

ESSAYS

AUTHORITY AND AUTHORITIES

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A curious feature of the current controversy over the citation of foreign law¹ is that it appears to be a debate about *citation*.

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¹ See, e.g., *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005) (Kennedy, J.); *id.* at 604–05 (O'Connor, J., dissenting); *id.* at 622–28 (Scalia, J., dissenting); *Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003) (Kennedy, J.); *id.* at 598 (Scalia, J., dissenting); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (Stevens, J.); *id.* at 324–25 (Rehnquist, C.J., dissenting); *id.* at 347–48 (Scalia, J., dissenting); *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (Scalia, J.); *id.* at 976–77 (Breyer, J., dissenting); *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 (1988) (Stevens, J.); *id.* at 868 n.4 (Scalia, J., dissenting); Roger P. Alford, In Search of a Theory for Constitutional Comparativism, 52 *UCLA L. Rev.* 639, 640–44 (2005); Steven G. Calabresi & Stephanie Dotson Zimdahl, The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision, 47 *Wm. & Mary L. Rev.* 743 (2005); Vicki C. Jackson, Constitutional Comparisons: Convergence, Resistance, Engagement, 119 *Harv. L. Rev.* 109 (2005); David S. Law, Generic Constitutional Law, 89 *Minn. L. Rev.* 652, 653–59 (2005); Sanford Levinson, Looking Abroad When Interpreting the U.S. Constitution: Some Reflections, 39 *Tex. Int'l L.J.* 353 (2004); Nelson Lund & John O. McGinnis, *Lawrence v. Texas* and Judicial Hubris, 102 *Mich. L. Rev.* 1555, 1580–81 (2004); Noga Morag-Levine, Judges, Legislators, and Europe's Law: Common-Law Constitutionalism and Foreign Precedents, 65 *Md. L. Rev.* 32 (2006); Gerald L. Neuman, The Uses of International Law in Constitutional Interpretation, 98 *Am. J. Int'l L.* 82 (2004); Michael D. Ramsey, International Materials and Domestic Rights: Reflections on *Atkins* and *Lawrence*, 98 *Am. J. Int'l L.* 69 (2004); Cheryl Saunders, Comparative Constitutional Law in the Courts: Is There a Problem?, 59 *Current Legal Probs.* 91 (2007); Mark Tushnet, Transnational/Domestic Constitutional Law, 37 *Loy. L.A. L. Rev.* 239, 241–46 (2003); Jeremy Waldron, Foreign Law and the Modern *Ius Gentium*, 119 *Harv. L. Rev.* 129 (2005); Ernest A. Young, Foreign Law and the Denominator Problem, 119 *Harv. L. Rev.* 148 (2005).

And what makes that so curious is that engaging in a debate about citation, or even seeming to *care* about citation, stands in such marked contrast to the current legal *zeitgeist*. Legal sophisticates these days worry little about the ins and outs of citation, tending instead to cast their lot with the legal realists in believing that the citation of legal authorities in briefs, arguments, and opinions is scarcely more than a decoration.² Citation may be professionally obligatory, the sophisticates grudgingly acknowledge, but it persists largely as an ornament fastened to reasons whose acceptance rarely depends on the assistance or weight of the cited authorities. So although learning the rules and practices of legal citation is necessary for speaking and writing the language of the law, it is a mistake to think that the cited authorities have very much to do with the substance of legal argument or the determination of legal outcomes.

With this dismissive attitude towards legal citation so prevalent, the focus of the debate on the citation to foreign (or, sometimes, international³) law seems almost quaint. Interestingly, however, the debate over the propriety of citing to non-American legal authority arises at the same time as the permissibility of other forms of citation has been at the vortex of a number of equally heated controversies. One such controversy erupted a few years ago with the Eighth Circuit's panel decision in *Anastasoff v. United States*,⁴ a case in which the court initially held unconstitutional a prohibition on the citation to (and precedential effect of) unpublished opinions on the grounds that the prohibition went beyond the court's judicial powers under Article III. Something of a firestorm ensued,⁵

² See, e.g., Gregory Scott Crespi, *The Influence of Two Decades of Contract Law Scholarship on Judicial Rulings: An Empirical Analysis*, 57 SMU L. Rev. 105, 106 n.10 (2004); Mark Tushnet, *Themes in Warren Court Biographies*, 70 N.Y.U. L. Rev. 748, 756 (1995).

³ See Harold Hongju Koh, *International Law as Part of Our Law*, 98 Am. J. Int'l L. 43, 52–56 (2004); Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 Ohio St. L.J. 1283, 1298–99 (2004); John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 Stan. L. Rev. 1175 (2007); Neuman, *supra* note 1, at 84–89.

⁴ 223 F.3d 898 (8th Cir. 2000), vacated as moot, 235 F.3d 1054 (2000) (en banc).

⁵ See *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) (Kozinski, J.); Bob Berring, *Unprecedented Precedent: Ruminations on the Meaning of It All*, 5 Green Bag 2d 245, 246 (2002); Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Na-*

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one focused significantly on whether it was desirable or permissible to prohibit advocates in their briefs from citing to a particular kind of authority. What eventually followed was the new Federal Rule of Appellate Procedure 32.1, prohibiting the circuits from adopting no-citation rules while allowing them to continue to adopt, if they wished, their own no-precedential-effect rules and practices.⁶ The new rule not only marked the denouement of the *Anastasoff* controversy in the Eighth Circuit, but also reflects a larger array of concerns that have arisen in all the federal circuits, and indeed in the state appellate courts as well. In the wake of growing concerns about how to manage a burgeoning caseload with little increase in the number of judges, these courts have wrestled with the desirability or permissibility, even if not the constitutionality, of various “no citation” rules,⁷ presumably to the sneers or yawns of the cogniscenti, especially those with realist sympathies. And when the Department of History at Middlebury College prohibited students from citing to Wikipedia in their term papers,⁸ legal observers de-

ture of Precedent, 4 Green Bag 2d 17, 18 (2000); Richard B. Cappalli, The Common Law's Case Against Non-Precedential Opinions, 76 S. Cal. L. Rev. 755, 759 (2003); Jeffrey O. Cooper, Citability and the Nature of Precedent in the Courts of Appeals: A Response to Dean Robel, 35 Ind. L. Rev. 423, 425–29 (2002); Frank I. Michelman, *Anastasoff* and Remembrance, 58 Ark. L. Rev. 555, 564–69 (2005); Lauren Robel, The Practice of Precedent: *Anastasoff*, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community, 35 Ind. L. Rev. 399, 409–14 (2002); Bradley Scott Shannon, May Stare Decisis Be Abrogated by Rule?, 67 Ohio St. L.J. 645, 648–51 (2006); J. Thomas Sullivan, Unpublished Opinions and No Citation Rules in the Trial Courts, 47 Ariz. L. Rev. 419, 419–21 (2005); Symposium, *Anastasoff*, Unpublished Opinions, and “No Citation” Rules, 3 J. App. Prac. & Process 169 (2001); Donn G. Kessler & Thomas L. Hudson, Losing Cite: A Rule's Evolution, Ariz. Att'y, June 2006, at 10, 10–11.

⁶ Fed. R. App. P. 32.1; see Scott E. Gant, Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1, 47 B.C. L. Rev. 705 (2006). It is worth noting that so-called unpublished opinions are now routinely published in West's Federal Appendix.

⁷ For useful overviews of the issues, see Jessie Allen, Just Words? The Effects of No-Citation Rules in Federal Courts of Appeals, 29 Vt. L. Rev. 555, 556–61 (2005); Stephen R. Barnett, No-Citation Rules Under Siege: A Battlefield Report and Analysis, 5 J. App. Prac. & Process 473, 487–97 (2003); Sullivan, *supra* note 5, at 430–451; Kenneth Anthony Laretto, Note, Precedent, Judicial Power, and the Constitutionality of “No-Citation” Rules in the Federal Courts of Appeals, 54 Stan. L. Rev. 1037, 1039–43 (2002).

⁸ Noam Cohen, A History Department Bans Citing Wikipedia as a Research Source, N.Y. Times, Feb. 21, 2007, at B8; Scott Jaschik, A Stand Against Wikipedia, Inside Higher Ed, Jan. 26, 2007, <http://insidehighered.com/news/2007/01/26/wiki>.

bated the relevance of Middlebury's decision to the question of permissible and impermissible citations to Wikipedia and other allegedly unreliable sources in academic legal work.⁹

Although the renewed attention to the citation of authorities initially seems anachronistic or otherwise odd, on further reflection it may not be so surprising after all. The issue in these controversies, after all, is not one of citation. It is one of authority, and law is, at bottom, an authoritative practice,¹⁰ a practice in which there is far more reliance than in, say, mathematics or the natural sciences on the source rather than the content (or even the correctness) of ideas, arguments, and conclusions.¹¹ And as long as this is so, then something as seemingly trivial as citation practice turns out to be the surface manifestation of a deeply important facet of the nature of law itself. It is not without interest and importance that lawyers and judges refer to the things they cite as *authorities* and that a brief is sometimes called a "memorandum of points and authorities."¹² These usages and many like them reinforce the point that citation practice is intimately connected with the authoritative core

⁹ See, e.g., Posting of Mary L. Dudziak to Legal History Blog, <http://legalhistoryblog.blogspot.com/2007/02/study-on-wikipedia-accuracy-in-history.html> (Feb. 6, 2007, 00:07 EST); Posting of Daniel J. Solove to Concurring Opinions, http://www.concurringopinions.com/archives/2007/02/when_is_it_appr.html (Feb. 5, 2007, 13:54 EST); see also Suzanna Sherry, *Democracy and the Death of Knowledge*, 75 U. Cin. L. Rev. 1053, 1054–55 (2007) (connecting phenomenon of Wikipedia with larger and troubling trends towards consensus epistemology).

