



2023

Problems With Authority

Amy J. Griffin

Georgetown University Law Center, ag2239@georgetown.edu

This paper can be downloaded free of charge from:
<https://scholarship.law.georgetown.edu/facpub/2583>
<https://ssrn.com/abstract=4726637>

St. John's Law Review , Vol. 97, No. 113, 2023.

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>



Part of the [Courts Commons](#), [Jurisprudence Commons](#), and the [Legal Writing and Research Commons](#)

PROBLEMS WITH AUTHORITY

AMY J. GRIFFIN[†]

INTRODUCTION

Judicial decision-making rests on a foundation of unwritten rules—those that govern the weight of authority. Such rules, including the cornerstone principle of *stare decisis*, are created informally through the internal social practices of the judiciary. Because weight-of-authority rules are largely informal and almost entirely unwritten, we lack a comprehensive account of their content. This raises serious questions—sounding in due process and access to justice—about whether judicial decision-making rests ultimately on judges’ arbitrary and unexamined preferences rather than transparent and deliberative processes. These norms of authority are largely invisible to many, including parties appearing before the courts. They govern the construction of every judicial decision, but they are not the product of design. As a whole, this body of norms—a foundational set of unwritten insiders’ rules created without deliberation by an elite set of judges—is both problematic and surprisingly unexamined.

Imagine a game of Scrabble where only one of the players determines the value of the letters. Add that the player setting values does not have to tell other players what the letters are worth. Finally, add that the player can change the letter values at any time during the game, even after it is finished. Creating and adjusting values is what judges do with what I call “weight-

[†] Associate Professor of Law, Legal Practice, Georgetown University Law Center. J.D., University of California at Berkeley School of Law; B.A., Boston College. With much appreciation to Pierre Schlag, Sarah Krakoff, Scott Skinner-Thompson, Jennifer Sullivan, Helen Norton, Fred Bloom, Nantiya Ruan, Amy Bauer, Susan Nevelow Mart, Harry Surden and the members of the Rocky Mountain Legal Writing Scholarship Group for their invaluable support and insights. I am grateful to Colorado Law for summer stipends that supported this work. For excellent research assistance, I thank Leah Fugere, Aaron Ganss, Stewart Ramsey, and Austin Slaughter. All errors are my own.

of-authority rules,” which lie at the heart of judicial decision-making.¹

Weight-of-authority rules are almost entirely “unwritten law,”² or “*Lex non Scripta*,”³ not enacted in a traditional positive law form.⁴ There are no constitutional provisions, no regulations, nor any legislation governing the weight of legal authority. The principle of stare decisis⁵ is often expressed in judicial opinions, but it did not originate in any particular case. Instead, like almost all rules related to the weight of authority, stare decisis emerged from the social practices of the judiciary, with no clear consensus on when it attained its current form. There is no textual source for the vast majority of authority practices; there never has been. Yet rules on the weight of authority are widely considered to be, without question, authoritative legal rules.⁶ We do not have a law that tells us the Constitution is valid;⁷ we accept that it is so. Similarly, the rules that tell us what else counts as law rest entirely on our acceptance of them. It is an obvious yet often unseen truth, like the water the proverbial fish swims in when it asks, “what is water?”

¹ Thanks to Sarah Krakoff for this analogy.

² Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 59 (2015); Stephen E. Sachs, *The “Unwritten Constitution” and Unwritten Law*, 2013 U. ILL. L. REV. 1797, 1832 (2013) (“[S]tare decisis might just be a rule of unwritten law.”).

³ Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1191 (2007) (citing MATTHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 1–2 (6th ed. 1820)).

⁴ Though I focus on federal law here, this appears to be largely true in state jurisdictions as well.

⁵ I use the term stare decisis in its broadest sense, including both horizontal (courts are bound by previous decisions made by that very court) and vertical (courts are bound by decisions made the court above them) forms.

⁶ See, e.g., John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 506 (2000) (assumes that the rules of stare decisis are authoritative legal rules); Nelson, *supra* note 2, at 59; Kent Greenawalt, *The Rule of Recognition and the Constitution*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 1, 8 (Matthew D. Adler & Kenneth Einar Himma eds., 2009) (“[E]very judge within a system takes as given certain basic materials that count as law; the judge who refers directly to the Articles of Confederation rather than the Constitution as a source of modern law is crazy.”).

⁷ See, e.g., Sachs, *supra* note 2, at 1840 (“Our social conventions and rules of recognition point us to certain legal axioms (say, ‘the Constitution is law’) that form part of legal system and don’t need any further foundations.”); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 586 (2001) (“The Constitution is law because relevant officials and the overwhelming preponderance of the American people accept it as such.”).

A broad description of the hierarchy of authority in the U.S. legal system designates the Constitution as the highest source of authority, enacted law the next highest, and judicial precedent third. That basic structural hierarchy is itself based on convention and acceptance,⁸ but the positions of both the Constitution and enacted law at the top of the authority hierarchy are virtually unassailable. The part of the hierarchy I focus on here is that *other than* the Constitution and enacted law: the weight-of-authority rules that address (1) *which* judicial decisions are binding (will the court consider itself bound by its own earlier decisions? Are “unpublished” decisions binding?) (2) which *parts* of judicial decisions are binding (such as dicta, dissents, and concurrences); and (3) which *additional sources* have content-independent weight (such as foreign law, treatises, or Restatements.) Such rules are not limited to those that decree what is binding but include those that dictate which sources of authority are a legitimate part of the judicial decision-making process, whether binding or not.

If weight-of-authority rules are unwritten, where do they come from? Much has been written about whether the Constitution implicitly requires stare decisis, but there is no widespread agreement on that point. Some have argued that the “judicial Power” of Article III incorporates the concept of stare

⁸ In Hart’s view,

custom and precedent are subordinate to legislation since customary and common law rules may be deprived of their status as law by statute. Yet they owe their status of law, precarious as this may be, not to a ‘tacit’ exercise of legislative power but to the acceptance of a rule of recognition which accords them this independent though subordinate place.

H.L.A. HART, *THE CONCEPT OF LAW* 101 (3d ed., 2012); Sachs, *supra* note 2, at 1826 (“The Constitution *does* trump statutes because that’s the kind of law we see it as; that’s the role that our social conventions give it in our system.”).

decisis,⁹ while others disagree.¹⁰ Even if the Constitution does require some form of stare decisis, either through the judicial Power clause, or as part of the common law at the time of the founding, or some combination of the two,¹¹ it does not do so in specific textual form.¹² And weight-of-authority rules have generally not been enacted by any legislative body, even if they could be. This leaves common law, or some other form of unwritten law, as the source of weight-of-authority rules.¹³ Which is not to say that such rules cannot be formally enacted—as they have been in very few local court rules¹⁴—but simply that for the most part they are not.

⁹ Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 754–55 (1988) (suggesting perhaps “the principle of stare decisis inheres in the ‘judicial power’ of article III”); see generally Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997 (1994); see also Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 84–85 (2000) (“[The] core idea [of precedent] was not only clearly present at the Founding, it has remained consistent over the course of American legal history.”); Fallon, *supra* note 7, at 572, 588 (Stare decisis “is a doctrine of constitutional magnitude, but one that is rooted as much in unwritten norms of constitutional practice as in the written Constitution itself. . . . [T]he norms defining the ‘judicial Power’ are themselves largely unwritten and owe their status to considerations going well beyond the ‘plain meaning’ of the Constitution’s language and its ‘original understanding.’”); Randy J. Kozel, *Precedent and Constitutional Structure*, 112 NW. U. L. REV. 789, 792 (2018) (“While the Constitution does not contain a ‘Stare Decisis Clause,’ the legal validity of the deference arises by implication from the Constitution’s structure, text, and historical context.”).

¹⁰ Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J. L. & PUB. POLY 23, 24 (1994); but see Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W.VA. L. REV. 43, 50, 55 (2001) (arguing that stare decisis is not a constitutional requirement; that it is doubtful that “the founding generation viewed stare decisis as an inherent limit on the exercise of judicial power”).

¹¹ See Kozel, *supra* note 9, at 792.

¹² Nelson, *supra* note 2, at 59 (“Article III certainly does not address the norms of stare decisis explicitly, and I am not aware of historical evidence that its general reference to ‘[t]he judicial Power’ was originally understood to incorporate a particular version of those norms.”) (alteration in original).

¹³ Amy E. Sloan, *A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule*, 79 IND. L.J. 711, 712–13 (2004) (Rules of precedent are generally established in judicial opinions.); Nelson, *supra* note 2, at 59 (“[N]orms about stare decisis . . . are most naturally described as unwritten law.”)

¹⁴ See, for example, local rules related to the Federal Rule of Appellate Procedure discussed *infra* Section I.B.1.

Instead, weight-of-authority rules are norms, “customs,” “conventions,” or “practices,”¹⁵ created from the ground up.¹⁶ While all common law rules lack canonical text, there is something about this particular category of unwritten rules—created by social practice—that is instinctively more perplexing and arguably troubling. These are not the same sort of substantive common law rules that arise from the resolution of a litigated dispute. Those rules, at least in their ideal form, reflect public and common understandings of our obligations. Instead, weight-of-authority rules are operational ground rules for the very act of decision-making, adopted by and for judges—the ultimate insiders to the game. There is something paradoxical about the notion that the rules of the game are determined on an ongoing basis by the players as they play the game according to those very rules. About the notion that binding rules rest on authority that is not itself defined as binding. Yet that is, in fact, how our legal system operates.

In part I of the article, I surface rules related to the weight of authority as a critical category of legal rules that goes largely unnoticed—a complex system of norms. Judges do, in fact, create the rules of the game as they go. Like language, etiquette, or any other social practice, weight-of-authority rules are based on the collective actions of actors in the legal community: they arise from the ground up and evolve as they are practiced. Weight-of-authority rules range from tacit informal practices to specifically articulated prescriptive norms, but none of them are the product of design.

In part II, based on an original empirical project, I expose and examine current authority practices in the Tenth Circuit as a case study. I analyze one such practice in depth: the Tenth Circuit’s routine reliance on treatises as legal authority. Close examination of the Tenth Circuit’s citation to treatises in about one of every five cases illustrates some of the consequences of a decentralized informal system, including the sort of pseudo-codification that occurs in the absence of written rules. The cementing of unwritten rules by treatise authors is concerning in a system of authority that lacks any means of quality assurance. Moreover, the case study reveals the due-process-related risks of letting weight-of-

¹⁵ See Section I.A for definitions of these terms.

¹⁶ Grant Lamond, *Legal Systems and the Rule of Recognition: Discussion of Marmor’s Philosophy of Law*, 10 JERUSALEM REV. LEGAL STUD. 68, 78 (2014); Frederick Schauer, *The Jurisprudence of Custom*, 48 TEX. INT’L L. J. 523, 526 (2013).

authority rules remain unexamined, in that lawyers and their clients are left in the dark about what to rely on when litigating.

In part III, I turn to a more holistic assessment of this system of unwritten norms, the form of which is not inevitable. The use of norms to govern what counts as authority deserves our attention, not least because it has developed in a way that permits judges to rely on just about anything. Norms develop organically by definition, and that characteristic allows for constant adaptation based on societal changes. But the system lacks any careful process of deliberation to debate the merits of a given practice before it is adopted. In addition, the informal character of weight-of-authority norms impedes our ability to evaluate their content, and results in no clear notice to litigants. They cede power to any actor who makes the effort to articulate them, as shown by the example of treatises in part II's case study. And judges invoke many of these norms as authoritative and decisive, as if judges themselves had no role in their creation, resulting in a kind of performative formalism. I consider possible alternatives to the current system, advocating for public reporting at a minimum, to provide greater transparency and at least some measure of deliberation.

As a whole, rules on this subject—how much weight to give authority—are often considered to be lowest in the hierarchy of authority, if they are even noticed. Yet they can be among the most important, as all sources, including constitutions, statutes, and judicial decisions, are rendered authoritative through the screens of weight-of-authority rules. The stakes are high, and it is past time to reveal them and consider more transparent and deliberative approaches to these foundational rules of the judicial game.

I. CONCEPTUALIZING THE WEIGHT OF AUTHORITY AS A SYSTEM OF JUDICIAL NORMS

A. *A unique category of legal rules*

Weight-of-authority rules are best understood as a complex body of judicial social norms. Defining and distinguishing terms like conventions, norms, customs, and practices is a complex subject: scholars do not agree on a single definition of any of these

terms.¹⁷ However, all these terms, used in fields like law, philosophy, social and developmental psychology, anthropology, and political science, refer to correlated behaviors across social groups, governed by local social interaction. Social norms “are the unwritten codes and informal understandings that define what we expect of other people and what they expect of us.”¹⁸ As “an obligation backed by a social sanction,”¹⁹ norms constrain the actions of those in the group that hold the norm.

Prevailing descriptions of authority are reductive, impeding our ability to understand how they are created, revised, and enforced. Rules about the weight of authority, with most attention on *stare decisis*, are often described as fixed—part of a static hierarchy of authority. Descriptions of *stare decisis* as a rule, like any other common law rule, are pervasive. Conceptualizing weight-of-authority rules instead as a complex set of interrelated, evolving norms provides important insights into their operation.

