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Out of Cite, Out of Mind: Navigating the Labyrinth That is State Appellate Courts' Unpublished Opinion Practices

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OUT OF CITE, OUT OF MIND: NAVIGATING THE LABYRINTH THAT IS STATE APPELLATE COURTS' UNPUBLISHED OPINION PRACTICES

*Lauren S. Wood**

“The first rule of [unpublished opinions] is: You do not talk about [unpublished opinions]. The second rule of [unpublished opinions] is: You do not talk about [unpublished opinions].”¹

I. INTRODUCTION

Imagine that you are an attorney, litigating an appellate case with an atypical fact pattern. You are familiar with the law; however, its application to your client’s circumstances is entirely unclear. After endless hours of research, you finally find it: a factually apposite case with a favorable outcome. Elated, you grab your legal pad to scribble down the case citation. But then you see it—that dreaded text at the top of the opinion: “NOT SELECTED FOR PUBLICATION.” This is an unpublished opinion. Perturbed and exhausted, your mind starts racing: “What’s that rule again? Can I use this? I think that one attorney cited one in his brief with no problem. Or no, was that somewhere else?”

The ambiguity and confusion surrounding the usage of unpublished opinions² is pervasive throughout state appellate courts, especially with more states each year amending their own practices.³ Where

* J.D. Candidate, May 2016, University of Baltimore School of Law. A special thank you to Associate Dean Amy E. Sloan, Professor Colin Starger, and the *University of Baltimore Law Review* staff, all of whom were instrumental to the publication of this Comment.

1. *Adapted from* FIGHT CLUB (Fox 2000 Pictures & Regency Enterprises 1999).
2. The term “unpublished” is technically a misnomer, as most of these types of opinions are now posted either in online databases such as LexisNexis and Westlaw, or on the state court’s website. For the purpose of this Comment, the significance of a court disposing of an opinion as unpublished or unreported is rooted in “the precedential status and citation restriction imposed” by the respective state jurisdiction. Dean A. Morande, *Publication Plans in the United States Courts of Appeals: The Unattainable Paradigm*, 31 FLA. ST. U. L. REV. 751, 754 (2004).
3. *See, e.g., infra* Appendix – Table 3 (Ariz.) (citation policy amended Jan. 1, 2015); *infra* Appendix – Table 4 (N.H.) (citation policy amended Jan. 1, 2016); *infra* Appendix – Table 3 (Mich.) (citation policy amended May 1, 2016).

some jurisdictions flatly prohibit citation to unpublished opinions,⁴ others value them no differently than their published counterparts.⁵ Even murkier are the jurisdictions that govern the use of unpublished opinions through conflicting formal and informal rules. The maze of clashing policies throughout state appellate courts has fostered uncertainty and arbitrariness in the administration of the law. The result is public distrust of the judiciary, lost precedent, and unintended language emerging as precedential law.

This Comment exposes the critical need for state jurisdictions to adopt a uniform law governing the citation and access to unpublished opinions. It provides, both textually and in chart form,⁶ a comprehensive update regarding state appellate courts' citation policies—a task that has not been undertaken in over a decade.⁷ Based on the collected data, this Comment goes on to examine state appellate courts' nationwide trend toward citability and dissect the variability-based issues between and among state jurisdictions.

Part II of this Comment outlines the development of selective publication plans in the United States and the early controversies sparked by its doctrine. Parts III–IV classify the fifty states and the District of Columbia into categories based on their citation rule and reveal the considerable degree of variation perpetuating state appellate courts. Next, Part V provides an overview of the conflicting philosophies embraced by state courts concerning usage of and reliance on unpublished opinions.

Part VI of this Comment demonstrates the discordant citation policies' damaging effects, focusing on their harmful impact on the integrity of the judicial system. Finally, Part VII proposes a rule for state appellate courts to uniformly adopt, establishing a compromise between commentators' conflicting philosophies by affording persuasive value to all unpublished dispositions. The proposed rule also requires state courts to make all unpublished opinions online-accessible. Ultimately, this Comment will seek to encourage nationwide uniformity in treatment of unpublished opinions and

4. See *infra* Appendix – Table 5.

5. See *infra* Appendix – Table 2.

6. *Infra* Appendix.

7. See generally Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROCESS 473, 481–86 & n.47–98 (2003), for the most recent fifty-state survey. Barnett's "Battlefield Report" served to update the findings of Melissa M. Serfass and Jessie L. Cranford, the "[p]ioneers in the task." *Id.* at 477–78; Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. APP. PRAC. & PROCESS 251 (2001).

extinction of the arcane practice of no-citation rules, thereby promoting transparency and accountability throughout the judicial system.

II. THE ORIGIN OF UNPUBLISHED OPINIONS AND CITATION RESTRICTIONS

Historically, the publication of judicial opinions was ubiquitous throughout the English common law system for centuries.⁸ The first books to report court opinions emerged in 1292 as unofficial manuscript law reports called Year Books.⁹ The Year Books, composed of transcribed notes by the Courts of England, were an early attempt to assemble the law into a logical structure.¹⁰ Over time, publishers replaced the Year Books with nominative case reporters—essentially compilations of notes discussing judicial decisions taken by lawyers, judges, and the compiler himself.¹¹ These reports were highly valuable for establishing precedent, described by one commentator as “crucial components for building a science of the law.”¹² Yet, they were also somewhat unreliable due to their tendency to “contradict[] each other in describing the [court’s] reasoning, and even the names, of particular cases.”¹³

A. *The American Case Publication System*

Following the American Revolution, the newly established nation began developing common law separate and distinct from the laws of England through early official reporters of its own.¹⁴ Although they were more objectively written than the nominative case reporters to precede them, the reports still lacked organization and efficiency.¹⁵

8. Suzanne O. Snowden, “*That’s My Holding and I’m Not Sticking to It!*” *Court Rules that Deprive Unpublished Opinions of Precedential Authority Distort the Common Law*, 79 WASH. U. L. REV. 1253, 1258 (2001), http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1425&context=law_lawreview.

9. *Id.* (citing Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CAL. L. REV. 15, 17 (1987)).

10. J. Jason Boyeskie, Comment, *A Matter of Opinion: Federal Rule of Appellate Procedure 32.1 and Citation to Unpublished Opinions*, 60 ARK. L. REV. 955, 957 (2008).

11. Snowden, *supra* note 8, at 1259.

12. Berring, *supra* note 9, at 18.

13. *Hart v. Massanari*, 266 F.3d 1155, 1166 (9th Cir. 2001).

14. Berring, *supra* note 9, at 19.

15. Snowden, *supra* note 8, at 1259.

The legal reporting system was forever altered in 1882, when John B. West formed the West Publishing Company.¹⁶ The West Company was significant in that it standardized court reporting in a way that had never been done before.¹⁷ Its reporters quickly covered every jurisdiction in the U.S., and “for the first time, lawyers were able to easily and accurately cross-reference cases and legal concepts.”¹⁸

Subsequently, in the twentieth century, the amount of cases decided per year soared.¹⁹ The result was “almost unmanageable proportions” of American case law—most of which contributing nothing to the development of the law and simply restating what had been said a hundred times before.²⁰ In light of this ballooning growth, the federal and state judiciaries began exploring ways to limit the publication of opinions.²¹

B. The Advent of Nonpublication Doctrine

In 1964, the Judicial Conference of the United States passed a resolution directing federal courts to only issue opinions for cases where the opinion holds precedential value.²² Over the next ten years, a number of states followed suit, crafting their own criteria for

16. *Id.*

17. Berring, *supra* note 9, at 21.

The significance of standardization operated on several levels. The first simply was accuracy The West Company established a system for receiving copies of opinions from every jurisdiction. It prided itself on gathering decisions and verifying the text with the judge who wrote them. Secondly, West established a uniform format for reporting. All West reporters were designed according to the same formula. West produced a sterile court reporting system that guaranteed reliability through similarity.

Id.

18. Charles J. Stiegler, *The Precedential Effect of Unpublished Judicial Opinions Under Louisiana Law*, 59 LOY. L. REV. 535, 539 (2013).

19. Snowden, *supra* note 8, at 1261.

20. Stiegler, *supra* note 18, at 539 (quoting Francis R. Auman, *American Law Reports: Yesterday and Today*, 4 OHIO ST. U. L.J. 331, 331 (1938)).

21. *Id.* at 540–41.

22. CHIEF JUSTICE EARL WARREN, ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964), <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/1964-03.pdf> [hereinafter 1964 JUDICIAL COUNCIL REPORT].

determining when a court opinion warranted publication.²³ Each state formulated its own unique rules, contrasting in degrees of specificity and stringency, as well as in posture.²⁴ Notably, however, no state addressed the *significance* of designating an opinion for nonpublication—that is, whether it can be cited in briefs for precedential value.²⁵ While the topic sparked contention, it was also easily avoidable for the time being, because of the difficulty in tracking down unpublished opinions.²⁶

Many jurisdictions, however, soon realized that the matter could only be dodged for so long. The first no-citation rule was enacted by Arkansas in 1974.²⁷ After debating the issue at length, California's constitutional revision commission initially chose to omit a no-citation rule from their limited publication plan due to fears that it would constitute a "prohibition on enlightenment."²⁸ However, after attorneys began deliberately searching court files and "ambush[ing] opponents" with untried, anomalous decisions, California added a controversial rule prohibiting citation to unpublished opinions in 1977.²⁹

While some critics asserted that no-citation rules ensured equity and efficiency,³⁰ others believed that the restrictions functioned as

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23. FED. JUDICIAL CTR., STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS 24–28 (1973), <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/appellate/id/33> [hereinafter 1973 FED. JUDICIAL CTR. REPORT]. The early states to adopt limited publication plans were, respectively, New York (1964), Georgia (1971), Washington (1972), California (1973), and New Jersey (1973). *See id.*
 24. *See, e.g.,* Eva S. Goodwin, *Partial Publication: A Proposal for a Change in the "Packaging" of California Court of Appeal Opinions to Provide More Useful Information for the Consumer*, 19 SANTA CLARA L. REV. 53, 57–58 (1979), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2172&context=lawreview> (discussing California's 1972 rule revision, changing CAL. R. CT. 976 (enacted 1964) from a rule favoring publication "to its present more restrictive form . . . reflect[ing] a bias against publication").
 25. *See* 1973 FED. JUDICIAL CTR. REPORT, *supra* note 23. Three federal appellate circuit courts, however, did choose to tackle this issue, all enacting non-citation provisions. *Id.* at 37–38.
 26. *See* Stiegler, *supra* note 18, at 541.
 27. Brian T. Damman, Note, *Guess My Weight: What Degree of Disparity is Currently Recognized Between Published and Unpublished Opinions, and Does Equal Access to Each Form Justify Equal Authority For All?*, 59 DRAKE L. REV. 887, 891 (2011) (citing *Weatherford v. State*, 101 S.W.3d 227, 231–32 (Ark. 2003)).
 28. Kenneth J. Schmier et al., *Has Anyone Noticed the Judiciary's Abandonment of Stare Decisis?*, 7 J.L. & SOC. CHALLENGES 233, 239 (2005).
 29. *Id.* at 239–40.
 30. *See, e.g.,* 1973 FED. JUDICIAL CTR. REPORT, *supra* note 23, at 19 (outlining reasons for requiring non-citation rules).

dissolutions of judicial accountability.³¹ In opposition of no-citation rules, Justice Robert S. Thompson contended:

An imperfectly reasoned and generally result-oriented opinion may be buried in a non-publication grave. A panel may avoid public heat or appointing authority disapprobation by interring an opinion of real precedential [sic] value. More frequently, a panel may make a mistake . . . and fail to publish an opinion.³²

Nonetheless, by the early 1980s, the controversy surrounding unpublished opinions dwindled, since most courts at the time were still publishing the vast majority of their decisions.³³ However, in the matter of a decade, a marked spike in the number of unpublished opinions quickly revived the debate.³⁴ The federal court of appeals' rate of unpublished opinions swelled from 11.2% in 1981 to a staggering 68.4% in 1990.³⁵ By 2000, that number rose even higher, where 79.8% of all federal court of appeals opinions were marked unpublished.³⁶

This spike bolstered academics' suspicion of no-citation rules, since an inordinate amount of cases appeared to be completely insulated from the principles of stare decisis³⁷:

Because of no-citation rules, even when the facts and issues in a prior unpublished decision mirrored the facts and issues in an attorney's current case, the attorney was prohibited from bringing the unpublished opinion to the court's attention. This prohibition . . . led to inconsistent and seemingly arbitrary decision-making in the federal courts, and thereby violated one of the foundational principles of the American legal system: stare decisis, which ensures that like cases will be treated alike.³⁸

31. Schmier, *supra* note 28, at 240–41.

32. *Id.*

33. See Andrew T. Solomon, *Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?*, 26 *MISS. C. L. REV.* 185, 192 (2007).

