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Schrödinger's Dissent: The Hybrid Authority of a Dissenting Opinion

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SCHRÖDINGER'S DISSENT: THE HYBRID AUTHORITY OF A DISSENTING OPINION

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A dissenting opinion is the Schrödinger's cat of authorities: both the law and not the law simultaneously. Courts and scholars often clarify that a dissenting opinion is not binding. Outside the universe of precedent, that authority defies easy description. Emerging from the pen of a judge wearing a black robe and acting in an official capacity, a dissenting opinion exhibits the form of the law. Yet, beneath that lofty sheen, a dissent exhibits the substance of commentary. A dissenting judge writes to undercut the law, providing a case law coda. This Article describes the traditional categories of authority, primary and secondary, and argues that a dissenting opinion inhabits a hybrid category. As primary authority, a dissent enjoys the same rhetorical leeway as other opinions; as secondary authority, a dissent is an untethered critique of the law. Over the years, dissenting opinions from the Supreme Court provide enduring examples of a dissent's mix of primary and secondary authority.

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I. INTRODUCTION

"Can I cite a dissent?" a student asked me one morning in class.

I stood at the whiteboard explaining a writing assignment. As I shifted attention to the argument section of the paper, this student shot up her hand. My students are in their first year of law school, and legal research and writing are meticulous and exacting skills even for seasoned attorneys. So day one I teach the court structure, the difference between binding law and persuasive law as a matter of hierarchy, and the difference between primary authority—i.e., sources that are the law—and secondary authority—i.e., sources that are not the law. I assign hypothetical clients, situate a dispute in court, and toss my 1L students into the deep end of advocacy. At this point in the semester, the students were diligently researching on Westlaw and Lexis (and occasionally in the library) for applicable law.

"A dissent?" I asked. "You're in trial court."

Every lawyer knows that a *yes/no* question demands a *yes/no* answer. I did not provide one, and so began a lengthy back-and-forth. Half the class was assigned to write a motion to dismiss, the other half an opposition to the motion. By design, everyone faced a challenge. The law favored the movant, while the facts favored the opponent. My student with today's question had begun the semester in a funk. She represented the opponent and found legal research frustrating. But on this morning she was excited, having read a dissenting opinion that "makes my argument for me." I complimented her enthusiasm and research skills but counseled against devoting any space to dissents in her page-limited opposition. For this assignment, she should apply the law as it is, not as it should be.

The student pressed on.

"But it's perfect!"

I tacked toward encouragement.

"Sounds like a great opinion. Just don't use it now. Save it for a law review article."

She tapped her finger on the printed case opinion on her desk.

"I really want to cite it now."

Time for a direct answer.

"No. Don't cite the dissent."

"Why can't I cite the dissent?"

"Because the court wants to know the law."

"This *is* the law."

"The majority opinion is the law. That's binding."

Silence. I stressed the point.

"The dissent is not binding. I don't think a dissenting opinion is even the law."

A gratuitous wave of my hand accompanied that last line. Theatrics stopped the wheels spinning. The class hour was upon us, and I walked back to my office wondering about our colloquy. *Was I helpful? Motivating? Should I revisit the court structure next week? And, hang on, is a dissenting opinion the law or not?* As so often happens, a student's inquiry launched a profound analysis. And a throwaway line morphed into a thesis.

A dissenting opinion is the Schrödinger's cat of authorities: both the law and not the law simultaneously.[1] Emerging from the pen of a judge wearing a black robe and acting in an official capacity, a dissenting opinion exhibits the form of the law. Yet, beneath that lofty sheen, a dissent exhibits the substance of commentary. A dissenting judge opines on the case at hand for the inherent purpose of undercutting the law, providing a case law coda.

This Article describes the traditional categories of authority, primary and secondary, and identifies the writer as a distinguishing feature. The Article then describes various types of judicial opinions and argues that a dissenting opinion inhabits a hybrid category. With exceptional status comes exceptional opportunity. As primary authority, a dissent enjoys the same rhetorical leeway as any other opinion; as secondary authority, a dissent is an untethered critique of the law. Over the years, dissenting opinions from the Supreme Court provide enduring examples of a dissent's mix of primary and secondary authority.

1. *See* JIM AL-KHALILI, THE WORLD ACCORDING TO PHYSICS 133–35 (2020) ("[T]he cat . . . should exist in quantum superposition: a state of being both dead and alive simultaneously."); TKO Equip. Co. v. C & G Coal Co., 863 F.2d 541, 545 (7th Cir. 1988) (recounting Schrödinger's cat thought experiment and refusing to treat an agreement as neither a sale nor a lease while awaiting the "more favorable" characterization).

II. PRIMARY AUTHORITY AND SECONDARY AUTHORITY

A dissenting opinion, by definition, is contrary to the law.[2] The dissent "shows what is not the law."[3] In the blunt words of Justice Ruth Bader Ginsburg, "the majority got it wrong."[4] Supreme Court Justices have been pointing out the error of a majority's ways since the early years of the Republic, with Justice William Johnson booming a contrarian voice from the Marshall Court that shattered the Chief Justice's unanimous opinions.[5] Eloquent dissents strengthen the bench; "random dissents" weaken it.[6] Many nations have contended with judicial dissents, as opinions both secret and transparent, in their civil law and common law systems for centuries.[7] Yet, the nature of a dissent defies easy description.[8]

Courts and scholars often clarify that a dissenting opinion is not binding authority.[9] A dissent expresses a judge's view, to be sure, but leaves no imprint

2. *See* W. Fire Ins. Co. v. Moss, 298 N.E.2d 304, 312 (Ill. App. Ct. 1973) (noting that dissent "demonstrates precisely what is *not* the law in Illinois"); Valentini v. City of Adrian, 79 N.W.2d 885, 889 (Mich. 1956) ("[T]he principal effect of a minority dissenting opinion (if it has any effect) is to indicate what is *not* the law of the case."); United States v. Cincotta, 146 F. Supp. 61, 62 (N.D.N.Y. 1956) (refusing to rely on a dissent "for this Court must take the law as it is"); *see also* NEIL DUXBURY, THE INTRICACIES OF *DICTA* AND DISSENT, at xxiii, 232–50 (2021) ("[I]n the context of the case, dissenting judicial opinion is rejected legal reasoning . . . .").

3. State v. Batson, 93 S.E. 135, 135 (S.C. 1917) ("A justice dissents only when in his judgment the prevailing opinion is contrary to what the law has been.").

4. Ruth Bader Ginsburg, *R.B.G.'s Advice for Living*, N.Y. TIMES (Oct. 2, 2016), https://www.nytimes.com/2016/10/02/opinion/sunday/ruth-bader-ginsburgs-advice-for-living.html [https://perma.cc/EJ2P-DR9M].

5. *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 147 (1810) (Johnson, J., dissenting) (dissenting from majority opinion written by Chief Justice Marshall on grounds that "[i]t appears to me to bear strong evidence, upon the face of it, of being a mere feigned case"); *see also* Antonin Scalia, *Dissents*, OAH MAG. HIST., Fall 1998, at 18–19.

6. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 5–7 (2010) (referencing statements from Justices Scalia and Brandeis); Scalia, *supra* note 5, at 19.

7. *See* Ginsburg, *supra* note 6, at 2–3; DUXBURY, *supra* note 2, at 135–52.

8. *See* DUXBURY, *supra* note 2, at 5, 178–85, 232–50.

9. *See, e.g.*, Hale v. Comm. on Character & Fitness for Ill., 335 F.3d 678, 683 (7th Cir. 2003) (stating that "views expressed by dissenting judges or justices are not binding"); Roberts v. AT&T Mobility LLC, 877 F.3d 833, 839 (9th Cir. 2017) (stating that "distinction, drawn from a dissenting opinion, lacks binding legal authority"); Dulin v. Mansfield, 250 F. App'x 338, 340 (Fed. Cir. 2007) (stating that "dissenting opinions are not binding legal authority"); Lomack v. Scribner, No. 07cv17-L (WMc), 2008 WL 509244, at *4 (S.D. Cal. Feb. 21, 2008) (stating that "a dissenting opinion is not binding legal authority"); *see also* BRYAN A. GARNER, CARLOS BEA, REBECCA WHITE BERCH, NEIL M. GORSUCH, HARRIS L. HARTZ, NATHAN L. HECHT, BRETT M. KAVANAUGH, ALEX KOZINSKI,

of precedent.[10] Precedential value attaches to the majority opinion, which "can be used as support for later actions or decisions."[11] The term "precedent" implies similarity, "[s]omething of the same type that has occurred or existed before."[12] A dissent is something of a different type, both like and unlike a majority opinion. Later support is far from straightforward.[13] A dissenting opinion shares a deep commonality with secondary authority beneath its surface commonality with primary authority.

A. Hierarchies and More Hierarchies

The distinction between primary and secondary authority is taught as legal canon, a foundational concept that reflects our constitutional democracy. A first-year law student need not enroll in my class to learn on day one the nomenclature of primary authority as everything that is the law and secondary authority as everything that is not the law, all those "extra-judicial efforts at

SANDRA L. LYNCH, WILLIAM H. PRYOR JR., THOMAS M. REAVLEY, JEFFREY S. SUTTON & DIANE P. WOOD, THE LAW OF JUDICIAL PRECEDENT 192, 239–40 (2016) [hereinafter GARNER] (stating that "dissents oppose the outcome" but "may clarify what the majority is doing"); Alexandra V. Orlova, *The Soft Power of Dissent: The Impact of Dissenting Opinions from the Russian Constitutional Court*, 52 VAND. J. TRANSNAT'L L. 611, 613, 641–42 (2019) (arguing that "while judicial dissents are not binding, the true 'soft power' of judicial dissents comes from their ability to challenge the permanence of both law and consensus").

10. *See* United States v. Rice, No. 3:22-CR-36 JD, 2023 WL 2560836, at *5 n.7 (N.D. Ind. Mar. 17, 2023) ("Dissents are not binding precedent, and that fact does not change because their authors are elevated to the Supreme Court of the United States."); Purcell v. BankAtlantic Fin. Corp., 85 F.3d 1508, 1513 (11th Cir. 1996) (noting that "a dissenting Supreme Court opinion is not binding precedent" and does not tell how the majority would decide); United States v. Romain, 393 F.3d 63, 74 (1st Cir. 2004) (stating that a "dissenting opinion is, of course, not binding precedent"); Bilotti v. Fla. Dep't of Corr., No. 22-CV-62068-RAR, 2023 WL 3159301, at *3 (S.D. Fla. Apr. 29, 2023) (agreeing with reasoning from dissenting opinion while recognizing that "dissent is not binding precedent"); *see also* Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820, 878 (4th Cir. 1999) (stating that "views in dissent, of course, are not binding authority, any more than are [views] in concurrence"), *aff'd sub nom.* United States v. Morrison, 529 U.S. 598 (2000).

11. *Precedent*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see* United States v. Powell, 109 F. Supp. 2d 381, 383 (E.D. Pa. 2000) (stating that "only majority opinions have precedential value").

12. *Precedent*, BLACK'S LAW DICTIONARY (11th ed. 2019).

13. *See, e.g.*, Xu v. Weis, No. 2:22-CV-00118-TL, 2023 WL 2142683, at *5 (W.D. Wash. Feb. 21, 2023) (stating that a "dissenting opinion is non-binding but provides a cogent, persuasive analysis"); Sarbacher v. AmeriCold Realty Tr., No. 1:10-CV-429-BLW, 2011 WL 5520442, at *8 (D. Idaho Nov. 14, 2011) ("Obviously, a dissent has no precedential value, but this one is instructive . . . ."); City of Oneida v. Salazar, No. 508-CV-0648 LEK/GJD, 2009 WL 3055274, at *2 (N.D.N.Y. Sept. 21, 2009) ("This dissent, however, has no precedential value nor is it persuasive.").

legal exposition."[14] Hierarchy of authority is a standard component of the 1L curriculum in U.S. law schools.

A threshold lesson is that laws arise from various sources. As Chief Justice John Marshall explained in *Marbury v. Madison*, the "fundamental and paramount law of the land" must be the Constitution as expressing the "original and supreme will" of the people.[15] Breaking from the British monarchy and its divine right of kings, the Framers tapped the people as "the reservoir of all sovereignty" and, thus, the normative foundation of all laws.[16] Indeed, "the whole American fabric has been erected" on the proposition "[t]hat the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness."[17]

With popular sovereignty as its animating force, the Constitution declares itself the "supreme Law of the Land" and sits atop a hierarchy of laws.[18] Beneath the Constitution, common law is subordinate to statutory law. But with coequal branches of government, judges who issue the opinions that form common law are not subordinate to legislators who vote on the bills that become

14. W.M. Lile, *The Uses and Abuses of Secondary Authority*, 1 VA. L. REV. 604, 605 (1914); *see also* JILL BARTON & RACHEL H. SMITH, THE HANDBOOK FOR THE NEW LEGAL WRITER 21–31 (3d ed. 2023) ("The sources that make up the governing law are called 'primary' authorities. The sources that comment on the law are called 'secondary' sources."); Caroline L. Osborne, *A Research Tool Is Not Law: A Response to* Code Revision Commission v. Public.Resource.Org, Inc., 28 TEX. INTELL. PROP. L.J. 53, 61 (2019) ("Constitutions, judicial opinions, statutes, and regulations are the law and primary authorities. Everything else is considered secondary authority."); Mark Cooney, *What Judges Cite: A Study of Three Appellate Courts*, 50 STETSON L. REV. 1, 3 (2020) (tallying "citations to (1) the law (primary authority), (2) sources that explain the law and its application (secondary authority), (3) nontraditional sources . . . , and (4) 'other' traditional legal sources").

15. 5 U.S. (1 Cranch) 137, 176–77 (1803).

