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Note

Judge Nullification: A Perception of Unpublished Opinions

RAFI MOGHADAM*

Back in 1974, the California Supreme Court took the ground-breaking step of creating an appellate rule that barred citation to unpublished opinions. The “no-citation rule” was designed to facilitate legal research by limiting the universe of citable cases. Over time, however, the rule has proven to be a mechanism for questionable discrimination against unpublished decisions. Unpublished appellate opinions are restricted supposedly based on characteristics shared by them—chiefly, unoriginal content—when in fact these cases often exhibit vibrant legal discourse. This Note reviews the no-citation rule from the ground up. The analysis begins with a comprehensive background, proceeds to test the legal basis for the no-citation rule, challenges misconceptions about the utility of unpublished decisions, and discusses changes in the circumstances upon which the no-citation rule was founded. Segregation of cases based on publication status, the analysis shows, is an unconstitutional practice that potentially casts the judiciary in bad light. The practice is at odds with the state’s judicial notice statute and the judiciary’s ethical obligation to maintain an appearance of fairness. Bringing an end to the no-citation rule, which enables discrimination against unpublished opinions, thus, is legally justified and ethically required.

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INTRODUCTION

In California, not all court opinions are created equal. Some are published, but most are censored.¹ By rules of court, appellate courts² decide for themselves whether their opinions should be published or carry precedential force.³ Through one such rule, dubbed the “no-citation rule,” citation to unpublished opinions is prohibited.⁴ An unpublished opinion, under this strict rule, is effectively treated as nonexistent, as it may neither be cited nor relied upon in subsequent cases. By the stroke of a pen, a court can make its opinion uncitable, limiting the scope of its reach.⁵ This ability to constrain opinions reduces accountability for decisions by discouraging supreme court review. As a result, the appellate publication process lends itself to a perception of secrecy, evasion, and injustice.

The California Supreme Court typically intervenes to resolve splits among courts, to address important issues, or to correct far-reaching errors.⁶ Unpublished decisions in this system are less likely to get the supreme court’s attention. Because it cannot be cited in subsequent cases,⁷ an unpublished opinion will not have far-reaching effect, cause splits in authority, or advance important problems. The unpublished decision becomes imprisoned to a single case. The supreme court, in turn, faces less pressure to intervene. An intermediate court bent on reaching a particular outcome, or one unsure of the correctness of its analysis, can exploit the no-citation rule to discourage supreme court review. The mechanism for rendering opinions uncitable,⁸ which is loosely regulated, is dangerous, because it enables intermediate courts to commit error with impunity.

Developed in 1974,⁹ the no-citation rule came almost a century after California voters disapproved the supreme court’s practice of issuing opinionless judgments.¹⁰ The supreme court defended opinionless judgments in the 1800s—much as it defends the no-citation rule today—

1. See CAL. R. CT. 8.1100–8.1125 (publication rules); see also JUDICIAL COUNCIL OF CAL., 2010 COURT STATISTICS REPORT, STATEWIDE CASELOAD TRENDS: 1999–2000 THROUGH 2008–2009, at 29 (2010).

2. All further court references are to California state courts unless otherwise noted.

3. CAL. R. CT. 8.1105, 8.1115.

4. *Id.* R. 8.1115(a).

5. See *id.* (proscribing citation to unpublished opinions).

6. *Id.* R. 8.500(b).

7. *Id.* R. 8.1115(a).

8. See *id.* R. 8.1105(c) (stating which standards “should” be used in deciding whether to publish opinions).

9. See *Gray v. Kay*, 120 Cal. Rptr. 915, 918 (Ct. App. 1975) (noting adoption of the no-citation rule in 1974).

10. *People v. Kelly*, 146 P.3d 547, 550, 552 (Cal. 2006).

as a necessary means of managing its docket and preventing waste.¹¹ The voters rejected this argument, refusing to place efficiency before accountability.¹² They compelled the court to provide written opinions and responded to its backlog by hiring more judges.¹³ Deprived of its ability to produce opinionless judgments, the supreme court passed a rule that today forces attorneys and judges to treat some cases as if they were opinionless.¹⁴ This rule of make-believe is the no-citation rule.¹⁵

From a legal standpoint, the no-citation rule is unconstitutional as inconsistent with the state's judicial notice statute.¹⁶ A fundamental constitutional restraint on rules of court is, and always has been, that rules of court must be consistent with statutes.¹⁷ The no-citation rule prohibits an act that judicial notice permits: citation to unpublished court records.¹⁸ In this battle between the no-citation rule and judicial notice, the statute overrides the rule. Inconsistency between the no-citation rule and the judicial notice statute is fatal to the former.¹⁹

As a practical matter, the no-citation rule unjustifiably jeopardizes public confidence in the judiciary's integrity. An order not to publish an opinion can be seen as an attempt to nullify the law in a given case in order to force a certain outcome. Even an innocent refusal to publish an opinion might be read as judicial indiscretion. Additionally, the advent of the Internet rendered obsolete the equitable premise of appellate censorship, which was to prevent exploitation of hard-to-find unpublished decisions.²⁰ Before the Internet, explorers with deeper pockets returned better search results.²¹ But today, every opinion is a

11. See *Houston v. Williams*, 13 Cal. 24, 26 (1859) (explaining the inefficiency and burdens avoided by opinionless judgments), *superseded by constitutional amendment*, CAL. CONST. art. VI, § 14.

12. See *Kelly*, 146 P.3d at 552 (noting a debate at the Constitutional Convention in which supporters argued written opinions would tend to promote honesty and accountability).

13. *Id.* at 553.

14. CAL. R. CT. 8.1115(a).

15. See *id.*

16. The term "judicial notice statute" as used here refers collectively to sections 450 through 460 of the California Evidence Code. See CAL. EVID. CODE §§ 450-460 (West 2004). All further statutory references are to California authorities unless otherwise noted.

17. CAL. CONST. art. VI, § 6(d); *People v. McClellan*, 31 Cal. 101, 103 (1866); *Brooks v. Union Trust & Realty Co.*, 79 P. 843 (Cal. 1905).

18. Compare CAL. EVID. CODE § 452(d) (permitting judicial notice to any court record), with CAL. R. CT. 8.1115 (barring citation to unpublished opinions).

19. See authorities cited *supra* note 17.

20. *People v. Valenzuela*, 150 Cal. Rptr. 314, 322 (Ct. App. 1978) (Jefferson (Bernard), J., dissenting) (explaining the fairness argument for the no-citation rule).

21. See *id.* ("Permitting the citation of unpublished opinions would create fundamental problems of unfairness between parties and their counsel who possess unlimited funds for research and those with very limited budgets."); APPELLATE COURT COMM., JUDICIAL COUNCIL OF CAL., REPORT AND RECOMMENDATION CONCERNING PROPOSED RULE TO PROHIBIT THE CITATION OF UNPUBLISHED APPELLATE OPINIONS 15 (Staff Draft 1973) [hereinafter JUDICIAL COUNCIL REPORT] (relaying a complaint concerning unfair use of hard-to-find unpublished cases).

Boolean or Google search away.²² Now, uncovering an unpublished decision is more a product of a competent query than a reciprocal of wealth. Confronted with this new reality, courts permit citation to unpublished opinions *from other jurisdictions*, while prohibiting reference to their own unpublished decisions. This double standard further undermines the equity argument for censorship.²³

The constitutionality of the no-citation rule has never been tested against the judicial notice statute, nor has the rule been challenged as frustrating the intent behind the ban on opinionless judgments. These challenges are ripe for pressing. At some point, every lawyer has the unpleasant experience of finding the perfect case on an issue, only to learn the opinion is unpublished.²⁴ In those instances, counsel may wish to request judicial notice of the unpublished authority, or to cite it directly and raise the constitutional arguments presented here. Similarly, if counsel loses an appeal in an unpublished opinion, challenging the constitutionality of the no-citation rule may be a prudent means of increasing the likelihood of supreme court review.

While the no-citation rule remains in force, every appeal in California is subject to its whim. This Note examines the history and evolution of California's publication system and analyzes the role of the no-citation rule within that system. The discussion identifies flaws in the premise behind the no-citation rule, explains the rule's unconstitutionality, and considers threats posed by it to the rule of law.

I. THE EVOLUTION OF APPELLATE PUBLICATION RULES

Restrictions on citation of appellate decisions are a product of the latter part of the Twentieth Century. Understanding the background to these restrictions is helpful to evaluating the premise for their continued existence, and is the focus of this Part.

22. See Stephen R. Barnett, *Deflating: The California Supreme Court's Wonderful Law-Making Machine Begins to Self-Destruct*, 45 HASTINGS L.J. 520, 549–50 (1994) [hereinafter Barnett, *Deflating*] (observing that modern legal research is computer-based); Stephen R. Barnett, *The Dog That Did Not Bark: No-Citation Rules, Judicial Conference Rulemaking, and Federal Public Defenders*, 62 WASH. & LEE L. REV. 1491, 1503–04 (2005) [hereinafter Barnett, *Bark*] (reporting on a study that suggests citability of unpublished opinions has insignificant adverse consequences).

23. See *Harris v. Investor's Bus. Daily, Inc.*, 41 Cal. Rptr. 3d 108, 112 (Ct. App. 2006) (allowing citation to unreported federal opinions); *Lebrilla v. Farmers Grp., Inc.*, 16 Cal. Rptr. 3d 25, 31–32 (Ct. App. 2004) (permitting citation to unpublished decisions of other states); *Brown v. Franchise Tax Bd.*, 242 Cal. Rptr. 810, 813 n.6 (Ct. App. 1987) (“Unpublished decisions by the courts of other jurisdictions may be cited and considered for their persuasive value.”); see also *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001) (“It is not unusual to cite the decision of courts in foreign jurisdictions, so long as they speak to a matter relevant to the issue before us.”); *Styne v. Stevens*, 26 P.3d 343, 351 n.4 (Cal. 2006) (relying on an unpublished administrative decision).

24. See, e.g., *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir.) (identifying an unpublished opinion as the only authority on point), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000).

A. SELECTIVE PUBLICATION

Since the early days of statehood, and for decades thereafter, California kept its supreme court out of the publication business. California's founding constitution of 1849 directed the legislature to publish all laws and whatever court decisions *it* deemed expedient.²⁵ "The legislature shall provide for the speedy publication of all statute laws, and of such judicial decisions as it may deem expedient; and all laws and judicial decisions shall be free for publication by any person."²⁶ Deciding which court opinions to publish was the prerogative of the legislature, not the supreme court.²⁷ This prerogative outlived the 1849 Constitution, which was replaced in 1879.²⁸ Under the 1879 Constitution, the legislature retained the duty to "provide for the speedy publication of such opinions of the Supreme Court as it . . . deem[ed] expedient," all of which had to remain free of charge for private publication.²⁹ As before, discretion for choosing which opinions to publish at public expense fell into the legislature's lap.³⁰ The supreme court was kept out of the loop.

A constitutional amendment in 1904 changed the process, transferring control over publication to the supreme court.³¹ Now, the supreme court chooses the decisions, and the legislature publishes them.³² Essentially, the supreme court undertook what the legislature had been doing for decades. This role reversal was fairly uneventful until the supreme court endowed itself with a right of censorship in 1974.³³ Then, the supreme court adopted a rule, initially numbered Rule 977 and later renumbered Rule 8.1115(a), stating, "[A]n opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action."³⁴

With this and other specially crafted rules, the supreme court enforces its selective publication authority. The rules identify opinions for publication and bar citation to all other opinions.³⁵ Rephrased, unselected opinions are censored.³⁶

25. CAL. CONST. of 1849, art. VI, § 12.

26. *Id.*

27. *Id.*

28. *See* CAL. CONST. of 1879, art. VI, § 16.

29. *Id.*

30. *Id.*

31. *See* CAL. SUPREME COURT ADVISORY COMM. ON RULES FOR PUBL'N OF COURT OF APPEAL OPS., REPORT AND RECOMMENDATIONS 9 (2006) [hereinafter COMMITTEE REPORT] (describing the history of appellate publication rules).

32. CAL. CONST. art. VI, § 14.

33. *Gray v. Kay*, 120 Cal. Rptr. 915, 918 (Ct. App. 1975).

34. *See* CAL. R. Ct. 8.1115 (prohibiting citation to unpublished decisions).

35. *See id.* R. 8.1100-8.1125 (publication rules).

36. *Id.* R. 8.1105.

B. WRITTEN OPINION REQUIREMENT

The constitutional provision relating to court opinions contains another imperative, requiring “[d]ecisions of the Supreme Court and courts of appeal that determine causes [to] be in writing with reasons stated.”³⁷ One might think this law merely codifies a natural judicial function, making it as unnecessary as legislating that people must breathe air. Demanding courts put pen to paper, however, follows an insightful history of resistance.³⁸

The 1849 Constitution established a three-member supreme court with appellate jurisdiction over a variety of cases, but imposed no duty on the court to provide reasons for its decisions.³⁹ Amendments to the constitution in 1862 expanded the court’s membership to five justices and described a wider range of cases in which the court had appellate jurisdiction.⁴⁰ “There was no provision in either the original 1849 Constitution or the amendments of 1862 for intermediate courts of appeal—all appeals . . . went directly to the Supreme Court.”⁴¹ As amended, the constitution also left unchanged the regulation of court opinions.⁴² The supreme court remained free to render opinionless judgments.

In 1854, the legislature tried to compel the supreme court to provide written reasons for its decisions, but was met with reproach.⁴³ The legislature enacted a statute requiring “[a]ll decisions given upon an appeal in any appella[te] Court of th[e] State, shall be given in writing, with the reason therefor, and filed with the Clerk of the Court.”⁴⁴ In *Houston v. Williams*, the supreme court responded by invalidating the statute.⁴⁵ The court held that the legislature was without authority to require the judicial branch to provide written reasons for its decisions.⁴⁶ “The Legislature can no more require this Court to state the reasons of its decisions, than this Court can require, for the validity of the statutes, that the Legislature shall accompany them with the reasons for their enactment.”⁴⁷ The court explained,

The principles of law settled, are to be extracted from the records of the cases in which the decisions are rendered. The reports are full of

37. CAL. CONST. art. VI, § 14.

38. See *People v. Kelly*, 146 P.3d 547, 550 (Cal. 2006) (examining the history of article VI, section 14, to decide whether written explanations are necessary in *Wende* appeals).

39. CAL. CONST. of 1849, art. VI, §§ 1, 2, 4.

40. *Kelly*, 146 P.3d at 550.

41. *Id.* at 550–51.

42. CAL. CONST. of 1849, art. VI, § 12 (amended 1862).

43. *Kelly*, 146 P.3d at 550.

44. *Id.* (quoting 1854 Cal. Stat. 72).

45. 13 Cal. 24, 25 (1859), *superseded by constitutional amendment*, CAL. CONST. art. VI, § 14.

