

Reconfiguring Law Reports and the Concept of Precedent for a Digital Age

Peter W. Martin

Reuschlein Lecture

April 18, 2007



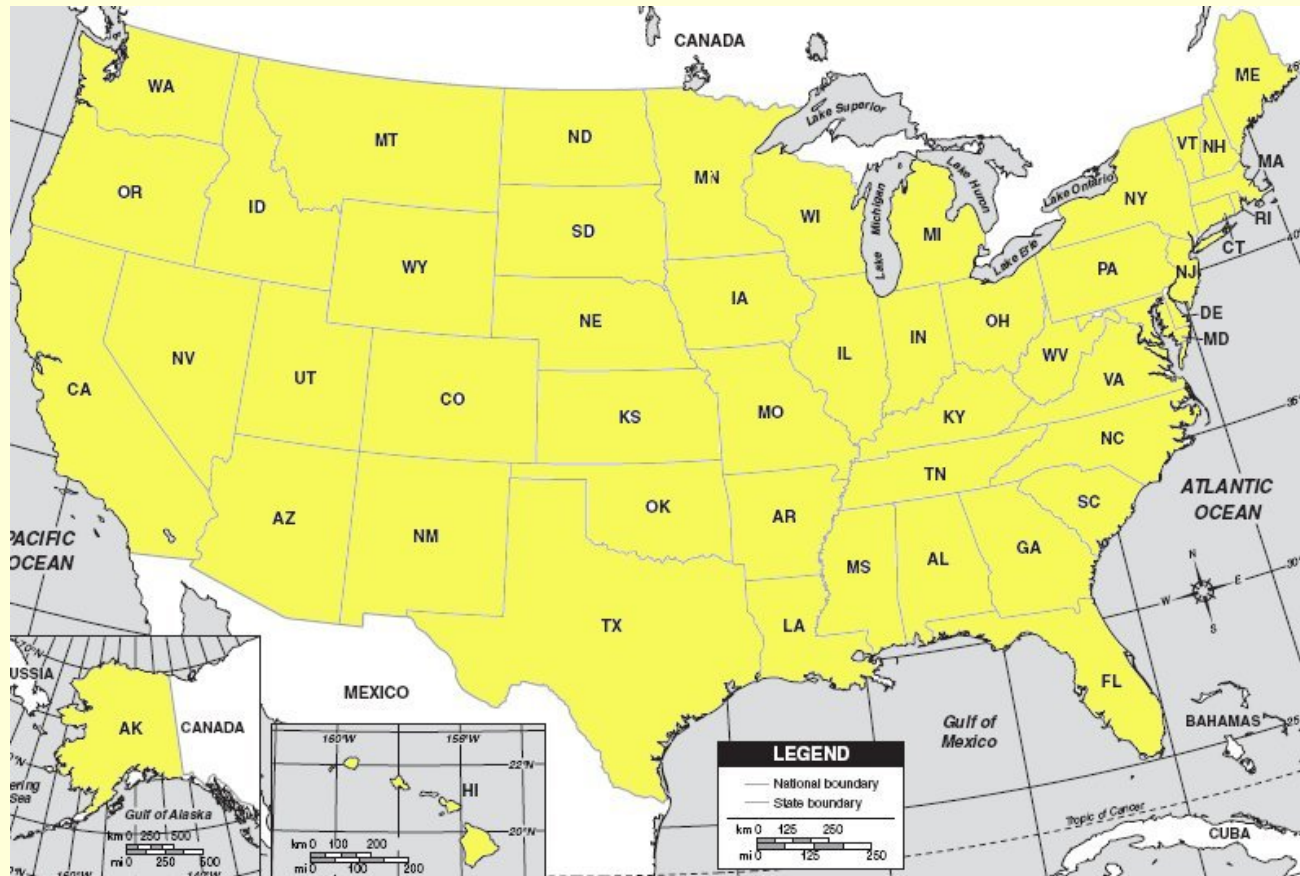
Villanova University
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Precedent

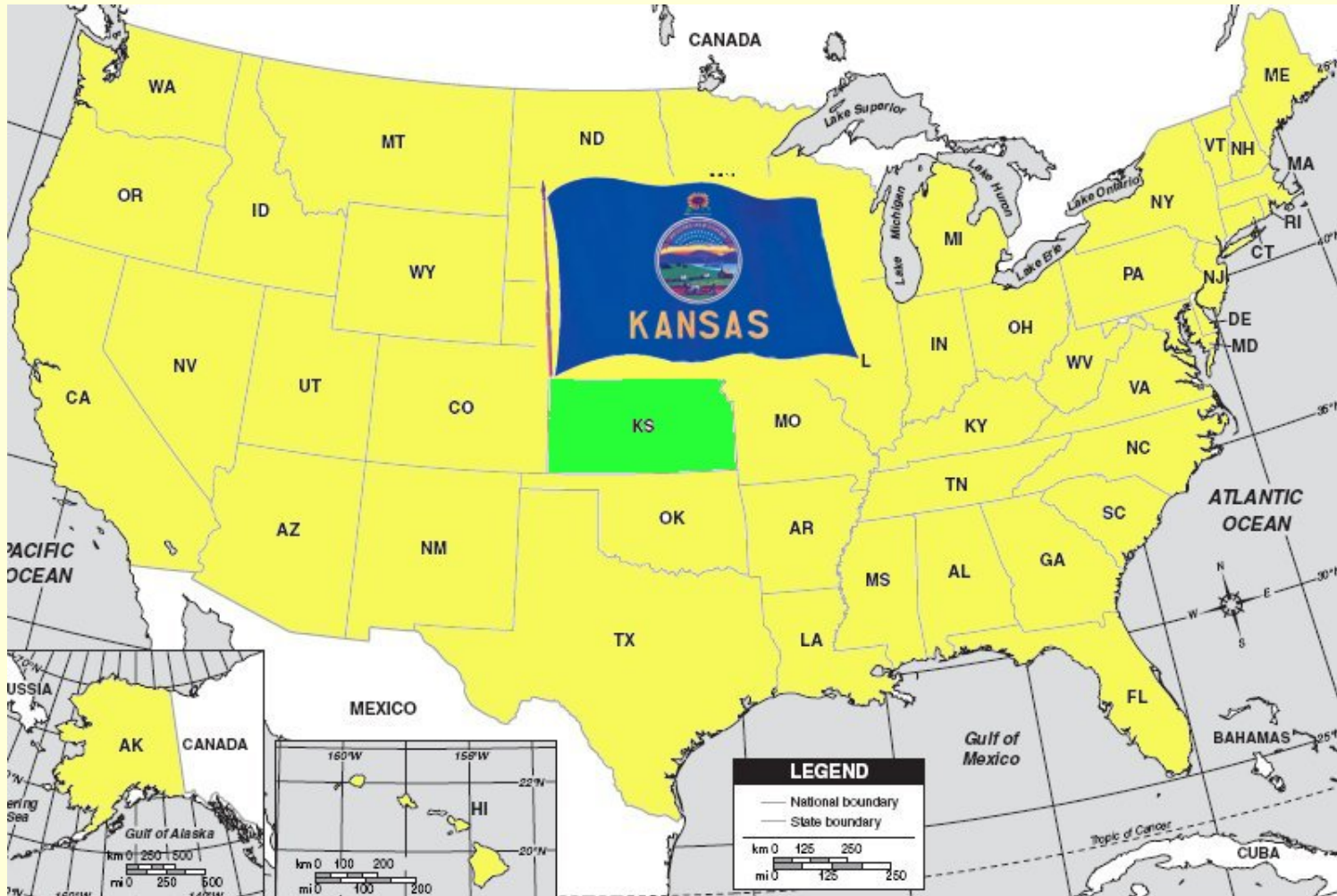
"It is an established rule to abide by former precedent, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waiver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, has now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments...."

