after July 4, 1776.<sup>70</sup>

Lacking American law reports containing precedent, post-independence lawyers began keeping their own reports of cases.<sup>71</sup> These personal reports or notebooks were comparable to the somewhat haphazardly collected *Year Books* of fourteenth and fifteenth century England and contained only the personal recollections of the individual attorneys.<sup>72</sup> The lack of a formal reporting system did not, however, prevent litigants from using the reasoning and conclusions of early American cases when arguing to the court.<sup>73</sup> Lawyers were allowed to cite to legal principles from prior decisions without documentation, even if the decisions were only in the memory of the lawyers or in their personal memoranda.<sup>74</sup>

A more organized and comprehensive reporting system soon developed as private reporters began publishing law reports.<sup>75</sup> Between 1789 and 1803, sixteen different private reporters began publishing

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<sup>66</sup> See LEGAL PAPERS OF JOHN ADAMS (L. Kiniviu Wroth & Hiller B. Zobel eds., 1965); BOORSTIN, *supra* note 61, at 3-8.

<sup>67</sup> See LEGAL PAPERS, *supra* note 66, at L; SUSAN W. BRENNER, PRECEDENT INFLATION 83 (1992); ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 38 (1990).

<sup>68</sup> See BRENNER, *supra* note 67, at 83-84; HICKS, *supra* note 57, at 132.

<sup>69</sup> See HICKS, *supra* note 57, at 132.

<sup>70</sup> ELIZABETH GASPAR BROWN, BRITISH STATUTES IN THE UNITED STATES: 1776-1836, at 41 (1964); BERNARD SCHWARTZ, THE LAW IN AMERICA 11 (1974).

<sup>71</sup> See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 282 (1973); HICKS, *supra* note 57, at 133.

<sup>72</sup> See FRIEDMAN, *supra* note 71, at 282; HICKS, *supra* note 57, at 133.

<sup>73</sup> See PETER KARSTEN, HEART V. HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA 28-32 (1997); SURRENCY, *supra* note 67, at 38.

<sup>74</sup> See KARSTEN, *supra* note 73, at 28-32; Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 37-38 (1959); SURRENCY, *supra* note 67, at 38.

<sup>75</sup> See HICKS, *supra* note 57, at 135; SURRENCY, *supra* note 67, at 39.

law reports in eight different states.<sup>76</sup> All of these reports were unofficial.<sup>77</sup> However, because of the high regard in which the reporters—including luminaries such as Chipman, Root and Kirby—were held, the reports were universally accepted as authentic.<sup>78</sup> Moreover, cases included in these reports were extensively relied upon and frequently cited by lawyers and judges of this period.<sup>79</sup>

In 1803, the reporting system of the American courts progressed further as states began publishing official reports.<sup>80</sup> Many states passed statutes requiring their highest courts to appoint reporters to monitor cases and report those considered important to the development of the common law.<sup>81</sup> In addition to governmental efforts, unofficial reports continued to be privately produced.<sup>82</sup> The combination of unofficial and official reports meant most states had a workable system of law reports in place between 1803 and 1834.<sup>83</sup> During this time, lawyers were free to cite either the official or unofficial reports when arguing past cases to the court.<sup>84</sup> Additionally, lawyers relied on cases not appearing in reports, instead using their personal notes or those of another attorney for the points they wished to argue.<sup>85</sup>

From 1830 to 1871, official and unofficial law reports were published on a state-by-state basis with little coordination or sense of a broader system.<sup>86</sup> During this period, however, litigation over the copyright of officially produced judicial opinions ensued, creating risk for unofficial reporters who were increasingly reliant upon the transcripts produced by official reporters.<sup>87</sup> In *Wheaton v. Peters*, the United States Supreme Court ruled that although official reporters may copyright headnotes and other independently produced commentary, anyone had the right to publish portions of the judicial opinions

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<sup>76</sup> See HICKS, *supra* note 57, at 135; SURRENCY, *supra* note 67, at 39.

<sup>77</sup> See HICKS, *supra* note 57, at 135; SURRENCY, *supra* note 67, at 39.

<sup>78</sup> See FRANCIS AUMANN, *THE CHANGING AMERICAN LEGAL SYSTEM* 74-76 (1969); HICKS, *supra* note 57, at 135; SURRENCY, *supra* note 67, at 39.

<sup>79</sup> See HICKS, *supra* note 57, at 135; SURRENCY, *supra* note 67, at 39.

<sup>80</sup> See AUMANN, *supra* note 78, at 77; HICKS, *supra* note 57, at 136.

<sup>81</sup> See HICKS, *supra* note 57, at 136-37; Byron D. Cooper, *Anglo-American Legal Citation: Historical Developments and Library Implications*, 75 *LAW LIBR. J.* 3, 18 (1982).

<sup>82</sup> See HICKS, *supra* note 57, at 136-37.

<sup>83</sup> See *id.* at 138.

<sup>84</sup> See *id.*; JAMES RAM, *SCIENCE OF LEGAL JUDGMENT* 28-29 (1834).

<sup>85</sup> See RAM, *supra* note 84, at 28-29 ("A manuscript note of a case is authority. It may be more full, or accurate, than a printed report of the same case. The existence of such manuscript may be little known. When cited by a party in a cause, it may be . . . an authority precisely applicable.") (internal citations and quotation omitted).

<sup>86</sup> See HICKS, *supra* note 57, at 138.

<sup>87</sup> See *id.*

themselves.<sup>88</sup> As a result of this decision, official reporters faced profit pressure from insurgent unofficial reporters, causing many courts overseeing the official reporters to insist that only official law reports be cited in arguments to their courts.<sup>89</sup>

The courts' favor for official reports, however, created only preference, not preclusion.<sup>90</sup> If a decided case was included in both the official and unofficial reports, the courts insisted on citation to the official report.<sup>91</sup> If the case did not appear in the official report, however, lawyers were free to cite to the unofficial report and argue the decision to the court.<sup>92</sup> Therefore, although some courts created a presumption favoring citation to official reports, this preference did not create a class of uncitable cases.<sup>93</sup>

In 1871, legal reporters became more systematic and assumed a style and organization that continues to be used today.<sup>94</sup> These improved reports included indexes, digests, and timely publication of cases soon after the rendering of a decision.<sup>95</sup> A nationwide system of reporting in this new format began to develop in 1876, including reports covering cases on a regional basis.<sup>96</sup> This system, known as the National Reporter System, was fueled by the aggressive sales efforts of John West and his West Publishing Company, which remains intact today.<sup>97</sup>

### C. Law Reports and Case Citation in the Lower Federal Courts

In 1875, the federal district courts and circuit courts<sup>98</sup> assumed jurisdiction over all federal matters described in the Constitution.<sup>99</sup> Prior to the expansion of federal jurisdiction, the role of the federal

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<sup>88</sup> See *id.*; 33 U.S. 591 (1834).

<sup>89</sup> See HICKS, *supra* note 57, at 138.

<sup>90</sup> See *id.* at 139, 143.

<sup>91</sup> See *id.*

<sup>92</sup> See *id.*

<sup>93</sup> See *id.*; RAM, *supra* note 84, at 28-29.

<sup>94</sup> See HICKS, *supra* note 57, at 140.

<sup>95</sup> See *id.*

<sup>96</sup> See HICKS, *supra* note 57, at 145-46; SURRENCY, *supra* note 67, at 49.

<sup>97</sup> See BRENNER, *supra* note 67, at 86-88; HICKS, *supra* note 57, at 145-46; SURRENCY, *supra* note 67, at 49.

<sup>98</sup> The Federal Circuit Courts of 1875 should not be confused with today's circuit courts of appeal. See SURRENCY, *supra* note 67, at 61. The circuit courts, like today's district courts, were primarily federal trial courts. See *id.* Although the circuit courts also heard occasional appeals of district court decisions, this was not their primary duty. See *id.* Circuit courts were abolished in 1912. See *id.*

<sup>99</sup> See HICKS, *supra* note 57, at 140-41; SURRENCY, *supra* note 67, at 61.

courts was circumscribed, focusing primarily on cases of admiralty.<sup>100</sup> Likely because of the limited importance and jurisdiction of the early federal courts, their judicial opinions were not widely circulated and were found only in practitioners' notebooks and a few private law reports.<sup>101</sup> Lawyers involved in litigation in those courts cited to both the published private law reports and their unpublished notebooks when arguing past judicial decisions to the court.<sup>102</sup>

Beginning in 1880, West Publishing Company began publishing the *Federal Reporter*.<sup>103</sup> This report was constructed in modern form—including headnotes, indexes and digests—and initially included the decisions of the federal district and circuit courts.<sup>104</sup> The *Federal Reporter's* coverage then expanded to include the Federal Circuit Courts Of Appeal at their inception in 1891.<sup>105</sup> Years later, in 1932, the reports of the decisions of the federal courts were divided, with the decisions of the district courts being published in the *Federal Supplement* and the decisions of the circuit courts of appeal continuing to be published in the *Federal Reporter*.<sup>106</sup>

West Publishing Company took a so-called "blanket approach" to its publication of the *Federal Reporter* by comprehensively publishing all decisions, written and oral, issued by the circuit courts of appeal.<sup>107</sup> Because *all* judicial decisions were included in the *Federal Reporter*, there was never a concern over whether litigants were citing "published" or "unpublished," "authorized" or "unauthorized" judicial decisions to the court.<sup>108</sup> All of the decisions that needed to be cited

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<sup>100</sup> See SURRENCY, *supra* note 67, at 61.

<sup>101</sup> See *id.*; HICKS, *supra* note 57, at 142.

<sup>102</sup> See HICKS, *supra* note 57, at 132-37; SURRENCY, *supra* note 67, at 61.

<sup>103</sup> HICKS, *supra* note 57, at 141-42.

<sup>104</sup> See *id.*

<sup>105</sup> See *id.*; 47 FEDERAL REPORTER i (1892) (the first edition of the *Federal Reporter* to include the Federal Circuit Courts Of Appeals).

