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## Dethroning the Hierarchy of Authority

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## INTRODUCTION

*Legal materials do not answer legal questions, people do.*<sup>1</sup>

Authority is the foundation of legal analysis. Our legal system is based on the rule of law ideal,<sup>2</sup> and law is well understood to be “an authority-soaked practice.”<sup>3</sup> In contrast to many other fields, or everyday decision-making and reasoning processes, law places greater reliance “on the source rather than the content (or even the correctness) of ideas, arguments, and conclusions.”<sup>4</sup> Legal analysis without the explicit support of appropriate authority is perceived as illegitimate,<sup>5</sup> as evidenced by the profession’s emphasis on the value of abundant citations. Use of legal authority is one of the very first concepts introduced to every first-year law student and one of a lawyer’s most essential responsibilities.

As commonly defined, the concept of authority “requires one to let authoritative directives pre-empt one’s own judgement. One should comply with them whether or not one agrees with them.”<sup>6</sup> Thus, authority is often referred to as “content-independent” in that the reasons for following it do not come from its content but from its status.<sup>7</sup> In Hannah Arendt’s words, “[I]f authority is to be defined at

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<sup>1</sup> STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* 317 (2001).

<sup>2</sup> “Traditionally, as we know, the term [rule of law] has meant two distinct though related things: that legal cases are to be decided according to their legal merits rather than according to the personal merits of the litigants (this is the law’s impersonality and the judge’s duty of disinterestedness); and that even the highest officials in society are subject to the law rather than being above (immune from) it.” RICHARD A. POSNER, *HOW JUDGES THINK* 354–55 (2008).

<sup>3</sup> Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495, 497 (2000) [hereinafter Schauer & Wise, *Delegalization*].

<sup>4</sup> Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1934 (2008) [hereinafter Schauer, *Authority*].

<sup>5</sup> “The judge has an obligation to justify his decision in legal terms (‘a government of laws’); by failing to cite authority, he has failed to inform and convince the parties, counsel and the public of the legal basis of the decision . . . [t]he obligation to cite authority seems indisputable.” John Henry Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 S. CALIF. L. REV. 381, 418 (1977).

<sup>6</sup> Joseph Raz, *Introduction to AUTHORITY*, 1, 5 (Joseph Raz ed., N.Y. Univ. Press 1990).

<sup>7</sup> See, e.g., H.L.A. HART, *Commands and Authoritative Legal Reasons*, in *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 243 (1982) [hereinafter HART, *ESSAYS ON BENTHAM*]; Schauer, *Authority*, *supra* note 4, at 1936–37; JOHN FINNIS, *NATURAL LAW & NATURAL RIGHTS* 233–34 (2d ed. 2011) (“One treats something (e.g. an opinion, a pronouncement, a map, an order, a rule. . .) as authoritative if and only if one treats it as giving one sufficient reason for believing or acting in accordance with it

all, then, it must be in contradistinction to both coercion by force and persuasion through argument.”<sup>8</sup> This definition of authority is entirely consistent with the use of “binding” or “mandatory” authority in the American legal system—lawyers and judges must follow mandatory authority regardless of whether they agree with its content.

However, in the legal realm, use of the term *authority* is not limited to binding authority that must be followed; the term is regularly used to describe nonbinding information as well. Nonbinding authority is defined entirely in the negative: it is any information that legal authors are *not* obliged to follow. As such, it is the very antithesis of authority as classically defined.

The very idea of authority without any accompanying duty to obey it seems paradoxical on its face, and yet this tension has barely been explored.<sup>9</sup> This is likely because the conventional wisdom regarding nonbinding (or “persuasive”) authority is that legal authors rely upon it only when persuaded by its substantive content.<sup>10</sup> As such, it is not authority at all in the classical sense. It does seem logical that a legal author would voluntarily cite to material only if persuaded by its content. However, this conventional wisdom is contradicted by common practice and has been convincingly debunked by Frederick Schauer.<sup>11</sup> Persuasive authority is often cited for reasons independent of its content, for authoritative reasons,<sup>12</sup> and thus persuasive authority has “weight” beyond its substantive merits. This weight—the authoritative weight of persuasive authority—has been analyzed by a

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*notwithstanding* that one cannot oneself otherwise see good reason for so believing or acting, or cannot evaluate the reasons one can see, or sees some countervailing reason(s), or would oneself otherwise (i.e. in the absence of what it is that one is treating as authoritative) have preferred not so to believe or act.”).

<sup>8</sup> R. B. Friedman, *On the Concept of Authority in Political Philosophy*, in *AUTHORITY*, 56, 63 (Joseph Raz ed., N.Y. Univ. Press 1990) (quoting HANNAH ARENDT, *BETWEEN PAST AND FUTURE* 91, 93 (1963)).

<sup>9</sup> Professor Frederick Schauer is the primary exception. See Schauer, *Authority*, *supra* note 4.

<sup>10</sup> See, e.g., CHRISTINE COUGHLIN, JOAN MALMUD ROCKLIN & SANDY PATRICK, *A LAWYER WRITES* 24 (2d ed. 2013) (“Although a court is not required to rely on or follow case law from another jurisdiction, a court may do so if it finds the reasoning expressed in that case law to be persuasive and consistent with the law from the court’s jurisdiction.”); STEVEN M. BARKAN, ROY M. MERSKY & DONALD J. DUNN, *FUNDAMENTALS OF LEGAL RESEARCH* 2 (9th ed. 2009).

<sup>11</sup> Schauer, *Authority*, *supra* note 4, at 1931; see also Charles A. Sullivan, *On Vacation*, 43 *HOUS. L. REV.* 1143, 1201–02 (2006); Chad Flanders, *Toward a Theory of Persuasive Authority*, 62 *OKLA. L. REV.* 55, 80–81 (2009).

<sup>12</sup> Schauer, *Authority*, *supra* note 4, at 1944.

few scholars,<sup>13</sup> but it is generally disregarded. Instead, the prevailing and persistent conventional wisdom is that persuasive authority is chosen solely for the persuasive power of its substantive content, and few people appear to be troubled by its label as authority. Persuasive authority can be selected any which way or completely ignored; this characteristic is, in general, simply accepted as part of the current legal system.

Meanwhile, the concept of legal authority, which once included only a limited set of materials, has become diluted: the term is now used simply to refer to any and all information cited in legal analysis.<sup>14</sup> Significantly, authority now includes information of almost any sort—sources now used regularly in legal analysis fall well outside the strictly defined universe of legal sources lawyers once relied upon.<sup>15</sup> Recent dramatic changes in access to information have only increased the diversity of sources used in legal analysis today; the trend has received plenty of attention.<sup>16</sup> At the same time, a rise in statutes and administrative law has displaced common law as the dominant source of law. This “statutorification”<sup>17</sup> of law, in turn, has led to the creation of entire subfields of analysis addressing the appropriate weight and role of external sources to interpret enacted law, such as administrative agency interpretations, legislative history, canons of construction, or dictionaries. As a result, the largely undifferentiated category of persuasive authority includes everything from interpretive tools (such as legislative history and canons of construction) to sources that are not legal at all (such as empirical studies from other disciplines).

Nevertheless, the ubiquitous “hierarchy of authority,” which categorically excludes all nonbinding authority, remains the beginning

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<sup>13</sup> Schauer, *Authority*, *supra* note 4, at 1932; *see also* Sullivan, *supra* note 11, at 1196; Flanders, *supra* note 11, at 62.

<sup>14</sup> “Attorneys use the words ‘sources’ and ‘authorities’ and ‘support for an argument’ interchangeably. Each is a catch-all reference to the materials used to analyze and predict the outcome of a legal issue.” COUGHLIN ET AL., *supra* note 10, at 16; “An authority refers to any cited source courts and attorneys use to oppose or support a legal proposition.” DAVID ROMANTZ & KATHLEEN VINSON, *LEGAL ANALYSIS: THE FUNDAMENTAL SKILL* 15 (2d ed. 2009). Whether the term “authority” should be used to refer to everything cited in legal argument is not a settled question, but it is beyond the scope of this Article.

<sup>15</sup> Robert C. Berring, *Legal Research and the World of Thinkable Thoughts*, 2 J. APP. PRAC. & PROCESS 305, 311 (2000).

<sup>16</sup> *See, e.g., id.* at 311; Schauer & Wise, *Delegalization*, *supra* note 3, at 510; Ellie Margolis, *Authority Without Borders: The World Wide Web and the Delegalization of Law*, 41 SETON HALL L. REV. 909, 912 (2011).

<sup>17</sup> GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1 (1982).

and end of most efforts to provide a schema of legal authority.<sup>18</sup> The traditional model of authority provides a standardized set of rankings for a narrow category of sources, using only two binary distinctions: binding/nonbinding and primary/secondary. For many reasons, not least of which is the indeterminacy of law,<sup>19</sup> the use of authority is far more complex—and interesting—than these simple distinctions suggest.

The hierarchy of binding authority, arguably the most prominent of authority metaphors, is a poor fit for the reality of authority. It depicts the weight of authority as all-or-nothing and permanently fixed; both of these characteristics are inaccurate. This traditional view has long maintained a steadfast description of The Law as a narrow set of unchanging sources, offering no explanation for why legal decision makers cite to nonbinding sources at all. Meanwhile, the number and type of sources used in legal analysis continue to expand. There are no signs that the increase in acceptable legal sources will be reversed any time soon; we live in an information age, and it is hard to imagine a movement that would successfully curtail the use of available sources. The chasm between the traditional description of legal authority and the actual practice of authority grows ever larger. This Article argues for a better, holistic view and understanding of *all* sources used in legal analysis and their characteristics. The way that lawyers, judges, law students, and professors talk and think about authority is important. It shapes the profession's understanding of legal analysis.<sup>20</sup> We need

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<sup>18</sup> The term “hierarchy of authority” is used colloquially as a way to refer to the overall hierarchy of laws (constitutions, statutes, and judicial decisions) and also as a way to refer only to the judicial hierarchy. *See, e.g.*, KRISTEN KONRAD TISCIONE, RHETORIC FOR LEGAL WRITERS (2d ed. 2016) (see chapter subheading “Hierarchy of Authority”); DERNBACH ET AL., A PRACTICAL GUIDE TO LEGAL WRITING AND LEGAL METHOD 11–13 (5th ed. 2013) (using subheadings “Hierarchy of Law” and “Hierarchy of Judiciary”). Materials published for practitioners are similar. *See* Terry Jean Seligmann & Thomas H. Seymour, *Choosing and Using Legal Authority: The Top 10 Tips*, PERSP.: TEACHING LEGAL RES. AND WRITING (W. Grp.), Vol. 6 Fall 1997, at 3 (Tip number three states, “Remember the Hierarchy of Authority.”). Practitioners receive similar advice. *See, e.g.*, Susan W. Fox & Wendy S. Loquasto, *The Art of Persuasion Through Legal Citations*, 84 Fla. B.J. 49, 49 (2010) (advising practitioners to “Choose Your Citations Based Upon the Hierarchy of Authority.”). I cite these simply to show that the concept of a hierarchy of authority is common.

<sup>19</sup> The indeterminacy of law is a deep and rich field of scholarship; there is a wide range of views on just how indeterminate the law is, a philosophical debate beyond the scope of this Article. *See also infra* notes 22 and 176.

<sup>20</sup> “[t]he forms of law mark . . . the ways in which we think and do law and the ways in which we imagine its future. This is true of both the most ethereal legal theory and the most

better vocabulary, metaphors, and descriptive tools for sources used in legal argument in order to address the underlying critical questions of what courts treat as law and why they do so.

Part I of this Article describes the conventional view of legal authority, a view that is centered on the judicial hierarchy.

Part II argues that the conventional view of authority, with its closed hierarchical structure, obscures many of the important characteristics of legal authority. This view oversimplifies a highly complex practice. The two predominant classifications (binding/nonbinding and primary/secondary) are too blunt. First, contrary to conventional wisdom, nonbinding authority is often relied on for its status rather than (or in addition to) its content. As a result, the weight of authority is not limited to two categories of all or none (binding or nonbinding) but is better described as a continuum. Second, the conventional view of authority as a fixed hierarchy has no means of recognizing the ongoing evolution of both the weight and origin of acceptable sources. The hierarchy of authority is thus substantially incomplete and inaccurate.

Part III proposes reorienting our view of authority as a pluralistic practice rather than a fixed hierarchical list and begins the task of creating a more nuanced and holistic account of legal authority. The existing binary scheme is of little use in contested jurisprudential questions. For hard legal questions,<sup>21</sup> it tells us nothing about what

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down-to-earth legal argument.” Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1109 (2002).

<sup>21</sup> “Hard” legal questions include those that cannot be easily resolved by the straightforward application of rules. See, e.g., Frederick Schauer, *Easy Cases*, 58 S. CALIF. L. REV. 399, 410 (1985) [hereinafter Schauer, *Easy Cases*]; David Lyons, *Justification and Judicial Responsibility*, 72 CALIF. L. REV. 178, 180 (1984); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1058 (1975) (“Statutes and common law rules are often vague and must be interpreted before they can be applied to novel cases. Some cases, moreover, raise issues so novel that they cannot be decided even by stretching or interpreting existing rules.”). Wilson Huhn describes “hard cases” as “cases where plausible legal arguments may be created for two contradictory results,” and identifies two categories of difficult cases—where “the applicable rule of law is ambiguous” or where “the validity of the rule has been challenged.” Wilson Huhn, *The Use and Limits of Syllogistic Reasoning in Briefing Cases*, 42 SANTA CLARA L. REV. 813, 852, 832 (2002). According to Ronald Dworkin, hard cases occur “when no settled rule dictates a decision either way.” Dworkin, *supra* at 1060. Rules are uncertain, and thus “most authorities are not binding or controlling in an absolute way.” Schauer, *Authority*, *supra* note 4, at 1954.

At the other end of the spectrum, cases where the result is determined by the straightforward application of a binding rule are referred to in any number of ways: mechanical jurisprudence, “slot-machine jurisprudence,” Merryman, *supra* note 5, at 421, and perhaps most frequently, “easy cases,” Schauer, *Easy Cases*, *supra*, at 399. There is no consensus on the percentage of cases that are easy, but in those easy cases, the governing

sources a decision maker might rely on beyond those that are binding. The existing model ignores the element of choice, assuming rules of law found within a prescribed set of legal sources dictate legal outcomes.<sup>22</sup> This oversimplification of authority impedes meaningful inquiry into and a deeper understanding of the practice of legal authority. Acknowledging the authoritative power of persuasive authority allows the exploration of possible theoretical reasons for reliance on nonbinding authority—authority used regularly in legal analysis, but entirely by choice. Understanding the rationale for citing to nonbinding authority will, in turn, help to better explain and predict the use of nonbinding sources in legal decision-making.

A more nuanced understanding of authority is valuable perhaps most obviously for law students, who are most likely to be misled by the conventional model of authority, and those who teach them. However, it is equally important for practitioners and judges (and those who could learn from them), who may have developed and internalized a nuanced practice of authority but lack a shared conceptual framework or vocabulary to articulate it. Finally, an alternative perspective on authority encourages further exploration of the complex art of legal analysis by scholars: What does it mean for the legal profession if sources of authority are essentially unlimited? Does the concept of authority in legal analysis remain meaningful? The hierarchy of authority purports to represent the universe of legal authority but falls far short; as a shortcut of sorts for difficult jurisprudential issues, it stands in the way of deeper theoretical insight into what counts as law.

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authorities are not “chosen”—there is no dispute as to which authorities should govern and the result they should dictate. Not only is the result “easy,” but the choice of authority is as well.

<sup>22</sup> A strictly formalist vision of the legal world has, of course, been heavily critiqued; mandatory sources of law are frequently unable to dictate particular legal outcomes. The degree to which the law dictates results remains an ongoing debate. “When judges are confronted with a precedent that is directly on-point and from an authoritative binding source, it appears largely to determine their rulings. This empirical result is quite limited, though, as the vast majority of important cases do not have such clear precedential direction.” Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin’s Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1177 (2005); see also Ken Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283, 296 (1989) (“Preoccupation with controversial appellate and Supreme Court cases engenders the illusion of pervasive indeterminacy. Focusing instead on everyday acts governed by law reveals the pervasiveness of determinate and correct legal outcomes.”); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1644 (2003) (“The majority of the cases in the circuit courts admit of a right or best answer and do not require the exercise of discretion.”).

## I

## THE CONVENTIONAL VIEW OF LEGAL AUTHORITY

Legal authority has long been organized in two uncontroversial ways: all legal authority is either *mandatory* (binding) or *persuasive* (nonbinding) and either *primary* or *secondary*. The mandatory/persuasive classification receives almost all the attention in any discussion about the weight of authority. The primary/secondary classification divides *law* from *not law* and offers little else. Both classifications serve to perpetuate the myth of a very simple system of authority, one in which legal authors need only identify applicable law in accordance with an established set of rules (which themselves go largely unquestioned).

*A. The Weight of Legal Authority As It Is Conventionally Understood*

The central operating principle of legal authority is that in constructing legal analysis authors must first rely on mandatory authority, also known as “binding,” “governing,”<sup>23</sup> or “controlling” authority, which consists entirely of primary sources (defined below). The defining characteristic of authority designated as mandatory is that it must be followed regardless of its substantive content.<sup>24</sup> The ranking of mandatory authorities is undisputed and typically offered without any sort of explanation. Constitutions are the highest source of authority, followed by legislation,<sup>25</sup> and then judicial opinions.<sup>26</sup> The

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<sup>23</sup> Justice Antonin Scalia and Bryan Garner divide case authorities into two categories: “governing” and “persuasive.” ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 52 (2008).