– 1 Sir William Blackstone, Commentaries 69

Precedent



Precedent



Precedent in Contemporary Context

KANSAS JUDICIARY

Supreme Court
7 justices sitting en banc

Court of Appeals
12 judges who normally sit in panels

District Court (31 districts)
239 judges (including 78 magistrates)

Municipal Court (393 cities)
255 judges

Precedent in Contemporary Context

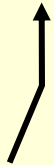
KANSAS JUDICIARY

Supreme Court
~ 880 appeals / year

Court of Appeals
~ 2,000 appeals / year

District Court (31 districts)
~ 500,000 cases / year

Municipal Court (393 cities)
? cases / year



Precedent – Applied Horizontally

"We have not failed to note the more or less analogous cases from other jurisdictions which the diligence of counsel has brought together for our perusal; but with due respect thereto we are bound to follow our own precedents...."

Kahm v. Arkansas River Gas Co., 122 Kan. 786, 791, 253 P. 563 (1927)

Precedent – Applied Vertically

“We are duty bound to follow Kansas Supreme Court precedent unless there is some indication that the court is departing from its previous position.”

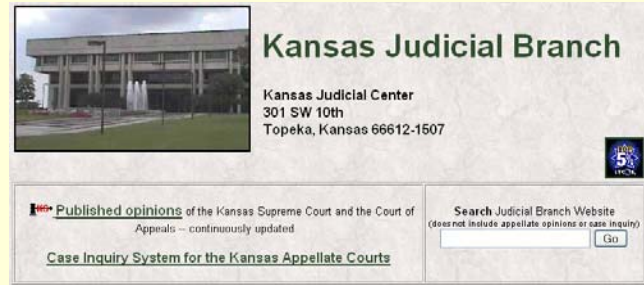
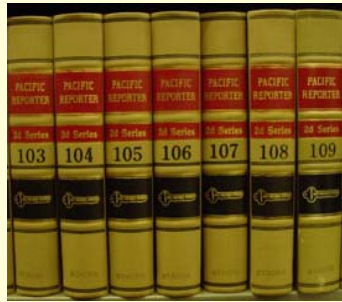
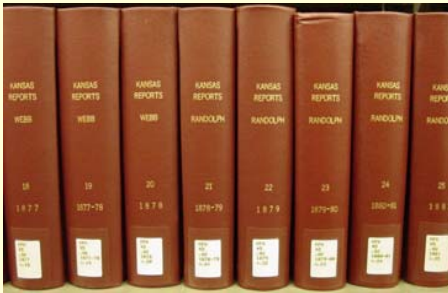
Noone v. Chalet of Wichita, 32 Kan. App. 2d 1230, 1236, 96 P.3d 674 (2004)

Precedent – As in “Not Unprecedented”