¹⁰ See Joseph Raz, *The Authority of Law: Essays on Law and Morality* (1979); Larry Alexander & Frederick Schauer, *Law's Limited Domain Confronts Morality's Universal Empire*, 48 Wm. & Mary L. Rev. 1579, 1586–87 (2007).

¹¹ "[A]uthority and hierarchy play a role in law that would be inimical to scientific inquiry." Richard A. Posner, *The Problems of Jurisprudence* 62 (1990). Judge Posner exaggerates, given that genuine authority does exist even in science and mathematics. See C.A.J. Coady, *Testimony: A Philosophical Study* 249–61 (1992); Robert Audi, *The Place of Testimony in the Fabric of Knowledge and Justification*, 34 Am. Phil. Q. 405 (1997); C.A.J. Coady, *Mathematical Knowledge and Reliable Authority*, 90 Mind 542, 548–49 (1981); John Hardwig, *The Role of Trust in Knowledge*, 88 J. Phil. 693, 694 (1991). Advances in science and mathematics are themselves collaborative enterprises, with mathematicians and scientists often relying on the conclusions of trusted others. And although trust and authority are not identical, they share the characteristic of involving reliance on the conclusions of others under circumstances in which the relier has no first-hand reason to accept the conclusions. Yet although it is useful to recognize the role of authority and trust in science, Posner's basic point that authority looms far larger in law than in science seems nevertheless sound.

¹² See, e.g., Cal. Ct. R. 5.118(a), 5.315; *In re Schmidt*, 114 P.3d 816, 825 (Alaska 2005); *Gourdine v. Crews*, 935 A.2d 1146, 1149 (Md. Ct. Spec. App. 2007).

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of the idea of law. Rather than being little more than the characteristic form of legal jargon, the law's practice of using and announcing its authorities—its citation practice—is part and parcel of law's character. The various contemporary controversies about citation practice turn out, therefore, to be controversies about authority, and as a result they are controversies about the nature of law itself.

I. AUTHORITY 101

It may be useful to begin by reprising the conventional wisdom about the very idea of authority. According to this conventional wisdom, the characteristic feature of authority is its *content-independence*.¹³ The force of an authoritative directive comes not from its content, but from its source. And this is in contrast to our normal decisionmaking and reasoning processes. Typically, the reason for an action, a decision, or a belief is one that is grounded in the content of the reason. I eat spinach because it is good for me, and it actually being good for me is a necessary condition for it being a good reason. Similarly, when Judge Cardozo in *MacPherson v. Buick Motor Co.* held that privity was not a requirement for manufacturer liability to consumers,¹⁴ that conclusion was a product of his belief that it was the most fair, efficient, or otherwise desirable approach. Had he not believed that to be true, he would not have reached the conclusion he did, just as I would not eat spinach if I did not believe it was good for me. So let us call this kind of reason a *substantive reason*. Someone considering what to do, what to decide, or what to believe will take a reason as a good substantive reason only if she believes in what the reason actually *says* and believes that what the reason says is true.

Content-independent reasons, however, are different. They are reasons to act, decide, or believe that are based not on the substan-

¹³The *locus classicus* is H.L.A. Hart, *Commands and Authoritative Legal Reasons*, in *Essays on Bentham: Studies in Jurisprudence and Political Theory* 243, 261–66 (1982). See also Richard T. De George, *The Nature and Limits of Authority* 34–42 (1985); Roger A. Shiner, *Norm and Nature: The Movements of Legal Thought* 52–53 (1992); R.A. Duff, *Inclusion and Exclusion: Citizens, Subjects and Outlaws*, 51 *Current Legal Probs.* 241, 247 (1998); Kenneth Einar Himma, *H.L.A. Hart and the Practical Difference Thesis*, 6 *Legal Theory* 1, 26–27 (2000); Frederick Schauer, *The Questions of Authority*, 81 *Geo. L.J.* 95, 95–96 (1992). For a challenge to the standard account, see P. Markwick, *Independent of Content*, 9 *Legal Theory* 43, 43–44 (2003).

¹⁴111 N.E. 1050, 1053 (N.Y. 1916) (Cardozo, J.).

tive content of a reason, but instead on its source. What matters is not what the reason says but where it comes from. So when an exasperated parent yells, "Because I said so!" to a child, the parent typically has tried to explain to the child *why* she should do her homework or *why* he should clean up his room. When these content-based or substantive reasons have been unavailing, however, the exasperated parent resorts to the because-I-said-so argument precisely to make clear that the child should do as told regardless of whether the child agrees with those substantive reasons. And in much the same fashion, a judge in a New York lower court subsequent to *MacPherson* then has an obligation to reach the same conclusion as Judge Cardozo even if she does not believe that doing away with the privity requirement in such cases is a good idea. Her obligation arises simply from the fact that Judge Cardozo in *MacPherson* said so.

Like parents and judges of higher courts, those who are *in* authority typically rely, or at least can rely, on their role or position to provide reasons for their subjects to follow their rules, commands, orders, or instructions.¹⁵ Sergeants and teachers, among others, will often try to induce their subordinates or students to understand and agree with the substantive reasons for doing this or that, but the essence of authority exists not because of substantive agreement on the part of the subject, but apart from it. Maybe the sergeant would like me to understand *why* I should have a sharp crease in my uniform pants,¹⁶ and surely the teacher would like me to understand *why* I must memorize and recite a Shakespeare sonnet. But in both cases, and countless others, the authorities want it understood that I am expected to do what I am told just because of who told me to do it, even if I do not accept the underlying substantive reasons for so doing. Following H.L.A. Hart, we think of

¹⁵ That role or position may include the ability to impose the authority's will by force. It is not my topic here, but it is worth mentioning that the ability to be treated as an authority will often be backed up by force. It is important, however, not to confuse the idea of authority with the idea of legitimate authority nor to confuse the fact that a subject may treat a source as authoritative with the reasons why the subject may have chosen to do so.

¹⁶ On further reflection, probably not. In my experience, which in fact does include experience as a private in the United States Army, sergeants are vastly more interested in having their orders obeyed than in having the subjects accept or agree with the substantive reasons lying behind them.

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authority as content-independent precisely because it is the source and not the content of the directive that produces the reasons for following it. And so, when a rule is authoritative, its subjects are expected to obey regardless of their own evaluation of the rule or the outcome it has indicated on a particular occasion.

It is highly controversial whether authority in this precise sense is a good idea and, if so, in what contexts. A longstanding body of thinking argues that it is irrational for an autonomous agent to do something she would not otherwise have done on the balance of substantive reasons just because a so-called authority says so.¹⁷ If Barbara has decided after careful thought to spend her life as a lawyer rather than as a physician, why should she follow a different course just because her father has said so? When Sam has concluded that he would like to smoke marijuana because he believes it makes him feel good and has few side effects, is it rational for him to put aside his own best judgment in favor of that of police officers and politicians? When the sign says “Don’t Walk” but there is no car in sight, does it make sense for me to stand obediently at the curb?¹⁸ And when a judge has determined what she believes would be the best outcome in the case before her, can it be rational for her to make a contrary ruling solely because a bare majority of judges of a higher court has come to a different conclusion in a similar case? Authority may be ubiquitous in our lives, but for generations its basic soundness has been an object of persistent challenge.¹⁹ Yet although authority has long been criticized, it has for

¹⁷ See, e.g., Heidi M. Hurd, *Moral Combat* (1999); A. John Simmons, *Moral Principles and Political Obligations* (1979); Robert Paul Wolff, *In Defense of Anarchism* (1970); Heidi M. Hurd, *Challenging Authority*, 100 *Yale L.J.* 1611, 1612–13 (1991); Heidi M. Hurd, *Why You Should Be a Law-Abiding Anarchist (Except When You Shouldn’t)*, 42 *San Diego L. Rev.* 75, 75–76 (2005). See generally Scott J. Shapiro, *Authority*, in *The Oxford Handbook of Jurisprudence and Philosophy of Law* 382, 391–93 (Jules Coleman & Scott Shapiro eds., 2002) (discussing the relationship between authority and rationality).

¹⁸ See Donald H. Regan, *Law’s Halo*, in *Philosophy and Law* 15, 18–19 (Jules Coleman & Ellen Frankel Paul eds., 1987).