34. *Id.* at 192–94.

35. *Id.* at 193 (“Table #1: The Dramatic Increase in Federal Court of Appeals Unpublished Opinions”).

36. *Id.*

37. *Id.* at 194 (stating that no-citation rules “created a ‘secret’ body of unpublished law”) (footnote omitted).

38. *Id.*

C. *The Anastasoff-Massanari Debate*

Supporters and opponents alike were stunned when the Eighth Circuit held unpublished opinions to be unconstitutional in the landmark case, *Anastasoff v. United States*.³⁹ Judge Arnold, writing for the court, contended that the use of unpublished opinions amounted to the courts “usurping lawmaking authority,” because they could arbitrarily determine what cases and controversies would, or would not, bind a court as precedential authority.⁴⁰ Although the opinion was vacated on rehearing en banc less than four months later,⁴¹ its sentiments lingered, triggering a “nationwide reexamination of non-precedent practice.”⁴²

Judge Alex Kozinski of the Ninth Circuit wasted no time in joining the debate by reaching the diametrically opposite conclusion to that of Judge Arnold, just one year later, in *Hart v. Massanari*.⁴³ Many state courts subsequently jumped on the *Massanari* bandwagon, explicitly rejecting the analysis of Arnold whilst singing the praises of Kozinski.⁴⁴ In the aftermath of *Anastasoff* and *Massanari*, the “depth of feeling” elicited from judges and practitioners alike when talking about the citation of unpublished opinions, whether they were Team Arnold or Team Kozinski, was comparable to the passion elicited when “talk[ing] . . . about sex or religion.”⁴⁵

39. 223 F.3d 898, 899–900 (8th Cir.), *vacated as moot on reh'g en banc*, 235 F.3d 1054, 1056 (8th Cir. 2000).

40. Boyeskie, *supra* note 10, at 964–65.

41. *Anastasoff*, 235 F.3d at 1056.

42. Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 759 (2003) (citing *Anastasoff*, 223 F.3d at 900).

43. 266 F.3d 1155, 1180 (9th Cir. 2001) (“Unlike the *Anastasoff* court, we are unable to find within Article III of the Constitution a requirement that all case dispositions and orders issued by appellate courts be binding authority.”).

44. *See, e.g.*, Schaaf v. Kaufman, 850 A.3d 655, 660 (Pa. Super. Ct. 2004) (“We have found no appellate court decision adopting *Anastasoff*'s reasoning. In fact, the trend is just the opposite. The leading criticism was iterated by Judge Alex Kozinski of the Ninth Circuit . . .”).

45. *See* Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429, 1433, 1461–62 (2005) [hereinafter Schiltz, *Much Ado About Little*].

D. Unpublished Opinions Today

To the dissatisfaction of some, unpublished opinions have become an established component of judicial procedure.⁴⁶ Consequently, the modern discussion largely turns on how to properly integrate unpublished opinions into the judicial system so as to “preserve the legitimacy of the . . . courts.”⁴⁷

In an attempt to address this issue, the federal courts adopted Federal Rule of Appellate Procedure (FRAP) 32.1, which prevents courts from restricting citation of unpublished federal opinions issued after January 1, 2007.⁴⁸ This rule is undoubtedly a step in the right direction; however, it still leaves many questions unanswered.⁴⁹ The rule is silent as to the precedential value, if any, of unpublished opinions, “add[ing] . . . uncertainty about [their] role . . . in the federal judicial system.”⁵⁰

Moreover, Rule 32.1 merely settles the citation debate among the *federal* courts.⁵¹ In marked contrast, state jurisdictions are largely⁵² still fighting the good fight, operating under archaic rules at best,⁵³ and paradoxical or fuzzy rules at worst.⁵⁴ One explanation for the states’ lag may be that state jurisdictions’ laws regarding citation to unpublished opinions receive less national notice than their federal counterparts.⁵⁵ Nevertheless, many states’ citation policies have become nothing more than a practice in need of a theory.

46. Amy E. Sloan, *If You Can't Beat 'Em, Join 'Em: A Pragmatic Approach to Nonprecedential Opinions in the Federal Appellate Courts*, 86 NEB. L. REV. 895, 899–900 (2008).

47. *Id.* at 900.

48. FED. R. APP. P. 32.1.

49. 16AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3978.10 (4th ed. 2008).

50. Sloan, *supra* note 46, at 900.

51. See FED. R. APP. P. 32.1(a) (“A court may not prohibit or restrict the citation of *federal* judicial opinions . . .”) (emphasis added).

52. A minority of state jurisdictions is blazing the trail in the unpublished opinion territory. See, e.g., ARK. SUP. CT. R. 5-2 (Editor’s Notes) (“Rule 5-2 has been completely rewritten to reflect the electronic publication of the official reports of appellate decisions . . . [and] eliminate[] the distinction between unpublished opinions. All opinions issued after July 1, 2009, are precedent and may be cited in any filing or argument in any court.”).

53. See, e.g., *Zimmer-Rubert v. Bd. of Educ.*, 179 Md. App. 589, 609 n.10, 947 A.2d 135, 147 n.10 (2008) (“It has been held that unreported cases are not acceptable authority.” (citing *Powers v. Hadden*, 30 Md. App. 577, 353 A.2d 641 (1976); *In re Blast*, 212 B.R. 499 (Bankr. D. Md. 1997))).

54. See, e.g., *infra* Appendix – Table 5 (Pa.).

55. See Barnett, *supra* note 7, at 477.

III. CLASSIFYING THE STATES

The most alarming aspect of state jurisdictions' unpublished opinion laws is their utter lack of uniformity. Classifying states by their standpoint on citing unpublished opinions is a cumbersome task, to say the least, because many states have conflicting practices between their statutory law and case law.⁵⁶ Other states' rules merely exist in custom or are difficult to find.⁵⁷ Nevertheless, doing so reveals the "schizophrenic"⁵⁸ grandeur of unpublished opinion law in the United States. State appellate courts' varying practices chiefly fall into one of five categories:⁵⁹ (1) states that publish *all* opinions or do not have a law governing unpublished opinions' citation; (2) states that allow citation of unpublished opinions as binding precedent; (3) states that allow citation of unpublished opinions for persuasive value; (4) hybrid states; and (5) no-citation states—meaning the states completely bar citation to unpublished opinions, except in respect to *res judicata*, *collateral estoppel*, and other related principles.

A. States That Publish All Opinions

This category is composed of four states: Arkansas,⁶⁰ Connecticut,⁶¹ Mississippi,⁶² and New York.⁶³

B. States That Allow Citation of Unpublished Opinions as Binding Precedent

In this category, there are five states that selectively publish their appellate opinions, yet still afford them precedential value. Such states include: Delaware,⁶⁴ Louisiana,⁶⁵ Ohio,⁶⁶ Utah,⁶⁷ and West Virginia.⁶⁸

56. *Id.*

57. *Id.*

58. Solomon, *supra* note 33, at 202.

59. These categories were influenced by Stephen R. Barnett, Elizabeth J. Boalt Professor of Law Emeritus at University of California, Berkeley, who classified the states similarly in 2003. *See* Barnett, *supra* note 7, at 481. Categories are in order of declining citability. *Id.*

60. *See infra* Appendix – Table 1 (Ark.).

61. *See infra* Appendix – Table 1 (Conn.).

62. *See infra* Appendix – Table 1 (Miss.).

63. *See infra* Appendix – Table 1 (N.Y.).

64. *See infra* Appendix – Table 2 (Del.).

65. *See infra* Appendix – Table 2 (La.).

66. *See infra* Appendix – Table 2 (Ohio).

C. States That Allow Citation of Unpublished Opinions for Persuasive Value

There are a growing number of states joining this category. Presently, eighteen states allow citation to unpublished opinions issued by their courts, but merely for the opinion's persuasive authority. These states include: Alaska,⁶⁹ Arizona,⁷⁰ Georgia,⁷¹ Hawaii,⁷² Iowa,⁷³ Kansas,⁷⁴ Kentucky,⁷⁵ Massachusetts,⁷⁶ Michigan,⁷⁷ Minnesota,⁷⁸ Nevada,⁷⁹ New Mexico,⁸⁰ North Carolina,⁸¹ North Dakota,⁸² Vermont,⁸³ Virginia,⁸⁴ Wisconsin,⁸⁵ and Wyoming.⁸⁶

D. Hybrid States

This category accounts for the ten states whose citation policies exist in a sort of limbo "between allowing citation and forbidding it."⁸⁷ Some states' citation rules, for example, differ based on the appellate court, allowing citation in the highest court, but barring citation in the intermediate courts.⁸⁸ Other states' policies are so distinctive that they cannot be pigeonholed in any other category.⁸⁹

This category also continues to grow, as more states continue to tweak their rules slightly in support of citability.⁹⁰ Such states include: Colorado,⁹¹ Florida,⁹² Indiana,⁹³ Nebraska,⁹⁴ New

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67. See *infra* Appendix – Table 2 (Utah).
 68. See *infra* Appendix – Table 2 (W. Va.).
 69. See *infra* Appendix – Table 3 (Alaska).
 70. See *infra* Appendix – Table 3 (Ariz.).
 71. See *infra* Appendix – Table 3 (Ga.).
 72. See *infra* Appendix – Table 3 (Haw.).
 73. See *infra* Appendix – Table 3 (Iowa).
 74. See *infra* Appendix – Table 3 (Kan.).
 75. See *infra* Appendix – Table 3 (Ky.).
 76. See *infra* Appendix – Table 3 (Mass.).
 77. See *infra* Appendix – Table 3 (Mich.).
 78. See *infra* Appendix – Table 3 (Minn.).
 79. See *infra* Appendix – Table 3 (Nev.).
 80. See *infra* Appendix – Table 3 (N.M.).
 81. See *infra* Appendix – Table 3 (N.C.).
 82. See *infra* Appendix – Table 3 (N.D.).
 83. See *infra* Appendix – Table 3 (Vt.).
 84. See *infra* Appendix – Table 3 (Va.).
 85. See *infra* Appendix – Table 3 (Wis.).
 86. See *infra* Appendix – Table 3 (Wyo.).
 87. See Barnett, *supra* note 7, at 483.
 88. See, e.g., *infra* Appendix – Table 4 (Tenn.).
 89. See *infra* Appendix – Table 4 (Or.).
 90. See discussion *infra* Part IV.
 91. See *infra* Appendix – Table 4 (Colo.).

Hampshire,⁹⁵ Oklahoma,⁹⁶ Oregon,⁹⁷ New Jersey,⁹⁸ Tennessee,⁹⁹ and Texas.¹⁰⁰

E. No-Citation States

Fourteen jurisdictions—thirteen states plus the District of Columbia—prohibit the citation of unpublished opinions entirely. The current no-citation state jurisdictions include: Alabama,¹⁰¹ California,¹⁰² D.C.,¹⁰³ Idaho,¹⁰⁴ Illinois,¹⁰⁵ Maine,¹⁰⁶ Maryland,¹⁰⁷ Missouri,¹⁰⁸ Montana,¹⁰⁹ Pennsylvania,¹¹⁰ Rhode Island,¹¹¹ South Carolina,¹¹² South Dakota,¹¹³ and Washington.¹¹⁴

IV. EXAMINING THE CLASSIFICATIONS

Breaking down the state jurisdictions into classifications exposes the considerable degree of variation that exists among the states' practices governing unpublished opinions. Even a brief scan of the states' rules outlined in the Appendix, *infra*, quickly reveals the immense incongruities that exist, even among states within the same classification.