Together, these norms comprise an “informal institution”: a set of unwritten socially shared rules²⁰ that govern the way that judges make use of authority in written decisions. Institutional actors are motivated to create informal rules when formal

¹⁷ To parse the differing definitions of all of these terms would exceed the scope of this paper. Adrian Vermeule, *Conventions in Court*, 38 DUBLIN U. L.J. 283, 288 (2015) (“There are a half-dozen terms that loiter in the neighbourhood of conventions — practices, customs, norms, etiquette and so on — and one might waste a lifetime diagramming the family relationships amount these . . . I will blithely skirt the whole semantic morass and treat custom, practice and convention as interchangeable shorthand for the definition I have given . . .”); Todd Jones, “*We Always Have a Beer After the Meeting*”: *How Norms, Customs, Conventions, and the Like Explain Behavior*, 36 PHIL. SOC. SCI. 251, 255 (2006) (“Despite the numerous attempts in various disciplines to define and clarify *norms*, *conventions*, *culture*, and the like, we still don’t understand how we explain using these terms.”).

¹⁸ H. Peyton Young, *The Evolution of Social Norms*, 7 ANN. REV. ECON. 359, 360 (2014).

¹⁹ Robert D. Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1, 5 (2000); see also Paul R. Ehrlich & Simon A. Levin *The Evolution of Norms*, 3 PLOS BIOLOGY 0943, 0943 (2005) (“Norms (within this paper understood to include conventions or customs) are representative or typical patterns and rules of behavior in a human group, often supported by legal or other sanctions. Those sanctions, norms in themselves, have been called ‘metanorms’ when failure to enforce them is punished. In our (liberal) usage, norms are standard or ideal behaviors ‘typical’ of groups.”).

²⁰ JACK KNIGHT, INSTITUTIONS AND SOCIAL CONFLICT 98 n.8 (1992) (a social institution is a set of rules); Gretchen Helmke & Steven Levitsky, *Informal Institutions and Comparative Politics: A Research Agenda*, 2 PERSP. ON POL. 725, 727 (2004) (defining “informal institution” as “socially shared rules, usually unwritten, that are created, communicated, and enforced outside of officially sanctioned channels”).

institutions are incomplete,²¹ and the informal institution of practices of recognition can be explained in that way. Formal judicial institutions in the United States were established at a time when “law” was confined to a small set of materials. Conventional wisdom is that the “predominant mode” of legal thinking from roughly 1860 through World War I was formalist,²² a model which viewed decision-making as deductive, based on a distinct narrow set of legal materials.²³ Such a model has no need for a set of rules to determine what materials count as law—in that model there is no debate about which sources count.

The operation of these rules as a system or institution has been largely ignored. All the focus is on *stare decisis* in its current form, rather than its creation and evolution, without much interest in the vast array of other related norms about the weight of authority. As I argue in detail below, a description of sources that includes only what is binding is incomplete—it doesn’t account for all the other sources used every day by judicial decisionmakers. I argue that using a taxonomy of norms, which make clear that weight-of authority-rules are not just like any other common law rule, will enhance our understanding of judicial decision-making. An understanding of the *form* and *mechanics* of these rules, in other words, leads to a better understanding of their content. Norms are commonly defined as including normative attitudes²⁴—“strong[] expectations about what people ought to

²¹ JACK KNIGHT, *supra*, at 730.

²² THE CANON OF AMERICAN LEGAL THOUGHT 8 (David Kennedy & William W. Fisher III eds., 2006).

²³ *Id.* at 9 (“Classical jurists seemed to imagine that specific legal rules and case outcomes could be reliably deduced from a relatively small number of basic principles which themselves reflected the nature of various legal authorities.”).

²⁴ Both customs and conventions are often described as types of norms but without the normative attitude. Conventions require shared expectations—parties must share the meaning for the convention to work, such as driving on one side of the road or holding up a middle finger. Robert X.D. Hawkins, Noah D. Goodman, & Robert L. Goldstone, *The Emergence of Social Norms and Conventions*, 23 TRENDS COGNITIVE SCI. 158, 159 (2019). A convention, which may also be called an arbitrary convention, is usually said to not have the same normative value as other sorts of norms. Arbitrary conventions are typically defined as a means of coordination to solve a problem, such as agreeing to drive on the right or left side of the road. DAVID K. LEWIS, CONVENTION: A PHILOSOPHICAL STUDY 97 (1969) (Convention “is not a normative term. Nevertheless, conventions may be a species of norms: regularities to which we believe we ought to conform.”); Ehrlich & Levin, *supra* note 19, at 0943 **Error! Hyperlink reference not valid.**; Gerald J. Postema, *Custom in International Law: A Normative Practice Account*, in THE NATURE OF CUSTOMARY LAW 279, 285 (Perreau-Saussine and Murphy eds., 2007) (“[C]ustoms are a certain species of *norm*.”).

do”²⁵—and many rules about the weight of authority fit that definition. But “[t]he concept of a norm is not monolithic,”²⁶ nor are the rules that govern the weight of authority. Rules about the weight of authority used in judicial decisions are comprised of both prescriptive norms, that include a strong sense of ‘ought to,’ and descriptive norms, which “only require that people tend to conform to the behaviors prevalent within their communities and have knowledge about what is prevalent.”²⁷ The vast majority of rules related to the weight of authority—whether prescriptive or descriptive—are informal, unwritten norms.

Types of Weight-of-Authority Rules

Formal (enacted)	Formally enacted rules are typically prescriptive norms . As described below, very few rules about the weight of authority take this form.
Informal (unwritten or tacit)	<p>Prescriptive norms that have not been textualized or codified, but still convey strong expectations about what people ought to do.</p> <p>Descriptive norms lack the same strong sense of “ought,” but people choose to follow them (like fashions).</p>

I use the term “norms” to distinguish certain rules from practices, which are merely “statistical generalization[s]”²⁸ or “behavioural regularities”²⁹—in other words, descriptive of what is common without normative content. Unlike descriptive norms, practices do not require knowledge of what is prevalent. It can be

²⁵ Hawkins et al., *supra* note 24, at 159; *see also* GEOFFREY BRENNAN, LINA ERIKSSON, ROBERT E. GOODIN, & NICHOLAS SOUTHWOOD, EXPLAINING NORMS 35 (2013) (Norms “are clusters of normative attitudes plus knowledge of those attitudes.”).

²⁶ Hawkins et al., *supra* note 24, at 159; *see also* Ehrlich & Levin, *supra* note 19, at 0943.

²⁷ Hawkins et al., *supra* note 24, at 159.

²⁸ BRENNAN ET AL., *supra* note 25, at 2,

²⁹ *Id.* at 16.

difficult to distinguish between descriptive norms and practices, as without further data it is obviously difficult to prove what judges know or think about them.

Federal judges, their own well-defined, exclusive, societal group, have a highly complex and partially invisible set of operational norms about authority—the consequence of a system based on the rule of law. The rule-of-law ideal “insists that the government should operate within a framework of law in everything it does.”³⁰ Judges are expected to decide cases impartially in accordance with the law. A legal system could instead give judges complete discretion to determine the best outcome for each dispute, based solely on the balance of reason. Or a legal system could require decisionmakers to resolve disputes based on moral, religious, or social reasons. But under the rule of law, judges must decide cases based on their legal status. A system based on such a framework must have the means for identifying its laws—a way to determine “what counts as law.”

H.L.A. Hart offered his now renowned “rule of recognition”³¹ to explain how we determine what counts as law in any particular legal system. A rule of recognition provides the criteria to determine whether a source of law is valid. Such rules of recognition are necessary for any source-based legal system.³² As Hart described it, “the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact.”³³ While a rule of recognition might be enacted in accordance with some other rule of recognition, eventually there must be “an ultimate rule” of recognition which does not itself derive from any other.³⁴ In other words, determining what counts as law has an infinite regression problem:³⁵ there must be an identifiable ultimate rule, or we are

³⁰ Jeremy Waldron, *The Rule of Law*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2020), <https://plato.stanford.edu/archives/sum2020/entries/rule-of-law/> [https://perma.cc/GS2C-K46H].

³¹ HART, *supra* note 8, at 94.

³² *Id.*

³³ *Id.* at 110.

³⁴ *Id.* at 105.

³⁵ Lamond, *supra* note 16, at 77 (“[U]ltimate criteria give other rules their legal status, but there is no rule to give the ultimate criteria *their* legal status.”).

left with nothing more than “turtles all the way down.”³⁶ The foundation of law, the last turtle, is acceptance.³⁷

Actual weight-of-authority rules in the U.S. legal system are as Hart described in theory—rules of recognition whose authority is based on acceptance,³⁸ developed and demonstrated by the practices of judges in our system.³⁹ These “‘practices’ of recognition”⁴⁰ arise as other norms do, from the ground up.⁴¹ They are not limited to formal procedures for enacting a valid statute: they are much more complex.

³⁶ “Turtles all the way down” refers to a Hindu myth that the world is supported by elephants, and those elephants stand on the back of a giant tortoise. The specific notion of turtles all the way down is attributed to numerous authors.

³⁷ HART, *supra* note 8, at 110; Fallon, *supra* note 7, at 585 (Hart’s view is “an assumption widely shared among legal philosophers: The foundations of law lie in acceptance.”).

³⁸ JOHN GARDNER, LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL 70 (2012) (“[I]f Hart is right, every legal system has at least one rule—at least one rule of recognition—that is customary rather than legislated”); Larry Alexander & Frederick Schauer, *Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance*, in THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION, *supra* note 6, at 192 (“It’s Turtles All the Way Down . . . Once we appreciate the unavoidable and dizzying fragility of a legal system’s nonlegal foundations, we discover that the security and stability that constitutionalism is alleged to bring depends less on constitutionalism itself than on the preconstitutional understandings that make constitutionalism possible.”); Richard H. Fallon, Jr., *Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition* in THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION, *supra* note 6, at 52 (“The short answer is that the Constitution ultimately owes its status as law to the social fact that it, or at least some nonderivable part of it, is simply *accepted* as such within a relevant social practice or practices.”).

³⁹ It may be true that there is a distinct *ultimate* rule of recognition in the U.S. legal system that authorizes the creation of all laws; whether that is the case is a thorny jurisprudential question. *See, e.g.*, THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION, *supra* note 6; *see also* Frederick Schauer, *Is the Rule of Recognition a Rule*, 3 TRANSNATIONAL LEGAL THEORY 173, 178 (2012) (“A rule of recognition could, in theory, simply recognise as law anything that legal elites use to make legal decisions.”).

⁴⁰ Schauer, *supra* note 16, at 532 n.65 (“[T]he ultimate rule of recognition is best understood as a collection of practices (in the Wittgensteinian sense), practices that may not be best understood in rule-like ways.”); A.W.B. SIMPSON, *The Common Law and Legal Theory*, in LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW 359, 376 (1987). *See also* Schauer, *supra* note 39, at 177 (“In place of the rule of recognition, Simpson offers as an alternative what might be best described as ‘practices’ of recognition. He says that what counts as a good legal source or a good legal argument is typically based on what certain legal elites—lawyers and judges—actually do.”).

⁴¹ Lamond, *supra* note 16, at 78 (describing rules of recognition as “*customary law* of the courts”); *see also* Stephen E. Sachs, *Finding Law*, 107 CAL. L. REV. 527, 537 (2019) (“[I]t seems entirely plausible that a legal system might include customary rules . . .”).

The most prominent norms are prescriptive; they dictate which sources of law are “binding” on future decisionmakers. In our current system, those binding sources—other than the Constitution and enacted laws—include only certain parts of certain judicial opinions. The traditional 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” their substantive content.⁴² Reasoning based on authority is thus often referred to as “content independent,” in that the reasons for following the authority are based on its status, not its content.⁴³ Vertical stare decisis, which dictates that courts follow precedent set by courts above them in the judicial hierarchy, fits the strict definition of traditional content-independent reasoning. Courts must follow the holdings in vertical precedent regardless of whether they agree with it. In some instances, such as in federal appellate court, the same is true for horizontal precedent.⁴⁴

But the term “authority” is used in an extremely broad sense within the legal community, to include just about anything a judge chooses to rely on in a judicial opinion.⁴⁵ Binding sources are far from the only sources judges rely upon and not the only sources included in the term “authority” as we use it. Because the law is to some degree indeterminate or under-specified, a closed set of “laws” cannot dictate the result of every legal dispute—judicial decision-making is not limited to “[p]edigreed”⁴⁶ sources of law. The extent of law’s indeterminacy is a matter of debate and not likely to be resolved anytime soon, but few would deny that some percentage of cases are “hard cases” that cannot be resolved by the

⁴² Joseph Raz, *Introduction* in AUTHORITY 1, 5 (Joseph Raz ed., 1990).

⁴³ See, e.g., H.L.A. HART, *Commands and Authoritative Legal Reasons*, in ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 243 (1982); Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1936–37 (2008); JOHN FINNIS, *NATURAL LAW & NATURAL RIGHTS* 233–34 (2d ed., 2011).

⁴⁴ Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1460–61 (2010).

⁴⁵ CHRISTINE COUGHLIN, JOAN MALMUD ROCKLIN & SANDY PATRICK, *A LAWYER WRITES* 16 (2d ed. 2013) (“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.”); DAVID S. ROMANTZ AND KATHLEEN ELLIOTT VINSON, *LEGAL ANALYSIS: THE FUNDAMENTAL SKILL* 15 (2d. ed. 2009) (“An *authority* refers to any cited source that courts and attorneys use to oppose or support a legal proposition.”).