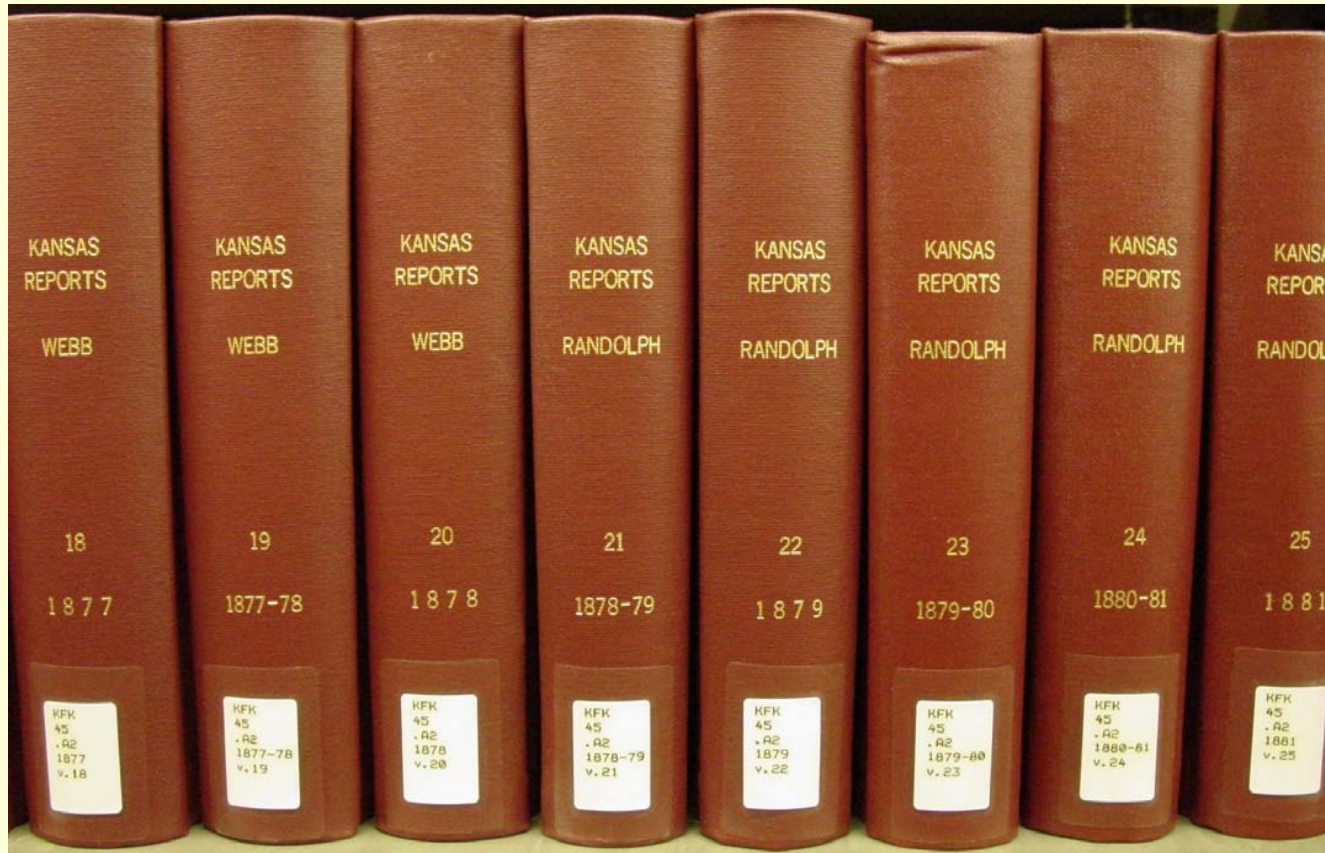
“The defendant cites two cases from foreign jurisdictions.... Neither case supports the defendant's position, for the statutes involved are different from our own.... [Consequently,] neither ... provide[s] any precedent for us to follow in the instant case.”

State v. Wyman, 198 Kan. 666, 670, 426 P.2d 26
(1967)

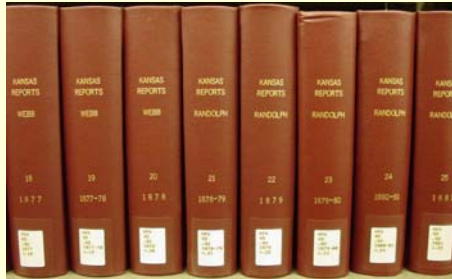
From Law Reports to Precedent Online



Law Reports and Precedent in the Pre-Digital Era

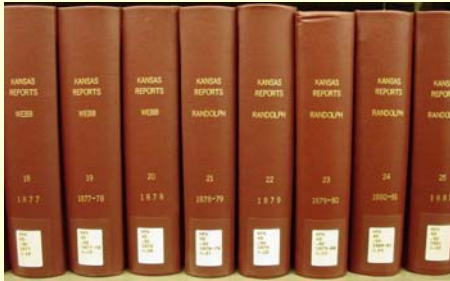


Law Reports and Precedent in the Pre-Digital Era



- Written opinions
- A public reporter of decisions
- Who organizes them, adding indices and other editorial content
- Publication of advance sheets followed by bound volumes
- Distribution at public expense to all judges, sale to lawyers and libraries

Law Reports and Precedent in the Pre-Digital Era



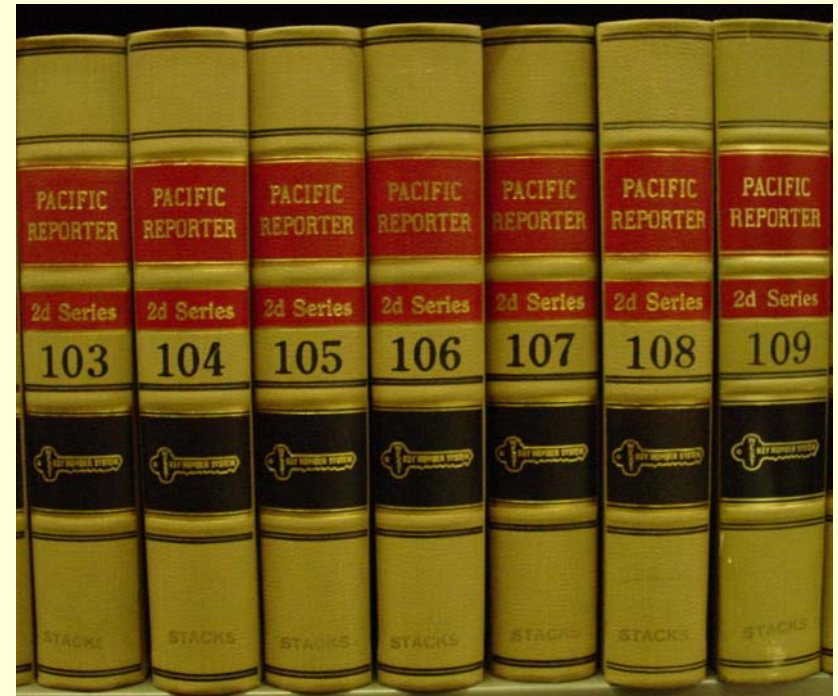
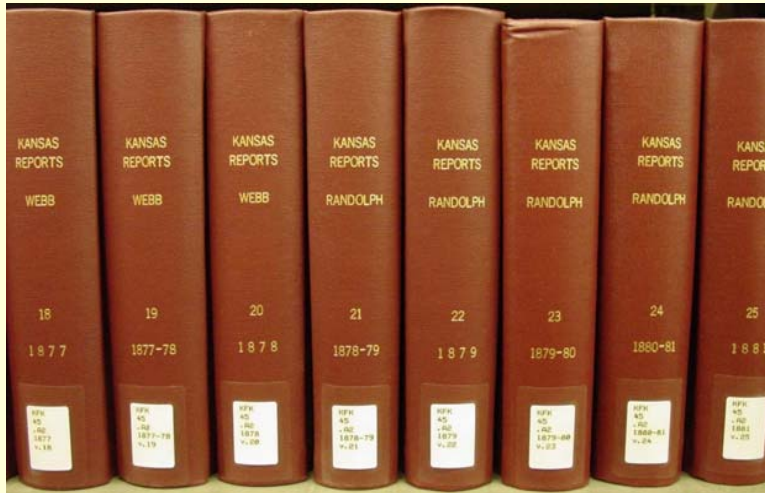
“The cases decided by the supreme court of this state ... and those of the court of appeals ... shall be prepared by the reporter and delivered to the director of printing, who shall as speedily as possible print and publish such number of copies of each volume of the reports as shall be specified by the reporter, and deliver the same to the state law librarian.” – Kan. Stat. §20-205