For instance, although both Kentucky and New Mexico, in a broad sense, allow citation to unpublished opinions for their persuasive value, each state rule has its own particularized nuances. Where a

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- 92. See *infra* Appendix – Table 4 (Fla.).
 - 93. See *infra* Appendix – Table 4 (Ind.).
 - 94. See *infra* Appendix – Table 4 (Neb.).
 - 95. See *infra* Appendix – Table 4 (N.H.).
 - 96. See *infra* Appendix – Table 4 (Okla.).
 - 97. See *infra* Appendix – Table 4 (Or.).
 - 98. See *infra* Appendix – Table 4 (N.J.).
 - 99. See *infra* Appendix – Table 4 (Tenn.).
 - 100. See *infra* Appendix – Table 4 (Tex.).
 - 101. See *infra* Appendix – Table 5 (Ala.).
 - 102. See *infra* Appendix – Table 5 (Cal.).
 - 103. See *infra* Appendix – Table 5 (D.C.).
 - 104. See *infra* Appendix – Table 5 (Idaho).
 - 105. See *infra* Appendix – Table 5 (Ill.).
 - 106. See *infra* Appendix – Table 5 (Me.).
 - 107. See *infra* Appendix – Table 5 (Md.).
 - 108. See *infra* Appendix – Table 5 (Mo.).
 - 109. See *infra* Appendix – Table 5 (Mont.).
 - 110. See *infra* Appendix – Table 5 (Pa.).
 - 111. See *infra* Appendix – Table 5 (R.I.).
 - 112. See *infra* Appendix – Table 5 (S.C.).
 - 113. See *infra* Appendix – Table 5 (S.D.).
 - 114. See *infra* Appendix – Table 5 (Wash.).

practitioner in New Mexico can cite any unpublished opinion for persuasive value, so long as he or she subjectively concludes that it contains persuasive language,¹¹⁵ a practitioner in Kentucky¹¹⁶ ought to proceed with more caution. The Supreme Court of Kentucky has made clear that the allowance of citation to unpublished opinions for persuasiveness is the *exception*, not the rule, providing that “[a]s a general rule, we are not greatly influenced by unpublished opinions” and that such opinions should only be cited in the limited circumstance where no published case adequately addresses the issue before the Court.¹¹⁷

State appellate courts’ “plague of inconsistency”¹¹⁸ is further illustrated by certain jurisdictions’ arbitrary variations within their own internal rules. Oklahoma, for instance, allows citation of unpublished criminal matters, but bars citation of unpublished civil matters.¹¹⁹ Likewise, Pennsylvania, which maintains two intermediate appellate courts, forbids citation to its Superior Court’s unpublished opinions, yet allows citation to its Commonwealth Court’s unpublished opinions for persuasive value—notwithstanding the two courts’ hierarchically equal positions.¹²⁰

In 2001, Melissa M. Serfass and Jessie L. Cranford compiled and comprehensively charted federal and state court jurisdictions’ publication and citation rules.¹²¹ A comparison of the *Serfass-Cranford* chart against the Appendix herein reveals state appellate courts’ considerable shift toward citability within the last fifteen years.¹²² As recently as January 1, 2015, Arizona’s no-citation rule was replaced with a rule permitting citation for persuasive value.¹²³

115. See *infra* Appendix – Table 3 (N.M.).

116. See *infra* Appendix – Table 3 (Ky.).

117. *Commonwealth v. Wright*, 415 S.W.3d 606, 613 (Ky. 2013).

118. Vincent M. Cox, Comment, *Freeing Unpublished Opinions from Exile: Going Beyond the Citation Permitted by Proposed Federal Rule of Appellate Procedure 32.1*, 44 WASHBURN L.J. 105, 110 (2004).

119. See *infra* Appendix – Table 4 (Okla.).

120. See *infra* Appendix – Table 5 (Pa.).

121. Serfass & Cranford, *supra* note 7.

122. See also *Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, & Intellectual Prop. of the Comm. on the Judiciary*, 107th Cong. 29 (2002) [hereinafter *2002 Hearing*] (statement of Hon. Alexander Kozinski of Ninth Circuit Court of Appeals) (relying on *Serfass-Cranford* findings to report that 38 states had some form of strict noncitation, nonpublication rule).

123. See *infra* Appendix – Table 3 (Ariz.); Serfass & Cranford, *supra* note 7, at 258 (citing ARIZ. R. SUP. CT. 111(c) (amended 2015)). See generally *Rule Change Petitions Under Consideration: R-14-0004*, ARIZ. SUP. CT. RULES F., <http://www.azcourts.gov/Rules-Forum/aft/446> (last visited Mar. 31, 2016) (Arizona

Similarly, Wisconsin repealed its no-citation provision effective July 2009, also in favor of citation for persuasive value.¹²⁴ In the Judicial Council's Note, the council comments that this change was based on Wisconsin's unpublished appellate opinions' increasing online availability and "conforms to the practice in numerous other jurisdictions."¹²⁵ Since the 2001 *Serfass-Cranford* chart, other states that have abolished their citation bans include, but are not limited to: Alaska, Arkansas, Hawaii, Iowa, Kentucky, Louisiana, Massachusetts, Texas, and West Virginia.¹²⁶

V. DISCORD AMONG STATE COURTS' CITATION POLICIES IS ATTRIBUTABLE TO DIFFERING PHILOSOPHIES EMBRACED BY DIFFERENT JURISDICTIONS

How is it that fifty-one jurisdictions all follow such diverse publication policies? Much of the ambiguity surrounding the role of unpublished opinions in precedential law can be attributed to varying philosophies embraced by different jurisdictions.¹²⁷ Since the conception of selective publication plans in the United States, commentators have demonstrated strong fervor on both sides of the debate. This section lays out the central arguments against citation to unpublished authority and demonstrates how they are surmounted by supporters' plea for fair administration of the law throughout the judiciary.

A. *The No-Citation Rule's Defense: Arguments Opposing Citation to Unpublished Authority*

1. Growing Caseloads Prevent Judges from Giving Precedent-Worthy Consideration to So Many Cases

A leading argument opposing citation to unpublished authority is that appellate courts do not have sufficient resources to craft carefully written judicial opinions for every case on a given docket.¹²⁸ Preparing a published opinion entails weeks of drafting, editing,

practitioners commenting on the petition to amend the state's citation rule for unpublished opinions).

124. See *infra* Appendix – Table 3 (Wis.); Serfass & Cranford, *supra* note 7, at 285 (citing WIS. STAT. ANN. § 809.23(3) (repealed 2008)).

125. § 809.23 judicial council's note to 2008 amendment (West Supp. 2015).

126. Compare *infra* Appendix, with Serfass & Cranford, *supra* note 7, at 258.

127. Daniel Schlein, *Rethinking the Role of Unpublished Authority*, 281 N.J. LAW. 59, 59 (2013).

128. 2002 Hearing, *supra* note 122, at 31–34 (statement of Hon. Alexander Kozinski).

polishing, and revising, whereas unpublished opinions require substantially less effort.¹²⁹ “Unpublished opinions traditionally consist of an inferior quality of writing, detail, and reasoning, requiring less time and resources from judges and their clerks.”¹³⁰ They simply inform the parties of who won, who lost, and a shorthand analysis of why, without requiring an elaborate elucidation of all relevant facts and legal principles.¹³¹

Critics argue that allowing citation to unpublished opinions will require judges to exert the same amount of energy into unpublished opinions as they give to their published counterparts.¹³² As Chief Judge John M. Walker, Jr. of the Second Circuit commented: “[The] efficiency [of unpublished opinions] is made possible only when the authoring judge has confidence that short-hand statements, clearly understood by the parties, will not later be scrutinized for their legal significance by a panel not privy to the specifics of the case at hand.”¹³³ If unpublished opinions can be relied on, commentators assert that judges will have to treat them as “mini-opinions,” which “would be impossible to do . . . without neglecting [their] other responsibilities.”¹³⁴ Critics further argue that this added workload will also mean a longer waiting time for parties to receive their unpublished decisions.¹³⁵ Where parties currently receive their unpublished opinion in just a few days, such a change could cause them to have to wait over a year.¹³⁶

2. Unpublished Opinions are Written for a More Limited Audience

Commentators argue that judges write unpublished opinions for a very different audience than published opinions, rendering them unreliable.¹³⁷ Unpublished opinions are written solely for the

129. *Id.* at 32.

130. Damman, *supra* note 27, at 913.

131. See William L. Reynolds & William M. Richman, *The Non-Precedential Precedent – Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1884 (1978).

132. See *2002 Hearing*, *supra* note 122, at 34.

133. Memorandum from Hon. Samuel A. Alito, Jr., Chair, Advisory Comm. on Appellate Rules to J. David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure 163 (May 14, 2004), [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Report s/AP5-2004.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Report%20s/AP5-2004.pdf) [hereinafter Report of Advisory Comm. on Appellate Rules].

134. See *2002 Hearing*, *supra* note 122, at 34.

135. Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23, 36 (2005).

136. *Id.*

137. See Joan M. Shaughnessy, *Commentary: Unpublication and the Judicial Concept of Audience*, 62 WASH. & LEE L. REV. 1597, 1599–1600 (2005).

litigants, attorneys, and the lower court, whereas published opinions are written for the legal community at large—that is, for members of the bar, future judges, law students, the legislature, and the public.¹³⁸ Since litigants are already familiar with their case, unpublished opinions often lack critical facts that underlie the court's legal analysis.¹³⁹ Since the facts are not fully known, it is impossible to accurately distinguish them from other cases.¹⁴⁰ As Judge Kozinski put it: “When the people making the sausage tell you it’s not safe for human consumption, it seems strange . . . to go ahead and eat it anyway.”¹⁴¹ Critics fear that relying on a court’s holding outside of its factual context will cause judges and parties to be misled and will result in unintended consequences for precedential law.¹⁴²

3. Unpublished Opinions Create No New Law

Supporters of no-citation rules contend that unpublished opinions merely apply the well-settled legal principles of that jurisdiction to the circumstances of a given case.¹⁴³ Because they do not add to or change the law, allowing citation to unpublished opinions would only “clutter up the law books and databases with redundant and thus unhelpful authority.”¹⁴⁴ Critics contend that “it would become a hunting ground for lawyers,” who would focus in on small nuances in language and argue the existence of spurious distinctions in the facts in an effort to portray the law as favorable to their client.¹⁴⁵ Because the informational value of unpublished opinions range from negative to naught, they are best not cited at all.¹⁴⁶

4. Unpublished State Opinions are Not Equally Accessible

Federal courts are required by the E-Government Act of 2002 to make all published and unpublished opinions accessible online.¹⁴⁷

138. *Id.*; see also Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 813–14 (1961).

139. See *Aaron v. Everett*, 644 S.W.2d 301, 302 (Ark. Ct. App. 1982).

140. *Winrock Inn Co. v. Prudential Ins. Co.*, 928 P.2d 947, 954 (N.M. Ct. App. 1996).

141. Hon. Alexander Kozinski, *In Opposition to Proposed Federal Rule of Appellate Procedure 32.1*, 51 FED. LAW. 36, 37 (2004).

142. See Schiltz, *supra* note 135, at 33.

143. Report of Advisory Comm. on Appellate Rules, *supra* note 133, at 156–57.

144. *Hart v. Massanari*, 266 F.3d 1155, 1179 (9th Cir. 2001).

145. See *2002 Hearing*, *supra* note 122, at 28 (statement of Hon. Alexander Kozinski).

146. See Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 959 (1989) (citing RICHARD POSNER, *THE FEDERAL COURTS* 124 (1985)).

147. 44 U.S.C. § 3501 (2012); Solomon, *supra* note 33, at 188 n.9.

However, no equivalent to the E-Government Act exists at the state court level and, consequently, the availability of unpublished opinions in state appellate courts remains wholly erratic.¹⁴⁸ For instance, in Texas—a state that allows citation for persuasive value—the availability of unpublished opinions “varies considerably from court to court.”¹⁴⁹ Texas’s fourteen intermediate appellate courts each have very different policies on how unpublished opinions are made available, if at all.¹⁵⁰ “This chaotic availability makes it virtually impossible to comprehensively research the state’s unpublished appellate decisions.”¹⁵¹

Because unpublished opinions are not accessible across the board, critics contend that allowing citation to them would impose undue burdens on practitioners.¹⁵² Regardless of availability, all unpublished opinions are still public documents—that is, anyone can walk in off the street to the court clerk’s office and pay the appropriate fee for a copy.¹⁵³ “[T]he inequality between persons knowing of unpublished opinions and those who did not would exist well before a matter reached the courts.”¹⁵⁴ Critics contend that solo practitioners, smaller firms, and public defenders would be especially disadvantaged, since they lack the resources of larger firms to stay on top of unpublished dispositions.¹⁵⁵

148. Solomon, *supra* note 33, at 222.

149. Andrew T. Solomon, *Practitioners Beware: Under Amended TRAP 27, “Unpublished” Memorandum Opinions in Civil Cases are Binding and Research on Westlaw and Lexis is a Necessity*, 3 ST. MARY’S L.J. 693, 720 n.111 (2009) (quoting MARK E. STEINER, *AFTER THE FLOOD: LEGAL RESEARCH IMPLICATIONS OF THE TRAP AMENDMENTS* 19.6 (2003)).