<sup>24</sup> Raz, *supra* note 6; HART, *ESSAYS ON BENTHAM*, *supra* note 7, at 243, 261–66.

<sup>25</sup> “[T]he principle of legislative supremacy . . . is basic in a democratic political system.” STEVEN J. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* 129 (3d ed. 2007).

<sup>26</sup> In a modern legal system where there are a variety of sources of law, the rule of recognition is correspondingly more complex; the criteria for identifying the law are multiple and commonly include a written constitution, enactment by a legislature, and judicial precedents. In most cases, provision is made for possible conflict by ranking these criteria in an order of relative subordination and primacy. It is in this way that in our system common law is subordinate to statute. H.L.A. HART, *THE CONCEPT OF LAW* 101 (2d ed. 1994); *see also* RICHARD K. NEUMANN, *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE* 84 (7th ed. 2005). As has often been noted,

[t]he modern concept of binding precedent—where a single opinion sets the course on a particular course of law and must be followed by courts at the same level and lower within a pyramidal judicial hierarchy—came about only gradually over the nineteenth and early twentieth centuries. Lawyers began to believe that judges made, not found, the law. This coincided with monumental improvements in the



relationship between constitutional law, legislative enactments, and judicial opinions is typically barely discussed in this context. All the specificity in the hierarchy of authority addresses the relative weight of judicial opinions alone, with little attention paid to the balance of power among institutions.

Determining which sources are mandatory in a particular case is the primary purpose of the hierarchy of authority. Mandatory authority can only be identified once a particular jurisdiction—including the specific decision-making body within that jurisdiction—has been determined. However, once the particular jurisdiction has been identified, the body of mandatory authority applicable to a particular problem can usually be identified without much difficulty.<sup>27</sup> The “hierarchy of authority” governing the use of mandatory authority is well established and generally uncontroversial.

Though practices vary slightly by court system, all courts are bound by decisions of those courts above them (vertical precedent) and may be bound by decisions made by courts at the same level (horizontal precedent).<sup>28</sup> Vertical precedent is the simplest—courts are bound by the decisions of courts above them in the court system hierarchy.<sup>29</sup> Vertical precedent has been described as “an inflexible rule that admits of no exception”,<sup>30</sup> it is indisputably the strongest form of judicial

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collection and reporting of case authorities. As the concept of law changed and a more comprehensive reporting system began to take hold, it became possible for judicial decisions to serve as binding authority.

Hart v. Massanari, 266 F.3d 1155, 1168 (9th Cir. 2001).

<sup>27</sup> Leaving aside complex choice of law questions, which determine when a court should apply the law of another jurisdiction. See generally Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453 (2010) (identifying a number of nonstandard appellate processes that do not fit the traditional appellate structure, leaving questions about which precedent is binding).

<sup>28</sup> Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1015 (2003) [hereinafter Barrett, *Stare Decisis*].

<sup>29</sup> Determining binding authority depends on “choice of law” issues, which can be complex. At the risk of oversimplifying, generally “[f]ederal courts defer to state court interpretations of state law.” Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 825 n.34 (1994) (citing *Erie R.R. v. Tompkins*, 304 U.S. 64, 72–73 (1938)), and state courts defer to federal courts on issues of federal law, AMY SLOAN, *BASIC LEGAL RESEARCH* 9 (4th ed. 2009). Though important, I leave choice of law out of my discussion here as a different threshold question. Choice of law tells the court which hierarchy it must follow on a particular issue—once that decision is made the traditional rules apply.

<sup>30</sup> Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1712 (2013) [hereinafter Barrett, *Precedent*].

authority. However, not every word of a vertical judicial opinion is binding; courts are only bound by the holding.<sup>31</sup>

Whether horizontal precedent is considered binding depends on the jurisdiction. Sometimes horizontal precedent is not binding at all, as in most trial courts. In the federal court system, horizontal stare decisis is “virtually nonexistent in district courts,” but a “virtually absolute rule in courts of appeals.”<sup>32</sup> By court rule, federal courts of appeal are bound horizontally by earlier panel decisions, unless the court is sitting en banc, in which case it is not bound by earlier panel decisions.<sup>33</sup> State courts vary in their practices, but as a general rule, courts tend not to consider themselves bound by horizontal precedent. Some courts—most notably the U.S. Supreme Court—consider themselves horizontally bound by their own previous decisions, but only in a “soft” sense.<sup>34</sup> As the Supreme Court itself has repeatedly asserted, “[I]t is common wisdom that the rule of *stare decisis* is not an ‘inexorable command,’”<sup>35</sup> and the Court can choose to overrule its own prior decisions. This soft version of horizontal precedent carries a lesser weight than vertical precedent but greater than nonbinding precedent.

The very purpose of the hierarchy of authority is to rank authorities so that some outweigh others; a case from the highest court in a state has more weight than a case from an intermediate court of appeals, though both are binding on the trial courts. “It is generally accepted that the higher the level of the court that issues a decision, the more authoritative the decision will be.”<sup>36</sup> But the variation in weight here is little explored—the basic idea is that if two decisions are inconsistent in any way, the higher decision controls the outcome.

Only when mandatory authority fails to resolve an issue should legal analysts turn to persuasive authority, also referred to as nonbinding, nonmandatory, or optional authority.<sup>37</sup> The need for persuasive authority is often described as the scenario in which mandatory

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<sup>31</sup> The distinction between dicta and holding is its own complicated subject.

<sup>32</sup> Barrett, *Precedent*, *supra* note 30, at 1713.

<sup>33</sup> Barrett, *Stare Decisis*, *supra* note 28, at 1018; Phillip M. Kannan, *The Precedential Force of Panel Law*, 76 MARQ. L. REV. 755, 756 (1993).

<sup>34</sup> Barrett, *Precedent*, *supra* note 30, at 1713.

<sup>35</sup> Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992).

<sup>36</sup> John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 499 (1986).

<sup>37</sup> Schauer, *Authority*, *supra* note 4, at 1946; LAUREL C. OATES & ANNE ENQUIST, *THE LEGAL WRITING HANDBOOK* 57 (5th ed. 2010).

authority leaves a “gap” that must be filled.<sup>38</sup> Persuasive authority—which all agree can be either primary or secondary authority—is often defined only in contrast to mandatory authority, and “[m]ostly, the term is unanalyzed.”<sup>39</sup>

The lack of analysis is likely due to the conventional wisdom about persuasive authority—that it is a source to be cited for its substantive content. Because the decision to follow authority is, by its own terms, independent of reason,<sup>40</sup> it is logical that when not “bound” a decision maker would rely only on other sources for substantive reasons. In other words, as its name suggests, persuasive authority is typically thought to be used only when its substantive content persuades the reader of its merits.<sup>41</sup> Or, as one introductory legal research text describes it, “[A]uthority can be considered *persuasive*, meaning that a decision-maker can, if so persuaded, follow it.”<sup>42</sup> In this view, persuasive authority has no place on the hierarchy of authority because it has no “weight” apart from the merits of its substantive content, and there are no rules directing its application.

The conventional model of the weight of authority is thus largely binary,<sup>43</sup> almost entirely focused on the distinction between binding and nonbinding authority and the ranking of binding judicial opinions. Guidance for, or explanation of, the use of nonbinding authority is limited and focused on how to choose judicial opinions from outside the governing jurisdiction. This model identifies mandatory authority, but otherwise leaves a legal author to her own devices, suggesting that the choice of any other authority is essentially ad hoc.

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<sup>38</sup> See, e.g., NEUMANN, *supra* note 26, at 86–88 (“Persuasive authority is used only to fill gaps in local law. . . . If you have mandatory authority relevant to your issue, it should dominate your analysis. But where you need to fill gaps in the law or want to provide additional support, you must choose which persuasive authority to rely on. It would be easier if courts adopted uniform and well-defined rules for selecting persuasive authority, but any such rules would deprive judges of some of the flexibility and creativity so valuable to judicial decision-making.”).

<sup>39</sup> Sullivan, *supra* note 11.

<sup>40</sup> Raz, *supra* note 6. (“[Authority] requires one to let authoritative directives pre-empt one’s own judgement. One should comply with them whether or not one agrees with them.”).

<sup>41</sup> As Chad Flanders notes, substance is not limited to reason; one could be persuaded by the emotional content of a source. Flanders, *supra* note 11, at 65 n.46.

<sup>42</sup> BARKAN, ET AL., *supra* note 10.

<sup>43</sup> Every introductory legal writing and research textbook this author has seen introduces authority using the binary mandatory/persuasive distinction. See, e.g., TERESA J. REID RAMBO & LEANNE PFLAUM, *LEGAL WRITING BY DESIGN* 96–97 (2001); LAUREL CURRIE OATES & ANNE ENQUIST, *THE LEGAL WRITING HANDBOOK* 46–48 (5th ed. 2010).

### B. *The Primary/Secondary Classification*

In addition to being sorted as binding or not binding, all legal authority is said to fall into one of two categories—either primary or secondary. The types of materials within the two categories are generally presented as entirely settled. Primary authorities are typically defined as “authorities that actually are law,”<sup>44</sup> “a statement of the law itself,”<sup>45</sup> or the authority “produced by a legislature, a court, or some other governmental entity with the power to make or determine law.”<sup>46</sup> Primary authority includes constitutions, statutes, administrative rules and regulations, and judicial opinions.<sup>47</sup> Only primary authority can be mandatory, but primary authority is not always mandatory, as the binding power of any primary authority is limited to particular jurisdictions.

Secondary authority is often defined simply as “not law” or “everything else.”<sup>48</sup> Lists of secondary authority almost always look the same; they include authorities “that are explanation or commentary on primary authorities,”<sup>49</sup> such as restatements, treatises, legal encyclopedias, and legal scholarship.<sup>50</sup> Secondary authority is

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<sup>44</sup> LINDA H. EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION* 56 (5th ed. 2010).

<sup>45</sup> ROBERT BERRING, *FINDING THE LAW* 308 (12th ed. 2005).

<sup>46</sup> NEUMANN, *supra* note 26, at 82; *see also* COUGHLIN ET AL., *supra* note 10, at 23 (“To be mandatory, the authority must emanate from a government body”; primary authorities are legislation, administrative rules and regulations, and judicial orders and opinions.)

<sup>47</sup> Note that this is a different definition of primary than is used in other fields—it is a primary source of *law*. In contrast, historians use the term primary sources differently: “Primary sources are materials that provide first hand testimony or direct evidence concerning a topic under investigation. They are created by the individuals who either witnessed or experienced the events or conditions . . . occurred, but can also be created later if based on first hand experiences.” *Primary, Secondary & Tertiary Sources Defined*, USC LIBR. RES. GUIDES (last updated Sep. 18, 2018, 2:21 PM), <http://libguides.usc.edu/primarysources/home>. Legislative history would likely be primary under this definition, but it is not a primary source of law.

<sup>48</sup> BERRING, *supra* note 45 (“everything else is secondary”).

<sup>49</sup> EDWARDS, *supra* note 44.

<sup>50</sup> For example, Linda Edwards explains that “some authorities are ‘law,’ and some are simply commentary on the law or suggestions about what the law ought to be.” She describes four basic categories of primary authority: (1) case law created by courts, (2) statutory law created by legislatures, (3) administrative law created by governmental agencies, and (4) state and federal constitutions. As secondary authority she lists treatises, hornbooks, legal encyclopedias, and law review articles. *Id.* And Neumann’s text explains that “Primary authority is produced by a legislature, a court, or some other governmental entity with the power to make or determine law. It includes federal and state constitutions, statutes, case law, court rules, administrative regulations, and administrative agency decisions.” As secondary authority—“not law”—they include restatements, treatises, law review articles

presented primarily as an aid to help find, summarize, or understand primary rules. Notably, in most introductory lists, sources listed are traditional legal materials<sup>51</sup>—“materials that look legal in the most ordinary sense.”<sup>52</sup>

Both the secondary and persuasive labels denote little more than “other”—not primary and not binding. The core of the introductory model of authority is essentially a ranked list of settled mandatory sources, a list which has remained the same for the last 200 years. It provides a description of authority consistent with a mechanical view of the legal world, in which rules determine the outcome of legal disputes, as it suggests that legal authors need only identify mandatory sources of law to determine the result. Its lack of attention to nonbinding sources silently diminishes their significance.

## II

### THE HIERARCHY OF AUTHORITY OBSCURES KEY CHARACTERISTICS OF LEGAL AUTHORITY

The conventional view of authority described above is both binary (sources are either binding or they are not) and static (it includes no indication that the sources of law or their weight might change over time). In both respects, the hierarchical model is significantly flawed and incongruent with what appears to be happening in practice.<sup>53</sup>

#### *A. The Weight of All Authority Falls Along a Continuum*

The phrase “weight of authority” is used frequently to introduce the concept of authority.<sup>54</sup> Weight, as a metaphor, allows for a nearly

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and other forms of legal scholarship, loose-leaf reporters, and legal encyclopedias and dictionaries. NEUMANN, *supra* note 26, at 82.

<sup>51</sup> Margolis, *supra* note 16, at 914 (Primary and secondary authority “are legal in the sense that they are either direct sources of law or expressly about the law.”).

<sup>52</sup> Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080, 1105 (1997) [hereinafter Schauer & Wise, *Legal Positivism*] (Schauer describes this definition as a “theoretically thin definition of ‘law’ . . . . These conceptions start with the idea of law in its most routine and banal sense, and would then take ‘legal information’ to include, for example, cases, statutes, constitutional provisions, law journals . . . and textbooks and treatises that are plainly about legal doctrine . . . .”) Schauer cites Posner’s term “orthodox legal materials.” *Id.* (quoting Richard Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 9 (1996)).

<sup>53</sup> We need more careful research on the use of optional authority in decision-making.

<sup>54</sup> See, e.g., KUNZ ET AL., *THE PROCESS OF LEGAL RESEARCH* 8 (7th ed. 2008) (“[S]ome law is weightier than the rest.”); SLOAN, *supra* note 29, at 5; COUGHLIN ET AL., *supra* note 10, at 24.

infinite number of distinctions. But the concept of weight is not well explained or explored in conventional views of authority beyond the binding (maximum weight) versus nonbinding (no weight) distinction.<sup>55</sup> The line between the two is generally presented as impermeable—either authority is binding or it is not—and the focus of the hierarchy of authority is on the task of determining which authority is binding. This view implies that persuasive authority has no weight independent of its ability to persuade substantively. Without any such “weight,” there is, seemingly, little reason to further organize persuasive authority—its only significant characteristic is its “nonbindingness.”

Yet several scholars, most notably Schauer, have recognized that persuasive authority is not cited solely for the persuasive power of its content, but for reasons independent of its content—authoritative reasons, reflecting the classic definition of authority.<sup>56</sup> The widespread view of persuasive authority—that it is used only for its ability to persuade with its content—has been convincingly debunked. In practice, persuasive authority appears to be regularly cited much like mandatory authority: not for its substance but for its status.<sup>57</sup> Schauer has explained that “[a]lthough courts often cite legal sources because

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<sup>55</sup> SLOAN, *supra* note 29, at 5 (“The degree to which an authority controls the answer to a legal question is called the weight of the authority. Not all authorities have the same weight. The weight of a legal authority depends on its status as primary or secondary and as mandatory or persuasive authority. . . . You must be able to distinguish among these categories of authority, therefore, to determine how much weight a particular legal authority has in the resolution of the issue you are researching.”); *see also* COUGHLIN, ET AL., *supra* note 10 (Listing table of “Authorities and their weight” in which all weights are listed as either mandatory or persuasive and explaining: “Because it is binding, mandatory authority is given the most weight in legal analysis. . . . Although a court is not required to rely on or follow case law from another jurisdiction, a court may do so if it finds the reasoning expressed in that case law to be persuasive and consistent with the law from the court’s jurisdiction. In analyzing a client’s legal question, you will likely give more weight to mandatory authority than to persuasive authority. However, persuasive authority may still be helpful, especially if the binding jurisdiction does not have law addressing the issue or if you are advocating for a change in the law.”).

<sup>56</sup> For example, Hart called reasons to follow authority independent of its merits “content-independent” reasons. HART, *ESSAYS ON BENTHAM*, *supra* note 7, at 243, 254 (1982); *see generally* Schauer, *Authority*, *supra* note 4.

<sup>57</sup> Sullivan, *supra* note 11, at 1203 (“‘[P]ersuasion’ does not accurately express the role such precedent plays.”); Schauer, *Authority*, *supra* note 4, at 1944; *see also* Flanders, *supra* note 11, at 75 (“[S]ome persuasive authorities do have an authority ordinarily thought to be held only by mandatory authorities.”). Even with the extensive scholarship about the use of binding precedent, some have argued that “we have no dominant working theory regarding why judges follow precedent. . . .” Lindquist & Cross, *supra* note 22, at 1159. If there is no dominant theory for binding precedent, there is certainly none for persuasive authority.

they are genuinely and substantively persuaded, many—perhaps even most—judicial uses of so-called persuasive authority seem to stem from authority rather than persuasion.”<sup>58</sup> For example, a court applying a doctrine for the first time might cite to numerous cases in other jurisdictions that have adopted the doctrine, not for the strength of the analysis in those cases, but to demonstrate the fact that the doctrine has been adopted elsewhere. In federal appellate court, judges regularly point out results in other circuits—identifying the circuits that have ruled one way or another. The more circuits agreeing on a doctrine, the better—their persuasive weight is often largely authoritative.