16. Code Revision Comm'n *ex rel.* Gen. Assembly of Ga. v. Public.Resource.Org, Inc., 906 F.3d 1229, 1232, 1240 (11th Cir. 2018), *aff'd sub nom.* Georgia v. Public.Resource.Org, Inc., 590 U.S. 255 (2020); *see also Public.Resource.Org, Inc.*, 590 U.S. at 281 (Thomas, J., dissenting) ("[U]nder the Constitution, sovereignty lies with the people, not a king."); Scalia, *supra* note 5, at 19 (arguing authority in a democracy "depends quite simply upon a grant of power from the people").

17. *Marbury*, 5 U.S. at 176; *see Code Revision Comm'n*, 906 F.3d at 1240.

18. U.S. CONST. art. VI, cl. 2; *see also Marbury*, 5 U.S. at 177; Hasanaj v. Detroit Pub. Schs. Cmty. Dist., 35 F.4th 437, 448 (6th Cir. 2022) (referencing "the basic hierarchy of substantive law (e.g., Constitution, statutes, regulations, common law)"); Carlos E. Gonzalez, *The Logic of Legal Conflict: The Perplexing Combination of Formalism and Anti-Formalism in Adjudication of Conflicting Legal Norms*, 80 OR. L. REV. 447, 455–56 (2001) ("[T]he legal system treats these four legal categories as comprising a stratified hierarchy. Constitutional norms occupy the highest strata, while statutory, administrative, and common law norms each occupy, in descending order, the remaining strata.").

statutory law.[19] As Chief Justice Marshall famously articulated in *Marbury v. Madison*, the power of judicial review is "the very essence of judicial duty."[20] Congress ultimately answers to the courts to enforce its limited and defined powers under Article I, as "[i]t is emphatically the province and duty of the judicial department to say what the law is."[21] Judicial review enables the judiciary—with its lower-tiered law—to check Congress—with its higher-tiered law—and declare a statute unconstitutional.[22]

Also beneath the Constitution, there are separate hierarchies for federal and state laws. The Framers established a system of dual sovereignty, such that "both the Federal government and the States wield sovereign powers."[23] States have their own constitutions as primary authority pinnacle, often granting rights beyond those enshrined in the Federal Constitution.[24] State constitutions reach into delicate political issues, for example, reproductive freedom and

19. *See Marbury*, 5 U.S. at 180.

20. *Id.* at 178.

21. *Id.* at 177; *see also* Bartlett v. Bowen, 816 F.2d 695, 710 (D.C. Cir. 1987) ("Judicial review has been with us since *Marbury v. Madison*, and no one has ever before suggested that it is discretionary on Congress' part."), *opinion reinstated on reconsideration sub nom.* Bartlett *ex rel.* Neuman v. Bowen, 824 F.2d 1240 (D.C. Cir. 1987).

22. *See* United States v. Windsor, 570 U.S. 744, 774 (2013) (finding the Defense of Marriage Act unconstitutional under Fifth Amendment); BARTON & SMITH, *supra* note 14, at 21–31. The judiciary also checks the executive branch. *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2368 (2023) (striking down President Biden's loan forgiveness program).

23. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1475 (2018); *see also* Lane Cnty. v. Oregon, 74 U.S. 71, 76 (1868) ("The people of the United States constitute one nation, under one government, and this government . . . is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence."); United States v. Lanza, 260 U.S. 377, 382 (1922) ("We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory."); Printz v. United States, 521 U.S. 899, 918–19 (1997) (quoting THE FEDERALIST NO. 39 (James Madison)) ("Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.'").

24. *See* Rucho v. Common Cause, 588 U.S. 684, 719 (2019) ("Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.").

gerrymandering.[25] And states are free to act until preempted.[26] At the point of conflict, the Supremacy Clause declares a winner: federal law.[27]

Wherever a primary authority falls on the hierarchies, it derives its force or power—in other words, its authority—from the Constitution, which expresses popular sovereignty.[28] Certain governmental officials are "empowered to speak with the force of law."[29] The Latin origin of "jurisdiction" stresses this power: to speak the law.[30] Any branch of government will suffice. For example, the President or a governor releases an executive order, Congress enacts a statute, or a judge writes a case opinion. The outcome is a rule or principle "officially imposed or accepted by the State,"[31] "the result of the actions of a public official engaged in the individual's law-making capacity."[32] As a secondary authority with devotees on the Supreme Court,[33] *Black's Law Dictionary* defines

25. *See, e.g.*, CAL. CONST. art. I, § 1.1 ("The state shall not deny or interfere with an individual's reproductive freedom in their most intimate decisions," including abortion and contraceptives); League of Women Voters of Fla. v. Detzner, 172 So. 3d 363, 369, 416 (Fla. 2015) (striking down congressional districting plan under Fair Districts Amendment to Florida Constitution).

26. *See* N.M. Pub. Regul. Comm'n v. Vonage Holdings Corp., 640 F. Supp. 2d 1359, 1364 (D.N.M. 2009) (stating that "[c]ourts interpret the preemption doctrine with a presumption against preemption" and describing three preemption situations: express, field, and conflict).

27. *See* Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008) ("Consistent with [the Supremacy Clause] . . . state laws that conflict with federal law are without effect.") (internal quotations omitted); Zimmerman v. Norfolk S. Corp., 706 F.3d 170, 176 (3d Cir. 2013) ("Under the Supremacy Clause, federal law trumps or preempts state law whenever the two are in conflict. Preemption can be express or implied—either way, the effect is the same: preemption renders the relevant state law invalid.").

28. *See* U.S. CONST. art. I, § 1 (vesting "[a]ll legislative Powers" in Congress); U.S. CONST. art. II § 1 (vesting "executive Power" in a President); U.S. CONST. art. III § 1 (vesting "judicial Power" in the courts); U.S. CONST. amend. X (reserving "to the States . . . or to the people" all powers not otherwise designated or prohibited); *see also* Printz v. United States, 521 U.S. 898, 918–19 (1997) (quoting THE FEDERALIST NO. 39 (James Madison)) (clarifying that the Tenth Amendment makes express the states' "residuary and inviolable sovereignty" implicit throughout the charter).

29. Georgia v. Public.Resource.Org, Inc., 590 U.S. 255, 259 (2020).

30. *See* THE FEDERALIST NO. 81 n.3 (Alexander Hamilton).

31. Lile, *supra* note 14, at 604; *see also* GARNER, *supra* note 9, at 796 (defining "law").

32. Osborne, *supra* note 14, at 61; *see also* Maureen Straub Kordesh, *Navigating the Dark Morass: A First-Year Student's Guide to the Library*, 19 CAMPBELL L. REV. 115, 116 (1996) ("A *primary* source is one which is created by one of the three branches of government while acting in its law-making capacity."); Shyamkrishna Balganesh, *Relying on Restatements*, 122 COLUM. L. REV. 2119, 2130 (2022) ("Primary authorities are always produced by institutions (or individuals) recognized by a legal system as vested with lawmaking power.").

33. *See, e.g.*, Turkiye Halk Bankasi A.S. v. United States, 598 U.S. 264, 273–74 (2023) (citing *Black's Law Dictionary* to define "litigant"); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 282, 387 (2022) (citing the 1979 edition of *Black's Law Dictionary* to define "necessary," while the dissenting opinion cites to the 2019 edition of *Black's Law Dictionary* to define "stare decisis").

"primary authority" as "[a]uthority that issues directly from a law-making body; legislation and the reports of litigated cases."[34]

B. Binding and Persuading

A specific primary authority may be binding or persuasive on a current question of law. As the adjectives indicate, binding law controls; persuasive law does not. The distinction is frequently a point of contention between opposing counsel. Binding law tends to be outcome determinative,[35] which favors the party that benefits from application of the law. (My students assigned to write a motion to dismiss know the feeling.) Across the courtroom, the party that does not benefit may argue that new facts or issues render the law inapplicable.[36] (My students assigned to write an opposition are experts.) The distinction is also a gateway from two dimensions—up and down the hierarchy of laws—into three—expanding the common law tier into a hierarchy of the federal and state court systems.

The Constitution constructs a hierarchy of courts as well as a hierarchy of laws, vesting the "judicial Power" in "one supreme Court" and any "inferior Courts" that Congress may establish.[37] A judge sitting on an inferior bench must follow applicable decisions from a superior court within the same jurisdiction.[38] Depending on the case, the judge may have to listen to a different sovereign.[39]

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34. *Primary Authority*, BLACK'S LAW DICTIONARY (11th ed. 2019).

35. Kordesh, *supra* note 32, at 118 (advising attorneys not to ignore mandatory authority "because those who make the law cannot ignore it"). *But see* Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1953 (2008) (clarifying that "[t]he existence of an authoritative reason is not inconsistent with there being other outweighing authoritative reasons or outweighing reasons of other kinds").

36. Scott v. United States, 890 F.3d 1239, 1257 (11th Cir. 2018) ("[W]e must follow the reasoning behind a prior holding if we cannot distinguish the facts or law of the case under consideration."); *see also* Henderson v. Collins, 262 F.3d 615, 623 (6th Cir. 2001); John Henry Merryman, *The Authority of Authority: What the California Supreme Court Cited in 1950*, 6 STAN. L. REV. 613, 620–21 (1954) ("[I]t is quite possible for a secondary authority to be *more* authoritative than primary authorities, since the judge has so much discretion in determining what is applicable to his case and how it is to be applied that he can, if he wishes to support a conclusion he has reached in the case, find that which supports it applicable and that which does not inapplicable.").

37. U.S. CONST. art. III, § 1.

38. "Jurisdiction" may refer to a court's power to exercise authority or to the geographic area over which a court exercises authority. *See Jurisdiction*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Binding Precedent*, BLACK'S LAW DICTIONARY (11th ed. 2019).

39. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (directing federal courts sitting in diversity to apply state substantive law); Felder v. Casey, 487 U.S. 131, 151 (1988) ("Thus, the very

In federal court, decisions from the highest state court control issues of state law.[40] In state court, decisions from the U.S. Supreme Court control issues of federal law.[41] The doctrine of stare decisis requires careful attention to precedent.

Stare decisis, a Latin phrase meaning "to stand by things decided,"[42] promotes stability and predictability.[43] People can order their lives with confidence that the law today will remain the law tomorrow.[44] The price of that confidence is legal rigidity. Stare decisis takes two forms: vertical and horizontal.[45] Vertical stare decisis imposes a rule of obedience. Inferior courts must follow case opinions that issue from a directly superior court.[46] On a question of federal law, for example, every U.S. district court must follow prior opinions from both the U.S. circuit court of appeals covering that district and the U.S. Supreme Court, regardless of the judge's take on the opinion's quality

notions of federalism upon which respondents rely dictate that the State's outcome-determinative law must give way when a party asserts a federal right in state court.").

40. *See* World Harvest Church, Inc. v. Guideone Mut. Ins. Co., 586 F.3d 950, 957 (11th Cir. 2009) ("When we address issues of state law, . . . we are bound by the decisions of the state supreme court."); King v. Ord. of United Com. Travelers of Am., 333 U.S. 153, 158 (1948) (clarifying that federal courts are bound by a state's intermediate appellate courts unless "persuasive evidence that the highest state court would rule otherwise"); West v. Am. Tel. & Tel. Co., 311 U.S. 223, 236–37 (1940).

41. *See* ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) (noting that state courts "possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law"); Lockhart v. Fretwell, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation."); Doe v. Pryor, 344 F.3d 1282, 1286 (11th Cir. 2003) ("The only federal court whose decisions bind state courts is the United States Supreme Court.").

42. *Stare Decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

43. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 387–88 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting); Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455–56 (2015).

44. *See Dobbs*, 597 U.S. at 387–88 (Breyer, Sotomayor & Kagan, JJ., dissenting); *Kimble*, 576 U.S. at 455–56.

45. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1416 n.5 (2020) (Kavanaugh, J., concurring) ("[T]he *stare decisis* issue in this case is one of horizontal *stare decisis*—that is, the respect that this Court owes to its own precedents and the circumstances under which this Court may appropriately overrule a precedent. By contrast, vertical *stare decisis* is absolute, as it must be in a hierarchical system with 'one supreme Court.' In other words, the state courts and the other federal courts have a constitutional obligation to follow a precedent of this Court unless and until it is overruled by this Court.") (internal citation omitted).

46. *See id.*

or correctness.[47] Similarly, every circuit court must follow prior opinions from the Supreme Court, again regardless of taste.[48] Perched on the top tier, the Supreme Court need not follow any prior opinions, not even its own.[49]

As one judge sitting on the U.S. Court of Appeals for the Fifth Circuit lamented, "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."[50] From his inferior vantage point, this judge's beliefs were of no moment: "Mindful . . . that the Constitution invests the Supreme Court with the final say, I defer to the Court's authority and concur in the majority opinion."[51] Years earlier, the same judge had expressed that the Supreme Court's decision on abortion rights in *Planned Parenthood of Southeastern Pennsylvania v. Casey* "causes me concern."[52] Again, no matter. Solely because the high court controls, "therefore, I concur."[53] Stable and predictable? Yes. Correct? Irrelevant.

Horizontal stare decisis is more flexible, a policy of "respect for the accumulated wisdom of judges who have previously tried to solve the same problem."[54] As Justice Louis D. Brandeis observed, "in most matters it is more important that the applicable rule of law be settled than that it be settled right."[55]

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47. *See* Manley v. Horsham Clinic, No. CIV. A. 00-4904, 2001 WL 894230, at *4 (E.D. Pa. Aug. 9, 2001); Brewster v. Cnty. of Shasta, 112 F. Supp. 2d 1185, 1191 (E.D. Cal. 2000) ("[A]s a general matter, this court must adhere to a holding of the Ninth Circuit until it is overruled. This obligation is not dependent on the correctness of the Circuit's decision."), *aff'd sub nom.* Brewster v. Shasta Cnty., 275 F.3d 803 (9th Cir. 2001).

48. *See* Henderson v. Collins, 262 F.3d 615, 623 (6th Cir. 2001) ("Where, as here, we are unable to perceive material distinctions between a decision of [the Supreme] Court and the case before us, we are obligated to defer to its lead regardless of our own inclinations.").

49. *See* Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 484 (1989) (admonishing lower courts to "leav[e] to this Court the prerogative of overruling its own decisions").

