

The Journal Of The Section Of Litigation American Bar Association

# Litigation

online

Volume 30 No. 4, Summer 2004

## **No-Citation Rules: An Unconstitutional Prior Restraint**

by **Charles L. Babcock**

For permission to reprint, write to Copyright Dept., American Bar Association, 321 N. Clark St., Chicago, IL 60610.  
Copyright © 2004, American Bar Association. All rights reserved.  
<http://www.abanet.org/litigation/home.html>

# No-Citation Rules: An Unconstitutional Prior Restraint

by Charles L. Babcock

There are court rules in four federal circuits and more than 25 states that prohibit citation to unpublished decisions of those courts. These "no citation rules" have generated much controversy in the past three years. A recent position paper from the American College of Trial Lawyers (ACTL) observes: "Courts are declining to publish opinions that turn out to be the best authority in a given setting, then refusing to talk about them or permit their discussion. For a court to blind itself, in advance, to the persuasive power of its own reasoning simply makes no sense." See *Opinions Hidden, Citations Forbidden: A Report and Recommendations*, 208 F.R.D. 645, 647 (2002), available at [www.actl.com/PDFs/Opinions.pdf](http://www.actl.com/PDFs/Opinions.pdf). On the other hand, in his January 16, 2004, Comment to the Advisory Committee on Appellate Rules, U.S. Circuit Judge Alex Kozinski defends the no-citation rule as "an important tool in the fair administration of justice," arguing that "its removal will have serious adverse consequences for the court and the parties appearing before it." Kozinski Comment at 21.

In the past two years, several state courts and federal circuits have either modified or abolished their no-citation rules. The Advisory Committee on Appellate Rules for the Committee on Rules of Practice and Procedure of the Administrative Office of the U.S. Courts (Advisory Committee) has proposed Rule 32.1, which would prohibit the federal circuits from imposing a restriction "upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as unpublished, not for publication, non-precedential, not precedent, or the like." When the comment period for this proposed rule closed on February 16, 2004, more than 400 comments had been received. More than

90 percent of the commentators were opposed to the proposed rule that would abolish no-citation rules in the four federal circuits where they currently exist.

On April 14, 2004, the eight-member Advisory Committee voted, with only one dissent, to endorse the proposed rule. The proposal still faces obstacles, including approval by the U.S. Judicial Conference and the U.S. Supreme Court. Thus, the future of Rule 32.1 is still in question, and the debate can be expected to continue.

The Advisory Committee memorandum, which analyzed the proposed rule prior to the comment period, noted that no-citation rules may be unconstitutional under the First Amendment as prior restraints. There was no extended discussion of this point, and it has received scant attention in the comments. Indeed, only a few of the public commentators to Rule 32.1 mentioned this issue, and then only in passing. Judge Kozinski, a staunch defender of the no-citation rules, labeled the First Amendment argument "foolish," arguing, "It is inconceivable that the issue would not have been litigated and resolved by now—if there were really a colorable First Amendment claim to be made." See Kozinski Comment at 20.

There is, in fact, no case that has considered or decided this issue, although Judge Kozinski himself had the opportunity to address the matter in *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001), when the Ninth Circuit issued a show cause order to an appellate lawyer who had cited an unpublished decision in violation of that court's rule. In approving the court's rule, Judge Kozinski focused on the constitutionality of denying precedential effect to a prior unpublished decision, *not* on whether First Amendment issues are raised by a sanction on a litigant who merely cites a prior opinion of the court. The failure to address the issue provoked some criticism.

The prior restraint issue is substantial and has led prestigious organizations such as the ACTL and commentators to conclude that the no-citation rules cannot stand under the First Amendment. If this conclusion is correct, proposed Rule 32.1 is constitutionally compelled.

*Charles L. Babcock is a partner at Jackson Walker L.L.P. in Dallas and Houston, Texas, and chair of the Texas Supreme Court advisory committee that recommended abolishing the Texas rule prohibiting citation to unpublished opinions. Mr. Babcock wishes to thank Texas Supreme Court Associate Justice Nathan Hecht, Chris Griesel, rules attorney for the Texas Supreme Court, and Tania Hefner, Desiree Killen, Kathy Adair, and Caren Luckie at Jackson Walker for their contributions to this article.*

It is worth looking at the history of no-citation rules to put this controversy in context. The current no-citation rules in the federal system are only 30 years old. They were developed as an adjunct to the concern that too many opinions were being printed and published and that “the common law of the United States court would be crushed by its own weight if the trends continued unabated.” See Note, “*Anastasoff v. United States*; Uncertainty in the Eighth Circuit—Is There a Constitutional Right to Cite Unpublished Opinions,” 54 *Arkansas Law Review* 847, 857-60 (2002). The board of the Federal Judicial Center recommended that the Judicial Conference direct each circuit counsel to review its publication policy and implement certain modifications. By 1974, each federal circuit had adopted its own unique plan for limiting publication of opinions, and each had some form of no-citation rule.