<sup>106</sup> See *id.*

<sup>107</sup> See RICHARD A. POSNER, FEDERAL COURTS 163 (1996); Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 Cal. L. Rev. 15, 21 (1987); Thomas A. Woxland, "Forever Associated with the Practice of Law": The Early Years of the West Publishing Company, 5 LEGAL REF. SERVICES Q. 115, 123-24 (Spring 1985); Thomas J. Young Jr., *A Look at American Law Reporting in the 19th Century*, 68 LAW LIBR. J. 294, 302-03 (1975); see also 1 FEDERAL REPORTER 3 (1880) (the preface to the first *Federal Reporter* states: "The Federal Reporter is devoted exclusively to the prompt and complete publication of the judicial opinions.") (emphasis added).

<sup>108</sup> See POSNER, *supra* note 107, at 163; Berring, *supra* note 107, at 15, 21; Woxland, *supra* note 107, at 123-24; Young, *supra* note 107, at 302-03.

were included in the published *Federal Reporter*.<sup>109</sup> Therefore, citation limitations, preferences, or prohibitions played no role at the inception of the Federal Circuit Courts of Appeal.<sup>110</sup> It was not until later, when court rules allowed unpublished decisions and prohibited or limited their citation that uncitable cases starting appearing in the circuit courts of appeal.<sup>111</sup>

## II. ABANDONMENT OF THE COMMON LAW PRACTICE OF ALLOWING CITATION TO ALL PRIOR JUDICIAL DECISIONS

### A. *The Process and Policies Behind the Abrogation*

In the 1950s and 1960s, the Federal Circuit Courts of Appeal were faced with a crisis.<sup>112</sup> The number of cases they were called upon to decide was rising dramatically without corresponding increases in the number of judges or judicial staff.<sup>113</sup> The added burden created severe case backlogs, often meaning substantial delays in the time it took to render and issue judicial decisions.<sup>114</sup> The increasing caseload also meant that the sheer volume of precedent was becoming unmanageably large.<sup>115</sup> The legal community generally, and the judiciary particularly, feared that as court decisions filled more and more law reports, it would become increasingly difficult for judges and lawyers to locate the appropriate decisions to serve as precedents for their current cases.<sup>116</sup> Additionally, commentators thought it would be almost impossible for lawyers, judges, or law professors to remain current on the state of the law, as it was practicable to monitor only a bare minimum of judicial decisions.<sup>117</sup>

The Judicial Conference of the United States responded to the rising caseloads and burgeoning law reports by issuing a general recommendation at their 1964 meeting that judges publish only those

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<sup>109</sup> See POSNER, *supra* note 107, at 163; Berring, *supra* note 107, at 15, 21; Woxland, *supra* note 107, at 123-24; Young, *supra* note 107, at 302-03; see also FEDERAL REPORTER, *supra* note 107, at 3.

<sup>110</sup> See Berring, *supra* note 107, at 15, 21; Woxland, *supra* note 107, at 123-24; Young, *supra* note 107, at 302-03.

<sup>111</sup> See *infra* notes 112-141 and accompanying text.

<sup>112</sup> See DRAGICH, *supra* note 5, at 761; REYNOLDS & RICHMAN, *supra* note 5, at 1167-68.

<sup>113</sup> See REYNOLDS & RICHMAN, *supra* note 5, at 1167-68.

<sup>114</sup> See *id.*

<sup>115</sup> See *id.* at 1169-70; see generally Leah F. Chanin, *A Survey of the Writing and Publication of Opinions in Federal and State Appellate Courts*, 67 LAW LIBR. J. 362 (1974).

<sup>116</sup> See REYNOLDS & RICHMAN, *supra* note 5, at 1169-70.

<sup>117</sup> See *id.* at 1169.

opinions "of general precedential value."<sup>118</sup> In reaction, the Advisory Council for Appellate Justice ("ACAP"), a group comprised of both federal and state appeals court judges and administrators, issued a report urging appellate courts to adopt rules that would reduce the number of published appellate opinions.<sup>119</sup> The ACAP urged consideration of the following criteria when deciding whether to publish an opinion: (1) whether the decision created a new rule of law or altered an existing one; (2) whether the decision involved a legal issue of ongoing public interest; (3) whether the decision criticized existing law; or (4) whether the decision resolved a conflict of authority.<sup>120</sup> If an opinion met one of these criteria, it was to be published; if not, the decision was to be designated "not for publication."<sup>121</sup> Since the issuance of the ACAP report, all of the federal circuit courts of appeal have enacted limited publication rules.<sup>122</sup>

Coupled with limited publication rules, the circuit courts of appeal also enacted "no-citation rules," which limited the ability of litigants to cite to unpublished judicial decisions.<sup>123</sup> The citation limitations, which were also recommended by the ACAP, were viewed as a necessary companion to the limited publication rule for two reasons.<sup>124</sup> First, the unpublished opinions were meant solely for the par-

<sup>118</sup> 1964 REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11.

<sup>119</sup> ADVISORY COUNCIL FOR APPELLATE JUSTICE, COMMITTEE ON USE OF APPELLATE COURT ENERGIES, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS 1 (1973); see also MARTINEAU, *supra* note 5, at 122 (stating that this was a joint effort of the state and federal courts).

<sup>120</sup> See ADVISORY COUNCIL, *supra* note 119, at 15-17.

<sup>121</sup> See *id.* In current practice, the writing judge typically makes the decision regarding publication. See Jerome I. Braum, *Eighth Circuit Decision Intensifies Debate Over Publication and Citation of Appellate Opinions*, 84 JUDICATURE 90 (2000) (stating that in practice if one judge on panel wants an opinion published, other judges defer); Arnold, *supra* note 4, at 221 (stating that in practice, Eighth Circuit publication decisions are made by the writing judge).

<sup>122</sup> See D.C. CIR. R. 28(c); FED. CIR. R. 47.6; FIRST CIR. R. 36 (b) (2) (F); SECOND CIR. R. 0.23; THIRD CIR. R. IOP 5.8 & 6.2; FOURTH CIR. R. 36(c); FIFTH CIR. R. 47.5.4; SIXTH CIR. R. 28(g); SEVENTH CIR. R. 53(b) (2) (iv) & 53(e); EIGHTH CIR. R. 28(a) (i); NINTH CIR. R. 36-3 (b) (iii); TENTH CIR. R. 36.3(B) (1) & (2); ELEVENTH CIR. R. 36-2; see also Berg, *supra* note 8, (page unavailable) (finding that most state appellate courts also enacted limited publication and no-citation practices).

<sup>123</sup> See Martin, *supra* note 5, at 177; see also D.C. CIR. R. 28(c); FED. CIR. R. 47.6; FIRST CIR. R. 36 (b) (2) (F); SECOND CIR. R. 0.23; THIRD CIR. R. IOP 5.8 & 6.2; FOURTH CIR. R. 36(c); FIFTH CIR. R. 47.5.4; SIXTH CIR. R. 28(g); SEVENTH CIR. R. 53(b) (2) (iv) & 53(e); EIGHTH CIR. R. 28(a) (i); NINTH CIR. R. 36-3 (b) (iii); TENTH CIR. R. 36.3(B) (1) & (2); ELEVENTH CIR. R. 36-2.

<sup>124</sup> See Martineau, *supra* note 5, at 125-26; Reynolds & Richman, *supra* note 5, at 1179, 1185-87.

ties to a particular case.<sup>125</sup> By virtue of the opinion's unpublished status, the case created no new law contributing to common law development and thus was not worthy of citation.<sup>126</sup> Second, and more importantly, because the unpublished decisions were only meant for the parties to the case, the reasoning and writing in them was not of the same quality as those widely-circulated opinions that were designated for publication.<sup>127</sup> With no-citation rules, judges could be comfortable knowing that their lower-quality unpublished decisions would only be relied upon by the parties to the case, and could thus save time and judicial resources by performing a less comprehensive survey and explanation of the law than that which would typically accompany a published decision.<sup>128</sup> One judge noted that in comparison to the preparation of a published decision, "my clerks and I spend about half as much time working on the average unpublished decision."<sup>129</sup> Judges feared that if their decisions, in spite of their unpublished status, could be cited in subsequent cases, they would pay more attention to the quality of the reasoning and writing in the opinions and mitigate the time-savings associated with the opinion's unpublished status.<sup>130</sup>

Federal circuit courts of appeal rules limiting or prohibiting the citation of unpublished decisions have taken various forms.<sup>131</sup> Today, the majority of the rules prohibit all citation to unpublished decisions, except in cases where the citation is made to support a claim of *res judicata*, collateral estoppel, or law of the case.<sup>132</sup> The First Circuit Court of Appeals rule, for example, states that: "[u]npublished opinions may be cited only in related cases. Only published opinions may

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<sup>125</sup> See Martineau, *supra* note 5, at 125-26; Reynolds & Richman, *supra* note 5, at 1186.

<sup>126</sup> See ADVISORY COUNCIL, *supra* note 119, at 15-17.

<sup>127</sup> See REYNOLDS & RICHMAN, *supra* note 5, at 1186.

<sup>128</sup> See *id.*; MARTIN, *supra* note 5, at 193-94.

<sup>129</sup> See MARTIN, *supra* note 5, at 190.

<sup>130</sup> See MARTIN, *supra* note 5, at 193-94; REYNOLDS & RICHMAN, *supra* note 5, at 1186. *But cf.* Merritt & Brudney, *supra* note 11, at 114 (finding that those circuit courts of appeal that allow for persuasive citation of unpublished judicial decisions saw a decrease in publication rates, meaning that judges saved time and judicial resources by preparing fewer published opinions).