50. Causeway Med. Suite v. Ieyoub, 109 F.3d 1096, 1113 (5th Cir. 1997) (Garza, J., concurring specially), *overruled by* Okpalobi v. Foster, 244 F.3d 405 (5th Cir. 2001) (en banc).

51. *Id.*

52. Sojourner T v. Edwards, 974 F.2d 27, 31 (5th Cir. 1992) (Garza, J., concurring specially).

53. *Id.* at 32.

54. Ramos v. Louisiana, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring); *see also* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 262–65 (2022); Santiago Legarre & Christopher R. Handy, *Overruling Louisiana: Horizontal Stare Decisis and the Concept of Precedent*, 82 LA. L. REV. 41, 43–44, 56–57 (2021) ("Horizontal stare decisis is a softer, policy-laden question, closer to persuasive authority—a matter of 'respect.'").

55. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting), *overruled by* Helvering v. Bankline Oil Co., 303 U.S. 362 (1938), *and* Helvering v. Mountain

Most, but not all. When a court finds "special justification" to overrule a prior opinion from the same level, some justification over and above simple 20/20 hindsight that the opinion was wrong, it may do so.[56] Although the Supreme Court is not obligated to obey any case law, it tends to listen to itself.[57] One tier down, the thirteen federal circuits observe a zealous brand of horizontal stare decisis.[58] Circuits' approaches vary, but generally a panel is bound by "the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court."[59] At the bottom tier, federal district judges feel no such pull from prior trial court opinions, only from the top down.[60]

Deciphering all the hierarchies, every judge must take care to speak the correct law.

Producers Corp., 303 U.S. 376 (1938); *see also* Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015) ("[A]n argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent.").

56. *Ramos*, 140 S. Ct. at 1414–16 (Kavanaugh, J., concurring) ("But even when judges agree that a prior decision is wrong, they may disagree about whether the decision is so egregiously wrong as to justify an overruling."); Dickerson v. United States, 530 U.S. 428, 443 (2000) (finding no special justification to overrule *Miranda v. Arizona*).

57. *See* State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) ("We approach the reconsideration of decisions of this Court with the utmost caution.").

58. *See, e.g.*, Darrah v. City of Oak Park, 255 F.3d 301, 310 (6th Cir. 2001) ("[W]hen a later decision of this court conflicts with one of our prior published decisions, we are still bound by the holding of the earlier case."); Scott v. United States, 890 F.3d 1239, 1257 (11th Cir. 2018); Swipies v. Kofka, 419 F.3d 709, 714 (8th Cir. 2005). Some state intermediate appellate courts also follow strong horizontal stare decisis. *See, e.g.*, Cook v. Cook, 560 N.W.2d 246, 256 (Wis. 1997).

59. United States v. Hogan, 986 F.2d 1364, 1369 (11th Cir. 1993); *see also* Payne v. Taslimi, 998 F.3d 648, 654 (4th Cir. 2021) ("[W]hen a panel of our Court looks horizontally to our own precedents, we must apply their commands as a mechanical mandate."); United States v. Steele, 147 F.3d 1316, 1318 (11th Cir. 1998) (noting that "a panel cannot overrule a prior one's holding even though convinced it is wrong"); GARNER, *supra* note 9, at 491–94 (explaining law of the circuit and describing weaker versions in First, Second, Seventh, and D.C. Circuits). An intervening change in state law or statutory law generally overrides the prior panel's holding, as well. *See* World Harvest Church, Inc. v. Guideone Mut. Ins. Co., 586 F.3d 950, 957 (11th Cir. 2009); United States v. Guerrero, 19 F.4th 547, 552 (1st Cir. 2021).

60. *See, e.g.*, United States v. Articles of Drug Consisting of 203 Paper Bags, 818 F.2d 569, 572 (7th Cir. 1987) (stating that a district court opinion "is not binding on the circuit, or even on other district judges in the same district"); Yniguez v. Arizona, 939 F.2d 727, 736–37 (9th Cir. 1991) ("[A] decision of a single federal district judge . . . is not even binding on the same judge in a subsequent action . . . .").

C. The Simplicity of Everything Else

Let us take a breath after all those primary authority twists and turns. Thankfully, secondary authority is simpler. A three-dimensional inquiry into binding status—up and down and through a multidimensional hierarchy worthy of M.C. Escher[61]—is unnecessary. Secondary authority lies outside the tiers and constitutes everything else, that is, every source that is not the law.

Again following the lexical gold standard of *Black's Law Dictionary*, "secondary authority" is "[a]uthority that explains the law but does not itself establish it, such as a treatise, annotation, or law-review article."[62] Commentaries, explanations, and definitions all aid in democratizing and translating the law, serving as a Rosetta Stone for terms, rules, and principles that may read like industry jargon and do retain an astounding amount of Latin.[63] These outside resources are invaluable as interpretive tools; "[t]hey are to the lawyer what translations of the classics are to the student."[64] But they are not officially imposed or accepted by the state. Such resources are at best persuasive as a measure of the author's prestige and force of argument.[65] Because a secondary authority never legally binds, lawmakers may adopt or ignore its reasoning.[66] That's it. Their call.

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61. *See M.C. Escher—Life and Work*, NAT'L GALLERY OF ART, https://www.nga.gov/features/slideshows/mc-escher-life-and-work.html [https://perma.cc/Z32M-VTMD] (stating that the artist "explored complex architectural mazes involving perspectival games and the representation of impossible spaces").

62. *Secondary Authority*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* DUXBURY, *supra* note 2, at 5 (defining "secondary (or epistemic) authority" as "a source of legal information, opinion, and argument, but . . . not an actual source of law").

63. *See* Daniel E. Cummins, *'Tis the Season to Be Civil: Lessons from "A Christmas Story,"* PA. LAW., Nov./Dec. 2014, at 33 ("While the practice of law is filled with Latin terms and legalese, and while some lawyers think they are fancy people who have to use fancy words just because they have a law degree, no normal person would use 'heretofore' or 'aforementioned' in a spoken sentence.").

64. Lile, *supra* note 14, at 606.

65. *See* Code Revision Comm'n *ex rel.* Gen. Assembly of Ga. v. Public.Resource.Org, Inc., 906 F.3d 1229, 1251–52 (11th Cir. 2018) (assigning "no authoritative weight" to judge's speech off the bench), *aff'd sub nom.* Georgia v. Public.Resource.Org, Inc., 590 U.S. 255 (2020); Balganesh, *supra* note 32, at 2130 ("Secondary authority, by contrast, are sources that are neither imposed as binding nor accepted as such but instead derive their relevance to the decisionmaker from their content and persuasiveness."); Kordesh, *supra* note 32, at 117 (stating that "[i]f the resource is not a published case, a properly passed statute, or a properly promulgated regulation, it is almost certainly secondary authority," which is "defined as those resources that help us to understand what the law is").

66. *See* Produce Pay, Inc. v. Izguerra Produce, Inc., 39 F.4th 1158, 1160 n.1 (9th Cir. 2022) (acknowledging that "the dissent relies upon such secondary sources as a legal dictionary and treatises,

The simplicity of secondary authority may suggest a lack of worth compared to primary authority. Indeed, primary has been equated to "real authority" and secondary demoted to the second-class status of "so-called authority."[67] A stinging choice of words, to be sure. But the description is nonetheless accurate if "real" simply means "legal."[68] The distinction between primary and secondary authority lies not in the intellectual prowess of each resource, but in the source of normativity.

All primary authorities spring from the Constitution, which expresses the sovereignty of the people.[69] Accordingly, only officials acting with sovereign power can summon legal force with their words.[70] This prestigious pedigree creates laws that are binding all the way down, regardless of merit or demerit. As H.L.A. Hart wrote in his iconic book, *The Concept of Law*, any complaint that a Supreme Court opinion "was 'wrong' has no consequences within the system; no one's rights or duties are thereby altered."[71] The Article III court still spoke. Oppressive laws are still laws.[72] *The Concept of Law* put the point with heartbreaking clarity: A society "might be deplorably sheeplike; the sheep might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system."[73]

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indeed even [a] website," but "we recognize that such sources are hardly binding"). *But see* Schauer, *supra* note 35, at 1949 (arguing that "optional authorities" are used in a "genuinely authoritative fashion" and "in a manner that hovers between the authoritative and the substantive").

67. Lile, *supra* note 14, at 604–05; *see also* Peter Friedman, *What Is A Judicial Author?*, 62 MERCER L. REV. 519, 529 (2011) (noting that "[c]ourts . . . are not bound at all to any secondary authorities," so "the effectiveness of an argument is unlikely to be affected in any positive way by attributing the argument to a secondary source that lacks persuasive weight").

68. Lile, *supra* note 14, at 604–05; *see also id.* at 619 (warning against "the seductive influences of secondary authority").

69. *See Code Revision Comm'n*, 906 F.3d at 1232; *Public.Resource.Org, Inc.*, 590 U.S. at 281–82 (Thomas, J., dissenting).

70. *Public.Resource.Org, Inc.*, 590 U.S. at 259, 264–66. The officials may have help. *See, e.g.*, Trackwell v. U.S. Gov't, 472 F.3d 1242, 1247 (10th Cir. 2007) (recognizing that a court may delegate tasks to a clerk and "when a court clerk assists a court or a judge in the discharge of judicial functions, the clerk is considered the functional equivalent of the judge and enjoys derivative immunity").

71. H.L.A. HART, THE CONCEPT OF LAW 141 (3d ed. 2012).

72. *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 132 (David Campbell & Philip Thomas eds., 1998) (1832) ("The existence of law is one thing; its merit or demerit another."); Schauer, *supra* note 35, at 1939 ("[W]e 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.").

73. HART, *supra* note 71, at 117.

By contrast, secondary authority enjoys no aura of sovereignty, no power from ancestry, no rung on a good or bad legal ladder. Sources that are not the law depend on their insights and authors to win the hearts and minds of lawmakers.[74] Some succeed wildly. Marquee secondary authorities command long-term respect. William Blackstone's *Commentaries on the Laws of England* from the eighteenth century is a go-to treatise for originalist jurists.[75] *Restatements of the Law* and *Black's Law Dictionary* appear frequently in Supreme Court citations.[76] The *Federalist Papers* remain so influential that Justices have relied on their arguments and ideas repeatedly.[77] The compilation's "intrinsic merit entitles it to this high rank."[78]

Between primary and secondary authority, therefore, the writer is a distinguishing feature. Only a writer with a pen dipped in ink from the Constitution can create primary authority and bind regardless of intrinsic merit. A writer with a pen dipped in non-pedigreed ink must tap a reservoir of normativity other than the Constitution, creating secondary authority that strives to attract an audience. So far, so good. Now we must go further. A dissenting judge has a pen dipped in hybrid ink, writing an opinion that is both the law and not the law simultaneously.

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74. *See* Lile, *supra* note 14, at 606.

75. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 243 (2022) (relying on Blackstone's statement regarding "abortion of a quick child"); District of Columbia v. Heller, 554 U.S. 570, 582 (2008) (citing Blackstone for the history of the phrase "keep arms" in Second Amendment context).

76. *See, e.g.*, Twitter, Inc. v. Taamneh, 598 U.S. 471, 495–96 (2023) (citing *Restatement (Second) of Torts* for analysis of "helping" in commission of crime and *Restatement (Third) of Torts* for analysis of aiding and abetting); New York v. New Jersey, 598 U.S. 218, 224–25 (2023) (citing *Williston on Contracts* and *Restatement (Second) of Contracts* for analysis of contract that contemplates continuing performance); Sackett v. EPA, 598 U.S. 651, 671, 718–19 (2023) (majority opinion citing to the 1979 edition of *Black's Law Dictionary* to define "waters," and concurring opinion citing to the 1968, 1979, and 2019 editions of *Black's Law Dictionary* to define "adjacent" and "adjoining").

77. *See, e.g.*, Printz v. United States, 521 U.S. 898, 918–19 (1997); Charles W. Pierson, *The Federalist in the Supreme Court*, 33 YALE L.J. 728, 728–34 (1924); LA. STAT. ANN. § 17:268 (2021) (requiring study of the *Federalist Papers* in Louisiana high schools, following the Declaration of Independence as required study in elementary schools).

78. Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 418 (1821) ("The opinion of the *Federalist* has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth.").

III. DISSENTING OPINIONS AS HYBRID AUTHORITY

In the mid-1930s, physicist Erwin Schrödinger proposed the following scene to illustrate a "riddle" of quantum mechanics.[79] Imagine a cat is trapped in a box with a lethal device: a radioactive substance and a vial of poison.[80] If the substance decays, it emits a particle that breaks the vial and releases the poison.[81] The cat dies. If the substance does not decay, the vial does not break and the poison remains contained.[82] The cat lives. So long as the box remains sealed, the quantum world governs. The particle is a mixture of both emitted and not emitted at the same time, which means the cat is a mixture of both dead and alive at the same time.[83] The cat stays in this quantum superposition until we open the box and look inside.[84] We then observe the animal as dead or alive, "never in this limbo state."[85] Riddling, indeed.

The Schrödinger's cat thought experiment forces us to jettison comfortable notions of *either/or* and contemplate a blurred world of *both/and*.[86] (It may also motivate us to rescue the cat.[87]) That blurred world encompasses the law as well as physics. Dissenting opinions hover in a limbo state between primary and secondary authority. Given that observing inside the box reveals the fate of the cat, we do well to examine dissents more closely.

79. CARLO ROVELLI, HELGOLAND 53 (Erica Segre & Simon Carnell trans., 2020); *see* AL-KHALILI, *supra* note 1, at 133–34.

80. JOHN GRIBBIN, SIX IMPOSSIBLE THINGS: THE MYSTERY OF THE QUANTUM WORLD 32 (2019); AL-KHALILI, *supra* note 1, at 134.

81. AL-KHALILI, *supra* note 1, at 134.

82. *Id.*

83. *Id.* at 134–35; MICHIO KAKU, THE GOD EQUATION 69–70 (2021) ("The cat is neither dead nor alive but a mixture of both.").