Law Reports and Precedent in the Pre-Digital Era

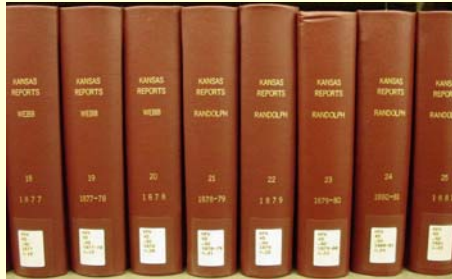


“The county board may, when in its discretion it shall deem it advisable, provide by purchase or otherwise for the procuring and maintaining of a suitable law library for the use of the public. Such library shall be under the supervision of the judges of the district court of the county wherein the same is located.” – Neb. Laws 1911, c. 73, § 1, p. 319, as amended

Law Reports and Precedent in the Pre-Digital Era

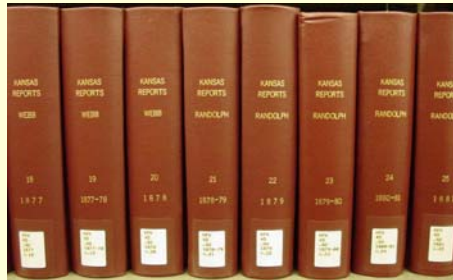


Law Reports and Precedent in the Pre-Digital Era



“The cases decided by the supreme court of this state **which the court deem of sufficient importance to be published** and those of the court of appeals **which are to be published pursuant to the rule of the supreme court** shall be prepared by the reporter and delivered to the director of printing....” – Kan. Stat. §20-205

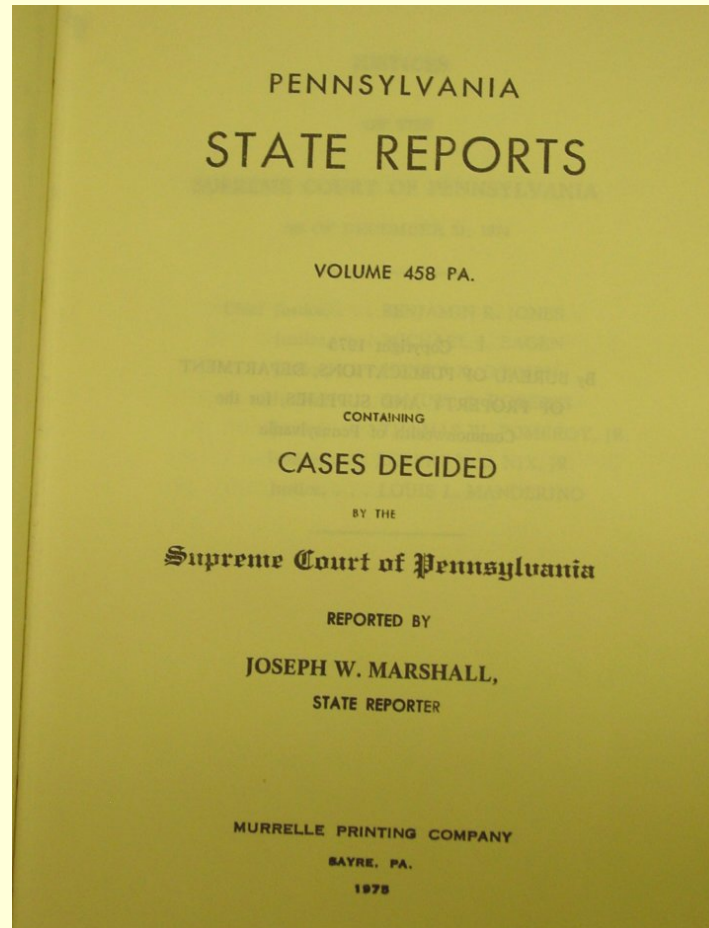
Law Reports and Precedent in the Pre-Digital Era