From the beginning, the circuits split on how to deal with citation of unpublished opinions. Some permitted citation, others disfavored the practice, and others flatly prohibited it. In 1994 the Tenth Circuit abolished its no-citation rule, and within the last three years the D.C. and First Circuits have modified their rules. But by 2004, it has been argued, “the existing circuit by circuit patch work is confusing, perilous, and getting worse.” ACTL Recommendations, 208 F.R.D. at 647. Now only the Second, Eighth, Ninth, and Federal Circuits have no-citation rules. Proposed Rule 32.1 is an effort to bring uniformity to the system where experimentation once was thought to be valuable. The rule squarely raises the prior restraint issue because it is, by design, limited only to the issue of citation. It takes no position on and does not address the epicenter of the debate over unpublished opinions, i.e., whether an unpublished judicial work is, or should be, precedential.

### Prior Restraint

Rule 32.1 does not require a court to issue an unpublished opinion or prevent a court from doing so. It takes no position on the constitutionality or even advisability of issuing unpublished decisions. According to the Advisory Committee, “[T]he one and only issue addressed by proposed Rule 32.1 is the ability of parties to cite opinions designated as ‘unpublished’ or ‘non-precedential.’” See Report of Advisory Committee on Appellate Rules (Advisory Committee Report), May 23, 2003, at 27.

The debate over whether unpublished opinions were precedential was set off by the Eighth Circuit’s opinion in *Anastasoff v. United States*, which held that Article III of the Constitution required the court to give precedential effect to a prior unpublished opinion. 223 F.3d 898, *vacated as moot on reh’g en banc*, 235 F.3d 1054 (8th Cir. 2000). The Ninth Circuit in *Hart* and the Federal Circuit in *Symbol Technologies v. Lemelson Medical*, 277 F.3d 1361 (Fed. Cir. 2002), took sharp exception to this ruling.

There has, however, been no discussion in the cases whether a no-citation rule is a prior restraint. Yet that goes to the heart—if not the *Hart*—of any proposed sanction on a litigant who seeks to tell a court what it has done before in violation of a rule prohibiting him from doing so.

No-citation rules bear all the indicia of a prior restraint: (i)

a prohibition of specific speech; (ii) by the judicial branch of government acting in its rule-making role; (iii) prior to publication; and (iv) punishable by judicial sanctions, including contempt. See, e.g., *Near v. Minnesota*, 283 U.S. 697 (1931); *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976). Thus, if a citizen, through an attorney or as a pro se litigant, wishes to provide the government with a truthful report of a prior public proceeding, deemed by the citizen to be important because it relates to a governmental function (the results or ongoing conduct of a lower court proceeding), the citizen may not do so without fear of sanction.

Some courts refuse to review the validity of court rules under a prior restraint analysis on the theory that the court is acting in a legislative rather than a judicial role. Nevertheless, even courts that refuse to characterize court rules restraining speech as prior restraints acknowledge that “court rules must endure even closer scrutiny than a legislative restriction” and that “rules [that] have some of the inherent features of ‘prior restraints’ have caused the judiciary to review them with particular care.” *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 248 (7th Cir. 1975). In *Bauer*, the Seventh Circuit held that a court rule that denied a lawyer his First Amendment rights “must be neither vague nor overbroad” and that “the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.”

Conversely, other courts applying First Amendment analysis to court rules restricting speech by attorneys on behalf of their clients do apply a prior restraint analysis. *United States v. Salameh*, 992 F.2d 445, 447 (2d Cir. 1993), for example, held:

Though the speech of an attorney participating in judicial proceedings may be subjected to greater limitations than could constitutionally be imposed on other citizens . . . the limitations on attorney speech should be no broader than necessary to protect the integrity of the judicial system and the defendant’s right to a fair trial.