46. *Id.*

47. *Id.*

adjudged cases, in which opinions were never delivered. The facts are stated by the Reporter, with the points arising thereon, and are followed by the judgments rendered, and yet no one ever doubted that the Courts, in the instances mentioned, were discharging their entire constitutional obligations.⁴⁸

As the supreme court's workload multiplied, so did the problem of unwritten opinions. Judgments were handed down without explanation, causing confusion, both as to what was to be done on remand and when cited as precedent in subsequent cases.⁴⁹ During the four years preceding the state's second Constitutional Convention in 1878, the court had elected not to provide a written opinion in nearly one-quarter of the more than 2200 cases it decided.⁵⁰ Delegates to the Constitutional Convention complained that the practice of deciding a case without a written opinion prevented lawyers from fully understanding the court's view on a case.⁵¹ Multiple issues may arise on any given appeal, delegate Samuel Wilson suggested, but a judgment without comment would not say which argument carried the day.⁵² Without "light from above," Wilson reasoned, cases could find themselves back in the supreme court on the same issue.⁵³

To remedy the compounding problem of unwritten decisions, the delegates of the Constitutional Convention of 1878 resolved to compel the supreme court to submit written reasons for its judgments.⁵⁴ The delegates proposed a constitutional mandate, mimicking the statute invalidated in *Houston v. Williams*.⁵⁵ A countervailing concern was burdening an already overwhelmed supreme court.⁵⁶ Being forced to write opinions would consume judicial time, further backlogging the court's docket.⁵⁷ But the delegates thought the increased burden was limited, as opinions could be succinct,⁵⁸ and was dwarfed by the compelling need for clarity, consistency, and accountability.⁵⁹ Requiring the court to justify its judgments with written opinions promoted "purity

48. *Id.*

49. See *Kelly*, 146 P.3d at 550–51 (citing 2 E.B. WILLIS & P.K. STOCKTON, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 950 (1881)) (discussing concerns of delegates to the Constitutional Convention).

50. *Kelly*, 146 P.3d at 550 (citing 2 WILLIS & STOCKTON, *supra* note 49).

51. *Id.* at 551–52 (citing 2 WILLIS & STOCKTON, *supra* note 49).

52. *Id.* at 551 (citing 2 WILLIS & STOCKTON, *supra* note 49).

53. *Id.* (quoting delegate Samuel Wilson) (citing 2 WILLIS & STOCKTON, *supra* note 49).

54. *Id.*

55. *Id.* at 552.

56. *Id.*

57. See *Hart v. Massanari*, 266 F.3d 1155, 1177 (9th Cir. 2001) (describing opinion writing as an "exacting and extremely time-consuming task").

58. See, e.g., *Kirksey v. Kirksey*, 8 Ala. 131 (1845).

59. See *Kelly*, 146 P.3d at 551–52 (quoting delegates Samuel Wilson and Clitus Barbour) (citing 2 WILLIS & STOCKTON, *supra* note 49, at 951, 1331–33, 1447–48, 1454–57, 1499).

and honesty in the administration of justice.”⁶⁰ Expanding the supreme court’s membership addressed the inferior concern for delay.⁶¹

Labeled article VI, section 2, the proposed constitutional changes were ratified by the electorate in 1879.⁶² The new constitution created two departments within the supreme court and directed that “[i]n the determination of causes, all decisions of the Court in bank or in departments shall be given in writing, and the grounds of the decision shall be stated.”⁶³ But the creation of departments was insufficient to adequately relieve the supreme court’s workload.

California’s population skyrocketed,⁶⁴ and the court’s backlog continued to increase until 1903, when the legislature proposed a constitutional amendment to add intermediate courts of appeal.⁶⁵ Voters approved the amendment in 1904 without retreating from their demand for written decisions.⁶⁶ The amendment insisted that “[i]n the determination of causes all decisions of the supreme court and of the District Courts of Appeal shall be given in writing, and the grounds of the decision shall be stated.”⁶⁷ Five years later, in 1909, the legislature passed a statute requiring publication of all court decisions, regardless of their designation by the supreme court.⁶⁸ Unpublished decisions were privately printed in a series entitled *California Unreported Cases*.⁶⁹

Over the years, the state has increased the number of intermediate appellate courts rather than compromise its demand for written decisions.⁷⁰ When article VI was last repealed and reenacted in 1966, the writing requirement was reaffirmed.⁷¹ Recast in section 14 of article VI, the writing requirement now reads, “Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated.”⁷²

60. *Id.* at 552 (citing 2 WILLIS & STOCKTON, *supra* note 49, at 951) (internal quotation marks omitted).

61. *Id.*

62. *Id.*

63. *Id.*

64. *State of California Total Population, 1850 to 2010*, CAL. DEP’T OF FINANCE, <http://www.dof.ca.gov/research/demographic/documents/California-HistoricalPop-Seats1850-2010.pdf> (last visited May 23, 2011).

65. *Kelly*, 146 P.3d at 552–53 (noting the creation of three court of appeal districts).

66. *Id.* at 553.

67. CAL. CONST. art. VI, § 24 (repealed 1966).

68. JUDICIAL COUNCIL REPORT, *supra* note 21, at 9.

69. *Id.*

70. See CAL. CONST. art. VI, § 14 (retaining the requirement of written decisions); CAL. GOV’T CODE § 69100 (West 2009) (establishing six court of appeal districts).

71. See *People v. Kelly*, 146 P.3d 547, 553 (2006) (noting the repeal and reenactment of article VI).

72. CAL. CONST. art VI, § 14.

The history of the written decision requirement suggests institutional resistance from the courts. When instructed by statute to give written explanation for decisions, the courts invalidated the statute as unconstitutional, prompting the electorate to amend the constitution.⁷³ Confronted with a constitutional mandate to give written decisions, the courts reacted by narrowly interpreting their duty.⁷⁴ Background materials prepared for the 1966 constitutional amendments explicitly noted that “the written opinion requirement . . . has received a narrow interpretation by the courts.”⁷⁵ Later, in 1974, the supreme court devised a rule of pretense—the no-citation rule—that has the effect of making opinions disappear.⁷⁶ By prohibiting citation to or reliance on certain decisions, the supreme court in effect asks the bench and bar to pretend those decisions are opinionless.

The judiciary’s reluctance towards written decisions seems at odds with the will of the electorate, which has repeatedly affirmed and expanded its demand that courts justify their decisions in writing.⁷⁷ In fact, appreciation for accountability has progressed so much that today the holding in *Houston v. Williams*—which said the legislature lacks the authority to demand explanation for court decisions—is unlikely to be affirmed even without article VI, section 14. Since *Houston*, the legislature has enacted several statutes requiring trial courts to provide explanation for various rulings.⁷⁸ For example, a trial court must provide written justification whenever it awards child custody to a sex offender.⁷⁹ Written explanation is also required for rulings on motions for summary judgment, on motions for ordinary judgment, and if requested, following bench trials.⁸⁰

Insofar as article VI, section 14 is inapplicable to trial courts, *Houston v. Williams*, which has never been overruled, should control.⁸¹ Application of *Houston v. Williams* to trial court rulings would ostensibly threaten section 3030 of the Family Code and sections 437c(g), 631.8, and

73. See *Kelly*, 146 P.3d at 550–51 (noting the reaction to *Houston v. Williams*).

74. *Id.* at 553 n.1 (listing cases where the writing requirement was narrowly interpreted).

75. *Id.* (alteration in original) (quoting CAL. CONSTITUTION REVISION COMM’N, BACKGROUND STUDY FOR CALIFORNIA CONSTITUTION REVISION COMMISSION ON ARTICLE VI pt. 3, at 4–5 (1964)).

76. See CAL. R. CT. 8.1115 (prohibiting reliance on unpublished opinions).

77. See CAL. CIV. PROC. CODE § 437c(g) (West 2004) (requiring written explanation for orders granting or denying motions for summary judgment); *id.* § 631.8 (requiring a statement of decision upon granting a motion for judgment); *id.* § 632 (requiring a statement of decisions in court trials upon request); CAL. FAM. CODE § 3030(a)(1) (West 2004) (demanding written explanation whenever the court grants child custody to a sex offender or child abuser); see also FED. R. CIV. P. 65(d)(1)(A) (requiring written reasons for orders granting injunctions).

78. See CIV. PROC. §§ 437c(g), 631.8, 632; FAM. § 3030(a)(1).

79. FAM. § 3030(a)(1).

80. CIV. PROC. §§ 437c(g), 631.8, 632.

81. See 13 Cal. 24, 25 (1859) (holding that the legislature may not demand explanations for court decisions), superseded by constitutional amendment, CAL. CONST. art. VI, § 14.

632, of the Code of Civil Procedure.⁸² But no one seriously believes that an appellate court today would invalidate these important provisions, which have become ingrained in our legal system. Invalidating them on account of judicial “dignity”⁸³ likely would trigger backlash in the form of public contempt and a constitutional amendment. The no-citation rule represents resistance to the state’s maturing trend towards increased openness and accountability in the courts.

II. THE MECHANICS OF APPELLATE CENSORSHIP

Regulation of citation to court opinions is a process that relies on multiple authorities, and delegates considerable discretion to intermediate courts of appeal, to accomplish their effect. The mechanics of the process, along with the premises advanced for it, are explored in this Part.

A. EMBODIMENT IN CODIFIED LAW

Publication of California appellate opinions is governed by the rules of court.⁸⁴ Current rules are purportedly derived from article VI, section 14 of the constitution, which directs “[t]he Legislature [to] provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate.”⁸⁵ The supreme court exercises this publication right by designating opinions to be included in the *Official Reports*, which the legislature publishes at public expense.⁸⁶ Chapter eight of the rules of court sets forth the supreme court’s designations.⁸⁷ Under those rules, all opinions of the supreme court are published in the *Official Reports*.⁸⁸ Publication of intermediate appellate opinions, by contrast, is discretionary.⁸⁹

Each inferior appellate court decides for itself whether its opinion in a particular case is certified for publication.⁹⁰ If only a portion of an opinion is deemed worthy of publication, the opinion may be certified for partial publication, limited to that portion.⁹¹ Interestingly, while fully unpublished opinions may be accessed in their entirety through Westlaw

82. See *supra* text accompanying notes 77–80.

83. See *id.* (stating that no court with “dignity” could sanction a statutory demand for explanations from the court).

84. CAL. R. CT. 8.1100–8.1125.

85. CAL. CONST. art. VI, § 14; see also CAL. R. CT. 8.1100 (predicating publication rules on the California Constitution).

86. See CAL. GOV’T CODE § 68902 (West 2009) (commanding publication of the *Official Reports*).

87. See generally CAL. R. CT. 8.1100–8.1125.

88. *Id.* R. 8.1105(a).

89. See *id.* R. 8.1105(b) (setting forth the appellate courts’ discretion to publish opinions).

90. *Id.*

91. *Id.* R. 8.1110.

and Lexis, partially published opinions are redacted: Both Westlaw and Lexis excise portions not marked for publication in such opinions.⁹²

Any person may request publication of an unpublished case, or depublication of a previously published opinion.⁹³ The requests must be made in the form of a letter.⁹⁴ If the court of appeal denies a publication request, the supreme court automatically reviews the denial.⁹⁵ Depublication requests are made directly to the supreme court.⁹⁶

The citability of an opinion is tied to its publication. If an opinion is not expressly certified for publication, it “must not be cited or relied on by a court or a party in any other action,”⁹⁷ although limited exceptions exist for *res judicata*, law of the case, and criminal proceedings involving the same party.⁹⁸ Restated, unpublished opinions are censored. Their precedential value is severed by fiat, and they may neither be used nor cited in any other case. This limitation is the direct result of the no-citation rule.

B. RATIONALE FOR CENSORSHIP: ACCESS, EQUITY, AND CONVENIENCE

Restrictions on unpublished opinions ostensibly were borne out of concern for fairness.⁹⁹ California’s legal reporting system consists of two series of books, the *California Reporter* and the *California Appellate Reports*, which record the decisions of the supreme court and the appellate courts, respectively. Collectively, these books serve as the *Official Reports* of decisions.¹⁰⁰ Only decisions certified for publication appear in the *Official Reports*. Omitted decisions are left for unofficial reporting, if at all, by private publishers.¹⁰¹

Before the digital era, this dichotomy of reporting created an opportunity for exploitation.¹⁰² Skilled attorneys would not limit their

92. See, e.g., *People v. Henry*, 90 Cal. Rptr. 3d 915, 917, 918 (Ct. App. 2009) (omitted portions); *People v. Grimes*, 90 Cal. Rptr. 3d 787, 788–89 (Ct. App. 2009) (same); *In re J.M.*, 89 Cal. Rptr. 3d 31, 33 (Ct. App. 2009) (same); *Sanders v. Lawson*, 78 Cal. Rptr. 3d 851, 853, 855 (Ct. App. 2008) (same); *Martinelli v. Int’l House USA*, 75 Cal. Rptr. 3d 186, 188 (Ct. App. 2008) (same).

93. CAL. R. CT. 8.1120(a) (publication requests), *id.* R. 8.1125(a) (depublishing requests).

94. *Id.* R. 8.1120(a)(2), 8.1125(a)(2).

95. *Id.* R. 8.1120(b).

96. *Id.* R. 8.1125(a).

97. *Id.* R. 8.1115(a).

98. *Id.* R. 8.1115(b).

99. See *People v. Valenzuela*, 150 Cal. Rptr. 314, 322–23 (Ct. App. 1978) (Jefferson (Bernard), J., dissenting) (discussing the fairness grounds for the no-citation rule); JUDICIAL COUNCIL REPORT, *supra* note 21, at 12, 15, 36 (same).

100. SUPREME COURT OF CAL., THE SUPREME COURT OF CALIFORNIA: CONTAINING THE INTERNAL OPERATING PRACTICES AND PROCEDURES OF THE CALIFORNIA SUPREME COURT 4 (2007); THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 231 tbl.T.1 (Columbia Law Review Ass’n et al. eds., 19th ed. 2010).

101. See JUDICIAL COUNCIL REPORT, *supra* note 21, at 9, 33 (describing private printing of unpublished opinions).

102. See authorities cited *supra* note 99.

legal research to the *Official Reports*. They would dig for gold in unofficial reports. The most in-depth research was largely dependent on finding, having access to, and having the time to comb through voluminous unofficial reports.¹⁰³ Researching unofficial reports, thus, created a unique advantage for parties with greater resources.

Some in the legal community complained that selective publication of cases “worked hardship upon attorneys and litigants in that unpublished decisions, substantial in number, are continually cited as authority under circumstances where opposing counsel have neither heard of the case nor seen the written opinion. In practical effect, counsel are ‘sandbagged’ by their use.”¹⁰⁴ Advocates proposed either publishing all appellate decisions in the *Official Reports* or barring citation to unofficial opinions.¹⁰⁵ The supreme court opted for the latter. Rule 8.1115(a) prevents citation to or reliance on unpublished opinions, whether by counsel or by the court.¹⁰⁶

III. PRIOR CHALLENGES TO NO-CITATION RULES

The no-citation rule has never been far from criticism.¹⁰⁷ Indeed, it has drawn a consistent history of criticism. The validity of restricting unpublished opinions has been challenged in three notable cases, on theories exclusive of judicial notice. The decisions in those cases provide insight into the policies influencing regulation of unpublished opinions.