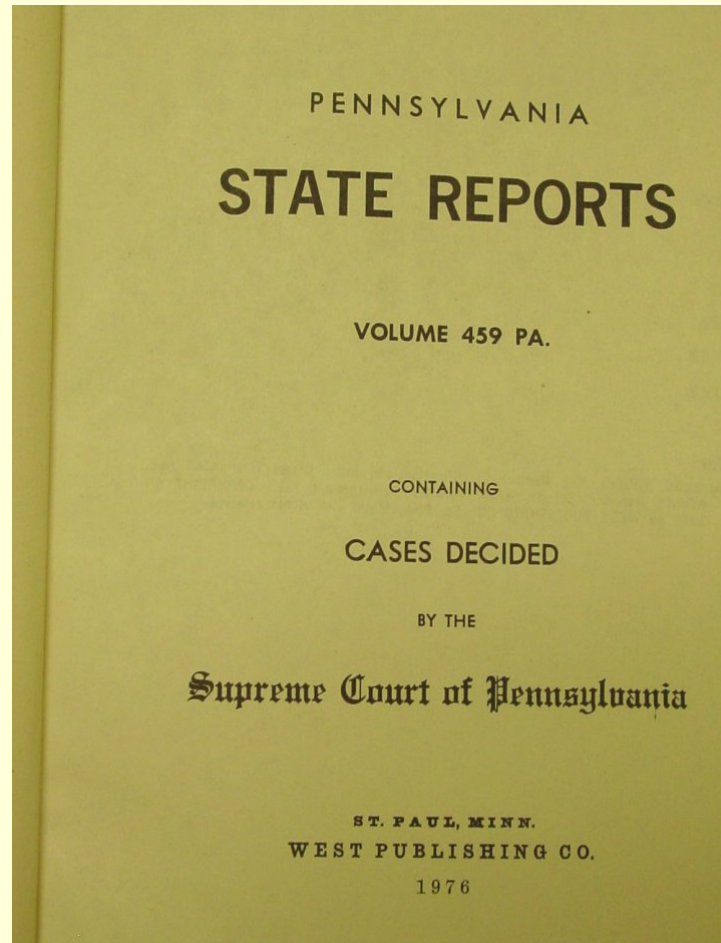
Last year of public law reports:

- Oklahoma - 1953
- Missouri - 1956
- Colorado - 1980

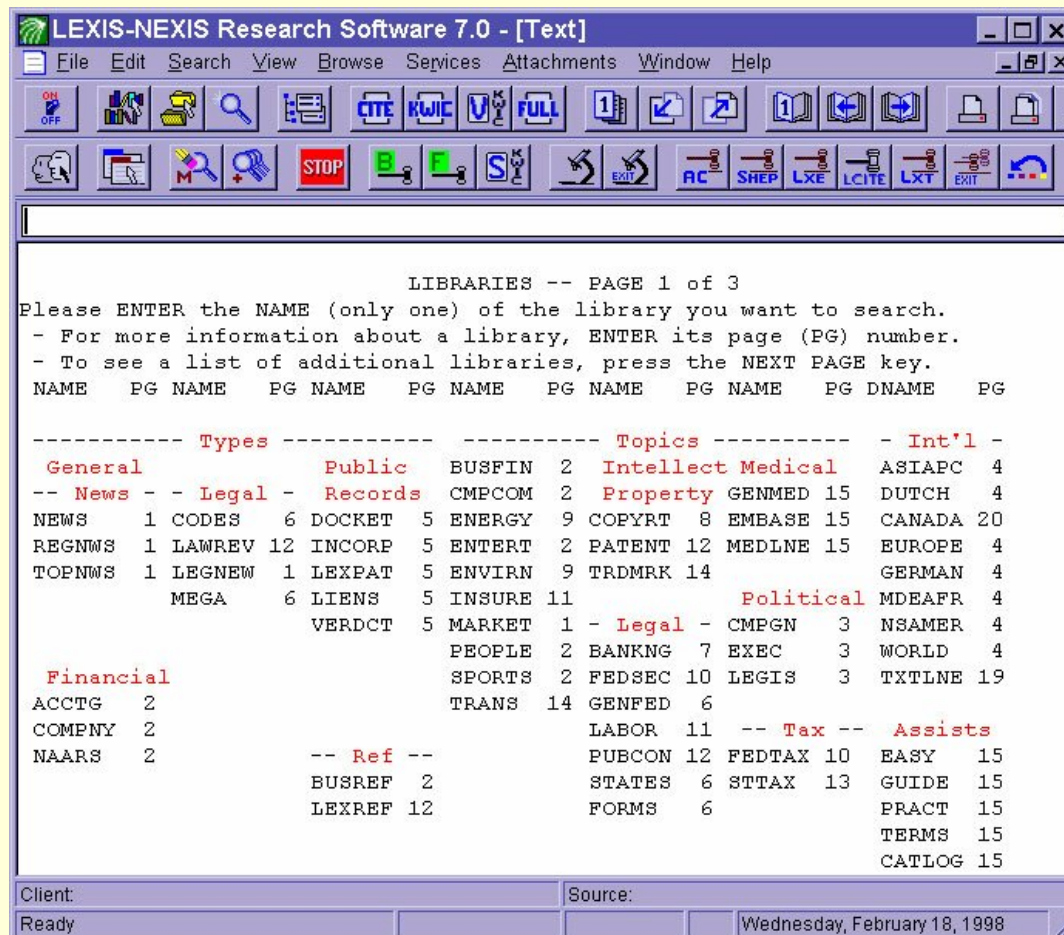
Law Reports and Precedent in the Pre-Digital Era