84. *See* ROVELLI, *supra* note 79, at 45, 52–53 (explaining "[a] quantum superposition is when two contradictory properties are, in a certain sense, present together," and the thought experiment "is different from saying that *we do not know*" the cat's fate); GRIBBIN, *supra* note 80, at 31–32 (describing Copenhagen Interpretation of quantum world such that a particle "does not have a certain property—any property—until it is measured").

85. AL-KHALILI, *supra* note 1, at 135.

86. *See* GRIBBIN, *supra* note 80, at 46 (quoting Schrödinger that "unobserved nature" in quantum theory behaves as "a featureless jelly or plasma, all contours becoming blurred").

87. *See* ROVELLI, *supra* note 79, at 52–53 (describing the cat in the thought experiment as asleep or awake rather than dead or alive, as "I prefer not to play around with the death of a cat").

A. Opinions and More Opinions

Taking a page from the Supreme Court, we return to *Black's Law Dictionary* for guidance. Recall that primary authority "issues directly from a law-making body"[88] and that secondary authority "explains the law but does not itself establish it."[89] A dissenting opinion fits neither definition perfectly and both imperfectly.[90] The definition of a dissent is "[a]n opinion by one or more judges who disagree with the decision reached by the majority."[91] Accordingly, a dissenting opinion issues directly from a contrarian member of a lawmaking body, and it explains the law issued from the majority members of that same lawmaking body.

The sheen of primary authority is there. A dissenting judge wears a black robe and acts in an official capacity in adversary proceedings, directing his or her gaze down the bench.[92] The resulting opinion is something of a misfit toy among judicial opinions, a coda tacked on for the sole purpose of exposing weaknesses in the law expressed by the majority.[93] Recently, one federal appellate judge stretched the coda theme into the realm of fan fiction, packaging his dissent as a mock unanimous opinion.[94] Rather than calling out "the panel majority's and district court's myriad mistakes" in the traditional style of a

88. *Primary Authority*, BLACK'S LAW DICTIONARY (11th ed. 2019).

89. *Secondary Authority*, BLACK'S LAW DICTIONARY (11th ed. 2019).

90. *See* DUXBURY, *supra* note 2, at 232–33 ("To conceive of a judicial dissent as any kind of authority might seem strange, given that to dissent from a majority whose decision binds as precedent is, in effect, to find oneself out of step with—is essentially to challenge—an authority.").

91. *Dissenting Opinion*, BLACK'S LAW DICTIONARY (11th ed. 2019).

92. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 388 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) ("[T]he story goes, Chief Justice John Marshall donned a plain black robe when he swore the oath of office. That act personified an American tradition. Judges' personal preferences do not make law; rather, the law speaks through them."); Larry Buchanan & Matt Stevens, *The Portrait of Justice*, N.Y. TIMES (Oct. 7, 2022), https://www.nytimes.com/interactive/2022/10/07/arts/supreme-court-photo.html [https://perma.cc/D66G-KN4A] (quoting Justice Breyer in saying, "We wear black robes because we are speaking for the law, not for ourselves as individuals").

93. *See* People v. Scott, 593 N.E.2d 1328, 1352 (N.Y. 1992) (describing reliance on "a parade of readily distinguishable cases . . . , along with selective secondary authorities and dissenting opinions," thus situating dissents outside "distinguishable cases" and "secondary authorities"); DUXBURY, *supra* note 2, at 233 (stating that "judicial dissent makes for a peculiar species of persuasive authority"); *cf.* RUDOLPH THE RED-NOSED REINDEER (Rankin/Bass Animated Entertainment 1964) (depicting an island of misfit toys who hope to be delivered as Christmas gifts for children).

94. Murphy v. Nasser, 84 F.4th 288, 294 (5th Cir. 2023) (Smith, J., dissenting).

dissent, the judge attached "the Fifth Circuit panel opinion that should have been issued."[95] Points for creativity.

Back in the genre of legal nonfiction, the common law tier hosts several types of judicial opinions. All share the essential element of lawmaker authorship.[96] Dissenting opinions arise only on appeal, as additional judges sit to hear a case in each higher tribunal. Consider again the federal court system, which has the attraction and ease of uniformity throughout the country. In the vast majority of cases at the trial level, one district court judge presides.[97] A magistrate judge may handle certain proceedings, as well. Given the absence of inferior courts, the district court's decision is binding on only the parties before it.[98] By contrast, appellate courts issue decisions that can bind future parties.[99] At the intermediate appellate level, a three-judge panel sits in circuit court, allowing a one-judge dissent.[100] Or, as occasion demands, all judges on a circuit court may hear or rehear a case en banc.[101] In fact, the prospect of rehearing en banc may motivate an appellate judge to devote the time and energy to pen a dissent. One legal whisper is that a certain judge on the Eleventh Circuit writes dissents only after quietly securing votes for rehearing. Otherwise, why bother?[102] Finally, in the court of last resort, en banc proceedings are the norm.

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95. *Id.*

96. This Article does not offer an exhaustive typology of judicial opinions. For a thorough discussion, see GARNER, *supra* note 9, at 155–333.

97. *See Court Role and Structure*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/court-role-and-structure [https://perma.cc/SV4E-5AW9]; *see also* 28 U.S.C. § 2284(a) ("A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.").

98. *See* Camreta v. Greene, 563 U.S. 692, 712 n.9 (2011). By contrast, some state trial courts exercise both original and appellate jurisdiction. *See, e.g.*, FLA. CONST. art. V, § 5 (providing that "circuit courts shall have original jurisdiction not vested in the county courts, and jurisdiction of appeals when provided by general law").

99. *See supra* Section II.B.

100. *See Court Role and Structure*, *supra* note 97.

101. *See, e.g.*, Okpalobi v. Foster, 244 F.3d 405, 410 (5th Cir. 2001) (quoting FED. R. APP. P. 35(b)(1)) (stating that en banc review may "clarify the law when a 'panel decision conflicts with a decision of the United States Supreme Court' or the case 'involves one or more questions of exceptional importance'").

102. This same motivation may be behind the dissenting judge's fictional opinion in *Murphy v. Nasser*, as he claimed to attach his mock unanimous opinion "[i]n the interest of time." 84 F.4th 288, 294 (5th Cir. 2023).

All nine Justices on the Supreme Court hear nearly every case, allowing up to four dissenters.[103]

An appellate court speaks the law through its unanimity or majority, the simple mathematical victor after voting.[104] With apologies for more Latin (and more to come), seriatim opinions from individual judges are an abandoned relic of the King's Bench.[105] Since the beginning of the Marshall Court in 1801, the writer of a unanimous or majority opinion enjoys top billing but delivers "the opinion of the Court."[106] Or the writer is left unnamed, even for momentous decisions that deliver a presidency.[107] A per curiam opinion is exclusively "by the court," leaving all judges in the majority as ghost writer candidates.[108] By contrast to these institutional documents, a dissenting opinion issues from an individual judge or a handful of judges. The writer of a dissent lost the vote and delivers a separate opinion under his or her own name, expressly to oppose the court's decision.

Reflecting the different "weight of authority" between the court's (majority) voice and the dissenter's (minority) voice, *The Bluebook* requires that case citations include parenthetical information for any "proposition that is not the single, clear holding of a majority of the court."[109] This "single, clear holding of a majority" is the purest strain of primary authority from the judiciary. A court hears a case or controversy and answers the question posed

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103. Justices decide their own recusal. *See, e.g.*, Cheney v. U.S. Dist. Ct. for the D.C., 540 U.S. 1217, 1217 (2004) ("In accordance with its historic practice, the Court refers the motion to recuse in this case to Justice SCALIA.").

104. *See* Thurlow v. Waite-Phillips Co., 22 F.2d 781, 784 (8th Cir. 1927) (recognizing "[t]hat case was determined by a divided court of seven judges, three of whom dissented, but the fact of this close division in the court does not touch the binding effect of that decision as a statement of [state] law"); *see also* Scalia, *supra* note 5, at 19.

105. *See* William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 432–33 (1986); GARNER, *supra* note 9, at 183. For an example of a seriatim opinion, see Chisholm v. Georgia, 2 U.S. 419 (1793).

106. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 222 (2022); *see* GARNER, *supra* note 9, at 183.

107. *See* Bush v. Gore, 531 U.S. 98, 100 (2000) (per curiam); Adam Liptak, *As Supreme Court Weighs Election Cases, a New Life for* Bush v. Gore, N.Y. TIMES, https://www.nytimes.com/2020/10/28/us/supreme-court-bush-gore-kavanaugh.html [https://perma.cc/HU8S-BXDQ] (Nov. 5, 2020).

108. *Per Curiam*, BLACK'S LAW DICTIONARY (11th ed. 2019).

109. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.6, at 108 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020).

by the parties, offering a rationale anchored to that question.[110] The court's answer binds the present parties, and the answer binds or persuades future parties based on the intertwined hierarchies of laws and courts.

Almost. A court must take a further step for its opinion to achieve binding status beyond the current proceedings: publication. Even when ruling unanimously, the court may designate its opinion as "not for publication" in an official reporter.[111] This designation reflects whether the opinion would have any effect "under another fact situation,"[112] "would add to the body of law,"[113] or would "maintain[] a coherent, consistent and intelligible body of caselaw."[114] Whatever the court's reason for declining to publish, the upshot is the same: nonbinding status going forward.[115]

Attorneys still research and cite plenty of unpublished opinions.[116] They have little choice. District court decisions are persuasive by virtue of hierarchy,

110. Given the constitutional requirement of a "case" or "controversy," federal courts do not issue advisory opinions. *See* U.S. CONST. art. III, § 2; United Pub. Workers v. Mitchell, 330 U.S. 75, 89–90 (1947). By contrast, many state courts do issue advisory opinions. *See, e.g.*, *In re* Ops. of the Justs. to the Senate, 802 N.E.2d 565, 569 (Mass. 2004) (advisory opinion on constitutionality of civil unions for same-sex couples).

111. *See* FED. R. APP. P. 32.1(a); United States v. Austin, 426 F.3d 1266, 1274 (10th Cir. 2005) (allowing citation to an unpublished opinion that "has persuasive value with respect to a material issue in a case and would assist the court in its disposition"); Kordesh, *supra* note 32, at 128 ("[C]ommercial reporters are of such high quality that some jurisdictions have stopped publishing official reporters altogether and rely on commercial reporters as the *only* source of primary case authority."). As with other matters concerning their court systems, states decide their own publication rules. *See, e.g.*, *New York Official Reports*, L. REPORTING BUREAU, https://www.nycourts.gov/reporter/decisions.shtml [https://perma.cc/YNV8-8CSK] (explaining publication of all New York "state appellate court decisions and selected state trial court decisions, as well as Court of Appeals motion decisions").

112. Damyn v. Brierton, 833 F.2d 1454, 1455 (11th Cir. 1987).

113. Zach v. Centocor, Inc., 491 F. Supp. 2d 867, 869 (S.D. Iowa 2007).

114. Hart v. Massanari, 266 F.3d 1155, 1179 (9th Cir. 2001); *see also* 11TH CIR. CT. APP. R. 36-2, INTERNAL OPERATING P. 5 ("The unlimited proliferation of published opinions is undesirable because it tends to impair the development of the cohesive body of law.").

115. *In re* Naranjo, 768 F.3d 332, 344 n.15 (4th Cir. 2014) (stating that unpublished opinions are "of no precedential weight"); *see also* Smith v. Sch. Dist. of Phila., 158 F. Supp. 2d 599, 607 n.5 (E.D. Pa. 2001) (finding an unpublished opinion instructive even though disfavoring citations to unpublished opinions); United States v. Austin, 426 F.3d 1266, 1274 (10th Cir. 2005).

116. *See* FED. R. APP. P. 32.1(a) (providing that a court may not prohibit citation to unpublished federal opinions issued since January 1, 2007); Robert Timothy Reagan, *Citing Unpublished Federal Appellate Opinions Issued Before 2007*, 241 F.R.D. 328, 328 (2007) ("Unpublished opinions issued before 2007 may be cited to the courts if permitted by the courts' local rules."); Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Courts of Appeals*, 74 FORDHAM L. REV. 23, 42 (2005).

regardless of publication.[117] As attorneys cast a wider net for citations, the circuit courts of appeals frequently pass on publication.[118] In the three years prior to September 2023, for example, more than 86% of circuit court opinions were unpublished.[119] From the perspective of the bench, the "solemn judicial act" of writing law to bind "hundreds or thousands of litigants and potential litigants" for posterity is simply too much, "exacting and extremely time-consuming."[120] An unpublished disposition does not dim the impact on the parties before the court; one side wins, and the other loses.[121] But future parties are left swimming in persuasive opinions.[122]

With the option not to publish, federal appellate courts exercise a de facto discretionary review on the back end, akin to the Supreme Court's de jure discretionary review on the front end.[123] Most litigants seeking an audience

117. Manley v. Horsham Clinic, No. CIV. A. 00-4904, 2001 WL 894230, at *4 (E.D. Pa. Aug. 9, 2001) ("I am not bound by the holdings of my fellow district court judges, whose opinions are rendered no more or no less persuasive due to their status as 'published' or 'unpublished.'").

118. *See, e.g.*, 11TH CIR. CT. APP. R. 36-2 ("An opinion shall be unpublished unless a majority of the panel decides to publish it."); *Federal Court Decisions*, LIBR. OF CONGRESS, https://guides.loc.gov/case-law/federal-courts [https://perma.cc/D7U6-8D9N]; J. Lyn Entrikin, *Global Judicial Transparency Norms: A Peek Behind the Robes in A Whole New World-A Look at Global "Democratizing" Trends in Judicial Opinion-Issuing Practices*, 18 WASH. U. GLOB. STUD. L. REV. 55, 74–75 (2019) ("In every year since the practice began in the mid-1970s, the proportion of federal appellate court opinions designated 'not for publication' (and therefore nonprecedential) has grown, and rather dramatically.").