¹⁹ Also relevant here is the literature criticizing judicial involvement in enforcing the Fugitive Slave Laws, Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (1975), the laws of Nazi Germany, Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 *Harv. L. Rev.* 630 (1958); but see Stanley L. Paulson, Lon L. Fuller, Gustav Radbruch, and the “Positivist” Theses, 13 *L. & Phil.* 313 (1994), and the racial laws of apartheid South Africa, David Dyzenhaus, *Hard Cases*

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just as long been defended. Socrates refused to escape from Athens on the eve of being put to death precisely because he accepted the authority of the state that had unjustly, even in his own mind, condemned him.²⁰ President Dwight Eisenhower sent federal troops to Little Rock, Arkansas in 1957²¹ to enforce a Supreme Court decision—*Brown v. Board of Education*²²—with whose outcome he disagreed,²³ and he did so because he accepted the authority of the Supreme Court,²⁴ just as he expected the state of Arkansas to accept the authority of the federal government. Questioning the idea of authority may have a long history, but there is an equally long history of people accepting and endorsing it and consequently seeking to explain why it is often appropriate for even a rational agent to defer to the views of others, even when she disagrees with the judgments to which she is deferring.²⁵

in *Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991).

²⁰ Plato, *The Apology of Socrates*, in *Dialogues of Plato* 11, 32 (Benjamin Jowett trans., rev. ed. 1900); Plato, *Crito*, in *Dialogues of Plato*, supra, at 41, 50–51.

²¹ See *Cooper v. Aaron*, 358 U.S. 1, 12 (1958).

²² 347 U.S. 483 (1954).

²³ Kenneth O'Reilly, *Nixon's Piano: Presidents and Racial Politics from Washington to Clinton* 170–71 (1995); see also Richard Kluger, *Simple Justice* 753–54 (1976).

²⁴ This is a controversial position these days. Compare Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 246–48 (2004) (rejecting the idea that the Supreme Court has interpretive authority over the other branches of government or over the people), and Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 *Geo. L.J.* 217, 343 (1994) (same, but focusing on executive branch and not the population at large), and Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 *Harv. L. Rev.* 4, 6–11 (2003) (same, with qualifications), with Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 *Harv. L. Rev.* 1359, 1361–62 (1997) (defending Supreme Court interpretive supremacy), and Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 *Harv. L. Rev.* 1594, 1628–35 (2005) (book review) (same).

²⁵ See, e.g., Raz, supra note 10, at 233–49; Joseph Raz, *The Morality of Freedom* 38–42, 97–105 (1986); Robert P. George, *Natural Law and Positive Law*, in *The Autonomy of Law: Essays on Legal Positivism* 321, 327–28 (Robert P. George ed., 1996); Scott J. Shapiro, *The Difference That Rules Make*, in *Analyzing Law: New Essays in Legal Theory* 33, 59–61 (Brian Bix ed., 1998); see also Donald H. Regan, *Reasons, Authority, and the Meaning of "Obey": Further Thoughts on Raz and Obedience to Law*, 3 *Can. J.L. & Jurisprudence* 3, 14–19 (1990) (offering complex and qualified defense of legal obligation).

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For my purposes here, the ultimate rationality (or not) of authority from the perspective of the subject is not the issue,²⁶ because there can be little doubt that authority exists, apart from the question of its desirability. We understand what authority is, and we can identify instances of its effect, even as we disagree about its normative desirability and the extent of its empirical prevalence in real-world decisionmaking. And thus we understand that authority provides reasons for action by virtue of its status and not by virtue of the intrinsic or content-based soundness of the actions that the authority is urging.

It is logically possible for those in authority—authorities—to prescribe only those actions that their subjects would have selected on the balance of substantive reasons even without the authoritative directive, but such a possibility is too fantastic to be taken seriously. As a practical matter, the universe of actual authoritative directives will encompass at least some decisionmaking occasions in which a subject who accepts an authority will have an authority-based and content-independent reason for doing something other than what that subject would otherwise have thought it correct to do. And also as a practical matter, these authoritative directives will sometimes be dispositive, thus requiring a subject actually to do or decide something other than what she would have done or decided in the absence of the authoritative directive. So although a source can be the repository of wisdom, experience, or information, when a source is authoritative it provides a potentially determinative reason for a decision other than the decision that the subject might have made after taking into account all of the knowledge, wisdom, and information she can obtain from herself or others. There is a key difference between *learning* how to do something from a book and taking something in that same book as correct just because it is in the book,²⁷ and it is precisely this distinc-

²⁶ Even if deference to authority is irrational from the perspective of the subject, imposition of authority may still be rational from the perspective of the authority. See Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. Pa. L. Rev. 1191, 1194–99 (1994); Larry Alexander, *The Gap*, 14 Harv. J.L. & Pub. Pol’y 695 (1991); Frederick Schauer, *Imposing Rules*, 42 San Diego L. Rev. 85, 88–89 (2005). But see Philip Soper, *The Ethics of Deference: Learning from Law’s Morals* (2002).

²⁷ I (mostly) learned how to play bridge from a book, and I initially learned from a book why it is generally not a good idea to lead away from a king. But if I am now asked why it is a bad idea to lead away from a king, I can give a substantive reason

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tion that is captured by the concept of authority and by the differentiation between substantive and content-independent reasons.

II. IS “PERSUASIVE AUTHORITY” AN OXYMORON?

With the basic concept of authority as necessary background, we can turn to the legal authorities that pervade and shape the formal discourse of the law. These authorities are not all of one type, however, and *mandatory* (or *binding*) authorities are commonly distinguished from *persuasive* authorities.²⁸ Mandatory authorities, according to the standard account drummed into the minds of lawyers from their first year of law school on, are ones that bind a court to follow them, as in the case of the obligation of a lower court in New York to follow Judge Cardozo’s decision in *MacPherson* solely because lower courts are bound to obey the decisions of higher courts in the same jurisdiction.²⁹ And this binding obligation to follow the decision of a higher court (or an earlier decision of the same court, when a strong norm of *stare decisis* exists) is in contrast, so it is said, with a court’s discretion to choose whether to follow a persuasive authority, such as a decision of a court in another jurisdiction or a so-called *secondary* authority like a treatise or law review article. A court may choose to follow such a decision or to rely on the conclusions in a secondary authority, but, unlike a court that is under an obligation to follow the decision of a higher court in the same jurisdiction, here a court is conventionally understood to be following only those decisions or conclusions whose reasoning the court finds persuasive. And thus proponents of the use of foreign law, for example, often argue that those who oppose its use seem to be making much ado about very little, because there

and need not and would not say, “Because Eddie Kantar in his book on bridge defense says so.” But if I am asked why it is a good idea to hold a golf club so that the angle between my right thumb and forefinger is aimed at my right shoulder, I can do no better than to say that this rule is in all of the golf instruction books I have ever read.

²⁸ See, e.g., Morris L. Cohen, Robert C. Berring & Kent C. Olson, *How to Find the Law* 3 (9th ed. 1989); Robin Wellford Slocum, *Legal Reasoning, Writing, and Persuasive Argument* 13–14 (2d ed. 2006).

²⁹ “For the second time in my judicial career, I am forced to follow a Supreme Court opinion I believe to be inimical to the Constitution.” *Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1113 (5th Cir. 1997) (Garza, J., concurring).

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is certainly no binding obligation for *any* court to follow a decision from another jurisdiction, whether domestic or foreign.³⁰

Yet perhaps this response is a bit too quick, and perhaps the fundamental distinction between binding and persuasive authority is deeply misguided. For once we understand that genuine authority is content-independent, we are in a position to see that persuasion and acceptance (whether voluntary or not) of authority are fundamentally opposed notions. To be *persuaded* that global warming is a real problem is to accept that there are sound substantive reasons supporting these conclusions and thus to have no need for authoritative pronouncements in reaching those conclusions. When a scientist reaches the conclusion that global warming is a problem, she does not do so because seven Nobel Prize winners have said it is so but because her own scientific knowledge or investigation justifies that conclusion.³¹ But when *I* conclude that global warming is a problem, I reach that conclusion not because I genuinely know that it is correct, for I have no authority-independent way of knowing. Rather, my conclusion is based on the fact that it is consistent with what various scientists whose authority I recognize and accept have said.³² Thus, it is not that I am persuaded that global warming is a problem. Rather, I am persuaded that people whose judgment I trust are persuaded that global warming is a problem. At times we may have both substantive and content-independent reasons for believing the same thing, but it remains crucial to recognize that the two are fundamentally different.

³⁰ See Jackson, *supra* note 1, at 114; Saunders, *supra* note 1, at 101; see also Tushnet, *supra* note 1, at 25 (noting that the real controversy over citation to foreign law is about “the relevance” of such references).

³¹ But see *supra* note 11.

³² It is characteristic of law and many other domains of authority that the system often tells the subjects who (or what) the authorities are, and thus the subject is not required (or entitled) to decide whether a given authority is entitled to source-based and content-independent deference. But in other contexts, including those in which the subject must decide whether to defer to an authority or must decide which of multiple authorities is entitled to deference, there arises the interesting question of how much knowledge the subject needs in order to defer to someone with greater knowledge. See Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 *Yale L.J.* 1535, 1582–85 (1998). This problem, which is characteristic of the issue of expert testimony, will be dealt with more extensively later in this Section. See *infra* note 58 and accompanying text.