⁴⁶ Ruth Gavison, *Legal Theory and the Role of Rules*, 14 HARV. J.L. & PUB. POL’Y 727, 740 (1991).

mechanical application of mandatory rules.⁴⁷ In the face of that indeterminacy, judges turn to other sources of authority. Under our ‘rule of law’ ideal, judges do not want to be perceived as making unprincipled decisions. Again, we could have a system in which judges were expected or encouraged to turn to reason or morality, or any other regime, to resolve disputes not easily resolved by binding law—but we don’t. Our legal system is based on legal sources. Thus, the system’s norms dictate *which* sources judges can legitimately rely on.

Non-binding sources have long been labeled “persuasive authority,” based on the conventional wisdom that judges rely upon them only when persuaded by their substantive content. While that might sometimes be true, it is clear that judges regularly rely on non-binding authority not because of its persuasive substantive content, but due to its status.⁴⁸ Supreme Court dicta is typically followed because it was written by the Supreme Court of the United States, not because the reasoning expressed is especially persuasive. A proposed interpretation of securities law found in a published student note is much less influential than the same idea posed by a Second Circuit judge. Federal appellate judges in one circuit often cite to decisions in other circuits to show the existence of a majority rule of sorts, or simply to show that another judge came to the same decision. These opinions are not necessarily cited for the persuasiveness of the reasoning therein.⁴⁹ Thus, the term “persuasive” authority is misleading, and I follow Frederick Schauer’s suggestion that we refer to these sources as “optional” authority.⁵⁰

Citations to any acceptable source, even if non-binding, support the desired perception of judicial neutrality and thus legitimacy. Thus, a critical foundational norm in U.S. courts is reliance on sources other than a judge’s own opinion. That norm makes citation to non-binding sources hugely important—*something* must be cited even if judges have a choice as to what that something is. In other words, while the citation to any particular source might be optional, these sources are not

⁴⁷ See e.g., Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975); Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 415, 423 (1985).

⁴⁸ Schauer, *supra* note 43, at 1944.

⁴⁹ Which is not to suggest that all sources have content-independent value; some may be entirely content-dependent. That appears to be the case with some non-legal sources like social science studies.

⁵⁰ Schauer, *supra* note 43, at 1946.

collectively optional in the sense that judges are expected to cite to some approved external source to support their decisions.

Most descriptions of legal authority are binary, based on a sharp distinction between rules about what sources are “binding” and all other authority practices. At any moment, it is true that the two sorts of rules can be distinguished. But they are intertwined, I contend—best understood as part of the same system. First, as I’ve argued in detail elsewhere,⁵¹ the system of weight we follow is not a simple binary one. The “weight” is the authoritative value or status—the content-independent reason for relying on a source—and that weight is not “all or nothing.” Instead, the weight of authoritative sources operates as a continuum—from strictly binding to softly binding to nearly binding, all the way down to “better than none.”⁵² Content-independent weight might be based on any of a number of principles, such as expertise, consensus, legitimacy, or efficiency.⁵³ And the continuum of weight is not fixed, as the origin and influence of acceptable sources are constantly evolving. The amount of weight accorded any given source may vary widely depending on the area of law, the historical era, the jurisdiction of the court applying it, or any of innumerable other factors.⁵⁴

Secondly, rules about what is binding do not simply arise, wholly formed, out of nowhere. Even the most prescriptive norms have developed over time based on the actual practices of the judiciary, in the same way that systems of etiquette or grammar develop.⁵⁵ Past precedent was not seen as binding until, at some indeterminable point in the early nineteenth century,⁵⁶ judges began to apply hierarchical precedent as binding law. They collectively created, through local practices, what is now the cornerstone principle of our entire judicial system. In this way, acceptable optional sources can become binding, and binding sources can become optional. This is true of many kinds of norms: “[W]hat begins as a descriptive norm or convention may take on

⁵¹ Amy J. Griffin, *Dethroning the Hierarchy of Authority*, 97 OR. L. REV. 51, 63–72 (2018).

⁵² *Id.* at 64, 88.

⁵³ *See id.* at 96–98.

⁵⁴ *See id.* at 100.

⁵⁵ BRENNAN ET AL., *supra* note 25, at 101.

⁵⁶ NEIL DUXBURY, *THE NATURE AND AUTHORITY OF PRECEDENT* 35 (2008); Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 55 (2001).

prescriptive force.”⁵⁷ All rules about the weight of authority—from the cornerstone principle of stare decisis to largely unrecognized tacit practices—are part of the same institution. This institution includes the norms and practices which govern the use of *all* sources cited, whether binding or optional.

Surprisingly, given the significance of these kinds of rules, our understanding of them is hazy. The status and nature of rules about the weight of authority are not often explicitly discussed, particularly rules other than stare decisis. Stare decisis itself is regularly referred to in a variety of imprecise ways. Many, including the Supreme Court itself, label stare decisis a matter of “judicial policy,” though it is not entirely clear what that means.⁵⁸ The doctrine of stare decisis is sometimes described as a norm,⁵⁹ but typically as a standalone principle, not as part of an extensive system of norms. In addition to being labeled a norm, stare decisis has been called a “principle,” “an interpretive methodology,” “a sub-constitutional doctrine,” “a principle of policy,” “a doctrine

⁵⁷ Hawkins, et al., *supra* note 24, at 159.

⁵⁸ *Seminole Tribe v. Fla.*, 517 U.S. 44, 63 (1996) (“[W]e always have treated *stare decisis* as a ‘principle of policy.’”); *Agostini v. Felton*, 521 U.S. 203, 235–36 (1997) (Stare decisis is a “policy judgment.”); see Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey*, 109 YALE L.J. 1535, 1538 (2000) (Stare decisis is “a sub-constitutional doctrine of ostensibly wise judicial practice, procedure, and policy.”); Thomas Healy, *Stare Decisis and the Constitution: Four Questions and Answers*, 83 NOTRE DAME L. REV. 1173, 1202 (Stare decisis is “not so much a type of law as it is an interpretive methodology—like originalism, textualism, or structuralism.”); Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 828 (2008) (internal citations omitted) (“[S]tare decisis is a doctrine comprised of judicial policy choices, and both courts and scholars characterize it as such.”); Fallon, *supra* note 7, at 570 (Stare decisis is not a “mere policy” but has “constitutional stature.”).

⁵⁹ See e.g., Jack Knight and Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018 (1996); Stefanie A. Lindquist, *Stare Decisis as Reciprocity Norm in WHAT’S LAW GOT TO DO WITH IT? What Judges Do, Why They Do It, and What’s at Stake* 173, 173–74 (Charles Gardner Geyh, ed., 2011) (Courts “develop informal norms that . . . constrain judicial actors to the extent that they produce shared expectations about appropriate behavior.”) (data supports hypothesis that court size, tenure length, and selection method influence courts’ adherence to the norm of stare decisis). (“The extent to which judges adhere to the consensual norms of stare decisis has particularly important applications for institutional legitimacy and authority.”); Harrison, *supra* note 6, at 531 (“norms of stare decisis”).

comprised of judicial policy choices,”⁶⁰ and “a rule society has imposed on the judiciary.”⁶¹

Because weight-of-authority rules are not codified and are articulated in judicial opinions, they are often swept into the category of “common law.” For example, current Supreme Court Justice Amy Coney Barrett has described stare decisis as one of several “procedural common law” doctrines.⁶² This categorization, while not necessarily wrong, is also not particularly helpful. Common law is often referred to as “judge-made law,”⁶³ but for all the attention given to it, exactly how judges “make” law remains unclear for most people.⁶⁴ Are rules about the weight of authority just a part of the common law system, or actually common *law*? Common law can just as easily be defined in a way that excludes these rules as in a way that includes them. They are at least a part of the common law system if they are not law itself.

But the common law label is inadequate, as it glosses over characteristics unique to weight-of-authority rules. The collective process of creating judicial norms can be seen as quite different from the creation of substantive common law rules. Changes in substantive common laws emerge from the resolution of particular disputes between parties. In contrast, practices of recognition, and possibly other sorts of non-substantive doctrines, develop through the individual practices of particular judges across cases—they do not arise as the result of any one dispute. They do not interact with the facts of cases in the way that substantive common laws

⁶⁰ MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 50 (1988); see *Moragne v. States Marin Lines, Inc.*, 398 U.S. 375, 403 (1970) (assuming existence of the “principle” of stare decisis); DUXBURY, *supra* note 56, at 116 (2008) (“*Stare decisis* is usually not a constitutional or statutory requirement, but one which courts impose on themselves.”); see sources cited *supra* note 58.

⁶¹ Erin O’Hara, *Social Constraint or Implicit Collusion? Toward a Game Theoretic Analysis of Stare Decisis*, 24 SETON HALL L. REV. 736, 737 (1993) (calling it a common assumption that stare decisis is a rule imposed on the judiciary and positing that “*stare decisis* has evolved as a result of judges’ preference for the doctrine”).

⁶² Barrett, *supra* note 58, at 823, 828.

⁶³ Gerald J. Postema, *Philosophy of the Common Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* (Jules L. Coleman, Kenneth Einar Himma, & Scott J. Shapiro eds., 2004) (“Every student of Anglo-American law knows that.”); STEPHEN J. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* 25 (3d ed., 2007) (“The common law is the law made by judges through their decisions in cases within their authority.”).

⁶⁴ Frederick Schauer, *Is the Common Law Law?*, 77 CAL. L. REV. 455, 455 (1989) (“For all its ubiquity, the common law remains uncommonly puzzling.”); Nelson, *supra* note 2, at 12 (“Unfortunately, the modern consensus that judges ‘make law’ obscures potential disagreements about what that means.”).

do. Supposedly, only the holding of the case affects the development of substantive law. Although there is no consensus on the definition of a holding, consider this one well-known formulation: “A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgement.”⁶⁵ Unarticulated background rules about what authority can be legitimately relied upon do not fit into this definition. They are not based on the facts of the case, not even in the way that procedural rules are related to the facts of the litigation process. They are not part of the holding, at least not in any traditional sense of the term.

Moreover, weight-of-authority rules are distinguishable from other types of secondary rules in that the role they play—as theorized by Hart many years ago with his “rules of recognition”—is distinct. They are not exactly procedural: they govern inputs rather than litigation process. They set the ground rules for judicial decision-making—we might call them “operational” rather than “substantive” or even “procedural.” They are foundational in that they govern the materials judges can use to make both procedural and substantive decisions. They govern the construction of legal analysis, not the course of the litigation. *Every* case involves the practices of recognition, as every citation to authority implicitly invokes a rule related to the weight of authority.

Some scholars have long seen the common law as a system of customary law,⁶⁶ but the type of customs incorporated into substantive common law are very different from weight-of-authority rules. Customary law has some democratic legitimacy, it is said, based on its ties to longstanding community practices. Substantive common law arguably comes from external sources—longstanding traditions of the community or, in some instances, from the general law of the fifty states.⁶⁷ But rules governing the

⁶⁵ Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 961 (2005).

⁶⁶ A.W.B. Simpson, *The Common Law and Legal Theory*, in OXFORD ESSAYS IN JURISPRUDENCE 94 (A.W.B. Simpson ed., 1973) (arguing that the common law is a system of customary law, “a body of practices observed and ideas received by a caste of lawyers . . . These ideas and practices exist only in the sense that they are accepted and acted upon within the legal profession.”)

⁶⁷ Nelson, *supra* note 2, at 13 (arguing that where external sources exist, common law decision-making is more analogous to interpretation than legislation). *But see*

appropriate inputs into judicial decision-making definitely do not come from external community rules—they are internal to the judiciary by their very nature, unlike, say, a business practice. Thus, while weight-of-authority rules might be customary, they lack the same democratic legitimacy of a broader community custom. Substantive common law incorporates practices of general society, whereas weight-of-authority rules reflect the customs or norms of a particular social group: judges. Weight-of-authority rules are custom *in foro*—the rules of the forum.⁶⁸ Substantive common law might *reflect* customs of the community, but these rules *are* customs or norms of the judicial community.

Whether some of these rules qualify as common law or not, it is worth categorizing weight-of-authority rules as their own unique category. First, not every weight-of-authority norm ends up expressly articulated as part of the common law. Many remain tacit. We have some rules about the weight of authority that we label “doctrine,” such as the doctrine of *stare decisis*. But other rules do not rise to the level of doctrine; they are more informal.⁶⁹ Because not all of them are articulated as doctrine in judicial opinions, to label them as common law is significantly under-inclusive.

And weight-of-authority rules on the bindingness of cases, or parts of cases, are unique in another respect—their inevitable circularity. Justice Scalia once wrote, “It seems to me that *stare decisis* ought to be applied even to the doctrine of *stare decisis*,”⁷⁰ highlighting the circularity of the point, whether intentionally or not. To say judicial doctrine determines its own weight relies on

Tiersma, *supra* note 3, at 1192 (“English judges generally claimed that the principles they used to decide cases were derived from, as Hale put it, ‘immemorial Usage and Custom.’ No doubt, when there was an applicable custom that came to mind and suggested a reasonable resolution to a dispute, early judges would have used it. But many issues would not have been resolvable by custom or usage, and in such cases the invocation of custom might have been just a fiction that lent some legitimacy to the fact that the judges were actually making new law.”).