In *Seattle Times v. Rhinehart*, 467 U.S. 20, 28 (1984), the U.S. Supreme Court considered whether a rule of civil procedure was a “prior restraint on free expression” and therefore subject to a “heavy burden of justification.” The Court found that a state rule prohibiting dissemination of information obtained through the discovery process before trial “is not the kind of classic prior restraint that requires exacting First Amendment scrutiny.” Instead, the Court applied a far less demanding standard: “whether the ‘practice in question [further] an important or substantial government interest unrelated to the suppression of expression’ and whether ‘the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular government interest involved.’”

The Court found that the rule, which was similar to Federal Rule of Civil Procedure 26(c), permitted protective orders that furthered a substantial government interest of entitling litigants to obtain information relevant to the case and allowing them to prepare for trial. It also permitted broad discovery and compelled sometimes unwilling parties to the litigation (the defendants) to reveal information that, in the case before

the Court, was sensitive and perhaps even constitutionally protected. e.g., membership lists. The unanimous Supreme Court concluded that because the protective order was made on a finding and showing of good cause, as required by the rule; was limited to the context of pretrial discovery; and did not restrict the dissemination of information that came from other sources, the First Amendment was not offended.

The Supreme Court's decision in *Seattle Times* considered a rule in a context far different from the no-citation rules. It is one thing for the government to set up a system whereby parties to litigation are compelled to reveal sensitive information only upon the promise that the information will be protected through the pretrial process, but quite another when the rules restrain speech about a public (in the sense that it is available) body of work—the writings of the various judges themselves deciding cases in a common law system.

Still, participants in litigation are subject to greater restraints than others. In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), the U.S. Supreme Court decided whether an attorney's extrajudicial comments in a criminal trial violated a state bar disciplinary rule and could be punished consistent with the First Amendment. The Court reversed the lawyer's conviction for statements made at a press conference, holding that the rule in question was void for vagueness. But in reaching this decision, the Court, in *dicta*, stated: "It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal." *Id.* at 1073.

Even though the appellate advocate is in "a courtroom," he is not in the same setting as an "emotionally charged criminal prosecution," as was the lawyer in *Gentile* or even in a run-of-the-mill civil trial. Rather, the appellate advocate is a part of a proceeding that contains numerous speech-neutral restraints on his participation. Typically, the advocate has 20 to 30 minutes to say what he deems is important for the appellate court, and his written product is typically circumscribed in a number of speech-neutral ways such as page limits, margin requirements, and font specifications. By contrast, a trial is a more lengthy proceeding, considerably less scripted, and often with factfinders (the jury) unfamiliar with the judicial process. Add to that mix our adversary system, which "presupposes, or at least stimulates, zeal in the opposing lawyers," and you have a proceeding that "can pervert as well as aid the judicial process unless it is supervised and controlled by a neutral judge representing the overriding social interest in imparting justice and with the power to curb both adversaries." *Sacher v. United States*, 343 U.S. 1, 8 (1952).

No-citation rules have less kinship with the lawyer speaking during a trial than they have with the lawyer or litigant who, as stated in *Gentile*, "has a constitutional freedom of utterance and the ability to exercise it to castigate courts and their administration of justice," which the Supreme Court suggests is fully protected First Amendment speech. 501 U.S. at 1073. After all, the no-citation rules implicate a citizen's ability to bring to the court, again with various speech-neutral limits, what was wrong with the lower court decision or what

another court had to say about a similar situation.

Even when speech restrictions are placed on the lawyer in pending or ongoing trials, and even when the statements are in the courtroom, courts have "engaged in a balancing process, weighing the State's interest in the regulation of a specialized profession with a lawyer's First Amendment interest in the kind of speech that was at issue." *Id.* at 1074.

*Zal v. Steppe*, 968 F.2d 924 (9th Cir. 1992), is a case in point. There, an attorney was prohibited from presenting certain defenses or saying specific words that would have violated a motion in limine granted by the trial court. It is hard to imagine a more unsympathetic First Amendment argument in light of *Gentile's* dictum that an attorney may not resist a ruling of a trial court beyond the point necessary to preserve a claim for appeal.