<sup>131</sup> See D.C. CIR. R. 28(c); FED. CIR. R. 47.6; FIRST CIR. R. 36 (b) (2) (F); SECOND CIR. R. 0.23; THIRD CIR. R. IOP 5.8 & 6.2; FOURTH CIR. R. 36(c); FIFTH CIR. R. 47.5.4; SIXTH CIR. R. 28(g); SEVENTH CIR. R. 53(b) (2) (iv) & 53(e); EIGHTH CIR. R. 28(a) (i); NINTH CIR. R. 36-3 (b) (iii); TENTH CIR. R. 36.3(B) (1) & (2); ELEVENTH CIR. R. 36-2.

<sup>132</sup> See D.C. CIR. R. 28(c); FED. CIR. R. 47.6; FIRST CIR. R. 36 (b) (2) (F); SECOND CIR. R. 0.23; THIRD CIR. R. IOP 5.8 & 6.2; SEVENTH CIR. R. 53(b) (2) (iv) & 53(e); NINTH CIR. R. 36-3 (b) (iii).



be cited otherwise.<sup>133</sup> Other circuits allow for the citation of unpublished decisions, but only as persuasive, not binding, authority.<sup>134</sup>

In practice, the combination of no-citation and limited publication rules allow judges in most circuits to decide—through their decisions regarding publication—which of their opinions will have precedential effect in future cases.<sup>135</sup> If judges do not wish their decisions to be cited in future cases, under most circuit court rules, they can simply designate their opinions as not for publication.<sup>136</sup> Thus, in more than half the circuits, a judge's unpublished designation means that the opinion can never again—except in infrequent instances of *res judicata*, collateral estoppel, or law of the case—be argued to the court.<sup>137</sup>

No-citation rules also bestow unpublished opinions a unique status: they are typically the only written source that—by rule—cannot be cited in court documents.<sup>138</sup> None of the circuit court rules prohibit litigants from citing to English cases, newspaper articles, international treaties, legislative histories, treatises and hornbooks, dictionaries, law review and journal articles, and even the works of philosophers and playwrights.<sup>139</sup> To add further irony, under the rules, many of these citable sources can themselves extensively discuss unpublished opinions while still serving as citable authority.<sup>140</sup> In sum, courts will consider nearly any written matter a litigant wishes to urge

<sup>133</sup> FIRST CIR. R. 36 (b) (2) (F).

<sup>134</sup> See FOURTH CIR. R. 36(c); FIFTH CIR. R. 47.5.4; SIXTH CIR. R. 28(g); EIGHTH CIR. R. 28(a) (i); TENTH CIR. R. 36.3(B) (1) & (2); ELEVENTH CIR. R. 36-2.

<sup>135</sup> See Braum, *supra* note 121, at 90; Arnold, *supra* note 5, at 223.

<sup>136</sup> See Braum, *supra* note 121, at 90; Arnold, *supra* note 5, at 221.

<sup>137</sup> See D.C. CIR. R. 28(c); FED. CIR. R. 47.6; FIRST CIR. R. 36 (b) (2) (F); SECOND CIR. R. 0.23; THIRD CIR. R. IOP 5.8 & 6.2; SEVENTH CIR. R. 53(b) (2) (iv) & 53(e); NINTH CIR. R. 36-3 (b) (iii).

<sup>138</sup> See D.C. CIR. R. 28(c); FED. CIR. R. 47.6; FIRST CIR. R. 36 (b) (2) (F); SECOND CIR. R. 0.23; THIRD CIR. R. IOP 5.8 & 6.2; FOURTH CIR. R. 36(c); FIFTH CIR. R. 47.5.4; SIXTH CIR. R. 28(g); SEVENTH CIR. R. 53(b) (2) ((iv) & 53(e); EIGHTH CIR. R. 28(a) (i); NINTH CIR. R. 36-3 (b) (iii); TENTH CIR. R. 36.3(B) (1) & (2); ELEVENTH CIR. R. 36-2.

<sup>139</sup> See, e.g., *United States v. Simonelli*, 237 F.3d 19, 24-25 (1st Cir. 2001) (court responding to defendant's use of Shakespeare's *King Lear* as persuasive authority).

<sup>140</sup> See, e.g., *Henderson v. Immigration & Naturalization Serv.*, 157 F.3d 106, 119 (2nd Cir. 1998). *Henderson* cites a Harvard Law Review Note, which cites an unpublished judicial decision. See *id.* at 119, citing Note, *The Avoidance of Constitutional Questions and Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions*, 111 HARV. L. REV. 1578, n. 65, citing, *Rosa v. Senkowski*, No. 97 CIV. 2468 (RWS), 1997 WL 436484, at \*9 (S.D.N.Y. 1997).

upon them, except for the portions of their own craft that they designate as "not for publication."<sup>141</sup>

### B. Constitutional Challenges to No-Citation Rules

Courts began considering legal challenges to limited publication and no-citation rules almost immediately after the rules were enacted.<sup>142</sup> Most of these early challenges were based on claims that rules limiting citation to unpublished decisions were unconstitutional.<sup>143</sup> In spite of these early challenges, it was not until 2000, that a court found no-citation rules to be unconstitutional.<sup>144</sup>

In *Jones v. Superintendent, Virginia State Farm*, the United States Court of Appeals for the Fourth Circuit held that litigants have a right to cite to the unpublished opinions of the court.<sup>145</sup> The court noted, "[w]e concede, of course, that any decision is by definition a precedent, and that we cannot deny litigants and the bar the *right* to urge upon us what we have previously done."<sup>146</sup> The court, however, went on to say that because access to unpublished decisions is limited, it would strongly prefer that litigants not cite the decisions.<sup>147</sup> Further, the court proclaimed that the court itself would not cite unpublished decisions in drafting their written opinions.<sup>148</sup> In effect, therefore, the court expressed that it would not give unpublished decisions precedential effect, but it could not prohibit litigants from arguing such decisions to the court.<sup>149</sup> However, the *Jones* court gave no constitutional justification for why it believed litigants had a *right* to cite to prior unpublished decisions.<sup>150</sup>

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<sup>141</sup> The portion of judicial decisions designated "not for publication" is large. See 2000 ANNUAL REPORT OF THE DIRECTOR ON THE JUDICIAL BUSINESS OF THE UNITED STATES, TABLE S-3 (2000) available at <http://www.uscourts.gov/judbus2000/contents.html>. In 2000, 79.8% of the judicial decisions of the circuit courts of appeal were designated not for publication. See *id.* This percentage ranged from a low of 56.5% in the Seventh Circuit, to a high of 90.5% in the Fourth Circuit. See *id.*

<sup>142</sup> See Dunn, *supra* note 6, at 141–45 (reviewing early challenges to limited publication and no-citation rules).

<sup>143</sup> See *id.*

<sup>144</sup> See *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), *vacated as moot en banc*, 235 F.3d 1054 (8th Cir. 2000).

<sup>145</sup> See 465 F.2d 1091, 1094 (4th Cir. 1972).

<sup>146</sup> *Id.* at 1094 (emphasis added).

<sup>147</sup> See *id.*

<sup>148</sup> See *id.*

<sup>149</sup> See *id.*

<sup>150</sup> See *Jones*, 465 F.2d at 1094.

Shortly after *Jones*, the Supreme Court of the United States twice received requests to rule on the constitutionality of no-citation rules.<sup>151</sup> First, in *Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit*, the Court was asked to grant the petitioners leave to file writs of mandamus and prohibition so that the Court could rule on the constitutionality of the Seventh Circuit's no-citation rule.<sup>152</sup> In the underlying case, the Seventh Circuit had struck the petitioners' reference to an unpublished decision because it violated the circuit's citation ban.<sup>153</sup> In their petition for leave, the *Do-Right* petitioners argued that precluding them from citing unpublished authority violated their free speech rights, impinged on their ability to petition the government for redress of grievances, and deprived them of fair and equal administration of justice.<sup>154</sup> The Supreme Court denied petitioners motion for leave.<sup>155</sup>

The Supreme Court next faced the constitutionality of no-citation rules a year later in *Browder v. Director*.<sup>156</sup> In *Browder*, the petitioner argued that the Seventh Circuit's refusal to publish their decision infringed upon their right to gain further appellate review.<sup>157</sup> Specifically, petitioners argued that the Seventh Circuit's holding in their case conflicted with an earlier *published* Seventh Circuit decision.<sup>158</sup> Because, however, the petitioners' case was unpublished and uncitable, the en banc panel would not recognize an intra-circuit conflict requiring resolution.<sup>159</sup>

The *Browder* Court was able to avoid ruling on the constitutionality of the no-citation rules. Rather, the Court found that the Seventh Circuit lacked jurisdiction to decide the underlying dispute.<sup>160</sup> There-

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<sup>151</sup> See Dunn, *supra* note 6, at 142.

<sup>152</sup> See 429 U.S. 917 (1976) (denying motion for leave); Dunn, *supra* note 6, at 142.

<sup>153</sup> See Dunn, *supra* note 6, at 142.

<sup>154</sup> See *id.* (citing Petitioners' Brief on Support of Motion for Leave to File a Petition for Writs of Mandamus and Prohibition at 8, *Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit*, 429 U.S. 917 (1976)).

<sup>155</sup> *Do-Right*, 429 U.S. at 917. Notably, however, at least one commentator has opined that the Supreme Court's denial of the motion resulted more from the lack of a continuing controversy and amendments to the Seventh Circuit citation rule, than the constitutional merits of the petitioner's claim. See Dunn, *supra* note 6, at 143.

<sup>156</sup> See 434 U.S. 257 (1978).

<sup>157</sup> See Brief for Petitioner Ben Earl Browder at 51, *Browder v. Director*, 434 U.S. 257 (1978).