Schauer has proposed the term “optional authority” rather than “persuasive authority” as a term that better captures the nature of the authority a legal author includes at her discretion.<sup>59</sup> The phrase persuasive authority is arguably a contradiction in terms—material that is cited for its persuasive power (its content) is not authority in the classic content-independent sense.<sup>60</sup> The term “optional” does not purport to identify whether the authority chosen was chosen for its content, its status, or some combination of the two. It does not perpetuate the conventional wisdom that optional authority is chosen only for its persuasive power. For these reasons I adopt Schauer’s term for the remainder of this Article.

Though optional authority is often introduced as authority used only for its substantive content, this view is contradicted by the guidance given for its application. The prevalence of status-related factors supports the view that optional authorities are often used in an authoritative way, despite the conventional wisdom to the contrary. There would be no reason to evaluate the weight of various categories of optional authority if such authorities were used only for their substantive content. Each authority would be assessed independently on substantive grounds, and status-related factors would be irrelevant. Disputes about the propriety of citing to any particular type of authority are always about the appropriate use of a source in authoritative ways. For example, in debates about the “citability” of unpublished opinions and foreign law, no one argues that either source is binding; the question is whether these sources may be used even as *optional*

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<sup>58</sup> Schauer, *Authority*, *supra* note 4, at 1947.

<sup>59</sup> *Id.* at 1946.

<sup>60</sup> *Id.* at 1943.

authority.<sup>61</sup> Arguably, if foreign law were used only for substantive reasons, there would be no reason to cite to it, and the controversy could be avoided altogether.

Similarly, the controversy over unpublished opinions is not about whether such opinions are binding, but whether they are authoritative.<sup>62</sup> Without an authoritative reason, the only reason to include an actual citation in the argument would be to attribute the idea to the source—to avoid plagiarism. In practice, citations seem to be included more often for their authoritative weight, not simply for the purpose of attribution.

Although the authoritative reasons for choosing optional authority are sometimes recognized, the dissonance between those reasons and the prevalent narrative that persuasive authority is chosen for its substance typically is not.<sup>63</sup> Such descriptions acknowledge the potential persuasive power of both the status and content of nonbinding sources, but do not note any distinction or tension between the two types of justification.

The fixed boundaries of mandatory authority are a bit like the political boundaries of a state. On a map, the line between two states appears perfectly clear—conceptually the boundary is distinct. But on the ground, that line is often invisible. Every lawyer and law student understands the difference between binding and nonbinding authority. But on the ground—in the work of building legal arguments—the

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<sup>61</sup> Ernest Young notes, “The crucial point is that, in this analysis, foreign practice carries weight that is independent of the underlying reasons for that practice. The Court thus chooses to treat foreign law as authoritative in Joseph Raz’s sense . . . .” Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 156 (2005) (emphasis omitted). “The Court is not persuaded by new rationales, but rather by the mere fact that foreign jurisdictions take a particular view. It has not ‘learned’ anything from looking abroad other than to find out that others agree with what the Court already believed. It is deferring to numbers, not reasons.” *Id.* at 155.

<sup>62</sup> In discussing the merits of a federal rule barring citation of unpublished opinions, Judge Myron H. Bright observed that “while the argument made in an unpublished opinion may always be repeated in a brief, what the lawyers want is the imprint of three judges on that opinion.” *Admin. Off. of the U.S. Ct., Advisory Comm. on App. Rules 15* (Apr. 13, 2004) (statement of Judge Myron H. Bright) (available at [www.nonpublication.com/aphearing.htm](http://www.nonpublication.com/aphearing.htm)).

<sup>63</sup> For example, according to one recent treatise on precedent authored by Bryan Garner and twelve notable judges, “Courts may perceive authority as being compelling (or not) depending on many factors.” The list of factors includes both substantive (“relevance and sound reasoning” and whether it is “founded on solid principles”) and authoritative (“the reputation of the author or issuing court” and “the extent to which [it] has been cited and followed”). GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* 164 (2016).



distinction is much less clear. When optional authority is used for authoritative purposes, and mandatory authority is recognized as indeterminate in many cases, the difference between the two looks much less stark.<sup>64</sup> Legal decisionmakers are not consulting binding sources for guidance and then filling in “gaps” only as they are substantively persuaded to do so—this picture is much too simplistic. Because optional authority often carries authoritative (content-independent) weight, it is much more similar to mandatory authority than a binary, hierarchical model allows. Legal decisionmakers often appear to be consulting such sources in the same way they consult binding sources. Secondary sources, like jury instructions or restatements, are cited as authoritative evidence of what the law is, not for their substantive persuasive power.

Whether optional authority *should* be used for authoritative reasons is beyond the scope of this Article. But optional authority *is* used regularly in an authoritative way, giving it a weight similar to that of mandatory authority. Thus, the weight of authority is not a simple binary concept but a more subtle and fluid notion.<sup>65</sup>

### *1. Optional Judicial Opinions Vary Widely in Weight*

The variation in weight is most developed in the realm of judicial precedent; there has long been an array of customs addressing the weight of opinions in different circumstances, though the term weight is never quite defined. This is true for both binding and optional precedent. The hierarchy of authority does not distinguish among the subtle differences in weight that exist in practice despite the fact that they are regularly acknowledged: the model does not match reality.

Most would agree that even vertical precedent is not uniformly weighted. “While many cases are technically binding, they can

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<sup>64</sup> When optional authority is used authoritatively, Ernest Young questions whether it is any different from binding authority. Young, *supra* note 61, at 151 (“When a legal rule has force whether or not we agree with the reasons used to justify it, is that not the very definition of binding legal authority?”); former Judge Kozinski asserts, “Controlling authority has much in common with persuasive authority.” *Hart v. Massanari*, 266 F.3d 1155, 1172 (9th Cir. 2001). Chad Flanders has sought “to demonstrate that the difference between the respect owed to decisions with a merely persuasive authority turns out to be more a difference in degree than a difference in kind.” Flanders, *supra* note 11, at 59.

<sup>65</sup> Stephen R. Barnett, *From Anastasoff to Hart to West’s Federal Appendix: The Ground Shifts Under No Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 9, 12 (2002) (describing the “spectrum of precedent” as a “rich palette,” naming categories as binding, overruling precedent, precedent or precedential value, persuasive value, and citable).

nonetheless carry greater or lesser authority . . . .”<sup>66</sup> Most notably, some cases are categorized as “super-precedent,” a term “generally understood to refer to cases that are so entrenched in the law and the legal culture that they can never or should never be reconsidered or overruled.”<sup>67</sup> *Brown v. Board of Education* is the quintessential example. Other factors affecting the weight of authority might include the age of the case, whether it took on a novel issue, or whether it has been adopted in other jurisdictions. “Leading cases” are also attributed a greater weight—“one[s] that first definitely settled an important rule or legal principle and ha[ve] since been consistently and frequently followed. Such cases are of the very highest authority.”<sup>68</sup> Whether leading cases are different from super-precedent is unclear, but in both cases the terms reference the reputation of the opinion in the legal community.

Horizontal precedent is, depending on the circumstances, the next step down from vertical precedent. As noted above, it can be binding depending on the jurisdiction. All federal circuit courts are, by rule, bound by prior decisions in their own circuit. In such cases, it is not clear that horizontal precedent is any different in weight from vertical precedent. But in some situations, horizontal precedent may be less binding than vertical. For example, it is commonly acknowledged that the weight of the Supreme Court’s own precedent is something less than fully binding. There is no definitive explanation of the measure of this weight—the Supreme Court Justices themselves do not agree on its value.<sup>69</sup> The Supreme Court’s own precedent can only be said to weigh more than optional authority but less than mandatory authority.

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<sup>66</sup> GARNER ET AL., *supra* note 63, at 156.

<sup>67</sup> Matthew E. K. Hall, *Bringing Down Brown: Super Precedents, Myths of Rediscovery, and Retroactive Canonization of Brown v. Board of Education*, 18 J.L. & POL’Y 655, 657 (2010) (Citing to William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. ECON. 249, 251 (1976), as first using the term “super-precedent.”).

<sup>68</sup> GARNER ET AL., *supra* note 63, at 173.

<sup>69</sup> For example, in a 1991 Supreme Court decision, in the majority opinion Justice Rehnquist noted that “when governing decisions are unworkable or are badly reasoned, ‘this Court has never felt constrained to follow precedent.’” *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)). Justice Marshall strongly disagreed in his dissent, writing that “this Court has never departed from precedent without ‘special justification.’” *Id.* at 849 (Marshall, J. dissenting) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). In *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), Justices O’Connor, Kennedy, and Souter signed the opinion which began with the words: “Liberty finds no refuge in a jurisprudence of doubt.” The Court crafted a four-part “pragmatic” test to determine whether to overrule *Roe v. Wade*. *Id.* at 854.

In that realm, where a court has the option of declining to follow any authority, variance in weight is arguably more logical than in the vertical context.

In the context of the Supreme Court, different standards of deference have long been recognized: scholars have identified at least three different categories of weight depending on the nature of the issue before the court. The Supreme Court is said to give less weight to prior constitutional decisions, because “in such cases ‘correction through legislative action is practically impossible.’”<sup>70</sup> This “diminished standard of deference to constitutional decisions”<sup>71</sup> did not arise until the twentieth century.<sup>72</sup> Decisions regarding statutory interpretation, in contrast, are given the most weight, because if such a decision is incorrect the legislature can act to override it.<sup>73</sup> Common law decisions are thought to fall in the middle of those two categories.<sup>74</sup> The federal courts of appeals seem to generally follow these practices as well.<sup>75</sup>

Another commonly recognized convention is a stronger presumption in favor of precedent that interprets property and contract rights based on reliance interests.<sup>76</sup> Property and contract rights receive more weight on the “sliding stare decisis scale,”<sup>77</sup> while procedural and evidentiary precedents are given less weight.<sup>78</sup> Reliance is an important content-independent consideration: “An opinion that has in fact induced considerable reliance interests will often receive more respect than one that hasn’t.”<sup>79</sup>

It is hard to know what it means for one binding source to have more weight than another, unless the difference in weight is simply a

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<sup>70</sup> *Payne*, 501 U.S. at 828 (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)).

<sup>71</sup> Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 704 (1999).

<sup>72</sup> *Id.* at 704, 720, 727 (1999) (noting that 1944 was the first majority opinion to adopt the Brandeis vision of diminished deference to constitutional precedent).

<sup>73</sup> Barrett, *Stare Decisis*, *supra* note 28, at 1030; *see also* WILSON HUHNS, *THE FIVE TYPES OF LEGAL ARGUMENT* 128 (3d ed. 2014).

<sup>74</sup> Barrett, *Precedent*, *supra* note 30, at 1713; *see also* Lindquist & Cross, *supra* note 22, at 1162.

<sup>75</sup> Barrett, *Precedent*, *supra* note 30, at 1713.

<sup>76</sup> Lee, *supra* note 71, at 649–50; *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

<sup>77</sup> Lee, *supra* note 71, at 687; GARNER ET AL., *supra* note 63, at 161.

<sup>78</sup> Lee, *supra* note 71, at 687.

<sup>79</sup> GARNER ET AL., *supra* note 63, at 161.

trumping rule to be applied when two sources conflict.<sup>80</sup> This construct only seems to work in the realm of soft horizontal precedent, where decision makers can decide whether or not to overturn precedent. Casting authority as more or less binding authority in a vertical context is problematic because it gives discretion to a decision maker in circumstances where she is not supposed to have any. This is the unsurprising result of a system that does not acknowledge the complicated nature of difficult legal questions.

Judicial opinions deemed nonbinding due to the rules of the hierarchy have authoritative value in many circumstances, such as when they contain longstanding common law principles.<sup>81</sup> As is often noted, federal circuit courts pay close attention to, and are likely influenced by, the decisions of other circuits even though such decisions are not binding. For instance, a study by David Klein shows that in federal court decisions establishing new legal rules in unsettled areas of law, the previous nonbinding decision of another circuit is a significant determinant.<sup>82</sup> A recent treatise on the law of judicial precedent tracks the customs suggesting a greater or lesser weight for more than a dozen categories of opinions, such as per curiam decisions, pluralities, advisory opinions, and so on.<sup>83</sup>

Advice for the use of optional authority commonly includes a set of criteria for determining the relative value of nonbinding judicial opinions,<sup>84</sup> such as the identity of the court and the date of the decision. John Henry Merryman long ago identified a “factor of authority,” which gives higher regard for the decisions of some courts than for others.<sup>85</sup> The level of the court and the identity of the judge are

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<sup>80</sup> NEUMANN, *supra* note 26 (“Sources of law, both primary and secondary, are ranked so that in the event of inconsistencies, one can be chosen over another.”).

<sup>81</sup> “Even when a precedent is not binding (for it may not be a precedent of the higher court), it may be so deeply woven into the fabric of the law that its overruling would be unthinkable. (Holmes gave the example of the doctrine of consideration in contract law.)” POSNER, *supra* note 2, at 44.

<sup>82</sup> DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS 137 (2002) (In decisions that establish new legal rules in significant unsettled areas of antitrust, environmental, and search and seizure law Klein found that the decision of another circuit court on same issue was a significant determinant). Similarly, Chad Flanders provides three examples of what he calls “super persuasive” authority: (1) circuit courts citing other circuit courts; (2) state courts citing other state courts interpreting the same uniform act; and (3) state courts citing other state court common law decisions. Flanders, *supra* note 11, at 75).

<sup>83</sup> GARNER ET AL., *supra* note 63, at 155 *passim*.

<sup>84</sup> See, e.g., NEUMANN, *supra* note 26, at 88.

<sup>85</sup> Merryman, *supra* note 5, at 403.

frequently cited as significant factors in the supposed weight of an opinion.<sup>86</sup> Other factors include whether the opinion was unanimous, the thoroughness of the opinion, and the expertise of the court making the decision.<sup>87</sup> Charles Sullivan calls the ranking of nonbinding authority “graded persuasiveness”<sup>88</sup>: the common practice of judges and lawyers to rank nonmandatory judicial decisions “on a kind of sliding scale.”<sup>89</sup> In their book about legal arguments, Bryan Garner and Justice Scalia cite status-related attributes which they say makes nonbinding precedent more persuasive.<sup>90</sup>

Many others—including the authors of research and writing textbooks—offer these sorts of factors to help a legal author choose among optional sources, and more factors are based on the status of the source than its substantive content. For example, in his legal analysis text, Richard Neumann offers seven criteria for selecting primary persuasive authority,<sup>91</sup> and four of them are related to status. Similarly, Linda Edwards offers a list of ten factors for selecting nonbinding judicial opinions, and at least seven of them are based on the status of the opinion rather than the substance of it.<sup>92</sup> The factors are usually relevant only for judicial opinions, not other types of sources.

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<sup>86</sup> See, e.g., KLEIN, *supra* note 82; Charles W. Collier, *Precedent and Legal Authority: A Critical History*, 5 WISC. L. REV. 771, 779 (1988) (“[T]he opinions of more learned and esteemed judges carry more weight and have more authority as precedents . . .”).

<sup>87</sup> Sullivan, *supra* note 11, at 1202; Dobbins, *supra* note 27, at 1462.

<sup>88</sup> Sullivan, *supra* note 11, at 1201.

<sup>89</sup> *Id.*

<sup>90</sup> “Among the precedents that are nongoverning, there is a hierarchy of persuasiveness that far too many advocates ignore. The most persuasive nongoverning case authorities are the dicta of governing courts (quote them, but be sure to identify them as dicta) and the holdings of governing courts in analogous cases. Next are the holdings of courts of appeals coordinate to the court of appeals whose law governs your case; next, the holdings of trial courts coordinate to your court; finally (and rarely worth pursuing), the holdings of courts inferior to your court and courts of other jurisdictions.” SCALIA & GARNER, *supra* note 23, at 53.

<sup>91</sup> NEUMANN, *supra* note 26, at 88–89 (The seven criteria are: (1) is the precedent on point? Or if not on point, would sound analogy make it useful anyway? (2) Quality of the precedent’s reasoning; (3) identity of the precedential court; (4) treatment of the precedent in other reported opinions; (5) clarity with which the holding is expressed; (6) when the precedent was decided; and (7) positions taken by a judge in precedential court (is the authority unanimous, respected dissent, influential judge?).

<sup>92</sup> EDWARDS, *supra* note 44, at 59–61 (Factors which affect precedential value are: (1) relative level of court; (2) date of opinion; (3) strength of the court’s reasoning; (4) subsequent treatment by other authorities; (5) whether court’s statements about your issue are part of holding or dictum; (6) how factually similar opinion is to the facts of the present situation; (7) the number of subscribing judges; (8) whether the opinion is published; (9) the reputation of the particular judge writing the case opinion; and (10) trends in the law).