⁶⁸ Jeremy Waldron, *Custom Redeemed by Statute*, 51 CURRENT LEGAL PROBS. 93,104–05 (1998) (Jeremy Bentham distinguished between custom *in pays*—a custom with some social existence before the courts legalized it—and custom *in foro*, “the independent development of a custom among the judiciary of sanctioning conduct of a certain sort.”).

⁶⁹ See Nelson, *supra* note 2, at 31.

⁷⁰ *Planned Parenthood v. Casey*, 505 U.S. 833, 993 (1992) (Scalia, J., dissenting).

bootstrapping.⁷¹ The weight of a case, or any part of it, must come from outside the case itself to avoid the bootstrapping problem. As discussed above, that weight comes from societal acceptance. The dominant and unifying characteristic of weight-of- authority rules is their means of creation—as social norms.

By failing to notice the character of norms related to authority, we miss an opportunity to better understand how judges make decisions. The mechanics of these important judicial norms remain largely unexamined. How are they created, communicated, and enforced? How do they evolve? Norms are “ubiquitous” in all parts of society, yet they are also “mysterious.”⁷² A norm emerges when enough people think of it as correct,⁷³ but how exactly does that happen within the judiciary? Consider just a few of the concepts developed by philosophers to better understand the emergence and persistence of norms: Norms may slowly emerge from practices,⁷⁴ or may be built by “norm entrepreneurs,”⁷⁵ or they may be accepted bandwagon-style as the result of “norm cascades.”⁷⁶ Do any of these concepts describe the way that federal judges begin to rely on a new source, such that it becomes more than a practice but a prescriptive norm—a source that should be relied upon? These sorts of questions are only the tip of the iceberg. How do judicial norms of authority relate to broader social norms, or moral norms? What is their legal status?

I cannot definitively answer whether these norms should count as law,⁷⁷ but by describing weight-of-authority rules as norms and practices, I do not intend to conclude they are not law.⁷⁸ Whatever their label, norms of authority are currently influencing

⁷¹ KENT GREENAWALT, *STATUTORY AND COMMON LAW INTERPRETATION* 213 (2013) (“whether precedents can *establish* the rule of following precedents. In one sense they cannot. . . . A doctrine established by judges can be abolished by judges.”). All “non-formal norms bootstrap their own authority.” BRENNAN ET AL., *supra* note 25, at 94.

⁷² BRENNAN ET AL., *supra* note 25, at 1.

⁷³ *Id.* at 95.

⁷⁴ *Id.* at 101.

⁷⁵ *Id.* at 91.

⁷⁶ *Id.* at 99 (“We have been describing these bandwagon and cascade processes as more ‘informal, free-flowing’ processes of norm emergence.”).

⁷⁷ Frederick Schauer, *Law’s Boundaries*, 130 HARV. L. REV. 2434, 2439 n. 18 (2017) (referring to what “counts as law” as “loosely referring only to the question of which inputs into legal arguments and conclusions will be accepted as (sociologically) legitimate”).

⁷⁸ Nelson, *supra* note 2, at 59 (“To be sure, norms about stare decisis . . . can certainly be described as a species of law, on the theory that courts are obliged to follow them.”).

the weight sources or inputs may have on judicial decision-making, even if we cannot quite quantify that influence.⁷⁹ For my purposes, it is both critical and sufficient for the moment to see rules regarding the weight of authority used in judicial decisions as a body of norms generated by judicial practices and followed by judges, almost never formally enacted. With that framework in mind, we can aim for a much better understanding of how these important norms actually work.

B. An overview of authority norms in federal courts

Norms related to the weight of authority arise from the ground up, though some are much more visible and more entrenched than others. Below, I briefly describe the actual weight-of-authority norms in the categories of norms described in the table above: (1) formal prescriptive norms—the few that are formally enacted as textual rules; (2) informal unwritten but articulated norms—those that are not formally enacted but are articulated in judicial decisions in rule-like form (they can be prescriptive or descriptive); and (3) tacit norms or practices—they are not articulated as a rule even though they are followed (and can also be prescriptive or descriptive).

1. Formal prescriptive norms of authority: the exceptions

The only federal textual, enacted norms specifically addressing the weight of authority are two of the local rules for the federal circuit courts.⁸⁰ The existence of these two written rules on the weight of authority may be partially explained by the fact that they deviate from older more established norms—the new norm needed to be formalized because it departed from those previously-accepted norms.

⁷⁹ See, e.g., Adam N. Steinman, *To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare Decisis*, 99 VA. L. REV. 1737, 1772 (2013) (“[I]t is also worth keeping in mind that legal materials can be quite influential even if they are unquestionably *not* binding.”).

⁸⁰ FED. R. APP. P. 47. Local appellate rules are authorized by Rule 47 of the Federal Rules of Appellate Procedure. It provides that a majority of judges in regular active service may “make and amend rules governing its practice.” Local procedural rules in district court are authorized by Rule 83 of the Federal Rules of Civil Procedure.

a. Unpublished cases

First, every federal circuit⁸¹ has enacted a local rule stating that “unpublished” cases are not to be deemed binding precedent.⁸² The local rules on this point are an exception to the general rule that lower courts are bound by existing precedent from the courts above them—they except from that general rule any cases that judges themselves decide should not be binding. The local rules about unpublished cases in no way purport to provide a comprehensive version of the hierarchy of authority. Instead, each local rule simply declares some version of the rule that unpublished cases are not treated as precedent. In each instance, the rule stands alone, assuming the existence of a much broader set of rules governing what counts as binding law.

This practice, whereby judges themselves determine whether their opinions will be binding, is widespread but controversial. Judges can deem an opinion nonprecedential simply by designating a case as “not for publication.” Their ability to do so has had a dramatic effect on federal case law: in 2020, eighty-seven percent of opinions and orders filed in cases terminated on the merits in the U.S. Courts of Appeals were “unpublished.”⁸³

Deeming large numbers of cases non-precedential is a well-established current norm, though it is not particularly intuitive and certainly not a necessary characteristic of a system of stare decisis. Sometime in the last century, courts began to distinguish between binding and non-binding opinions—by some accounts, largely due to the increasing caseload.⁸⁴ Scholars have not determined an exact starting point, but a 1964 Judicial

⁸¹ Though extensive research on the subject in state courts is beyond the scope of this article, several states do have similar rules.

⁸² 1ST CIR. R. 32.1.0(a) (“The court will consider such dispositions for their persuasive value but not as binding precedent.”); 2D CIR. R. 32.1.1; 3D CIR. R. 5.3; 4th CIR. R. 32.1; 5TH CIR. R. 47.5.4; 6TH CIR. R. 32.1(a); 7TH CIR. R. 32.1; 8TH CIR. R. 32.1A; 9TH CIR. R. 36—3(a); 10TH CIR. R. 32.1(A); 11TH CIR. R. 36-2; D.C. CIR. R. 36(e)(2); FED. CIR. R. 32.1(d).

⁸³ UNITED STATES COURTS, JUDICIAL BUSINESS, FEDERAL JUDICIARY WORKLOAD DATA, Table 2.5 (2020), https://www.uscourts.gov/sites/default/files/data_tables/jff_2.5_0930.2020.pdf [https://perma.cc/HKA4-YBGL].

⁸⁴ See William L. Reynolds & William M. Richman, The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals, 78 COLUM. L. REV. 1167, 1169–70 (1978).

Conference⁸⁵ resolution directed federal district and appellate courts to limit publication of opinions to those “of general precedential value,”⁸⁶ and a 1971 report from the Federal Judicial Center⁸⁷ is said to have accelerated the process. In 1972, the Judicial Conference asked every circuit to develop “an opinion publication plan,” and the circuits did so in various forms.⁸⁸ At least one scholar calls this change—to a system with unpublished opinions with different precedential value—“sudden[]”, but also acknowledges that some circuits had already begun experimenting with limited publication.⁸⁹

The practice received attention in the early 2000's, when an Eighth Circuit panel concluded that *every* opinion must have precedential value, whether published or not.⁹⁰ The *Anastasoff* panel's opinion was eventually vacated and its view did not carry the day,⁹¹ but it brought additional attention to ongoing Advisory Committee proceedings and engendered innumerable articles and lengthy discussion. Eventually, in 2006, Federal Rule of Appellate Procedure 32.1 was enacted, providing that “[a] court may not prohibit or restrict the citation of federal judicial opinions . . . that have been . . . designated as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent,’ or the like.”⁹² As the advisory committee notes state, “Rule 32.1 is extremely limited. It does not

⁸⁵ The Judicial Code of 1948 established the Judicial Conference of the United States, presided over by the Chief Justice of the Supreme Court and including the chief justices of each judicial circuit. Conference participants are directed to advise “as to any matters in respect of which the administration of justice in the courts of the United States may be improved.” 28 U.S.C. § 331.

⁸⁶ Sloan, *supra* note 13, at 717–18, n.32.

⁸⁷ See Reynolds & Richman, *supra* note 84, at 1169–70 (reporting that the federal judicial establishment began considering limiting publication in the 1940's, and that efforts accelerated in 1971).

⁸⁸ Patrick J. Schiltz, *Much Ado About Little: Explaining the Sturm Und Drang Over the Citation of Unpublished Opinions*, 62 WASH. & LEE L. REV. 1429, 1434–35, 1441 (2005) (“[T]he unpublished-opinions issue would not die.”); Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1438 n.8 (2004) (describing the practice of “unpublication” as an institutionalized practice beginning in the 1970's, but a “longstanding phenomenon” well before that). See also David R. Cleveland, *Local Rules in the Wake of Federal Rules of Appellate Procedure 32.1*, 11 J. APP. PRAC. & PROCESS 19, 19–20 (2010).

⁸⁹ *Id.* at 22.

⁹⁰ *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000).

⁹¹ See *Hart v. Massanari*, 266 F.3d 1155, 1163 (9th Cir. 2001) (“The overwhelming consensus in the legal community has been that having appellate courts issue nonprecedential decisions is not inconsistent with the exercise of the judicial power.”).

⁹² FED. R. APP. P. 32.1. For a detailed description of the entire process, see Schiltz, *supra* note 88, 1434–50.

require any court to issue an unpublished opinion or forbid any court from doing so . . . It says nothing about what effect a court must give to one of its unpublished opinions.”⁹³ The drafters of the rule declined to make a global decision about the precedential value of cases, instead kicking the decision back to individual courts and judges.

After all the debate, to date the power remains with individual judges and the practice continues. Each year the percentage of cases designated as unpublished rises, so that in the past several years, only about 10-12% of all federal opinions have actually been published.⁹⁴ The fact that this practice has been extensively challenged but persists only proves the point that judges have the power to set current weight-of-authority rules. At least for the moment, in the U.S. legal system, federal appellate judges can decide whether they want their decisions to be binding.

b. The law of the circuit

The second weight-of-authority norm that has been formally enacted is a rule referred to as “the law of the circuit,” which requires horizontal stare decisis in the federal appellate courts. In contrast to the rule on published opinions, this one is not controversial. Each panel in a circuit is bound by the decisions of earlier panels in the same circuit.⁹⁵ At least four circuits have enacted a formal rule to that effect, though most follow it as an unwritten principle without enacting it formally.⁹⁶ The law-of-the-circuit rule seems to have started in the late 1950’s in the D.C. and Fifth Circuit, with other circuits declaring the rule in the 1970’s.⁹⁷ For example, the Third Circuit has an “Internal Operating Procedure” called the “Policy of Avoiding Intra-circuit Conflict of Precedent,” that states, “It is the tradition of this court that the

⁹³ FED. R. APP. P. 32.1 (advisory committee notes for 2006 adoption).

⁹⁴ *Judicial Facts and Figures 2019*, UNITED STATES CTS. (Sept. 30, 2019), https://www.uscourts.gov/sites/default/files/data_tables/jff_2.5_0930.2019.pdf [<https://perma.cc/73PC-SJVZ>].

⁹⁵ Amy Sloan, *The Dog That Didn’t Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeal*, 78 FORDHAM L. REV. 713, 718 (2009).

⁹⁶ The Seventh Circuit has its own version, which requires judges of the Seventh Circuit to circulate a draft opinion to the entire Circuit if it overrules Seventh Circuit precedent. It allows for the opinion to be published anyway, even if a majority of the court votes *not* to rehear it *en banc*. 7TH CIR. R. 40(e), Petitions for Rehearing; see Hon. Michael S. Kanne, *The Non-Banc En Banc Seventh Circuit Rule 40(e) and the Law of the Circuit*, 32 S. ILL. U. L.J. 611, 611–12 (2008).

⁹⁷ Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 796 (2012) (citing to cases).

holding of a panel in a precedential opinion is binding on subsequent panels.”⁹⁸ The law-of-the-circuit rule—that one panel *cannot* overrule another—is an exception to the more widely-accepted norm, which treats horizontal precedent as non-binding. The law-of-the-circuit could be the result of the way in which those circuits developed. The original judges were not appointed full time but filled in from trial courts, so that it made sense to view an opinion as that of the court as an entity, rather than that of an individual judge.⁹⁹ The imposition of strict horizontal stare decisis in the circuit courts could thus be seen as “something of an historical accident.”¹⁰⁰ This view may or may not be correct, but it is entirely consistent with a system of rules that have developed through practice and acceptance. While additional weight of authority rules arguably *could be* enacted, it is notable that they have not been.¹⁰¹ The vast majority of weight-of-authority rules remain unwritten.