<sup>158</sup> See *id.*

<sup>159</sup> See *id.*

<sup>160</sup> See *Browder*, 434 U.S. at 258.

fore, the Court left questions of the validity of the Seventh Circuit's unpublished opinion and no-citation rules "to another day."<sup>161</sup>

Following *Browder*, it was many years before a federal court again addressed the constitutionality of no-citation rules. In 1986, Chief Judge Holloway of the United States Court of Appeals for the Tenth Circuit, joined by two of her colleagues, dissented from the Tenth Circuit's decision to adopt a rule stating that unpublished opinions have no precedential effect and should not be cited.<sup>162</sup> The dissenters found the proponent's arguments in support of the rule unpersuasive and pointedly addressed the rule's constitutional implications:

No matter how insignificant a prior ruling might appear to be to us, any litigant who can point to a prior decision of the court and demonstrate that he is entitled to prevail under it should be able to do so as a matter of essential justice and fundamental fairness. To deny a litigant this right may well have overtones of a constitutional infringement because of the arbitrariness, irrationality, and unequal treatment of the rule.<sup>163</sup>

Fourteen years later, a federal court again addressed the constitutional implications of no-citation rules in *Anastasoff I*.<sup>164</sup> Only then, for the first time, did a court rule that no-citation rules were unconstitutional.<sup>165</sup> In *Anastasoff I*, the Federal Circuit Court of Appeals for the Eighth Circuit had to decide whether Faye Anastasoff's tax refund demand was timely mailed.<sup>166</sup> The time requirements in the Tax Code conflicted with those under the so-called "mailbox rule" in traditional contract law.<sup>167</sup> An earlier unpublished decision—*Christie v. United States*<sup>168</sup>—would have dictated a ruling against Anastasoff.<sup>169</sup> Anastasoff argued, however, that because *Christie* was unpublished, the decision was not binding on the parties or the court under Eighth Circuit Rule 28(a)(i).<sup>170</sup> The court rejected Anastasoff's argument, holding

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<sup>161</sup> *Id.*

<sup>162</sup> See *In Re Rules of United States Court of Appeal Tenth Circuit*, 955 F.2d 36, 37 (10th Cir. 1992) (Holloway, J. dissenting). Ironically, though this decision was rendered in November, 1986, it remained unpublished until February, 1992. See *id.*

<sup>163</sup> *Id.* at 37.

<sup>164</sup> See *Anastasoff I*, 223 F.3d at 898.

<sup>165</sup> See *id.*

<sup>166</sup> *Id.*

<sup>167</sup> See *id.*

<sup>168</sup> No. 91-2375MN (8th Cir. 1992).

<sup>169</sup> See *Anastasoff I*, 223 F.3d at 899.

<sup>170</sup> See *id.* Rule 28(a)(i), reads as follows:

that *Christie* was valid and citable precedent because Rule 28(i) was an unconstitutional expansion of the federal judiciary's Article III powers.<sup>171</sup> Specifically, the Eighth Circuit concluded that federal courts had no constitutional power to issue non-citable, and, therefore, non-precedential, opinions.<sup>172</sup>

The unanimous Eighth Circuit panel examined the historical status of judicial power in precedential development.<sup>173</sup> It found that the doctrine of precedent dated back to early England where the use of precedents had been a valuable part of using the rule of law to guard against the arbitrary power of government.<sup>174</sup> Further, the Eighth Circuit stated, the doctrine of precedent was so pervasive that it was at the core of the historic method of judicial decision-making and that judges used that method as "a bulwark of judicial independence in past struggles for liberty."<sup>175</sup>

The Eighth Circuit noted that in early America, precedent was viewed as the basic way that judging was carried out, and as such, the practice was known to the Framers at the time of the Constitutional Convention.<sup>176</sup> Hence, when the Framers crafted the provisions of the Constitution granting power to the judiciary—Article III—they were aware of the importance of precedent and the powerful role it could play in checking other usurpation branches of government.<sup>177</sup> The Framers also thought that judicial decisions would become binding precedents and that, over a period of time, the number of precedents would swell to create a massive body of law.<sup>178</sup> More pointedly, the

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Citation of Unpublished Opinion. Unpublished opinions are not precedent and parties generally should not cite to them. When relevant to establishing the doctrines of *res judicata*, collateral estoppel, or the law of the case, however, the parties may cite an unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well. A party who cites an unpublished opinion for the first time at oral argument must attach a copy of the unpublished opinion to the supplemental authority letter required by FRAP 28(j). When citing an unpublished opinion, a party must indicate the opinion's unpublished status.

Eighth Cir. Rule 28(a)(i).

<sup>171</sup> See *Anastasoff I*, 223 F.3d at 903.

<sup>172</sup> See *id.*

<sup>173</sup> See *id.* at 900.

<sup>174</sup> See *id.*

<sup>175</sup> *Id.*

<sup>176</sup> See *Anastasoff I*, 223 F.3d at 900–01.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 902.

Framers envisioned that like cases would be decided alike.<sup>179</sup> The *Anastasoff I* court cited Alexander Hamilton, who specifically commented 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 . . . ."<sup>180</sup> The Eighth Circuit admitted that the Framers never imagined the publication of judicial opinions but, nevertheless, judges and lawyers of the day "recognized the authority of unpublished decisions even when they were established only by memory or by a lawyer's unpublished memorandum."<sup>181</sup>

The *Anastasoff I* court concluded that the need for courts to follow their precedents has been long understood to derive from the nature of judicial power itself and has served to separate it from the power of the legislature.<sup>182</sup> Specifically, the doctrine of precedent has served as a limit on the judicial power delegated to the courts under Article III of the U.S. Constitution.<sup>183</sup> Therefore, according to the court, the Eighth Circuit rule allowing judges to determine which cases will have precedential effect impermissibly expanded the Article III powers of the judiciary, removed the liberty check of binding precedent, and was consequently unconstitutional.<sup>184</sup>

After *Anastasoff I*, litigants throughout the country began citing favorable unpublished opinions, using *Anastasoff I* and its Article III arguments as authority to do so.<sup>185</sup> Thus, although *Anastasoff I* is no longer good law, it is likely only a matter of time before another simi-

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<sup>179</sup> See *id.*

<sup>180</sup> *Id.* at 902.

<sup>181</sup> *Anastasoff I*, 223 F.3d at 903.

<sup>182</sup> See *id.* at 903-04.

<sup>183</sup> See *id.*

<sup>184</sup> See *id.* at 904.

<sup>185</sup> See *U.S. v. Goldman* 228 F.3d 942, 944 (8th Cir. 2000); *Schmier v. U.S. Court of Appeals, Ninth Circuit*, No. C-00-4076 VRW, 2001 WL 313583, at \*4 (N.D. Cal. 2001); *Amgen, Inc. v. Hoechst Marion Roussel, Inc.*, 126 F. Supp. 2d 69, 136 (D. Mass. 2001); *MacNeill Eng'g Co. v. Trisport, Ltd.*, 126 F. Supp. 2d 51, 58 (D. Mass. 2001); *Alvarenga-Villalobos v. Reno*, No. C-00-4291 VRW, 2000 WL 1897302 at \*3 (N.D. Cal. 2000); *Conant v. City of Hibbing*, 131 F. Supp. 2d 1129, 1133 n.2 (D. Minn. 2000); *U.S. v. Carrillo*, 123 F. Supp. 2d 1223, 1247 (D. Colo. 2000); *Snell v. Allianz Life Ins. Co. of North America*, No. Civ. 97-2784 RLE, 2000 WL 1336640 at \*7 n.8 (D. Minn. 2000); *Massachusetts Housing Finance Agency v. Evora*, No. CIV.A.99-12669-WGY, 2000 WL 1738701, at \*6 n.3 (D. Mass. 2000); *Luciano v. U.S.*, No. 00-CV-1725(FB), 2000 WL 1597771 at \*1 (E.D.N.Y. 2000); *In re Arzt*, 252 B.R. 138, 142-43 (B.A.P. 8th Cir. 2000); *In re Norkus*, 256 B.R. 298, 305 (Bankr. S.D. Iowa 2000); *Dwyer v. Kislak Mortg. Corp.*, 13 P.3d 240, 244 (Wash. Ct. App. 2000).

larly-postured case takes its place.<sup>186</sup> Further, because no- or limited-citation rules are pervasive, and circuits are likely to be split with respect to *Anastasoff*'s Article III argument, future Supreme Court review of the rules appears likely.<sup>187</sup>

### III. PROCEDURAL DUE PROCESS PROTECTIONS AND *HONDA MOTOR CO. v. OBERG*

The prominence of *Anastasoff I* and the likelihood of continued litigation over the issues it presented will almost certainly lead courts to consider the constitutional implications of no-citation rules.<sup>188</sup> While the logical starting point for such an inquiry lies in the Article III arguments made in *Anastasoff I*, procedural due process arguments could prove more successful.<sup>189</sup> *Honda Motor Co. v. Oberg* and its progeny serve as the backbone for a procedural due process challenge to rules prohibiting citation to unpublished authority.<sup>190</sup> These cases have held that the abrogation of a deeply-rooted common law procedure, without adequate replacement or justification, is violative of procedural due process.<sup>191</sup>

The Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution require that no person be deprived "of life, liberty or property without due process of law."<sup>192</sup> Courts have interpreted these clauses to have two components—one substantive and one procedural.<sup>193</sup> On the procedural side, the Due Process Clauses guarantee that people who are to be deprived of life, liberty or property, are entitled to a reasonable level of judicial or administrative process.<sup>194</sup> In determining what is reasonable process, the U.S. Supreme Court has used traditional practice as "the touch-

<sup>186</sup> See *Goldman* 228 F.3d at 944; *Schmier*, 2001 WL 313583, at \*4; *Amgen*, 126 F. Supp. 2d at 136; *MacNeill*, 126 F. Supp. 2d at 58; *Alvarenga-Villalobos*, 2000 WL 1897302 at \*3; *Conant*, 131 F. Supp. 2d at 1133 n.2; *Carrillo*, 123 F. Supp. 2d at 1247; *Snell*, 2000 WL 1336640 at \*7 n.8; *Evora*, 2000 WL 1738701, at \*6 n.3; *Luciano*, 2000 WL 1597771 at \*1; *Arzt*, 252 B.R. at 142-43; *Norkus*, 256 B.R. at 305; *Dwyer*, 13 P.3d at 244.