A. *PEOPLE V. VALENZUELA*

Just four years after taking effect, the no-citation rule—then Rule 977—was declared invalid by the appellate department of the superior court.¹⁰⁸ The appellate department in *People v. Valenzuela* voided Rule 977 and proceeded to consider one of its own unpublished opinions in deciding the case before it.¹⁰⁹ A substantial portion of the appellate department’s decision was devoted to rejecting the no-citation rule as violating the basic concept of stare decisis, and as being inconsistent with Civil Code section 22.2¹¹⁰—a codification of the English common law.

The court of appeal transferred the case to itself, sua sponte, without the request of either party.¹¹¹ The transfer vacated the appellate

103. See JUDICIAL COUNCIL REPORT, *supra* note 21, at 15.

104. See *id.*

105. See *id.*

106. CAL. R. CT. 8.1115(a).

107. See, e.g., JUDICIAL COUNCIL REPORT, *supra* note 21, at 21, 28–32 (recording opposition to the proposed no-citation rule).

108. *People v. Valenzuela*, 150 Cal. Rptr. 314, 320 (Ct. App. 1978) (Jefferson (Bernard), J., dissenting).

109. *Id.* at 320.

110. *Id.* at 320–21.

111. *Id.* at 320.

department's decision—including its holding that Rule 977 was invalid—by operation of law.¹¹² With Rule 977 resuscitated, the majority in the higher court declined to comment on the issue. But the dissent took exception. The gravity of the lower court's attack on the no-citation rule evoked a response from Justice Jefferson.¹¹³ He theorized that censorship was tethered to the supreme court's publication right. Under this theory, the no-citation rule was “an effective aid to the usefulness of [selective publication].”¹¹⁴ Justice Jefferson also believed that the supreme court, as the ultimate arbiter of case law, could attempt to control the development of common law with devices like the no-citation rule without offending *stare decisis*.¹¹⁵

As a matter of policy, Justice Jefferson dispatched the basic fairness argument behind the no-citation rule.¹¹⁶ At the time, the lack of electronic databases made access to unpublished opinions a product of chance rather than research, “since they [were] . . . generally unavailable to the bar.”¹¹⁷ Thus, absent the no-citation rule, an unfair opportunity for exploitation arose for litigants with deep pockets for research.¹¹⁸

B. *SCHMIER V. CALIFORNIA SUPREME COURT*

Some of Justice Jefferson's arguments resurfaced in *Schmier v. California Supreme Court*,¹¹⁹ this time more directly. The *Schmier* court adopted Justice Jefferson's dissent in *People v. Valenzuela* to save the no-citation rule.¹²⁰ The plaintiff in *Schmier* challenged the no-citation rule as contrary to section 22.2 of the Civil Code and, therefore, violative of a constitutional requirement that rules of court be consistent with statutes.¹²¹ Section 22.2 codifies English common law, insofar as it is not repugnant to or inconsistent with state or federal law.¹²² Relying on the “repugnancy” qualification of section 22.2, the court in *Schmier* held that the no-citation rule itself, as a duly adopted California authority,¹²³ rendered inoperative any common law to the contrary.¹²⁴

112. *Id.* at 320–21.

113. *Id.* at 321.

114. *Id.* at 322.

115. *Id.* at 323–24.

116. *Id.*

117. *Id.* at 322.

118. *See id.* at 322–24.

119. *See generally* 93 Cal. Rptr. 2d 580 (Ct. App. 2000).

120. *See id.* at 584 (citing *Valenzuela*, 150 Cal. Rptr. at 322).

121. *Id.* at 582–83; *see also* CAL. CONST. art. VI, § 6(d) (proscribing rules inconsistent with statute).

122. CAL. CIV. CODE § 22.2 (West 2007).

123. Rules of court not transcending legislative enactments have the force of positive law. *Cantillon v. Superior Court*, 309 P.2d 890, 892 (Cal. Ct. App. 1957); *see also Silverbrand v. County of Los Angeles*, 205 P.3d 1047, 1059 (Cal. 2009) (confirming that rules of court have the force of statute to the extent that they are not inconsistent with statutes).

124. *Schmier*, 93 Cal. Rptr. 2d at 584–85.

Schmier also dismissed arguments against the no-citation rule based on free speech, due process, and equal protection.¹²⁵ The thrust of plaintiff's argument on those issues was that California's publication rules create "a system of selective prospectivity that allows courts to create a new rule of law applicable to a single case."¹²⁶ Without denying the evil of "selective prospectivity," the court responded that the rules have enough safeguards to protect against it.¹²⁷ Like Justice Jefferson, the *Schmier* court emphasized inconvenience to the judiciary of doing away with the no-citation rule, despite its flaws.¹²⁸ The court highlighted the time saved, for example, by summarily disposing of *Wende* appeals¹²⁹ with a few sentences in an unpublished opinion.¹³⁰ Plaintiff's failure to celebrate the efficiency of this process was criticized by the court.¹³¹ Ironically, the *Wende* practice to which the court alluded was disapproved by the supreme court six years later in *People v. Kelly*.¹³²

C. *ANASTASOFF V. UNITED STATES*

Several months after *Schmier* was decided, an appellate panel held that an analogous federal no-citation rule was unconstitutional.¹³³ In *Anastasoff v. United States*, a taxpayer sought a refund from the IRS.¹³⁴ The IRS denied her claim as untimely.¹³⁵ The taxpayer relied on the "Mailbox Rule" to sustain her claim.¹³⁶ There was a case directly on point against the plaintiff, but it was unpublished. The taxpayer argued that the unpublished opinion was not binding in her case.¹³⁷ The appellate panel disagreed, holding that courts cannot artificially escape the precedential

125. *Id.* at 585–86.

126. *See id.* at 585.

127. *Id.* at 585–86.

128. *See id.* at 586–87 (stressing the waste and inefficiency of destroying the no-citation rule); *see also* Hart v. Massanari, 266 F.3d 1155, 1177 (9th Cir. 2001) (expressing how unpublished opinions are used to manage the court's docket).

129. "[A] *Wende* case is one in which appellate counsel in a criminal appeal advises the court that no arguable appellate issues can be found, thereby invoking the obligation of the Court of Appeal to conduct an independent review of the record." *Schmier*, 93 Cal. Rptr. 2d at 586. *Wende* cases originate from *People v. Wende*, 600 P.2d 1071 (Cal. 1979).

130. *Schmier*, 93 Cal. Rptr. 2d at 586–87.

131. *Id.*

132. *People v. Kelly*, 146 P.3d 547, 548–49, 558–59 (Cal. 2006) (disapproving cursory dispositions of *Wende* appeals, and requiring, instead, a brief synopsis in every opinion deciding a *Wende* appeal, describing contentions raised by the appellant, the underlying facts, procedural history, crime of which defendant was convicted, and the punishment imposed).

133. *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

effect of prior decisions.¹³⁸ A court cannot declare the law in one case but refuse to apply it in another.¹³⁹ To do so, held the court, would unconstitutionally expand the power of the judiciary by allowing disjointed application of the law.¹⁴⁰

A California court had similar thoughts earlier, in 1937, when it ruled,

The fact that this case was not ordered reported in the official reports of the Supreme Court does not detract from its binding force. . . . We make this statement in view of appellants' contention that the foregoing case is not binding because it does not appear in the official reports of the Supreme Court.¹⁴¹

Anastasoff, thus, might fairly be viewed as a restatement of law. Regardless, *Anastasoff* was subsequently vacated as moot when the government caved in and paid the taxpayer's claim after she petitioned for a rehearing en banc.¹⁴²

While overlooking judicial notice, *Valenzuela*, *Schmier*, and *Anastasoff* do identify the competing interests affecting the no-citation rule: efficiency versus accountability.¹⁴³ Against this backdrop, we turn to the challenge posed by judicial notice to the no-citation rule.

IV. INVALIDITY OF THE NO-CITATION RULE

Friction between a statute and a rule of court can spark a constitutional controversy. When assessing the interaction between the no-citation rule and the judicial notice statute, thus, relevant questions include whether there is any friction between them, and if so, whether that friction is necessary or tolerable. As elaborated below, the no-citation rule presents substantial resistance to the judicial notice statute, and this resistance is unjustified, both as a matter of law and as a matter of policy.

A. THE NO-CITATION RULE IS INCONSISTENT WITH THE JUDICIAL NOTICE STATUTE

Rules of court are valid "to the extent that they are not inconsistent with legislative enactments and constitutional provisions."¹⁴⁴ A rule in

138. *Id.*

139. *Id.* at 899-900.

140. *Id.* But see *Hart v. Massanari*, 266 F.3d 1155, 1160 (9th Cir. 2001) (disagreeing with *Anastasoff* as overbroad and upholding the validity of no-citation rules as "an effort to deal with precedent in the context of a modern legal system, which has evolved considerably since the early days of common law," and which has only continued to evolve).

141. *In re Little's Estate*, 72 P. 2d 213, 215 (Ct. App. 1937) (internal citations omitted).

142. *Anastasoff v. United States*, 235 F.3d 1054, 1055 (8th Cir. 2000) (en banc).

143. See *Anastasoff*, 223 F.3d at 901 ("Modern legal scholars tend to justify the authority of precedents on equitable or prudential grounds.").

144. *In re Richard S.*, 819 P.2d 843, 847 (Cal. 1991).

conflict with a statute is unconstitutional.¹⁴⁵ The California Evidence Code permits judicial notice of the records of any state or federal court.¹⁴⁶ Court orders, judgments, opinions—including tentative decisions—findings of fact, and conclusions of law are all eligible for judicial notice under this legislation.¹⁴⁷ In fact, where a party requests judicial notice of a court record, gives notice of that request, and furnishes the court with sufficient information to take judicial notice, the court *must* take judicial notice.¹⁴⁸

Since appellate decisions are a matter of court record, unpublished opinions are properly subject to judicial notice.¹⁴⁹ But judicial notice requires citation to, and asks the court to rely on, court documents regardless of their publication status.¹⁵⁰ The no-citation rule, which prohibits citation to and reliance on unpublished opinions, is at war with the judicial notice statute. The no-citation rule defeats the purpose of the judicial notice statute, and in so doing, loses the constitutional war.

I. Notable Developments in the No-Citation Rule's History

The State Bar's Special Committee on Appellate Courts cautioned the supreme court in 1973 that its proposed no-citation rule had "a problem" with the judicial notice statute, which "might provide the focus for a wholesale attack" on its validity.¹⁵¹ "There would appear to be a serious question whether the right to make a request for judicial notice could be limited by rule of the Supreme Court,"¹⁵² the report said, concluding that the rift with "judicial notice *must be handled through legislation*."¹⁵³ The committee advising the supreme court, however, summarily dismissed the State Bar's warning.¹⁵⁴

145. CAL. CONST. art. VI, § 6(d); *Hess v. Ford Motor Co.*, 41 P.3d 46, 57 (Cal. 2002) (asserting the invalidity of rules that are inconsistent with statutes); *Maldonado v. Superior Court*, 209 Cal. Rptr. 199, 200 (Ct. App. 1984) (same).

146. CAL. EVID. CODE § 452(d) (West 2004).

147. *See, e.g.*, *Gerawan Farming, Inc. v. Lyons*, 12 P.3d 720, 755 n.3 (Cal. 2000) (taking judicial notice of a tentative decision); *People v. Woodell*, 950 P.2d 85, 89–92 (Cal. 1998) (taking judicial notice of an appellate opinion); *Knodel v. Knodel*, 537 P.2d 353, 355 n.3 (Cal. 1975) (taking judicial notice of a trial court order, despite its omission from the clerk's transcript); *Nichols v. Hast*, 400 P.2d 753, 754 (Cal. 1965) (deeming court minutes judicially noticeable); *People v. Harbolt*, 71 Cal. Rptr 459, 462 (Ct. App. 1997) (affirming judicial notice of an appellate opinion); *Gen. Ins. Co. v. Mammoth Vista Owners' Ass'n*, 220 Cal. Rptr. 291, 296 (Ct. App. 1985) (granting judicial notice of a prior opinion); *Day v. Sharp*, 123 Cal. Rptr 918, 924 (Ct. App. 1975) (confirming the propriety of judicial notice for court documents).

148. EVID. §§ 453, 459(a).

149. *See id.* § 452(d) (authorizing judicial notice of court documents).

150. *Id.* §§ 453, 459(a). Judicial notice may also be taken of facts not involving the content of documents, such as the publication status of an opinion. *Id.* § 452(g). Here, the discussion is focused on situations where someone wants to rely on the content of a prior court opinion.

151. JUDICIAL COUNCIL REPORT, *supra* note 21, at 12.

152. *Id.* at 21.

153. *Id.* at 12 (emphasis added).

154. *Id.* at 5.

The courts have yet to uphold the no-citation rule against a judicial notice-based, constitutional attack. The closest constitutional assault on the no-citation rule in California came from *Schmier*. However, judicial notice was not the rationale for that case. The *Schmier* court said the no-citation rule was consistent with Civil Code section 22.2, and thus, was constitutional.¹⁵⁵ *Schmier*'s analysis is a straightforward application of the consistency-with-statute requirement for rules of court. While that analysis saved the no-citation rule from attack based on Civil Code section 22.2, it does little to withstand the violence done by the judicial notice statute. The judicial notice statute says that unpublished opinions—as court records—can be cited in other cases; the no-citation rule says they cannot. The position of the two authorities is in direct conflict, and in conflicts between the rules of court and statutes, the rules of court must submit.¹⁵⁶ Nothing in *Schmier* suggests otherwise.

The supreme court's scarce decisions in the judicial notice controversy are mixed. In *People v. Webster*,¹⁵⁷ the prosecutor in a death penalty case sought judicial notice of an unpublished appellate decision involving the appellant's codefendants.¹⁵⁸ In a short footnote, the supreme court refused the request as inconsistent with the no-citation rule.¹⁵⁹ The court made no analysis other than to note the inconsistency.

Three years later, in *Mangini v. R.J. Reynolds Tobacco Co.*,¹⁶⁰ R.J. Reynolds requested judicial notice of a federal court decision after its case had been fully briefed.¹⁶¹ Noting defendant's lack of diligence, the supreme court denied its request as an improper attempt to bypass the normal briefing process.¹⁶² In seven sentences addressing the issue, the court reasoned that judicial notice should not be used to skirt appellate rules, citing *Webster* as precedent.¹⁶³ As if oblivious to article VI, section 6, the court construed *Webster* as authority for the proposition that "judicial notice may not be used to circumvent the prohibition against citing unpublished opinions."¹⁶⁴ Four years later, the court retreated from this disturbing conclusion in *People v. Hill*.¹⁶⁵

155. See *Schmier v. Cal. Supreme Court*, 93 Cal. Rptr. 2d 580, 584–85 (Ct. App. 2000).

156. See CAL. CONST. art. VI, § 6(d).

157. 814 P.2d 1273 (Cal. 1991).

158. *Id.* at 1280 n.4.

159. *Id.*

160. 875 P.2d 73, 77 (Cal. 1994), *overruled on other grounds by In re Tobacco Cases II*, 163 P.3d 106 (Cal. 2007).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* (citing *Webster*, 814 P.2d at 1280 n.4).

165. 952 P.2d 673, 700 n.9 (Cal. 1998) (taking judicial notice of an unpublished opinion critical of the same prosecutor as in the case at bar).