The distinction is the same in law.³³ It is one thing to conclude that the best theory of freedom of speech permits speakers to advocate racial hatred. It is quite another to say that advocating racial hatred is constitutionally protected in the United States because the Supreme Court said so (more or less) in *Brandenburg v. Ohio*.³⁴ Here the contrast is the same as between the scientists and me with respect to global warming. A decision driven by the intrinsic or substantive reasons for a conclusion is very different from one based solely on authority, plain and simple. Those who accept scientific authority (which scientists rarely but not never do³⁵) will accept that global warming is a problem even if their own authority-independent reasoning leads to a different conclusion. Likewise, a lower court judge who accepts the authority of precedent (from a higher court) and a Supreme Court Justice who accepts the authority of previous Supreme Court decisions (according to the principle of *stare decisis*) are expected to conclude that advocacy of racial hatred is constitutionally protected even if they believe that such a conclusion is legally erroneous.³⁶

³³ See Posner, *supra* note 11, at 62; see also Lon L. Fuller, Reason and Fiat in Case Law, 59 Harv. L. Rev. 376, 377–80 (1946).

³⁴ 395 U.S. 444, 447–48 (1969) (per curiam).

³⁵ See *supra* note 11. On the law/science comparison, compare Waldron, *supra* note 1, at 143–46, with James Allan, Jeremy Waldron and the Philosopher's Stone, 45 San Diego L. Rev. 133, 138–47 (2008).

³⁶ “The concept of a system of precedent is that it constrains judges in some cases to follow decisions they do not agree with.” P.S. Atiyah, Form and Substance in Legal Reasoning: The Case of Contract, in *The Legal Mind: Essays for Tony Honoré* 19, 27 (Neil MacCormick & Peter Birks eds., 1986); see also Larry Alexander, Constrained By Precedent, 63 S. Cal. L. Rev. 1, 4 (1989); Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan. L. Rev. 817 (1994); Richard H. Fallon, Jr., *Stare Decisis* and the Constitution: An Essay on Constitutional Methodology, 76 N.Y.U. L. Rev. 570, 570 (2001); Michael J. Gerhardt, The Role of Precedent in Constitutional Decisionmaking and Theory, 60 Geo. Wash. L. Rev. 68, 87 (1991); Henry P. Monaghan, Taking Supreme Court Opinions Seriously, 39 Md. L. Rev. 1, 3 (1979); Frederick Schauer, Precedent, 39 Stan. L. Rev. 571, 575 (1987).

The question of *stare decisis* has been much in the news and in Supreme Court opinions recently, as the Court and various commentators debate not only the question whether the Supreme Court is obligated to take its previous decision as authoritative but also whether the Court is in fact doing so. See, e.g., *Leegin Creative Leather Prods. v. PSKS, Inc.*, 127 S. Ct. 2705, 2737 (2007) (Breyer, J., dissenting); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2835 (2007) (Breyer, J., dissenting); *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2704 (2007) (Souter, J., dissenting); *Morse v. Frederick*, 127 S. Ct. 2618, 2649 (2007) (Stevens, J., dissenting); *Scott v. Harris*, 127 S. Ct. 1769, 1781 (2007) (Breyer, J., concurring); Fre-

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But now we can see just how curious the ubiquitous references to persuasive authority turn out to be. It is true that standard texts on legal research, legal method, and legal writing almost invariably distinguish between binding—or mandatory—and persuasive authority.³⁷ But if an agent is genuinely persuaded of some conclusion because she has come to accept the substantive reasons offered for that conclusion by someone else, then authority has nothing to do with it. Conversely, if authority is genuinely at work, then the agent who accepts the authoritativeness of a directive need not be persuaded by the substantive reasons that might support the same conclusion. As with the parent saying, “Because I said so,” authority is in an important way the fallback position when substantive persuasion is ineffective. And thus being persuaded is fundamentally different from doing, believing, or deciding something because of the prescriptions or conclusions of an authority. But if this is so, then the very idea of a persuasive authority is self-contradictory, for persuasion and authority are inherently opposed notions.³⁸ A judge who is genuinely persuaded by an opinion from another jurisdiction is not taking the other jurisdiction’s conclusion as authoritative. Rather, she is *learning* from it, and in this sense she is treating it no differently in her own decisionmaking processes than she would treat a persuasive argument that she has heard from her brother-in-law or in the hardware store. Conversely, the judge who decides to treat a decision from another jurisdiction as worthy of following because of its source and not its

derick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 Ga. St. U. L. Rev. 381, 381–85 (2007); Ronald Dworkin, *The Supreme Court Phalanx*, N.Y. Rev. Books, Sept. 27, 2007, at 92; Editorial, *Justice Denied*, N.Y. Times, July 5, 2007, at 12; Charles Lane, *Narrow Victories Move Roberts Court to Right; Decisions Ignore Precedent, Liberal Justices Contend*, Wash. Post, June 29, 2007, at A4; see also Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 139 (Amy Gutmann ed., 1997) (“The whole function of [stare decisis] is to make us say that what is false under proper analysis must nonetheless be held to be true . . .”). Although in this Article I do not directly engage the questions whether the Supreme Court should or does follow its own previous decisions even when it thinks them mistaken, the debate about stare decisis underscores the importance of understanding the concept of authority which undergirds these debates.

³⁷ See sources cited supra note 28.

³⁸ “If the precedent is truly binding on [the judge], and if he loyally accepts the principle of *stare decisis*, he will not even pause to consider what substantive reasons may be given for an opposite decision.” Atiyah, supra note 36, at 20; see also Fuller, supra note 33, at 377.

content is treating it as authoritative and need not be persuaded by the substantive reasons that might have persuaded the court that reached that decision. Thus, the fundamental contrast between persuasion and authority renders the term “persuasive authority” self-contradictory. The use of a source can be one or the other—it can be persuasive or it can be authoritative—but it cannot be both at the same time.

Although courts often cite legal sources because they are genuinely and substantively persuaded, many—perhaps even most—judicial uses of so-called persuasive authority seem to stem from authority rather than persuasion. In *Thompson v. Oklahoma*, one of the earlier juvenile death penalty cases, for example, the plurality opinion of Justice Stevens reinforced its judgment by the fact that the Court’s outcome was “consistent with the views that have been expressed by *respected* professional organizations, by other nations that share our Anglo-American heritage, and by the *leading* members of the Western European community.”³⁹ Similarly, in *Roper v. Simmons*, Justice Kennedy’s opinion for the Court referred to the fact that there was “‘virtual unanimity’”⁴⁰ among other nations on the question of the death penalty for juveniles and explained that the Court’s conclusion was consistent with the “overwhelming weight of international opinion.”⁴¹ This is not the language of persuasion; it is the language of authority. It is the very actions of the other nations, and not their justifications for those actions, that add weight to the Court’s conclusion;⁴² and the fact that the actual reasoning of these other courts and nations is not described at all in the opinion adds credence to this interpretation.⁴³ It is simply the conclusion that other nations have reached that is supposed to make a difference.

³⁹ 487 U.S. 815, 830 (1988) (Stevens, J., plurality opinion) (emphasis added).

⁴⁰ 543 U.S. 551, 575 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 102–03 (1958) (plurality opinion)).

⁴¹ *Id.* at 578.

⁴² I do not make the claim that such sources are typically outcome-determinative. Rather, the claim is that their authority as authority is used to strengthen a conclusion reached on other grounds or as one factor among several, which in combination produce the following court’s conclusion.

⁴³ See Young, *supra* note 1, at 155–56 (arguing that the absence of discussion of reasoning of other courts shows that Supreme Court is deferring to foreign opinion).

Taking so-called persuasive authority as authoritative rather than persuasive is by no means peculiar to the issue of foreign law. In referring to the law of other jurisdictions, American courts persistently refer to the “weight of judicial opinion,”⁴⁴ the “consensus of the courts,”⁴⁵ the “consensus of judicial opinion,”⁴⁶ what the “majority” of courts in other jurisdictions have done,⁴⁷ or what “most courts have held.”⁴⁸ Courts do not always use the language of authority, to be sure, and on occasion talk of having been “persuaded by the reasoning” of a court in another jurisdiction.⁴⁹ But such uses seem considerably less frequent. As should be apparent, the task of determining the exact percentage of optional sources cited because of their authoritativeness versus those cited because of their persuasiveness is too daunting even to comprehend. But it seems apparent even without a systematic empirical examination that, with respect to a vast number of uses of so-called persuasive authority, persuasion seems to have very little to do with it. It is not that courts follow these optional sources because they are persuasive; rather, courts follow them because of their very existence.

Widespread judicial practice, therefore, appears to support the conclusion that persuasion is rarely part of the equation when persuasive authorities are being used. Yet although at first glance the idea of persuasive authority seems to be as empirically inaccurate as it is conceptually oxymoronic, the matter may not be quite so simple. Because the concept of *persuasive* authority is traditionally offered in opposition to the concept of *mandatory* authority, the

⁴⁴ E.g., *Ziegelmaier v. Rasmussen*, 324 P.2d 116, 118 (Cal. App. Dep’t Super. Ct. 1958); *Volk v. Atl. Acceptance & Realty Co.*, 59 A.2d 387, 392 (N.J. Ch. 1948).

⁴⁵ E.g., *Gaspro, Ltd. v. Comm’n of Labor & Indus. Relations*, 377 P.2d 932, 935 (Haw. 1962).