150. Solomon, *supra* note 33, at 210–11. “[S]ome [Texas] unpublished opinions are completely unavailable, some . . . are only available via Westlaw, some . . . are only available via LEXIS, some . . . are only available via the court websites, and some unpublished opinions are available from multiple sources.” *Id.* at 211.

151. *Id.*

152. J. Thomas Sullivan, *Unpublished Opinions and No Citation Rules in the Trial Courts*, 47 ARIZ. L. REV. 419, 423 (2005).

153. Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 220 (1999).

154. Sullivan, *supra* note 152.

155. *See* Schiltz, *supra* note 135, at 39.

B. The Paramount Position: Arguments Supporting Citation to Unpublished Authority

1. Citation Will Ensure Judicial Accountability

No-citation rules undermine judicial accountability insofar as they permit judges to decide cases without having to properly explain themselves.¹⁵⁶ This gives judges latitude to essentially disregard precedent and effect “an underground body of law good for one place and time only.”¹⁵⁷ Several commentators have gone so far as to liken no-citation rules to gag orders.¹⁵⁸ After issuing an unpublished disposition, judges can more or less say: “I forbid you, on pain of sanction that I will impose, to even mention to me a public action that I took in my official capacity.”¹⁵⁹

Like supporters of no-citation rules, opponents agree that the ability to cite unpublished opinions will force judges to craft their words with more care.¹⁶⁰ The difference is that critics of no-citation rules question *what is so bad about that*—that is, why putting pressure on judges to interpret and reason the law with precision could be seen as a negative¹⁶¹:

Can we ever give judges a pass not to be precise in their language? Of course not. From something as simple as an informal letter to litigants to formal published opinions, judges must say what they mean and mean what they say. Even if it is only the mere litigants before the court, not the rest of the world, that will be guided and informed by the text, judges have an absolute obligation to speak clearly.¹⁶²

Ultimately, the ability for practitioners and courts to remind judges of their own words would reduce inconsistent resolutions of cases and increase judicial accountability.¹⁶³

156. Report of Advisory Comm. on Appellate Rules, *supra* note 133, at 78.

157. *Anastasoff v. United States*, 223 F.3d 898, 904 (2000); Beth Zeitlin Shaw, *Please Ignore This Case: An Empirical Study of Nonprecedential Opinions in the Federal Circuit*, 12 GEO. MASON L. REV. 1013, 1027 (2004).

158. Schiltz, *Much Ado About Little*, *supra* note 45, at 1467.

159. *Id.* at 1468.

160. See Lawrence J. Fox, *Those Unpublished Opinions: An Appropriate Expedience or an Abdication of Responsibility?*, 32 HOFSTRA L. REV. 1215, 1222 (2004).

161. *Id.*

162. *Id.*

163. See Damman, *supra* note 27, at 912; see also *2002 Hearing*, *supra* note 122, at 48 (statement of Kenneth J. Schmier).

2. No-citation Rules Cultivate "Lost Precedent"

No-citation rules of unpublished opinions breed three different forms of "lost precedent": (1) significant yet unpublished opinions; (2) factually similar yet inconsistent unpublished opinions; and (3) erroneous unpublished opinions.¹⁶⁴ All three forms of "lost precedent" undermine the integrity of the judiciary and demonstrate the real and considerable harm that no-citation rules cause.

A notorious example of a significant opinion marked not-for-publication is *Edge Broadcasting Co. v. United States*, in which the Fourth Circuit declared an Act of Congress unconstitutional.¹⁶⁵ Although the Supreme Court on appeal claimed that "it [is] remarkable and unusual" that the Court of Appeals "found it appropriate to announce its judgment in an unpublished *per curiam* opinion,"¹⁶⁶ in reality, such missteps are not uncommon.¹⁶⁷ Courts have a tendency to overlook issues of first impression, assuming that once a rule of law is announced, all cases thereafter need not be precedential.¹⁶⁸ However, the application of the rule of law to varying fact patterns can often be as informative as the rule of law itself.¹⁶⁹ No-citation rules serve as arbitrary barricades, preventing attorneys and courts from assessing valuable opinions merely because they were not marked for publication.

Another negative effect of no-citation rules is the issuance of similar unpublished opinions with inconsistent outcomes. In *United States v. Rivera-Sanchez*, the Ninth Circuit drew attention to twenty different unpublished dispositions incompatibly solving the same problem.¹⁷⁰ The Dallas Area Rapid Transit (DART) authority cases¹⁷¹

164. Lawrence R. McDonough, *To Be or Not To Be Unpublished: Housing Law and the Lost Precedent of the Minnesota Court of Appeals*, 35 *HAMLIN L. REV.* 1, 6-17 (2012).

165. *Edge Broad. Co. v. United States*, No. 90-2668, 1992 WL 35795, at *3 (4th Cir. Feb. 27, 1992), *published in full*, 5 F.3d 59 (4th Cir. 1992).

166. *United States v. Edge Broad. Co.*, 509 U.S. 418, 425 n.3 (1993), *rev'g* *Edge Broad. Co. v. United States*, 5 F.3d 59 (4th Cir. 1992).

167. *See, e.g.*, *Siler v. Siler*, No. CA93-10-081, 1994 WL 386106 (Ohio Ct. App. July 25, 1994), *overrul'g* *King v. King*, 78 Ohio App. 599 (1992); *Zalusky v. Zalusky*, No. 0199-02-4, 2002 WL 31553133 (Va. Ct. App. Nov. 19, 2002) (addressing the classification of intellectual property interests as marital property for the first time).

168. Brett R. Turner, *Unpublished Opinions: Precedential Value, Persuasive Value, and Choice of Law*, 18 *DIVORCE LITIG.* 181 (2006).

169. *See id.*

170. 222 F.3d 1057, 1063 (9th Cir. 2000). The disposition dates of the twenty inconsistent cases spanned from December 4, 1998 to February 2, 2000. *See id.*

171. *Compare* *Anderson v. Dall. Area Rapid Transit*, No. CA3:97-CV-1834-BC, 1998 U.S. Dist. LEXIS 15493 (N.D. Tex. Sept. 29, 1998), *aff'd*, 180 F.3d 265 (5th Cir. 1999)

demonstrate an even greater travesty, where the same litigant in the same factual setting bore the brunt of inconsistent treatment while defending five separate lawsuits—with only the ultimate disposition being published.¹⁷² No-citation rules perpetuate such detrimental inconsistencies by forbidding attorneys from bringing the prior decisions to the court’s attention and by requiring courts to continually treat these already-litigated issues as cases of first impression.¹⁷³ “No-citation rules keep issues ‘in play’—and thus encourage litigation—much longer than necessary.”¹⁷⁴ Judges make a decision, then bar future parties from telling them what they have done. If a judge makes miscalculations, nobody can correct them, because they are forbidden from mentioning it.¹⁷⁵ Judge Arnold said it best, albeit mockingly: “We may have decided this question the opposite way yesterday, but this does not bind us today, and, what’s more, you cannot even tell us what we did yesterday.”¹⁷⁶

The final form of “lost precedent,” and arguably also the most acute, is erroneous unpublished opinions. Erroneous unpublished opinions “deprive[] [litigants] of justice *under law* because the non-publication and no-citation rules combine[] to allow the judges to free themselves of the rule of law, and make rules that cannot possibly affect the public generally.”¹⁷⁷ These consequences are tragically illustrated in the case of *Commonwealth v. McKeithan*.¹⁷⁸

(per curiam) (unpublished); *Tolbert v. Vasquez*, No. 3:93-CV-1468-X, 1998 U.S. Dist. LEXIS 17616 (N.D. Tex. Mar. 27, 1998), *aff’d*, 163 F.3d 1355 (5th Cir. 1998) (per curiam) (unpublished); *Davis v. Mathis*, 846 S.W.2d 84 (Tex. App. 1992) (denying writ on same grounds), *with* *Young v. Dall. Area Rapid Transit*, No. 3:95-CV-2596-X, 1999 U.S. Dist. LEXIS 4470, at *3 (N.D. Tex. Mar. 24, 1999); *Williams v. Dall. Area Rapid Transit*, 242 F.3d 315 (5th Cir. 2001).

172. *See Williams*, 242 F.3d at 318 & n.1; *see also* David R. Cleveland, *Overturing the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. APP. PRAC. & PROCESS 61, 147–48 (2009). *See generally* *Williams v. Dall. Area Rapid Transit*, 256 F.3d 260, 260–63 (5th Cir. 2001), *denying reh’g en banc from Williams*, 242 F.3d 315 (5th Cir. 2001) (Smith, J. dissenting) (“The refusal of the en banc court to rehear this case en banc is unfortunate, for this is an opportunity to revisit the questionable practice of denying precedential status to unpublished opinions.”).

173. Report of Advisory Comm. on Appellate Rules, *supra* note 133, at 86.

174. *Id.*

175. *See id.* at 78.

176. *Anastasoff v. United States*, 223 F.3d 898, 904 (8th Cir. 2000).

177. *2002 Hearing, supra* note 122, at 51 (statement of Kenneth J. Schmier, Chairman, Comm. for the Rule of Law).

178. *See supra* notes 179–83 and accompanying text. For the purpose of disclosure, note that the author of this Comment personally consulted on the *McKeithan* case under the

In 1983, Dennis McKeithan was convicted of robbery and criminal conspiracy in Pennsylvania and sentenced to an aggregate term of 55 to 110 years confinement. McKeithan alleged innocence since day one, and in 2008, he finally discovered evidence to prove it. McKeithan filed a petition for relief under Pennsylvania's Post-Conviction Relief Act (PCRA)¹⁷⁹ and asserted the "after-discovered evidence" exception to the PCRA's one-year filing limitation.¹⁸⁰ However, in an unpublished opinion,¹⁸¹ the Pennsylvania Superior Court improperly found that McKeithan failed to establish an exception to the time-bar, by implementing a four-factor test that was explicitly abrogated by the Supreme Court of Pennsylvania in 2007.¹⁸² This critical error procedurally barred McKeithan's claim from being considered on the merits. McKeithan's request for leave to appeal was denied by the Pennsylvania Supreme Court,¹⁸³ as are most requests following unpublished dispositions. As a result, McKeithan has no option but to continue serving his undue sentence day-for-day in a Pennsylvania correctional facility.

Would the Superior Court have researched the law more thoroughly if it knew that its opinion would be citable in future cases?¹⁸⁴ In 2013, the Superior Court of Pennsylvania published a mere 326 opinions out of 4,860 total opinions filed.¹⁸⁵ In other words, a staggering 93% of the Superior Court's filed opinions in 2013 were non-published and barred from citation.¹⁸⁶ One cannot help but wonder how many other litigants' cases receive short shrift,

supervision of an attorney and associate professor at the University of Baltimore School of Law. The astonishment and dismay caused by the outcome of this case was the inspiration for this Comment topic.

179. 42 PA. STAT AND CONS. STAT. ANN. §§ 9541-43 (West 2007).

180. § 9545(b)(1)(ii); Amended Petition Under Post-Conviction Relief Act and Affidavits, Commonwealth v. McKeithan, No. 2318-EDA-2013 (Phila. Ct. Com. Pl. Jan. 18, 2013) (on file with author).

181. Commonwealth v. McKeithan, No. 2318-EDA-2013, at 9.

182. See *id.*; see also Commonwealth v. Bennett, 930 A.2d 1264, 1270-72 (Pa. 2007), *abrogating* Commonwealth v. Holmes, 905 A.2d 507 (Pa. Super. Ct. 2006) (explaining that the *Holmes* court, among others, "erroneously engrafted *Brady*-like considerations" into its analysis and spelling out the proper test to be used) (footnote omitted).