<sup>187</sup> See Mauro, *supra* note 2, at 1 (quoting Harvard Law Professor Laurence Tribe "En banc treatment or a grant of cert [by the Supreme Court] seem[s] fairly likely.")

<sup>188</sup> See *supra* notes 185-187 and accompanying text.

<sup>189</sup> See *infra* notes 235-332 and accompanying text.

<sup>190</sup> See 512 U.S. 415 (1994).

<sup>191</sup> See *id.*

<sup>192</sup> U.S. CONST. AMEND. V, XIV.

<sup>193</sup> See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §13.1 (6th Ed. 2000).

<sup>194</sup> See *id.* at 544.

stone for constitutional analysis."<sup>195</sup> Because of the deep historical roots of common law procedures, the Supreme Court has found them to be fundamental to judicial process and due process of law, and, thus, has looked disfavorably upon their removal.<sup>196</sup>

Cases in which the Supreme Court has been called upon to consider the constitutionality of abrogated common law procedures are infrequent, as courts and legislatures rarely find need to remove traditional common law judicial procedures.<sup>197</sup> Starting in the late nineteenth century, however, the Supreme Court began deciding a small series of cases in which it considered whether the removal of a deeply-rooted common law judicial procedure, without adequate replacement, violated litigants' procedural due process rights.<sup>198</sup> The most recent addition to the "deeply rooted" line of cases came in *Honda Motor Co. v. Oberg*.<sup>199</sup>

In *Honda*, the Supreme Court held that the removal of a deeply-rooted judicial procedure, without proper justification or adequate replacement, violates a litigant's procedural due process rights.<sup>200</sup> The Court in *Honda* first reviewed English and early American legal history and determined that thorough review of punitive damage awards was a judicial procedure that was deeply rooted in the common law.<sup>201</sup> Having found the practice to be deeply rooted, the Court next determined that the procedure in the instant case, which did not provide as thorough a review as that which traditionally existed at common law, thus departed from deeply-rooted common law procedure.<sup>202</sup> This departure created an insurmountable presumption of unconstitutionality because there was no adequate replacement procedure and no societal transformation justifying the departure.<sup>203</sup> The procedure at issue in *Honda* was a provision of the Oregon Constitution prohibiting judicial review of punitive damage awards "unless the court can affirmatively say there is no evidence to support the

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<sup>195</sup> See *Honda*, 512 U.S. at 430; *Hurtado v. California*, 110 U.S. 516, 538 (1884).

<sup>196</sup> See *Honda*, 512 U.S. at 430.

<sup>197</sup> See *id.*

<sup>198</sup> See *id.*; *In re Winship*, 397 U.S. 358, 361 (1970); *In re Oliver*, 333 U.S. 257 (1948); *Brown v. Mississippi*, 297 U.S. 278 (1936); *Tumey v. Ohio*, 273 U.S. 510 (1927); *Hurtado*, 110 U.S. 516.

<sup>199</sup> See *Honda*, 512 U.S. at 430.

<sup>200</sup> See *id.*

<sup>201</sup> See *id.*

<sup>202</sup> See *id.* at 430.

<sup>203</sup> See *id.* at 431.



verdict."<sup>204</sup> Honda argued that the inability to seek full judicial review—particularly review for excessiveness—of an adverse verdict deprived them of procedural due process.<sup>205</sup>

Using traditional practice as the touchstone for its analysis, the *Honda* majority began by reviewing English and early American legal history.<sup>206</sup> The court found that judicial review of punitive damage awards dated to eighteenth century England where the Court of Common Pleas found that it was appropriate for the court to review a potentially excessive punitive damage award and that in doing so, it had power to grant a new trial.<sup>207</sup>

The English process of judicial review followed settlers to the United States where American common law courts continued to provide judicial review of punitive damages, often striking excessive jury awards as a result.<sup>208</sup> Thorough judicial review remained constant throughout the nineteenth century as judges reviewed excessive damage awards for "partiality" or "passion and prejudice," often resulting in the granting of new trials.<sup>209</sup> This level of review continued into the twentieth century and took root in all modern federal and state courts, except Oregon.<sup>210</sup> Because judicial review of excessive punitive damage awards went back nearly three hundred years, the Court deemed the process to be one deeply rooted in common law judicial procedure.<sup>211</sup>

The next question addressed by the Court was whether Oregon's standard of punitive damage review, which was limited to awards in which there was no basis in evidence to support the verdict, conflicted with deeply-rooted common law practice.<sup>212</sup> The Court rejected the state's argument that its procedure still allowed for meaningful judicial review and its contention that its procedure, like the common law practice, could eliminate excessive awards.<sup>213</sup> Contrarily, the court stated that "unlike the common law, [Oregon] provides no assurance

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<sup>204</sup> See *Honda*, 512 U.S. at 418.

<sup>205</sup> See *id.*

<sup>206</sup> See *id.* at 421.

<sup>207</sup> See *id.*

<sup>208</sup> See *id.* at 424.

<sup>209</sup> *Honda*, 512 U.S. at 425–26.

<sup>210</sup> See *id.*

<sup>211</sup> See *id.*

<sup>212</sup> See *id.* at 426.

<sup>213</sup> See *id.* at 428–29.

that those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary amounts."<sup>214</sup>

Oregon's removal of the common law judicial review protection created a presumption of unconstitutionality.<sup>215</sup> The Court did, however, recognize that presumptions of unconstitutionality could be overcome and that "not all deviations from established procedures result in constitutional infirmity."<sup>216</sup> After all, "to hold all procedural change unconstitutional would be to deny every quality of law but its age, and to render it incapable of progress or improvement."<sup>217</sup>

The Court, therefore, had to determine whether Oregon's abrogation of the deeply-rooted practice of judicial review of punitive damages was justifiable.<sup>218</sup> In doing so, the Court considered whether Oregon's departure accorded with other cases in which the Court had allowed common law departures that either: (1) resulted from societal transformation necessitating change; or (2) were replaced by an adequate substitute procedure.<sup>219</sup>

Oregon's unique punitive damage review standard did not comport with other Supreme Court cases allowing for departure from common law practice.<sup>220</sup> In *International Shoe Co. v. Washington*,<sup>221</sup> the Court allowed for the imposition of personal jurisdiction in a way that departed from traditional common law practice.<sup>222</sup> The *International Shoe* Court held that the rise of the corporate entity, capable of doing business in a state without a physical presence, created jurisdictional problems not envisioned by rules created in previous generations.<sup>223</sup>

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<sup>214</sup> See *Honda*, 512 U.S. at 429.

<sup>215</sup> *Id.* at 430.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 430-31 (internal quotes omitted).

<sup>218</sup> See *id.* at 431.

<sup>219</sup> See *Honda*, 512 U.S. at 430-31.

<sup>220</sup> See *id.*

<sup>221</sup> 326 U.S. 310 (1945).

<sup>222</sup> See *Honda*, 512 U.S. at 430-31.

<sup>223</sup> *Id.*; see *International Shoe*, 326 U.S. at 317-20 (finding that traditionally courts considering jurisdiction found that "[T]o require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries more substantial activities . . . lay[s] too great and unreasonable a burden on the corporation to comport with due process . . ."; however, given the growth of corporate activity outside its home state, it is "reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which [the corporation] has incurred . . ."); see also *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 617 (1990) ("In the late 19th and early 20th centuries, changes in the technology of transportation and communication, and the tremendous growth of interstate business activity, led to an

Moreover, improvements in transportation and communication made distant litigation more manageable.<sup>224</sup> Therefore, allowing the extension of state jurisdiction over those not physically present in the state was a common law development, necessary to afford litigants' redress for their grievances and not violative of due process.<sup>225</sup>

Unlike the changes in *International Shoe*, the *Honda* Court found no societal change justifying Oregon's abrogation of judicial review for punitive damages, "nor do improvements in technology render unchecked punitive damages any less onerous."<sup>226</sup> In essence, the need for review of excessive damage awards was as compelling in 1994 as it was in eighteenth century England.<sup>227</sup> Thus, unlike in *International Shoe*, Oregon lacked a justifiable societal impetus for its abrogation of a common law procedure, and was unable to reverse the presumption of unconstitutionality on those grounds.<sup>228</sup>

The Court also found that Oregon failed to replace the more thorough abrogated review of punitive damages with other procedures that afforded litigants similar protections.<sup>229</sup> As an example, the Court pointed to *Hurtado v. California*, in which it found the state's removal of a grand jury procedure for criminal defendants—a practice deeply rooted in the common law—was adequately replaced by an appearance before a neutral magistrate.<sup>230</sup> By replacing the deeply-rooted practice with an adequate alternative procedure, California overcame what otherwise would have been a constitutional infirmity.<sup>231</sup> In *Honda*, however, Oregon provided no similar substitute procedure to make up for its removal of thorough punitive damage review.<sup>232</sup> The Court did not consider Oregon's review of punitive damage verdicts that were without basis in fact to be a sufficient re-

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inevitable relaxation of the strict limits on state jurisdiction over non-resident corporations.") (internal quotations omitted).

<sup>224</sup> See *Honda*, 512 U.S. at 431.

<sup>225</sup> See *id.*; *International Shoe*, 326 U.S. at 320.

<sup>226</sup> See *Honda*, 512 U.S. at 430–31.

<sup>227</sup> See *id.*

<sup>228</sup> See *id.*; *International Shoe*, 326 U.S. at 320.

<sup>229</sup> See *Honda*, 512 U.S. at 431.

<sup>230</sup> See *id.*; *Hurtado*, 110 U.S. at 516 (holding that examination by neutral magistrate was adequate replacement for abrogated common-law grand jury procedure; Oregon in contrast provided no similar substitute).

<sup>231</sup> See *Honda*, 512 U.S. at 431.