⁴⁶ E.g., *Wallace Constr. Co. v. Indus. Boiler Co.*, 470 So. 2d 1151, 1153 (Ala. 1985); *Puffer Mfg. v. Kelly*, 73 So. 403, 403 (Ala. 1916); see also *EEOC v. Nat’l Children’s Ctr., Inc.*, 146 F.3d 1042, 1047 (D.C. Cir. 1998) (noting a “growing consensus among the courts of appeals” (quoting *Pansy v. Borough of Stroudsbouurg*, 23 F.3d 772, 779 (3d Cir. 1994))).

⁴⁷ See, e.g., *Mastro v. Brodie*, 682 P.2d 1162, 1168 (Colo. 1984) (describing and following approach of “[t]he overwhelming majority of state appellate courts”); *Smidt v. Porter*, 695 N.W.2d 9, 20 (Iowa 2005) (referring to a conclusion reached by the “overwhelming majority of courts”).

⁴⁸ E.g., *Quint v. Pawtuxet Valley Bus Lines*, 335 A.2d 328, 332 (R.I. 1975); *Wal-Mart Stores v. Sturges*, 52 S.W.3d 711, 724 (Tex. 2001).

⁴⁹ E.g., *4000 Asher, Inc. v. State*, 716 S.W.2d 190, 192 (Ark. 1986); *State v. Rizzo*, 833 A.2d 363, 406 (Conn. 2003); *Therrien v. Sullivan*, 891 A.2d 560, 563 (N.H. 2006).

distinction between the two hinges on whether the decisionmaker has a choice to use the authority. And here the contributions of Ronald Dworkin can be instructive. When Dworkin distinguishes rules from principles,⁵⁰ he relies in part on the fact that the judge *must* apply⁵¹ a rule that applies to the facts at hand but has a choice about whether to apply a principle. Both rules and principles have *scopes*—they apply by their own terms to some but not all acts and events.⁵² But under Dworkin's distinction, the defining characteristic of a rule is that it must be applied whenever its triggering acts or events occur, while principles are never mandatory in this sense, even if it appears on their face that they apply to the matter at hand.

The value of Dworkin's analysis for our purposes here has little to do with any alleged distinction between rules and principles. Rather, Dworkin helps us grasp a valuable distinction between seemingly applicable authorities that must be applied and other seemingly applicable authorities whose application is optional and not obligatory. Transposing Dworkin's distinction between mandatory rules and less mandatory principles to the question of authority encourages us to distinguish mandatory from *optional* authorities. And "optional,"⁵³ rather than "persuasive," seems a word much better suited to capturing the distinction we are after between that which must be used and that which may be ignored. A judge in the Southern District of New York is *required* to follow Second Circuit and Supreme Court decisions but is not required to follow or even notice the conclusions of the Eastern District of New York, the New York Court of Appeals, the Third Circuit,

⁵⁰ See Ronald Dworkin, *Taking Rights Seriously* 23–28 (1977).

⁵¹ Although Dworkin initially appeared to suggest that the obligation to follow a rule was a conclusive one, he has been frequently criticized for collapsing the distinction between the obligation to use a source and the obligation to treat it as conclusive. See Joseph Raz, *Legal Principles and the Limits of Law*, 81 *Yale L.J.* 823, 845 (1972); Colin Tapper, *A Note on Principles*, 34 *Mod. L. Rev.* 628, 634 (1971); Frederick Schauer, (Re)Taking Hart, 119 *Harv. L. Rev.* 852, 873 n.69 (2006) (book review). For Dworkin's response to these critiques, see Ronald Dworkin, *Hart and the Concepts of Law*, 119 *Harv. L. Rev.* F. 95, 100–01 (2006), <http://www.harvardlawreview.org/forum/issues/119/jan06/dworkin.pdf>.

⁵² See Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* 23–24 (1991).

⁵³ The word "permissive" is also better than "persuasive." See John Gardner, *Concerning Permissive Sources and Gaps*, 8 *Oxford J. Legal Stud.* 457, 458 (1988).

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Wigmore on Evidence, the *Harvard Law Review*, the High Court of Australia, the Constitutional Court of South Africa, or the European Court of Human Rights. Yet, although the Southern District judge may ignore all of the items on this list of optional authorities without fear of sanction, she is *permitted* by the applicable professional norms to use them, in a way that she is not permitted, for fear of criticism and professional embarrassment if nothing else, to provide citations to astrology, private conversations with her brother, articles in the *National Enquirer*, and (slightly more controversially) the Bible.⁵⁴

This much may appear banal, but a much more difficult and important question remains. If a court is not required to cite or use secondary authority, or authority from another jurisdiction—if the use of optional authorities is nonmandatory but nevertheless permissible—then on what basis does a judge select an optional authority? And is there anything at all authoritative about an optional authority whose use is solely at the discretion of the judge? The decisionmaker may select the optional authority because she is persuaded by the substantive reasons the authority offers in support of its conclusion, but we understand then that the authority is not being used *as* an authority. As such, little would differentiate the genuinely persuasive opinion of a court located in a different jurisdiction from the genuinely persuasive opinion of the judge's father-in-law. Moreover, when a judge is actually persuaded by the decision of another jurisdiction, whether foreign or domestic, we would expect the judge to explain both the reasoning of that other jurisdiction as well as the reasons why she found it persuasive.⁵⁵ Good manners and perhaps the desire to give research direction to others will typically counsel the judge to acknowledge the source of

⁵⁴ Indeed, it may be that in legal decisionmaking generally the distinction between impermissible and permissible sources (and outcomes) is even more important than the distinction between mandatory and optional sources (and outcomes). And that is because the entire shape of legal argument is determined by what sources can and cannot be used, whereas the distinction between mandatory usable sources and optional usable sources, while undoubtedly important, does not have the same discourse-shaping importance. For related observations in the context of “on the wall” and “off the wall” arguments, see Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything at All?*, 24 *Osgoode Hall L.J.* 353 (1986); Sanford Levinson, *What Do Lawyers Know (And What Do They Do with Their Knowledge)?* *Comments on Schauer and Moore*, 58 *S. Cal. L. Rev.* 441 (1985).

⁵⁵ See Young, *supra* note 1, at 152–53.

what she has now taken on as *her* ideas and conclusions. The citation to the decision of another jurisdiction in these circumstances will accordingly not be a citation to authority as we now understand the idea of authority but will instead be the judicial equivalent of an academic paper that gives credit to the origins of the author's own thinking.

If an optional source of guidance is selected because of the substantive, first-order soundness of the source's reasoning, then the source, even if by tradition and convention we label it as an "authority," is not being used as an authority. But although that conclusion makes the idea of a persuasive authority once again appear self-contradictory, there remains still another possibility. At times, optional authorities are selected *as authorities* because the selector trusts the authority as an authority even if the selector does not agree with the conclusion or, more likely, believes herself unreliable in reaching some conclusion. So although a Tenth Circuit judge is under no obligation in a securities regulation case to rely on conclusions reached by the Second Circuit or found in the pages of the Loss and Seligman treatise on securities regulation,⁵⁶ the judge might believe her own judgments about securities matters sufficiently unreliable that she would prefer to rely on a court or commentator she believes to be more expert. This could even be true if she perceives herself as having little ability to evaluate the soundness of the authority's conclusions and, indeed, even if she suspects that the authority's conclusions are erroneous. The Tenth Circuit judge who looks to the Second Circuit for guidance in securities cases⁵⁷ is like a trial court relying on expert testimony or any other novice relying on expertise. And in such cases the decision-maker is not so much persuaded by the expert's reasons and argu-

⁵⁶ Louis Loss, Joel Seligman & Troy Paredes, *Securities Regulation* (4th ed. 2006).

⁵⁷ The phenomenon of taking Second Circuit securities decisions as authoritative even outside the Second Circuit is well documented. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting); *SEC v. Kasser*, 548 F.2d 109, 115 (3d Cir. 1977) (noting the Second Circuit's "especial expertise" in securities matters); *Travis v. Anthes Imperial Ltd.*, 473 F.2d 515, 523 n.14 (8th Cir. 1973) (correcting a district court's interpretation of a Second Circuit case while appearing to treat that case as authoritative); Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 728 n.171 (1984); Robert W. Hamilton, *The State of State Corporation Law: 1986*, 11 Del. J. Corp. L. 3, 16 (1986).

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ments as by (the decisionmaker's inexpert evaluation of⁵⁸) the expert's expertise, an expertise that operates in a genuinely authoritative manner.

Insofar as this picture of expertise-influenced selection of optional authorities is accurate, then an optional authority is genuinely authoritative when the selector of the authority is not (necessarily) persuaded by what some nonmandatory source says, but is (inexpertly) persuaded that the optional source is more likely reliable than the selector herself.⁵⁹ So although a judge of the Southern District of New York is required to follow Second Circuit rulings he thinks wrong even if he thinks that the judges of the Second Circuit are morons, there are other circumstances in which a judge defers to an authority not because he is persuaded by the authority's conclusions or reasons but by the fact that the authority is an authority. In such circumstances, relying on the authority is genuinely optional and not mandatory, but it is nevertheless true that the reliance or obedience that ensues is one that is content-independent and, as such, an example of authentic authority.