183. Commonwealth v. McKeithan, No. 474-EAL-2014 (Pa. Feb. 11, 2015) (*per curiam*), <http://www.pacourts.us/assets/opinions/Supreme/out/474EAL2014%20-%201021057133111885.pdf?cb=1>.

184. See 2002 Hearing, *supra* note 122, at 51 (statement of Kenneth J. Schmier, Chairman, Comm. for the Rule of Law).

185. 2013 Annual Statistical Report, SUPERIOR CT. OF PA. 9, <http://www.pacourts.us/assets/files/setting-3829/file-3586.pdf?cb=8b35b7> (last visited Mar. 31, 2016).

186. *Id.*

simply tucked away where the public will not notice or be affected by them. Some commentators stand firm that there is little evidence to support the notion that no-citation rules cause “substantial practical harm”¹⁸⁷—but is that surprising? As one critic put it: “[U]nless all cases are precedent, each of us stands alone, without recourse, before the enormous and unaccountable power of the judiciary, with no real mechanism for correcting our law.”¹⁸⁸

3. Judicial Systems Need Transparency

“Our government, to the greatest extent practicable, should conduct its business in the open. That principle is central to the proper operation of a democracy.”¹⁸⁹ No-citation rules “create the appearance that courts have something to hide” or are using unpublished opinions improperly.¹⁹⁰ After all, lawyers are allowed to cite practically *anything*—from Supreme Court opinions to law review articles to op-ed articles in local newspapers.¹⁹¹ No-citation rules beg the question of why unpublished opinions, authored by sworn government officials, are the only medium that courts and practitioners are forbidden from referencing.¹⁹² This suspicion undermines the public’s perception of the judiciary by implying secrecy and the subsistence of dishonest activity.¹⁹³

Further, no-citation rules cultivate “a subordinate class of appellate authority”¹⁹⁴—especially so, considering that a disproportionate amount of published opinions appears to involve wealthy litigants represented by prominent attorneys.¹⁹⁵ Hence, two classes of justice are formed: “high-quality justice for wealthy parties represented by

187. See, e.g., Schiltz, *Much Ado About Little*, *supra* note 45, at 1467.

188. See *2002 Hearing*, *supra* note 122, at 50 (statement of Kenneth J. Schmier, Chairman, Comm. for the Rule of Law).

189. Howard J. Bashman, *It’s Time to Abolish ‘Invisible’ State Appellate Court Rulings*, JAIL4JUDGES.ORG (Jan. 9, 2007), http://www.jail4judges.org/J.A.I.L._News_Journals/2007/2007-01-09.html.

190. Report of Advisory Comm. on Appellate Rules, *supra* note 133, at 79.

191. See Letter from J. Frank H. Easterbrook, Seventh Circuit Court of Appeals to Peter G. McCabe, Sec’y, Comm. on Rules of Practice and Procedure (Feb. 13, 2004).

192. *Id.*

193. Report of Advisory Comm. on Appellate Rules, *supra* note 133, at 79; Schiltz, *Much Ado About Little*, *supra* note 45, at 1468.

194. Sloan, *supra* note 46, at 907.

195. Schiltz, *Much Ado About Little*, *supra* note 45, at 1469.

big law firms, and low-quality justice for 'no-name appellants represented by no-name attorneys.'"¹⁹⁶

Although some judges insist that such impressions of the judiciary are simply arrant nonsense,¹⁹⁷ alas, when it comes to public opinion, perception triumphs. Regardless of whether judges actually use unpublished opinion improperly, "to the extent that . . . the bar *believes* that this occurs, whether it does or not . . . allowing citation serves a salutary purpose and reinforces public confidence in the administration of justice."¹⁹⁸ If nothing else, the allowance of citation to unpublished opinions would appease the public's suspicions of foul play.

4. Judges Cannot Predict Ex-Ante Whether a Case Will Have Precedential Value

Since a judge cannot determine ahead of time whether the facts of a given case will be relevant in the future, no-citation rules are arbitrary blockades of justice.¹⁹⁹ The precedential relevance of an earlier decision only materializes when another case with similar factual circumstances appears.²⁰⁰ As one practitioner remarked:

[T]he assumption that *any court* can know, at the time of issuing a decision, that the decision neither adds (whatsoever) to already existing case law and that it could *never* contribute (in any way) to future development of the law, strikes me as hero-worship taken beyond the cusp of reality.²⁰¹

Further, critics contend that courts often define cases of first impression too narrowly:

Once a rule of law is announced, future cases applying that rule tend not to be published. But . . . [p]ractitioners often find considerable value in case law applying a settled rule of law to a fact situation materially different from the situation

196. Report of Advisory Comm. on Appellate Rules, *supra* note 133, at 80 (statement of Beverly B. Mann, Esq.).

197. See 2002 Hearing, *supra* note 122, at 35 (statement of Hon. Alexander Kozinski).

198. Report of Advisory Comm. on Appellate Rules, *supra* note 133, at 79 (statement of Hon. Frank H. Easterbrook).

199. See Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 773 (2003).

200. Report of Advisory Comm. on Appellate Rules, *supra* note 133, at 76 (statement of Richard B. Cappalli, Professor, Temp. U., James E. Beasley Sch. of L.).

201. *Id.* (statement of Michael N. Loebel, Esq.).

in which it was originally recognized. Yet this type of case disproportionately tends to be unpublished.²⁰²

Notably, researchers have found that “[t]he more experience a judge had with an area of law in practice, the less likely the judge is to publish opinions in that area (which, ironically, means that citable opinions in that area will disproportionately be published by the judges who know the least about it).”²⁰³ Although there is concededly a practical value in selectively publishing opinions, if the selection process cannot be done correctly, then the ability to cite unpublished opinions can at least combat the court’s nonexistence of omniscient powers.²⁰⁴

VI. CONFLICTING POLICIES GOVERNING UNPUBLISHED OPINIONS AMONG STATE APPELLATE COURTS UNDERMINE JUDICIAL INTEGRITY AND CREATE CONFUSION

State appellate courts’ unpublished opinion practices lack any sort of cohesion or uniformity.²⁰⁵ This lack of uniformity is pervasive both between and within states.²⁰⁶ These considerable variations are problematic in that they leave practitioners and judges alike befuddled in respect to the proper usage of unpublished opinions, if they should be used at all.²⁰⁷ As one commentator stated: “Anyone who states that lawyers and judges have a common understanding of how to handle unpublished decisions is either misinformed or less than candid.”²⁰⁸ The layers of ambiguity surrounding unpublished opinions, a form of disposition that occupies an overwhelming majority of dispositions on the merits in most states,²⁰⁹ is truly a cause for concern.²¹⁰ It results in unintended precedent, penalties for unwitting parties, patent evasions of the law, and arbitrariness in the administration of justice.

202. Turner, *supra* note 168.

203. Report of Advisory Comm. on Appellate Rules, *supra* note 133, at 77.

204. See Turner, *supra* note 168.

205. See *supra* discussion Part IV.

206. See *supra* discussion Part IV.

207. See Cox, *supra* note 118, at 106.

208. See Sloan, *supra* note 46, at 899 (citation omitted).

209. See, e.g., *supra* notes 185–88 and accompanying text; *Opinions*, CAL. CTS., www.courts.ca.gov/opinions.htm (last visited Mar. 31, 2016) (“The majority of [California] Court of Appeal opinions are not certified for publication . . .”).

210. See Sloan, *supra* note 46, at 915–16.

A. The Issuing Court is Not Necessarily the Court that Determines How Unpublished Opinions Will be Used

The issuing court's rules governing unpublished opinions only dictate how the opinions may be used within that jurisdiction's borders.²¹¹ Principles of state sovereignty²¹² prevent an issuing court from defining how *other* state courts may use the issuing court's unpublished opinions.²¹³ Since other states courts' "local rules determining how unpublished opinions may be used in their own jurisdictions" are not affected by the local rules of the issuing court, there is a strong interstate interest in establishing consistency and clarity in the law governing citation of unpublished opinions.²¹⁴

In *Monarch Consulting, Inc. v. National Union Fire Insurance Co.*, the Appellate Division of the New York Supreme Court was faced with the dilemma of how much weight to afford a factually apposite unreported decision from the California Court of Appeal²¹⁵: "[T]he California Rules of Court prohibit citation to unpublished decisions. We are not, of course, bound by the California Rules of Court, nor do our own Rules of Court contain any prohibition against citing to unpublished opinions."²¹⁶ The New York court chose not to adhere to California's no-citation rule, reasoning that "New York state courts routinely cite unreported cases of other jurisdictions" and that other jurisdictions, including Illinois and Delaware, have also specifically considered unpublished California Court of Appeals cases.²¹⁷ Similarly, in *Eastern Air Lines, Inc. v. New Jersey Department of Labor Board of Review*, the Superior Court of New Jersey—which, notably, is prohibited from citing its *own* unpublished opinions²¹⁸—nonetheless cited and considered a factually apposite unpublished opinion from a Massachusetts state agency.²¹⁹

At first blush, one may fail to see the trepidation caused by an out-of-state court citing an unpublished opinion from a no-citation state. However, the perceived audience for which one is writing affects the way the text is written. Since the audiences for unpublished

211. Shenoa L. Payne, *The Ethical Conundrums of Unpublished Opinions*, 44 WILLAMETTE L. REV. 723, 735 (2008).

212. See 3 WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 34:1 (3d ed. 2011).

213. Payne, *supra* note 211, at 735.

214. See *id.*

215. 123 A.D.3d 51, 66 (N.Y. App. Div. 2014).

216. *Id.* at 67 (citations omitted).

217. *Id.* at 67–68.

218. See *supra* note 98.

219. 588 A.2d 396, 399 (N.J. Super. Ct. App. Div. 1991); see also Schlein, *supra* note 127, at 60.

dispositions are chiefly seen as the parties and their attorneys, the drafter does not necessarily detail the facts or allege sweeping declarations of how the legal principles are applied.²²⁰ As a result, if a judge in a no-citation jurisdiction perceives that only the litigants and their attorneys will be reading her disposition, she is less likely to craft it with the same care as she would when writing an opinion set for publication.²²¹ Consequently, an out-of-state court's reliance on a no-citation state's unpublished opinion raises a red flag that hurried, factually ambiguous language, which was never intended to see the light of day, may transform into binding precedential law.²²² Variations among states in their citation policies also mean variations among judges' perceived audiences when drafting unpublished opinions. An unpublished opinion issued in Virginia—which allows citation for persuasive value—is likely to be more comprehensive and detailed than an unpublished opinion issued in Maine—a no-citation state.

Moreover, the practice of citing out-of-state unpublished opinions only heightens the discord among jurisdictions' citation policies. Like most other aspects of unpublished opinions, states tackle this issue differently as well. In New York, as *Monarch Consulting* pointed out, it is a routine practice to cite other jurisdictions' unpublished dispositions.²²³ Conversely, in Oregon, the Supreme Court agreed to withdraw its citation of a no-citation jurisdiction's unpublished opinion “as a matter of comity.”²²⁴ A small minority of states extends their no-citation rules to encompass “any unpublished opinion from any state.”²²⁵

In Kentucky, there is a difference in opinion within its Court of Appeals whether its prohibition against citation to unpublished opinions extends to citation to unpublished decisions from other jurisdictions.²²⁶ Where some judges interpret their citation ban to concern only unpublished *Kentucky* cases, other judges believe “that it is fundamentally inconsistent to allow citation to unpublished

220. See *supra* discussion Part V.A.2.

221. See Shaughnessy, *supra* note 137, at 1599–1601.

222. See Brian Soucek, *Copy-Paste Precedent*, 13 J. APP. PRAC. & PROCESS 153, 166 (2012).

223. See *supra* notes 215–18 and accompanying text.

224. *In re Conduct of Davenport*, 57 P.3d 897, 898 (Or. 2002) (per curiam).