2. Informal, “unwritten” but articulated norms

As the term “unwritten” in this context is not used literally, many weight-of-authority rules are in fact recorded and can be found in the text of judicial opinions, in publisher’s digests, and in treatises. Such norms can be prescriptive or descriptive.

a. *Stare Decisis*

The most prominent weight-of-authority norms are those labeled as part of the doctrine of stare decisis. Stare decisis rules, which come in both vertical and horizontal forms and can vary from court to court, are unwritten. Many scholars have carefully constructed historical accounts of the use of legal precedent, which

⁹⁸ 3RD CIR. R. 9.1 (2018) (“Thus, no subsequent panel overrules the holding in a precedential opinion of a previous panel. Court en banc consideration is required to do so.”) See also 6TH CIR. R. 32.1(b) (“Published panel opinions are binding on later panels. A published opinion is overruled only by the court en banc.”) 11TH CIR. R. 36(2) (“Under the law of this circuit, published opinions are binding precedent.”); 4TH CIR. R. 36(b); 8TH CIR. R. IV. B.

⁹⁹ Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1465 (2010).

¹⁰⁰ *Id.* at 1466.

¹⁰¹ Mortimer N. S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 AM. J. COMPAR. L. 67, 68–69 (2006) (“The practice of precedent may differ slightly as applied to (1) the common law, (2) constitutions, and (3) legislation . . . but all depend ultimately on the culture of American lawyers, as developed in the course of their separation from Britain, mostly in the eighteenth century, and perpetuated by the tenacity and conservatism of the Courts.”).

make it clear that the notion of binding precedent evolved slowly over time and is not a necessary component of a common law system.¹⁰² While regard for precedent is a longstanding concept, often traced back to ancient Greek, Roman, and Egyptian legal systems,¹⁰³ the current understanding of some precedent as “binding” is a relatively modern invention, arising in the early nineteenth century.¹⁰⁴ For my purposes, the point is simple: our current practices related to the ‘bindingness’ of case law came ‘from the ground up,’ established by practice, over time, with no specific textual origin.¹⁰⁵ They are prescriptive norms.

Subsidiary norms related to *stare decisis* are articulated in the federal courts on a regular basis, and these principles appear much like any other common law. Entries in the West digests cover innumerable sub-doctrines, focused on which judicial opinions are binding under what circumstances, and what parts of opinions are binding.¹⁰⁶ For example, consider the super-strong presumption against overruling statutory precedents—decisions that interpret statutes as opposed to the Constitution. As William Eskridge put it, “[i]ts exact origins are something of a mystery.”¹⁰⁷ Eskridge traces the presumption to a 1932 dissenting opinion by

¹⁰² See, e.g., Healy, *supra* note 10, at 60 (“[A]t no point during the Year Book period did judges think they were bound, even presumptively, by prior decisions.”); Lawson, *supra* note 10, at 23; Paulsen, *supra* note 58, at 1537; Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 659–60 (1999); Scholars have shown that lawyers paid attention to precedent as early as the thirteenth century in England. DUXBURY, *supra* note 56, at 32 (citing 1 FREDERICK POLLACK AND FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 219 (2d ed., 1899) (In the 13th century, “[w]hile courts would occasionally follow and even distinguish precedents, nobody yet believed that a court could be bound by a previous decision.”)).

¹⁰³ See, e.g., Healy, *supra* note 10, at 54.

¹⁰⁴ THEODORE F.T. PLUNKETT, *A CONCISE HISTORY OF THE COMMON LAW* 306–08 (1929) (“[I]t is only in the nineteenth century that the present system of case law with its hierarchy of authorities was established.”); Healy, *supra* note 10, at 55 (stating that *stare decisis* “developed slowly, almost imperceptibly over several hundred years, assuming its modern form only in the late eighteenth and early nineteenth centuries.”).

¹⁰⁵ See e.g., Lee, *supra* note 102, at 307; Healy, *supra* note 10, at 55, 121; Price, *supra* note 9, at 108–09 (arguing that the binding force of precedent has “never meant precisely the same thing in any given era”).

¹⁰⁶ West Key Number System contains a subsection labeled “Courts” with a part II “Establishment, Organization and Procedure,” part II- G “Rules of Decision.” One of three parts under G includes the topic “Previous decisions as controlling or as precedents.” That key number contains thousands of entries—over 13,000 as of January 2021.

¹⁰⁷ William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1364 (1988).

Justice Brandeis, *Burnet v. Coronado Oil & Gas*, in which Brandeis defended a less strict stare decisis for constitutional precedents.¹⁰⁸ In Brandeis's dissent, the cited source of the rule was the observation of prior practice, where he wrote: "in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions."¹⁰⁹ But, as Thomas Lee has pointed out, Brandeis

offered little support for any historic practice in support of his view . . . the voluminous cases cited in Brandeis' lengthy footnotes simply exemplified instances in which the Court had overruled previous decisions, without consciously adopting a different standard based on the constitutional or statutory nature of the decisions.¹¹⁰

Brandeis himself appears to be at least part of the origin of the now-accepted norm with respect to statutory precedents.

b. *Sister circuits*

An example of a well-known norm that can be characterized as more descriptive than prescriptive is that the decisions of sister appellate courts should be given great weight but are not binding. It is more than just a statistical generality, as courts often articulate the norm regarding the value of sister circuit decisions. Publishers' digests collect cases that articulate the norm in a variety of ways: decisions of other circuits are not binding but should be given "[r]espectful consideration."¹¹¹ Courts are "reluctant" to create a circuit split, "without strong cause," or absent "sound reason" or "compelling basis" or "compelling reason."¹¹² Courts recognize that "uniformity . . . is preferable" and cite to the "importance of maintaining harmony among the circuits on issues of law."¹¹³

No formal rule dictates that courts should pay attention to the decisions of other circuits, but courts do so regularly. Following the lead of sister circuits is a descriptive norm, part of the regular

¹⁰⁸ *Id.* at 1365.

¹⁰⁹ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting).

¹¹⁰ Lee, *supra* note 102, at 707.

¹¹¹ See e.g., *United States v. Thomas*, 27 F.4th 556, 559 (7th Cir. 2022).

¹¹² *United States v. Thomas*, 939 F.3d 1121, 1130–31 (10th Cir. 2019) (collecting cases).

¹¹³ Barbara J. Van Arsdale, et al., *Court of appeals as bound by prior court of appeals decisions*, in 2A FED. PROC., L. ED. § 3:790 (2022).

practices of the judiciary and verging on prescriptive if not already. It has not gone unnoticed. In a 2002 study, David Klein showed that in federal court decisions establishing new legal rules in unsettled areas, the previous non-binding decision of other circuits was a significant determinant.¹¹⁴ The decisions of sister circuits have weight, even if they are not deemed binding.

This rule—that the decisions of other circuits should have significant weight—is not particularly controversial. But it also remains informal—there is no movement to codify such a rule. The source of it is the practices of the federal courts themselves.¹¹⁵ As an unwritten rule, the weight of sister circuit decisions is not tied to any specific text, and it is not precise. It appears to have evolved over time and might vary by circuit or even by individual judge. It is a quintessential example of a norm established by its use.

One can easily imagine this practice—the weight of sister circuits—shifting over time, in the same way that the notion of binding precedent evolved in the first place. John Harrison suggests that in the late nineteenth century, it might have been the rule that circuit courts should be *bound* by other circuit courts' decisions.¹¹⁶ It is quite possible that this could become the rule again—possibly through formalization, but perhaps just because the practice of relying on previous circuit decisions becomes so entrenched that it is effectively binding. The rule about whether to give sister circuit decisions weight, and how much weight to give them, is an informal norm.

c. *Dicta*

Another of the longstanding, uncontroversial weight-of-authority rules is that courts are to be bound only by the holdings of previous opinions, not by dicta. This has long been treated as a

¹¹⁴ DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS 137 (2002) (stating that in decisions that establish new legal rules in significant unsettled areas of antitrust, environmental, and search and seizure law, decisions of another circuit court on same issue were a significant determinant). *See also* Chad Flanders, *Toward a Theory of Persuasive Authority*, 62 OKLA. L. REV. 55, 75 (2009) (providing 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).

¹¹⁵ BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 166 (2016) (“Federal courts . . . draw from the decisions of other federal courts outside their own circuit when there are factual similarities between a cited case and the case at hand, or similar legal approaches taken by two different circuits.”).

¹¹⁶ *See* Harrison, *supra* note 6, at 516.

prescriptive norm: dicta are not to be given binding weight, an uncodified principle often articulated by judges and scholars alike. But it is an evolving norm. Numerous scholars have noted an increasing tendency for lower courts to consider themselves bound by the dicta of superior courts.¹¹⁷ Dicta is on the 'close to binding' end of the weight-of-authority spectrum.¹¹⁸ For some courts, that may be closer to binding than in others. A panel in the First Circuit, for example, recently held in *United Nurses & Allied Professionals v. Nat'l Labor Relations Bd.* that it was bound by Supreme Court dicta. The court cites to other First Circuit cases, quoting language that is a bit more equivocal:

We are bound by the Supreme Court's "considered dicta." *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991) ("[F]ederal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement."); see also *United States v. Moore-Bush*, 963 F.3d 29, 39–40 (1st Cir. 2020) ("Carefully considered statements of the Supreme Court, even if technically dictum, must be accorded great weight and should be treated as authoritative when, as in this instance, badges of reliability abound." (quoting *United States v. Santana*, 6 F.3d 1, 9 (1st Cir. 1993))).¹¹⁹

One can easily imagine the next First Circuit decision quoting the first line above ("We are bound by the Supreme Court's considered dicta"), and some future court dropping the adjective "considered." The *McCoy* case cited by the *United Nurses* court itself relied on a treatise written by Charles A. Wright, along with a number of judicial decisions.¹²⁰ The *Moore-Bush* case cites back to *McCoy*, and also to a scholarly article on the subject.¹²¹ Is it currently the norm in all federal courts to be bound by "considered" Supreme Court dicta?¹²² This is—at least in part—an empirical question I have not tried to answer. More empirical work is

¹¹⁷ See e.g., Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1250 (2006).

¹¹⁸ See Griffin, *supra* note 51, at 72.

¹¹⁹ *United Nurses & Allied Pros. v. Nat'l Lab. Rels. Bd.*, 975 F.3d 34, 40 (1st Cir. 2020).

¹²⁰ *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991).

¹²¹ *United States v. Moore-Bush*, 963 F.3d 29, 39–40 (1st Cir. 2020), *reh'g en banc granted, opinion vacated*, 982 F.3d 50 (1st Cir. 2020), and *rev'd on other grounds*, 36 F.4th 320 (1st Cir. 2022).

¹²² See GARNER ET AL., *supra* note 115, at 70–71 n.120.

needed to determine whether a new norm is developing around the weight of dicta, but studies completed so far suggest that it is.

Unlike enacted laws, norms are not static but develop incrementally over time, like the examples of *stare decisis*, sister circuits, and dicta described above. It is easy to see how principles can move from unpracticed (no one accords dicta any weight) to practiced but unarticulated (courts accord dicta weight without saying so), to practiced and articulated—thereby moving from practice to prescriptive norm. It is not enough for one judge to declare that Supreme Court dicta—or anything else—is binding, nor is it enough for a scholar to say so in an article or treatise. But when articulated principles are repeated enough times and not countered, they gain in stature. Eventually, they become an established prescriptive norm.

3. Informal, tacit norms and practices

Tacit norms and practices are those that are not articulated in doctrinal form in judicial opinions, and thus not found in publishers' digest systems, so many of them remain largely unrecognized. They are not expressed in rule-like form, and they may or may not have a normative component. Some essentially unarticulated norms about which sources are taboo, for example, are largely invisible but highly prescriptive. A judge should *not* rely on the Bible, or a coin flip, or a horoscope as a source of law. Tacit norms and practices can often only be seen by examining the practices of judicial decisionmakers—an empirical inquiry.

Even descriptive tacit practices likely have some impact on judicial decision-making, and they can evolve to become prescriptive. Citations are used as proof of judicial impartiality, guided by the foundational norm that something must be cited. What is permissible can become required—think of the evolution of dicta or sister circuits. In other words, what might begin as a practice of convenience can become an “ought to” if enough judges agree.

For an example of an unwritten norm that remains largely unarticulated by the courts themselves, consider the general practice of eschewing methodological *stare decisis*, “the practice of giving precedential effect to judicial statements about

methodology.”¹²³ Federal courts¹²⁴ do not routinely give stare decisis effect to statements about the appropriate methodology for either constitutional or statutory interpretation.¹²⁵ This ‘weight of authority’ norm is like the principle of dicta, in that it applies to a particular part of a decision—setting aside part of a decision as not binding even if other parts of the opinion are binding. The rules at stake—governing whether certain types of methodological statements in judicial precedent have binding status—have no textual source. Courts generally do not articulate the principle, and you won’t find it in the West digests. To be clear, courts regularly recite rules about constitutional and statutory interpretation. They just don’t articulate a rule that says they are (or are not) bound by earlier court’s statements about interpretive methodology. That doesn’t mean the norm doesn’t exist; it may be internalized as a view that it is appropriate for judges to make their own methodological decisions.