Hill involved another death penalty case, but one that was riddled with prosecutorial misconduct.¹⁶⁶ The prosecutor's errors were so flagrant that the defendant's conviction was overturned.¹⁶⁷ After explaining the need for reversal, the supreme court addressed prosecutorial misconduct as an institutional concern. As part of its discourse, the supreme court lambasted the prosecutor for past and present misconduct to emphasize how her behavior resulted in a miscarriage of justice.¹⁶⁸ Using judicial notice, the supreme court referenced "a 1987 unpublished opinion . . . affirming a conviction of Roderick Congious" in which the same prosecutor had been admonished.¹⁶⁹ Having determined that unpublished opinions are "[r]ecords of . . . any court of this state," within the meaning of the judicial notice statute, the court took judicial notice over the prosecutor's objection.¹⁷⁰ "Because we do not cite or rely on that opinion," the court explained, "judicial notice does not in this circumstance run afoul of [the no-citation rule]."¹⁷¹ Of course, the court did precisely what it said it was not doing: It *relied on* the unpublished opinion to press the woes of prosecutorial misconduct—the very point of its dissertation.¹⁷² Moreover, the supreme court inexplicably allowed the defendant to cite, discuss, and rely on *Congious* in his brief,¹⁷³ contravening the no-citation rule's command that unpublished cases "must not be cited or relied on by a court *or a party* in any other action."¹⁷⁴ The court turned the no-citation rule on its head, while claiming—with a straight face—that it was fully adhering to it.

Hill was not the first instance in which the supreme court was unfaithful to the no-citation rule. Nominal fidelity to the no-citation rule traces back to *People v. Turner* and *Cynthia D. v. Superior Court*, where the supreme court found occasion to cite unpublished decisions. The high court cited several unpublished cases for persuasion in *Turner*,¹⁷⁵ and modeled its decision after one in *Cynthia D.*¹⁷⁶ No explanation was given in either *Turner* or in *Cynthia D.* how reliance on unreported cases was

166. *Id.* at 678–79.

167. *Id.* at 679.

168. *Id.* at 699–700.

169. *Id.*; see also *People v. Congious*, No. B020979, at 8 (Cal. Ct. App. Dec. 4, 1987) (unpublished) (“[I]t is disheartening, to say the least, to learn that she takes ‘pride’ in our admonitions, apparently because we did not reverse the judgment rendered . . .”).

170. *Hill*, 952 P.2d at 700 n.9 (alteration in original) (quoting CAL. EVID. CODE § 452(d) (internal quotation marks omitted)).

171. *Id.*

172. See *id.* at 699–700 (analyzing the harmless error rule with reference to prosecutor's past conduct, as recorded in *Congious*).

173. See Appellant's Opening Brief at 163–65, *People v. Hill*, 952 P.2d 673 (No. S007386).

174. CAL. R. CT. 8.1115(a) (emphasis added).

175. *People v. Turner*, 789 P.2d 887, 906 n.17 (Cal. 1990).

176. 851 P.2d 1307, 1314 n.9 (Cal. 1993).

consistent with the no-citation rule. Despite this history of infidelity, the supreme court remains wedded to the no-citation rule.

The supreme court has never considered the impact of article VI, section 6(d) on its analysis of the no-citation rule. Because “an opinion is not authority for a proposition not therein considered,”¹⁷⁷ no present supreme court ruling is effective against an article VI, section 6(d) attack predicated on judicial notice. The court’s cursory review of judicial notice in *Webster, R.J. Reynolds*, and *Hill* is thoroughly inadequate. In each case, the court failed to deliberate over the preemptory aspect of legislative acts.

In *R.J. Reynolds*, the court went so far as to place court rules before statutes. It said the judicial notice statute may not be used to “circumvent” rules of court.¹⁷⁸ The court got it backwards: “A rule of court cannot take precedence over a statute.”¹⁷⁹ Statutes outrank rules of court.¹⁸⁰ “If a rule is inconsistent with a statute, the statute controls.”¹⁸¹ Failure to import constitutional law into the fray led the court astray. Constitutional analysis should have led the supreme court to affirm the priority of statutes over rules of court. The supreme court, instead, made the bizarre suggestion that rules of court trump statutes.¹⁸²

2. Fairness Accommodations Within Legislation

Legislative enactments mark existential boundaries for rules of court.¹⁸³ Those boundaries provide adequate accommodations for policies behind rules of court. A request for judicial notice must (1) involve proper subject matter,¹⁸⁴ (2) provide sufficient notice to the adverse party,¹⁸⁵ and (3) satisfy otherwise applicable rules of evidence.¹⁸⁶ These conditions are built into the judicial notice statute. The second condition, requiring sufficient notice, is geared towards fairness to the adverse party. Had it relied on this accommodation in *R.J. Reynolds* and *Hill*, the

177. *Ginns v. Savage*, 393 P.2d 689, 691 n.2 (Cal. 1964).

178. *Mangini v. R.J. Reynolds Tobacco Co.*, 875 P.2d 73, 77 (Cal. 1994), *overruled on other grounds by In re Tobacco Cases II*, 163 P.3d 106 (Cal. 2007).

179. CAL. CONST. art. VI, § 6(d); *Pellegrini v. Weiss*, 81 Cal. Rptr. 3d 387, 403 (Ct. App. 2008).

180. CAL. CIV. CODE § 22.1 (West 2007) (stating that statutes and the constitution express the will of the supreme power); *McMahon v. Hamilton*, 260 P. 793, 795 (Cal. 1927) (per curiam) (“It is true, of course, that rules of court are subservient to statutory mandate.”).

181. *Hess v. Ford Motor Co.*, 41 P.3d 46, 57 (Cal. 2002).

182. *Mangini*, 875 P.2d at 77.

183. See CAL. CONST. art. VI, § 6(d) (stating that rules of court may not be inconsistent with statute); *Hess*, 41 P.3d at 57.

184. See CAL. EVID. CODE §§ 451, 452 (West 2004) (describing the proper subject matter for judicial notice). Judicially noticeable matters must be notorious or indisputable. See *id.* A “dying declaration,” for instance, presumably is an improper subject for judicial notice.

185. *Id.* §§ 453, 454, 459.

186. See, e.g., *N. Beverly Park Homeowners Ass’n v. Bisno*, 54 Cal. Rptr. 3d 644, 656 (Ct. App. 2007) (explaining the applicability of the hearsay rule to judicial notice). California’s rules of evidence, of course, are statutory. See, e.g., CAL. EVID. CODE §§ 1, 300 (West 2004).

supreme court could have reached the same outcome in those cases without offending constitutional boundaries.

In *R.J. Reynolds*, the supreme court could have denied the defendant's request for judicial notice as untimely—in other words, unfairly prejudicial to the adverse party.¹⁸⁷ By extension, granting judicial notice in *Hill* was proper, as all procedural requisites had been satisfied, and there was no showing of unfair prejudice to the prosecutor.¹⁸⁸ Reference to the no-citation rule was unnecessary.

Statutory bars on irrelevant and hearsay evidence provide other accommodations.¹⁸⁹ With these legislative directives, a court may freely deny irrelevant requests for judicial notice or requests that seek to introduce hearsay evidence. Thus, if a party to a divorce proceeding requests judicial notice of the fact that cows moo, his request may be denied as irrelevant. But neither the relevancy test nor the hearsay bar does anything to save the no-citation rule. At best, the two restraints lead to a teaser. Some may urge, for example, that the no-citation rule necessarily makes unpublished opinions irrelevant in other cases, allowing for denial of judicial notice. But the import of this claim is that the no-citation rule is constitutional because it says it is. That argument is circular.

A rule of court cannot cite itself as authority for violating constitutional law.¹⁹⁰ Otherwise, the no-citation rule could also make, for instance, the Federal Constitution irrelevant in California cases simply by prohibiting its citation. *Houston v. Williams* said even opinionless judgments can be relevant authority in subsequent cases.¹⁹¹ Unpublished opinions, a fortiori, are useful beyond themselves.

By failing to rest its analysis on statutory grounds, the supreme court in *Webster*, *R.J. Reynolds*, and *Hill* veered off course. In *Webster* and *R.J. Reynolds*, the court trespassed outside constitutional terrain, giving priority to rules of court over statutes.¹⁹² And while the court in *Hill* reached the correct destination, it did so by venturing into legal

187. EVID. § 453(a).

188. Compare *Mangini v. R.J. Reynolds Tobacco Co.*, 875 P.2d 73, 77 (Cal. 1994), *overruled on other grounds*, In re Tobacco Cases II, 163 P.3d 106 (Cal. 2007) (seeking judicial notice a few weeks before oral argument), with Appellant's Opening Brief, *supra* note 173, at 164 n.33 (requesting judicial notice at the outset of the appeal). By contrast, denial of judicial notice in *Webster* was improper. Absent a showing of undue prejudice to the opposing party, judicial notice should have been granted, as in *Hill*.

189. See EVID. § 350 (rendering irrelevant evidence inadmissible); *id.* § 1200(b) (barring hearsay evidence); *Bisno*, 54 Cal. Rptr. 3d at 656 (discussing the interplay of hearsay in judicial notice).

190. See *Javorek v. Superior Court*, 552 P.2d 728, 738–39 (Cal. 1976) (dismissing circular or “bootstrap reasoning”).

191. 13 Cal. 24, 25 (1859) (clarifying how to use opinionless judgments in subsequent cases), *superseded by constitutional amendment*, CAL. CONST. art. VI, § 14.

192. See *Mangini*, 875 P.2d at 77 (citing *Webster* as authority for the proposition that rules of court may not be circumvented by statutes).

fiction.¹⁹³ The statutory requirements of sufficient notice and relevancy should have adequately placated the supreme court's concerns in those cases without compromising constitutional limits on rules of court. Most rules of court are accommodated by and are consistent with statutes. The no-citation rule is an anomaly. The rule's inability to function even with statutory accommodations makes it a dead limb on the constitutional tree, ready to be lopped off.¹⁹⁴

B. THE NO-CITATION RULE IS IN EXCESS OF THE SUPREME COURT'S JURISDICTION

Writing rules of court is normally the province of the Judicial Council.¹⁹⁵ Created in 1926, the Judicial Council is a body of judges, lawyers, and legislators who "adopt rules for court administration, practice and procedure, and perform other functions prescribed by statute."¹⁹⁶ The Judicial Council created all but two segments of the rules of court.¹⁹⁷ The exceptions are division five of title eight, the publication rules, and title nine, the rules of professional conduct, both of which were adopted directly by the supreme court.¹⁹⁸ The supreme court invoked the publication rules using its constitutional power to designate opinions for publication under article VI, section 14.¹⁹⁹

I. *The Legal Basis for the No-Citation Rule Is Illogically Derived*

The supreme court sees the no-citation rule as a natural extension of its powers under article VI, section 14.²⁰⁰ But a closer look should dispel this mirage. The no-citation rule was admitted on an illogical construction of article VI, section 14. That provision is a directive *to the legislature* to distribute certain court opinions at public expense.²⁰¹ The supreme court is granted a narrow power to select opinions for that purpose.²⁰² Essentially, the supreme court's power under article VI, section 14 is to force the legislature to publish at least some court decisions. But nothing

193. See *People v. Hill*, 952 P.2d 673, 700 n.9 (Cal. 1998) (justifying judicial notice of an unpublished opinion on the ground that the court was not relying on it).

194. This language derives from *People v. Greene*, 16 P. 197, 199 (Cal. 1887).

195. CAL. CONST. art. VI, § 6; see also 2 WITKIN, CALIFORNIA PROCEDURE: COURTS § 181 (5th ed. 2008) (noting the Judicial Council's rule-making occupation).

196. CAL. CONST. art. VI, § 6(d). The amendment creating the Judicial Council, article VI, section 6, was ratified in 1926 but took effect in 1927. *People v. Smith*, 211 P.2d 561, 563 (Cal. 1949).

197. CAL. R. CT. 1.3.

198. The Judicial Council apparently cosigned the no-citation rule, *People v. Valenzuela*, 150 Cal. Rptr. 314, 321 n.3 (Ct. App.1978) (Jefferson (Bernard), J., dissenting), but current rules give sole credit to the supreme court. CAL. R. CT. 1.3, 8.1100.

199. CAL. CONST. art VI, § 14; CAL. R. CT. 8.1100.

200. See CAL. R. CT. 8.1100 (citing article VI, section 14 as the basis for the publication rules); see also *Valenzuela*, 150 Cal. Rptr. at 322.

201. See CAL. CONST. art. VI, § 14 (instructing the legislature to publish opinions selected by the supreme court).

202. See *id.* (authorizing implicitly the supreme court to compel publication of its opinions).

in article VI, section 14 prohibits the legislature from publishing more. In fact, the legislature did just that in 1909: By statute, the legislature commanded publication of *all* filed decisions.²⁰³ Moreover, the statute *forbade* the supreme court from censoring anything.²⁰⁴ It said, “All opinions *filed* must be printed in full in the law reports.”²⁰⁵ Yet in 1974, the supreme court read into its positive right to select opinions a negative right to prohibit unselected opinions.²⁰⁶ This assumption of power does not logically follow.

Article VI, section 14 tells the legislature to publish opinions selected by the supreme court. Stripping the provision to its logical parts, article VI, section 14 gives this instruction: If designated, publish. From this, the supreme court has inferred: If not designated, censor. This inference is a variation of the fallacy known in formal logic as “denying the antecedent.”²⁰⁷ If the constitutional provision instead read, “all monkeys eat bananas,” applying the supreme court’s logic would yield, “if you are not a monkey, you do not eat bananas.”²⁰⁸ Deriving a right to censor from the right to publish at public expense is as illogical as professing that only monkeys eat bananas.

The no-citation rule is an aberration of constitutional trend, precedent, and intent. The language of the present publication authority mirrors its predecessors with little variation. The 1849 Constitution said, “The legislature shall provide for the speedy publication of . . . such judicial decisions as it may deem expedient[] . . .”²⁰⁹ The 1879 Constitution similarly commanded the legislature to “provide for the speedy publication of such opinions of the supreme court as it may deem

203. Namely, California law provided:

The reports are to be published under the general supervision of the supreme court, which may correct clerical errors in the opinion as filed, or authorize the same to be corrected; *but may not in any manner alter the written opinion as to substance, argument or authority cited, or omit any portion of the opinion as filed. All opinions filed must be printed in full in the law reports.* Proof-sheets of the opinions must be furnished by the official reporter to the supreme court from time to time as the cases are set up in the galleys and corrections made.

CAL. POLITICAL CODE § 774, *amended by* 1909 Cal. Stat. 1022–23 (repealed 1951) (emphasis added).

204. *Id.*

205. *Id.*

206. *See* Gray v. Kay, 120 Cal. Rptr. 915, 918 (Ct. App. 1975) (mentioning the inception of the no-citation rule in 1974).

207. *See* Crouse-Hinds Co. v. InterNorth, Inc., 634 F.2d 690, 702–03 n.20 (2d Cir. 1980) (explaining the fallacy of denying the antecedent, where a necessary condition is mistaken for a sufficient one).

208. *See* Agri Processor Co., Inc. v. NLRB, 514 F.3d 1, 6 (D.C. Cir. 2008) (illustrating the fallacy of denying the antecedent with the example: “Because it’s not cold outside, it’s not snowing. It is now cold outside, therefore it must be snowing” (internal quotation marks omitted)); *see also* LSAT *If-Then Statements*, TEST SHERPA, <http://www.testsherpa.com/lsat/lsat-if-then-statements/> (last visited May 23, 2011) (illustrating the monkey example).