The Ninth Circuit, however, gave careful attention to the trial advocate's claim. Indeed, the decision affirming the trial court's order holding the lawyer in contempt was split, with each panel member writing an opinion. One of the panelists dissented, although the majority held that the trial court's evidentiary order did not infringe the lawyer's rights to preserve his client's right to appeal and therefore the

---

### **"In the courtroom, whatever right to 'free speech' an attorney has is extremely circumscribed."**

---

orders did not violate the First Amendment. Judge Noonan, dissenting in part, noted that the justification for prohibiting outbursts in court by jurors, witnesses, or spectators was supported by the compelling governmental need not to disrupt the trial. But he noted that "regulation of lawyers' speech presents a problem that requires much finer analysis when the intent of the lawyer speaking is to serve the client who is on trial." 968 F.2d at 936.

Finally, we come to two recent U.S. Supreme Court decisions dealing with related First Amendment issues. The first, *Legal Services v. Velazquez*, 531 U.S. 533, 545 (2001), concerned a statute that prohibited use of legal services funds to challenge existing welfare laws. The law was struck down because it was "inconsistent with the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case." Then there is *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), where Justice Scalia wrote that the First Amendment did not permit the Minnesota Supreme Court to prohibit candidates for judicial election in that state from announcing their views on disputed legal and political issues.

Although neither case was decided on prior restraint grounds, both are instructive. In *Velazquez*, Justice Kennedy,

writing for seven members of the Court, felt that the restriction imposed by the statute would result in two tiers of cases. In the first, where Legal Services corporate counsel were attorneys, there would be lingering doubt about whether the truncated representation had resulted in complete analysis of the case, full advocacy for the client, and proper presentation to the court. The Court found, "The statute is an attempt to draw lines around the LSC program to exclude from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of the courts to consider." 531 U.S. at 546. The First Amendment, the Court noted, was "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Id.* at 548.

### Justifications

In no-citation jurisdictions, a substantial body of law, annually 80 percent of the decisions in the federal courts of appeals, may not be used to bring about change. In other words, a substantial body of law, dating back 30 years, may not be discussed in no-citation jurisdictions. Whatever First Amendment standard is applied and whether or not it is labeled a prior restraint, the rules bear some burden of justification as they restrict a substantial amount of important speech. The importance of the speech consistently has been noted by the U.S. Supreme Court, for example, in *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976): "Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment." To be sure, there may be an interest, compelling or otherwise, that dictates the suppression of this speech, but, as we shall see, no justification that has been advanced is weighty enough to infringe on the litigant's First Amendment rights.

For example, the Advisory Committee Report, at 32, noted:

It is difficult to justify prohibiting or restricting the citation of "unpublished opinions." Parties have long been able to cite in the Courts of Appeals an infinite variety of sources solely for their persuasive value. These sources include the opinions of federal district courts, state courts and foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearean sonnets and advertising jingles. No Court of Appeals places any restrictions on the citation of these sources . . . Parties are free to cite them for their persuasive value, and Judges are free to decide whether or not to be persuaded. There is no compelling reason to treat "unpublished" opinions differently. It is difficult to justify a system under which the unpublished opinions of the D.C. Circuit can be cited to the Second Circuit, but the unpublished opinions of the Second Circuit cannot be cited to the Seventh Circuit. And more broadly it is difficult to justify a system that permits parties to bring to a court's attention virtually every written or spoken word in existence *except* those contained in the court's own "unpublished" opinion.

In *Jones v. Superintendent, Virginia State Farm*, 465 F.2d 1091, 1094 (4th Cir. 1972), the Fourth Circuit acknowledged that "any decision is by definition our precedent, and . . . we

cannot deny litigants and the bar the right to urge upon us what we have previously done."

The chief judge of the Tenth Circuit, in questioning his court's now-abandoned no-citation rule, wrote:

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

In *re Rules of the U.S. Court of Appeals for the Tenth Circuit*, 955 F.2d 36, 37 (1992) (Holloway, C.J. dissenting).

Even U.S. Supreme Court Justice Stevens criticized the no-citation rules when he wrote in dissent in *County of Los Angeles v. Kling*, 474 U.S. 936, 938 (1985) (mem.):

As this Court's summary disposition today demonstrates, the Court of Appeals would have been well advised to discuss the record in greater depth. One reason it failed to do so is that the members of the panel decided that the issues presented by this case did not warrant discussion in a published opinion that could be "cited to or by the court of this circuit" . . . That decision not to publish the opinion or permit it to be cited—like the decision to promulgate a rule spawning a body of secret law—was plainly wrong.