<sup>232</sup> See *id.*

view.<sup>233</sup> The lack of a replacement procedure meant Oregon was again unable to overcome the presumption of unconstitutionality.<sup>234</sup>

#### IV. ANALYSIS: RULES PROHIBITING CITATION TO UNPUBLISHED JUDICIAL DECISIONS ARE VIOLATIVE OF PROCEDURAL DUE PROCESS

*Honda Motor Co. v. Oberg*, by analogy, evidences constitutional infirmity in rules prohibiting citation to unpublished judicial decisions.<sup>235</sup> Like the appellate review of punitive damages in *Honda*, the practice of citing all prior judicial decisions: (1) is deeply rooted in common law tradition; (2) creates a presumption of unconstitutionality if removed; (3) lacks an adequate replacement procedure; and (4) was not abrogated in response to constitutionally justifiable societal transformation.<sup>236</sup> Therefore, like the procedure in *Honda*, abrogation of the traditional common law ability to cite to all prior judicial decisions violates procedural due process.<sup>237</sup>

A review of legal history clearly indicates that litigants have long been able to cite to previously-decided judicial decisions.<sup>238</sup> Early English lawyers often cited to prior decisions, long before the advent of law reports, and even when the record of the decision existed only in a haphazardly collected *Year Book*.<sup>239</sup> As a more formalized reporting system developed in England, lawyers began citing cases appearing in law reports but also used decisions contained in their memories or personal memoranda.<sup>240</sup> Even when the case was not included in a report, the lawyer could attest to the validity of the case and then argue the reasoning and holding of the decision to the court.<sup>241</sup> At no time in pre-American English law was a lawyer prohibited from citing to a prior decision.<sup>242</sup>

The English practice of citing all previous judicial decisions in argument to the court made the Atlantic voyage with early colonists and was followed in early American courts.<sup>243</sup> The advent of law re-

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<sup>233</sup> See *id.*

<sup>234</sup> See *id.*

<sup>235</sup> See 512 U.S. at 415 (1994).

<sup>236</sup> See *id.*

<sup>237</sup> See *id.*

<sup>238</sup> See *supra* notes 30-111 and accompanying text.

<sup>239</sup> See *supra* notes 30-38 and accompanying text.

<sup>240</sup> See *supra* notes 39-55 and accompanying text.

<sup>241</sup> See XV HOLDSWORTH, *supra* note 54, at 248.

<sup>242</sup> See *supra* notes 30-55 and accompanying text.

<sup>243</sup> See *supra* notes 57-97 and accompanying text.

ports brought new sources of previously decided cases.<sup>244</sup> These reports, however, were not the only sources to which lawyers cited in legal argument.<sup>245</sup> Lawyers continued to argue unpublished decisions, frequently relying on their own notes or memorandum as their sources.<sup>246</sup> Uninhibited citation to prior decisions continued as the reporting system developed more comprehensively and was in place at the inception of the current Federal Circuit Courts Of Appeal.<sup>247</sup>

Starting in 1891, when the initial Federal Circuit Courts Of Appeal were created, all of the decisions of those courts were published in the *Federal Reporter*.<sup>248</sup> Due to the comprehensive coverage of these opinions in the *Federal Reporter*, there was never a need for lawyers to cite unpublished decisions.<sup>249</sup> It was not until the circuit courts of appeal responded to the ACAP recommendations and enacted limited publication and no-citation rules that lawyers were prohibited from citing prior decisions.<sup>250</sup>

The history of lawyers citing to all prior judicial decisions is much lengthier than the comprehensive punitive damage review considered "deeply rooted" by the *Honda* Court.<sup>251</sup> Whereas the *Honda* Court traced the practice of punitive damage review to the mid-seventeenth century, the ability to cite prior decisions dates back four hundred years further—to the middle of the thirteenth century.<sup>252</sup> The long history of this citation procedure is sufficient to indicate a deeply-rooted common law practice in accord with *Honda*.<sup>253</sup> The removal of the procedural ability to cite to previously decided cases, like the removal in *Honda*, thus creates a presumption of unconstitutionality.<sup>254</sup>

The judiciary's desire in the 1960s to ease burgeoning caseloads was an understandable goal given the pressure mounting on judges to produce more opinions faster and the increasingly large body of precedential judicial decisions.<sup>255</sup> Concerns for judicial economy and

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<sup>244</sup> See *supra* notes 62–97 and accompanying text.

<sup>245</sup> See RAM, *supra* note 84, at 28–29.

<sup>246</sup> See *id.*

<sup>247</sup> See *supra* notes 86–97 and accompanying text.

<sup>248</sup> See BERRING, *supra* note 107, at 21; WOXLAND, *supra* note 107, at 123–24 (Spring 1985); YOUNG, *supra* note 107, at 302–03; FEDERAL REPORTER, *supra* note 107, at 3.

<sup>249</sup> See *id.*

<sup>250</sup> See *supra* notes 112–137 and accompanying text.

<sup>251</sup> See *Honda*, 512 U.S. at 421–26; *supra* notes 30–111 and accompanying text discussing history of citation to previous judicial decisions.

<sup>252</sup> See *Honda*, 512 U.S. at 421–26; WALKER & WALKER's, *supra* note 33, at 82.

<sup>253</sup> See *Honda*, 512 U.S. at 421–26.

<sup>254</sup> See *id.* at 430.

<sup>255</sup> See REYNOLDS & RICHMAN, *supra* note 5, at 1167–70.

precedent expansion, however, are not constitutionally sufficient reasons to remove a deeply-rooted common law procedure.<sup>256</sup> In passing their no-citation rules, the majority of the circuit courts of appeal neither provided adequate replacement procedures nor acted in response to a societal transformation that necessitated the procedural change.<sup>257</sup> The majority of the circuit courts of appeal, therefore, lacked either of the two justifications the Supreme Court set forth in *Honda* for overcoming the presumption of unconstitutionality accompanying the removal of a deeply-rooted procedure.<sup>258</sup>

Some circuits were successful in enacting sufficient replacement procedures to overcome the presumption of unconstitutionality.<sup>259</sup> The traditional common law citation practice that dates back to thirteenth century England allowed litigants to cite to all previous judicial decisions.<sup>260</sup> It did not ensure, however, that those decisions would be given binding or precedential effect.<sup>261</sup> Therefore, those circuits—the Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh—that enacted rules allowing the citation of previously decided judicial decisions for their persuasive value, still afford litigants the citation ability they were afforded at common law.<sup>262</sup> This level of replacement procedure, therefore, likely would be sufficient to overcome a presumption of unconstitutionality.<sup>263</sup>

Other circuit courts of appeal—the Federal, District of Columbia, First, Second, Third, Seventh, and Ninth—have failed to meet the first constitutional justification by not creating an adequate replacement procedure.<sup>264</sup> In *Hurtado v. California*, the state replaced the traditional grand jury proceeding with an appearance before a neutral magistrate.<sup>265</sup> Unlike *Hurtado*, these circuit courts have made no similar effort to create a replacement procedure that would afford litigants' citation abilities similar to those of the traditional common law

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<sup>256</sup> See *Honda*, 512 U.S. at 421–26.

<sup>257</sup> See *id.*

<sup>258</sup> See *id.*

<sup>259</sup> See FOURTH CIR. R. 36(c); FIFTH CIR. R. 47.5.4; SIXTH CIR. R. 28(g); EIGHTH CIR. R. 28(a)(i); TENTH CIR. R. 36.3(B) (1) & (2); ELEVENTH CIR. R. 36–2.

<sup>260</sup> See *supra* notes 30–111 and accompanying text.

<sup>261</sup> See PLUCKNETT, *supra* note 35, at 345.

<sup>262</sup> See *id.*; FOURTH CIR. R. 36(c); FIFTH CIR. R. 47.5.4; SIXTH CIR. R. 28(g); EIGHTH CIR. R. 28(a)(i); TENTH CIR. R. 36.3(B) (1) & (2); ELEVENTH CIR. R. 36–2.

<sup>263</sup> See *Honda*, 512 U.S. at 431.

<sup>264</sup> See D.C. CIR. R. 28(c); FED. CIR. R. 47.6; FIRST CIR. R. 36 (b)(2)(F); SECOND CR. R. 0.23; THIRD CIR. R. IOP 5.8 & 6.2; SEVENTH CIR. R. 53(b)(2)(iv) & 53(e); NINTH CIR. R. 36–3 (b)(iii).

<sup>265</sup> See 110 U.S. 516, 538 (1884)

practice.<sup>266</sup> Most of these rules allow for citation to previous decisions in instances of *res judicata*, collateral estoppel, or law of the case.<sup>267</sup> This allowance, however, does not afford litigants the same rights as those which existed in the traditional common law practice.<sup>268</sup> The traditional practice allowed litigants to cite to any prior judicial decision that they thought pertinent to the disposition of their case.<sup>269</sup> The citation of prior decisions for the purpose of *res judicata*, collateral estoppel, or law of the case, in contrast, is done only to avoid the reconsideration of previously-decided legal or factual issues, not to bolster the litigant's underlying case by way of analogy or comparison.<sup>270</sup> Moreover, the rule allowing citation to prior unpublished decisions for *res judicata*, collateral estoppel, or law of the case purposes only affects a tiny class of litigants—a fraction of the number covered by the traditional procedure.<sup>271</sup>

The limited scope of this citation rule replacement is comparable to the inadequacy of judicial review for punitive damages at issue in *Honda*.<sup>272</sup> The *Honda* court found that a drastic decrease in the standard for judicial review of punitive damage awards meant that the procedure was an insufficient replacement that could not reverse the presumption of unconstitutionality.<sup>273</sup> Similarly, Supreme Court review of the citation prohibitions of the majority of circuit courts of appeal likely would result in a conclusion that allowing citation to unpublished decisions for the purposes of *res judicata*, collateral estoppel or law of the case is an inadequate replacement procedure.<sup>274</sup> There-

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<sup>266</sup> See *id.* Compare D.C. CIR. R. 28(c); FED. CIR. R. 47.6; FIRST CIR. R. 36 (b)(2)(F); SECOND CIR. R. 0.23; THIRD CIR. R. IOP 5.8 & 6.2; SEVENTH CIR. R. 53(b)(2)(iv) & 53(e); and NINTH CIR. R. 36-3 (b)(iii) (providing replacement procedure by allowing persuasive citation of unpublished judicial decisions), with FOURTH CIR. R. 36(c); FIFTH CIR. R. 47.5.4; SIXTH CIR. R. 28(g); EIGHTH CIR. R. 28(a)(i); TENTH CIR. R. 36.3(B) (1) & (2); and ELEVENTH CIR. R. 36-2 (prohibiting all citation of unpublished judicial decisions).