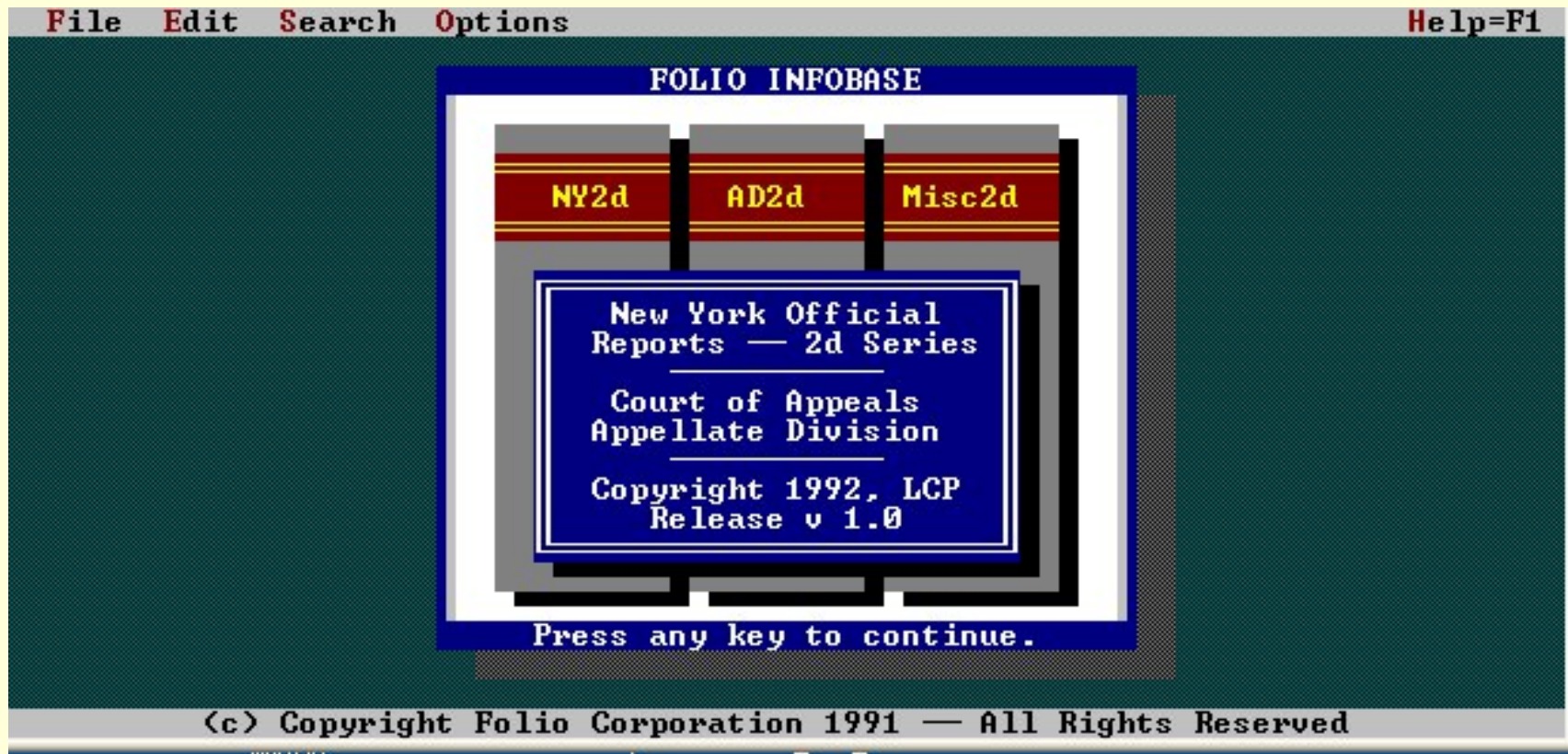
Law Reports and Precedent in the Pre-Digital Era



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The Arrival of Virtual Law Reports and Libraries



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03/01/79 STATE DELAWARE v. EMMONS B. PHILLIPS AND

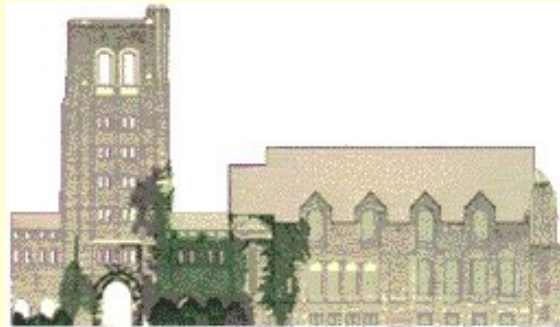
[1] COURT OF CHANCERY OF DELAWARE, SUSSEX

[2] Civil Action No. 276 (1967)

[3] 1979.DE.61 <<http://www.versuslaw.com>>, 400 A.2d 299

[4] March 1, 1979

The Arrival of Virtual Law Reports and Libraries



LII
legal information institute

LII Backgrounder: State Law on the Net

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The LII summer editorial group has recently completed our annual review and update of state legal materials accessible on the Net from non-fee sites. (For the results visit the LII's [state pages](#).)

As of Sept. 1, 1999 the statutes of all states but Louisiana are accessible and among state top appellate courts only the Connecticut Supreme Court remains offline. But a year ago the statutes of ten states and recent decisions of the top appellate courts of a slightly smaller number were not to be found on the Internet. That itself represented extraordinary progress, for in June 1995 only ten states had their statutes on the Internet.

The Arrival of Virtual Law Reports and Libraries



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“Casemaker is the best member benefit the state bar has ever offered. It is worth far more than my annual membership dues. Thanks KBA!”
– David J. Rebein, Rebein Bangerter P.A.,
Dodge City

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Washburn University Law Library has several sets of Kansas Reports available for sale. We seek to dispose of these items by April 15, 2003.

For further information please see <http://washburnlaw.edu/library/usedbooks/>

Thanks for your interest.- Martin Wisneski


The Problematic and Costly Status Quo



Kansas Judicial Branch

Kansas Judicial Center
301 SW 10th
Topeka, Kansas 66612-1507



 Published opinions of the Kansas Supreme Court and the Court of Appeals -- continuously updated

Case Inquiry System for the Kansas Appellate Courts

Search Judicial Branch Website
(does not include appellate opinions or case inquiry)

Go

The Problematic and Costly Status Quo

Lawless v. Cedar Vale Regional Hosp.,
252 Kan. 1064, 1072-73, 850 P.2d 795
(1993)

The Problematic and Costly Status Quo

Lawless v. Cedar Vale Regional Hosp.,
252 Kan. 1064, 1072-73, 850 P.2d 795
(1993)

State v. Cole, No. 96,361 (Kan. Ct. App.
Apr. 13, 2007) or

State v. Cole, ____ Kan. App. ____, ____
P.3d ____ (2007) or

...