In *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260 (5th Cir. 2001) (Smith, J. dissenting), Judge Smith of the Fifth Circuit noted, "This court's primary asserted justification for issuing unpublished opinions is efficiency," adding, "Indeed, efficiency may be the only justification for the practice of issuing unpublished opinions, but one that cannot be gainsaid." Judge Kozinski issues a more elaborate justification. Noting that briefs and other court papers are not public forums, he observed, "[W]e apply all manner of restrictions . . . that can never be applied to other types of speech." See Kozinski Comment at 20. These restrictions, he says, are needed to ensure the fair administration of justice. He argues that the judges of the Ninth Circuit Court of Appeals believe that citations to their unpublished opinions would be misleading if used in briefs because, he says, some decisions of the Ninth Circuit are prepared by staff attorneys, with the judges themselves spending only "five to ten minutes" on the case. In other instances, he reveals the "open secret" that judicial law clerks (typically recently graduated law students) prepare the opinions with minimum input from the judges. *Id.* at 5-6.

As one who clerked for a federal judge (albeit a long time ago), I know that it is not much of a secret that law clerks and staff counsel do much of the writing for the courts. Of course, that varies from chamber to chamber, but nonetheless, Judge Kozinski is entirely accurate when he notes the heavy involvement of young lawyers in the writing process. But whether a non-judicial appointee in the federal system or a non-elected judge in the state system (the clerks) actually wrote the words, or "spent a lot of time" on the opinion, seems

a flimsy justification for restricting a litigant's rights to bring the court's own words before it. In the end, it is the court that endorses the words and performs a governmental function of ordering the rights of the parties in the case. What if it is learned that judges deciding a case had only slight involvement in drafting a published opinion? Can the lack of substantial judicial involvement be brought to the attention of the court to reduce the precedential value of the opinion?

It seems that the better practice is to cite the unpublished opinion because it is persuasive on a point of law that is important for the disposition of this case. The no-citation rules make no judgment about whether or not the prior unpublished opinion is precedent. But if a litigant wants to waste precious brief and argument time and space on authority, shouldn't that decision rest with the litigant and his counsel?

Judge Kozinski's argument that the no-citation rule does not offend the First Amendment because the courtroom where the unpublished opinion might be cited is not a public forum is beside the point. The public forum issue relates to *access* to government buildings, not to what speech is permissible

## The no-citation rules are unconstitutional, and Rule 32.1 is constitutionally compelled.

within them. It has been held (although not definitively so) that a judicial complex is not a public forum. *Sammartano v. First Judicial District Court*, 303 F.3d 959 (9th Cir. 2002). Restrictions on free expression in a non-public forum are subject to a relaxed standard under which the restrictions are constitutional if the distinctions drawn are (1) "reasonable in light of the purpose served by the forum" and (2) viewpoint-neutral. *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 806 (1985). The public forum analysis, however, seems inapposite here. No-citation rules do not implicate access to the courthouse. The parties to litigation or appeal surely have a right of access. Nor are we discussing restrictions on their right to attend by wearing or not wearing certain clothing, as was the case in *Sammartano*, or their political viewpoint, as was the case in *Cornelius*. We are talking here about what is said in the building or in the briefs that are filed in the building, not about gaining access to it.

In testimony before the House of Representatives Committee on the Judiciary on June 27, 2002 (Kozinski Testimony), Judge Kozinski proposed an additional justification for no-citation rules:

Prohibiting citation to, and reliance on, unpublished dispositions helps our court to maintain consistency and clarity in the law of the circuit—law applied by lower

court judges in their courtrooms, by our panels in later cases, and by lawyers advising clients about the likely consequences of various courses of actions.

He adds, "Appellate courts . . . have to speak with a consistent voice and, if they failed to do so—if they leave the law uncertain or in disarray—they will make it very difficult for lawyers to advise their clients and for lower court judges to decide cases correctly." *Id.* at 31. Further, "If unpublished decisions could be cited as precedent, conscientious judges would have to pay much closer attention to their precise wording." *Id.* at 34.

Rule 32.1, however, makes no recommendation regarding whether or not unpublished opinions should be precedent. Indeed, the Ninth Circuit can continue to treat its unpublished opinions as nonbinding. The First Amendment question, however, is whether a citizen may be prevented from using the precious space (in the brief) and time (at oral argument) to urge upon the court an unpublished opinion. There is an obvious disincentive to do so. Citing an unpublished opinion is a tacit (sometimes express) admission that the advocate can find no published opinion to support the case. Nevertheless, the advocate may see a value in citing the case for its persuasive reasoning, presumably on similar facts.