209. CAL. CONST. of 1849, art. VI, § 12.

expedient . . .”²¹⁰ A notable change came in 1904, when the supreme court assumed the role of deciding which opinions to publish at public expense.²¹¹ Aside from a change in management, in other words, the publication process remained the same. And it was not until 1974 that the supreme court barred the century-long practice of citing unpublished opinions.²¹²

Never during its stewardship of judicial publication did the legislature claim an inferred right to censor unpublished opinions, unlike the supreme court. Opinions not officially published remained in the public domain for discovery.²¹³ In fact, when the supreme court’s practice of issuing opinionless judgments interfered with the supply of publishable decisions, the legislature tried to curtail the practice.²¹⁴ The legislature passed a statute demanding written explanation for court decisions.²¹⁵ When the supreme court resisted, the writing requirement was constitutionally imposed.²¹⁶ And in 1909, the legislature specifically ordered publication of all court decisions, whether or not the supreme court designated them.²¹⁷ The trend was to increase circulation of opinions.

In *Houston v. Williams*, the supreme court itself encouraged use of unpublished opinions. The court said attorneys could determine the principles of law from case records and then cite those cases, along with their presumed propositions, as precedent.²¹⁸ But today even *explicit* principles of law from an unreported decision cannot be used as precedent. *Houston* approved citation to implied reasoning, but the no-citation rule disapproved citation to explicit reasoning. To say that a judgment without comment can be used as precedent, but an unreported judgment with a written explanation cannot, is irrational. The no-citation rule flies in the face of the trend, history, and intent of the constitutional publication authority.

By its explicit terms, article VI, section 14 grants no rulemaking authority to the supreme court.²¹⁹ The court does possess inherent

210. CAL. CONST. of 1879, art. VI, § 16.

211. COMMITTEE REPORT, *supra* note 31, at 9 (mentioning the 1904 amendment).

212. *Gray v. Kay*, 120 Cal. Rptr. 915, 918 (Ct. App. 1975) (referencing adoption of the no-citation rule in 1974).

213. *See* 9 WITKIN, CALIFORNIA PROCEDURE: APPEAL § 489 (5th ed. 2008) (describing the early treatment of unreported cases).

214. *See* *People v. Kelly*, 146 P.3d 547, 550 (Cal. 2006) (referencing an 1854 statute that compelled the supreme court to give written opinions).

215. *Houston v. Williams*, 13 Cal. 24, 25 (1859), *superseded by constitutional amendment*, CAL. CONST. art. VI, § 14.

216. *Kelly*, 146 P.3d 547, 552–53.

217. 1909 Cal. Stat. 1022–23.

218. 13 Cal. at 25 (asserting that attorneys can use opinionless judgments as precedent with careful study of the records in each case).

219. *Cf.* CAL. CONST. art. VI, § 6 (reserving explicit rule-making authority for the Judicial Council).

rulemaking power in the absence of explicit authority, but that power is limited.²²⁰ If the no-citation rule cannot find basis in the supreme court's inherent constitutional power either, it stands in excess of the court's jurisdiction.

2. *The No-Citation Rule Is Beyond the Scope of the Supreme Court's Inherent Powers*

Courts possess inherent power to create rules of practice to control the proceedings before them. This “power arises from necessity where, in the absence of any previously established procedural rule, rights would be lost or the court would be unable to function.”²²¹ Unnecessarily invoking the inherent powers would be crying wolf to the constitution. The no-citation rule presents no basis for invoking the court's inherent rule-making power. Previously established procedural rules, such as judicial notice, are available, and the supreme court can function without censoring opinions—as it did from 1849 through 1974.²²² But even assuming, arguendo, cause existed for their invocation, “inherent powers should never be exercised in such a manner as to nullify existing legislation or frustrate legitimate legislative policy.”²²³

For over a century, the supreme court has observed that rules commissioned by inherent powers are valid “[i]n the absence of any rules of practice enacted by the legislative authority.”²²⁴ The court has further explained that it “may make and enforce rules of practice, but a rule which operates to deprive a party of a statutory right is repugnant to the statute and therefore to that extent void.”²²⁵ This limitation *predates* article VI, section 6(d)'s explicit requirement that rules of court be consistent with statutes.²²⁶ Rules adopted by courts were subordinate to statutes even before the adoption of article VI, section 6(d).²²⁷ Therefore, the no-citation rule's inconsistency with the judicial notice statute cannot be excused on the technical ground that article VI, section 6(d) is directed at the Judicial Council rather than at the supreme court.²²⁸

220. See 2 WITKIN, CALIFORNIA PROCEDURE: COURTS § 185 (5th ed. 2008) (explaining the judiciary's limited, inherent powers).

221. *Id.*

222. See *Gray v. Kay*, 120 Cal. Rptr. 915, 918 (Ct. App. 1975) (stating the no-citation rule's effective date in 1974).

223. *Ferguson v. Keays*, 484 P.2d 70, 73 (Cal. 1971) (determining the court of appeal had inherent power to waive filing fees in the absence of statute or a Judicial Council rule providing otherwise).

224. *People v. Jordan*, 4 P. 683, 684 (Cal. 1884).

225. *People v. McClellan*, 31 Cal. 101, 103 (1866) (voiding a rule which prohibited simultaneous demurrer and answer as inconsistent with statute).

226. See *id.* (identifying limitation on rules promulgated under inherent powers); see also CAL. CONST. art. VI, § 6(d) (voiding rules inconsistent with statutes); *Brooks v. Union Trust & Realty Co.*, 79 P. 843, 845 (Cal. 1905) (per curiam) (stating that the supreme court rules may “not conflict with any act of the Legislature”).

227. *McClellan*, 31 Cal. at 103.

228. The supreme court, not the Judicial Council, sustains the no-citation rule. CAL. R. CT. 1.3; see

Article VI, section 6(d) merely clarified that the newly formed Judicial Council was not exempt from the consistency-with-statute requirement on account of its *explicit* rulemaking power. Before the Judicial Council, between 1904 and 1925, explicit constitutional rulemaking power belonged to the supreme court, and even then the supreme court was bound by the consistency-with-statute requirement.²²⁹ That explicit grant of power was transferred to the Judicial Council in 1926.²³⁰ It would be incredible to claim that the supreme court's rule-making power somehow *increased* when it lost its explicit constitutional grant to the Judicial Council.

The supreme court's rulemaking power has a continuous history of submission to legislative enactments. In *People v. McClellan*—a case decided in 1866—the supreme court said it had no power to craft rules contravening statutes.²³¹ In 1905, the court reaffirmed this limitation in *Brooks v. Union Trust & Realty Co.*, during a period when it enjoyed explicit constitutional rulemaking power.²³² By its own jurisprudence, the supreme court has thus acknowledged the inherent subordination of court rules to statutory law.

The court's creation of the no-citation rule was an illegitimate act. The supreme court, like all courts, has an inherent right to promulgate rules of procedure.²³³ That power has always been qualified by the requirement of consistency with all statutory and constitutional provisions.²³⁴ When the state's constitution was amended in 1926, the newly created Judicial Council was told its rules would be subject to the requirement of consistency with statute.²³⁵ Article VI, section 6(d) enshrined the constitutional principle that non-legislative rules are secondary to legislative enactments.²³⁶ This clarification for the Judicial Council in no way translates to increased power for the supreme court.

Admonishment to the Judicial Council to refrain from certain conduct, which the supreme court had long recognized was improper (namely, making rules in conflict with statutes), is not consent to the

also supra note 198.

229. See *Brooks*, 79 P. at 845.

230. The amendment creating the Judicial Council was ratified in 1926 and became effective in 1927. See *People v. Smith*, 211 P.2d 561, 563 (Cal. 1949).

231. 31 Cal. at 103.

232. 79 P. 843, 845 (Cal. 1905) (per curiam).

233. See *Albermont Petroleum, Ltd. v. Cunningham*, 9 Cal. Rptr. 405, 407 (Ct. App. 1960).

234. See *People v. Jordan*, 4 P. 683, 684 (Cal. 1884) (authorizing court-adopted rules in the absence of legislation directly on point); *McClellan*, 31 Cal. at 103 (disapproving rules inconsistent with statute); *Cunningham*, 9 Cal. Rptr. at 407–08 (noting the inherent power of courts to make rules not in conflict with constitutional or legislative provisions).

235. See CAL. CONST. art. VI, § 6; 2 WITKIN, CALIFORNIA PROCEDURE: COURTS § 390 (5th ed. 2008) (noting the adoption of what is now article VI, section 6 in 1926).

236. See *Trans-Action Commercial Investors, Ltd. v. Jelinek*, 70 Cal. Rptr. 2d 449, 456 (Ct. App. 1997) (confirming the legislature's primary constitutional authority to provide rules of procedure).

supreme court to engage in that very conduct. Supported by neither the express nor implied powers of the supreme court, the no-citation rule is disconnected from the constitution. The supreme court unilaterally approved the no-citation rule, in excess of its jurisdiction, defying the long-standing constitutional principle that rules of court may not be inconsistent with statutes.

C. A RULE OF CENSORSHIP ELICITS THE IMPRESSION OF JUDGE NULLIFICATION

Beyond the obligation to be fair in fact, judges are duty-bound to maintain an appearance of fairness.²³⁷ The appearance of fairness in court proceedings is an element of due process.²³⁸ As a practical matter, public perception is important to the judiciary because judges “possess no real power except that which is derived from the respect and confidence of the people.”²³⁹ And, “[j]udicial power will not long endure if public respect and confidence is destroyed because judicial power is exercised in an unfair manner or appears to be exercised in an unfair manner.”²⁴⁰ Citation schemes that enable courts to censor their opinions, like the no-citation rule, lend themselves to an appearance of impropriety too unpleasant to bear.

I. Basic Problem with Censoring Opinions

When courts censor decisions, by ordering them not to be published or cited, they invite suspicion of wrongdoing.²⁴¹ Aiding this perception is the ability of unpublished opinions to cloak grounds for review. The supreme court intervenes “[w]hen necessary to secure uniformity of decision or to settle an important question of law.”²⁴² Preventing disorder in the legal system, in other words, is motivation for review. An unpublished opinion purportedly is neither authority nor law.²⁴³ Because it cannot be cited or relied upon, an unpublished opinion is incapable of creating splits in authority or presenting important questions of law. At

237. *Pratt v. Pratt*, 74 P. 742, 743–44 (Cal. 1903) (reversing a judgment where the judge seemed prejudiced against the defendant, and holding that judges must be fair in fact and maintain an appearance of fairness).

238. *See Peters v. Kiff*, 407 U.S. 493, 502 (1972) (reversing the conviction of a white man on the ground that jury selection, which excluded blacks, created an appearance of unfairness).

239. *Wood v. City Civil Serv. Comm’n*, 119 Cal. Rptr. 175, 179 (Ct. App. 1975).

240. *Id.*

241. *E.g.*, *County of Los Angeles v. Kling*, 474 U.S. 936, 937 (1985) (Stevens, J., dissenting) (criticizing the former federal no-citation rule as “a rule spawning a body of secret law”); JUDICIAL COUNCIL REPORT, *supra* note 21, at 31–32 (“To allow a court to carry on this process in relative secrecy by not publishing its decisions is to invite arbitrariness. While all judges are presumptively men of good will, our system of government is predicated upon the notion that its just operation will be promoted by rules of law, rather than by reliance of the presumption of good will.”).

242. CAL. R. CT. 8.500(b)(1).

243. *See id.* R. 8.1115 (asserting that unpublished opinions are not authority).

least in theory, unpublished opinions fail to create the sort of chaos that normally would induce the supreme court to intervene. So much was implied by then-Associate Supreme Court Justice Joseph Grodin, who in 1984 considered the prospect of publication as a “means of inducing the supreme court to grant [a] hearing” in a case.²⁴⁴

2. *Statistical Analysis of Unpublished Opinions*

A study commissioned by the supreme court reported that nearly ninety-two percent of appellate opinions are unpublished.²⁴⁵ The study showed that between 2001 and 2005, the court of appeal collectively decided 75,313 cases.²⁴⁶ The supreme court reviewed 905 of those cases and issued opinions in 452 of them.²⁴⁷ Cases in which opinions were not issued included “grant and hold” reviews, in which the court carries a case until it resolves a leading case on a decisive issue.²⁴⁸ These cases are typically disposed of by an order—without briefing, hearing, or an opinion.²⁴⁹ The study determined that “[o]f the approximately 92 percent of cases overall that were not certified for publication, only one-tenth of 1 percent resulted in opinions issued by the supreme court.”²⁵⁰ By contrast, published opinions, which emerged in a tiny fraction of appeals, accounted for the vast majority of cases decided by the supreme court.²⁵¹ The numbers speak for themselves.

Whether by design or in practice, unpublished decisions are less accountable for error.²⁵² If an unscrupulous court wants to defy controlling precedent, ordering its decision not to be published is a prudent measure. Odds are less than one-tenth of one percent that the supreme court subsequently will decide the unpublished case.²⁵³ This potential for lawlessness makes the practice of selective publication seem unfair, even dangerous. What an honorable court may think is a harmless act, the public may construe as a surreptitious attempt to nullify the law in order to bring about a certain outcome.

244. Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 CALIF. L. REV. 514, 522 (1984) [hereinafter Grodin, *Depublication*]; see also Joseph R. Grodin, Former Assoc. Justice, Cal. Supreme Court, Remarks at the Right to Cite Debate at University of California, Hastings College of the Law (Apr. 14, 2010) (acknowledging that a published opinion is much more likely than an unpublished opinion to be reviewed by the supreme court).

245. COMMITTEE REPORT, *supra* note 31, at 18.

246. *Id.* at 16.

247. *Id.* at 18.

248. *Id.*; see also CAL. R. CT. 8.512(d) (describing the “grant and hold” mechanism).

249. COMMITTEE REPORT, *supra* note 31, at 18.

250. *Id.* at 19.

251. *Id.* at 18–19.

252. See *id.*

253. *Id.*

3. *The No-Citation Rule in Practice*

In an effort to improve public confidence in the publication rules, the supreme court liberalized the standard for publication of court opinions in 2006.²⁵⁴ This liberalization came amidst complaints that “unpublished opinions may be used to suppress certain types of decisions or to discourage supreme court review.”²⁵⁵ Among other things, the current standard states that an opinion “should” be published if it establishes a new rule of law; modifies, explains, or criticizes a rule of law; or creates an apparent conflict in the law.²⁵⁶ The rules also permit any member of the public to request publication or depublishment of a court opinion, with oversight by the supreme court.²⁵⁷ These purported safeguards against misuse of the publication rules lack teeth.

On its face, the standard for publication is entirely precatory. The operative word in the standard is a wishful “should.”²⁵⁸ There is nothing resembling a guarantee that the standard will be enforced. A court bent on nullifying controlling precedent in a given case has an incentive not to find grounds for publication—and under the rules, it is not *required* to do so.²⁵⁹ The aggrieved party’s only recourse is to complain to the supreme court. But the same disincentive that keeps the supreme court away from unpublished opinions discourages it from ordering an opinion published: Publishing a questionable opinion increases the need for review.