The Problematic and Costly Status Quo

Compare:

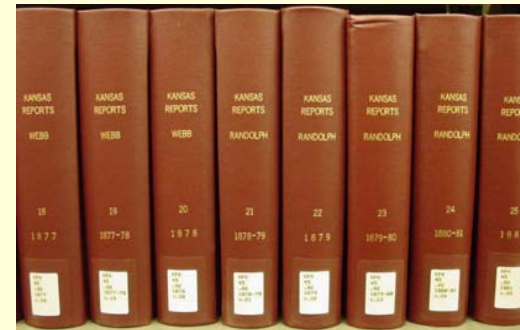
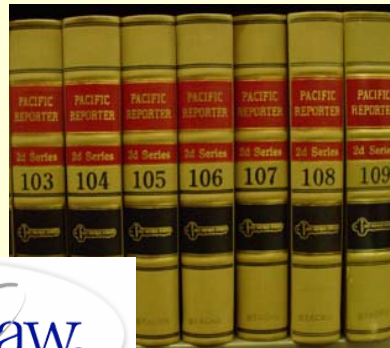
Odden v. Rath, 2007 ND 51, ¶ 18.

The Problematic and Costly Status Quo

“Slip opinions ... are subject to modification orders and editorial corrections prior to publication in the official reporters. Consult the bound volumes of Kansas Reports and Kansas Court of Appeals Reports for the final, official texts of the opinions of the Kansas Supreme Court and the Kansas Court of Appeals.”

– <http://www.kscourts.org/kscases/>

The Problematic and Costly Status Quo

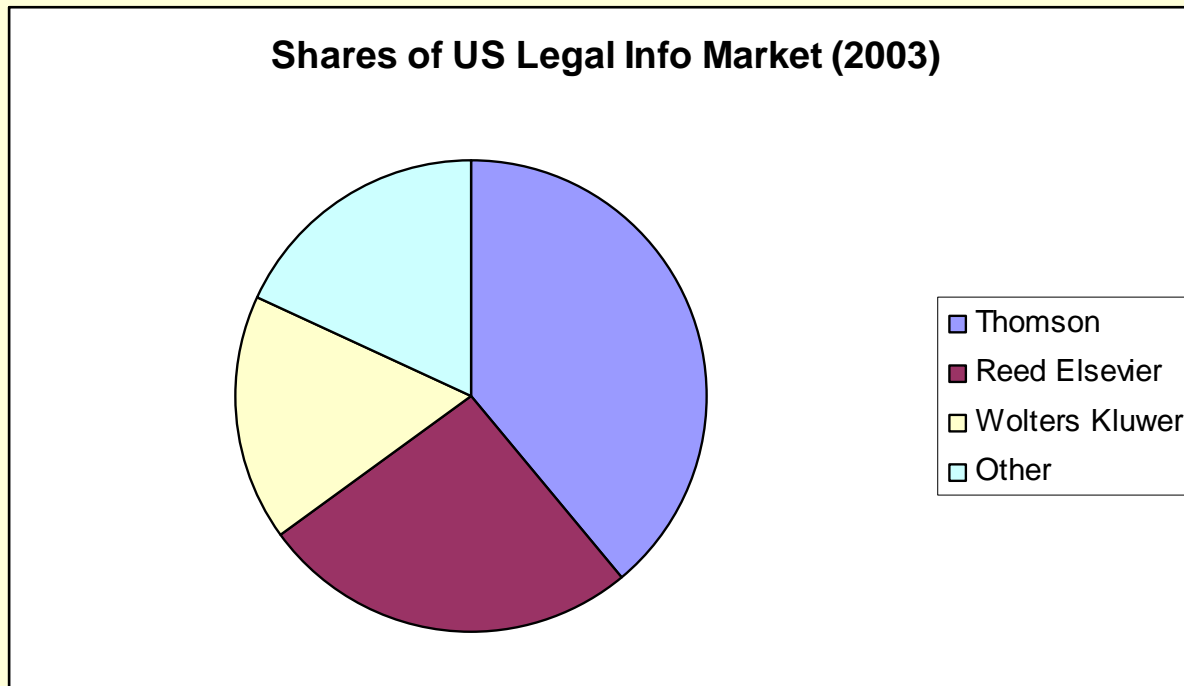


The Problematic and Costly Status Quo


AGREEMENT

For the Printing and Publication of the Reports of the Court of Appeals, the Reports of the Appellate Division, and the Miscellaneous Reports of the State of New York; the Combined Weekly Advance Sheets and Cumulative Tables and Index thereof; a CD-ROM Edition thereof; an On-line Computer Retrieval Data Base Edition thereof; an Opinion Service and an Official Style Manual, for five years from and after January 1, 2006

The Problematic and Costly Status Quo



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Going Beyond Reform to Richer Notions of Precedent

In the
Indiana Supreme Court

In re: Request from
Indiana Court of Appeals to
Post Unpublished Opinions on
Judiciary Website

)
)
)
)

Indiana Supreme Court
Cause No. 94S00-0608-MS- 299



Going Beyond Reform to Richer Notions of Precedent



RULE 4. "Controlling" and "Persuasive" Designations Based on Form of Publication Abolished; Use of Opinions.

(A) Notwithstanding the prior versions of these rules, designations of, and distinctions between, "controlling" and "persuasive" opinions of the courts of appeals based merely upon whether they have been published in the Ohio Official Reports are abolished.

(B) All court of appeals opinions issued after the effective date of these rules may be cited as legal authority and weighted as deemed appropriate by the courts.