119. *See* U.S. CTS., U.S. COURTS OF APPEALS—TYPE OF OPINION OR ORDER FILED IN CASES TERMINATED ON THE MERITS, BY CIRCUIT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2023 (2023), https://www.uscourts.gov/sites/default/files/data_tables/jb_b12_0930.2023.pdf [https://perma.cc/4KFW-RPZS]; U.S. CTS., U.S. COURTS OF APPEALS—TYPE OF OPINION OR ORDER FILED IN CASES TERMINATED ON THE MERITS, BY CIRCUIT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2022 (2022), https://www.uscourts.gov/sites/default/files/data_tables/jb_b12_0930.2022.pdf [https://perma.cc/X4DF-QQ5M]; U.S. CTS., U.S. COURTS OF APPEALS—TYPE OF OPINION OR ORDER FILED IN CASES TERMINATED ON THE MERITS, BY CIRCUIT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2021 (2021), https://www.uscourts.gov/sites/default/files/data_tables/jb_b12_0930.2021.pdf [https://perma.cc/3A7G-LM5N] (all excluding data for the U.S. Court of Appeals for the Federal Circuit).

120. Hart v. Massanari, 266 F.3d 1155, 1177 (9th Cir. 2001).

121. *Id.* at 1178 ("An unpublished disposition is, more or less, a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the court's decision.").

122. *See* J W *ex rel.* Tammy Williams v. Birmingham Bd. of Educ., 904 F.3d 1248, 1260 n.1 (11th Cir. 2018) ("Unpublished cases, however, do not serve as binding precedent and cannot be relied upon to define clearly established law.").

123. *Hart*, 266 F.3d at 1177.

before the high court must file a petition for a writ of certiorari. The Supreme Court typically grants only 100 to 150 of the more than 7,000 petitions it receives each year.[124] Culling the case load early, the Supreme Court publishes all its subsequent opinions.[125]

Once published, an appellate opinion binds future parties litigating similar facts and issues in directly lower courts. Again, almost. Not every word in every victorious opinion expresses a majority's pristine holding. Case opinions often include dicta, or comments "in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding."[126] As peripheral and unnecessary, a passing statement "may not have received the full and careful consideration of the court that uttered it."[127] Though potentially illuminating, dicta are words from the majority that merely persuade.[128]

Outside the majority, a concurring opinion agrees with the case result but not the reasoning. Although a concurrence is persuasive rather than binding when viewed alongside a majority opinion,[129] the concurring judge still voted with the majority. At least, then, the result reflects his or her vote and the concurrence's reasoning supports that outcome. At most, in a plurality decision, the concurrence may articulate a position that constitutes the case holding. As the Supreme Court explained in *Marks v. United States*, the holding from "a fragmented Court . . . may be viewed as that position taken by those Members

124. *See United States Courts: Supreme Court Procedures*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 [https://perma.cc/5W2N-DXRH].

125. *See* SUP. CT. R. 41; 28 U.S.C. § 411. Despite their shared rarity, Supreme Court opinions vary in degree of "procedural regularity." William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 4–5 (2015). Cases on the so-called "shadow docket, . . . issue[d] without full briefing and oral argument," offer less "consistency and transparency." *Id.* at 4; Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 125 (2019); *see also* Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting) ("[T]his Court's shadow-docket decisionmaking . . . every day becomes more unreasoned, inconsistent, and impossible to defend.").

126. *In re* McDonald, 205 F.3d 606, 612 (3d Cir. 2000).

127. *Id.*; *see also* Cetacean Cmty. v. Bush, 386 F.3d 1169, 1173 (9th Cir. 2004).

128. *See* Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller, 957 F.2d 1575, 1578 (11th Cir. 1992) (explaining that a discussion in dicta "is neither the law of the case nor binding precedent"); Austin v. Wilkinson, 502 F. Supp. 2d 660, 671 (N.D. Ohio 2006) ("Through the principle of *stare decisis, ratio decidendi* (unlike *orbiter dicta*) constitutes binding precedent on lower courts.").

129. *See* Maryland v. Wilson, 519 U.S. 408, 412–13 (1997) (clarifying that neither dicta nor concurrence is binding).

who concurred in the judgments on the narrowest grounds."[130] If no narrow view serves as common denominator among the majority of votes, "there is then no law of the land."[131]

Dissents are a risky bet to fill the void.[132] A dissenting opinion inhabits its own land, not expressing the law but exposing its cracks. Many courts resist following dissents even from a splintered bench, discounting the dissenter's rationale when "trying to discern a governing holding from divided opinions."[133] The majority's reasoning may be left unsaid or drowning in dicta; multiple concurrences may be difficult to untangle; lower courts may resign themselves "to work with the authoritative sources that remain available to us."[134] No matter. The dissent lost the vote, and including a rejected rationale

130. Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)); *see also* United States v. Davis, 825 F.3d 1014, 1020 (9th Cir. 2016) (stating that "two main approaches have emerged" from *Marks*: "one focusing on the *reasoning* of the various opinions and the other on the ultimate *results*").

131. United States v. Alcan Aluminum Corp., 315 F.3d 179, 189 (2d Cir. 2003); *see also* Saleh v. Tillerson, 293 F. Supp. 3d 419, 426 (S.D.N.Y. 2018) ("[W]here no common rationale exists, the only binding aspect of such a splintered decision is its specific result, and the precedent is to be read only for its persuasive force.") (internal quotations and citation omitted).

132. United States v. Heron, 564 F.3d 879, 885 (7th Cir. 2009) (finding it "risky to assume . . . any particular rule of law" from a prior Supreme Court opinion, "since the plurality and dissent approaches garnered only four votes each").

133. Gibson v. Am. Cyanamid Co., 760 F.3d 600, 620 (7th Cir. 2014) ("It makes sense to exclude the dissenting opinions: by definition, the dissenters have disagreed with both the plurality and any concurring Justice on the outcome of the case, so by definition, the dissenters have disagreed with the plurality and the concurrence on *how* the governing standard applies . . . ."); *see also Heron*, 564 F.3d at 884; Lair v. Bullock, 697 F.3d 1200, 1205 (9th Cir. 2012); United States v. Robison, 505 F.3d 1208, 1221 (11th Cir. 2007). *But see* Michael L. Eber, Comment, *When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, 58 EMORY L.J. 207, 218, 248 (2008) (stating that the *Marks* rule "bars counting dissenting opinions" but arguing that "[w]hen a dissent forms a cross-cutting majority on a proposition of law, the dissent creates the law by signaling to lower court judges how a majority of Justices probably would resolve the issue"); Nina Varsava, *The Role of Dissents in the Formation of Precede*nt, 14 DUKE J. CONST. L. & PUB. POL'Y 285, 288–89 (2019) (arguing for a "dissent-inclusive view" of plurality opinions, such that "courts sometimes have an obligation to take dissenting material as binding").

134. *Heron*, 564 F.3d at 885; *see also Alcan Aluminum Corp.*, 315 F.3d at 189; Strange *ex rel.* Strange v. Islamic Republic of Iran, 964 F.3d 1190, 1197 (D.C. Cir. 2020) ("[T]he majority's silence does not transform the dissent's conclusion into a binding holding."); Chandler v. Florida, 449 U.S. 560, 571 (1981) (recognizing that where Justice Harlan provided the fifth vote in a plurality decision and "pointedly limited his concurrence," a "careful analysis of Justice Harlan's opinion is therefore fundamental to an understanding of the ultimate holding").

in the case holding would only generate confusion, certainly "not the way to make binding precedent."[135]

The universe of binding law, then, is a subset of words within a subset of unanimous, majority, and plurality opinions: found "not in what the court said, but in what the court decided."[136] From one extreme of a published case holding to the other extreme of a dissent, all statements arise from judges discharging their official lawmaking duty to decide a case or controversy. Accordingly, these statements satisfy the primary authority criterion of a writer with a pen dipped in constitutional ink. Yet, a different through-line stops just short of a dissent. A court's dicta, unpublished opinions, and concurrences may not control as law, but all strive for consistency with the law. Not so for the dissent. Whatever the court says, the dissent says the opposite. A dissenting judge slides to the end of the bench and strikes out alone, revealing the limits of lawmaker authorship to identify primary authority.[137]

B. Use the Force

The logic within the *Black's Law* definition of primary authority underscores a dissent's outsider status. Given that primary authority issues from a lawmaking body directly and exclusively, it follows that the existence of primary authority implies the existence of a lawmaking body. *If P then Q*. A lawmaking body is necessary to make the law. But this conditional does not mean that every word emerging from the lawmaking body constitutes the law. *If P then Q* does not equate to *If Q then P*. Necessity is not sufficiency. As a lawmaking body comprises individual lawmakers, the same logic holds. A judge can both sit as a lawmaker and not make the law.

The Supreme Court agrees. As the Court first explained in the nineteenth century[138] and recently reiterated in *Georgia v. Public.Resource.Org, Inc.*,

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135. *Gibson*, 760 F.3d at 620.

136. Lile, *supra* note 14, at 618.

137. *See* DUXBURY, *supra* note 2, at 215 (clarifying that judges value "the right to offer an individual opinion"); Brennan, *supra* note 105105105, at 437 ("[I]t would be a great mistake to confuse this unquestioned duty to obey and respect the law with an imagined obligation to subsume entirely one's own views of constitutional imperatives to the views of the majority."); CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1928) ("Dissenting opinions enable a judge to express his individuality.").

138. *See* Callaghan v. Myers, 128 U.S. 617, 647 (1888) (extending copyright protection to a court reporter who prepared a volume of law reports as "the result of his intellectual labor"); Banks v. Manchester, 128 U.S. 244, 253 (1888) (denying copyright protection to judges for "whatever work

"officials empowered to speak with the force of law" create works in the course of their official duties that carry the force of law and other works that lack the force of law.[139] In *Public.Resource.Org, Inc.*, the Court considered whether Copyright Act protection for "original works of authorship" extends to the annotations attached to Georgia's official statutes.[140] Analyzing the statutory term "author," the Court held that the protection does not apply.[141]

Under "the government edicts doctrine, officials empowered to speak with the force of law cannot be the authors of—and therefore cannot copyright—the works they create in the course of their official duties."[142] Full stop. All such work is exempt from copyright protection because its author is "vested with the authority to make and interpret the law," and this exemption "applies regardless of whether a given material carries the force of law."[143] Thus, Georgia's statutory annotations "authored by an arm of the legislature in the course of its official duties" are uncopyrightable, even though the annotations are "non-binding," "explanatory," and "supplementary."[144]

Public.Resource.Org, Inc. clarifies that lawmakers are not copyright authors, whether their official works constitute the law or not.[145] The annotations at issue performed quintessential secondary service, explaining and supplementing the primary authority of Georgia's statutes. Those annotations offered a "first-class" Rosetta Stone translation, illuminating unconstitutional statutes as "unenforceable relics" overstaying their welcome on the hierarchy.[146] Yet, the Supreme Court sidestepped the messy task of "attempting to catalog the materials that constitute 'the law'" in favor of a clear rule:

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they perform in their capacity as judges, and as well to the statements of cases and headnotes prepared by them as such, as to the opinions and decisions themselves"); Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 668 (1834) (stating the Court's unanimous view that "no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right").

139. Georgia v. Public.Resource.Org, Inc., 590 U.S. 255, 259, 263, 272 (2020). The opinion quotes the phrase "force of law" from the Compendium of U.S. Copyright Office Practices. *See id.* at 272. Circling back, the current edition of the Compendium now quotes the phrase from *Georgia v. Public.Resource.Org, Inc*. *See* COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.6(C)(2) (2021).

140. *Public.Resource.Org, Inc.*, 590 U.S. at 259.

141. *Id.* at 259, 263.

142. *Id.* at 259.

143. *Id.* at 263.

144. *Id.* at 259–60, 263–64.

145. *Id.* at 265.

146. *Id.* at 275.

"Because judges are vested with the authority to make and interpret the law, they cannot be the 'author' of the works they prepare 'in the discharge of their judicial duties.'"[147] The government edicts doctrine bans "officials responsible for creating the law from being considered the authors of *whatever work* they perform in their capacity as lawmakers."[148]

Although set in the world of copyright, the *Public.Resource.Org, Inc.* opinion reveals a general truth, with Supreme Court italics. The scope of a lawmaker's official work is wider than the scope of primary authority: *whatever work*.[149] Legislators in their capacity as lawmakers, "acting as legislators," write explanations and supplements.[150] Judges in their capacity as lawmakers, "acting as judges," write explanations and supplements, as well.[151] The Supreme Court long ago identified a syllabus and a headnote as such work, distinct from a ruling and lacking "the force of law."[152] The function of syllabi and headnotes may have shifted over time.[153] Even when written by judges back in the day, those sections stood outside the four corners of "the opinion or decision of the court."[154]

These days, syllabi and headnotes are tasked to others. For Supreme Court opinions, the Reporter of Decisions drafts the syllabus "for the convenience of the reader."[155] Headnotes lie within the province of editors at Westlaw and Lexis. Similar "editorial additions" may bookend statutes as well as case opinions.[156] Despite assembly by a congressional office, additions such as headings and pending titles are "not any part of a statute enacted by

147. *Id.* at 265 (quoting Banks v. Manchester, 128 U.S. 244, 253 (1888)); *see also* Brennan, *supra* note 105, at 435 (clarifying that courts do not "*declare* law" but "*derive* legal principles").

148. *Public.Resource.Org, Inc.*, 590 U.S. at 266 (internal quotations and brackets omitted).

149. *Id.*

150. *Id.*

151. *Id.* at 266 (quoting *Banks*, 128 U.S. at 253) ("Because these officials are generally empowered to make and interpret law, their 'whole work' is deemed part of the 'authentic exposition and interpretation of the law' . . . .").

152. *Banks*, 128 U.S. at 253; *Public.Resource.Org, Inc.*, 590 U.S. at 272.

153. *See Public.Resource.Org, Inc.*, 590 U.S. at 289 n.7 (Thomas, J., dissenting).