An appellate court deciding whether to certify its opinion for publication has a conflict of interest. On the one hand, the court “should” follow the guidelines for publication.²⁶⁰ On the other hand, the court wants to avoid rebuke by a higher court.²⁶¹ So, if the court is not fully confident in some aspect of its decision—irrespective of any result-oriented intent—it may hesitate to publish. Without publication, after all, an opinion has an infinitesimal chance of being visited by the supreme court.²⁶² Refusal to publish an opinion can therefore be interpreted as a calculated move to discourage supreme court intervention. Since the true intent of the appellate court is unknown in this process, even a negligent failure to publish an opinion may be perceived as willful wrongdoing.

254. News Release, Judicial Council of Cal., Supreme Court Amends Rules on Publication of Court of Appeal Opinions (Dec. 12, 2006), available at <http://www.courtinfo.ca.gov/presscenter/newsreleases/NR91-06.pdf>.

255. COMMITTEE REPORT, *supra* note 31, at 4.

256. CAL. R. CT. 8.1105(c).

257. *Id.* R. 8.1120, 8.1125.

258. *Id.* R. 8.1105(c).

259. *Id.*

260. *Id.*

261. See *People v. Nettekville*, No. 3173174, 2005 WL 32853, at *14 (Cal. Ct. App. Jan. 7, 2005) (considering the “sting of reversal” on a lower court).

262. See COMMITTEE REPORT, *supra* note 31, at 19 (discussing appellate statistics).

a. The Publication Standard Is Easily Ignored

Liberalization of the publication standard was meant to reserve the unpublished opinion procedure for unoriginal, redundant decisions. Yet a basic online search still yields quite a few inventive decisions that have been censored: *Gonzales v. Department of Health Care Services*,²⁶³ *Sweet v. Superior Court*,²⁶⁴ *Maiorano v. Professional Community Management, Inc.*,²⁶⁵ *Aida A. v. Superior Court*,²⁶⁶ *People v. Colon*,²⁶⁷ and *De La Rosa v. City of San Jose*.²⁶⁸ These cases, each of which contains either an internal disagreement, a disagreement with a sister court, or engages in novel construction, demonstrate the consequences of a toothless rule.²⁶⁹ While each case easily passes the hurdle for publication, they remain unpublished.²⁷⁰ Their authors do not want them cited.²⁷¹ With the no-citation rule, courts can keep their disagreements relatively private, attracting less attention from the supreme court, and this ability to muzzle disagreement may explain the reluctance for publication. The revised publication standard has the unrealistic expectation that courts will obey a discretionary rule to their own detriment.

b. The Importance of Unpublished Decisions

Meshed within unpublished opinions are trends in law, practice points, and insight. Consider, for illustration, *Neu v. Superior Court*.²⁷² There, petitioner-wife originally sought a writ of mandate, seeking to join trusts as parties in a marital dissolution action.²⁷³ While the wife's petition was pending, her husband moved for discovery sanctions.²⁷⁴ The court of appeal subsequently granted a stay in the proceedings below, but once

263. No. B219433, 2010 WL 5377987, at *1-4, *6 (Cal. Ct. App. Dec. 29, 2010) (exploring the impact of statutory amendments on a prior supreme court case, distinguishing petitioner's case from another case, and opting for an entirely different line of reasoning); *see also* CAL. R. CT. 8.1105(c)(1)-(5), (8).

264. No. A127884, 2010 WL 1511705, at *2 (Cal. Ct. App. Apr. 16, 2010) (acknowledging split among courts and taking sides); *see also* CAL. R. CT. 8.1105(c)(3)-(6).

265. No. B220127, 2010 WL 3786721, at *4 (Cal. Ct. App. Sept. 30, 2010) (partially rejecting a published decision); *see also* CAL. R. CT. 8.1105(c)(3), (5).

266. No. B225457, 2010 WL 3993719, at *5 (Cal. Ct. App. Oct. 13, 2010) (partly disagreeing with a published case); *see also* CAL. R. CT. 8.1105(c)(3)-(5).

267. No. F056334, 2010 WL 612245, at *13 (Cal. Ct. App. Feb. 22, 2010) (disagreeing with dissent's interpretation of controlling precedent); *see also* CAL. R. CT. 8.1105(c)(3), (5), (9).

268. No. H033488, 2010 WL 1918658, at *8-17 (Cal. Ct. App. May 13, 2010) (taking the infrequent step of reviewing an in limine ruling de novo and engaging in statutory construction); *see also* CAL. R. CT. 8.1105(c)(2)-(4).

269. *See Regents of the Univ. of Cal. v. Superior Court*, No. A096423, 2002 WL 120818, at *2 (Cal. Ct. App. Jan. 30, 2002) (resolving an important issue of public interest).

270. *See* correlating factors for publication cited *supra* notes 263-268.

271. CAL. R. CT. 8.1115(a).

272. No. B163692, 2003 WL 1928397 (Cal. Ct. App. Apr. 24, 2003).

273. *Id.* at *1.

274. *Id.*

that stay was lifted, the trial court granted the husband's renewed motion for discovery sanctions.²⁷⁵

The wife again petitioned for a writ, this time seeking relief from the discovery sanctions.²⁷⁶ The *Neu* court sided with petitioner, holding that the issuance of the stay in the first mandate proceeding relieved the wife of her obligation to respond to discovery.²⁷⁷ In a footnote, *Neu* explicitly repudiated a thirty-seven-year-old precedent, which had held that the mere filing of an extraordinary petition, taken in good faith, excused noncompliance with discovery.²⁷⁸ "We do not go as far today as we went in *Fairfield*," said the court, "where we held that the mere filing of a writ petition . . . relieves a party of an existing obligation to respond to outstanding discovery requests."²⁷⁹ The court even purported to give advice to members of the bar, remarking, "We close with this caution to future petitioners: Be specific when you ask for or oppose a stay; when necessary, seek clarification."²⁸⁰ Having split with a thirty-seven-year-old precedent, and giving important guidance to practitioners, the *Neu* court nonetheless declined to certify its opinion for publication.

The court may have been simply negligent in failing to publish its decision. But there is room for speculation that the court lacked confidence in its reasoning. Worse, censorship here may foster a perception of abuse; namely, masking disagreement with precedent to reduce the likelihood of scrutiny by the supreme court.²⁸¹ A citation scheme in which mere negligence can be perceived as an impropriety is contrary to the duty to maintain an appearance of fairness. Selective publication, as in *Neu*, disrupts the appearance of probity in judicial decisionmaking.

The perception of noncitability as a device for masking error and nullifying the law is more than speculation. One court was explicitly accused of judge nullification in 2008.²⁸² In *Hild v. Southern California Edison Co.*, the underlying action,²⁸³ a Southern California Edison ("Edison") employee accidentally blinded a minor.²⁸⁴ The plaintiff filed a personal injury action against Edison. The case went to trial on the issue of vicarious liability: whether the Edison employee who injured the

275. *Id.*

276. *Id.*

277. *Id.* at *2.

278. *See id.* at *2 n.8 (disapproving *Fairfield v. Superior Court*, 54 Cal. Rptr. 721 (Ct. App. 1966)).

279. *Id.*

280. *Id.* at *2.

281. *See* authorities cited *supra* note 244; *see also* COMMITTEE REPORT, *supra* note 31, at 4.

282. *See* *Hild v. Cal. Supreme Court*, No. C 07-5107 TEH, 2008 WL 544469, at *8 (N.D. Cal. Feb. 26, 2008) (challenging the court of appeal's refusal to publish its decision in the underlying action as an attempt to discourage intervention by the supreme court).

283. No. B185778, 2007 WL 1806850 (Cal. Ct. App. June 25, 2007).

284. *Hild*, 2008 WL 544469, at *1 (discussing *Hild v. S. Cal. Edison Co.*).

plaintiff acted within the scope of her employment.²⁸⁵ Because Edison had suppressed evidence during litigation, the trial court entered a spoliation sanction, permitting the jury to infer that the suppressed evidence was damaging to Edison's case.²⁸⁶ The jury returned a verdict for the plaintiff, aided by the discovery sanction.²⁸⁷ The court of appeal reversed, in an opinion ordered not to be published.²⁸⁸

Plaintiff claimed the opinion should have been published because it broke with and misapplied existing law and established a new rule of law to his detriment.²⁸⁹ When the court of appeal refused to budge, plaintiff sought declaratory relief in federal district court. He complained that the court of appeal was deliberately using the no-citation rule to torpedo his chances of review in the California Supreme Court.²⁹⁰

According to the plaintiff, the court of appeal deviated substantially from controlling precedent, substituted its own inferences for the jury's, and applied "revolutionary and controversial new legal grounds" to reach its decision—all without posing a single question to plaintiff's counsel during oral argument.²⁹¹ The court was deliberately using the no-citation rule, plaintiff added, to insulate its dubious decision from review.²⁹² This was possible, plaintiff explained, because the no-citation rule prevents unpublished cases from creating a conflict with published decisions, thereby depriving litigants of the main ground for supreme court review: the need to "secure uniformity of decision."²⁹³ Hild's federal action was dismissed as moot when the supreme court denied his then-pending petition for review.²⁹⁴

The allegations in *Hild* are troubling. Plaintiff recited details portraying a court that acted with stealth to deny him justice.²⁹⁵ The sole issue at trial was whether the defendant's employee was acting within the scope of her employment when she blinded the plaintiff.²⁹⁶ "[T]he determination whether an employee has acted within the scope of employment presents a question of fact," except when "the facts are

285. *Id.*

286. First Amended Complaint for Declaratory Relief at 3, *Hild*, 2007 WL 5136904 (No. C 07-5107 TEH).

287. *Hild*, 2008 WL 544469, at *1.

288. *Id.*

289. First Amended Complaint, *supra* note 286, at 6-7.

290. *Hild*, 2008 WL 544469, at *1; First Amended Complaint, *supra* note 286, at 4-5.

291. First Amended Complaint, *supra* note 286, at 4, 6-7.

292. *Hild*, 2008 WL 544469, at *1, *8; First Amended Complaint, *supra* note 286, at 4-5.

293. *Hild*, 2008 WL 544469, at *1, *3.

294. *Id.* at *6-8 (dismissing the case as moot but upholding the no-citation rule based on *Schmier*); see also *Hild v. Cal. Supreme Court*, No. 08-15785, 346 F. App'x 252, 253 (9th Cir. 2009) (dismissing appeal as moot).

295. *Hild*, 2008 WL 544469, at *1, 8; First Amended Complaint, *supra* note 286, at 4-5.

296. *Hild*, 2008 WL 544469, at *1.

undisputed and *no* conflicting inferences are possible.”²⁹⁷ A jury verdict on a disputed question of fact “will not be disturbed on appeal, of course, if there is any substantial evidence to support it.”²⁹⁸

The court of appeal in Hild’s underlying action conceded that “[t]he facts in this case are somewhat disputed,” but used precedent applicable where “the facts are undisputed.”²⁹⁹ With this contradiction, a quick reference to a decision from a sister court, which it seemed less than eager to embrace,³⁰⁰ and having posed no questions to plaintiff’s counsel at oral argument, the court of appeal reversed a jury verdict.³⁰¹ The court of appeal’s subsequent refusal to publish its decision under the circumstances is difficult to justify.

Whether Joshua Hild was in fact deprived of justice in this inquiry is not as relevant as whether *it appears* he was denied justice, which seems to be the case.³⁰² “Poor Joshua!”, to borrow Justice Blackmun’s famous line from *DeShaney v. Winnebago County of Department of Social Services*,³⁰³ had his judgment vetoed under dubious circumstances. *Hild* shows how easily a court’s refusal to publish its decision can be interpreted as result-oriented mischief. One view of *Hild* is justice done in a difficult case, by an honorable court. Another view depicts defiance of the law by judges in order to force a particular result. Because the latter picture shows scandalous conduct, it is likely to attract more attention and become the prevailing view among the public.

Hild is both unoriginal and extraordinary. The case is unoriginal because the party who loses an unreported appeal frequently makes what one appellate judge calls a “hostile publication request” (that is, demands publication of the unfavorable decision) to coerce the supreme court to intervene,³⁰⁴ the idea being that the supreme court will act to prevent case law from becoming infected with flawed precedent.³⁰⁵ Because publication requests are processed informally, by letter,³⁰⁶

297. *Mary M. v. City of Los Angeles*, 814 P.2d 1341, 1347 (Cal. 1991) (emphasis added) (quoting *Perez v. Van Groningen & Sons, Inc.*, 719 P.2d 676, 679 (Cal. 1986)).

298. *Barnett v. Keilig*, 338 P.2d 477, 478 (Cal. Ct. App. 1959).

299. *Hild v. S. Cal. Edison Co.*, No. B185778, 2007 WL 1806850, at *3 (Cal. Ct. App. June 25, 2007) (quoting *Kephart v. Genuity, Inc.*, 38 Cal. Rptr. 3d 845, 851 (Ct. App. 2006)) (internal quotation marks omitted).

300. *Id.* at *6 n.2.

301. See First Amended Complaint, *supra* note 286, at 4, 6–7 (describing the court of appeal’s conduct).

302. This is not to say that an illusion of justice is ever a substitute for true justice. Here, priority is given to perception, because public perception is the subject of discussion.

303. 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting).

304. Mark Simons, Assoc. Justice, Cal. Court of Appeal, First Appellate Dist., Remarks at the Right to Cite Debate at University of California, Hastings College of the Law (Apr. 14, 2010).

305. See Grodin, *Depublication*, *supra* note 244, at 514–15 (explaining the supreme court’s aversion to leaving wrongly decided cases on the books).

306. CAL. R. CT. 8.1120(a)(2).

tracking them is difficult. In this regard, *Hild* is extraordinary—a rare instance where a hostile publication request is thoroughly documented.

Empirical studies provide further evidence that appellate censorship is prone to perceptions of impropriety. One study of the liberal supreme court under Chief Justice Rose Bird “found that three-quarters of its depublishment orders were aimed at opinions with conservative outcomes.”³⁰⁷ After Republican appointees replaced Chief Justice Bird and two liberal justices in 1986, “another study found the same correlation continued, albeit in the opposite direction.”³⁰⁸ With statistics like these, a process advertised as fair on paper seems less appealing in practice. Ironically, one of the notable opponents of the no-citation rule in 1973 was then-public-defender Rose Bird.³⁰⁹

In the court of public opinion, thus, refusal to certify publication may be seen as an attempt to insulate a decision from scrutiny.³¹⁰ Courts, under a mandate to maintain an appearance of fairness, must steer clear of practices that risk injury to their reputation. The practice of unpublishing or depublishing opinions involves accusations so serious, with benefits so comparatively minor, that any court engaged in it recklessly risks harm to its integrity.

D. AVOIDING CONGESTION WITHOUT CENSORSHIP

Censoring unpublished opinions is a drastic means of reducing court congestion. California courts can function without a no-citation rule. What follows is a nonexhaustive list of potential alternatives to this unnecessary and controversial rule.