The parts of judicial opinions deemed nonbinding often have authoritative weight as well. Most notably, dictum—consistently defined as *never* binding—has authoritative weight. Several scholars have noted an increasing tendency for lower courts to consider themselves bound by the dicta of superior courts.<sup>93</sup> Less well-known than dicta but in the same category (parts of judicial precedent deemed nonbinding) are the parts of judicial opinions determining the appropriate interpretive methodology. Abbe Gluck has pointed out that in the Supreme Court and other federal courts, methodological decisions are not accorded the same degree of bindingness as other substantive parts of a judicial opinion: “[T]he legal status of methodology itself—whether it is ‘law’ or something ‘less’ or ‘different’—remains entirely unresolved.”<sup>94</sup> There is no agreement as to whether there should be stare decisis for principles of statutory construction, but as Gluck demonstrates, the parts of an opinion choosing a methodology of interpretation do not carry the same weight as substantive rules.<sup>95</sup> Secondary rules, which are rules about how to interpret rules, seem to be entitled to less weight than first-order rules.<sup>96</sup> Again, the hierarchy gives no hint of this distinction, perhaps because it presupposes a simplistic syllogistic methodology. Once this methodology is called into question, the choice of sources is as well.

The complicated array of weights in judicial opinions alone belies the simplistic binary vision of authority that predominates in the profession.

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<sup>93</sup> See David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2021 (2013) (“[L]ower courts hardly ever refuse to follow a statement from a higher court because it is dictum.”). Judge Pierre Leval writes that “[t]he distinction between dictum and holding is more and more frequently disregarded.” Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1250 (2006); see also Sullivan, *supra* note 11, at 1154 (“The elevation of dictum toward quasi-binding status, coupled with the elevation of vacated opinions to persuasive power has tended towards a kind of federal ‘common law’ that increasingly mirrors the legislative approach.”). Along the same lines, vacated and unpublished opinions can have some authoritative weight. Sullivan has noted that judges are citing even vacated opinions, noting that such vacated authority might be “‘only’ persuasive, but that means it is beginning to emerge as one of the sources which a judge attuned to the norms of the profession may, and perhaps should, take into account.” *Id.* at 1206.

<sup>94</sup> Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1756 (2010) [hereinafter Gluck, *States as Laboratories*].

<sup>95</sup> *Id.*

<sup>96</sup> H.L.A. HART, *THE CONCEPT OF LAW* 94–95 (3d ed. 2012).

## 2. *The Spectrum of Weight Includes Sources Other Than Case Law*

Indeed, the spectrum of weight continues well beyond the hierarchy of judicial opinions, yet receives very little attention. Some have attempted to impose a kind of extended hierarchy on those sources. Chad Flanders asserts that “[t]here is, in fact, a hierarchy of persuasive authority,”<sup>97</sup> and that nonbinding court decisions have more weight than law review articles or treatises.<sup>98</sup> Others agree—secondary authority is generally depicted as having less weight than primary authority,<sup>99</sup> though what that weight might be has barely been considered. Because the authoritative weight of optional authority is not largely acknowledged, there is little exploration of its value.

Many “never binding” sources such as the Federalist Papers, legislative history, dictionaries, and canons of interpretation<sup>100</sup> are all used in classic authoritative ways—for their status, not their substantive content. For example, canons of interpretation, a long-accepted part of statutory interpretation, have no particular place on the hierarchy of authority but are used for their status. As highlighted by Gluck, such canons are often referred to simply as “rules of thumb;” their legal status is ambiguous.<sup>101</sup> Canons of construction can be found in judicial opinions, but at least in federal court, they are not typically deemed binding in the same way as substantive law. In some state courts, canons of interpretation are made binding by statute, demonstrating that there is an open question even as to who or which

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<sup>97</sup> Flanders, *supra* note 11, at 58.

<sup>98</sup> *Id.*

<sup>99</sup> HELENE S. SHAPO, MARILYN R. WALTER & ELIZABETH FAJANS, WRITING AND ANALYSIS IN THE LAW 282 (5th ed. 2008) (“Secondary materials are generally of less weight than primary persuasive authorities.”).

<sup>100</sup> In the world of statutory interpretation, even amicus briefs filed by the Solicitor General on matters of statutory interpretation have been described as “quasi-authoritative on points of fact or even law.” William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1112 (2008).

<sup>101</sup> Abbe Gluck has recently drawn attention to the unclear status of these ubiquitous canons:

At a minimum, and regardless of how the stare decisis question is resolved, canons must have *some* legal status. If they aren’t precedent or “law,” what are they? It is difficult to think of any other rules that do so much work in judicial opinions whose legal status remains so ambiguous.

Abbe R. Gluck, *What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 615 (2014) [hereinafter Gluck, *30 Years of Chevron*].

institution should decide on interpretive methodology.<sup>102</sup> The weight of these sources varies with context.

Similarly, agency interpretations—famously governed by *Chevron*<sup>103</sup> and its progeny—are typically granted significant authoritative weight. Determining the weight of agency interpretations in any particular circumstance—the degree of deference accorded such interpretations by a court—is a complicated subject that cannot be fully addressed here. (Even *Chevron* itself is not always treated as fully binding,<sup>104</sup> similarly to other methodological opinions, as Gluck has pointed out.) But the role of agencies cannot be ignored in any comprehensive accounting of legal authority. The varying degrees of deference courts give to agency interpretations—what some have called a “continuum of deference”<sup>105</sup>—are just another way of describing the authoritative weight of agency decisions on the larger scale of authority.

Pattern jury instructions are another source of authority with clear authoritative weight, but their weight seems to vary from one jurisdiction to another,<sup>106</sup> and it is difficult to find any description of their role. By authoritative weight, I refer to their weight as

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<sup>102</sup> Gluck, *States as Laboratories*, *supra* note 94.

<sup>103</sup> *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984) (“Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”).

<sup>104</sup> Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1808 (2010) (“Although Justices sometimes seem to treat *Chevron* as binding as a matter of stare decisis (illustrated by Justice Scalia’s concurring opinion in *City of Jackson*), *Chevron* is more typically treated like a canon of construction (illustrated by Justice Stevens’s opinion for the Court in *City of Jackson*, by Chief Justice Rehnquist’s opinion for the Court in *Solid Waste*, and probably by Justice Scalia’s plurality opinion in *Rapanos*).”).

<sup>105</sup> Eskridge & Baer, *supra* note 100, at 1090.

<sup>106</sup> “A lawyer engaged in litigation should know the weight of authority given jury instructions in his or her state.” Am. Inst. of Law Libraries’ Research Instruction Caucus, *Core Legal Research Competencies: A Compendium of Skills and Values as Defined in the ABA’s McCrate Report* 107 (Ellen M. Callinan ed., July 1997) [hereinafter *Core Legal Research Competencies*]; see also *State v. Watkins*, 820 N.W.2d 264, 268 (Minn. Ct. App. 2012), *aff’d on other grounds*, 840 N.W.2d 21 (Minn. 2013) (quoting *State v. Kelley*, 734 N.W.2d 689, 695 (Minn. App. 2007) (“[T]he jury instruction guides are ‘not precedential or binding.’”); *United States v. Carter*, 776 F.3d 1309, 1324 (11th Cir. 2015) (“However, this Circuit’s pattern instructions, while a valuable resource, are not binding law.”).



authoritative statements of what the law is, which is how they are frequently cited by courts in judicial opinions.<sup>107</sup>

Even traditional secondary authority can be virtually mandatory—to fail to cite to particular sources is to ignore authority the court is sure to rely on. Sources of nonbinding authority may be virtually mandatory in some circumstances because they carry so much authoritative weight, as Schauer has observed.<sup>108</sup> Many fields of law have a particular treatise that is almost always consulted and relied upon<sup>109</sup>; the Witkin treatises in California are an oft-cited example.<sup>110</sup> According to the Core Legal Research Competencies prepared by the American Institute of Law Libraries, these types of local treatises are “authoritative texts,”<sup>111</sup> though they are undoubtedly only optional authority. State courts frequently cite state practice treatises for what appears to be their authoritative status.<sup>112</sup> For those in federal litigation practice, Moore’s Federal Practice<sup>113</sup> and Wright & Miller’s Federal Practice and Procedure treatises have a similar status.<sup>114</sup>

Secondary authorities are themselves sometimes informally ranked in an effort to give them a place relative to the hierarchy of authority.<sup>115</sup>

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<sup>107</sup> See, e.g., *Dep’t of Labor & Indus. v. Shirley*, 288 P.3d 390, 398 (Wash. App. 2012) (citing jury instructions for definition of proximate cause).

<sup>108</sup> Schauer, *Authority*, *supra* note 4, at 1958 (“For example, it is virtually impossible to argue or decide an evidence case in the Massachusetts Supreme Judicial Court without making reference to Liacos’s *Handbook of Massachusetts Evidence* or its successor.”).

<sup>109</sup> See *id.* (pointing out other examples like the Massachusetts court following particular evidence treatise); *Core Legal Research Competencies*, *supra* note 106, at 104.

<sup>110</sup> *Core Legal Research Competencies*, *supra* note 106; FREDERICK SCHAUER, THINKING LIKE A LAWYER 71 (2009) (using example of Loss and Seligman’s Securities Regulation treatise as a source of expertise).

<sup>111</sup> *Core Legal Research Competencies*, *supra* note 106, at 104.

<sup>112</sup> See, e.g., *Specialty Restaurants Corp. v. Nelson*, 231 P.3d 393, 398 (Colo. 2010) (“If an employee is entitled to more than the maximum aggregate lump sum available, her remaining bi-weekly payment is reduced by the amount of the lump sum payment spread out over the remainder of her life expectancy.”) (citing 17 Douglas R. Phillips & Susan D. Phillips, *Colorado Practice Series: Colorado Workers’ Compensation Practice and Procedure* § 6.61 at 335 (2d ed. 2005)).

<sup>113</sup> DANIEL R. COQUILLETTE, GREGORY P. JOSEPH, GEORGENE M. VAIRO, SOL SCHREIBER & CHILTON DAVIS VARNER, MOORE’S FEDERAL PRACTICE (3rd ed. 1997) (originally written by Professor James William Moore in 1938).

<sup>114</sup> CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE (1980–2018).

<sup>115</sup> See, e.g., SHAPO, ET AL., *supra* note 99 (“Secondary materials are generally of less weight than primary persuasive authorities.”); NEUMANN, *supra* note 26, at 90 (explaining legal encyclopedias, legal dictionaries and American Law Reports (ALR) articles should be used “only as a last resort”).

Nonlegal sources, discussed further below, are thought to be at the bottom of the hierarchy,<sup>116</sup> perhaps off the grid altogether.<sup>117</sup> Such sources, including empirical studies from other disciplines, are regularly cited in support of a legal argument and frequently referred to as “authority” simply by virtue of being cited in support of a legal argument. But they are neither law, nor evidence of law, and as such fall into an entirely different category. Such nonlegal sources may have little authoritative (content-independent) value; they appear to be cited primarily for their substantive content.

These variations in weight do not fit a hierarchical structure, a structure that not only sets permanently fixed weights but suggests a precision in weight that just does not exist in practice. While all of these subtleties in weight have been acknowledged in various settings, there is no comprehensive view—and no recognition that the task of creating a complete hierarchical taxonomy of authority may be inherently flawed. An extensive, precise hierarchy is attractive but ultimately misleading. Authority can never be satisfactorily taxonomized in a fixed manner because its use is not only context dependent but constantly evolving.

### *B. Acceptable Sources of Authority Are Constantly Evolving*

The traditional view of legal authority masks another one of its essential features: its dynamic nature. In recent years, there have been many empirical studies of citation practices, and if there is one common theme among these studies, it is that citation is not a static practice.<sup>118</sup> A heavy emphasis on mandatory sources presents a stagnant picture of authority because sources on the hierarchy remain the same, as do their designated weights in relation to one another. The traditional view of authority defines authority as a list of sources, not as an active practice.

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<sup>116</sup> Margolis, *supra* note 16, at 919.

<sup>117</sup> Schauer & Wise, *Delegalization*, *supra* note 3 (“[A]uthorities outside of the traditional legal canon [are] traditionally understood to be at or even below the bottom of the hierarchy of acceptable authority.”); *see also* SCALIA & GARNER, *supra* note 23, at 127 (“Don’t expect the court, or even the law clerks, to read your secondary authority; they will at most check to see that it supports the point you make. They will therefore be persuaded not by the *reasoning* of your secondary authority but only by the *fact* that its author agrees with you. And the force of the persuasion will vary directly with the prominence of the author. Thus, except as a convenient way to refer the court to a compendium of cases, it’s not much help to bring to the court’s attention the fact that a student law-review note is on your side. Use it only when you have nothing else.”).

<sup>118</sup> Schauer, *Authority*, *supra* note 4, at 1960. (“At least in American courts, citation practice is now undergoing rapid change . . .”)

Optional authority practices can and do change because, unlike the realm of mandatory authority, there are no formal rules limiting the optional sources that can be cited in support of a legal argument. When a lawyer cites to mandatory authority in a brief, the Model Rules of Professional Conduct require the lawyer to “disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”<sup>119</sup> There is no parallel requirement or even convention for optional authority.<sup>120</sup> Conventions of legal citation do not require comprehensive citation—a favorable case in one jurisdiction may be cited while a raft of opposing cases from other jurisdictions need not be mentioned at all.<sup>121</sup> The choice of optional authority is entirely up to the author and thus entirely a matter of strategy. It remains, surprisingly, almost entirely unexplained as a general matter.<sup>122</sup>

Reliance on optional authority is often referred to simply as a “norm,” and the legal community informally determines whether a source is acceptable. Sources of authority can become more or less valuable, and sources which once were not recognized as having any weight at all can become authoritative. Schauer explains that, “in reality, the status of a source as an authority is the product of an informal, evolving, and scalar process by which some sources become progressively more and more authoritative as they are increasingly used and accepted.”<sup>123</sup> At one point in history, it was only acceptable to cite dead treatise authors, not those who were still living.<sup>124</sup> Although it would have once been unthinkable to cite to an empirical study, doing so is now common. The authoritative weight of legislative history

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<sup>119</sup> MODEL RULES OF PROF’L CONDUCT 3.3(2) (AM. BAR ASS’N 2002).

<sup>120</sup> Schauer, *Authority*, *supra* note 4, at 1950.

<sup>121</sup> Consider Llewellyn’s infamous observation about canons of construction: Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950) (“[T]o make any canon take hold in a particular instance, the construction contended must be sold, essentially, by means other than the use of the canon . . .”). Or, as Duncan Kennedy long ago observed, “In a typical legal argument, policies are elaborated and strongly asserted without regard to their matched pairs.” Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 534 (1986).

<sup>122</sup> Though the value of specific types of optional authority are explored in great depth in the fields of statutory and constitutional interpretation.

<sup>123</sup> Schauer, *Authority*, *supra* note 4, at 1956–57; *see also* Flanders, *supra* note 11, at 63. (“Not anything and everything is cited as persuasive authority.”).

<sup>124</sup> Schauer & Wise, *Legal Positivism*, *supra* note 52, at 1088–89.

fluctuates depending on the judge, the court, and the era. The same is true of dicta, of treatises, and of foreign law.

According to Schauer, a judge is “permitted by the applicable professional norms” to use certain optional authorities “in a way that she is not permitted, for fear of criticism and professional embarrassment if nothing else, to provide citations to astrology, private conversations with her brother, articles in the *National Enquirer*, and (slightly more controversially) the Bible.”<sup>125</sup> Any active debates about “what the law is” fall within the realm of optional authority, with its fluid boundaries.<sup>126</sup>

While optional authority could certainly be limited by custom, limits are not the norm; the trend is clearly moving in the opposite direction. In neither of the two debates mentioned above (whether foreign law or unpublished cases should be recognized as valid legal sources) have opponents of any particular class of authority succeeded in limiting its use. As (then federal judge) Justice John Roberts observed during the debate about citation to unpublished authority:

Traditionally I think in our adversary system we allow disputes about the value of citable materials to be resolved by the lawyers in the exercise of their professional judgment in the interest of their client and let the judges decide whether we think that’s worth anything, whether it’s an opinion from another circuit, a district court opinion, a student comment in a law review.<sup>127</sup>

That debate led to the enactment of Federal Rule of Appellate Procedure 32.1, which prevents federal courts from prohibiting or restricting citation of unpublished opinions.<sup>128</sup> The debate about whether to limit citation seems to have waned, perhaps in accordance

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<sup>125</sup> Schauer, *Authority*, *supra* note 4, at 1947 (emphasis omitted).

<sup>126</sup> *Id.* at n.54.

<sup>127</sup> *Admin. Off. of the U.S. Ct., Advisory Comm. on App. Rules 53–54* (Apr. 13, 2004) (statement of Justice (then Circuit Judge) John G. Roberts) (available at <http://www.nonpublication.com/aphearing.htm>) (“You know, my experience over the last 10 months, I think I’ve seen non—whatever we call them—nonprecedential memoranda, whatever, probably twice. Two different times I’ve seen that cited, even though it’s freely citable in our circuit, because the lawyers know the judges aren’t terribly impressed by it. On the other hand, as a lawyer I’ve had situations where that is the exact case. It’s a year ago. Maybe two of the judges are on the same panel. However basic the proposition, in my professional judgment this is what I want that court to know on my client’s behalf and I found it frustrating to have a rule saying you can’t do that.”).