154. *Banks*, 128 U.S. at 251; *see also Public.Resource.Org, Inc.*, 590 U.S. at 265 ("This rule applies both to binding works (such as opinions) and to non-binding works (such as headnotes and syllabi).").

155. *See, e.g.*, *Public.Resource.Org, Inc.*, 590 U.S. at 255 n.* ("The syllabus constitutes no part of the opinion of the Court . . . ."); United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337 (1906).

156. United States v. Ehmer, 87 F.4th 1073, 1112 (9th Cir. 2023).

Congress."[157] Outside the words of the law, "they are entitled to no weight and provide no grounds for disregarding the clear statutory text."[158] Cues to rules, at best.[159]

Judges qua lawmakers still write plenty of words that lack the force of law. A concurring opinion states the law on a case result, but its rationale lacks potential force outside a plurality.[160] For that matter, the force is weak in all unpublished and trial court opinions, given their pinpoint mandates on the present parties and not beyond.[161] Perhaps a statement in dicta is better considered a compelling secondary authority, a passing remark with a sovereign touch, a *Federalist Paper* from the bench.[162] The court speaks alongside the law, but no one need listen. Not even unanimous opinions are chiseled in stone. Once overruled, a formerly binding opinion loses its legal force, similar to the relic of a statute that is repealed or ruled unconstitutional. The force may not be with you, always.

The question is close, suggesting a spectrum of authority rather than the crisp, traditional *either/or* of primary and secondary that 1L students learn in first-day lectures.[163] The close question also shines a spotlight on dissents. If

157. *Id.*

158. *Id.*

159. *See* Yates v. United States, 574 U.S. 528, 540 (2015) (noting that while statutory section "headings are not commanding, they supply cues" of Congress' intent).

160. *Compare Public.Resource.Org, Inc.*, 590 U.S. at 273 ("[C]oncurrences and dissents . . . carry no legal force."), *with* United States v. Lipscomb, 66 F.4th 604, 612 n.11 (5th Cir. 2023) (citing "Justice Breyer's controlling concurrence" under the *Marks* rule).

161. *See, e.g.*, United States v. Articles of Drug Consisting of 203 Paper Bags, 818 F.2d 569, 572 (7th Cir. 1987); Yniguez v. Arizona, 939 F.2d 727, 736–37 (9th Cir. 1991); Kordesh, *supra* note 32, at 117 ("[A] published judicial opinion is 'primary' authority but an unpublished opinion is not—usually.").

162. *See* DUXBURY, *supra* note 2, at 5 (describing *obiter dicta* as secondary authority outside "the lawmaking power of judges"); Lile, *supra* note 14, at 605, 618 (describing *obiter dicta* as secondary authority, "extra-judicial expressions" akin to textbooks, encyclopedias, editorial annotations, and digests).

163. *See* Amy J. Griffin, *Dethroning the Hierarchy of Authority*, 97 OR. L. REV. 51, 63–76, 88–89 (2018) (arguing that weight of authority falls on a continuum or spectrum and proposing "a holistic, pluralistic view"); Schauer, *supra* note 35, at 1952, 1953 (arguing 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 that an authoritative instruction need not be "absolute or determinative"); Balganesh, *supra* note 322, at 2132 (describing *Restatements* as sitting "uncomfortably between the categories of primary and secondary authority"); Cooney, *supra* note 14, at 5 (including legislative history in "'other' sources that are undeniably legal in nature but that defy neat primary- or secondary-

authority blends across a spectrum, then a dissenting opinion occupies a particular nexus: where opinion is nothing but explanation, where explanation morphs into critique, and where a lawmaker untethers from the law.[164]

Court remains in session. Like their brethren on the bench, dissenting judges are "officials empowered to speak with the force of law" who, "in the course of their official duties," write a case opinion.[165] Also like their brethren, dissenting judges write words in those opinions that lack the force of law. Comments in a dissenting opinion "are just that: comments in a dissenting opinion."[166] But only a dissenting judge writes an opinion with the inherent purpose of undercutting the law, disagreeing with majorities, concurrences, pluralities, and passing statements alike.

A dissent is the one judicial opinion that, *by definition*, is inconsistent with the law.[167] Granted, the inconsistency may burn off over time, as a dissent's rationale wins adherents in a later majority.[168] Recalling H.L.A. Hart, a complaint that a high court opinion was "'wrong' has no consequences within the system" and alters "no one's rights or duties."[169] True. For now. Such complaints may have consequences and alter rights or duties in the future.[170] Justice Oliver Wendell Holmes, Jr.'s dissenting opinion in *Lochner v. New York*

source categorization"); Schiltz, *supra* note 116, at 42 (recalling comment that federal appellate opinion "will not be treated as a law review article or newspaper column, no matter how many admonitions from the appellate court that its unpublished opinions have no precedential authority"); DUXBURY, *supra* note 2, at 98, 232 (noting that dicta "might do the work of a primary legal source" and distinguishing "merely *dicta*" from "weighty *dicta*").

164. *See* DUXBURY, *supra* note 2, at 239–41 (describing English judges' reliance on dissents as secondary sources).

165. Georgia v. Public.Resource.Org, Inc., 590 U.S. 255, 259 (2020).

166. *Id.* at 273 (quoting U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 177 n.10 (1980)).

167. *See* Gibson v. Am. Cyanamid Co., 760 F.3d 600, 620 (7th Cir. 2014); State v. Batson, 93 S.E. 135, 135 (S.C. 1917); Liberty/Sanibel II Ltd. P'ship *ex rel.* Gen. Partner, LRE Properties, Inc. v. Gettys Grp., Inc., No. 2:06-CV-16FTM29SPC, 2007 WL 1109274, at *1 (M.D. Fla. Apr. 12, 2007) ("[A] district court cannot follow a dissenting opinion.").

168. *See* HUGHES, *supra* note 1377, at 68; Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 288 (1998) (describing dissents that became canonical when redeemed by later courts and arguing "that the most important element of a redeemed dissent is its holding and that those holdings are retrospectively created"); Adam Liptak, *In Her First Term, Justice Ketanji Brown Jackson 'Came to Play*,*'* N.Y. TIMES (July 7, 2023), https://www.nytimes.com/2023/07/07/us/supreme-court-ketanji-brown-jackson.html [https://perma.cc/B6EF-BK2D] (quoting Professor Melissa Murray that Justice Ketanji Brown Jackson is writing her dissents "for the public and for a future where she may not always be in the dissent").

169. *See* HART, *supra* note 71, at 141; Scalia, *supra* note 5, at 20.

170. *See* Hunter Smith, *Personal and Official Authority: Turn-of-the-Century Lawyers and the Dissenting Opinion*, 24 YALE J.L. & HUMAN. 507, 532–33 (2012).

famously outshines the majority's now "radioactive" decision.[171] Feeling that every loss "truly traumatizes" her, Justice Sonia Sotomayor writes her dissents expressly "for the future, and probably for a different culture."[172] Undercutting may transform into underpinning. Until then, conflict is baked into the structure of the opinion de jure and de facto. Not only does a dissent never bind, it tries to chip away at the common law rung.[173]

Unlike the mixed state of Schrödinger's cat, the mixed state of authority persists after observation. Or the box is jammed shut. Remaining in limbo, and following the Supreme Court's analysis in *Georgia v. Public.Resource.Org, Inc.*, a dissenting opinion flips the Latin origin of "jurisdiction" on its head: to speak *not the law* in the course of official duties as a lawmaker. That hybrid authority—with a primary black robe layered over a secondary message—opens opportunities.

IV. DISSENTING OPINION AS OPPORTUNITY

Returning to our ever-patient cat, one interpretation of Schrödinger's thought experiment adopts a "relational perspective."[174] Facts are not absolute but relative.[175] Entities "do not exist in splendid isolation" but exhibit properties through interactions.[176] Specifically, "a fact might be real with respect to you and not real with respect to me."[177] Imagine yourself as the cat trapped inside the box. (This ask will sound familiar to anyone who watched the Marvel movie

171. Lochner v. New York, 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting); James B. Stewart, *Did the Supreme Court Open the Door to Reviving One of Its Worst Decisions?*, N.Y. TIMES, https://www.nytimes.com/2022/07/02/business/scotus-lochner-v-new-york.html [https://perma.cc/6ALV-N2QB] (July 5, 2022) (quoting Professor Laurence Tribe).

172. Bob Egelko, *'Every Loss Truly Traumatizes Me,' Sotomayor Says at UC Berkeley of Life in SCOTUS Minority*, S.F. CHRONICLE (Jan. 29, 2024), https://www.sfchronicle.com/politics/article/sonia-sotomayor-uc-berkeley-18636070.php [https://perma.cc/6ESB-R733].

173. *See* United States v. Smith, 240 F.3d 927, 930 n.7 (11th Cir. 2001) (stating that while "dissents do not lessen the binding effect" of prior opinion, "this lack of unanimity supports our conclusion that the district court's acts were not so extremely bad to threaten the fairness, integrity, and public reputation of the judicial system").

174. ROVELLI, *supra* note 79, at 81. Physicists have also proposed the "many worlds interpretation of quantum mechanics," where two parallel realities exist, one with a dead cat and one with a living cat. AL-KHALILI, *supra* note 1, at 136; *see also* KAKU, *supra* note 83, at 70 (noting the current popularity of many worlds interpretation where the universe splits in half).

175. ROVELLI, *supra* note 79, at 81.

176. *Id.* at 75, 81.

177. *Id.* at 81.

Ant-Man and the Wasp: Quantumania.[178]) For you, the poison is released or not, and you are either dead or alive. For me, outside the box, you are in a quantum superposition of both dead and alive simultaneously. Both are true "with respect to distinct observers—you and me."[179]

Similarly, a dissenting opinion might be primary authority with respect to one observer and secondary authority with respect to a different observer. Perspective matters. So is a dissent the law or not? Given that this entire inquiry stemmed from a student's question in class, it is appropriate that the answer is typical of law school: It depends.

A. Dissenting from the High Bench

Supreme Court dissents are illustrative. Recall the Supreme Court decision that so vexed our Fifth Circuit judge, forced by vertical stare decisis to obey what he viewed as an unconstitutional rule in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[180] *Casey* belongs to a high-profile series of abortion rulings from the Supreme Court, beginning with *Roe v. Wade*[181] in 1973 and culminating nearly five decades later with a reversal in *Dobbs v. Jackson Women's Health Organization* in 2022.[182]

In *Roe v. Wade*, the Supreme Court examined Texas's criminal abortion statutes in the context of "the sensitive and emotional nature of the . . . controversy."[183] At the time, Texas law prohibited abortion at any stage of pregnancy except "for the purpose of saving the life of the mother."[184] Finding "the roots" of a right to privacy in constitutional amendments,[185] notably the Fourteenth Amendment's Due Process Clause, the Court accepted that "[t]his right of privacy . . . is broad enough to encompass a woman's

178. ANT-MAN AND THE WASP: QUANTUMANIA (Marvel Studios 2023) (M.O.D.O.K. to Scott Lang) ("You're inside Schrödinger's box. And you're the cat.").

179. ROVELLI, *supra* note 79, at 81.

180. *See* Sojourner T v. Edwards, 974 F.2d 27, 31 (5th Cir. 1992) (Garza, J., concurring specially).

181. Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

182. *Dobbs*, 597 U.S. 215 (2022). This series also includes, for example, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (subsequently overruled by *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)).

183. *Roe*, 410 U.S. at 116.

184. *Id.* at 118–19.

185. *Id.* at 152.

decision whether or not to terminate her pregnancy."[186] The woman's decision must be balanced, however, against the State's "important and legitimate interest in potential life."[187] In the first trimester of pregnancy, the State must leave abortion largely unregulated.[188] In the second trimester, the State may regulate abortion to protect maternal health.[189] In the third trimester, after fetal viability, the State may prohibit abortion except to save a woman's life or health.[190] Applying this framework, the Court struck down the sweeping Texas statutes as unconstitutional.[191]

Just shy of twenty years later, in 1992, the Supreme Court revisited state abortion laws as a question of liberty in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[192] There, the Court examined the requirements of the Pennsylvania Abortion Control Act, including informed consent, a twenty-four-hour waiting period, one-parent consent for a minor, and spousal notification, all with a "medical emergency" exemption.[193] The Court reaffirmed *Roe*'s "essential holding" under the Fourteenth Amendment, recognizing "[t]he woman's right to terminate her pregnancy before viability" as "a component of liberty we cannot renounce."[194] Rejecting the "rigid trimester framework" from *Roe*, a plurality of Justices adopted an undue burden analysis as replacement and secured enough support for a holding under the *Marks* rule.[195] Informed

186. *Id.* at 153; *see also id.* at 164.

187. *Id.* at 163.

188. *Id.*

189. *Id.* at 163–64.

190. *Id.*

191. *Id.* at 164.

192. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 843, 846 (1992) (plurality), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

193. *Id.* at 844 (providing a judicial bypass option for parental consent and requiring certain recordkeeping and reporting by abortion facilities).

194. *Id.* at 846, 871 (noting that later cases interpreted *Roe* to require strict scrutiny).