Although optional authorities are often used in just this genuinely authoritative fashion, they are also employed frequently in a manner that hovers between the authoritative and the substantive. When a lawyer in a brief, a judge in an opinion, or a scholar in a law review article makes reference to an authority, it is often done to provide alleged "support" for some proposition. But the idea of "support" here is an odd one. The cited authority is often not one that supports the proposition in question any more than some other authority might negate it.⁶⁰ And this makes the use of an authority as "support" a peculiar sense of authority, because the set of authorities does not necessarily point in one direction rather

⁵⁸ See Brewer, *supra* note 32, at 1538–39 (noting the difficulties nonexpert judges and juries face when deciding between competing experts).

⁵⁹ Legal philosophers will recognize the affinity between this account and the "service conception" of authority developed by Joseph Raz. See, e.g., Raz, *supra* note 10; Raz, *supra* note 25; Joseph Raz, *Practical Reason and Norms* 62–65 (2d ed. 1990).

⁶⁰ There is an ethical obligation for lawyers to cite to directly contrary controlling authority, see Model Rules of Prof'l Conduct R. 3.3(a)(2) (2007), but even apart from the significant qualifications provided by "directly" and "controlling," the obligation is one that is hardly universally followed. See Roger J. Miner, Lecture, Professional Responsibility in Appellate Practice: A View from the Bench, 19 *Pace L. Rev.* 323, 331 (1999).

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than another. Nevertheless, the conventions of legal citation do not appear to require only strong (authoritative) support. Rather, the conventions seem to require that a proposition be supported by a reference to some court (or other source) that has previously reached that conclusion, even if other courts or other sources have reached a different and mutually exclusive conclusion, and even if there are more of the latter than the former. Thus, to support a legal proposition with a citation is often only to do no more than say that at least one person or court has said the same thing on some previous occasion.

When this kind of support appears in a law review article, it serves little purpose other than to acknowledge the provenance of an idea, and thus to think of the authority as supporting a conclusion is rather tenuous. But perhaps such support has greater import when it appears in a brief or judicial opinion. The requirement of at least some modicum of support reflects not only law's intrinsically authoritative nature but also law's inherent conservatism (in the non-political sense of that word). That is, a legal argument is often understood to be a better legal argument just because someone has made it before, and a legal conclusion is typically taken to be a better one if another court either reached it or credited it on an earlier occasion. The reference to a source in this context rarely refers to one that is more persuasive or authoritative than one that could be marshaled for an opposing proposition, but instead appears to be the legal equivalent of the line commonly used by the humorist Dave Barry—"I am not making this up."⁶¹

So what does it mean for the author of a brief, a judicial opinion, or a law review article to say "I am not making this up"? One possibility is that there are not that many legal propositions whose affirmation and denial are both supportable. Were that the case, then the fact that a proposition was not novel would provide some genuine, even if minimal, decision-guiding force. But if, on the other hand, Karl Llewellyn's famous "thrust and parry" is representative of the legal domain generally,⁶² then it will typically be the case that

⁶¹ See, e.g. Dave Barry, *Dave Barry Is Not Making This Up* (1994). Like every other citation in this Essay, this one has an oddly ironic and self-referential double aspect.

⁶² Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 *Vand. L. Rev.* 395, 401-06 (1950). Llewellyn himself acknowledged that his skepticism about the outcome-

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there is some citation to a case, rule, or principle available to support virtually any legal proposition. And if that is so, then the requirement of “some” support will not be very much of a constraint. Judges frequently use the expression, “It won’t write,” to refer to situations in which there is *no* support or *no* argument for the result they would antecedently prefer to reach,⁶³ but in a dense legal system it is arguable that this predicament will be rare indeed. To the extent that this conclusion is true, and thus to the extent that there are few judicial opinions or law review articles that will not write,⁶⁴ a requirement of some support will be of little consequence.

But although the requirement of support may not be very constraining, it is worth noting that this variety of citation is a species, albeit a weak one, of genuine authority. The author of a brief or opinion who uses support to deny genuine novelty is asking the reader to take the supported proposition as being at least slightly more plausible because it has been said before than had it not been.⁶⁵ And this is being done, typically, on the basis of the source’s existence and not the substantive reasoning contained in it. One could well ask why the legal system is so concerned about the existence of one supporting “authority” even when the weight of au-

determining effect of formal legal rules (or canons) was limited to hard appellate cases. Karl Llewellyn, *The Bramble Bush: Some Lectures on Law and Its Study* 54 (1930). And even with respect to hard appellate cases, the frequency with which mutually exclusive legal propositions are each supportable by legitimate legal sources is an empirical question to which Llewellyn’s examples do not provide a conclusive answer. Indeed, whether Llewellyn was actually right about the canons is not entirely clear. See Michael Sinclair, “Only a Sith Thinks Like That”: Llewellyn’s “Dueling Canons,” *One to Seven*, 50 *N.Y.L. Sch. L. Rev.* 919, 919–20 (2006); Michael Sinclair, “Only a Sith Thinks Like That”: Llewellyn’s “Dueling Canons,” *Eight to Twelve*, 51 *N.Y.L. Sch. L. Rev.* 1003, 1004 (2007).

⁶³ See Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 *U. Chi. L. Rev.* 1371, 1375 (1995); see also Paul A. Freund, *An Analysis of Judicial Reasoning*, in *Law and Philosophy: A Symposium* 282, 288 (Sidney Hook ed., 1964); Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 *Fordham L. Rev.* 23, 49 (2005).

⁶⁴ This is not to say that they should have been written.

⁶⁵ One can draw an analogy from the law of evidence to understand the practice of citing sources. The standard for evidentiary relevance is that the evidence must have “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *Fed. R. Evid.* 401. Likewise, the practical standard for citing a source may be that it simply makes a legal proposition more likely to be sound than if the source did not exist, which is still compatible with it being more likely unsound than sound.

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thority might go in the other direction, but that is for another time. The point here is only that even this weaker and arguably more common form of citation to authority is a variant on genuine authority and consistent with the authoritative character of law itself.

III. MUST REAL AUTHORITY BE “BINDING”?

What emerges from the foregoing discussion is the conclusion that authority can be at the same time both optional and genuinely authoritative when it is selected for reasons other than its intrinsic persuasiveness. And thus we see the very misleading nature of the phrase “persuasive authority.” But there is still more work to do, because we must now attend to the widespread view that a mandatory authority is *binding*. This view, however, may also be mistaken, for it may be possible for an authority to be both mandatory and non-binding, depending on what it is we mean by “binding.”

It is a commonplace in the foreign law debate for commentators, especially those sympathetic to the use of foreign or international law by American courts, to distinguish between “binding” (or, sometimes, “controlling”) and “persuasive” (what we are now calling “optional”) authority. They insist that the use of foreign law by American courts need not be perceived as threatening because its use would fall within the latter and not the former category.⁶⁶ In other words, it is said, foreign law need not be considered binding or controlling in order for it to be valuable and citable.⁶⁷ This conclusion may well be sound, but it is nevertheless important to clear up the widespread confusion arising from a failure to specify carefully what is meant by “binding.” For when we typically think of some norm or constraint as binding, we think of it as inescapable, as leaving no choice, and, most importantly, as being absolute or non-overridable. When an authority is binding, therefore, the standard account is that the authority, especially if a precedent, must be followed or distinguished.⁶⁸ A binding authority is one that, under this account, is determinative within its scope.

⁶⁶ See, e.g., Mark Tushnet, *When Is Knowing Less Better than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 *Minn. L. Rev.* 1275, 1284–85 (2006).

⁶⁷ See, e.g., Jackson, *supra* note 1, at 116–20; Saunders, *supra* note 1, at 100–01.

⁶⁸ See Rupert Cross & J.W. Harris, *Precedent in English Law* 4 (4th ed., 1991); Grant Lamond, *Do Precedents Create Rules?*, 11 *Legal Theory* 1, 2 (2005); Stephen

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There is no reason, however, why an authoritative prescription need be understood as absolute or determinative. Just as rights, rules, and obligations can serve as reasons for action or decision even if they can be overridden at times by stronger rights, rules, and obligations,⁶⁹ sources can also function as authorities without necessarily prevailing over all other sources, or even all other reasons for a decision. What there is a reason to do is different from what should be done, all things considered, just as what there is a right to do is different from what the right-holder actually gets to do, all things considered. Thus, my right to freedom of speech does not evaporate even when I am permissibly restricted from speaking because of a compelling state interest.⁷⁰ And so too, my obligation to keep my luncheon appointments and to teach my classes at the designated times does not disappear even when it is overridden by, say, my obligation to attend to ailing relatives.

With this account of what are sometimes called “prima facie” rights and obligations in hand, we can see with little difficulty how authorities can be authoritative without being conclusively authoritative. The existence of an authoritative reason is not inconsistent with there being other outweighing authoritative reasons or outweighing reasons of other kinds. When a court rules that even the crisp rules of an applicable statute must yield at times to the demands of justice,⁷¹ it is saying that an undeniably applicable statute is to be understood as prima facie but not absolutely outcome pro-

R. Perry, *Judicial Obligation, Precedent and the Common Law*, 7 *Oxford J. Legal Stud.* 215, 215 (1987).

⁶⁹ See W.D. Ross, *The Right and the Good* 28 (1930); Alan Gewirth, *Are There Any Absolute Rights?*, 31 *Phil. Q.* 1, 2 (1981); Robert Nozick, *Moral Complications and Moral Structures*, 13 *Nat. L. F.* 1, 7 (1968); Frederick Schauer, *A Comment on the Structure of Rights*, 27 *Ga. L. Rev.* 415, 415 (1993); John Searle, *Prima Facie Obligations*, in *Practical Reasoning* 81, 81–82 (Joseph Raz ed., 1978); Judith Jarvis Thomson, *Some Ruminations on Rights*, 19 *Ariz. L. Rev.* 45, 50 (1977).