<sup>128</sup> FED. R. APP. P. 32.1 provides: “A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like; and (ii) issued on or after January 1, 2007.”

with a societal trend toward greater access to information. Even Twitter may now constitute an acceptable source of authority.<sup>129</sup> A mainstream, nonlegal newspaper, USA Today, carried a headline in November of 2017 proclaiming that “@realDonaldTrump’s tweets often carry legal weight.”<sup>130</sup>

While lawyers and judges may once have relied on finite body of legal information with strictly defined borders, that is no longer the case.<sup>131</sup> But the current dominant primary/secondary distinction, without more, offers no means of differentiating between sources as disparate as empirical social science studies and legislative history. In the traditional hierarchy of authority, all nonprimary authority falls

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<sup>129</sup> See *Hawaii v. Trump*, 859 F.3d 741, 773 n.14 (9th Cir. 2017), *cert. granted sub nom. Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080 (2017), *cert. granted, judgment vacated*, 138 S. Ct. 377 (2017), *vacated*, 874 F.3d 1112 (9th Cir. 2017) (The Ninth Circuit cited the President’s Twitter Account: “Indeed, the President recently confirmed his assessment that it is the ‘countries’ that are inherently dangerous, rather than the 180 million individual nationals of those countries who are barred from entry under the President’s ‘travel ban.’ See Donald J. Trump (@realDonaldTrump), TWITTER (June 5, 2017, 6:20 PM), <https://twitter.com/realDonaldTrump/status/871899511525961728> (‘That’s right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won’t help us protect our people!’).”) (emphasis in original). The court also cited Elizabeth Landers, *White House: Trump’s Tweets are ‘Official Statements’*, CNN (June 6, 2017, 4:37 PM), <http://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/>, reporting the White House Press Secretary’s confirmation that the President’s tweets are “considered official statements by the President of the United States.” The court took “judicial notice of President Trump’s statement as the veracity of [the] statement can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” *Hawaii*, 859 F.3d at 773 n.14. (internal quotation omitted). *But see* Note, *Tweets on Transgender Military Members*, 131 HARV. L. REV. 934 (2018) (explaining the President’s tweets lack “legal status”).

<sup>130</sup> Gregory Korte, *Trump and the Twitter Presidency: @realDonaldTrump’s Tweets Often Carry Legal Weight*, USA TODAY (Nov. 8, 2017, 10:55 AM), <https://www.usatoday.com/story/news/politics/2017/11/08/trump-and-twitter-presidency-realdonaldtrumps-tweets-often-carry-legal-weight/815980001/>; *see also* Marcia Coyle, *Trump’s Tweets Are ‘Authority’ in Advocates’ New Travel Ban Filings*, THE NAT’L L.J. (June 12, 2017, 12:02 AM), [https://www.law.com/nationallawjournal/almID/1202789419920?cmp=share\\_twitter](https://www.law.com/nationallawjournal/almID/1202789419920?cmp=share_twitter) (“In what may be a first at the U.S. Supreme Court, President Donald Trump’s Twitter account was identified Monday as an ‘authority’ along with the cases, law review articles and news citations that lawyers typically use to bolster their arguments.”).

<sup>131</sup> Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CALIF. L. REV. 1673, 1691 (2000) (explaining in 1899 authority issues were simple because the world of authority was much more restricted) [hereinafter Berring, *Cognitive Authority*]; *see also* Schauer & Wise, *Legal Positivism*, *supra* note 52, at 1080; Schauer & Wise, *Delegalization*, *supra* note 3, at 514 (“In many respects legal decision making is highly information dependent and was traditionally dependent on a comparatively small universe of legal information, a universe whose boundaries were effectively established, widely understood, and efficiently patrolled.”).

within one largely undifferentiated category called *secondary authority*, reflecting its original perceived insignificance (the word *secondary* is commonly defined as lesser or inferior).<sup>132</sup> This single, nebulous category obscures even the most obvious developments in authority, providing no framework for their discussion.

A marked increase in the use of nonlegal sources and an entire schema of authority devoted to the interpretation of statutes and regulations are two examples of the important ways that the use of legal authority has changed, demanding a deeper look at the current practice of deploying legal authority.

### *1. Changes in Access and the Use of Nonlegal Information*

Dramatic improvement in access to information is one of the reasons for a new, more nuanced view of authority. The impact of this change can hardly be overstated. At a minimum, much more information is now reliably available to every lawyer and judge, and that has clearly played an important role in the recent changes to citation practice.<sup>133</sup> Any such changes are not explicitly recognized by the hierarchy of authority. Instead, the realm of nonbinding sources (essentially off the grid) just continues to grow.

The evolution of sources is multifaceted—it is not limited to the addition of new categories of sources. With changes in technology, optional authority has gained many of the attributes of mandatory authority. A rule of law system requires that law be “accessible and so far as possible intelligible, clear, and predictable.”<sup>134</sup> Optional

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<sup>132</sup> *Secondary*, OXFORD ENGLISH DICTIONARY (online ed., available at [www.oed.com](http://www.oed.com)) (“Belonging to the second class in respect of dignity or importance; entitled to consideration only in the second place. Also, and usually, in less precise sense: Not in the first class; not chief or principal; of minor importance, subordinate.”).

<sup>133</sup> See, e.g., Berring, *Cognitive Authority*, *supra* note 131; Schauer & Wise, *Legal Positivism*, *supra* note 52, at 1105; Schauer & Wise, *Delegalization*, *supra* note 3, at 497; Michael Whiteman, *The Death of Twentieth-Century Authority*, 58 UCLA L. REV. DISCOURSE 27 (2010); ETHAN KATSH, *THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW* (1989); Richard B. Cappalli, *Bringing Internet Information to Court: Of “Legislative Facts,”* 75 TEMPLE L. REV. 99, 123 (2002) (“Not long ago, lawyers would have lacked the time, resources and capacity to generate extra-legal studies and reports supporting their legal argumentation.”). The E-Government Act of 2002 requires each circuit to establish and maintain a website with all written opinions. Pub. L. No. 107-347 (Dec. 17, 2002).

<sup>134</sup> TOM BINGHAM, *THE RULE OF LAW* 37 (2010); see also Jeremy Waldron, *Stare Decisis and the Rule of Law*, 111 MICH. L. REV. 1, 3 (2012) (The rule of law requires “that the laws be the same for all and that they be accessible to the people in a clear, public, stable, and prospective form.”).

authority is becoming more like mandatory authority in these very ways. When opinions were rarely published and difficult to access, the most important sources of law were treatises that restated the law.<sup>135</sup> The legal system now has the opposite problem—a vast and ever-growing number of reliably accessible judicial opinions, and a vast number of other easily accessible sources of information.<sup>136</sup> The sheer volume of sources now available is one of the likely reasons for a recent movement to develop a positive legal methodology—a way to figure out what the law is.<sup>137</sup>

The change in form from print to digital has arguably also affected the way attorneys perceive and engage with the law.<sup>138</sup> These changes have made mandatory and optional sources look more similar.<sup>139</sup> Frederick Schauer and Virginia Wise, among numerous others, have tracked and analyzed the increase in use of “nonlegal” authority,<sup>140</sup> and

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<sup>135</sup> *Hart v. Massanari*, 266 F.3d 1155, 1165 (9th Cir. 2001).

<sup>136</sup> *Id.* at 1174 (“The very existence of the binding authority principle is not inevitable.”)

<sup>137</sup> See, e.g., William Baude, Adam S. Chilton & Anup Malani, *A Call for Developing a Field of Positive Legal Methodology*, 84 U. CHI. L. REV. 1 (2017).

<sup>138</sup> More than twenty-five years ago, Katsch argued that “[t]he change in the means of access to legal materials will ultimately affect how law is perceived by lawyers and by others who may have an interest in such materials. Print supported a standardized set of categories, and every case was placed into one or more categories. The internal organization of legal materials need no longer conform to such a system. If law cannot be expected to possess the same internal organization in the future, neither can it expect its external boundaries to remain as fixed as they are today. The question of what is law, which even today is often a matter of controversy, or the issue of who is entitled to dispense ‘legal’ information will become even more difficult in the future.” M. ETHAN KATSH, *THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW* 223 (1989).

<sup>139</sup> “These differences in the research process mean that, as a general matter, electronic researchers do not encounter and interpret individual cases through the lens of key system information (key topics/numbers, digest blurbs) to the same extent as print researchers.” Katrina Fischer Kuh, *Electronically Manufactured Law*, 22 HARV. J.L. & TECH. 223, 247 (2008). As a result, there is “greater divergence with respect to case texts reviewed . . . [S]earches that electronic researchers run are highly individualized.” *Id.* at 249. Others argue that “changes in legal publishing and electronic search technologies are making it increasingly difficult for the current generation of legal researchers to distinguish easily between types of authority and their relative weight.” Margolis, *supra* note 16, at 922. Margolis argues that “[t]he external clues which reinforce notions of authority in the print-based world do not exist in the online world. The technology driven changes do more than change the way we access legal materials. Indeed, they make it increasingly difficult to determine just what counts as ‘law’ at all.” *Id.* at 923.

<sup>140</sup> Schauer & Wise, *Delegalization*, *supra* note 3; see also, Margolis, *supra* note 16, at 923; Bezalel Stern, *Nonlegal Citations and the Failure of Law: A Case Study of the Supreme Court 2010-11 Term*, 35 WHITTIER L. REV. 79, 89 (2013).

more than fifteen years ago questioned whether the distinction between legal and nonlegal authority is itself breaking down.<sup>141</sup>

The use of nonlegal sources—social science authorities in particular—is perhaps the most conspicuous example of a changing citation practice. Citation to social science authorities was once nonexistent, but the practice has now become entirely commonplace.<sup>142</sup> The marked increase in citation of nonlegal sources in the last thirty years<sup>143</sup> is a phenomenon that has received a great deal of attention.<sup>144</sup> One study notes that “virtually every discipline,

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<sup>141</sup> Schauer & Wise, *Delegalization*, *supra* note 3, at 515 (“[D]oes the breakdown of the line between the legal and the nonlegal with respect to information presage a breakdown in the line between the legal and the nonlegal with respect to law itself?”); Berring, *Cognitive Authority*, *supra* note 131, at 1675 (“Legal information is transforming from a stable universe of settled sources into a free-for-all of competing authority. . . . The way authority is used has changed; the way authority is defined is changing.”). Not all agree that technology has changed everything; Susan Nevelow Mart recently pointed out that “the nineteenth-century worldview of the legal system” has been incorporated into the algorithms of modern search engines, through Westlaw’s Key Numbers system and Lexis Advance’s Topics. Susan Nevelow Mart, *The Algorithm as a Human Artifact: Implications for Legal [Re]Search*, 109 LAW LIBR. J. 387, 419 (2017).

<sup>142</sup> Berring, *Cognitive Authority*, *supra* note 131, at 1688; *but see* Frederick Schauer, *The Decline of “The Record”: A Comment on Posner*, 51 DUQ. L. REV. 51, 55 n.25 (2013) [hereinafter Schauer, *The Decline of the Record*] (“[T]he purpose for which Brandeis used non-legal information and sources was in fact quite limited, and far more limited than has subsequently been appreciated.”).

<sup>143</sup> Schauer & Wise, *Delegalization*, *supra* note 3 (“Since 1990, the Supreme Court’s citation of nonlegal sources has increased dramatically, even as the number of citations has remained relatively constant, the number of clerks for the justices has remained constant, and the number of pages of opinions produced by the Court has decreased. Moreover, the same phenomenon of increased citation to nonlegal materials is seen in state courts and lower federal courts as well, although the absolute numbers are lower and the trend is slower.”).

<sup>144</sup> *See, e.g., id.* (discussing the trend); Margolis, *supra* note 16, at 922; Michael Whiteman, *The Death of Twentieth-Century Authority*, 58 UCLA L. REV. DISCOURSE 27 (2010); Stern, *supra* note 140. For example, a study of secondary citations per majority opinion in the Supreme Court shows that secondary citations have increased from .5 per majority opinion in 1930, to 3.5 in 1960, to 5.5 in the 1996–97 term. William H. Manz, *Citations in Supreme Court Opinions and Briefs: A Comparative Study*, 94 LAW LIBR. J. 267, 297 (2002). Another study of Supreme Court citations shows a dramatic increase in the use of dictionaries from 1989–98, and an increase in citations to *The Federalist* and to various newspapers. John J. Hasko, *Persuasion in the Court: Nonlegal Materials in U.S. Supreme Court Opinions*, 94 LAW LIB. J. 427, 431–32 (2002); *see also* Note, *Looking it Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437 (1994). And, for example, in a study comparing the use of interpretive resources by Supreme Court Justices in workplace law cases, the Burger Court (1969–1985) relied on dictionaries in 1.4% of the cases, while the Rehnquist Court (1986–2002) relied on dictionaries in 6% of the cases. Conversely, the use of legislative history in workplace law cases decreased from 46.6% in the Burger Court era to 27.7% in the Rehnquist era. Use of language canons increased from



scientific or not, has become fair game for citation.”<sup>145</sup>

Introductory explanations of authority in law do not typically include nonlegal authority because they end with traditional legal secondary sources. But scholars have long recognized the use of nonlegal sources in actual practice. More than thirty years ago, John Monahan and Laurens Walker tracked the Supreme Court’s perception of nonlegal authority, beginning with *Muller v. Oregon*,<sup>146</sup> the case in which Louis Brandeis prepared his famous Brandeis Brief for the state. Monahan and Walker explain “After referring to the social science materials, the Court stated that although they ‘may not be, technically speaking, authorities,’ they would nonetheless receive ‘judicial cognizance.’”<sup>147</sup> But by the time of *Brown v. Board of Education*,<sup>148</sup> “the Court referred to the social science studies that supported the district court’s finding that segregated public education harmed black children as ‘modern authority.’”<sup>149</sup>

The use of such information—commonly referred to as “legislative facts” (as opposed to adjudicative facts)<sup>150</sup>—has generated a great deal of scholarly discussion. Defining “legislative facts” as “generalized facts about the world that are not limited to any specific case,”<sup>151</sup> Allison Orr Larsen documents an increase in empiricism<sup>152</sup> in the U.S. Supreme Court, noting that “whatever the reason, the Court’s factual statements about the world are now commonly accompanied by

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12% to 23.4% and use of substantive canons from 8.3% to 15.6%. James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 30 (2005).

<sup>145</sup> Hasko, *supra* note 144, at 442 (noting the increase in use of scientific studies in federal courts noted in 1990 Federal Courts Study Committee).

<sup>146</sup> Monahan & Walker, *supra* note 36, at 480–81 (discussing *Muller v. Oregon*, 208 U.S. 412 (1908)).

<sup>147</sup> *Id.* at 481 (“Further in the opinion, the Court clearly returned to the classical perspective and referred to the materials as presenting a question of fact.”).

<sup>148</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

<sup>149</sup> Monahan & Walker, *supra* note 36, at 483. Monahan and Walker argued that “courts should treat social science research relevant to creating a rule of law as a source of authority rather than as a source of facts.” They proposed that “courts treat social science research as they would legal precedent under the common law.” *Id.* at 488.

<sup>150</sup> The first use of this term is attributed to Kenneth Culp Davis in *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404 (1942).

<sup>151</sup> Allison Orr Larsen, *The Trouble With Amicus Facts*, 100 VA. L. REV. 1757, 1759 (2014) [hereinafter Larsen, *Trouble*].

<sup>152</sup> *Id.* at 1777.

nonlegal authorities.”<sup>153</sup> Although a rich body of scholarship explores the regular use of legislative facts in judicial decision making, such sources have no place in the standard vocabulary of legal authority: the legal status of such sources remains unclear.<sup>154</sup> Currently, social-science-related information is just another part of the vast realm of nonbinding authority.

Legal authors are generally not well equipped to evaluate the authoritative value (or substantive merits) of sources in other fields, and it is not at all clear that the citation of such sources follows any sort of meaningful guidelines. Schauer has raised concerns about the fact that appellate judges are increasingly conducting their own factual research.<sup>155</sup> Appellate judges are distinguishing nonlegal material cited by parties in their briefs, which the other side can rebut, from material found independently by the judge and incorporated into an opinion, without providing an opportunity for the parties to respond. On the other side, former Federal Judge Richard Posner has argued that factual complexity has grown (scientific and technological complexity as well as financial and other commercial practices) and that judges should be “relying more than they do on facts established to a reasonable degree of certainty by science, including the social sciences, and technology, including statistical tools for marshaling and analyzing evidence.”<sup>156</sup> The hierarchy of authority assumes a limited set of sources and provides a built-in valuation for each one. For sources not in the hierarchy, such as social science papers, legal authors have no established way to evaluate their value.

For the purpose of creating a better model of authority, this shift to nonlegal sources is particularly significant because their characteristics are so different from that of traditional legal authority. Desire for apparent objectivity increases the value of any source other than the

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<sup>153</sup> Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 78 (2013) [hereinafter Larsen, *Factual Precedents*]; see also Larsen, *Trouble*, *supra* note 151 at 1803. (“As the Supreme Court shrinks the number of cases it agrees to hear every year, there is an increased focus on generalized facts as opposed to case-specific and record-specific ones.”); Wes Daniels, “*Far Beyond the Law Reports*”: *Secondary Source Citations in United States Supreme Court Opinions October Terms 1900, 1940, and 1978*, 76 LAW. LIBR. J. 1 (1983).

<sup>154</sup> Richard B. Cappalli, *Bringing Internet Information to Court: Of “Legislative Facts,”* 75 TEMP. L. REV. 99, 100 (2002).

<sup>155</sup> Schauer, *The Decline of The Record*, *supra* note 142.