<sup>267</sup> See D.C. CIR. R. 28(c); FED. CIR. R. 47.6; FIRST CIR. R. 36 (b)(2)(F); SECOND CIR. R. 0.23; THIRD CIR. R. IOP 5.8 & 6.2; SEVENTH CIR. R. 53(b)(2)(iv) & 53(e); NINTH CIR. R. 36-3 (b)(iii).

<sup>268</sup> See *supra* notes 30-111 and accompanying text discussing the common law practice of citing all prior judicial decisions.

<sup>269</sup> See *supra* notes 30-111 and accompanying text.

<sup>270</sup> See generally FRIEDENTHAL JACK ET AL., CIVIL PROCEDURE §§ 14.1-14.12 (2d ed. 1993) (discussing law and policy of *res judicata*, collateral estoppel, and law of the case).

<sup>271</sup> See *id.*

<sup>272</sup> See *Honda*, 512 U.S. at 431.

<sup>273</sup> See *id.*

<sup>274</sup> See *id.*

fore, these circuit courts would be unable to overcome the presumption of unconstitutionality on replacement procedure grounds.<sup>275</sup>

Additionally, the circuit courts of appeal did not act in response to a societal transformation necessitating change—the second constitutional justification—when they enacted no-citation rules.<sup>276</sup> In *International Shoe Co. v. Washington*, the Court found that the common law standard for the establishment of personal jurisdiction could be abrogated because of the growth of corporations and their increased ability to engage in business in states without maintaining a physical presence.<sup>277</sup> Additionally, technological advancement in travel and communications made adjusting the jurisdictional requirements to include distant litigation less onerous.<sup>278</sup> Justice required that corporations conducting business in a state be held accountable at law to the litigants of the states in which they were acting.<sup>279</sup> Adjustments to the common law procedures for personal jurisdiction, therefore, were necessary to bring the out-of-state corporations under the jurisdiction of the state.<sup>280</sup>

No similar societal transformations required the circuit courts of appeal to prohibit citation to unpublished decisions.<sup>281</sup> In passing no-citation rules, the courts reacted to rising caseloads that created heightened pressure on judges to produce more judicial opinions, creating an excessively voluminous body of published case law.<sup>282</sup> Thus, proponents of the no-citation rules likely would contend that the transformation into an increasingly litigious society during the early to mid-twentieth century compelled the circuits to alter their citation rules to deal with unanticipated pressures on the judiciary.<sup>283</sup> This argument fails for three reasons.<sup>284</sup>

First, the transformation into a more litigious, case-producing society may be a justification for *issuing* unpublished opinions, but not

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<sup>275</sup> See *id.*

<sup>276</sup> See *id.* at 430–31.

<sup>277</sup> See *International Shoe Co. v. Washington*, 326 U.S. 310, 317–20 (1945).

<sup>278</sup> See *id.*; *Burnham v. Superior Court of California*, 495 U.S. 604, 617 (1990).

<sup>279</sup> See *Burnham*, 495 U.S. at 617–19; *International Shoe*, 326 U.S. at 320.

<sup>280</sup> See *Burnham*, 495 U.S. at 617–19; *International Shoe*, 326 U.S. at 320.

<sup>281</sup> See *supra* notes 112–130 and accompanying text discussing reasons for creating no-citation rules.

<sup>282</sup> See REYNOLDS & RICHMAN, *supra* note 5, at 1167–70; *supra* notes 112–130 and accompanying text.

<sup>283</sup> See REYNOLDS & RICHMAN, *supra* note 5, at 1167–70; *supra* notes 112–130 and accompanying text.

<sup>284</sup> See *infra* notes 285–325 and accompanying text.



for prohibiting their citation.<sup>285</sup> By allowing judges to issue unpublished opinions, the circuit courts of appeal have eased the work demands of their member judges.<sup>286</sup> Those judges can issue terse opinions that give only a basic recitation of facts and minimal corresponding law.<sup>287</sup> They avoid the extensive research, reasoning and writing that accompanies an opinion that is to be published in the *Federal Reporter*.<sup>288</sup> According to one estimate, the creation of an unpublished opinion takes only half the time required to produce a decision of publishable quality.<sup>289</sup>

Citation rules prohibiting citation to unpublished decisions do nothing to further ease the workload of federal appellate court judges.<sup>290</sup> No-citation rules do not shorten the amount of time it takes a judge to write, research or reason through a judicial opinion.<sup>291</sup> Moreover, the argument that citation prohibitions are necessary to the success of a limited publication plan is false.<sup>292</sup> If a total citation prohibition—including citation for persuasive value—were necessary to the successful implementation of a limited publication system, the rules of those six circuits that allow citation of unpublished decisions for persuasive value would not remain viable.<sup>293</sup> The preservation of limited publication schemes in those circuits indicates that citation prohibitions are merely convenient, not necessary, to a functioning limited publication system.<sup>294</sup>

If unpublished decisions are afforded the persuasive value to which they are entitled under the traditional citation practice, judges could easily distinguish or disregard them when they are cited to the

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<sup>285</sup> See *supra* notes 112–130 and accompanying text.

<sup>286</sup> See *supra* notes 127–130 and accompanying text.

<sup>287</sup> See REYNOLDS & RICHMAN, *supra* note 5, at 1186; MARTIN, *supra* note 5, at 193–94.

<sup>288</sup> See REYNOLDS & RICHMAN, *supra* note 5, at 1186; MARTIN, *supra* note 5, at 193–94.

<sup>289</sup> See MARTIN, *supra* note 5, at 193–94.

<sup>290</sup> See *infra* notes 291–298 and accompanying text.

<sup>291</sup> See *supra* notes 118–130 and accompanying text discussing how it is the act of writing a less thorough unpublished opinion that saves judicial resources.

<sup>292</sup> See FOURTH CIR. R. 36(c); FIFTH CIR. R. 47.5.4; SIXTH CIR. R. 28(g); EIGHTH CIR. R. 28(a)(i); TENTH CIR. R. 36.3(B)(1) & (2); ELEVENTH CIR. R. 36–2.

<sup>293</sup> See FOURTH CIR. R. 36(c); FIFTH CIR. R. 47.5.4; SIXTH CIR. R. 28(g); EIGHTH CIR. R. 28(a)(i); TENTH CIR. R. 36.3(B)(1) & (2); ELEVENTH CIR. R. 36–2.

<sup>294</sup> Compare D.C. CIR. R. 28(c); FED. CIR. R. 47.6; FIRST CIR. R. 36(b)(2)(F); SECOND CIR. R. 0.23; THIRD CIR. R. IOP 5.8 & 6.2; SEVENTH CIR. R. 53(b)(2)(iv) & 53(e); and NINTH CIR. R. 36–3(b)(iii) (allowing persuasive citation of unpublished judicial decisions), with FOURTH CIR. R. 36(c); FIFTH CIR. R. 47.5.4; SIXTH CIR. R. 28(g); EIGHTH CIR. R. 28(a)(i); TENTH CIR. R. 36.3(B)(1) & (2); and ELEVENTH CIR. R. 36–2 (prohibiting all citation of unpublished judicial decisions).

court.<sup>295</sup> If the criteria the ACAP established for determining when to publish a decision are followed when the publication decision is made, the unpublished decisions litigants cite to are, indeed, of little value and should require little judicial attention.<sup>296</sup> After all, under the ACAP guidelines, the decision would not: (1) create or alter other existing case law; (2) involve an issue of public interest; (3) criticize existing law; or (4) resolve a conflict of authority.<sup>297</sup> The additional judicial resources required to deal with unpublished cases, given their presumably negligible importance, is likely to be minimal.<sup>298</sup>

No-citation rules also do nothing to further limit the increasingly large volume of published, precedential judicial decisions.<sup>299</sup> It is the rule creating unpublished opinions, not the rule prohibiting their citation, that reduces the volume of published case law by affording judges the option not to publish decisions that contribute little or nothing to the development of the common law.<sup>300</sup> Rules prohibiting the citation of unpublished decisions are likely to have little effect on judges' publication decisions.<sup>301</sup> In fact, empirical evidence indicates that in those circuits that allow the citation of unpublished decisions for persuasive value, the percentage of decisions designated for publication is lower than in those circuits that prohibit the citation of unpublished decisions.<sup>302</sup> Therefore, if citation prohibitions have any correlation to the size of the body of published case law, it is a negative, not positive, one.<sup>303</sup>

The second reason the societal transformation argument fails is that there are several other less onerous methods that could have resolved the problems created by an increasingly litigious society.<sup>304</sup> In *International Shoe*, it was necessary for the Court to alter existing juris-

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<sup>295</sup> See ADVISORY COUNCIL, *supra* note 119, at 15-17.

<sup>296</sup> See *id.*

<sup>297</sup> See *id.*

<sup>298</sup> See FOURTH CIR. R. 36(c); FIFTH CIR. R. 47.5.4; SIXTH CIR. R. 28(g); EIGHTH CIR. R. 28(a)(i); TENTH CIR. R. 36.3(B) (1) & (2); ELEVENTH CIR. R. 36-2.

<sup>299</sup> See *supra* notes 118-130 and accompanying text.