⁷⁰ The compelling interest formulation, more commonly associated with due process and equal protection, see *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Korematsu v. United States*, 323 U.S. 214, 216 (1944), is not unheard of in the free speech context. See, e.g., *New York v. Ferber*, 458 U.S. 747, 756–57 (1982).

⁷¹ The most standard of the standard examples for this proposition is *Riggs v. Palmer*, 22 N.E. 188 (1889), in which the injustice of allowing Elmer Palmer to inherit under a will as a result of his having murdered the testator was held sufficient to override the clearly contrary words of the New York Statute of Wills. *Id.* at 189–90. And there are numerous other examples. See Richard H.S. Tur, *Defeasibilism*, 21 *Oxford J. Legal Stud.* 355, 360 (2001).

ducing. In this sense, it is certainly true that most authorities are not binding or controlling in an absolute way. And the suggestion that treating some source as authoritative requires that the prescriptions emanating from that source must be followed, come what may, is simply not part of the concept of authority at all.

Yet although neither mandatory nor optional authorities need be absolute in order to retain their authoritative status, it is important to recall from the conclusion of the previous section that even optional authorities can be genuinely authoritative. And this explains why those who object to the use of foreign law really do have, from their perspective, something to worry about. Neither the optional nor the non-conclusive aspect of using foreign law prevents it from being taken seriously as an authority, which is exactly what the objectors are concerned about.⁷² Similarly, when courts issue no-precedential-effect rules for a class of cases,⁷³ their concern is not a worry that what the court has quickly and casually said in some earlier opinion will be totally controlling in a subsequent case. Rather, the worry is that what a court may have said entirely for the benefit of the parties and without careful (or any) consideration of the implications for other cases will even be used

⁷² See Richard A. Posner, *How Judges Think* 348–49 (2008). In fact it is rare for an American court to be asked to treat as authoritative the conclusions of a single foreign court. Far more common is the view that American courts should treat as non-conclusively authoritative the collective judgments of the community of nations, or the community of civilized nations, or the community of Western industrialized democracies, or some similar aggregation of other jurisdictions. See Waldron, *supra* note 1, at 144–45. I suspect, however, that Justice Scalia and his allies believe that the collective production of international opinion is essentially a questionable political process of groupthink. It is therefore not, they would argue, a genuinely interactive and self-correcting system in which, like Lord Mansfield's image of the common law working itself pure, *Omychund v. Barker*, 26 Eng. Rep. 15, 23 (Ch. 1744), group opinion is more reliable than individual opinion. See James Surowiecki, *The Wisdom of Crowds* (2004).

⁷³ See *supra* notes 4–7 and accompanying text. The cases subject to such an order are typically “publicly available, either electronically or in print.” Amy E. Sloan, *A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule*, 79 *Ind. L.J.* 711, 711 n.2 (2004); see also Brian P. Brooks, *Publishing Unpublished Opinions*, 5 *Green Bag 2d* 259, 259 (2002). Yet although most of the controversy now is about the precedential effect of unpublished opinions, earlier the issue was whether decisions with precedential effect should even be published. See Shannon, *supra* note 5, at 655; see also 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, 1167–68 (1978).

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as a reason in subsequent cases.⁷⁴ The court simply wants to deny the authority,⁷⁵ even if not the absolute authority, of its own casual, rushed, or simply overly party-focused statements.⁷⁶

Similarly, when the Middlebury College Department of History prohibited its students from citing to Wikipedia, it was not (only) worried that Middlebury students would take whatever is in Wikipedia as absolute and unchallengeable gospel. That is a risk, but we would hope that for Middlebury students it is a remote one. What is less remote, however, is the possibility that Middlebury students will consider Wikipedia entries to be authoritative—to be serious sources of information—and this, even without the absolutism, is what the faculty presumably wishes to guard against.⁷⁷ In-

⁷⁴ There is an interesting analytic point here. A court that makes a rule in Case 1 is, by virtue of the necessarily generalizing feature of all rules, making a rule that will presumptively apply in Case 2, Case 3, . . . , Case *n*. So when a court considers in Case 1 whether some rule that will generate the correct result in Case 1 will also generate the correct result in, say, Case 2, Case 3, and Case 4, it is open to the possibility that it might be required to reach the wrong all-things-considered result in Case 1, the case before it, in order to avoid providing reasons for future incorrect results in Cases 2, 3, and 4. See M.P. Golding, *Principled Decision-Making and the Supreme Court*, 63 *Colum. L. Rev.* 35, 49 (1963); Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 *Colum. L. Rev.* 982, 1002–03 (1978). If a court wishes to avoid incorrect results in the cases before it, therefore, one way of doing so is to try to ensure that those results do not become reasons in other and future cases. See Frederick Schauer, *Do Cases Make Bad Law?*, 73 *U. Chi. L. Rev.* 883, 900–01 (2006); Frederick Schauer, *Giving Reasons*, 47 *Stan. L. Rev.* 633, 637 (1995).

⁷⁵ The *Anastasoff* issue seems to involve the distinct questions of precedent-stripping and citation-prohibiting. See Michelman, *supra* note 5, at 562. Implicit in my argument here, however, is that the two may be more closely related than either the *Anastasoff* court or most of the commentators have appreciated. Citation is not just a pathway to precedent; it is the language the law uses to embody its precedential character. To prohibit the citation of decisions that may have precedential effect is to endorse the existence of secret law, the unacceptability of which explains the impetus for the new Rule 32.1 of the Federal Rules of Appellate Procedure. But a precedent-stripping rule without a no-citation rule may be toothless, because even formally non-precedential but still citable decisions may exert constraining and path-dependency-creating effects on future decisions.

⁷⁶ Although the desire of a court both to say something and not to have that something stand as a precedent for future cases is mostly associated these days with the controversies about no-citation rules and about so-called unpublished opinions, this is essentially what the Supreme Court explicitly attempted to do in *Bush v. Gore*, 531 U.S. 98, 109 (2000). And it is noteworthy that in the eight years since that decision, it has never been cited by the Court itself, although it has been cited 221 times in state and lower federal courts.

⁷⁷ I should note that it is hardly clear that Middlebury in fact made the correct decision. Wikipedia is notoriously prone to errors, but it is also notoriously more reliable

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deed, Middlebury's prohibition on Wikipedia is similar to the strong warnings against citing *Corpus Juris Secundum* or *American Jurisprudence* that are, among other things, a staple of legal writing instruction for first-year law students.

Thus, there is a shared worry of Justice Scalia and others with respect to foreign law, of the Middlebury History Department with respect to Wikipedia, of overworked appellate courts that dash off brief opinions for the benefit of the parties, of a legal system that frowns on citation to legal encyclopedias, and indeed of a Supreme Court that warns about the uniqueness of *Bush v. Gore*, that will not treat its denials of certiorari as authoritative,⁷⁸ and that in *every* one of its decisions warns against taking the syllabus as authority.⁷⁹ And this is the worry that to recognize something as authority, even optional and non-conclusive authority, is to take it seriously as a source and thus to treat its guidance and information as worthy of respect. That a legal system premised to its core on the very notion of authority would worry about what it is treating as authoritative should come as little surprise.

IV. HOW DO AUTHORITIES BECOME AUTHORITATIVE?

Although I have drawn a seemingly sharp distinction between mandatory and optional authorities, the reality is more complex, and it is a reality that likely further fuels the worries of Justice Scalia, the Middlebury history department, the circuit judges guarding the purity of no-citation rules, and many others. For in reality, the status of a source as an authority is the product of an informal, evolving, and scalar process by which some sources become

on many topics than not only the person who is consulting Wikipedia in the first place but also many other sources. If the Supreme Court of the United States in *Bush v. Gore*, 531 U.S. at 103, can rely on articles in the *Omaha World-Herald* for empirical propositions on electoral behavior (on which, see the very amusing footnote in Frederick Schauer, *The Dilemma of Ignorance: PGA Tour, Inc. v. Casey Martin*, 2001 Sup. Ct. Rev. 267, 287 n.62 (2002)), then it is not apparent to me that Wikipedia should be relegated to a lower category of authoritativeness. A court (or student) citing to an authority as an authority is acknowledging the comparative advantage of the authority over the author, and maybe even the comparative advantage of the authority over (some) other authorities. And it may well be true that Wikipedia in fact has at least one of these advantages for many topics.

⁷⁸ *Teague v. Lane*, 489 U.S. 288, 296 (1989).

⁷⁹ The boilerplate citation is to *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337 (1906).