<sup>156</sup> RICHARD POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* 319, 292 (2016) [hereinafter POSNER, *DIVERGENT PATHS*]. Posner argues that judges need help finding such evidence, citing Schauer’s term “informationally disabled” to describe judges. *Id.* at 159.

decision maker herself and appears to drive the citation of just about anything, including social science studies. But the legal profession does not hold legal authors to any standards at all for quality or impartiality of sources. The custom is to cite to sources, and the quality of sources was not in question when a legal author could really draw only from a limited pool of vetted legal sources. Now, that pool has expanded to include virtually anything, without any corresponding system of scrutiny. Such a system is not a scientific model of evidence; the only guard against bias seems to be the adversarial design of the judicial system.

## 2. *The Rise of Enacted Law and Importance of Interpretive Sources*

A second significant development in the legal system remains seemingly unacknowledged by the standard hierarchy of authority—the replacement of much of the common law with statutory and administrative regimes. This, in turn, has led to the expansion of entire scholarly fields focused on statutory and regulatory interpretation. The act of interpreting a primary rule is an act that requires external sources beyond the rule itself (even if only the interpreter herself, as “words do not interpret themselves.”<sup>157</sup> But the traditional model of authority separates *law* from *not law*, and in a formalist legal world, such *not law* sources are of little significance. Thus, all sources used to interpret the law simply fall into the undifferentiated secondary category. In short, the conventional, juriscentric, hierarchy of authority, focused almost entirely on the identification of binding rules, mostly ignores the *interpretation* of those rules.

Given the prevalence of interpretation in the modern legal world, the omission of interpretive authority is problematic, to say the least. As is generally acknowledged, in the first half of the twentieth century the “greater part of substantive law was recast in statutory form,”<sup>158</sup> and we are now in the Age of Statutes, “an era in which federally made statutory law dominates the legal landscape and the primary role of federal courts is to interpret it.”<sup>159</sup> Though not reflected by the hierarchy of authority, scholars have long been exploring the

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<sup>157</sup> FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 35 (2009).

<sup>158</sup> GRANT GILMORE, *THE AGES OF AMERICAN LAW* 86 (2d ed. 2014).

<sup>159</sup> Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Ages of Statutes*, 54 WM. & MARY L. REV. 753, 755 (2013) (“Statutory interpretation cases dominate the federal docket.”).

consequences of an increasingly legislative legal universe.<sup>160</sup> The fields of constitutional interpretation and statutory interpretation are vast; in both fields scholars have developed—and the conversation is far from over—complex interpretive theories that rely on many nonbinding sources, such as legislative history, canons of construction, documents evidencing the drafters’ intent, dictionaries, and so on.

The Age of Statutes and the rise of the administrative state have made interpretation a primary task of many decision makers, but most of the sources used to resolve interpretive disputes do not appear in the hierarchy of authority, except as part of the undifferentiated realm of nonbinding sources. For example, introductory lists of authority typically omit legislative history, even though judges and lawyers commonly rely on it. It is not even clear whether legislative history is primary or secondary; many texts do not label it one way or another. One research text calls it “a unique form of legal authority,”<sup>161</sup> another lists it under “primary sources of law,”<sup>162</sup> and some refer to it as “secondary authority,”<sup>163</sup> though it does not appear to ever be included in introductory lists of secondary authority. In the historical sense, legislative history is a primary source—it is “based on firsthand experience.”<sup>164</sup> And it is not secondary to primary legal authority in the traditional sense (it does not compile or summarize primary sources), which may explain its absence from secondary authority lists.

Traditional introductory descriptions of authority pay little attention to the allocation of interpretive power among institutions, despite the increasing significance of statutory regimes and the administrative state.<sup>165</sup> Arguably, the formalist hierarchy of authority significantly

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<sup>160</sup> Abbe Gluck has analyzed in depth what she calls “a resounding shift in the center of law’s gravity away from judge-made law toward statutes and their primary administrators.” Gluck, *30 Years of Chevron*, *supra* note 101, at 631.

<sup>161</sup> KUNZ, ET AL., *supra* note 54, at 279 (“The materials created during the legislative process are generated by a government body while creating primary authority—a statute—but they are subordinate to the statute itself.”); *cf.* AMY SLOAN, *BASIC LEGAL RESEARCH* 199 (3d ed. 2006) (“In deciding cases, judges must determine what the legislature intended when it passed the statute.”).

<sup>162</sup> MARK K. OSBECK, *IMPECCABLE RESEARCH: A CONCISE GUIDE TO MASTERING LEGAL RESEARCH SKILLS* 125 (2010).

<sup>163</sup> BARKAN ET AL., *supra* note 10, at 10.

<sup>164</sup> See *Primary, Secondary & Tertiary Sources Defined*, USC LIBR. RES. GUIDES (last updated Aug. 8, 2018, 1:58 PM), <http://libguides.usc.edu/primarysources/home> (listing examples of primary sources, including “interview and speech transcripts . . . oral histories . . . [and] government documents (laws, bills, proceedings, acts, census records, etc.)”).

<sup>165</sup> See Mark Edwin Burge, *Without Precedent: Legal Analysis in the Age of Non-Judicial Dispute Resolution*, 15 *CARDOZO J. CONFLICT RESOL.* 143, 164–66 (2013).

understates the role of other institutions, perhaps a remnant of “juriscentrism,” the idea that judges are the primary creators of law.<sup>166</sup> Constitutions have an undisputed place at the top of the hierarchy of authority, with enacted law below constitutions, and judicial opinions below enacted law. Thus, the rule provided by a statute outranks the rule provided in a judicial opinion, but can be trumped by a rule in a constitution. But this simple ranking says nothing about the interaction between institutional branches, such as when the judiciary interprets rules enacted by the legislature. When a court interprets a constitution or statute, its role is obviously different than its role in a purely common law matter. When interpreting a statute, “[a] judge’s role is subsidiary and secondary: subsidiary to the legislature and secondary to the agencies.”<sup>167</sup> The hierarchy of authority offers no guidance as to what other sorts of sources might be used to interpret its rules. There is plenty of debate about this, of course, but again, the debate is unmoored from the traditional model of authority.

Developments in administrative law have raised important issues about the weight of authority across institutions, such as the 2005 Supreme Court decision *Brand X*, which places agency statutory interpretation above a judicial interpretation.<sup>168</sup> The traditional hierarchy of authority has no framework for the rules that allocate and evaluate the balance of power between institutions. It is a description of authority developed in a different era, when common law dominated the legal landscape. A hierarchy that dictates only that “statutes outrank

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<sup>166</sup> Edward L. Rubin, Book Review: *Statutory Interpretations and the Therapy of the Obvious*, 68 VAND. L. REV. 159, 162 (2015).

<sup>167</sup> *Id.* at 173.

<sup>168</sup> Abbe Gluck argues that in its 2005 *Brand X* decision, “the Supreme Court held that agency statutory interpretations of ambiguous statutes sometimes could, and indeed should, displace judicial precedents on what those statutes mean—perhaps even U.S. Supreme Court precedent. This is a ‘WOW’ moment.” Gluck, *30 Years of Chevron*, *supra* note 101, at 625. As a Tenth Circuit judge, Supreme Court Justice Neil Gorsuch raised concerns about the role of executive agencies in a strident concurrence:

There’s an elephant in the room with us today. We have studiously attempted to work our way around it and even left it unremarked. But the fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design. . . . [A]fter this court declared the statutes’ meaning and issued a final decision, an executive agency was permitted to (and did) tell us to reverse our decision like some sort of super court of appeals.

Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149–50 (10th Cir. 2016) (Gorsuch, J., concurring).

judicial decisions” gives no hint of the complex task of interpreting enacted law.

Reams have been written about the appropriate interpretive methodology in various contexts, and that controversy is largely about which sources of optional authority are appropriate and which should be prioritized. Yet, those discussions are largely disconnected from the predominant hierarchy of mandatory sources, which is of little use in addressing interpretive questions.

The standard hierarchy of authority as a description fails to capture key characteristics of authority, thus failing to capture many inconsistencies, peculiarities, and trends in the way that legal authors actually use authority.

### III

#### TOWARD A BETTER UNDERSTANDING OF LEGAL AUTHORITY

The predominant descriptive tools for authority have remained essentially unchanged for the last century and need to be reconsidered. The binary description of authority with its central hierarchical structure for mandatory authority persists; no widely accepted alternative means for understanding and evaluating authority has arisen. Those who have addressed the value of optional authority have generally tried to extend the hierarchy concept to optional authority, attempting to rank sources in a way that mimics the ranking of mandatory authority. This sort of effort might be better than none; it moves beyond the all-or-nothing valuation of authority. However, it perpetuates the notion that all legal authority is an objective, autonomous body of information that yields decisions. It continues to use a ranking system to stand as a proxy for the valuation of authority. For example, law review articles have a designated place on the list: lower than court decisions from another jurisdiction but higher than legal encyclopedias. But a “better” taxonomy of legal sources is insufficient; we must resist the appeal of a neat objective ranking. Legal authors craft legal analysis for difficult legal questions using a vast array of acceptable legal sources. Their choice of authority varies widely given the context, and the factors that determine their choices evolve over time. We need a better understanding of how and why legal authors use sources of information to support legal analysis and how and why they should.

The first essential step in reimagining concepts of authority—and it is admittedly only a first step—is to shift to a holistic, pluralistic view

of legal authority, moving beyond the persistent dualistic description of authority. A pluralistic view provides a commonsense framework for examining the unique ways in which legal authors use authority. Most importantly, a pluralistic view of authority allows for more than one ultimate principle, accommodating the natural coexistence of multiple competing sources of authority and the related flexibility in legal argument. It allows for a continuum of weight rather than a binary view, and it allows for the evolution of legal authority. A pluralist perspective acknowledges that the construction of legal arguments is dependent on the legal author's choice of methodology, emphasizing a creative rather than formalist view of legal argument. Describing authority in this way forces a shift away from the formalist thinking encouraged by a hierarchy and instead encourages close evaluation of the purpose and value of each source of information.

In both the fields of statutory and constitutional interpretation, scholars have developed widely-accepted pluralistic models of legal argument. Philip Bobbitt labeled six modalities of legitimate constitutional argument: historical, textual, structural, doctrinal, ethical, and prudential.<sup>169</sup> Similarly, William Eskridge and Philip Frickey identified multiple sources of argumentation, including textual, historical, and evolutive.<sup>170</sup> Each of these modalities rests on different types of supporting evidence; the choice of modality dictates the choice of evidence. Based on these statutory and constitutional interpretation models, Wilson Huhn created a broader framework identifying text, intent, precedent, tradition, and policy analysis as the five legitimate forms of legal argument.<sup>171</sup> Like the constitutional and statutory interpretation models, Huhn's model provides a cogent framework for

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<sup>169</sup> PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12 (1991); see also Randy Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1878–79 (2013) (“Depending on the case, factors such as text, history, precedent, justice, political philosophy, and government policy might drive the analysis. . . . The best description of the Court’s interpretive approach is not pragmatic but *pluralistic*.”).

<sup>170</sup> William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 321–22, 353 (1990); see also Todd D. Rakoff, *Statutory Interpretation as a Multifarious Enterprise*, 104 NW. L. REV. 1559, 1560 (2010) (“[T]here are many legitimate and useful modes of statutory interpretation . . . these methods can look very different from one another, and . . . choosing the right one in any given instance is not a question of ‘theory’ in the ordinary sense of the term but of appropriateness or ‘fit.’”); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1136 (1992) (“The data put into doubt any claims that the Supreme Court is strictly originalist or textualist in its approach to statutory cases. The Court’s approach is more eclectic, considering a wide range of sources of authority.”).

<sup>171</sup> HUHNS, *supra* note 73, at 14.

considering the value and purpose of all types of acceptable authority. As Huhn explains, “Each type of legal argument springs from a different source of law. Each type of argument functions as a rule of recognition. Each type of argument is based upon a different set of evidence.”<sup>172</sup>

Less important than the exact label or number of categories of argument is the explicit recognition of potentially conflicting types of legal argument, which rely on different sources of information. The concept is not novel. For example, Steven J. Burton recognizes the same concept with different vocabulary, noting that “reasons allowed by the law may compete.”<sup>173</sup> Whether recognizing specific categories of legal argument, or simply a broader set of “reasons allowed by the law,” a pluralistic framework allows for balancing among sources, rather than a strict ranking—a critical difference.

A hierarchy,<sup>174</sup> the current dominant scheme for description of legal authority, is organized around a single, uncontradicted principle. As such, it cannot capture the strategic and creative reality of legal analysis, which often requires the balancing of competing principles. Instead of a hierarchy, we need a scheme that allows legal authors to recognize, understand, and explain the use of authority as a complicated and evolving practice.<sup>175</sup> A description of authority as a practice that allows for the choice of sources is consistent with a much more sophisticated and realistic decision-making process than a hierarchy, which suggests no choice and no balancing. A pluralistic model of authority acknowledges the indeterminacy of law;<sup>176</sup> it allows

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<sup>172</sup> *Id.* at 13.

<sup>173</sup> BURTON, *supra* note 25, at 90.

<sup>174</sup> The fourth definition of “hierarchy” in the Oxford English Dictionary is “A body of persons or things ranked in grades, orders, or classes, one above another.” Interestingly, the first three definitions in the OED are religious (implicating a higher authority): (1) each of three divisions of angels, (2) rule or dominion in holy things, and (3) the collective body of ecclesiastical rulers. *Hierarchy*, OXFORD ENGLISH DICTIONARY, (online ed., available at <http://www.oed.com/view/Entry/86792?redirectedFrom=hierarchy#eid>) (last visited Jan. 15, 2017).

<sup>175</sup> Schauer, *Authority*, *supra* note 4, at 1957.

<sup>176</sup> The indeterminacy of law is a vast and unsettled topic. But for the purpose of selecting authority, what is significant is the near consensus that there is *some* indeterminacy in the law—its precise measure is less important. “Legal theory has in this matter a curious history; for it is apt either to ignore or to exaggerate the indeterminacies of legal rules.” H.L.A. HART, *THE CONCEPT OF LAW* 130 (2d ed. 1994). The existence of some indeterminacy allows for meaningful choice in the selection of authority to support at least some subset of legal analysis. Mandatory authority is not definitive in numerous scenarios: (1) when it does not directly address an issue (an issue of first impression); (2) when one



for the possibility of more than one answer under more than one methodology. It encourages careful thought about *why* a legal author might choose one optional authority over another.

An author's choice of legal authority is inextricable from the legal reasoning itself. Just as in questions of constitutional and statutory interpretation, legal authors can choose to construct an argument based on any number of argumentative methodologies, and that choice will drive the choice of authority. The most common description of the role of optional authority—that legal authors use it to “fill gaps”<sup>177</sup>—suggests that a complete picture of the law can be formed if we only have enough authority. But the notion that law is moving toward a complete and unified body is little more than a fairy tale; there is no such end point. The use of optional authority is thus much more complex than simply filling gaps. Law is indeterminate in many complex ways—filling a gap might suffice to describe the task given the lack of law on an issue (a case of first impression), but it is not well suited for the other types of indeterminacies. How should a legal author

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authority directly conflicts with another (for example, when two courts of appeal rule differently on a similar issue and both are binding on a trial court facing the issue); (3) when the authority can be reasonably interpreted in different ways; or (4) when the mandatory authority would require a counterintuitive or repugnant result. The classic example is *Riggs v. Palmer*, 115 N.Y. 506 (1889). It is not possible for legal rules to be dispositive in every situation, and mandatory authority is not always outcome-determinative. Kress, *supra* note 22, at 283.

Even when parties agree that a case is binding, they are not likely to agree on its meaning. Many legal thinkers have sought to find a way to determine and define the part of a case that binds future courts; this difficult question remains unresolved. “Taking our cue from Molière, we would find a consensus for the judgment that everything that is not holding is dictum and everything that is not dictum is holding, but little in the way of substantive definition of either term.” Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2004 (1994). And determining whether the holding of a case applies to the legal problem at hand is a similarly complex task, one many scholars have considered. Opinions vary, but many have argued that “[s]tare decisis is not binding because cases can always be distinguished.” Hiroshi Motomura, *Using Judgments as Evidence*, 70 MINN. L. REV. 979, 1017 n.186 (1986).

Because judges are reluctant to overrule decisions—their preference is for “distinguishing” them to death rather than explicitly overruling them, in order to preserve the appearance of the law’s continuity and stability—the landscape of case law is littered with inconsistent precedents among which current judges can pick and choose, resurrecting if need be a precedent that had died but had not been given a decent burial.

POSNER, *supra* note 2, at 45. Holdings can be crafted narrowly or broadly in order to include or exclude a new set of facts. In addition, there are some cases in which the rule dictates a clear result, but that result is not acceptable for moral or practical reasons.

<sup>177</sup> See, e.g., NEUMANN, *supra* note 26, at 79, 86.

use optional authority to resolve a conflict between laws, to analyze linguistic uncertainty, or to reconcile clear text with a repugnant result? The best choice of authority will depend on context, including the type of legal argument, the identity of the decision maker, and the extent of mandatory authority (if there is any).