<sup>300</sup> See *supra* notes 118-130 and accompanying text.

<sup>301</sup> See Merritt & Brudney, *supra* note 11, at 114 (finding that lower publication rates in those circuits which allow for the persuasive citation of unpublished decisions likely results from the "rational belief that if unpublished opinions are citable, there is less harm in leaving a decision unpublished.").

<sup>302</sup> See *id.* (finding that those circuit courts of appeal that allow for persuasive citation of unpublished judicial decisions saw a decrease in publication rates).

<sup>303</sup> See *id.*

<sup>304</sup> See Arnold, *supra* note 4, at 222 (noting that circuit courts of appeal have hired more staff attorneys, heard less argument, and issued unpublished decisions to deal with rising caseloads).

diction rules because if it did not, people wishing to sue companies that lacked a physical presence in their state would be denied a judicial remedy for the harm they had suffered.<sup>305</sup> Put another way, changing the common law jurisdictional requirements and allowing litigants to obtain jurisdiction in more situations was the only way to solve the problem presented by the societal transformation of interstate companies.<sup>306</sup>

The problem of burgeoning caseloads, on the other hand, could have been resolved in numerous other ways that did not require removal of the deeply-rooted common law procedure allowing for the citation of previous judicial decisions.<sup>307</sup> More judges could have been hired for those circuits having difficulty dealing with the caseloads, a new circuit could have been created to shift some cases away from the most burdened circuits, or more staff attorneys, law clerks, and legal assistants could have been hired to assist judges in the preparation of their opinions.<sup>308</sup> Additionally, the circuit courts of appeal could have done as they did and decided not to publish certain opinions.<sup>309</sup> Limiting publication does not conflict with the deeply-rooted practice of allowing litigants to cite to the decisions of all previous cases.<sup>310</sup> Given the other less onerous options for addressing increasing caseloads, it was not necessary for the circuit courts of appeal to abrogate a traditional common law procedure.<sup>311</sup>

The third failure in the societal transformation argument is that unlike in *International Shoe*, where transportation and communication improvements strengthened the case for abrogating the traditional common law procedure, in the case of no-citation rules, technological and societal changes argue *against* making such a change.<sup>312</sup> A large reason for enacting the citation rules was a fear that the increasingly large body of published case law was becoming difficult to research or search through and impossible to master.<sup>313</sup> Technological advance-

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<sup>305</sup> See *International Shoe*, 326 U.S. at 320.

<sup>306</sup> See *id.*

<sup>307</sup> See Arnold, *supra* note 4, at 222.

<sup>308</sup> See *id.* See generally FINAL REPORT, COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS 54-60 (1998) (discussing possibility of adding an additional circuit court of appeals to ease burden of rising caseloads).

<sup>309</sup> See Arnold, *supra* note 4, at 222; *supra* notes 112-122 and accompanying text discussing the initiation of limited publication rules.

<sup>310</sup> See *supra* notes 30-111 and accompanying text.

<sup>311</sup> See *supra* notes 307-310 and accompanying text; *Burnham*, 495 U.S. at 617-19; *International Shoe*, 326 U.S. at 320.

<sup>312</sup> See *International Shoe*, 326 U.S. at 320.

<sup>313</sup> See CHANIN, *supra* note 117, at 362; REYNOLDS & RICHMAN, *supra* note 5, at 1169-70.

ments in computer technology and research capabilities, and the specialized nature of today's legal practice have, if anything, made these concerns less compelling.<sup>314</sup>

The use of sophisticated computer researching has enabled judges and lawyers to locate helpful cases more easily than they could have using traditional, manual research tools.<sup>315</sup> The concern that lawyers and judges would have to manually search endless digests and law reports for applicable cases no longer exists.<sup>316</sup> Through the use of computers, searches can be narrowed and refined to allow for an exhaustive search of applicable case law.<sup>317</sup>

Additionally, the practice of law has, in recent decades, trended away from a general practice and into fields of specialties and sub-specialties.<sup>318</sup> As a result of this development, lawyers no longer need, nor even attempt, to master the vast entirety of the common law.<sup>319</sup> Rather, most focus on their narrow specialty and monitor decisions on related issues.<sup>320</sup> These technological and societal changes alleviate, not accentuate, concerns over the ability to deal with an increasingly large body of published case law.<sup>321</sup>

No-citation rules were not a necessary resolution to the societal changes that prompted their enactment.<sup>322</sup> Even assuming, *arguendo*, that they were necessary, other less invasive changes could have eased caseload pressure without removing a deeply-rooted common law procedure.<sup>323</sup> Further, technological advancement and legal specialization have, if anything, made the case for continuing the traditional citation practice stronger.<sup>324</sup> The circuit courts of appeals are, there-

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<sup>314</sup> See *infra* notes 315–321 and accompanying text.

<sup>315</sup> See Lynn Foster & Bruce Kennedy, *Technological Advancement in Legal Research*, 2 J. APP. PRAC. & PROCESS 275, 279–83 (2000) (discussing ways in which the world wide web and computers have made legal research easier).

<sup>316</sup> See *id.*

<sup>317</sup> See *id.*

<sup>318</sup> See Michael Ariens, *Know the Law: A History of Legal Specialization*, 45 S.C. L. REV. 1003, 1042–60 (1994) (documenting history of legal specialization and discussing increasing trend towards specialization in recent decades); Geoffrey C. Hazard, *Changing Structures in the Practice of Law*, 61 LA. L. REV. 167, 167–69 (2000) (discussing increasingly specialized practice of law and how specialization causes lawyers to focus their continued learning on discrete areas of the law).

<sup>319</sup> See Ariens, *supra* note 318, at 1004; Hazard, *supra* note 318, at 167–68.

<sup>320</sup> See Hazard, *supra* note 318, at 167–68.

<sup>321</sup> See *supra* notes 315–320 and accompanying text.

<sup>322</sup> See *supra* notes 285–303 and accompanying text.

<sup>323</sup> See *supra* notes 304–311 and accompanying text.

<sup>324</sup> See *supra* notes 312–321 and accompanying text.

fore, unable to justify their abrogation of the traditional common law citation practices as necessary responses to societal transformation.<sup>325</sup>

To summarize, litigants have a deeply rooted common law right to cite to all previous judicial decisions.<sup>326</sup> No-citation rules abrogate that right, and thus, create a presumption of unconstitutionality.<sup>327</sup> The courts can overcome the presumption of unconstitutionality by either: (a) enacting a sufficient replacement procedure; or (b) acting in response to a societal transformation that necessitated the change.<sup>328</sup> Six of the circuit courts of appeal have enacted rules that still afford litigants the right to cite to unpublished judicial decisions for their persuasive value.<sup>329</sup> These rules provide comparable protections to those afforded litigants at common law, and, therefore, are sufficient to overcome the presumption of unconstitutionality.<sup>330</sup> The other seven circuits, however, neither enacted a sufficient replacement procedure nor acted in response to a societal transformation that necessitated the change.<sup>331</sup> Those seven circuits have, therefore, abrogated the traditional common law citation procedure in a way that is violative of procedural due process.<sup>332</sup>

### CONCLUSION

The no-citation rules of the Circuit Courts of Appeal for the Federal, District of Columbia, First, Second, Third, Seventh, and Ninth Circuits are violative of procedural due process. The effects of a successful procedural due process challenge to these rules are limited but important. Striking these rules, unlike *Anastasoff I*, would not have the sweeping effect of turning all of the unpublished judicial decisions of the federal appellate judiciary into binding precedent.

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<sup>325</sup> See *Honda*, 512 U.S. at 431; *Burnham*, 495 U.S. at 617-19; *International Shoe*, 326 U.S. at 320.

<sup>326</sup> See *supra* notes 238-250 and accompanying text.

<sup>327</sup> See *supra* notes 251-254 and accompanying text.

<sup>328</sup> See *Honda*, 512 U.S. at 431.

<sup>329</sup> See *FOURTH CIR. R.* 36(c); *FIFTH CIR. R.* 47.5.4; *SIXTH CIR. R.* 28(g); *EIGHTH CIR. R.* 28(a)(i); *TENTH CIR. R.* 36.3(B) (1) & (2); *ELEVENTH CIR. R.* 36-2; *supra* notes 259-263 and accompanying text.

<sup>330</sup> See *supra* notes 259-263 and accompanying text.

<sup>331</sup> See *D.C. CIR. R.* 28(c); *FED. CIR. R.* 47.6; *FIRST CIR. R.* 36 (b)(2)(F); *SECOND CIR. R.* 0.23; *THIRD CIR. R.* IOP 5.8 & 6.2; *SEVENTH CIR. R.* 53(b)(2)(iv) & 53(e); *NINTH CIR. R.* 36-3 (b)(iii); *supra* notes 264-321 and accompanying text.

<sup>332</sup> See *Honda*, 512 U.S. at 430-31; *D.C. CIR. R.* 28(c); *FED. CIR. R.* 47.6; *FIRST CIR. R.* 36 (b)(2)(F); *SECOND CIR. R.* 0.23; *THIRD CIR. R.* IOP 5.8 & 6.2; *SEVENTH CIR. R.* 53(b)(2)(iv) & 53(e); *NINTH CIR. R.* 36-3 (b)(iii); *supra* notes 264-321 and accompanying text.

Rather, litigants in every court would merely have the right to cite to previous decisions—published or unpublished—for their persuasive value. In addition to comporting with a common law tradition of more than seven hundred years, such a result would also further one of the fundamental issues raised in *Anastasoff I*: it would serve as a check on the arbitrary power of the judiciary. If a judge decides a case one way on Monday, he or she will know that from Tuesday forward, litigants will use that decision to persuasively argue that similar results are appropriate in their similar cases. Such a system is faithful to the common law and assures that judges unpublished judicial decisions are, minimally, afforded the same value in our legal system as the published works of philosophers and playwrights.

LANCE A. WADE