That the Supreme Court, in particular, does not consider itself bound by its own earlier statements on how to interpret text—constitutional or statutory—is a subject of frequent discussion. The debate centers on whether courts *should* give precedential status to methodological statements.¹²⁶ For the purposes of this article, however, I am less interested in what those practices are or what they should be than their character as unwritten practices. Chad Oldfather posits that “perhaps we have reached

¹²³ Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1754 (2010) [hereinafter *The States as Laboratories*].

¹²⁴ Some state courts do give stare decisis effect to methodological statements, and some states have codified canons of interpretation. Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as Law and the Erie Doctrine*, 120 YALE L.J. 1898, 1919 (2011); see also Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 350 (2010).

¹²⁵ See *The States as Laboratories*, *supra* note 123, at 1754; Randy Kozel, *Statutory Interpretation, Administrative Deference, and The Law of Stare Decisis*, 97 TEX. L. REV. 1125, 1146 (2019) (noting that “Aaron-Andrew Bruhl responds [to Gluck] that stare decisis is more prevalent than is commonly appreciated within the federal judiciary, especially in the lower federal courts.”); Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology*, 96 GEO. L.J. 1863, 1863 (2008) (arguing that courts should give doctrines of statutory interpretation even stronger stare decisis effect than their substantive law counterparts); Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1573, 1594 (2014) (“[F]ederal courts have never given stare decisis effect to interpretive methodology.”).

¹²⁶ See Foster, *supra* note 125.

consensus on pluralism as our methodology.”¹²⁷ In other words, we have tacitly agreed that federal judges can decide for themselves which interpretative techniques to use, unless Congress decides to step in. In the meantime, judges are independently deciding how to interpret constitutional and enacted text. Judges are unbound by methods that judges deployed in previous opinions, even if those opinions are otherwise considered to be binding.

This particular norm has received a great deal of attention in recent years, but many other tacit norms internalized by judges remain unarticulated and largely invisible. The nature of these rules as internal, unwritten, evolving norms means that other practices receive far less attention and may not even be recognized. Empirical evidence reveals active practices or norms of recognition even if they are not articulated as such. Identifying norms and practices is a necessary prerequisite to understanding, critiquing, or endorsing them. I conducted an original study to reveal some of the otherwise ignored norms and practices of federal courts.

II. UNCOVERING TACIT NORMS AND PRACTICES: A CASE STUDY

The task of identifying *all* current norms and practices related to the weight of authority is a vast one, well beyond the scope of this article. In this section, I aim to provide some insight by way of example, using an original data set to make visible the practices of recognition in the Tenth Circuit. Empirical evidence can at least tell us what practices exist, though whether these practices are accompanied by a normative attitude is more difficult to discern. Citations are the best evidence we have of norms relating to the use of authority. As described above, even practices that are only statistical regularities without any normative component can evolve into norms. Because citations are the way for judges to signal to the legal community which sources they’ve relied on, citations may be better evidence of attitudinal norms than of what judges actually rely on when making a decision.¹²⁸

¹²⁷ Chad M. Oldfather, *Methodological Pluralism and Constitutional Interpretation*, 80 BROOK. L. REV. 1, 62 (2014).

¹²⁸ Of course, citations do not provide proof that judges actually relied on the source when making their decision.

A. *Tenth Circuit Norms and Practices*

I studied all the Tenth Circuit's published opinions in 2017 in order to identify current norms of authority. My reasons for choosing a subset of opinions consisting of a single year in the Tenth Circuit were pragmatic—I wanted a manageable subset of cases that could still be considered a complete set. I chose published cases on the theory that the citations in published opinions were more likely to serve a signaling purpose than citations in unpublished opinions. I coded all citations to optional authority in every opinion published by the Tenth Circuit in 2017 (a total of 224 opinions once withdrawn opinions were excluded)¹²⁹ defining “optional authority” as every citation to authority that was not to another Tenth Circuit case, a Supreme Court case, or governing enacted law, like statutes or regulations.¹³⁰

Significantly, in 88% of all published opinions in 2017, Tenth Circuit judges cited to at least one source of optional authority.¹³¹ In other words, in only 12% of all cases did the judge authoring the majority opinion decide that citations to binding authority were sufficient to explain the decision. Even the simple fact that in published appellate opinions judges almost always turn to non-binding sources of authority is quite revealing. The federal judiciary has a deeply entrenched foundational norm: judges must cite to *something* to justify their decisions. Thus, while the sources themselves can be deemed optional in that any particular source need not be cited, some sources must be. Citing to nothing at all is not appropriate—that is, itself, a prescriptive norm.

¹²⁹ I chose 2017 simply because I began the coding in 2018 and wanted the most recent full year of data to work with.

¹³⁰ The categories I tracked included published opinions in every other circuit. Included are: Tenth Circuit unpublished opinions (circuit and district court decisions), district court decisions in all circuits other than the Tenth, non-majority Supreme Court opinions (dissents and concurrences), treatises, dictionaries, information from a non-law field, Restatements, jury instructions, legislative history, law review articles, non-binding state law, and an “other” category for anything that did not fall into one of those. I did not include indirect citations – in other words, if the opinion cited to a source as “quoting” a treatise, I did not include that as a citation to a treatise.

¹³¹ Data on file with author.

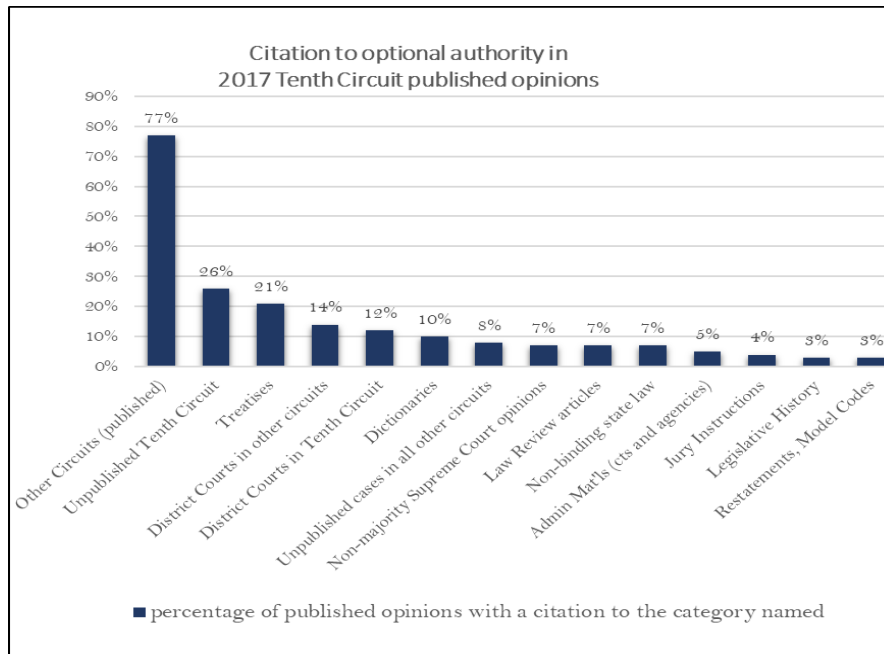


Figure 1. Citations to Optional Authority in the Tenth Circuit in 2017 Published Opinions

Looking at the data in this way is somewhat rudimentary due to the limitations inherent in the source material. It does not track whether optional authority has been used to fill a true gap in binding law, resolve a conflict in binding law, or to support existing binding authority. I have not accounted for the number of times in each case that a court cited to any of these sources, only whether the opinion cited to one of these sources at least once. The data only captures a particular moment in time. But even with these limitations, at a high and somewhat general level, the data is informative.

First, the data provides strong evidence of the optional sources that have weight. In the Tenth Circuit, at least, the most significant source of optional authority is the published opinions of other federal appellate courts—so-called “sister circuits.”¹³² More than three-quarters of the time (77%), judges who wrote a published opinion in the Tenth Circuit cited to another circuit’s published opinion. The data substantiates a widely recognized

¹³² See *supra* Figure 1.

norm, that judges ought to treat the opinions of its sister circuits with great respect, as discussed in Part I.¹³³ In 88% of the instances in which the court deemed it necessary to turn to any optional authority, it turned to sister circuits. Has citation to sister circuits increased over time in a way that suggests such decisions might eventually be deemed “binding” by the federal judiciary? Because these rules are set by the collective practices of the judiciary, such a shift is well within the realm of the possible. Longitudinal data is required to confirm or refute the existence of a trend in that direction.

Even if not “binding,” citation to sister circuit decisions on point may very well be a prescriptive norm. In a couple of instances, judges who decided their own case in a way that conflicted with a decision from another circuit explained *why* they did so. In other words, even though that other decision was not binding, the norm in its favor was so strong that the judges felt compelled to explain. This might fall into a category just below binding on the continuum of weight, and the extent to which it does so might vary from circuit to circuit.

More narrowly, the data shows that Tenth Circuit judges might give greater weight to some circuits more than others. In 2017, judges on the Tenth Circuit cited to the Ninth Circuit in published opinions more than any other circuit, and twice as often as they cited the D.C. Circuit or Third Circuit opinions.¹³⁴ Could this be due to the subject matter these courts are likely to encounter, the reputation of the judges, or the number of cases in the Ninth Circuit? Does the power of any particular circuit wax and wane over time? All these questions might be worth exploring, particularly for those lawyers practicing in the Tenth Circuit. With the data from just one year, it is difficult to tell whether Ninth Circuit opinions carry more weight, or if the higher number of citations is due to structural factors. But this kind of empirical analysis could easily be expanded.

Collectively, non-binding cases are the dominant source of optional authority, and these figures do not include citations to the dicta of binding cases. The most significant source after sister circuit opinions is unpublished Tenth Circuit decisions, cited in a quarter (26%) of all published cases. Only 8% of the time did the

¹³³ See *supra* Part I.

¹³⁴ Federal Circuit in 1% of cases; First Circuit in 9%, Second Circuit in 10%, Third Circuit in 6%, Fourth, 8%, Fifth, 9%, Sixth, 11%, Seventh, 10%, Eighth, 8%, Ninth, 13%, Eleventh, 9%, D.C., 6%.

Court cite to unpublished cases from sister circuits. Why are unpublished cases in other circuits so much less valuable? Again, this might be related to the types of cases the Tenth Circuit hears, such that Tenth Circuit unpublished cases are more likely to have relevant content, or it might be that the judges have more faith in their immediate circle of colleagues. This norm may be a way for judges to show respect for other panels in the Tenth Circuit. District court decisions, in comparison, seemed to be just about equally valuable regardless of whether they were inside or outside of the Tenth Circuit—12% of the cases included a citation to a district court inside the Tenth Circuit as compared to the 14% which included a citation to a district court outside the Tenth.

Each of the data points above raises its own branch of new questions, and I cannot pursue them all here. For example, in 8% of the 224 cases, the opinion cites to non-binding part of a Supreme Court opinion, concurrence or dissent. Why? The reasons include: to explain the majority opinion, in particular to explain the extent (limited or expansive) of the majority opinion; for policy support; or to support a particular interpretation of a statute or rule of procedure.¹³⁵ Or take the citation to dictionaries and legislative histories. For that data to be more meaningful, I'd want to determine how many interpretive cases the Tenth Circuit heard that year, to see how frequently judges turned to dictionaries or legislative history in interpretive cases.

Another way of evaluating the use of optional authority is not by source but by purpose. Why are judges citing to optional authority? To that end, I coded each set of citations in a set¹³⁶ as falling into one of seven categories:

¹³⁵ *Margheim v. Buljko*, 855 F.3d 1077, 1084 (10th Cir. 2017) (“*Manuel* did not address whether the tort of malicious prosecution, as opposed to some other common law cause of action, provides an appropriate framework for these Fourth Amendment § 1983 claims. *See id.* at 920–22 (describing issues left on remand); *see id.* at 923 (Alito, J., dissenting) (stating majority had not resolved ‘whether a claim of malicious prosecution may be brought under the Fourth Amendment’) . . .”).

¹³⁶ A “set” of citations is a single group of citations supporting the same point.

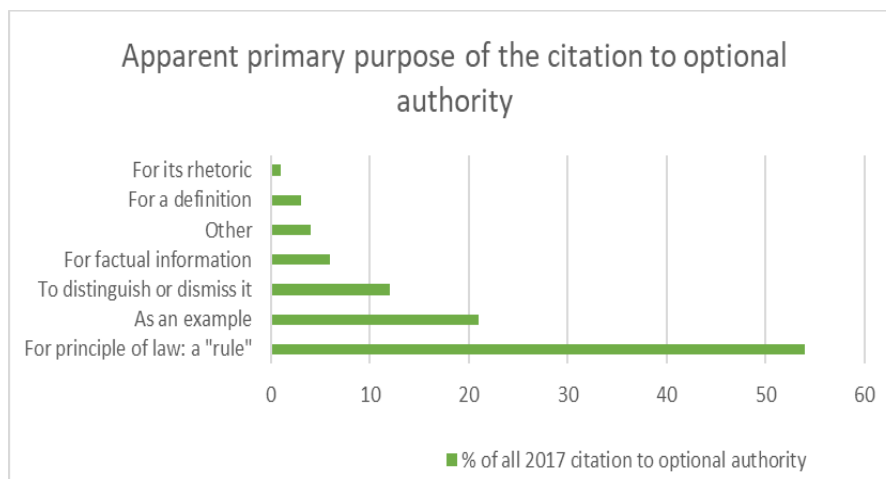


Figure 2. Apparent primary purpose of the citation to optional authority

Coding the citations in this way is undoubtedly subjective. I defined citations by “set,” a determination that other scholars might make differently. I decided that counting each clustered group of citations as having a single purpose would be a more meaningful way to judge the purpose of citations. For example, if an opinion included three different case citations to support one rule, I counted that as one example of using optional authority to define a rule, not three.