Judge Kozinski, who amplified his congressional remarks in his written comments to the Advisory Committee, charged that citing to an unpublished opinion is fraudulent. He argues that citing a law review article is different from citing a prior unpublished opinion of the court because the party seeking to cite the unpublished opinion wants "the added boost of claiming that three court of appeals judges endorse that reasoning." See Kozinski Comment at 4.

The ACTL had this to say about Judge Kozinski's "fraud" argument:

The argument is unworthy of its distinguished author. Circuit judges—the hypothetical recipients of the hypothetically fraudulent representation—are not about to be gulled; they know better than anyone the limitations of non-circuit binding opinions. Indeed, if there is that imbalance of knowledge that is generally thought to be the badge of fraud, it is in this instance the recipients who have the better knowledge. The court decided the cited case, and members of the court knew all the facts in the record; the citing lawyer knows only what the Westlaw or Lexis opinion tells him. Even in anti-citation circuits, as we have seen, the judges themselves cite the non-reporter published opinions of other circuits when they are thought to have persuasive value; the lawyer is doing no more.

ACTL Recommendation at 34.

Judge Kozinski also took the Advisory Committee to task by noting that, unlike law review articles, opinions of district courts, and other nonbinding authorities, unpublished dispositions of the circuit are seldom dismissed as inconsequential as they should be. Kozinski Comment at 3. Of course, law review articles written by distinguished judges, such as Judge Kozinski, can be cited and "are seldom dismissed as inconsequential" because a judge of the circuit (perhaps even one on the panel deciding a case) has expressed a view. For

example, I would suspect that an appellate advocate would be hesitant to cite an unpublished opinion to a panel consisting of Judges Kozinski and Reinhardt (who wrote a law review article on the subject), although she might want to cite their article (and could do so). But that is just a guess.

Finally, Judge Kozinski suggests that the proposed rule would increase the burden on lawyers and the cost to their clients, and impose severe disadvantages on poor and weak litigants. As support for this, Judge Kozinski relies on a *Yale Law Journal* article that argues that making all unpublished decisions precedential would “disproportionately disadvantage litigants with the fewest resources.” Note, “Fairness and Precedent,” 110 *Yale L.J.* 1295 (2001). But Rule 32.1 does not make cases precedential, and the prior restraint argument does not turn on this distinction. The *Yale Law Journal* article was persuasively dissected by Professor Barnett in his comments to the Advisory Committee.

Whether one applies the “heavy presumption against” standard of prior restraints law or the more lenient balancing test discussed here, the no-citation rules are unconstitutional, and Rule 32.1 is constitutionally compelled. There is no rational justification sufficient to overcome the speech interests of our citizens in citing public decisions of our government. The opinions are not private as in *Rhinehart*, they are not necessary to maintain decorum in the courtroom as in *Zal*, they don’t impli-

cate access to the public forum as in *Sammartano*, they don’t implicate the right to a fair trial as in *Gentile*, they don’t deal with whether or not the decision is precedent as in *Hart* and *Anastasoff*, and they aren’t likely to defraud the court, which is acutely aware of its workload and the extent to which law clerks and staff do the writing. In short, there is no interest sufficient to overcome the litigants’ First Amendment interests.

And as for Judge Kozinski’s argument that “a small but vociferous number of lawyers and litigants” are behind all this trouble, Kozinski Comment at 1-2, I would differ. First, I hardly would paint the ACTL as a bunch of rabble-rousers. Yet their recommendation persuasively calls for the adoption of Rule 32.1. And the Texas experience, of which I have personal knowledge, is instructive. The amendment to our appellate rule 47 was called for by members of the bar who petitioned the Texas Supreme Court for change. It was studied and recommended by our Texas Supreme Court Advisory Committee, consisting of lawyers and judges from around the state. It was advocated by editorial writers in major newspapers throughout the state and ultimately was accepted by the bench and bar with little dissent. In other words, at least in one large state, there was consensus, not advocacy from “a small but vociferous group of lawyers.” Despite the outpouring of sentiment from certain judges and lawyers against Rule 32.1, it should be adopted. □