1. *More Judges*

Withdrawing the no-citation rule will not drive the courts to bedlam. Repeal of the no-citation rule merely *returns* California courts to a prior state of existence. For most of its history, the judiciary of this state functioned without a no-citation rule and performed fine.³¹¹ As of 2007, the federal system has operated without a no-citation rule and is no closer to collapse.³¹² California courts, too, will survive without

307. Steven B. Katz, *Without Precedent*, L.A. LAW, Mar. 2001, at 43, 44 (citing Phillip J. Dubois, *The Negative Side of Judicial Decision Making: Depublication as a Tool of Judicial Power and Administration on State Courts of Last Resort*, 33 VILL. L. REV. 69, 511 (1988)) (noting that 76.5% of opinions ordered depublished by the Bird court had conservative outcomes).

308. *Id.* (citing Gerald F. Uelman, *Publication and Depublication of California Court of Appeal Opinions: Is the Eraser Mightier Than the Pencil?* 26 LOY. L.A. L. REV. 1007, 1018–20 (1993)).

309. See JUDICIAL COUNCIL REPORT, *supra* note 21, at 28–30 (opposing nonpublication of criminal cases).

310. See COMMITTEE REPORT, *supra* note 31, at 4 (noting concerns that unpublished opinions may be used to discourage supreme court review); Grodin, *Depublication*, *supra* note 244, at 522 (considering the idea that a published decision may be more likely to induce supreme court review).

311. See COMMITTEE REPORT, *supra* note 31, at 9.

312. See FED. R. APP. P. 32.1(a) (permitting citation to unpublished federal opinions).

ensorship. But even if stress on the court docket intensifies without the no-citation rule, the state can resort to the antidote it discovered back in 1879: hiring more judges.

2. *More Clerks*

A cheaper alternative to recruiting more judges is to increase the stock of law clerks. Law clerks can be a court's most prized possession. These quasi-judges do the legwork for the court, from legal research to opinion drafting.³¹³ Judges can manifest their will through their law clerks, like the President and his³¹⁴ speechwriters. By delegating drafting tasks to their law clerks, and thus freeing themselves of having to start an opinion from scratch, judges can conserve substantial judicial time. With law clerks pedaling alongside judges, the wheels of justice can turn faster, at a cheaper cost.

3. *Shorter Opinions*

Judges can also reduce backlog by writing more concise opinions. While the delegates to the 1879 Constitutional Convention contemplated reasoned decisions from courts, they hardly expected the behemoth treatises that frequently issue from appellate courts. Needlessly long opinions deplete already scarce judicial resources. For example, the decision in the *Marriage Cases*,³¹⁵ discussing gay marriage, spans 100 pages and resembles a law review article. Its federal companion, *Perry v. Schwarzenegger*,³¹⁶ comfortably stretches over seventy pages. By contrast, the U.S. Supreme Court's decision in *Loving v. Virginia*,³¹⁷ discussing interracial marriage, is less than ten pages long. Both *Marriage Cases* and *Loving* were groundbreaking, involved similar subject matter, and encompassed first-impression issues of vast importance, but the *Loving* opinion was up to ten times as efficient.

While *Marriage Cases* might be more thorough than *Loving*, it is not necessarily as alluring to litigators.³¹⁸ Practitioners, unlike law school

313. See Rick A. Swanson & Stephen L. Wasby, *Good Stewards: Law Clerk Influence in State High Courts*, 29 JUST. SYS. J. 24, 38–39 (2008) (emphasizing the importance of law clerks to judicial decisionmaking); cf. Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This!: Why We Don't Allow Citation to Unpublished Dispositions*, CAL. LAW., June 2000, at 43, 44 (stating that most unpublished federal memorandum dispositions "are drafted by law clerks with relatively few edits from the judges").

314. To dispense with the phrase "his or her" (and its permutations), this Note follows the conventions of the California Evidence Code. CAL. EVID. CODE § 9 (West 2004) ("The masculine gender includes the feminine and neuter.").

315. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *as recognized in* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

316. 704 F. Supp. 2d 921 (N.D. Cal. 2010).

317. 388 U.S. 1 (1967).

318. Cf. Julie A. Oseid, *The Power of Brevity: Adopt Lincoln's Habits*, 6 J. ASS'N LEGAL WRITING DIRECTORS 28, 29 (2009) ("Writing is the craft of our profession, and writing with brevity enhances our persuasiveness.").

professors, arguably lack the time necessary to sit down and ruminate over a 100-page opinion. To them, an oversized opinion may seem unattractive. A terser, more concise opinion is better suited to their schedule. The inefficiency of writing long opinions, thus, probably serves the busy litigator least, for whom less tends to be more.

Great opinions can be short, as Justice Holmes so regularly demonstrated.³¹⁹ Concision allowed Holmes, on average, to return judgments within thirty days of oral argument, in less than four pages.³²⁰ “[T]he art of writing legal decisions,” according to Holmes, “is to omit all but the essentials.”³²¹ Perhaps one way of guiding courts to write more efficiently is to subject them to the same page limits they impose on practitioners.³²² The constraint of a page limit, in theory, should motivate judges to budget their words against a looming deadline for their decision. By simply trimming their opinions, judges can facilitate reduction of their own dockets. The shorter the opinion, the smaller the backlog.

E. THE PREMISE FOR THE NO-CITATION RULE NO LONGER EXISTS

The basic rationale for the no-citation rule was to mitigate “unfairness between parties and their counsel who possess unlimited funds for research and those with very limited budgets.”³²³ This rule came out in 1974, halting a tradition of citing unpublished decisions dating back to 1849.³²⁴ The supreme court was persuaded by complaints that unpublished opinions were generally unavailable *to members of the bar*,

319. See *Harris v. Rivera*, 454 U.S. 339, 346 n.15 (1981) (per curiam) (noting that Holmes’s writing “characteristically was brief and to the point”). But see *Hayes v. Solomon*, 597 F.2d 958, 986 n.22 (5th Cir. 1979) (“I have made this letter longer than usual because I lack the time to make it shorter.” (quoting Blaise Pascal)).

320. Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1290 (2001); see also Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 782 (1983) (“Abridged memorandum decisions can be addressed primarily to the parties, not to the public. They can identify the issue for decision, the court’s disposition, and the principle basis for the ruling. They can normally forego an exposition of the facts and procedural history.”).

321. Post, *supra* note 320, at 1291.

322. See CAL. R. CT. 3.1113(d) (trial court memoranda); *id.* R. 8.204(c) (briefs in the court of appeal); *id.* R. 8.504(d) (briefs in the supreme court); *cf.* *Hollingsworth v. Perry*, 130 S. Ct. 705, 706 (2010) (per curiam) (“Courts enforce the requirement of procedural regularity on others, and must follow those requirements themselves.”).

323. *People v. Valenzuela*, 150 Cal. Rptr. 314, 322 (Ct. App. 1978) (Jefferson (Bernard), J., dissenting).

324. See *id.* at 323 (noting the adoption of the no-citation rule in 1974); see also *Houston v. Williams*, 13 Cal. 24, 25 (1859), *superseded by constitutional amendment*, CAL. CONST. art. VI, § 14 (permitting citation to opinionless decisions); *Overton v. White*, 64 P.2d 758, 759 (Cal. Ct. App. 1937) (citing an unpublished opinion).

giving an unfair advantage to attorneys with resources to go on research expeditions.³²⁵

The impetus for the no-citation rule—unavailability of unpublished opinions to the bar—vanished with the digital era.³²⁶ No longer are attorneys required to ride their horses across town to find advantageous precedent. Today, all court decisions are a few clicks away.³²⁷ Electronic databases, court websites, and blogs make legal research a matter of internet access.

A survey commissioned by the supreme court found that ninety-two percent of attorneys and fifty-eight percent of appellate judges use unpublished opinions in their work.³²⁸ Justice Mark Simons, a judge on the California Court of Appeal, openly confirms that appellate judges “are looking at those opinions.”³²⁹ It is “very easy to view these opinions,” he explains, and “because they are easy to view, they are viewed.”³³⁰ Making “opinions unciteable does not really relieve lawyers from reviewing them.”³³¹ The original reason for the no-citation rule is plainly gone, and “[w]hen the reason of a rule ceases, so should the rule itself.”³³²

Despite the dissolution of its original premise, the no-citation rule persists. The premise for the rule has evolved from concern for fairness

325. See *Valenzuela*, 150 Cal. Rptr. at 321–22; JUDICIAL COUNCIL REPORT, *supra* note 21, at 15; see also *Anastasoff v. United States*, 223 F.3d 898, 901 (8th Cir.) (touching on modern justifications for the no-citation rules), *vacated as moot on reh’g en banc*, 235 F.3d 1054 (8th Cir. 2000).

326. See Lawrence J. Fox, *Those Unpublished Opinions: An Appropriate Expedience or an Abdication of Responsibility?*, 32 HOFSTRA L. REV. 1215, 1219 (2004) (rejecting the notion that the no-citation rule is necessary in the digital age because of unequal access to unpublished opinions); *id.* (“Whatever merit this argument had years ago, it reflects a world that no longer exists.”).

327. *Id.*; see also Barnett, *Deflating*, *supra* note 22, at 549 (“With today’s methods of computer-based legal research, all such obstacles are bypassed.”).

328. COMMITTEE REPORT, *supra* note 31, at 41.

329. Simons, *supra* note 304; see also *Sepulveda v. Wal-Mart Stores, Inc.*, 237 F.R.D. 229, 242, 250 (C.D. Cal. 2006) (citing unreported decisions), *rev’d in part* by 275 F. App’x 672 (9th Cir. 2008); *Kalantar v. Lufthansa German Airlines*, 402 F. Supp. 2d 130, 139 (D.D.C. 2005) (discussing an unpublished case); *In re Heritage Bond Litig.*, No. MDL 02-ML-1475 DT, 2004 WL 1638201, at *3–4, *7–8 (C.D. Cal. July 12, 2004) (citing an unreported case); *Sumitomo Corp. v. J.P. Morgan & Co., Inc.*, No. 99 Civ. 8780(JSM), 2000 WL 145747, at *2 (S.D.N.Y. Feb. 8, 2000) (citing an unreported case); *People v. Hill*, 952 P.2d 673, 700 n.9 (Cal. 1998) (referencing an unpublished opinion); *Cynthia D. v. Superior Court*, 851 P.2d 1307, 1314 n.9 (Cal. 1993) (adapting analysis of an unreported case); *Harris v. Investor’s Bus. Daily, Inc.*, 41 Cal. Rptr. 3d 108, 112–13 (Ct. App. 2006) (relying on unreported opinions).

330. Simons, *supra* note 304.

331. Fox, *supra* note 326, at 1221 (pointing out that lawyers necessarily read unpublished opinions to keep up with legal trends); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 reporter’s note cmt. c (2000) (same); DAVID F. HERR, MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.132 (2009 ed. 2009) (citing an unpublished decision); D. KELLY WEISBERG, EMANUEL LAW OUTLINES: FAMILY LAW 64, 70 (2d ed. 2008) (same); THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION B4.1.4, at 11 (Columbia Law Review Ass’n et al. eds., 19th ed. 2010) (noting the frequent practice of citing unreported decisions).

332. CAL. CIV. CODE § 3510 (West 2007) (noting a maxim of jurisprudence).

to judicial convenience.³³³ “At bench and bar meetings, lawyers complain at length about being” unable to cite to unpublished decisions.³³⁴ Judges respond that many unpublished decisions add little or nothing to existing case law, and absent no-citation rules, court backlog would increase, as judges would exert additional time writing more detailed opinions.³³⁵ As the *Schmier* court put it, publication of uncertified decisions would “clutter overcrowded library shelves and databases with information utterly useless to anyone other than the actual litigants therein and complicate the search for meaningful precedent.”³³⁶

Inconvenience to the courts, case backlog, and other predictions of doom and gloom are insufficient to justify the no-citation rule.³³⁷ These same arguments were raised and rejected over a century ago.³³⁸ Before 1879, the supreme court produced unpublished decisions in a different way: by issuing opinionless judgments.³³⁹ This practice irritated the legislature to the point that they tried to end it by statute.³⁴⁰ An offended supreme court responded, “not every case . . . justif[ies] the expenditure of time necessary to write an opinion. Many cases involve no new principles, and are appealed only for delay. It can serve no purpose of public good to repeat elementary principles of law which have never been questioned for centuries.”³⁴¹ Unconvinced, California voters approved a constitutional amendment.³⁴²

The delegates to the 1879 Constitutional Convention determined that requiring written decisions tended to foster “purity and honesty in the administration of justice.”³⁴³ This purity and honesty would follow the increased accountability from opinions that “must come before the

333. See Kozinski & Reinhardt, *supra* note 313, at 43–44 (explaining increased burdens on courts but for no-citation rules); see also Hart v. Massanari, 266 F.3d 1155, 1177 (9th Cir. 2001) (Kozinski, J.) (upholding the prior federal no-citation rule, and noting that opinion writing “is an exacting and extremely time-consuming task”).

334. Kozinski & Reinhardt, *supra* note 313, at 43.

335. See authorities cited *supra* note 333.

336. *Schmier v. Cal. Supreme Court*, 93 Cal. Rptr. 2d 580, 587 (Ct. App. 2000).

337. See *Chesney v. Byram*, 101 P.2d 1106, 1109 (Cal. 1940) (explaining that while legislation may be convenient, any legislation still must be subordinate to constitutional provisions, further the purpose of the applicable constitutional provision, and must not attempt to narrow or flout the provision).

338. *People v. Kelly*, 146 P.3d 547, 550–51 (Cal. 2006) (discussing the passage of a constitutional amendment requiring written decisions over the supreme court’s objections regarding inefficiency and institutional rights).

339. See *id.* at 551 (mentioning the supreme court’s practice of deciding cases without written opinion).

340. See *id.* at 550 (citing a prior statute requiring the supreme court to provide written opinions for its decisions).

341. *Houston v. Williams*, 13 Cal. 24, 26 (1859), *superseded by constitutional amendment*, CAL. CONST. art. VI, § 14.

342. See *Kelly*, 146 P.3d at 551 (noting the passage of a constitutional amendment requiring written opinions in appeals).

343. *Id.* at 552.

jurists of the country and be subjected to the severest criticism.”³⁴⁴ The electorate heard the arguments, deliberated, and refused to compromise judicial honesty for convenience. Its solution to court backlog was to hire more judges.³⁴⁵

Article VI, section 14 enjoined an overwhelmed supreme court from resorting to opinionless judgments. Nearly a century later, in 1974, the supreme court recalled the spirit of opinionless decisions. Today, the high court—and by proxy, the intermediate courts of appeal—issues reasoned decisions but achieves the effect of opinionless judgments through the no-citation rule.³⁴⁶ An opinion that cannot be cited might as well not exist. Its accountability is on par with opinionless judgments. To justify the no-citation rule on the basis of efficiency is a perversion of the writing requirement of Article VI, section 14. If abandoning the no-citation rule is inconvenient, perhaps the state should hire more appellate judges. The judges who complain most about court backlog presumably would be first to offer to share their power.