Ohio Rules of Court for Reporting of Decisions

Going Beyond Reform to Richer Notions of Precedent

  | [Keyword](#) | Name » [SupCt](#) - [CtApp](#) | [Docket](#) | [Date](#) |


Kansas Court of Appeals
Opinions Released April 13, 2007

Published Opinions

Docket Number / Case Name
[95941](#) - Gates v. Goodyear
[96361](#) - State v. Cole
[96400](#) - State v. Lemons

Unpublished Opinions
Fulltext NOT available on the web.
Contact the Kansas Supreme Court Law Library at 785-296-3257 to obtain fulltext.

Going Beyond Reform to Richer Notions of Precedent

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	COURTS
<i>Search Decisions</i>	LITIGANTS
<p>Here you will find Supreme Court Civil and Criminal decisions, dating back to 2001.</p>	ATTORNEYS
<p>Civil Cases are from the following counties: Allegany, Bronx, Broome, Cattaraugus, Chautauqua, Cortland, Delaware, Erie, Kings, Livingston, Madison, Monroe, Nassau, New York, Niagara, Oneida, Onondaga, Ontario, Orange, Putnam, Queens, Richmond, Schuyler, Seneca, Steuben, Suffolk, Westchester and Wyoming Counties.</p>	JURORS
<p>Criminal Cases are from the following counties: Broome, Cattaraugus, Delaware, Erie, Kings, Livingston, Monroe, New York, Oneida, Onondaga, Orange, Queens, and Suffolk Counties</p>	JUDGES
	CAREERS

Going Beyond Reform to Richer Notions of Precedent

(Slip Opinion)

OCTOBER TERM, 2006

1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 327.

SUPREME COURT OF THE UNITED STATES

Syllabus

ENVIRONMENTAL DEFENSE ET AL. *v.* DUKE ENERGY
CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

No. 05–848. Argued November 1, 2006—Decided April 2, 2007


In the 1970s, Congress added two air pollution control schemes to the Clean Air Act (Act): New Source Performance Standards (NSPS) and Prevention of Significant Deterioration (PSD), each of which covers modified, as well as new, stationary sources of air pollution. The NSPS provisions define “modification” of such a source as a physical change to it, or a change in the method of its operation, that increases the amount of a pollutant discharged or emits a new one. 42 U. S. C. §7411(a)(4). The PSD provisions require a permit before a “major emitting facility” can be “constructed,” §7475(a), and define such “construction” to include a “modification (as defined in [NSPS]),” §7479(2)(C). Despite this definitional identity, the Environmental Protection Agency’s (EPA) regulations interpret “modification” one way for NSPS but differently for PSD. The NSPS regulations require a source to use the best available pollution-limiting technology, see *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 846, when a modification would increase the discharge of pollutants measured in kilograms per hour, 40 CFR §60.14(a), but the 1980 PSD regulations require a permit for a modification only when it is a “major” one, §51.166(b)(2)(i), and only when it would increase the actual annual emission of a pollutant above the actual average for the two prior years, §51.166(b)(21)(ii).

After respondent Duke Energy Corporation replaced or redesigned the workings of some of its coal-fired electric generating units, the United States filed this enforcement action, claiming, among other things, that Duke violated the PSD provisions by doing the work without permits. Petitioner environmental groups intervened as plaintiffs and filed a complaint charging similar violations. Duke

Going Beyond Reform to Richer Notions of Precedent

```
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<html xmlns:xsl="http://xml.apache.org/xslt">
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<link HREF="/supct/css/supct.css" TYPE="text/css" REL="stylesheet">
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">
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[North Dakota Supreme Court Docket](#) ◀ ▲ ▢ ▹ ?

Odden v. Rath

20060170

Heather Odden, Plaintiff and Appellee
v.
Mark Rath, Defendant and Appellant

Appeal from: District Court, [South Central Judicial District, Burleigh County](#)
[Judge Thomas J. Schneider](#)

Nature of Action: [Other \(Civil\)](#)

Counsel: Appellant: [Loren Cay McCray](#)
Appellee: [Smith Bakke Porsborg & Schweigert](#)

Term: 01/2007 Argument: 01/16/2007 09:30am

ND cite: 2007 ND 51

Issues: **Appellant's Statement of the Issues:**
Did the trial court abuse its discretion by extending the domestic violence protection order?

Audio: [Listen to recording of oral argument](#) using [RealPlayer Basic](#),[®] a free download.

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Going Beyond Reform to Richer Notions of Precedent

Qualitex Co. v. Jacobson Products Co.,
514 U.S. 159 (1995)

Pressing pads a “special shade of green-gold”

Going Beyond Reform to Richer Notions of Precedent

Qualitex Co. v. Jacobson Products Co.,
514 U.S. 159 (1995)

Pressing pads a “special shade of green-gold”



Going Beyond Reform to Richer Notions of Precedent

Two Pesos v. Taco Cabana, Inc.,
505 U.S. 763 (1992)

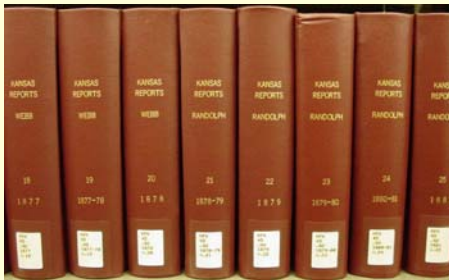
“a festive and vivid color scheme using top border paint and neon stripes ... bright awnings and umbrellas continue the theme”

Going Beyond Reform to Richer Notions of Precedent

Two Pesos v. Taco Cabana, Inc.,
505 U.S. 763 (1992)



Institutional Inhibitions, Sources of Resistance



- Old habits deeply embedded in institutional structures and professional practice
- Powerful commercial interests that benefit from the status quo
- Judicial systems that aren't
- Judges too busy judging (and well served by the major online vendors) to see the need for or lead change

In Conclusion



“We live in the information age. It is vital and exciting to bring the Kansas court system into this new age and to do it right and by the most efficient means.”

– Kay McFarland, Chief Justice
Kansas Supreme Court, State of the
Judiciary (2006)