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progressively more and more authoritative as they are increasingly used and accepted. It was formerly the practice in English courts, for example, to treat as impermissible the citation in an argument or judicial opinion to a secondary source written by a still-living author. If the author of a treatise or (rarely) an article were dead, then citation was permissible, but not otherwise. The reasons for this practice remain somewhat obscure, but that is not important here. What is important is the fact that the prohibition gradually withered, a withering that commenced more or less when the House of Lords in 1945 cited to a work by the then-living Arthur Goodhart.⁸⁰ Once the first citation to a living secondary author appeared, subsequent courts became slightly less hesitant to do the same thing, and over time the practice became somewhat more acceptable.

There is nothing unusual about this example. Although H.L.A. Hart made famous the idea of a *rule of recognition*,⁸¹ it is rare that formal rules determine what is to be recognized as law or as a legitimate citation in a legal brief, argument, or opinion. Rather, as Brian Simpson has insightfully described,⁸² the recognition and non-recognition of law and legal sources is better understood as a *practice* in the Wittgensteinian sense: a practice in which lawyers, judges, commentators, and other legal actors gradually and in diffuse fashion determine what will count as a legitimate source—and thus what will count as law. Justice Scalia, the Middlebury history department, and the guardians of no-citation rules thus have some genuine basis for worrying that legitimizing the use of this or that source will set in motion a considerably more expansive process. Indeed, a legal citation has an important double aspect. A citation to a particular source is not only a statement by the citer that this is a good source but also a statement that sources *of this type* are legitimate. Citation practice is a practice, and thus an institution, and

⁸⁰ See Frederick Schauer & Virginia J. Wise, Legal Positivism As Legal Information, 82 Cornell L. Rev. 1080, 1088–89 (1997).

⁸¹ H.L.A. Hart, The Concept of Law 94 (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994).

⁸² Brian Simpson, The Common Law and Legal Theory, in Legal Theory and Common Law 8, 18–21 (William Twining ed., 1986); see also Benjamin C. Zipursky, The Model of Social Facts, in Hart's Postscript: Essays on the Postscript to *The Concept of Law* 219, 228–29 (Jules Coleman ed., 2001).

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consequently every citation to a particular source legitimizes the institution of using sources of that type.⁸³

What is especially intriguing is the transformation of authoritativeness. How does it come to be that optional or even prohibited authorities over time turn into mandatory ones? Although the Tenth Circuit would be doing nothing wrong by failing to cite to the Second Circuit in a securities case, the failure to cite to the most prominent court on securities matters would likely raise some eyebrows. And the higher the eyebrows are raised, the more that what is in some sense optional is in another sense mandatory.⁸⁴ The more there is an expectation of reliance on a certain kind of authority, the more an authority passes the threshold from optional to mandatory. For example, it is virtually impossible to argue or decide an evidence case in the Massachusetts Supreme Judicial Court without making reference to Liacos's *Handbook of Massachusetts Evidence* or its successor.⁸⁵ Likewise, it was formerly difficult to argue a Charter of Rights and Freedoms case in the Supreme Court of Canada without nodding to American Supreme Court decisions.⁸⁶ Jurisdictional boundaries are generally reliable markers of which authorities are optional and which are mandatory, but just as there are questionable within-jurisdiction authorities,⁸⁷ so too can there be non-questionable out-of-jurisdiction au-

⁸³ Plainly instructive on this point is John Rawls, Two Concepts of Rules, 64 *Phil. Rev.* 3, 19 (1955) (arguing that decisions have an institution-creating aspect along with their decisionmaking one).

⁸⁴ There is an obvious connection here with the academic legal writing that has focused on the identity of the legal canon and on the ways in which the canon shifts. See J.M. Balkin & Sanford Levinson, *Legal Canons: An Introduction*, in *Legal Canons* 3 (J.M. Balkin & Sanford Levinson eds., 2000).

⁸⁵ Paul J. Liacos, Mark S. Brodin & Michael Avery, *Handbook of Massachusetts Evidence* (7th ed. 1999); Mark S. Brodin & Michael Avery, *Handbook of Massachusetts Evidence* (8th ed. 2007). Given that the book, in all of its editions, has been cited more than a thousand times by the Massachusetts Supreme Judicial Court and the Massachusetts Appeals Court, it would take a brave (or foolhardy) lawyer to argue a point of evidence before one of those courts without dealing with what Liacos had to say on the issue. To say that the source is not a binding (although, to repeat, not absolutely binding) authority seems therefore to be quite an oversimplification.

⁸⁶ See Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 *Yale J. Int'l L.* 409, 414–15 (2003) (noting that early Charter of Rights and Freedoms cases frequently cited United States Supreme Court decisions).

⁸⁷ Perhaps the Ninth Amendment is a good example, although less so now than in the past. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 34 (1980) ("In sophisticated legal circles mentioning the Ninth Amendment is a surefire

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thorities. And it is likely that a further fear of Justice Scalia and others about the citation of foreign and international law is that at some point these out-of-jurisdiction sources will become not only legitimate sources but also mandatory ones.

Thus, for Justice Scalia (and others) with reference to foreign and international law, for legal writing instructors counseling first-year law students about which authorities are permissible citations and which are not, and for appellate courts wrestling with no-citation rules, the question is nothing less than what to count as law. When Justice Breyer, in *Parents Involved in Community Schools v. Seattle School District No. 1*, provides two pages of sources, mostly historical and administrative, and mostly not to be found in the briefs or the record below,⁸⁸ his citation practice not only speaks volumes about what for him counts as law and what it is for him to *do* law, but also, and perhaps more importantly, his citations serve an authoritative (although less so because he was in dissent) function in telling lawyers and judges what they can *use* to make legal arguments and thus in telling lawyers and judges what law is.⁸⁹ For Justice Scalia, Judge Posner, and others, the debate about foreign law is not a debate about citation. Instead, it is a debate about the rule of recognition or the *grundnorm*, to use Kelsen's term for a similar but not identical idea.⁹⁰ What Justice Scalia fears is precisely that the political and legal decisions of another nation, the world community, or the creators of international law will have actual influence and effect—as authority in the strong sense—on American law. What Justice Scalia and Judge Posner fear may to some of us appear to be more opportunity than threat,

way to get a laugh. ('What are you planning to rely on to support that argument, Lester, the Ninth Amendment?'); Thomas B. McAfee, *A Critical Guide to the Ninth Amendment*, 69 *Temp. L. Rev.* 61, 63 (1996). And perhaps so too is the constitutional guarantee of a "republican form of government." U.S. Const. art. IV, § 4, cl. 1. Thus, Bruce Ackerman notes, correctly, that just as *Brown v. Board of Education*, 347 U.S. 483 (1954), has become quasi-textual as an authority (this is my phrasing and not his), so too has the explicitly textual guarantee of a republican form of government become, in essence, non-authoritative. Bruce Ackerman, 2006 Oliver Wendell Holmes Lectures: *The Living Constitution*, 120 *Harv. L. Rev.* 1737, 1752 (2007).

⁸⁸ 127 S. Ct. 2738, 2840–42 app. b (Breyer, J., dissenting).

⁸⁹ And thus the debate at Middlebury College and elsewhere about Wikipedia is analogously not about citation or footnoting but is about what it is to do history, and thus about what history as a practice is.

⁹⁰ Hans Kelsen, *Pure Theory of Law* 3–4 (Max Knight trans., 2004).

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but it seems a mistake to believe that from their lights they have nothing to worry about.

V. CONCLUSION: THE BOUNDARIES OF LAW

A large part of my goal here is to connect the seemingly trivial idea of citation to far less trivial questions about authority, a connection which then leads to rather more profound questions about what is a source of law and what is law itself. If law is an authoritative practice, then a great deal turns on what the authorities are. Why the Supreme Court and the Congress of the United States but not the President and Fellows of Harvard College or the editorial board of the *New York Times*? Why the Federal Trade Commission but not the board of directors of Wal-Mart? Why Loss and Seligman but not Marx and Engels? Why the *Harvard Law Review* but not the *Village Voice*? Why the writings of Thomas Jefferson but not of Jefferson Davis?

It is interesting that none of the rhetorical questions in the previous paragraph are strictly rhetorical. At least in American courts, citation practice is now undergoing rapid change, and we have seen a great increase not only in citations to non-American sources, but also to sources that not so many years ago would have been sneeringly dismissed as “non-legal.”⁹¹ This change in citation practice reflects something deeper: a change in what counts as a *legal* argument. And what counts as a legal argument—as opposed to a moral, religious, economic, or political one—is the principal component in determining just what law is. To be clear, the claim I make here is not that citation practice or the selection of legal authorities is a marker or indicator of what law is. This is not (only) a “miner’s canary” claim. Rather, the claim is that what counts as a good legal authority is the determinant and not just the indicator of what law is. Both the language and the decisionmaking modalities of law place weight on the preexisting.⁹² Citation is thus law’s way of justifying its conclusions in law’s characteristically incremental and partially backward-looking way. It may turn out, therefore,

⁹¹ See Frederick Schauer & Virginia J. Wise, Nonlegal Information and the Delegation of Law, 29 J. Legal Stud. 495, 497 (2000).

⁹² See Richard A. Wasserstrom, The Judicial Decision: Toward a Theory of Legal Justification 28–29 (1961).

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that far greater attention to disputes about citation and the nature of permissible legal authorities will yield greater insight not only into how law operates, but also into just what law is.