195. *Id.* at 873–74 ("Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause."); *see also* Stenberg v. Carhart, 530 U.S. 914, 952 (2000) (Rehnquist, C.J., dissenting) ("Despite my disagreement with the opinion, under the rule laid down in *Marks v. United States* . . . , the *Casey* joint opinion represents the holding of the Court in that case."); Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908, 922 n.11 (9th Cir. 2004) ("Although the undue burden test was endorsed by only three justices, as the narrowest ground for the Court's holding it is as binding on the lower courts as would be a majority opinion.").

consent, a waiting period, parental consent, and the medical emergency definition did not impose an undue burden, but spousal notification did.[196]

The passage of thirty more years ushered a conservative supermajority into the abortion debate.[197] In 2022, the Supreme Court decided *Dobbs v. Jackson Women's Health Organization* and overruled both *Roe* and *Casey*.[198] Again situating its ruling in "a profound moral" setting, the Court examined Mississippi's Gestational Age Act that banned most abortions after fifteen weeks of pregnancy, that is, several weeks before viability.[199] Disparaging *Roe* as "egregiously wrong," "exceptionally weak," and "damaging," and dismissing *Casey* as "skipping over" constitutional questions on the altar of horizontal stare decisis, the Court trained a new lens on the purported right to abortion.[200] Such right is not written in the Constitution nor "deeply rooted in this Nation's history and tradition" nor implicit in ordered liberty.[201] State abortion laws are subject to rational-basis review like any "other health and welfare laws."[202] With "a strong presumption of validity" and an expression of "legitimate state interests" in "prenatal life at all stages of development," the Mississippi statute easily passed muster.[203]

As shifting majorities on the Supreme Court issued these landmark decisions, minorities dissented. *Casey* and *Dobbs*, in particular, concluded with vehement dissenting opinions. In an earlier day, Justice William H. Rehnquist's dissent in *Roe* opened on a genteel note that borders on anachronistic, expressing his "respect" for the majority's "extensive historical fact and a wealth of legal scholarship."[204] In *Casey*, by contrast, Justice Antonin Scalia dissented to the upholding of *Roe* by digging in his heels, announcing in the

196. *Casey*, 505 U.S. at 883, 885, 886, 895, 902 (finding reporting requirements did not impose an undue burden).

197. *See* Adam Liptak, *Court's Term Was Its Most Conservative Since 1931*, N.Y. TIMES, July 2, 2022, at A1, https://static01.nyt.com/images/2022/07/02/nytfrontpage/scan.pdf [https://perma.cc/9AEZ-TD8F].

198. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 292 (2022).

199. *Id.* at 233.

200. *Id.* at 234.

201. *Id.* at 231, 238, 239, 260, 298 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

202. *Id.* at 301.

203. *Id.* (listing interests in maternal health and safety, medical procedures, the medical profession, fetal pain, and discrimination).

204. Roe v. Wade, 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting).

first sentence that his view on abortion rights remains "unchanged."[205] Justice Scalia was "sure" that abortion is not a constitutional right, excoriating the majority's arguments as "outrageous."[206] The plurality had engaged in "a verbal shell game" to disguise its "raw judicial policy choices."[207] An undue burden analysis is "ultimately standardless," the power play of an "Imperial Judiciary" that makes "*value judgments*" rather than divines "our society's traditional understanding" of constitutional text.[208] (All capital letters and italics in original.) The plurality's view was all the more "frightening" as a stand against public disapproval.[209] Sitting on the U.S. Court of Appeals for the Fifth Circuit, one judge agreed wholeheartedly but, like Justice Scalia, could not change the law.[210]

In their dissenting opinion in *Dobbs*, Justices Stephen G. Breyer, Sonia Sotomayor, and Elena Kagan sounded a similar power theme. The majority reversed *Roe* and *Casey* simply because it could.[211] Abortion stood as a constitutional right for nearly fifty years, and the only new factor was "the composition of this Court."[212] The Justices chastised the majority for diminishing women's "status as free and equal citizens" and taking a "cavalier" approach to stare decisis, without any "good reason for the upheaval in law and society it sets off."[213] The Justices also foreshadowed a bleak future for "other settled freedoms," finding cold comfort in the majority's assurance "not to worry."[214] Doubting that "this majority is done with its work," the Justices predicted that the "deeply rooted in history" rationale tolls a death knell for

205. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part); *see also* Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 520 (1990) (Scalia, J., concurring); Webster v. Reprod. Health Servs., 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in the judgment).

206. *Casey*, 505 U.S. at 980–81.

207. *Id.* at 987.

208. *Id.* at 987, 996, 1000.

209. *Id.* at 998.

210. *See* Sojourner T v. Edwards, 974 F.2d 27, 31 (5th Cir. 1992) (Garza, J., concurring specially); Causeway Med. Suite v. Ieyoub, 109 F.3d 1096, 1114 (5th Cir. 1997) (Garza, J., concurring specially), *overruled by* Okpalobi v. Foster, 244 F.3d 405 (5th Cir. 2001) (en banc).

211. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 364, 414 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (quoting Payne v. Tennessee, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting)) ("Today, the proclivities of individuals rule," where "[p]ower, not reason, is the new currency of this Court's decisionmaking.").

212. *Id.* at 364 (Breyer, Sotomayor & Kagan, JJ., dissenting).

213. *Id.* at 363–64 (Breyer, Sotomayor & Kagan, JJ., dissenting).

214. *Id.* at 362, 382 (Breyer, Sotomayor & Kagan, JJ., dissenting).

protections over "bodily integrity, familial relationships, and procreation."[215] The Jenga tower wobbles, as eager litigants will keep "ginning up new legal challenges" for this "conservative Court."[216] For now, the abortion opinion is "catastrophic enough."[217]

Sensitive and emotional, indeed. As words fly, the hybrid nature of a dissenting opinion provides cover. From different angles, the dissents in *Casey* and *Dobbs* claim the protections of both primary and secondary authority. It all depends on one's vantage point, from inside or outside the box.

B. Words and More Words

First look from the outside in, as the reader. From the perspective of restraining the words in a dissent, the opinion is primary authority. A dissent enjoys the same rhetorical leeway as other judicial opinions, all stapled together and boasting the constitutional seal of popular sovereignty.

The Code of Conduct for United States Judges underscores the sanctity of judicial writing.[218] Adopted by the Judicial Conference of the United States in 1973, the Code contains five canons designed to preserve both the "actual and apparent integrity of the federal judiciary."[219] Official duties have pride of place, "tak[ing] precedence over all other activities."[220] For example, Canon 3A(6) specifies that a "judge should avoid public comment on the merits of a pending or impending action."[221] "Pending" covers cases in all courts through all appeals; "impending" starts the clock "even before a case enters the court system, when there is reason to believe a case may be filed."[222] But the Canon

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215. *Id.* at 362 (Breyer, Sotomayor & Kagan, JJ., dissenting).

216. *Id.* at 414 (Breyer, Sotomayor & Kagan, JJ., dissenting).

217. *Id.* at 386 (Breyer, Sotomayor & Kagan, JJ., dissenting).

218. *Code of Conduct for United States Judges*, 175 F.R.D. 363, 363 (1998).

219. United States v. Microsoft Corp., 253 F.3d 34, 111 (D.C. Cir. 2001); *see also* United States v. Ciavarella, 716 F.3d 705, 718 (3d Cir. 2013). States have their own judicial ethics codes. *See, e.g.*, Tracey Tully, *Judge Investigated Over His Profane TikTok Videos*, N.Y. TIMES (July 3, 2023), https://www.nytimes.com/2023/07/03/nyregion/new-jersey-judge-gary-wilcox-tiktok.html [https://perma.cc/SZX8-Z37X] (describing New Jersey ethics complaint against state judge for TikTok videos of himself lip-syncing rap song lyrics).

220. *Code of Conduct for United States Judges*, *supra* note 218, at 367.

221. *Id.*

222. *Id.*; *Microsoft Corp.*, 253 F.3d at 111–12; *see also In re* Charges of Judicial Misconduct, 769 F.3d 762, 788–89 (D.C. Cir. 2014) (noting the lack of definition for "pending" or "impending"); Raymond J. McKoski, *The Refusal of Supreme Court Nominees to Discuss Legal, Political, and Social Issues at Senate Confirmation Hearings: Ethical Obligation or Survival Strategy?*, 73 S.C. L. REV. 27, 50 (2021).

excludes "public statements made in the course of the judge's official duties," as well as "explanations of court procedures" and "scholarly presentations."[223] Canon 4 then clarifies that scholarship and other extrajudicial activities must not "detract from the dignity" of the office nor interfere with job performance.[224] Judicial duties come first. Indeed, the Supreme Court long ago recognized absolute immunity for judicial acts, "insulating judges from vexatious actions prosecuted by disgruntled litigants."[225]

By its terms, the Code of Conduct for United States Judges applies only to federal judges beneath the Supreme Court.[226] Facing embarrassment from ethics lapses and congressional threats of ethics legislation,[227] the Supreme Court recently joined the conversation. On November 13, 2023, the Court promulgated its own Code of Conduct, "substantially derived from the Code of Conduct for United States Judges."[228] Again, official duties benefit from a carveout. The Supreme Court's Canon 3A mirrors federal court Canon 3A(6): "A Justice should not knowingly make a public comment on the merits of a matter pending or impending in any court."[229] This prohibition excludes "public statements made in the course of the Justice's official duties," as well as

223. *Code of Conduct for United States Judges*, *supra* note 218, at 367; *see also* White v. Nat'l Football League, 585 F.3d 1129, 1140 (8th Cir. 2009) (preferring the broad view of "Canon's prohibition on public comment"). The American Bar Association's Model Code of Judicial Conduct includes similar language. *See* MODEL CODE OF JUD. CONDUCT r. 2.10 (AM. BAR ASS'N 2020) ("A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court," but "may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity.").

224. *Code of Conduct for United States Judges*, *supra* note 218, at 372.

225. Forrester v. White, 484 U.S. 219, 225 (1988); *see also* Bradley v. Fisher, 80 U.S. 335, 351 (1871); Randall v. Brigham, 74 U.S. 523, 535 (1868).

226. *Code of Conduct for United States Judges*, *supra* note 218, at 363.

227. *See* Lawrence Hurley, *Supreme Court Adopts Code of Conduct Amid Ethics Scrutiny*, NBC NEWS, https://www.nbcnews.com/politics/supreme-court/supreme-court-code-of-conduct-rcna124951 [https://perma.cc/C3LA-23PW] (Nov. 13, 2023, 3:57 PM); Sahil Kapur & Frank Thorp V, *Senate Democrats Announce Vote To Advance Supreme Court Ethics Bill*, NBC NEWS (July 10, 2023, 3:55 PM), https://www.nbcnews.com/politics/supreme-court/senate-democrats-announce-vote-advance-supreme-court-ethics-bill-rcna93486# [https://perma.cc/9U4Y-E8EQ]; *see also* U.S. CONST. art. III, § 1; JOANNA R. LAMPE, CONGRESSIONAL RESEARCH SERVICE, THE SUPREME COURT ADOPTS A CODE OF CONDUCT (2023), https://crsreports.congress.gov/product/pdf/LSB/LSB11078 [https://perma.cc/G8LW-GQQF].

228. *Code of Conduct for Justices of the Supreme Court of the United States*, 344 F.R.D. 967, 967 (2023).

229. *Id.* at 968.

"scholarly, informational, or educational" descriptions of case issues.[230] Under new Canon 4, scholarship and other extrajudicial activities still yield to the dignity and responsibilities of the office.[231]

While the Supreme Court's Code of Conduct relies on the honor system,[232] lower federal judges are subject to the Judicial Conduct and Disability Act as an enforcement mechanism.[233] The Act formalizes a process for complaints that a federal "judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts."[234] Statutory discipline is not coextensive with the "aspirational rules" in the Code of Conduct for United States Judges.[235] But the Act echoes the limited reach shared by federal court Canon 3A(6) and Supreme Court Canon 3A.[236] As with common law immunity, Congress did not empower disgruntled litigants to challenge the correctness of a case decision.[237] Both the Act and the Canons fortify the shield over judicial opinions and elevate medium over message.

Consider, for example, a 2020 case from the U.S. Court of Appeals for the Seventh Circuit resolving judicial misconduct complaints.[238] There, the appellate court examined a law review article written by Judge Lynn Adelman of the U.S. District Court for the Eastern District of Wisconsin.[239] The article took direct aim at the Roberts Court for its opinions "decided wrongly" over fifteen years.[240] As a result of those wrong opinions, the U.S. political system is "less representative and more fragile" and "the economic and political power

230. *Id.*

231. *Id.* at 970.

232. *See* Adam Liptak, *Supreme Court's New Ethics Code Is Toothless, Experts Say*, N.Y. TIMES (Nov. 14, 2023), https://www.nytimes.com/2023/11/14/us/politics/supreme-court-ethics-code-clarence-thomas-sotomayor.html [https://perma.cc/R3VV-G6MP].

233. 28 U.S.C. §§ 351–64.

234. 28 U.S.C. § 351(a).

235. *In re* Charge of Jud. Misconduct, 769 F.3d 762, 766 (9th Cir. 2014).

236. *Code of Conduct for Justices of the Supreme Court of the United States*, *supra* note 228, at 967; 28 U.S.C. § 351(a).

237. *See In re* Jud. Misconduct, 579 F.3d 1062, 1064 (9th Cir. 2009); *Judicial Conduct & Disability*, U.S. CTS., https://www.uscourts.gov/judges-judgeships/judicial-conduct-disability [https://perma.cc/C8KV-DJT7].

238. *See* Resol. of Jud. Misconduct Complaints about Dist. Judge Lynn Adelman, 965 F.3d 603, 604 (7th Cir. 2020).

239. *Id.*; *see also* Lynn Adelman, *The Roberts Court's Assault on Democracy*, 14 HARV. L. & POL'Y REV. 131 (2019).