The claim that the no-citation rule avoids wasteful research is presumptuous, as the study of unpublished decisions continues to be an important part of legal research.³⁴⁷ Over ninety percent of lawyers currently use unpublished opinions.³⁴⁸ *Bluebook* forecasts, “In practice, you will frequently need to cite a case or slip opinion that has not been or will not be assigned to a reporter for publication.”³⁴⁹ As any seasoned practitioner knows well, good legal research requires examination of unpublished decisions.³⁵⁰ Sometimes the only analysis on a particular issue is found in an unpublished opinion.³⁵¹ The no-citation rule in these instances compounds inefficiency, as lawyers have to disregard a case on point and needlessly search for a different opinion. Their search results become “like a Soviet era department store, crammed with goods that can be seen but never attained.”³⁵² Lawyers have a *duty* to study trends in

344. *Id.*

345. *See id.* at 553 (pointing out the expansion of the supreme court’s membership following the constitutional amendment requiring written opinions in appeals).

346. *See* CAL. R. CT. 8.1115 (prohibiting citation to unpublished opinions).

347. COMMITTEE REPORT, *supra* note 31, at 41. *See generally* Barnett, *Bark*, *supra* note 22 (suggesting that censorship of opinions is unproductive).

348. COMMITTEE REPORT, *supra* note 31, at 41. *See generally* Barnett, *Bark*, *supra* note 22 (noting evidence that suggests citability of unpublished opinions yields no significant waste).

349. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION B4.1.4, at 11 (Columbia Law Review Ass’n et al. eds., 19th ed. 2010).

350. Barnett, *Deflating*, *supra* note 22, at 550 (emphasizing that no serious appellate attorney would submit a brief on an issue without reviewing both published and unpublished opinions).

351. *See, e.g.*, *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir.), *vacated as moot on reh’g en banc*, 235 F.3d 1054 (8th Cir. 2000) (citing an unpublished opinion as the only authority on point); *Overton v. White*, 64 P.2d 758, 759 (Cal. 1937) (same); *see also In re Little’s Estate*, 72 P.2d 213, 215 (1937) (relying on an unpublished opinion as the most controlling precedent).

352. WILLIAM T. HANGLEY, AM. COLL. TRIAL LAWYERS, OPINIONS HIDDEN, CITATIONS FORBIDDEN: A

law and to try to anticipate court decisions.³⁵³ A rule that tells lawyers to refrain from relying on unpublished opinions, or to pretend they do not exist, is an unrealistic effort at thought control.³⁵⁴

Careful examination of unpublished decisions may reveal crucial developments in the law.³⁵⁵ For example, the court in *Neu*, an unpublished decision, renounced a thirty-seven-year-old precedent and gave an admonishment to the bar.³⁵⁶ “We close with this caution to future petitioners,” said the court, “[b]e specific when you ask for or oppose a stay; when necessary, seek clarification. In the long run, this approach is both easier and cheaper.”³⁵⁷ An attorney whose case might come before this panel *must* be aware of *Neu*. Abandonment of the no-citation rule would merely push the reluctant practitioner to get himself up to speed with the rest of the bar.

The claim that the no-citation rule still operates to save members of the bench and bar from expensive, time-consuming, and unfair research is further belied by the citability of unreported cases from jurisdictions outside California.³⁵⁸ Surely whatever unfairness, waste, and expense that attends research of unpublished opinions applies to California and to foreign cases alike. Yet citation to unpublished opinions of non-California courts is allowed. California courts cannot credibly claim citation to *their* unreported decisions will lead to gloom and doom, but citation to the unreported decisions of more exotic jurisdictions will not. “[I]t is difficult to justify a system that permits parties to bring to a court’s attention virtually every written or spoken word in existence *except* those contained in the court’s own non-precedential opinions.”³⁵⁹ This inconsistent practice is evidence that the premise for the no-citation rule has evolved from fairness to litigants to convenience for judges.

No calamity awaits the judiciary without a no-citation rule. Lawyers will continue lawyering; judges will continue judging; litigants will continue litigating; and the Earth will continue spinning. Some say permitting citation to nonprecedential decisions would force California

REPORT AND RECOMMENDATIONS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS ON THE PUBLICATION AND CITATION OF NONBINDING FEDERAL CIRCUIT COURT OPINION 12 (2002).

353. See Barnett, *Deflating*, *supra* note 22, at 543 (urging study of depublished opinions for trends).

354. *Id.* at 543–44.

355. See, e.g., *Neu v. Superior Court*, No. B163692, 2003 WL 1928397, at *2 n.8 (Cal. Ct. App. Apr. 24, 2003) (distancing itself from *Fairfield v. Superior Court*, 54 Cal. Rptr. 721 (Ct. App. 1966), and purporting to warn the bar).

356. *Id.*

357. *Id.*

358. See *Harris v. Investor’s Bus. Daily, Inc.*, 41 Cal. Rptr. 3d 108, 114 (Ct. App. 2006) (accepting citation to unreported federal opinions); *Lebrilla v. Farmers Grp., Inc.*, 16 Cal. Rptr. 3d 25, 31 (Ct. App. 2004) (approving citation to unpublished decisions of other states).

359. Memorandum from Judge Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules, to Judge Anthony J. Scirica, Chair, Standing Comm. on Rules of Practice and Procedure 26 (Dec. 6, 2002), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/AP12-2002.pdf>.

judges and lawyers on an impossible trek.³⁶⁰ Jurists and lawyers, according to supporters of the no-citation rule, would have to figure out the full context of nonbinding decisions; lawyers would be tempted to mischief; immense time would be wasted; and California's judiciary would come to its knees.³⁶¹

But the California Supreme Court dismissed these concerns in *Houston v. Williams* when the legislature tried to take away its power to issue opinionless judgments. There, the court said, "The reports are full of adjudged cases, in which opinions were never delivered."³⁶² The court went on to say, "The principles of law settled *are to be extracted from the records* of the cases in which the decisions are rendered."³⁶³ *Houston* invited these supposedly confusing and difficult outcomes. As a matter of law, therefore, extracting principles of law from case records is no cause for concern.

Finally, to the extent that the no-citation rule may be said to further the supreme court's selective publication right, convenience to the court will not excuse inconsistency with statute.³⁶⁴ The supreme court's approach to a similar issue in *Houston* is instructive. At the time *Houston* was decided, selective publication was the right of the legislature—the constitution empowered the legislature to decide which opinions should be published at public expense.³⁶⁵ A rule compelling the supreme court to state reasons for its decisions unquestionably would have aided the legislature's publication right, as more opinions would permit more selection. But when the legislature pressed the supreme court with its analogous "aid," it received a cold shoulder.³⁶⁶ The supreme court refused to enforce an aid to the legislature's constitutional publication power.³⁶⁷ When the shoe was on the other foot, the supreme court saw a rule that facilitated the legislature's constitutional power as an affront to its autonomy.³⁶⁸ By parity of reason, the no-citation rule's aid to the supreme court's publication right should be irrelevant.

360. See *Schmier v. Cal. Supreme Court*, No. C 09-02740 WHA, 2009 WL 2246205, at *4-5 (N.D. Cal. July 27, 2009) (upholding the no-citation rule against a First Amendment attack).

361. *Id.*

362. *Houston v. Williams*, 13 Cal. 24, 25 (1859), *superseded by constitutional amendment*, CAL. CONST. art. VI, § 14.

363. *Id.* (emphasis added).

364. See *Chesney v. Byram*, 101 P.2d 1106, 1109 (Cal. 1940) (emphasizing that convenience alone will not justify violation of constitutional restraints).

365. CAL. CONST. of 1849, art. VI, § 12.

366. *Houston*, 13 Cal. at 25 (holding a statute requiring written decisions to be unconstitutional).

367. *Id.*

368. See *id.* (construing a statute requiring written decisions to be offensive to the court's "dignity and independence").

CONCLUSION

Censorship of appellate opinions is a practice at odds with the state's constitution, history, and sense of justice. Early in its history, the supreme court managed its growing caseload by simply opting not to provide written opinions for many of its cases.³⁶⁹ The procedure was practical but unpopular with the public.³⁷⁰ Opinionless decisions lacked the accountability that results when a court is compelled to defend its judgment with reason. Nonetheless, the supreme court was unwilling to halt the simple process that made its life easier.³⁷¹

Refusing criticism of opinionless judgments, the supreme court said its workload would become unbearable, and libraries would be filled to the heavens, were it required to provide written reasons for all its judgments.³⁷² The high court thought written opinions were unnecessary because attorneys were expected to extract the court's reasoning by examining the case file.³⁷³ California voters rejected the court's arguments, opting for a more accountable system.³⁷⁴ They imposed on the courts a constitutional duty to provide opinions for their judgments, while mitigating the increased burdens of such a duty by hiring more judges.³⁷⁵

Almost a century later, the supreme court gave itself the power to censor appellate decisions.³⁷⁶ With current publication rules, appellate courts can issue opinions that neither have precedential effect nor may be cited.³⁷⁷ These rules resurrect the spirit of opinionless judgments. An opinion that cannot be cited is effectively an opinion that does not exist. Before article VI, section 14, some cases had no opinion to which to cite.³⁷⁸ Today, the no-citation rule asks us to *pretend* some cases have no opinion to which to cite.³⁷⁹ The effect is the same under each system: Reasons for a judgment are unavailable for direct citation or reliance. There is constructive censorship under the former system and actual censorship in the latter. With the no-citation rule, courts do indirectly

369. See *People v. Kelly*, 146 P.3d 547, 550–51 (Cal. 2006) (discussing the supreme court's previous practice of issuing opinionless judgments).

370. See *id.* (pointing out the legislature's effort to compel written decisions).

371. See *Houston*, 13 Cal. at 26 (arguing that a rule requiring written opinions would be wasteful).

372. See *id.* (speculating on the consequences of a writing requirement).

373. See *id.* at 25 (stating that principles of law could be extracted from court records).

374. See *Kelly*, 146 P.3d at 553 (noting the passage of constitutional amendment, justified as tending to honesty, which required written opinions in appeals).

375. See *id.* at 552 (discussing the expansion of the supreme court).

376. CAL. R. CT. 1.3, 8.1100 (asserting that the supreme court adopted publication rules on its own); *People v. Valenzuela*, 150 Cal. Rptr. 314, 323 (Ct. App. 1978) (Jefferson (Bernard), J., dissenting) (determining the effective date of the no-citation rule to be 1974).

377. CAL. R. CT. 8.1115.

378. See *Houston*, 13 Cal. at 25–26 (mentioning the then-prevailing practice of issuing opinionless decisions).

379. See CAL. R. CT. 8.1115 (barring citation to or reliance on unpublished opinions).

that which they cannot do directly.³⁸⁰ The publication rules circumvent the intent behind the writing requirement of article VI, section 14 and, to that end, are unconstitutional.

Another constitutional hurdle to the supreme court's publication rule is the requirement that rules of court be consistent with all statutes.³⁸¹ The consistency-with-statute requirement predates its explicit incorporation into the state constitution in 1926, where it admonishes the Judicial Council.³⁸² The no-citation rule fails this consistency-with-statute requirement. The rule is in direct conflict with the judicial notice statute, which permits citation to any court record.³⁸³ Because the requirement existed before the Judicial Council, the no-citation rule gets no exemption on account of being the product of the supreme court. Rules adopted by courts, rather than by the Judicial Council, remain subject to the inherent constitutional restraint that they must not conflict with statutes.

Legal reasons aside, the no-citation rule should be abandoned for its potentially detrimental effect on public perception of the courts.³⁸⁴ Some judges point to the efficient qualities of the no-citation rule to justify their affinity for the rule.³⁸⁵ To them, the no-citation rule is a velvet glove, worn to ensure delicate handling of controversies. The problem is that lower courts can use the no-citation rule to discourage supreme court review.³⁸⁶ An opinion ordered not to be published quarantines its flaws to the case at hand and no further.³⁸⁷ That quarantine of potential problems takes away an incentive for a higher court to intervene.

A lower court wishing to avoid scrutiny by the supreme court will be motivated to keep its opinion unpublished. Regulated loosely by a standard that "should" apply, decisions on publication are sticky.³⁸⁸ Thus,

380. See *People v. Dryden*, 245 P. 436, 437 (Cal. 1926) ("The law forbids that to be done indirectly which may not be done directly.").

381. See *People v. McClellan*, 31 Cal. 101, 103 (1866) (deeming void rules that are inconsistent with statute); see also CAL. CONST. art. VI, § 6(d) (same).

382. See generally *People v. Smith*, 211 P.2d 561 (Cal. 1949) (clarifying that article VI, section 6 became effective in 1927); *McClellan*, 31 Cal. 101 (decided in 1866); 2 WITKIN, CALIFORNIA PROCEDURE: COURTS § 390 (5th ed. 2008) (noting the adoption of article VI, section 6 in 1926).

383. Compare CAL. EVID. CODE § 452(d) (West 2004) (permitting judicial notice to any court record), with CAL. R. Ct. 8.1115 (barring citation to unpublished opinions).

384. See, e.g., *Hild v. Cal. Supreme Court*, No. C 07-5107 TEH, 2008 WL 544469, at *1 (N.D. Cal. Feb. 26, 2008) (accusing the court of appeal of deliberately and improperly refusing to publish its opinion in order to discourage supreme court review).

385. *Kozinski & Reinhardt*, *supra* note 313; see also *Hart v. Massanari*, 266 F.3d 1155, 1177 (9th Cir. 2001); *Schmier v. Cal. Supreme Court*, 93 Cal. Rptr. 2d 580, 586-87 (Ct. App. 2000).

386. See COMMITTEE REPORT, *supra* note 31, at 18-19 (reporting that the vast majority of cases decided by the supreme court involved published opinions). See generally Grodin, *Depublication*, *supra* note 244 (entertaining the idea that publication may affect the likelihood of supreme court review).

387. See CAL. R. Ct. 8.1115 (prohibiting citation of unpublished opinions in other cases).

388. See *id.* R. 8.1105(c) (suggesting, but not compelling, adherence to a standard for publication).

when the public sees judges wearing velvet gloves, it may question whether the gloves are really being used for delicate handling or to hide unclean hands. Judges, whose honor is vital to their efficacy, should avoid the adverse risk to their reputation that is inherent in production of unpublished opinions.³⁸⁹

The public must have confidence in judicial decisions and that confidence is suppressed by rules of censorship.³⁹⁰ “Censorship reflects a society’s lack of confidence in itself.”³⁹¹ So too with unpublished opinions. Every unpublished opinion has an asterisk next to it, casting doubt on the soundness of its reasoning. In 1879 the voters of this state disapproved opinionless judgments as a means of efficiency.³⁹² Their intent should not now be circumvented by a rule that makes opinions seem and be treated as if they were nonexistent.

389. See *supra* text accompanying notes 241 & 307; see also *Hild*, 2008 WL 544469, at *1.

390. See *Wood v. City Civil Serv. Comm’n*, 119 Cal. Rptr. 175, 179 (Ct. App. 1975) (stressing the importance of public perception to the judiciary’s efficacy).

391. *Ginzburg v. United States*, 383 U.S. 463, 498 (1966) (Stewart, J., dissenting); see also JUDICIAL COMMITTEE REPORT, *supra* note 31, at 29 (“History has taught us that the lack of information concerning the operation of any branch of our government brings with it correspondingly less responsible officials.”).

392. *People v. Kelly*, 146 P.3d 547, 553 (Cal. 2006) (noting the passage of the writing requirement over objections by the supreme court).