A pluralist framework easily accommodates the complex characteristics of authority, including the continuum of weight described in Part II above. In fact, the weight metaphor makes much more sense in a balancing context than a hierarchical one. Weight, as applied to legal sources, is not specific; typically, the most that can be said is that one source weighs more or less than another. Greater and lesser weights make more sense given a continuum of weight, where the value and persuasiveness of sources are relative. Sources are balanced against one another, the weight of a source might fall anywhere along the spectrum, and that weight can change over time.

Similarly, abandoning a fixed list of sources as a definition of authority accommodates the evolution of authority described above, and makes visible the consequences of that evolution. The legal system has moved from a primarily common law system with a narrow set of vetted sources to a system dominated by enacted law requiring judicial interpretation, with a wide open field of unvetted sources. It is much easier to list the sources that are not acceptable than those that are. Though nonlegal sources have become a routine part of judicial decision-making, the profession lacks a means to evaluate those sources. The hierarchy has long served as a proxy for value, but it is too simplistic. The traditional view of authority suggests that all parties agree on the sources to be used; they have all been preapproved by the legal system. That view suggests that parties on both sides, as well as the judge, all have access to the same information. That is no longer true, if it ever was.

Acknowledging that the profession has moved beyond a closed system of sources raises all sorts of questions that have yet to be satisfactorily addressed. For example, a party that has unlimited resources already has an unfair advantage over a party with limited resources: a greater ability to collect and manipulate optional sources. Existing ethical rules approved by the profession are limited to mandatory authority only (“legal authority in the controlling jurisdiction”).<sup>178</sup> The choice of authority is arguably more

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<sup>178</sup> MODEL RULES OF PROF'L CONDUCT 3.3(a)(2) (AM. BAR ASS'N 2002).

opportunistic in the optional realm than in the mandatory. Presumably, legal authors representing clients will not choose optional authority unless its substance supports the client's position—in fact, an attorney arguably has an ethical duty *not* to include optional authority adverse to the client's position.<sup>179</sup> But the calculus seems entirely different for judges, who do not have the limitations that accompany client representation. As noted above, a related issue in the new world of authority is that judges can rely on sources in judicial opinions without giving attorneys an opportunity to rebut those sources. Again, this practice potentially exacerbates differences in resources.

We are likely still in the midst of a radical change in information access, unable to see its eventual effect on the use of legal sources. But we should not wait until the end of that revolution to consider its effect on the legal system.

Using a pluralist scheme in place of a hierarchy has at least two apparent advantages in the quest for a deeper understanding of the practice of legal authority. First, moving past a binary description of authority that minimizes the significance of optional authority creates a much better opportunity for understanding *why* legal authors rely on it. The conventional wisdom discourages any theorization of optional authority—if judges choose sources based solely on substantive content, it is quite difficult to design a general theory that explains their choices. In contrast, if judges choose optional authority for authoritative reasons in addition to substantive ones, it is possible to explain and better predict those choices. Thus, recognizing an evolving continuum of authoritative weight is not just a matter of semantics. A pluralistic model makes the role of optional authority visible, encouraging its theorization.

Second, developing a cogent theory for the use of optional authority would, in turn, support the development of a better predictive model of authority. The oversimplification of authority with a hierarchical, binary model discourages a closer look at the complicated practices of authority. A more complete, pluralist model encourages legal authors and scholars to consider the value of legal authority in particular contexts. The landscape of authority is not fixed and flat; authority is used differently depending on factors such as the field of law, the identity of the decision maker, the reason why the legal question is a

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<sup>179</sup> *But see* Stephen G. A. Pitel & Yu Seon Gadsen-Chung, *Reconsidering a Lawyer's Obligation to Raise Adverse Authority*, 49 UBC L. REV. 521, 522 (arguing that a lawyer should be required to raise not only binding but relevant authority of which she is aware).

difficult one, and the amount or quality of mandatory authority on the issue. A pluralist model including optional authority would foster a more nuanced understanding of optional authority, encouraging both lawyers and judges to make more thoughtful choices about sources of authority. When legal authors face difficult jurisprudential issues, no model or taxonomy of authority will suffice. But we can at least be more transparent about our practices.

*A. Developing a Theory to Explain the Use of Optional Authority*

While mandatory authority is typically justified by well-developed theories based on values such as fairness, efficiency, uniformity, and judicial economy,<sup>180</sup> little has been written on the theory of optional authority. According to one scholar, the prevalence of citation to optional authority may be best described as a “strong professionalism norm.”<sup>181</sup> Another suggests that judges “defer to other judges out of respect or perhaps a desire for geographical consistency and stability.”<sup>182</sup> According to former Judge Alex Kozinski, it would simply be “bad form”<sup>183</sup> to ignore the existing authority (he refers to “other courts and commentators”) on an issue.<sup>184</sup> A recent treatise on judicial precedent relies on Black’s Law Dictionary for the explanation that a nonbinding decision is “not binding on a court but is nonetheless entitled to respect and careful consideration.”<sup>185</sup> None of these explanations are based solely on the substantive merits of the authority cited—they all suggest content-independent reasons for relying on nonbinding authority.

Yet, despite this tacit recognition, whether, why, and to what extent judges defer to optional authority for content-independent reasons remains largely unexplored. The conventional wisdom around optional authority—that it is chosen based solely on its merits—is likely the primary reason why. The hierarchical model perpetuates that conventional wisdom by paying so little attention to optional authority. As a result, the prevalence of optional authority remains largely unexplained.

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<sup>180</sup> See, e.g., Caminker, *supra* note 29.

<sup>181</sup> Sullivan, *supra* note 11, at 1147.

<sup>182</sup> Lindquist & Cross, *supra* note 22, at 1162.

<sup>183</sup> Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001).

<sup>184</sup> *Id.* (“So long as the earlier authority is acknowledged and considered, courts are deemed to have complied with their common law responsibilities.”).

<sup>185</sup> GARNER ET AL., *supra* note 63 (internal citation omitted).

Any sophisticated understanding of authority must recognize the authoritative value of optional authority, viewing it as an integrated part of legal authority as a whole. Once the content-independent value of authority is recognized, it is possible to better understand why legal authors choose to cite it and how its use relates to that of mandatory authority. Even though the use of optional authority is not restricted by any formal rules, it is constrained by *something*. The freedom to choose sources when constructing legal arguments does not appear to include the freedom to leave out sources altogether. And it does not include the freedom to rely solely, for example, on intuition or a roll of the dice when mandatory sources do not dictate a particular result. Instead, the law's persistent conservative nature—resting on a foundation of objectivity—drives the citation of all types of sources in legal argument—mandatory or optional—for authoritative, content-independent reasons. As a result, legal analysis today is built on a peculiar and possibly paradoxical system in which authors choose among a virtually unlimited set of sources for the authority they wish to be governed by.

The idea that optional authority might have authoritative value is not entirely surprising. Given our “rule of law” ideal, it makes sense that legal decision makers would turn to authority even when not required to do so.<sup>186</sup> Jeremy Waldron argues that in a rule of law system, a judge must ask herself what the law requires:

Once she determines that there is no established rule that bears directly and explicitly on the situation before her, then surely the question she should ask herself is this: “What bearing, then, *does* the law have on this situation, even if it is indirect or implicit?” She must stay in touch with the law; she must try “to relate the grounds of the present determination in some reasoned fashion to previously established principles and policies and rules and standards.”<sup>187</sup>

Citing to any authority—binding or optional—accomplishes this purpose. The authoritative reasons for relying on optional authority overlap substantially with the reasons justifying reliance on binding authority, if to a lesser degree. Justifications for a system of mandatory authority are continually examined and questioned by scholars, but the essential themes are constant. Relying on past authority is thought to

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<sup>186</sup> “[P]ublic respect depends on a perception that the Court’s decisions are governed by the rule of law, and not by the vagaries of the political process.” Lee, *supra* note 71, at 653.

<sup>187</sup> Waldron, *supra* note 134, at 15 (citing HART & SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 569 (William N. Eskridge, Jr. & Philip Frickey eds., 1994)).

have “several theoretical virtues,”<sup>188</sup> including coherence, stability, predictability, fairness and equity, and efficiency.<sup>189</sup> These values apply to optional authority as well as mandatory authority. For example, uniformity, a broad concept which includes many of the most oft-cited reasons for a rule-of-law system, offers a content-independent reason for citing to optional authority.<sup>190</sup> If uniformity is valued, existing decisions have value whether they are binding or not. Chad Flanders has argued that uniformity supports the use of nonbinding case law.<sup>191</sup> His examples include when federal circuit courts cite other circuit courts, when state courts look to other state courts to interpret the common law, and when courts in one state consider how other states have interpreted a uniform act.<sup>192</sup>

Consensus is another logical reason to cite optional authority; it is closely related to uniformity but not identical. Citing to a source because it indicates consensus or majority on a matter could stem from a desire for uniform interpretation of law. But it could also reflect a belief that the majority view on an issue is more likely to be right—the Condorcet Theorem—as Eric Posner and Cass Sunstein argue.<sup>193</sup> Citing to show consensus on an issue is a content-independent reason for citing to authority—what many call “nose-counting.”<sup>194</sup> Again, this justification applies to optional authority just as well as to mandatory authority. It may encourage a court to look to the law of other states, or to the law of other nations.

Some of the theoretical purposes behind mandatory authority support the citation of sources that are *never* binding. For example, the

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<sup>188</sup> Lindquist & Cross, *supra* note 22, at 1159.

<sup>189</sup> Kozel, *supra* note 169, at 1859; *see also* Waldron, *supra* note 134, at 3 (In Jeremy Waldron’s view, “Our jurisprudence is cluttered with a haphazard variety of considerations adduced to justify stare decisis. They include the importance of stability, respect for established expectations, decisional efficiency, the orderly development of the law, Burkean deference to ancestral wisdom, formal or comparative justice, fairness, community, integrity, the moral importance of treating like cases alike, and the political desirability of disciplining our judges and reducing any opportunity for judicial activism.”).

<sup>190</sup> Caminker, *supra* note 29, at 850–54 (Caminker identifies interests served by uniformity as predictability, efficient administration, equal treatment under the law, and respect for judicial authority—“[i]n sum, consistent interpretation and application of law can secure several important values undergirding a government dedicated to the rule of law.”).

<sup>191</sup> *See* Flanders, *supra* note 11, at 76; *see also* Dobbins, *supra* note 27, at 1493 n.122.

<sup>192</sup> Flanders, *supra* note 11, at 76–79.

<sup>193</sup> Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 131 (2006).

<sup>194</sup> Young, *supra* note 61, at 150–51.

goals of uniformity and consensus can support reliance on secondary sources, which often reflect the majority rule.<sup>195</sup> Melvin Eisenberg has pointed out that “in the absence of a local binding precedent the national-law rule will often be treated in virtually the same way as such a precedent.”<sup>196</sup> Practices of other states provide useful information when “those practices reflect the judgment of the affected population or decision makers; the other state is sufficiently similar; and the judgment embodied in the practice of the other state is independent.”<sup>197</sup> Thus, restatements, uniform laws, and even treatises can be cited to show uniformity and consensus, even though they are never binding. In some instances, a restatement will be a more “authoritative” source than a single judicial opinion from another jurisdiction, contradicting the conventional wisdom that primary authority is always more valuable than secondary.

Efficiency as an authoritative justification has been well explored in the context of binding authority, but it can easily be used to justify reliance on nonbinding authority as well. Evan Caminker explains that

a court might follow precedent simply to avoid “reinventing the wheel” by engaging in start-to-finish legal analysis, thus allowing a judge both to avoid becoming mired in unfamiliar legal thickets, and to concentrate her energies on interesting issues in which she wishes to develop expertise. Indeed, frequent adherence to precedent is a prerequisite to effective adjudication: Courts simply do not have the time to fully address each legal issue raised by every case.<sup>198</sup>

Expertise is another reason for relying on authority, and expertise does not depend on binding status. Optional authority may be relied upon because the source is deemed an expert in an area. To use Schauer’s example, a nonbinding decision from the Second Circuit on a securities issue may carry extra weight because that particular court is deemed an expert on such issues.<sup>199</sup> Similarly, the D.C. Circuit is deemed to have expertise in administrative matters.<sup>200</sup> More generally,

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<sup>195</sup> Posner and Sunstein note, “In private law, the practice of determining law in a particular state by reference to the ‘majority rule’ is so common as to be virtually invisible; this is also usually what state courts do when they rely on restatements.” Posner & Sunstein, *supra* note 193, at 171.

<sup>196</sup> Melvin A. Eisenberg, *The Concept of National Law and the Rule of Recognition*, 29 FLA. ST. U. L. REV. 1229, 1250 (2002); *see also* POSNER, *supra* note 2, at 211.

<sup>197</sup> Posner & Sunstein, *supra* note 193, at 136.

<sup>198</sup> Caminker, *supra* note 29, at 827.

<sup>199</sup> FREDERICK SCHAUER, THINKING LIKE A LAWYER 71 (2009).

<sup>200</sup> Margolis, *supra* note 16, at 915.

according to Charles Sullivan, the “judging norm” of looking to nonbinding decisions

can be functionally justified by the expectation that decisions, the result of a presumably effective adversary process and presumably considered deliberation by several judges, all of whom are neutral at least in the sense of being personally disinterested in the outcome, are more likely to be correct and well-reasoned than, say, an op-ed in the local newspaper.<sup>201</sup>

Expertise might also be viewed as a justification for citing to social science and other similar nonlegal resources, but as noted above, the problem with relying on such sources is the lack of any system for evaluating them. In the legal realm, expertise might be viewed as a reason to cite to traditional secondary authority.<sup>202</sup> In another era, treatises like Williston and Corbin on contracts were often cited in this manner.<sup>203</sup> The benefits of a treatise synthesizing existing cases is useful now for slightly different reasons—the overwhelming number of decisions rather than difficulty in accessing them.

Integrity and legitimacy, often cited in support of a binding law system, are perhaps the most ubiquitous authoritative reasons for citing to optional authority. Citation to authority suggests that the judge is acting for principled, legal reasons—with integrity. It is thus not at all surprising that in a rule of law system judges rely on what has gone before, even when not required to do so. Stephen Barnett argues that the “habit of stare decisis is hard-wired into the brains of common law judges. And, other things being equal, it is easier to follow a lead than to blaze one’s own trail.”<sup>204</sup> Randy Kozel describes it as “stage setting”—“the existence of the precedents is used to suggest that the

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<sup>201</sup> Sullivan, *supra* note 11, at 1200–01.

<sup>202</sup> As Judge Posner notes that

a mature or complete rule is more likely to have been reconstructed from a line of cases than to be found fully and precisely stated and explained in the latest case in the line. It falls to the law professors to clean up after the judges by making explicit in treatises, articles and restatements of the law the rules implicit in the various lines of cases, identifying outliers, explicating policy grounds, and charting the path of future development.

POSNER, *supra* note 2, at 211. However, this “type of legal scholarship . . . is no longer in vogue at the leading law schools.” *Id.*

<sup>203</sup> Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261, 263 (1987).

<sup>204</sup> Stephen R. Barnett, *From Anastasoff to Hart to West’s Federal Appendix: The Ground Shifts Under No Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 11 (2002).



subsequent court's ruling represents an unremarkable application of established principles."<sup>205</sup>

The legal practice of following earlier decisions—just because they were made first—is not limited to mandatory authority. The concept of path dependence<sup>206</sup> applies to optional authority just as well as mandatory. Path dependence can be seen as a category of weight—the mere existence of a prior decision can influence a decision maker. “Indeed, reliance on precedent as a basis for decision-making is relatively common, even in nonlegal contexts where prior actions have no legally binding effect, as well as in systems of civil law that typically do not recognize the force of precedent.”<sup>207</sup> An extreme example of path dependence is what Brian Soucek has identified and labeled as “copy-paste precedent”—unpublished opinions that are followed (actually copied word for word) without being either cited or quoted, even in instances when the standard followed was actually incorrect.<sup>208</sup>

Providing authenticity—countering the perception of judicial whimsy—is what the use of optional authority seems to accomplish on many occasions. “A distinct defense of reliance on precedent is the assurance that judges will not decide capriciously, for personal rather than legal reasons,”<sup>209</sup> and this reason is easily extended to optional authority. Law is often described as conservative, and Schauer argues it is common practice to give weight to earlier decisions simply because they came first. “That is, a legal argument is often understood to be a better legal argument just because someone has made it before, and a legal conclusion is typically taken to be a better one if another court

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<sup>205</sup> Kozel, *supra* note 169, at 1851 (Kozel argues that this practice, though “nonconstraining . . . may even supply an element of ‘lawyerly authenticity.’”)

<sup>206</sup> Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903 (2005); Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 606 (2001) (“The doctrine of stare decisis thus creates an explicitly path dependent process.”).

<sup>207</sup> Lindquist & Cross, *supra* note 22, at 1166 (citing Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987)); see also Scott Hamilton Dewey, *How Judges Don't Think: The Inadvertent Misuse of Precedent in the Strange Career of the Illinois Doctrine of Antagonistic Defenses 1876–1985*, 9 J. JURIS. 59, 64 (2011).

<sup>208</sup> Brian Soucek, *Copy-Paste Precedent*, 13 J. APP. PRACT. PROC. 153, 153 (2012) (“These decisions shape the course of the law not because they are binding—they explicitly are not—but simply because portions of their text get repeatedly copied and pasted into other unpublished opinions.”).