225. Turner, *supra* note 168.

226. 19 SHERYL G. SNYDER ET AL., KENTUCKY PRACTICE SERIES, APPELLATE PRACTICE § 16:7 (2013).

foreign opinions, but not to unpublished Kentucky cases.”²²⁷ The judges in the latter category contend that the rule bars citation to all unpublished opinions across the board.²²⁸ Until this issue is settled, Kentucky practitioners are instructed to proceed with caution when citing out-of-state unpublished opinions, since the law is being applied inconsistently.²²⁹

Washington’s courts were facing a similar predicament to that of Kentucky, in which its Divisions of the Court of Appeals were “tak[ing] differing approaches to the issue of whether parties may cite non-Washington unpublished decisions.”²³⁰ To resolve this confusion, Washington amended its court rules in 2007 to expressly provide that, despite their prohibition on citation to unpublished Washington appellate opinions, a party *may* cite as an authority an unpublished opinion “that has been issued by any court from a jurisdiction *other than Washington state*, only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court.”²³¹

Currently, Washington is the only state that has clarified its statutory law in this regard.²³² The discrepancies among states’ publication policies make it difficult for judges drafting unpublished opinions to recognize whom they are writing to, since it is unpredictable whether another jurisdiction will eventually rely on that opinion’s language. Thus, such variations pose a risk of unintended language—likely originating from a no-citation state—transforming into precedential law.²³³ Consistency in unpublished opinion policies is hence critical, so that practitioners and judges are able to fundamentally understand the value and quality of an unpublished opinion, regardless of the jurisdiction that it originated from.

B. Unclear Rules Create Risks of Penalty for Unwitting Parties

The ambiguities that persist among states’ unpublished opinion policies create undue hardships for practitioners, who are at risk of

227. *Id.*

228. *Id.*

229. *Id.*

230. 2 KARL B. TEGLAND, WASHINGTON PRACTICE § 14.1 (7th ed. 2014).

231. WASH. R. GEN. APPLICATION 14.1 (emphasis added).

232. Vermont’s case law allows courts to rely upon an out-of-state unpublished decision for persuasive value, however the matter is not addressed in their formal Rule. See *Gamache v. Smurro*, 2006 VT 67, ¶ 11 n.4, 904 A.2d 91, 97 n.4 (citing an unpublished opinion from the California Court of Appeals and relying on the opinion in its analysis).

233. Soucek, *supra* note 222, at 166.

incurring sanctions or professional discipline for citing an “uncitable” opinion.²³⁴ Attorneys are obliged to comb through “inconsistent formal no-citation rules and informal practices,” hoping to not make a mistake along the way.²³⁵ In *Dwyer v. J.I. Kislak Mortgage Corp.*, the Court of Appeals of Washington imposed sanctions against the mortgagee’s counsel for “cit[ing] and discuss[ing] at length in their appellate brief an unpublished opinion of this court” in violation of Washington’s citation ban.²³⁶

As a precursor, attorneys should not be subjected to sanctions for pointing out to a court how it has ruled in the past.²³⁷ But even more so, attorneys should not be penalized based on their inability to navigate a jurisdiction’s obscure formal and informal citation rules. Attorneys who practice in many jurisdictions, or who represent clients that are contractually bound by choice-of-law clauses,²³⁸ are especially hampered by the lack of cohesion among and within the states’ policies.²³⁹ If a practitioner is unfamiliar with an informal nuance in the rules and unwittingly violates it, he or she risks, at the least, a tongue-lashing by the presiding judge.²⁴⁰ In a broader sense, the ambiguities surrounding proper usage of unpublished opinions could discourage lawyers from taking cases in multiple jurisdictions by making it too burdensome to find out how to conform to local practices.

234. See Barnett, *supra* note 7, at 488.

235. See Report of Advisory Comm. on Appellate Rules, *supra* note 133, at 49.

236. *Dwyer v. J.I. Kislak Mortg. Corp.*, 13 P.3d 240, 244 (Wash. Ct. App. 2000) (“Ironically, it is that doctrine of precedent on which we rely in imposing sanctions and which we are loathe to ignore. . . . [O]ur case law holds that [unpublished] cases do not become part of the common law of our state.”); see also WASH. R. GEN. APPLICATION 14.1(a).

237. See J. Lyn Entrikin Goering, *Legal Fiction of the “Unpublished” Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor*, 1 SETON HALL CIR. REV. 27, 89–90 (2005).

238. A choice of law clause is “a provision in a contract in which the parties stipulate that any dispute between them arising from the contract shall be determined in accordance with the law of a particular jurisdiction.” WEBSTER’S NEW WORLD LAW DICTIONARY 71 (Susan Ellis Wild ed., 2006).

239. See Goering, *supra* note 237, at 47–49.

240. See, e.g., *Baugus v. Special Indem. Fund*, 1998 OK Civ. App. 146, ¶ 5 n.1, 966 P.2d 801, 803 n.1.

C. Ambiguities Allow Courts and Practitioners to Regularly Circumvent Unpublished Opinion Procedures, Undermining the Integrity of the Judiciary

The obscure nature of state courts' rules governing citation to unpublished opinions invites judges and attorneys alike to exploit potential loopholes and, thereby, cite allegedly uncitable decisions.²⁴¹ As one commentator provided: "[L]awyers, district court judges, and appellate judges regularly read and rely on unpublished decisions despite prohibitions on doing so."²⁴²

In several jurisdictions, courts have gone so far as to informally carve out exceptions to their citation bans. A New Jersey court, which is statutorily banned from citing unpublished opinions, "concluded that if an unpublished case is discussed and quoted at length, yet not cited as authority, the integrity of the rule is maintained."²⁴³ In a Nebraska case, the Court of Appeals felt "compelled" to examine the rationale of two unpublished decisions that were factually apposite with the present case, despite recognizing "that unpublished decisions of this court do not carry precedential weight."²⁴⁴

The language of Maryland Rule 1-104 is particularly susceptible to circumvention, providing that an unreported Maryland appellate opinion may be cited "for any purpose other than as precedent within the rule of stare decisis or as persuasive authority."²⁴⁵ In 2009, the Court of Special Appeals effectively circumvented this prohibition by allowing the appellant to cite an unpublished decision in its brief on the grounds that it was not cited for precedential authority and that the court "can take judicial notice of [its] own opinions."²⁴⁶

Even in no-citation states, it is common practice for judges to read and consider unpublished opinions.²⁴⁷ When attorneys and judges skirt formal procedural rules, the integrity of the judiciary suffers.

241. Schlein, *supra* note 127, at 60–61.

242. See Report of Advisory Comm. on Appellate Rules, *supra* note 133, at 74 (statement of Richard Frankel, Esq.).

243. Schlein, *supra* note 127, at 60.

244. *State v. James*, 573 N.W.2d 816, 820–21 (Neb. Ct. App. 1998).

245. MD. R. 1-104(b).

246. *Evans v. County Council*, 185 Md. App. 251, 255 n.2, 969 A.2d 1024, 1027 n.2 (2009).

247. See *McCoy v. State*, 80 P.3d 757, 761 (Alaska Ct. App. 2002) ("And even in those states that forbid the parties from mentioning unpublished opinions, judges read unpublished opinions and pay attention to them." (citing *Wortel v. Somerset Indus., Inc.*, 770 N.E.2d 1211, 1220 n.5 (Ill. App. Ct. 2002))); *State v. Locklear*, 20 P.3d 993, 996 n.11 (Wash. Ct. App. 2001).

Courts must be consistent with the application of the law, including procedural law, for the judicial system to maintain its legitimacy.²⁴⁸ The disparities and ambiguities both among and within states' procedures invite just the opposite. They encourage members of the bar to construct "wiggle room" within states' positive laws and, ultimately, allow judges to operate with no boundaries.²⁴⁹

D. Lack of Consistency in Treatment of Opinions Creates Arbitrariness and Injustice

With dozens of obscure local rules at odds with one another, unfair results are inevitable. Courts inconsistently administer their jurisdiction's respective policies, and practitioners have unequal access to the courts' issued opinions.²⁵⁰ Although each individual variance may seem minor, "in the aggregate, they reflect very different policies regarding the development of precedential law" among the states.²⁵¹ The considerable gaps between and among rules pose a real danger of shaping the law in a negative or unintended way.²⁵² A predictable and cohesive body of law is not achieved by treating unpublished opinions as the "red-headed stepchildren" of precedent—but rather, by ensuring that the application of both substantive and procedural law is consistent, notwithstanding the disposition's publication status.²⁵³

248. See Martha J. Dragich, *Will the Federal Courts of Appeals Perish if they Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 778 (1995).

249. Compare OKLA. SUP. CT. R. 1.200(c)(5) (providing that unpublished opinions "shall not be considered as precedent by any court or cited in any brief or other material presented to any court"), with 5 HARVEY D. EILLIS, JR. & CLYDE A. MUCHMORE, OKLAHOMA APPELLATE PRACTICE § 14:132 (2015 ed.) (explaining the "appropriate course of action" to citing an otherwise uncitable unpublished opinion notwithstanding the state's no-citation rule).

250. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 130 (1990).

251. Sloan, *supra* note 46, at 915.

252. See *id.* at 926.

253. See Fox, *supra* note 160 at 1223–24.

VII. PROPOSED SOLUTION: STATES SHOULD ADOPT A UNIFORM RULE THAT VALUES UNPUBLISHED OPINIONS AS PERSUASIVE AND GUARANTEES COMPREHENSIVE ELECTRONIC ACCESS TO APPELLATE DISPOSITIONS NOTWITHSTANDING THEIR PUBLICATION STATUS

In order to put an end to the confusion and apprehension surrounding unpublished opinions, it is critical that state appellate courts adopt a uniform rule, to the extent permissible,²⁵⁴ standardizing state courts' unpublished opinion citation policies. Ultimately, the emphasis here is less on the *terms* of the uniform rule, and more on the fundamental need for *any* uniform practice to be established and adopted nationwide. Simply put, the current discord among states' policies creates such a circumstance where "it is more important that the applicable rule of law be settled than that it be settled right."²⁵⁵

Nonetheless, some solutions are obviously more viable than others. One promising resolution, in particular, is a uniform rule whose functions would be two-fold: first, it would specify unpublished opinions' value within the precedential law hierarchy; and second, it would require that unpublished opinions be categorically available online.

While most jurisdictions' unpublished opinion practices "lag behind the realities of the legal profession and technological change,"²⁵⁶ several states are blazing the trail for the modern unpublished opinion.²⁵⁷ An examination of states' publication

254. An analysis of possible separation-of-powers-related implications of such an adoption is outside the scope of this Comment; however, it should be noted that the method by which a given state can adopt a uniform rule governing judicial procedure varies from state to state, based on the power each states' constitution grants to its respective legislature. Cf. JUDIE ZOLLAR, SEPARATION OF POWERS: WHEN STATUTES AND COURT RULES CONFLICT 2 (2005), <http://www.house.leg.state.mn.us/hrd/pubs/ss/ssseppw.pdf> (providing that if the Minnesota legislature passes a law pertaining to "procedural rules that apply in court proceedings," and that law is in conflict with a court rule, "the court will find the statute unconstitutional on separation of powers grounds").

255. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

256. Schlein, *supra* note 127, at 62.

257. See *infra* Appendix – Table 3 (Ariz.) (allowing citation for persuasive value); *infra* Appendix – Table 2 (W. Va.) (court establishing a unique three-tier system of precedent); *infra* Appendix – Table 5 (Wash.) (allowing parties to cite as an authority an unpublished opinion "issued by any court from a jurisdiction other than Washington state, only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court"); *In re Arkansas Supreme Court and Court of Appeals Rule 5-2*, 2009 Ark. 330 (2009) (per curiam),

policies over the last decade reveals a clear trend in favor of citability and judicial transparency.²⁵⁸ The nation-wide adoption of a uniform rule would eliminate the antiquated, arcane, and arbitrary practices of states and replace them with a clear and rational procedural guideline. The adoption of a uniform rule affording persuasive value and online access to unpublished opinions will have wide-reaching effects on the clarity and justiciability of precedential law.