Judges are looking to optional authority as the source of a rule more often than for any other purpose. Calling these optional sources ‘authority’ is apt in that they often appear to be are cited *as law*, not as an external reason for a decision. Again, detailed analysis is beyond the scope of this article, but these brief observations suggest that there is much to learn by looking closely at the informal practices of recognition in our courts. We must do more than just count citations to understand the norms in any given legal community, and the ramifications of citation to a particular source.¹³⁷

¹³⁷ Brian N. Larson, *Precedent as Rational Persuasion*, 25 J. LEGAL WRITING INST. 135, 140 (2021).

1. Citation to treatises as an accepted judicial norm

I looked closely at the Tenth Circuit's citation to treatises as an example of a practice that is largely unnoticed and unexamined. Treatises are typically relegated to the large heap of so-called "secondary authority," a category which receives little attention and is not often discussed as a legitimate source of authority. Unlike constitutions, statutes, regulations, and judicial opinions, treatises are not viewed as law, so they are typically found at the bottom of any lists ranking the "weight" of optional authority.¹³⁸ Yet, while treatises have no official legal pedigree, they are cited as if they do. The regular citation to treatises coincides with anecdotal reports of lawyers from practice: in many fields of law, treatises are well-respected and heavily relied upon. I analyzed the use of treatises by Tenth Circuit judges in an effort to understand why citing to this form of secondary authority is a regular practice.

2. Specific treatise practices in the Tenth Circuit

I expanded my review of cases to three years for treatises only, to see if the 2017 data was an anomaly. In a comprehensive review of three years (2017, 2018, and 2019) of all 634 published opinions in the Tenth Circuit, I found that twenty percent (130) of the majority opinions published cited to at least one treatise.¹³⁹ I defined treatise broadly, including any source which purports to tell the reader what the law is by providing its own version of legal principles.¹⁴⁰

I identified each instance of a treatise citation and identified 189 separate instances in 124 opinions over three years.¹⁴¹ In the 189 instances I tracked, treatises were used most often (60% of the

¹³⁸ Flanders, *supra* note 114, at 58 ("There is, in fact, a hierarchy of persuasive authority. As a purely descriptive matter, decisions from other *courts* outside the jurisdiction of the deciding court are treated as having more weight than other authorities—such as law review articles or treatises.").

¹³⁹ For more analysis of treatise citation by Tenth Circuit judges, see Amy J. Griffin, *Treatise Tactics*, 100 DENV. L. REV. (forthcoming 2023).

¹⁴⁰ 19th century treatise writer Joel Prentiss Bishop described the treatise as "an orderly statement of those principles in which the law consists, whether drawn from the reports of law cases, from natural reason, or from any other source." Steven Wilf, *Legal Treatise*, in THE OXFORD HANDBOOK OF LAW AND HUMANITIES 686, 687–88 (Simon Stern ed., 2019).

¹⁴¹ For the purposes of this article, I counted a citation as a new instance if it was in a different paragraph and citing to a different treatise than the first citation. I counted citation to the same treatise as a new instance only if it both appeared in a different paragraph and was cited for a different issue.

time) to explain, describe or summarize federal law. In just a few instances (2%), treatises were cited as a source of a specific state's law. And in a few instances (4%), mostly in the context of cases involving American Indian law, treatises were cited for historical or other sort of factual information. In the remaining instances (34%), treatises were cited as a source of general law. That is to say, about a third of the time treatises were cited for rules that are not tied to any particular jurisdiction.

a. *The norm: treatises are an acceptable source of federal law*

The *Federal Practice and Procedure* treatise by Wright and Miller is by far the single-most cited treatise in the Tenth Circuit. A list of all treatises cited and their frequency can be found in Appendix A.¹⁴² Over a three-year period, eight percent of all published Tenth Circuit opinions included a citation to some version of Wright and Miller's treatise. A typical citation to Wright and Miller includes a direct quotation from the treatise in rule form:

Waiver by participation is a common-law creation. *Rothner v. City of Chicago*, 879 F.2d 1402, 1408 (7th Cir. 1989). It concerns the situation where a defendant has participated in the state court before seeking removal. See 14B Charles Alan Wright et al., *Federal Practice and Procedure* § 3721 (4th ed. 2017) ("A state court defendant also may lose or waive the right to remove a case to a federal court by taking some substantial offensive or defensive action in the state court action. . . .").¹⁴³

Heavy reliance on Wright and Miller raises questions about the comparative weight of treatises—why do some carry so much more weight than others? How do these norms develop?

In contrast to Wright and Miller, the vast majority of treatises used to assert federal law were cited only once or twice, reflecting a wide array of subject matter and types of legal issues.¹⁴⁴ In the 120 instances in which a treatise was used in the context of federal issues, 42% (50) related to issues that were statutory in origin, 33% (39) related to the application of federal rules, and 19% (23) were constitutional issues. Though many of these also involved interpretation of case law, only 8 (7%) seemed to be interpreting

¹⁴² See *infra* Appendix A.

¹⁴³ *Cty. of Albuquerque v. Soto Enters., Inc.*, 864 F.3d 1089, 1093 (10th Cir. 2017).

¹⁴⁴ See *infra* Appendix A.

federal common law without a direct connection to a rule, statute, or constitutional provision.

Treatises were sometimes explicitly cited to provide an expert or normative view of what the law *should* be in that jurisdiction, as opposed to a declaration of what it is. Explicit reliance on experts actually did not seem to happen all that often, though it is difficult to discern exactly when it is happening when courts so often cite to the treatise without comment. In only about 10% of the citations did I see clear evidence that the court was citing the treatise in that way.¹⁴⁵

b. The norm: treatises are an acceptable source of general law

After federal law citations, the second most significant category of treatise citations were those in which the treatise provides a statement of *general* law—rules that are not part of any specific jurisdiction. As Caleb Nelson pointed out about fifteen years ago, reports of the death of general law are exaggerated.¹⁴⁶ I use the term “general law” here to refer to any legal rules that are not specific to a particular jurisdiction.¹⁴⁷ Treatises are just one way for courts to cite to general law—they might also cite to Restatements or model rules, for example (noted above as cited in 3% of 2017 Tenth Circuit published cases). Reliance on general law through treatises is more veiled, as the reason a treatise is cited isn’t clear from a simple citation count, and it is not easy to craft an electronic search that will identify all the varied treatises courts rely on.

General law, of course, does not fit within a hierarchy of authority at all. The fact that general law is regularly—even if infrequently—cited illustrates the shortcomings of the ubiquitous limited hierarchy of authority.

¹⁴⁵ See e.g., *Felders v. Bairett*, 885 F.3d 646, 655 (10th Cir. 2018) (“Since Rule 68’s adoption in 1938, it has been criticized for many different reasons as a less-than-effective incentive for settlement. See 12 Wright, Miller & Marcus, *Federal Practice & Procedure*, § § 3001, 3007. For example, the Rule has been criticized because it only applies to offers made by one side of the litigation, the defending party; because the Rule ordinarily involves only a small amount of costs and no attorney’s fees; and because the Rule allows for offers of judgment to be made early in the litigation, before the plaintiffs have gathered much information about their claims. See *id.*”).

¹⁴⁶ Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 503 (2006).

¹⁴⁷ See *id.* (describing general law as “rules whose content is not dictated entirely by any single decisionmaker (state or federal), but instead emerges from patterns followed in many different jurisdictions”).

i. Substantive general law

In my three-year study, in 39 instances the Tenth Circuit cited to a treatise for a *substantive* principle of general law—sometimes to explain state law. For example, on one occasion, the Tenth Circuit used a treatise to explain general torts doctrine as relevant to a state statute, the Wyoming Recreational Safety Act (WRSA).¹⁴⁸ In about a dozen of these cases, treatises were cited in the application of formally enacted federal rules, including the Employment Retirement Income Security Act (ERISA), and the U.S. Sentencing Guidelines (USSG). For the USSG, for example, doctrine has developed that requires courts to determine the “generic” definition of offenses not defined in the guidelines.¹⁴⁹ The Supreme Court determined, in interpreting the USSG, “that Congress meant by ‘burglary’ the generic sense in which the term is now used in the criminal codes of most States.”¹⁵⁰ Thus, according to the Supreme Court, courts should rely on generic law to define otherwise undefined offenses in the sentencing guidelines. Citing to a treatise is one way to show what a generic crime might be, as the Tenth Circuit did in this 2017 case:

And in his criminal law treatise, Professor LaFave has explained that generic robbery involves the misappropriation of property “under circumstances involving a danger to the person. . . .” 3 Wayne R. LaFave, *Substantive Criminal Law* § 20.3 (2d ed. & Oct. 2016 update); *see also id.* at n.3 (stating that the “modern trend is to consider robbery as an offense against the person”).¹⁵¹

The Tenth Circuit has relied on a treatise as a source of general criminal doctrine in other federal contexts. For example, to explain the heat of passion doctrine used as a defense to a federal crime, the court cited Wayne LaFave’s *Substantive Criminal Law* treatise. LaFave offers a general description of criminal law, describing “usual” types of voluntary manslaughter in “most jurisdictions.”¹⁵² A citation to his treatise in this context is a citation to general law. In another instance, the court cited a

¹⁴⁸ *Roberts v. Jackson Hole Mountain Resort Corp.*, 884 F.3d 967, 972–73 (10th Cir. 2018); *see Leathers v. Leathers*, 856 F.3d 729, 758 (10th Cir. 2017).

¹⁴⁹ Office of General Counsel, *Primer on the Categorical Approach*, U.S. SENT’G COMM’N (March 2020), https://www.ussc.gov/sites/default/files/pdf/training/primers/2020_Primer_Categorical_Approach.pdf [<https://perma.cc/ES2U-QRUT>].

¹⁵⁰ *Taylor v. United States*, 495 U.S. 575, 598 (1990).

¹⁵¹ *United States v. O’Connor*, 874 F.3d 1147, 1155 (10th Cir. 2017).

¹⁵² *United States v. Currie*, 911 F.3d 1047, 1054–55 (10th Cir. 2018) (citing 2 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 15.2 (3d ed. 2018)).

criminal law treatise as a source of a principle defining the defense of duress in a prosecution for embezzlement and theft from an Indian tribal organization, a federal crime.¹⁵³

Similarly, the court turned to a treatise as the source of general civil law doctrine in several instances, to define a trust, for example, in the context of an ERISA case.¹⁵⁴

ii. Non-substantive general law

My study also revealed repeated (24) citations to treatises for *non-substantive* rules not specific to any jurisdiction. The treatise citations to such secondary rules include rules in two categories: those related to statutory interpretation and those related to the “law of precedent” more generally. Both sets of citations are almost entirely to two relatively new treatises, *Reading Law: The Interpretation of Legal Texts* by Bryan Garner and Justice Antonin Scalia, and *The Law of Judicial Precedent* by Garner and twelve judges.¹⁵⁵

The two texts seek to essentially ‘codify’ both unwritten weight-of-authority rules and unwritten methodology rules. The treatises present the rules as distinct, identifiable principles in bold font, emphasizing their permanence perhaps, rather than calling attention to their unwritten, evolving nature. As discussed above, methodological rules on how to interpret enacted law are found frequently in judicial opinions but, at least in federal court,

¹⁵³ *United States v. Dixon*, 901 F.3d 1170, 1180 (10th Cir. 2018). “A heat of passion defense has both a subjective and an objective element: the defendant must subjectively have been in a heat of passion, and the provocation must be substantial enough to cause a reasonable person to have ‘such a passion.’” *Currie*, 911 F.3d at 1054–55 (citing 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 15.2 (3d ed. 2018)).

¹⁵⁴ The term *trust* is not defined in § 267. RESTATEMENT (THIRD) OF TRUSTS § 2 (2003) (hereinafter Restatement Third) broadly defines the term as ‘a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee.’ A trust generally has the following elements: (1) trust property (real or personal, tangible or intangible) which the trustee holds subject to the rights of another, (2) a trustee (an individual or entity charged with holding the trust property for the benefit of another), and (3) a beneficiary (the person for whose benefit the trustee holds the trust property). See AMY M. HESS ET AL., BOGERT’S TRUST AND TRUSTEES § 1 (2018) (Bogert).

Petersen v. Comm’r of Internal Revenue, 924 F.3d 1111, 1116 (10th Cir. 2019).