<sup>209</sup> Lindquist & Cross, *supra* note 22, at 1160.

either reached it or credited it on an earlier occasion.”<sup>210</sup> He describes this as using citation in order to “deny genuine novelty.”<sup>211</sup>

At this end of the spectrum, any citation at all makes some sense. In other words, a legal author may cite simply to establish that the idea originated elsewhere, thus giving the idea more influence in the conservative (backward-facing) legal world. The legal author cites it simply to “deny genuine novelty.”<sup>212</sup> A “decision without principled justification would be no judicial act at all.”<sup>213</sup> At this end of the spectrum, some argue that citations may be nothing more than window dressing,<sup>214</sup> a mask,<sup>215</sup> and as such inconsequential. “In this vision, the Justices first choose their preferred outcome, based on ideological or other considerations, and then seek out precedents to cite in support of that outcome.”<sup>216</sup> But even if this is true, the practice of citation is still worthy of attention. “[T]he fabric of law,” as Gluck explains, is formed through judicial opinions.<sup>217</sup> Thus, she states, methodology within those opinions matters “[e]ven if one cannot prove that methodology dictates outcomes.”<sup>218</sup>

### *B. Developing a Better Predictive Model of Authority*

Understanding why legal authors cite to optional authority helps to better predict legal outcomes and persuade judges—to improve what

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<sup>210</sup> Schauer, *Authority*, *supra* note 4, at 1950.

<sup>211</sup> *Id.* at 1950–51 (“[T]he conventions of legal citation do not appear to require only strong (authoritative) support. Rather, the conventions seem to require that a proposition be supported by a reference to some court (or other source) that has previously reached that conclusion, even if other courts or sources have reached a different and mutually exclusive conclusion, and even if there are more of the latter than the former. Thus, to support a legal proposition with a citation is often only to do no more than say that at least one person has said the same thing on some previous occasion.”).

<sup>212</sup> Schauer, *Authority*, *supra* note 4, at 1951.

<sup>213</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992); *see also* Margolis, *supra* note 16, at 921 (“The citation conventions of legal writing instruct that some citation is better than no citation. The culture of citation is so entrenched that the mere fact of a citation lends some authority to the statement being cited.”).

<sup>214</sup> POSNER, *DIVERGENT PATHS*, *supra* note 156, at 300 (“[Canons of statutory construction are] at best window dressing; at worst the emperor’s new clothes in Hans Christian Anderson’s tale of that name.”).

<sup>215</sup> Frank B. Cross, James F. Spriggs II, Timothy R. Johnson & Paul J. Wahlbeck, *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 500 (2010).

<sup>216</sup> *Id.* at 501.

<sup>217</sup> Gluck, *States as Laboratories*, *supra* note 94, at 1855.

<sup>218</sup> *Id.* at 1768.

Melvin Eisenberg has called the “replicability” of judicial reasoning. The legal profession is based on the assumption that lawyers can help to predict legal outcomes. “Granted that it is desirable for lawyers as well as judges to be able to determine the law, it becomes critical that lawyers should be able to replicate the process of judicial reasoning and, therefore, that the courts utilize a process of reasoning that is replicable by lawyers.”<sup>219</sup> If we have no theory to explain the reasons why judges rely on particular materials, replicability becomes ever more difficult. We should not be satisfied with the explanation that a judge might rely on any acceptable optional sources, particularly when that category of sources has come to mean just about anything.

A hierarchical model suggests a one-size-fits-all approach for legal analysis, but that approach is belied by the huge amount of variety in legal problems. A hierarchy of authority cannot accommodate deep jurisprudential questions; it leaves out the human element of legal reasoning. For hard legal questions, a legal author must go beyond the mandatory sources, taking into account subtler considerations than the hierarchy recognizes. If the case is difficult because it presents an issue of first impression, a legal author will likely choose different sources than if the case is difficult because its facts do not fit an established rule. The author of a difficult antitrust argument might rely heavily on a well-known treatise, while the author of a difficult discrimination case might rely heavily on social science data. A legal author in state court might rely on different sources than a legal author with a similar issue in federal court. Authority has different value in different contexts.

The identity of the particular decision maker is perhaps the most obvious factor in choosing authority. However, the most studied context—the Supreme Court—is unique. Many insights gained from examining the use of authority by the Supreme Court are just not applicable in other contexts. The Supreme Court lies at one end of the spectrum, with its focus on the most difficult national questions and operating only under a “soft” version of *stare decisis*; it is the court most open to optional authority. Robert Berring argues that “[f]or the modern Supreme Court there is no final primary authority, only a kaleidoscope of sources that one can shift to provide any of a number of pictures.”<sup>220</sup> The use of optional authority in lower courts—both

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<sup>219</sup> MELVIN EISENBERG, *THE NATURE OF THE COMMON LAW* 11 (1988).

<sup>220</sup> Berring, *Cognitive Authority*, *supra* note 131, at 1690.

state and federal—is quite different than that in the Supreme Court and deserves closer study. Consider that disputes are increasingly resolved by arbitrators who may not be subject to the traditional hierarchy of authority at all. A *New York Times* series on arbitration included an example of a case in which a contract dictated that the “supreme authority” was to be the holy scripture.<sup>221</sup> As dispute resolution outside of the courtroom increases, traditional rules regarding the hierarchy of authority arguably become less useful.<sup>222</sup>

Legal authors ought to consider why the legal issue is a difficult one because such a consideration might drive the choice of authority. The current categorization of all optional authority as simply “other than mandatory” offers no practical guidance for its use. But the type of legal issue—including the nature of the substantive field—is significant. If the question is one of first impression, a legal author has the most freedom to choose authority.<sup>223</sup> If the difficult question is one of interpretation, it is routine for legal authors to rely on sources such as legislative history, dictionaries, canons of construction, or agency decisions for their authoritative status. If the question is difficult for policy reasons, it is routine for legal authors to turn to factual sources of information—arguably not for their authoritative status, but for their substantive content.

The choice of optional authority always depends on the existing mandatory authority on an issue. Duncan Kennedy’s “field configurations”<sup>224</sup> concept captures this important piece; the use of optional authority is supplemental to the use of mandatory. As Kennedy explains:

The constraint imposed by the law is that it defines the distance that I will have to work through in legal argument if I decide to come out the way I initially thought I wanted to. “The law” constrains in

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<sup>221</sup> Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture is the Rule of Law*, N.Y. TIMES, (Nov. 3, 2015), <https://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html> [https://nyti.ms/1KVPvRU]; see also W. Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091, 1093 (2012) (“[A]rbitrators who write reasoned awards behave much like judges . . . . They write detailed awards that make extensive use of precedent, although perhaps to a slightly lesser degree than judges.”).

<sup>222</sup> See Mark Edwin Burge, *Without Precedent: Legal Analysis in the Age of Non-Judicial Dispute Resolution*, 15 CARDOZO J. CONFLICT RESOL. 143 (2013).

<sup>223</sup> Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 534–42 (1986).

<sup>224</sup> *Id.* at 538.

that it is an element of the situation as I initially experience it. It is the “field” of my action.<sup>225</sup>

The “impacted field,” for example, is the most constraining, because it contains “a substantial number of cases distributed in a regular pattern along the boundary, dispelling any doubt that the rule means what it says.”<sup>226</sup> The case of first impression is at the opposite end of the spectrum, and in between are a vast number of other scenarios. The binary view of authority masks this complicated relationship, discouraging the development of strategies of *how* to work in any of Kennedy’s fields—what optional authority will work best in any given field?

For example, a lawyer researching a state law property issue might rely heavily on the Restatement of Property for an established common law principle that has not been explicitly recognized by her state’s courts. (For example, the rights of a property owner when he discovers that one wall of his building has long been shared with an adjoining building). In that context, the restatement, a secondary source, represents the consensus of many states (party walls can be established by prescriptive easement) and is highly persuasive. It is likely to be much more persuasive than a single decision from a court of appeals in Kansas, a primary source. A field of law is not completely empty just

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<sup>225</sup> *Id.* at 530.

Of course, each field is different from every other one. But in the gestalt process by which we grasp it, we employ—albeit nonreflectively—what we might call “configuration-types.” We get a cognitive grip on the particularity of a given field by relating it to one or more of these types, distorting it in the process. We can loosely array configuration-types according to how impacted they are. By this I mean that some fields seem to offer more opportunities for one kind or another of legal argument than others.

*Id.* at 538.

<sup>226</sup> *Id.* Kennedy identifies more ambiguous fields with significant opportunity for effective legal argument: “The unrationalized field” includes lots of cases decided on their facts, “with minimal argumentation and narrow or conclusory or obviously logically defective holdings.” *Id.* at 540. “The contradictory field” contains lots of cases on both sides—“an extremely complex structure shot through with interstices.” *Id.* at 541. The other categories are the “the collapsed field,” where “the policy arguments on one side of the boundary get restated so as to abolish the boundary,” and “the loopified field,” which “makes people uptight . . . when supposedly easy cases in the heartlands of the territories of the opposing rules seem closer together (around the back, so to speak) than cases that are opposite one another along the boundary.” *Id.*

because there is no binding decision available, and secondary authority can be more persuasive than primary.<sup>227</sup>

In contrast, consider a 2017 federal criminal law case in the Tenth Circuit, where the prosecution sought to admit evidence under the doctrine of chances, a controversial evidentiary doctrine.<sup>228</sup> The doctrine had not been adopted in the Tenth Circuit and had barely been alluded to by a Supreme Court decision. The prosecution cited to a 1994 state law case in Washington and a 1991 Seventh Circuit decision, and the trial court relied heavily on both decisions in its order.<sup>229</sup> In that instance, with no widely accepted longstanding common law principle, and in a scenario with compelling facts quite similar to the past cases cited, the court found the nonbinding cases to be compelling. Interestingly, the Tenth Circuit agreed with the district court result, but put the optional authority in a footnote,<sup>230</sup> choosing to frame the decision as one that was determined by the Federal Rules of Evidence and did not require application of the doctrine of chances. In other words, a legal author has the choice of authority even when binding authority exists—the framing of the legal issue dictates the applicable authority. This interaction between the selection of authority and framing of the legal issue deserves further exploration.

Eliminating the metaphorical wall between mandatory and optional authority created by the traditional view of authority facilitates scrutiny of the relationship between the two. In a pluralistic model, mandatory and optional authority can be seen as related parts of a legal argument, not wholly separate (and opposite) concepts. For example, an argument based on intent “may be drawn from the text of the law itself, from previous versions of the text, from its drafting history, from official comments, or from contemporary commentary.”<sup>231</sup> As Wilson Huhn points out, arguments based on intent are found in nearly every area of law—interpretation of constitutions, statutes, regulations, and private documents like contracts and wills. Evidence of intent, such as legislative history, is not a mandatory source of law but is used to supplement the text. Arguments based on text and precedent rely

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<sup>227</sup> This may seem obvious to practitioners, but it is not so obvious to new legal authors, as my use of this issue as a course assignment indicated.

<sup>228</sup> See *United States v. Henthorn*, 864 F.3d 1241 (10th Cir. 2017).

<sup>229</sup> *United States v. Henthorn*, No. 14-CR-000448 (D. Colo. Nov. 5, 2014) (order denying motion in limine in part).

<sup>230</sup> *Henthorn*, 864 F.3d at 1252, n.8.

<sup>231</sup> HUHNS, *supra* note 73, at 34.

primarily on mandatory sources, but not exclusively. Plain meaning arguments rely on a mandatory source, of course, the text itself. But they might also rely on a dictionary, or a canon of construction—both optional authority. Interpretive tools have a natural place in this perspective of authority.

Unlike the traditional hierarchy, a pluralistic model also recognizes arguments based entirely on optional sources of authority, acknowledging their legitimacy. For example, arguments based on tradition are also typically based on optional sources of authority, as tradition-based arguments include historical evidence of “people’s beliefs and behavior patterns over decades or centuries.”<sup>232</sup> And of course, policy arguments typically do not rely on traditional sources of authority, but on nonlegal sources, as described above. “Policy analysis differs from the other four types of legal arguments in that the scope of information that the court may draw on is virtually unlimited.”<sup>233</sup> As Ellie Margolis has noted in teaching legal analysis to students, policy argumentation has traditionally been treated only in a cursory way.<sup>234</sup> This is likely due, in great part, to its reliance on sources that do not appear on the traditional hierarchy of authority.

An integrated view of mandatory and optional authority makes it possible to develop cohesive strategies for their use—strategies which can evolve as practices change. The evolution of optional sources cannot be completely divorced from binding authority practices. Permissible sources of authority are fluid—optional sources (and even nonlegal sources) can become effectively mandatory sources when courts cite to them consistently—a kind of bootstrapping. Judicial citations to optional sources give that source at least a place in the established legal dialogue.<sup>235</sup> The “weight” of a source shifts after it has been cited. This is the sort of subtlety that a fixed hierarchy cannot capture.

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<sup>232</sup> *Id.* at 45.

<sup>233</sup> *Id.* at 66.

<sup>234</sup> Ellis Margolis, *Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs*, 62 MONT. L. REV. 59, 63 (2001).

<sup>235</sup> John Henry Merryman, *The Authority of Authority: What the California Supreme Court Cited in 1950*, 6 STAN. L. REV. 613, 619 (1954) (“This addition of prestige to a work by judicial citation has an unavoidable effect on future decisions. As a work increases in stature it becomes more authoritative—more capable of influencing the actual consideration of cases by judges.”); *see also* Sullivan, *supra* note 11, at 1206 (“When persuasive authority accumulates in a particular direction (which, of course, is likely) the result may well be to strongly influence the course of the law in a way not indicated by its formal status.”).

For example, Allison Orr Larsen points out that lower courts use Supreme Court factual claims in an authoritative way. In cases she examined,

the courts cite the actual Supreme Court language in the U.S. Reports without always including the original factual source. It must matter to these lower courts that the Justices used the authority once before—the Supreme Court citation gives the source an extra bump of persuasive power supplemental to the power it contains independently.<sup>236</sup>

Larsen doubts the Supreme Court's competence as an authority on factual claims: "no supplemental authoritative force—no extra persuasive bump—should attach to the factual sources because they appeared in the U.S. Reports."<sup>237</sup>

Again, no formal rules govern the use of such sources, and Larsen concludes that "[t]he current rule seems to be to use them when it is convenient and to avoid them when it is not."<sup>238</sup> Whether this lack of consistency is a significant problem may be up for debate, but this problem is invisible if legal authority is seen as entirely binary. Only by digging into the complexities of authority—dicta can have weight; citation of nonbinding sources can give them a weight they didn't previously have—can the impact of these citation practices be seen.

Strategies for choosing optional authority are not well articulated anywhere. Undoubtedly, experienced practitioners develop the skill of choosing authority in their particular field, and perhaps that expertise is passed on by word-of-mouth. But it is difficult to find any written explanation beyond the tips for choosing case law from outside the jurisdiction, leaving many interesting questions unanswered. Optional authority in the legal realm is unique in that the content-independent reason for citing it is not the sole reason.<sup>239</sup> If that is the case, which reason comes first—the source's status or its content? According to Chad Flanders, "The 'authority' will be initially consulted because it/he/she is an authority; the decision to follow that authority, however, will be based on that authority's reasons."<sup>240</sup> But the process seems to

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<sup>236</sup> Larsen, *Factual Precedents*, *supra* note 153, at 104.

<sup>237</sup> *Id.* at 107.

<sup>238</sup> *Id.* at 86.

<sup>239</sup> J. Raz, *Authority and Justification*, in *AUTHORITY* 115, 124 (Joseph Raz ed., N.Y. Univ. Press 1990) ("The fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them." (emphasis omitted)).

<sup>240</sup> Flanders, *supra* note 11, at 67 n.53.



happen in the reverse direction as well. At least anecdotally, supervising attorneys often ask their subordinates to find a case that stands for a particular principle. Once such a case is found, its authoritative value might then be considered—if more than one source offers the same principle, a legal author likely chooses based on its perceived authoritative status. The choice of argument seems to dictate the choice of optional authority, not the other way around.

All this suggests that there is a great deal of work to be done in examining the use of authority in legal argument—both practical and theoretical. I hope that this Article will prompt a closer look at legal authority practices.

#### CONCLUSION

Authority is the foundation of legal analysis: there is no real understanding of legal analysis without an understanding of how and why sources are chosen to construct it. The distinction between binding and nonbinding authority might be significant, but it is only the beginning of the story of authority. The once well-defined, limited world of legal authority has expanded exponentially, so that it now includes anything and everything cited, and authors face more choices of authority than ever. Today's legal authors cannot effectively understand optional authority if the profession persists in treating such authority as a source used only for its substantive content, and the fixed hierarchy remains the customary description of authority. The continued predominance of the hierarchical model discourages a deeper exploration of the issues surrounding legal authority. By oversimplifying the use of authority, it encourages only a surface-level understanding, overshadowing the valuable insights of many scholars. It particularly disadvantages law students, law clerks, and other new lawyers, leaving them to discover on their own how to use authority in practice.

Many unanswered questions about authority deserve to be addressed. Is our current judicial system equipped to handle the increasingly open universe of acceptable sources? Should we have guidelines that help to define the relative expertise of a source? Are there any ethical principles at all guiding the use of optional authority? Should there be? Does the increasing array of sources give an advantage to parties with more resources? Will, and should, the line between mandatory and optional authority eventually disappear? The traditional hierarchy of authority impedes thoughtful discussion of

these sorts of questions. We need a wider lens and more flexible framework to encourage thoughtful examination of how legal authors actually use authority to craft legal analysis.