A. The Upside in Uniformity

Uniform laws and model rules are frequently proposed and adopted to standardize “what the law is or should be” for specific jurisdictions.²⁵⁹ Uniform laws are helpful in that they “provide[] states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.”²⁶⁰ Much of the confusion surrounding unpublished opinions hinges on their varying treatment. A uniform law would do away with the considerable “ambiguities and hidden loopholes” that many jurisdictions’ current rules are riddled with.²⁶¹

B. The Proposed Uniform Law Should Allow Citation of Unpublished Opinions for Persuasive Value

Specifically, the proposed uniform law should eliminate no-citation rules and prospectively allow citation to unpublished opinions for their persuasive value. A nationwide adoption of such a rule is an equitable compromise. As an Arizona practitioner in support of its recently amended court rule commented:

Any concerns a court might have that a particular case does not warrant an opinion of precedential value—because of difficult facts or inadequate briefing—is adequately addressed by limiting citation . . . for its persuasive value

<http://opinions.aoc.arkansas.gov/WebLink8/0/doc/236929/Electronic.aspx> (“Arkansas will be the first state in the nation to publish and distribute the official report of its appellate decisions electronically.”).

258. See discussion *supra* Part IV.

259. Mary Whisner, *There Oughta be a Law — A Model Law*, 106 L. LIBR. J. 125, 125 (2014). These laws are drafted by various organizations, including the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission), and other interest groups or associations that want to promote specific policies. See *generally id.* (providing an overview of the various types of model laws).

260. *About the ULC*, UNIF. LAW COMM’N, <http://www.uniformlawcommission.com/Narrative.aspx?title>About%20the%20ULC> (last visited Mar. 31, 2016).

261. See Whisner, *supra* note 259, at 125.

only and by imposing no obligation on the court or parties to research or distinguish the decision.²⁶²

This uniform rule would set forth a “compromise position” between those who want an outright prohibition on citation to unpublished opinions and those who want unpublished opinions to be fully citable.²⁶³ Like newspaper or law review articles, unpublished opinions will only be cited and relied upon if they are valuable, with valueless dispositions simply disappearing into the archives.²⁶⁴ Still, the ability to cite those dispositions that *are* valuable will promote judicial accountability by allowing litigants to bring errors or areas of uncertainty to the court’s attention. As one commentator provided:

[T]he task of creating a coherent and sensible body of law is not one that the judges carry out alone. On the contrary, under the adversary system, the judges work, or should work, in partnership with the lawyers. When a litigant, through counsel, informs the court that a prior panel has improvidently made new law in an unpublished opinion, the court should welcome that information and either assimilate the holding into the body of law, or forthrightly repudiate it.²⁶⁵

Moreover, with unpublished appellate opinions universally valued on the same field, judges will be able to more acutely forecast who their audience will be, beyond just the parties to the case. Since the rule would be prospective in nature, it would also give adequate notice to courts in present no-citation states to modify their drafting practices. The ability to cite unpublished opinions will hold judges more accountable for their words and reduce the likelihood of unintended language developing into precedential law.

262. Comment in Support of Petition to Amend, In the Matter of Petition to Amend Rule 111, Ariz. R. Sup. Ct., Rule 28, Ariz. R. Civ. App. P., and Rule 31.24, Ariz. R. Crim. P., (No. R-14-0004), <http://www.azcourts.gov/Rules-Forum/aft/446> [hereinafter American Academy of Appellate Lawyers’ Comment].

263. See Stiegler, *supra* note 18, at 543.

264. See Report of Advisory Comm. on Appellate Rules, *supra* note 133, at 78.

265. 2002 Hearing, *supra* note 122, at 64 (statement of Arthur Hellman, Professor, U. of Pittsburgh Sch. of L.).

C. The Proposed Uniform Law Should Require States to Make their Unpublished Opinions Available Online

The second function of the proposed uniform law is to create a state equivalent to the E-Government Act of 2002 and, thereby, require each state appellate court to establish a website with access to “all written opinions issued by a court, regardless of whether such opinions are to be published in the official court reporter.”²⁶⁶ Any advantages of a uniform law allowing citation for persuasive value are negated absent unpublished opinions’ guaranteed online availability.²⁶⁷ If unpublished opinions are not readily accessible, attorneys cannot be expected to research and know the law.²⁶⁸ This would be an undue burden and result in disparate representation “based on whether the attorney has access” to the forum state’s unpublished opinions.²⁶⁹

Technological advances have transformed legal research and case publication as we once knew it.²⁷⁰ “These changes alone cry out for a reevaluation of the concept of limited publication and precedent.”²⁷¹ The expansion of technology makes high quantities of information exponentially more manageable, and, so long as it is effectively utilized, renders the philosophies supporting states’ no-citation rules antiquated. The no-citation system was the product of an environment “limited to print resources”—a setting that simply does not exist in today’s technological age.²⁷²

Concededly, comprehensive availability of unpublished dispositions will increase the volume of case law for practitioners and courts to research.²⁷³ However, “the exponential increase in efficiency through online search-term queries avoids what would have become a seemingly insurmountable project in the past.”²⁷⁴ If today’s practitioner is unduly burdened, is it not by added unpublished cases to sift through, but rather, by no-citation gag orders that capriciously forbid her from referencing the court’s very own past decisions. A state equivalent to the E-Government Act,

266. E-Government Act of 2002, Pub. L. No. 107-347, § 205(a)(5), 1116 Stat. 2899, 2913 (codified at 44 U.S.C. § 3501 (2012)); see also Cox, *supra* note 118, at 115–16.

267. See Solomon, *supra* note 33 at 220–21.

268. *Id.*

269. *Id.* at 222–23.

270. Cleveland, *supra* note 172, at 87–88.

271. *Id.* at 88.

272. *Id.* at 89.

273. Damman, *supra* note 27, at 899–900.

274. *Id.*

coupled with the comprehensive allowance of citation of unpublished authority, will combat jurisdictions' unfounded aversion from securing Internet accessibility for the public²⁷⁵ by requiring that the judiciary maintain transparency and accountability.²⁷⁶

VIII. CONCLUSION

The time has come to end state appellate courts' "plague of inconsistency,"²⁷⁷ in favor of a clean and coherent uniform law. Allowing universal citation to precedential opinions rightly shifts the duty of determining a decisions impact to the precedent-*applying* court, and away from the precedent-*setting* court.²⁷⁸ A uniform law will promote consistent administration of the law, both procedurally and in substance.

Although they once may have been an effective method to combat unmanageable appellate caseloads, no-citation rules, in whole or part, have no place in today's technological age. The trend is clearly supportive of citation to unpublished opinions for persuasive value, so as to maintain a predictable, transparent, and cohesive body of law. Comprehensive online accessibility is also critical to refute public perceptions of "secret law"²⁷⁹ and uphold democratic notions of openness. By valuing appellate opinions, not by their publication status, but by their precedential merit, the integrity of the judiciary will be restored and this nation's commitment to stare decisis will prevail once again.

275. See, e.g., *infra* Appendix – Table 5 (Me.) (providing that memorandums of decision "will not be published on the Judicial Branch website").

276. Bashman, *supra* note 189.

277. Cox, *supra* note 118, at 109.

278. See Cappalli, *supra* note 199, at 773.

279. See Solomon, *supra* note 33, at 194.

APPENDIX

CLASSIFICATION OF STATE COURTS' CITATION RULES

Table 1: States that Prospectively Publish All Dispositions

| | STATE | CITATION RULE |
|----|-------------|--|
| 1. | Arkansas | ARK. SUP. CT. R. 5-2(c) ("Every Supreme Court and Court of Appeals opinion issued after July 1, 2009, is precedent and may be relied upon and cited by any party in any proceeding."); <i>In re</i> Ark. Supreme Court & Court of Appeals Rule 5-2, 2009 Ark. 330 (2009) (per curiam), http://opinions.aoc.arkansas.gov/WebLink8/0/doc/236929/Electronic.aspx . |
| 2. | Connecticut | CONN. GEN. STAT. ANN. §§ 51-212(b), -215a(b) (West 2005) (providing that all appellate case dispositions are published). |
| 3. | Mississippi | MISS. R. APP. P. 35-A(b), -B(b) (providing that all opinions issued after November 1, 1998 are published and that opinions issued before this date may not be cited to). |
| 4. | New York | N.Y. JUD. LAW § 431 (McKinney 2005); <i>see also</i> <i>Monarch Consulting, Inc. v. Nat'l Union Fire Ins. Co.</i> , 123 A.D.3d 51, 67 (N.Y. App. Div. 2014) ("[T]here is no [] rule in New York which prevents the citation of unpublished decisions."). |

Table 2: States that Allow Citation to Unpublished Opinions as Binding Precedent

| | STATE | CITATION RULE |
|----|-----------|---|
| 1. | Delaware | DEL. SUP. CT. R. 14(b)(vi)(B)(2), 17(a). |
| 2. | Louisiana | LA. CODE CIV. P. 2168 (allowing unpublished opinions to be cited as authority). This code was legislatively enacted in 2006, replacing a non-citation court rule. <i>See</i> LA. CT. APP. UNIF. R. 2-16.3 (amended 2007). |

| | | |
|----|---------------|--|
| 3. | Ohio | OHIO REP. OP. R. 3.4 (“All opinions of the courts of appeals issued after May 1, 2002 may be cited as legal authority and weighted as deemed appropriate by the courts without regard to whether the opinion was published or in what form it was published.”). Ohio technically falls into two camps, because all Ohio Supreme Court opinions are published. OHIO REP. OP. R. 2.1. However, because Ohio still selectively publishes their court of appeals opinions, it is best suited for this category. |
| 4. | Utah | UTAH R. APP. P. 30(f) (“[U]npublished decisions of the Court of Appeals issued on or after October 1, 1998, may be cited as precedent in all courts of the State.”). <i>See generally</i> Grand Cty. v. Rogers, 2002 UT 25, ¶ 16, 44 P.3d 734, 738 (striking down “no citation” rule). |
| 5. | West Virginia | West Virginia’s Supreme Court of Appeals recently established a three-tier system of precedent in order to clarify the weight of their Court opinions. <i>See</i> State v. McKinley, 764 S.E.2d 303, 313 (W. Va. 2014). Memorandum decisions, which are simply unsigned and unpublished decisions by the Court, have the lowest precedential value: “[W]hile memorandum decisions may be cited as legal authority, and are legal precedent, their value as precedent is necessarily more limited; where a conflict exists between a published opinion and a memorandum decision, the published opinion controls.” <i>Id.</i> |

Table 3: States that Allow Citation to Unpublished Opinions for Persuasive Value

| | STATE | CITATION RULE |
|----|--------|---|
| 1. | Alaska | ALASKA R. APP. P. 214(d)(1) (“Citation of unpublished decisions . . . is not encouraged. If a party believes, nevertheless, that an unpublished decision has persuasive value in relation to an issue in the case, and that there is no published opinion that would serve as well, the party may cite the unpublished decision.”). |

| | | |
|----|----------|---|
| 2. | Arizona | ARIZ. R. SUP. CT. 111(c)(1)(C) (allowing unpublished opinions issued after January 1, 2015 to be cited for persuasive value if no other opinion adequately addresses the issue before the court and the citation is not to an opinion with depublished content); <i>see also</i> ARIZ. R. CIV. APP. P. 28(c). |
| 3. | Georgia | GA. CT. APP. R. 33(b) (“An unreported opinion is neither a physical nor binding precedent . . .”). <i>But see</i> Barnett, <i>supra</i> note 7 at 483 n.67 (“But ‘there is no rule against’ citing [unreported opinions] for persuasive value, and that is done, although infrequently.”) (citation omitted). <i>See also</i> GA. CT. APP. R. 24(d) (providing instructions for citation to unreported cases). |
| 4. | Hawaii | HAW. R. APP. P. 35(c) (providing that dispositions filed after July 1, 2008 may be cited for persuasive value but not precedent). |
| 5. | Iowa | IOWA R. APP. P. 6.904(2)(c); <i>see also In re Guardianship of Barros</i> , 2005 ND 122, ¶ 15, 701 N.W.2d 402, 407 (“The Iowa courts allow citation to unpublished decisions only for their persuasive value and not as controlling precedent.”). |
| 6. | Kansas | KAN. SUP. CT. R. 7.04(g)(2) (providing that the citation of unpublished opinions is not favored and “may be cited only if the opinion has persuasive value with respect to a material issue not addressed in a published opinion of a Kansas appellate court”) (amended 2003). |
| 7. | Kentucky | KY. R. CIV. P. 76.28(4)(c) (“[U]npublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court.”); <i>see also Young v. Vista Homes, Inc.</i> , 243 S.W.3d 352, 364 n.4 (Ky. Ct. App. 2007) (holding that Kentucky courts are not prohibited from citing unpublished decisions rendered before 2003). |