240. *Judge Lynn Adelman*, 965 F.3d at 605.

of the middle class and the poor" is weaker.[241] The article also described the Republican party as "serving the wealthy."[242] Four private citizens, from California, North Carolina, and Iowa, filed complaints under the Judicial Conduct and Disability Act against Judge Adelman, accusing him of a bias rooted in "far-left ideology" against Republicans, conservatives, and then-President Donald Trump.[243]

Analyzing the Code of Conduct for United States Judges, including Canons 3A(6) and 4, the Seventh Circuit found the bulk of Judge Adelman's article to be "substantive criticism of Supreme Court decisions" and, thus, "well within the boundaries of appropriate discourse."[244] Only a few sentences raised a red flag, specifically an opening reference to Chief Justice John G. Roberts, Jr.'s statements before the Senate as "a masterpiece of disingenuousness."[245] Recognizing the author's attempts to make amends and "thoughtful and hardworking" reputation, the court resolved the misconduct complaints with a public admonition and a reminder to all judges not to "undermine public confidence in the fair administration of justice."[246]

Focusing on the content of the law review publication, the Seventh Circuit recognized that "much of Judge Adelman's article draws from dissenting opinions in the decisions he criticizes."[247] The court accepted that "judges criticize one another's reasoning, sometimes harshly."[248] But such harsh criticism risked judicial misconduct complaints only outside the four corners of a case or controversy, as well as outside the Supreme Court. Judge Adelman faced complaints for repackaging the dissenters' arguments as an article. While extrajudicial writing is all well and good, judges should "refrain[] from personal attacks."[249]

On the bench, personal attacks happen.[250] Civility is not lost, but gloves come off from time to time. Plenty of judges writing opinions up and down the

241. *Id.*
242. Adelman, *supra* note 239, at 137.
243. *Judge Lynn Adelman*, 965 F.3d at 606.
244. *Id.* at 610.
245. *Id.* at 605, 610; Adelman, *supra* note 239, at 131.
246. *Judge Lynn Adelman*, 965 F.3d at 611.
247. *Id.* at 609.
248. *Id.*
249. *Id.* at 611; *see also* McKoski, *supra* note 222222, at 57.
250. *See Judge Lynn Adelman*, 965 F.3d at 609.

hierarchies have chided their colleagues as "disingenuous."[251] Given that every case opinion emerges in the course of official duties, judges in dissent have the same freedom of expression as judges in a majority or concurrence. Both the lower and upper Codes of Conduct respect the primacy of official duties. And these Codes provide a lens for us to revisit the opinions in *Casey* and *Dobbs*: medium over message.

"Disingenuous" is nothing. In *Casey*, Justice Scalia attacked the plurality's statements as outrageous and frightening and the Justices themselves as obstinate imperialists.[252] Justices in the plurality were no better than street magicians, playing a shell game to displace a sacred text with personal *values*.[253] In *Dobbs*, the majority attacked prior Justices' statements as intellectually weak and divisive; that whole "viability line makes no sense."[254] Time for a much-needed lesson in history and the deep roots of this Nation.[255] The dissent in *Dobbs* from Justices Breyer, Sotomayor, and Kagan painted the majority Justices as either hypocrites or pawns in the pocket of conservative strategists, just waiting for chances to strike down "settled freedoms."[256] That waiting game prompted the dissenting Justices to comment on the merits of impending actions, which they spotted on the horizon: file certiorari petitions in cases concerning "bodily integrity, familial relationships, and procreation,"

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251. *See, e.g.*, Saffle v. Parks, 494 U.S. 484, 502 (1990) (Brennan, J., dissenting) ("The Court's conclusion . . . is disingenuous."); Duckworth v. Eagan, 492 U.S. 195, 221 (1989) (Marshall, J., dissenting) ("It is highly disingenuous for the majority to ignore this fact . . . ."); Harris v. McRae, 448 U.S. 297, 348 (1980) (Blackmun, J., dissenting) (calling the majority's holding condescending, "disingenuous and alarming"); Grutter v. Bollinger, 288 F.3d 732, 772 (6th Cir. 2002) (Clay, J., concurring) ("The dissent's claim . . . is disingenuous, at best . . . ."), *aff'd*, 539 U.S. 306 (2003); Bolder v. Armontrout, 928 F.2d 806, 808 (8th Cir. 1991) ("[W]e find the arguments in the special dissent to be a bit disingenuous."); United States v. Grasso, 568 F.2d 899, 900 (2d Cir. 1977) (Timbers, J., dissenting) ("[T]he subtle mischief of the panel majority opinion is its disingenuous implicit overruling . . . ."); *see also, e.g.*, Gu v. Napolitano, No. C 09-2179 PVT, 2009 WL 2969460, at *2 n.2 (N.D. Cal. Sept. 11, 2009) (finding the Government's argument "somewhat disingenuous").

252. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 996, 998 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 263 (2022).

253. *Id.* at 998.

254. *Dobbs*, 597 U.S. at 263; *see also id.* at 348 (Roberts, C.J., concurring) ("That line never made any sense.").

255. *See id.* at 277.

256. *Id.* at 362 (Breyer, Sotomayor & Kagan, JJ., dissenting).

and this majority will likely strip constitutional protections.[257] All fair in judicial writing.

In fact, a dissenting opinion enjoys freer rein than a majority or concurring opinion. Look now from the inside out, as the writer. From the perspective of choosing the words in a dissent, the opinion is secondary authority. The sovereign seal embosses a personal missive.

All judges in majority and concurring opinions agree on the case result. The majority and concurrence diverge on reasoning, and both opinions include persuasive statements in dicta on any peripheral topic.[258] Binding law lies within, comprising only those words that answer the question before the court and command a majority of votes. Such words govern the present parties and, if an appellate court chooses to publish, future parties. Accordingly, the path to binding law runs directly through the case or controversy and the votes. In *Casey*, the plurality's undue burden analysis became the Supreme Court's binding holding for three decades.[259] When writing a majority opinion or a concurrence on a splintered bench, the closer a judge hews to the material facts and issues before the court, the more likely the judge writes a "single, clear holding" that achieves the first-class status and legacy of binding law.[260]

By contrast, a dissenting opinion already lost. The through-line of consistency with the law stops short. Signing for themselves, judges in dissent need not aim for even one binding word. A dissenting opinion can hew close to or far from the material facts and issues. The outcome is the same—rejection—and the audience is the same—curious readers who flip to the end. There's nothing more to lose. Justice Kagan once remarked that she writes in "a kind of informal way" and uses contractions "only in dissents."[261] Justice Scalia

257. *Id.*; *see also id.* at 385 ("So if the majority is right in its legal analysis, . . . it is impossible to understand (as a matter of logic and principle) how the majority can say that its opinion today does not threaten—does not even 'undermine'—any number of other constitutional rights.").

258. *See supra* Section III.A.

259. *See* Stenberg v. Carhart, 530 U.S. 914, 952 (2000) (Rehnquist, C.J., dissenting); Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908, 921 n.11 (9th Cir. 2004).

260. THE BLUEBOOK, *supra* note 109, R. 10.6.1(a), at 108.

261. Interview by Bryan A. Garner with Hon. Elena Kagan, Assoc. Just., U.S. Sup. Ct. (July 16, 2015), https://lawprose.org/bryan-garner/videos/supreme-court-interviews/hon-elena-kagan-associate-justice-part-2-of-4/ [https://perma.cc/3BL4-XN4P]. In her 2023 majority opinion concerning Jack Daniel's whiskey, Justice Kagan allowed a few contractions. *See* Jack Daniel's Properties, Inc. v. VIP Prod. LLC, 599 U.S. 140, 148–49 (2023) ("A bottle of Jack Daniel's—no, Jack Daniel's Old No. 7 Tennessee Sour Mash Whiskey—boasts a fair number of trademarks. Recall what the bottle looks like (or better yet, retrieve a bottle from wherever you keep liquor; it's probably there) . . . . Even if you didn't already know, you'd probably not have much trouble identifying which one.").

observed that dissents "can have a character and flair ordinarily denied to majority opinions."[262] In addition to style, why not stretch on substance?[263]

Justice Scalia certainly did. His judicial writing, including the dissent in *Casey*, elevated him to conservative icon.[264] At times, the writing had little to do with the law. Toward the end of his *Casey* dissent, Justice Scalia added a paragraph of pure personal nostalgia.[265] He recalled seeing a portrait of Chief Justice Roger B. Taney hanging in Harvard Law School.[266] Chief Justice Taney had authored the infamous *Dred Scott v. Sandford* decision in 1857, and Justice Scalia imagined the consequences of that decision were "burning on his mind" as the artist painted.[267] The Chief Justice's right hand hung "limply, almost lifelessly"; his "deep-set eyes" betrayed "an expression of profound sadness and disillusionment."[268] Without a single citation to case law or any source other than his own memory, Justice Scalia drew a line from slavery to abortion.

Over the years, many pens dipped in hybrid ink have signed dissents that do not establish the law but "sow the seeds for future harvest" and "straddle the worlds of literature and law."[269] Justice John M. Harlan's dissenting opinion in *Plessy v. Ferguson* in 1896 revered a color-blind, caste-free Constitution and prophesied that the majority's racism would "stimulate aggressions, more or less brutal and irritating," and "encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes" of constitutional amendments.[270] All true. Justice Robert H. Jackson's dissenting opinion in *Korematsu v. United States*, set against the backdrop of World War II nearly

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262. Scalia, *supra* note 5, at 23.

263. *See* Wiersum v. U.S. Bank, N.A., 785 F.3d 483, 487 (11th Cir. 2015) (finding the dissent's reliance on secondary authorities "[p]uzzling"); Cooney, *supra* note 14, at 29 (reporting that Supreme Court concurrences and dissents cited secondary sources at higher rates).

264. *See also, e.g.*, Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting) (expressing "moral opprobrium" at the majority's decision to strike down anti-sodomy laws); NPR Staff, *Reflections Of Conservative Icon Supreme Court Justice Antonin Scalia*, NPR (Dec. 29, 2016, 4:08 PM), https://www.npr.org/2016/12/29/507436655/reflections-of-conservative-icon-supreme-court-justice-antonin-scalia [https://perma.cc/T3KN-8GFL].

265. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 1001–02 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

266. *Id.*

267. *Id.* at 1002.

268. *Id.* at 1001–02.

269. Brennan, *supra* note 105, at 431; *see* HUGHES, *supra* note 1377, at 68 (explaining that a dissenter "is a free lance" who writes "an appeal to the brooding spirit of the law").

270. Plessy v. Ferguson, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

half a century after *Plessy*, dismantled another expression of racism from the majority.[271] There, an innocent act became a crime "merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign."[272]

Dissenting opinions have joined the intellectual fray on myriad issues. Justice Holmes's 1905 dissent in *Lochner* was already more than a decade old when his dissent in *Abrams v. United States* explained and endorsed the notion of a marketplace of ideas.[273] Justice Holmes wrote that the Constitution "is an experiment, as all life is an experiment," and "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[274] John Stuart Mill would be proud.[275]

Justice Ginsburg won legions of fans—and a moniker as the "Notorious RBG"[276]—with her dissents on high-stakes topics, including gender discrimination and voting rights. In *Ledbetter v. Goodyear Tire & Rubber Co.*, Justice Ginsburg disparaged the majority's "cramped interpretation" of Title VII governing gender pay discrimination and announced that "the ball is in Congress' court."[277] Congress took the hint and two years later enacted the Lilly Ledbetter Fair Pay Act.[278] In *Shelby County v. Holder*, Justice Ginsburg warned that throwing out preclearance under the Voting Rights Act "is like throwing away your umbrella in a rainstorm because you are not getting wet."[279] *Bush v.*

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271. *See* Korematsu v. United States, 323 U.S. 214, 242–43 (1944) (Jackson, J., dissenting), *abrogated by* Trump v. Hawaii, 585 U.S. 667 (2018).

272. *Id.* at 243.

273. Abrams v. United States, 250 U.S. 616, 624–25 (1919) (Holmes, J., dissenting).

274. *Id.* at 630.

275. *See* JOHN STUART MILL, ON LIBERTY 33 (Andrews UK Ltd. 2011) (1859) ("The peculiar evil of silencing the expression of an opinion is, that it is robbing the human race . . . ."); Brian K. Pinaire, *A Funny Thing Happened on the Way to the Market: The Supreme Court and Political Speech in the Electoral Process*, 17 J.L. & POL. 489, 496 (2001) (describing the influence of Milton and Mill on Justice Holmes).

276. *See* Jeffrey Brown & Anne Azzi Davenport, *How Ruth Bader Ginsburg Became the 'Notorious RBG,'* PBS NEWS HOUR (Sept. 23, 2020, 6:25 PM), https://www.pbs.org/newshour/show/how-ruth-bader-ginsburg-became-the-notorious-rbg [https://perma.cc/U5SX-CYQP].

277. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting).

278. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5; *see also* Ginsburg, *supra* note 6, at 7.

279. Shelby Cnty. v. Holder, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting).

Gore may have delivered the presidency per curiam, but not with Justice Ginsburg's vote.[280]

Perhaps most poignant amid all this soaring rhetoric is silence. In 1927, the Supreme Court decided *Buck v. Bell* and held that forced sterilization of an institutionalized, "feeble-minded white woman" was consistent with the Fourteenth Amendment's guarantees of due process and equal protection.[281] In the majority's view, "[t]hree generations of imbeciles are enough."[282] Justice Pierce Butler issued a dissent without comment or written opinion.[283] The lone Catholic on the bench, Justice Butler watched as *Buck* stamped the high court's 8–1 imprimatur on eugenics.[284] His stance struck a dignified blow against injustice.

In the end, the truth revealed from Schrödinger's cat is that nobody understands the quantum world.[285] The *both/and* blur in physics is a mystery. The *both/and* blur in the law is an opportunity. As an opinion from a judge hearing a case, every dissent is the law in form and, thus, a safe space for heated exchanges. As a critique of the majority, every dissent is not the law in substance and, thus, an open invitation to untethered excellence.

V. CONCLUSION

A student's question led me down the path to this Article. It is only fitting that I conclude on a note of gratitude. Nothing focuses the mind like teaching, and I am grateful for the many class moments when my students pushed me to explain a legal concept or entertain a hypothetical or break down an argument. Students endlessly inspire. I hope they appreciate the spectrum of authority and read plenty of inspiring opinions in law school and beyond. They may even cite a dissent as perfect authority.

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280. Bush v. Gore, 531 U.S. 98, 135 (2000) (Ginsburg, J., dissenting).

281. Buck v. Bell, 274 U.S. 200, 205 (1927).

282. *Id.* at 207.

283. *Id.* at 208.

284. *See* Phillip Thompson, *Silent Protest: A Catholic Justice Dissents in Buck v. Bell*, 43 CATH. LAW. 125, 137 (2004) (describing "Catholic anxiety over eugenics, which may have influenced [Justice] Butler").

285. *See* ROVELLI, *supra* note 79, at 52.