| | | |
|-----|---------------|---|
| 8. | Massachusetts | MASS. REG. APP. PRAC. R. 1:28. <i>But see</i> Commonwealth v. Gray, 951 N.E.2d 931, 935 n.1 (Mass. App. Ct. 2011) (providing that, because unpublished memorandum are often conclusory and missing imperative factual context, they are not accorded precedential weight). |
| 9. | Michigan | MICH. CT. R. 7.215(C)(1) (“An unpublished opinion is not precedentially binding under the rule of stare decisis. Unpublished opinions should not be cited for propositions of law for which there is published authority. If a party cites an unpublished opinion, the party shall explain the reason for citing it and how it is relevant to the issues presented.”) (effective May 1, 2016). |
| 10. | Minnesota | MINN. STAT. ANN. § 480A.08 (West 2014); MINN. R. CIV. APP. P. 136.01(1)(b) (“Unpublished opinions and order opinions are not precedential except as law of the case, res judicata or collateral estoppel, and may be cited only as provided in Minnesota Statutes, section 480A.08, subd. 3 (1996).”); 9 HENRY W. MCCARR & JACK S. NORDBY, MINNESOTA PRACTICE, CRIMINAL LAW AND PROCEDURE § 37:31 (4th ed. 2015) (“The [Minnesota] Court of Appeals has criticized a trial court for relying on an unpublished opinion and discouraged their use generally. These opinions, the court said, are ‘not precedential,’ but at best ‘of persuasive value.’”) (footnotes omitted). |
| 11. | Nevada | NEV. R. APP. P. 36(c)(3) (“A party may cite for its persuasive value, if any, an unpublished disposition issued by this court on or after January 1, 2016.”). |
| 12. | New Mexico | N.M. R. APP. P. 12-405(C); State v. Gonzales, 1990-NMCA-040, ¶ 50, 110 N.M. 218, 227, 794 P.2d 361, 370 (“[I]f counsel concludes that language in a memorandum opinion or calendar notice is persuasive, we see no reason why it cannot be presented to the court for consideration.”). |

| | | |
|-----|----------------|---|
| 13. | North Carolina | N.C. R. APP. P. 30(e)(3) (“[C]itation of unpublished opinions . . . is disfavored If a party believes, nevertheless, that an unpublished opinion has precedential value to a material issue in the case and that there is no published opinion that would serve as well, the party may cite the unpublished opinion . . .”). |
| 14. | North Dakota | <i>In re Guardianship of Barros</i> , 2005 ND 122, ¶ 15, 701 N.W.2d 402, 408 (“Although our Court has not formally adopted such a rule, we believe [unpublished] decisions should only have value for their persuasive reasoning.”). |
| 15. | Vermont | <i>See Gamache v. Smurro</i> , 2006 VT 67, ¶ 11 n.4, 904 A.2d 91, 97 n.4 (citing an unpublished opinion from the California Court of Appeals and finding it persuasive in its application of the governing statute). |
| 16. | Virginia | VA. SUP. CT. R. 5.1(f) (“The citation of judicial opinions, orders, judgments, or other written dispositions that are not officially reported, whether designated as ‘unpublished,’ ‘not for publication,’ ‘non precedential,’ or the like, is permitted as informative, but shall not be received as binding authority.”). |
| 17. | Wisconsin | WIS. STAT. ANN. § 809.23(3) (West Supp. 2015) (allowing citation of unpublished opinions issued on or after July 1, 2009 for persuasive value); <i>see also id.</i> judicial council note (2008) (“Section (3) was revised to reflect that unpublished Wisconsin appellate opinions are increasingly available in electronic form. This change also conforms to the practice in numerous other jurisdictions . . .”). |
| 18. | Wyoming | <i>See Barnett, supra</i> note 7, at 482 n.63 (“Wyoming has no rule against citing unpublished opinions, and they can be cited for persuasive value.”) (citation omitted). |

Table 4: Hybrid States

| | STATE | CITATION RULE |
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| 1. | Colorado | All opinions of the Colorado Supreme Court are published. <i>See</i> COLO. REV. STAT. ANN. § 13-2-122 (West 2014); 18 LEONARD P. PLANK & ANNE WHALEN GILL, COLORADO PRACTICE, APPELLATE LAW & PRACTICE § 21.5 (2d ed. 2014). Opinions of the Colorado Court of Appeals are selectively published, and the citation of unpublished opinions is forbidden unless decided between January 1, 1970 and November 1, 1975. <i>See</i> COLO. APP. R. 35(f); <i>Woods v. Delgar Ltd.</i> , 226 P.3d 1178, 1181 n.1 (Colo. App. 2009). |
| 2. | Florida | Although Florida publishes all Supreme Court opinions, “a per curiam affirmance without written opinion, even one with a written dissent, has no precedential value and should not be relied on for anything other than res judicata.” <i>St. Fort ex rel. St. Fort v. Post</i> , 902 So.2d 244, 248 (Fla. Dist. Ct. App. 2005); <i>see also</i> <i>Dep’t of Legal Affairs v. Dist. Ct. of Appeal, 5th Dist.</i> , 434 So. 2d 310, 311 (Fla. 1983) (“The issue is whether a per curiam appellate court decision with no written opinion has any precedential value. We hold that it does not.”). |
| 3. | Indiana | IND. R. APP. P. 65(D) (stating that all Supreme Court opinions are published, but “memorandum decision[s]” issued by the Court of Appeals “shall not be regarded as precedent and shall not be cited to any court”); <i>see also</i> <i>Selective Ins. Co. of South Carolina v. Erie Ins. Exch.</i> , 14 N.E.3d 105, 113 n.4 (Ind. Ct. App. 2014) (clarifying that Rule 65(D) only prohibits citation to decisions issued by the Court of Appeals of Indiana and allows citation to unpublished U.S. district court cases). |
| 4. | Nebraska | <i>See</i> NEB. CT. R. APP. P. § 2-107; <i>see also</i> <i>State v. James</i> , 573 N.W.2d 816, 820–21 (Neb. Ct. App. 1998) (recognizing “that unpublished decisions of this court do not carry precedential weight,” but feeling “compelled” to examine the rationale of two unpublished decisions that were on all fours with the present case). |

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| 5. | New Hampshire | Effective January 1, 2016, the Supreme Court of New Hampshire adopted a series of amendments to its court rules, allowing litigants to cite and discuss unpublished opinions, while providing that they do not constitute binding precedent. <i>See Supreme Court Orders</i> , N.H. BAR ASSOC. (Dec. 16, 2015), https://www.nhbar.org/publications/archives/display-news-issue.asp?id=8194 ; <i>see also</i> N.H. SUP. CT. R. 12-D(3) (“An order issued by a 3JX panel shall have no precedential value, but it may, nevertheless, be cited or referenced in pleadings or rulings in any court in this state, so long as it is identified as a non-precedential order.”) (effective Jan. 1, 2016). <i>But see</i> N.H. SUP. CT. R. 25(5) (“Cases summarily disposed of under this rule shall not be regarded as establishing precedent or be cited as authority.”). |
| 6. | Oklahoma | Oklahoma draws a line between criminal and civil matters. <i>Compare</i> OKLA. R. CRIM. APP. 3.5(C)(3) (stating that “parties may cite and bring to the Court’s attention the unpublished decisions of this Court provided counsel states that no published case would serve as well the purpose for which counsel cites it”), <i>with</i> OKLA. SUP. CT. R. 1.200(c)(5) (providing that unpublished opinions “shall not be considered as precedent by any court or cited in any brief or other material presented to any court”). |
| 7. | Oregon | Oregon has no statute or rule regarding the publishing of opinions or the precedential value of unpublished decisions, however cases that are affirmed without an opinion may not be cited to. OR. R. APP. P. 5.20(5). |
| 8. | New Jersey | New Jersey’s citability rule, uniquely, diverges on the basis of the role of the actor. <i>See</i> N.J. CT. R. 1:36-3 (stating that “no unpublished opinion shall be cited by any court” while also permitting parties to bring unpublished opinions to the attention of the court). |

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| 9. | Tennessee | Tennessee's citation rules hinge on whether the opinion was issued by the Supreme Court or the Court of Appeals. <i>Compare</i> TENN. SUP. CT. R. 4(G)(1) (“[U]npublished opinions . . . shall be considered persuasive authority.”), <i>with</i> TENN. CT. APP. R. 10 (“When a case is decided by memorandum opinion it . . . shall not be published, and shall not be cited or relied on for any reason in any unrelated case.”). |
| 10. | Texas | TEX. R. APP. P. 47.7 (providing that all opinions in civil cases issued after January 1, 2003 are published, whereas opinions in criminal cases are selectively published and nonprecedential, but may be cited). |

Table 5: No-Citation States

| | STATE | CITATION RULE |
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| 1. | Alabama | <i>See</i> ALA. R. APP. P. 53(d), 54(d) (prohibiting citation of and affording no precedential value to “No Opinion” Affirmances). |
| 2. | California | CAL. R. CT. 8.1115(a) (“[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.”). |
| 3. | District of Columbia | D.C. CT. APP. R. 28(g) (“Unpublished orders or opinions of this court may not be cited in any brief . . .”). |
| 4. | Idaho | IDAHO SUP. CT. OP. R. 15(f) (“If an opinion is not published, it may not be cited as authority or precedent in any court.”). |
| 5. | Illinois | ILL. SUP. CT. R. 23 (providing that unless a case is disposed of by a published opinion, it “is not precedential and may not be cited by any party”). |

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| 6. | Maine | <i>See</i> ME. R. APP. P. 12(c) (“A memorandum of decision decides a case, but does not establish precedent and will not be published on the Judicial Branch website or in the Maine Reports); ME. R. APP. P. 12 advisory notes to 2004 amendment (“A memorandum of decision may be used to decide cases in which the law governing resolution of the case is clear and no legal principle is being newly established or modified.”). |
| 7. | Maryland | MD. R. 1-104(b) (“An unreported opinion of [the Court of Appeals or Court of Special Appeals] may be cited in either Court for any purpose other than as precedent within the rule of stare decisis or as persuasive authority.”). <i>But see</i> <i>Evans v. County Council</i> , 185 Md. App. 251, 255 n.2, 969 A.2d 1024, 1027 n.2 (2009) (stating that the inclusion of an unpublished decision in a party’s brief is not in violation of Rule 1-104(b), because the court can take judicial notice of their own opinions and it was not cited as precedential authority). |
| 8. | Missouri | MO. SUP. CT. R. 84.16(b) (providing that a written statement attached to a memorandum decision or written order “shall not be reported, and shall not be cited or otherwise used in any case before any court”). |
| 9. | Montana | MONT. SUP. CT. INTERNAL OP. R. § 1(3)(c)(ii) (providing that the decision of a case classified as a memorandum opinion “shall not be citeable as binding precedent”). |

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| 10. | Pennsylvania | PA. SUPER. CT. I.O.P. § 65.37 (“An unpublished memorandum decision shall not be relied upon or cited by a Court or a party in any other action or proceeding . . .”). Cf. COMMONW. CT. I.O.P. § 414 (allowing parties to cite unreported panel decisions of Commonwealth Court issued after Jan. 15, 2008 for persuasive value). Pennsylvania’s Commonwealth Court is one of two intermediate appellate courts, “primarily responsible for matters involving state and local governments and regulatory agencies.” <i>Learn, UNIFIED JUD. SYS. OF PA.</i> , http://www.pacourts.us/learn (last updated Sept. 2013). |
| 11. | Rhode Island | R.I. SUP. CT. R. 16(j) (“Unpublished orders will not be cited by the Court in its opinions and such orders will not be cited by counsel in their briefs. Unpublished orders shall have no precedential effect.”). |
| 12. | South Carolina | S.C. APP. CT. R. 268(d)(2) (“Memorandum opinions and unpublished orders have no precedential value and should not be cited . . .”). |
| 13. | South Dakota | S.D. R. APP. P. § 15-26A-87.1(E). |
| 14. | Washington | WASH. R. GEN. APPLICATION 14.1 (providing that “[a] party may not cite as an authority an unpublished opinion of the Court of Appeals[,]” but may cite as an authority an unpublished opinion “issued by any court from a jurisdiction other than Washington state, only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court.”). |