¹⁵⁵ See generally GARNER ET AL., *supra* note 115; ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

are often not deemed to be a binding part of the opinion. Thus, it is interesting that judges started citing to Garner and Scalia's book as a source of authority for these sorts of rules soon after it was published. At the outset Garner and Scalia proclaim that "Our approach is unapologetically normative, prescribing what, in our view, courts ought to do with operative language."¹⁵⁶

Where are all these interpretive canons to be found? Are they tidily collected somewhere in a code: Generally, no. Mostly, the canons exist within the thousands of law reports scattered through a law library, expounded at length but with questionably lucidity . . . We believe that our effort is the first modern attempt, certainly in a century, to collect and arrange only the valid canons (perhaps a third of the possible candidates) and to show how and why they apply to proper legal interpretation.¹⁵⁷

A typical example in the Tenth Circuit cites to *Reading Law* to interpret the False Claims Act: "We ordinarily derive Congress's intent 'from the text, not from extrinsic sources.' Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012)."¹⁵⁸ Or this opinion interpreting ERISA: "'A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored.' Antonin Scalia & Bryan A. Garner, *Reading Law* 63–65 (2012)."¹⁵⁹

As discussed above, judges in the federal courts do not consider themselves bound by previous judicial statements regarding interpretive methodology. Yet, they cite to a treatise as authority for the interpretive choices they are making. Prior to the existence of this treatise, would these judges have simply cited to a canon of construction, an earlier judge's description of a canon, or other treatises? Although the number of citations is small, the Scalia-Garner text is possibly becoming part of judicial practices of recognition. After noting its citation in the Tenth Circuit, I searched for its citation across all jurisdictions, and found that its use has steadily increased in federal and state courts alike.¹⁶⁰ In

¹⁵⁶ *Id.* at 9.

¹⁵⁷ *Id.*

¹⁵⁸ *United States ex rel. Reed v. KeyPoint Gov't Sols.*, 923 F.3d 729, 744 (10th Cir. 2019).

¹⁵⁹ *Medina v. Catholic Health Initiatives*, 877 F.3d 1213, 1226 (10th Cir. 2017).

¹⁶⁰ Data on file with author. Used da(year) and "reading law" /s scalia in Westlaw database for all state and federal cases.

2021, for example, federal judges cited to it in over 300 opinions, and state courts in 185.¹⁶¹

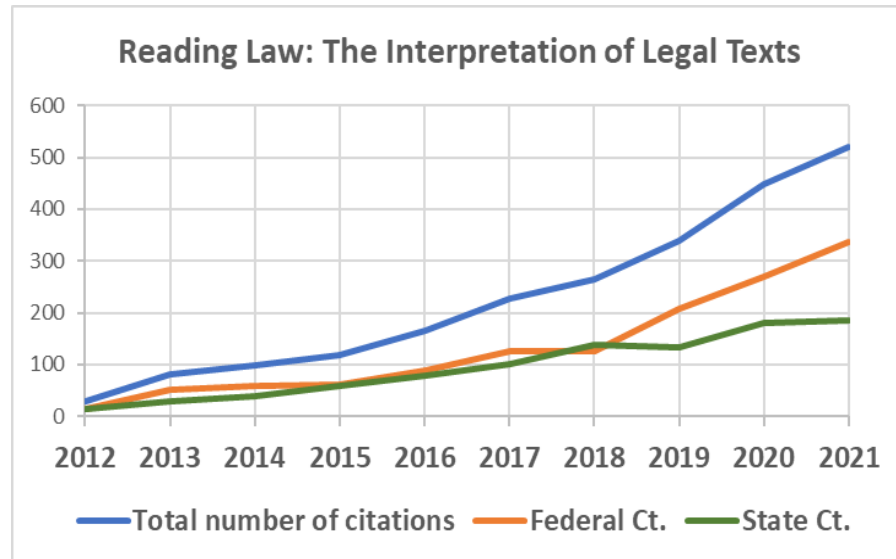


Figure 3. Citations to *Reading Law: The Interpretation of Legal Texts*

Is this an example of a “norm cascade” in progress—where a source is relied upon more and more frequently until so many judges have jumped on the bandwagon that it gains prescriptive force? Might it eventually become a source that “ought” to be consulted in interpretive cases? Do the judges who cite this source share any common attributes?

The last category of general principles for which judges cited to a treatise is the very topic of this paper: unwritten weight-of-authority rules. The vast majority of the citations were to the same treatise, *The Law of Judicial Precedent*, published in 2016. This book, authored collaboratively by 12 appellate judges and Bryan Garner, includes 93 “Blackletter Principles”—legal principles written in positive law format.¹⁶² Published in 2016, it examines the “nuances and complications” of the law of

¹⁶¹ Search in Westlaw database of “Federal Cases” for da(2020) and scalia /s “reading law.”

¹⁶² See generally GARNER ET AL., *supra* note 115.

precedent¹⁶³ in what author Bryan Garner calls the “staggering” task of addressing the law of precedent in hornbook style for the first time since 1912’s *A Handbook on the Law of Judicial Precedent* by Henry Campbell Black.¹⁶⁴ *The Law of Judicial Precedent* offers a “conventional description of contemporary practice useful to the working lawyer and judge” in the “American system.”¹⁶⁵ *The Law of Judicial Precedent*’s 93 principles capture many of the unwritten, articulated rules discussed above. For example, see one of the most oft-cited sections, Blackletter Principle 4, Dicta versus Holdings: “The *holding* of an appellate court constitutes the precedent, as a point necessarily decided. *Dicta* do not; they are merely remarks made in the course of a decision but not essential to the reasoning behind that decision.”¹⁶⁶ Or Blackletter Principle 41, “Practice and Procedure:” “Stare decisis applies less strongly to decisions on matters of practice and procedure than to those involving property and contract rights.”¹⁶⁷

The Blackletter Principles are not directly supported with citations, but each one is followed by several pages of explanation, and the sources cited in support of the explanation are varied. Many of the citations are, of course, to older cases. Sometimes the authors cite to law review articles, books, or English cases. For example, see Blackletter Principle 28: “A decision’s authority may be magnified by the eminence of the judge who wrote the opinion.”¹⁶⁸ The first few citations in the explanation for this particular principle include a 2008 book, the *New Oxford Companion to the Law*, a 1996 Marquette Law Review article, a 1995 Tulsa Law Journal article, and a 1909 book called *Law Books and How to Use Them*.¹⁶⁹

The sources cited for each principle vary widely, as noted in the examples above, from current U.S. decisions across jurisdictions to old English cases to scholarly books and articles. That is the very nature of unwritten rules—they do not have a specific textual source. *The Law of Judicial Precedent* attempts to formalize this unwritten area of law, though it does not address tacit practices. Much like *Reading Law*, *The Law of Judicial*

¹⁶³ *Id.* at 1.

¹⁶⁴ *Id.* at xiii.

¹⁶⁵ *Id.* at 18–19.

¹⁶⁶ *Id.* at 44.

¹⁶⁷ *Id.* at 370.

¹⁶⁸ *Id.* at 248.

¹⁶⁹ *Id.* at 248 n. 1–4.

Precedent has become a source of regular, growing (if not as frequent) citation, cited in 114 federal cases from 2016-2021.¹⁷⁰ Even the Supreme Court has cited to this treatise in a dissent by Justice Gorsuch who is, probably not coincidentally, one of the treatise authors. He cited the text to define dicta and confirm that it “cannot bind future courts.”¹⁷¹

For more on the consequences and curiosity of a codified code of precedent, see my work elsewhere.¹⁷² Here, I want to point out that both Garner texts seek to establish a code of non-substantive rules in two areas of general law—interpretative methodology and the operation of precedent. General law is more susceptible to third-party codification because there is no jurisdiction and so no traditional authoritative body to make laws—either judicial or legislative.

B. *Consequences of reliance on treatises*

We ought to be thinking hard about the consequences of relying on treatises as a source of authority. From one perspective, treatises might be viewed as highly valuable; reliance on them might be an efficient and desirable practice. Treatise authors have presumably done the hard, time-consuming work of canvassing all jurisdictions, collecting and counting cases, organizing and synthesizing them to create a coherent set of rules. These sources may be invaluable to judges and clerks burdened with too many cases and unable to spend the time to do that research themselves. Perhaps this brings clarity on unwritten rules more quickly to the legal community. Treatises have been described as a “freeze-frame of law,”¹⁷³ and in that sense can be useful for quickly determining the current state of the law.

¹⁷⁰ Amy J. Griffin, “*If Rules They Can Be Called*”: An Essay on The Law of Judicial Precedent, 19 LEGAL COMM’N & RHETORIC: JALWD 155, 157, 157 n.11 (2022).

¹⁷¹ Torres v. Madrid, 141 S. Ct. 989, 1005 (2021) (Gorsuch, J., dissenting) (“Under the doctrine of *stare decisis*, we normally afford prior holdings of this Court considerable respect. But, in the course of issuing their holdings, judges sometimes include a ‘witty opening paragraph, the background information on how the law developed,’ or ‘digressions speculating on how similar hypothetical cases might be resolved.’ B. Garner et al., *The Law of Judicial Precedent* 44 (2016). Such asides are dicta. The label is hardly an epithet: ‘Dicta may afford litigants the benefit of a fuller understanding of the court’s decisional path or related areas of concern.’ *Id.* at 65. Dicta can also ‘be a source of advice to successors.’ *Ibid.* But whatever utility it may have, dicta cannot bind future courts.”).

¹⁷² Griffin, *supra* note 170, at 156–58.

¹⁷³ Wilf, *supra* note 140, at 690.

But from another perspective, treatises are objectionable, capable of warping the evolution of unwritten rules. There is no assurance that any treatise is objective, if that could even be defined. And there is a circular nature to treatises, frequently revised (especially in the online age) to incorporate new citations. For example, in reviewing Wright & Miller's *Federal Practice* treatise to see the content cited by an opinion in my study, I'd sometimes find that the case had already been included in the supporting footnote as evidence of the principle's validity. There is a certain circularity to this type of authority: after an opinion cites to the treatise, the treatise authors add the case to the treatise to "prove" the rule.¹⁷⁴ Perhaps this simultaneity has the effect of cementing unwritten laws earlier than we'd like.

Along these lines, scholars have criticized the influence of particular treatises. For example, Rebecca Haw Allensworth describes the impact of Areeda's treatise on Antitrust law as "staggering"¹⁷⁵ and its dominance unique among all other areas of law (with perhaps the exception of Wright and Miller in Civil Procedure). Supreme Court Justice Stephen Breyer has remarked "that most practitioners would prefer to have two paragraphs of Areeda's treatise on their side than three Courts of Appeals or four Supreme Court Justices."¹⁷⁶ In the context of antitrust law, Allensworth argues that a professor's ideas have an inescapable "academic perspective" and "lack democratic legitimacy."¹⁷⁷ Similarly, Ann Bartow has criticized "excessive reliance" on the Nimmer on Copyright treatises¹⁷⁸ as undemocratic. She describes "an infinite loop of logrolling" whereby clerks were encouraged by their judges to include Nimmer citations in order to increase the chances the opinion would itself be included in Nimmer.¹⁷⁹

A review of all the Tenth Circuit treatise citations in context suggests that treatises often provide a kind of pseudo-codification

¹⁷⁴ See, e.g., *United States v. Russian*, 848 F.3d 1239 (10th Cir. 2017). By the time I checked Wright and Miller to see what it relied on, the case itself had been added to the entry.

¹⁷⁵ Rebecca Haw Allensworth, *The Influence of the Areeda-Hovenkamp Treatise in the Lower Courts and What it Means for Institutional Reform in Antitrust*, 100 IOWA L. REV. 1919, 1921 (2015).

¹⁷⁶ *Id.* at 1920 (citing Stephen Breyer, *In Memoriam: Phillip E. Areeda*, 109 HARV. L. REV. 889, 890 (1996)).

¹⁷⁷ *Id.* at 1937–38.

¹⁷⁸ Ann Bartow, *The Hegemony of the Copyright Treatise*, 73 U. CINN. L. REV. 581, 582 (2004).

¹⁷⁹ *Id.* at 595.

of legal principles. The citations arguably reflect a judicial preoccupation with rules and rule-like forms. In more than half of all instances I examined (102 out of 183), the judicial opinion directly quoted the treatise for a rule-like principle. In another 27 instances, the opinion cited to the treatise as support for a rule-like statement, though without quoting the treatise. Combined, those two categories account for 70% of all citations to treatises.¹⁸⁰ In other words, treatises are cited more like law than as an explanation of the law.

In the text of an opinion, judges do not typically acknowledge (not explicitly at least) whether the source of a rule is binding or not. Treatise citations are woven into the analysis in the same way as other sources of rules. Of course, the citation itself reveals whether a source is optional or binding, so perhaps judges do not deem any additional acknowledgment necessary. Nevertheless, one could envision a different sort of analysis, in which the author of an opinion makes the line between binding and non-binding sources explicit, to show exactly where the binding law is indeterminate. But that is not the usual practice. In opinion after opinion, optional authority is integrated seamlessly into the analysis along with binding authority, so that without citations, a reader would have no idea which was which. In other words, judges do not point out that binding law isn't sufficient to resolve the question.

In 1981, A.W.B. Simpson argued that "certain literary forms are closely tied to theories about the nature of law itself, and that this is particularly true of the treatise."¹⁸¹ In his view, the decline of treatise use at that time was attributable to the realist movement more than any other factor.¹⁸² He was referring to classic substantive treatises such as Wigmore's treatise on evidence, Williston and Corbin's treatises on contracts, and Scott's on the law of trusts.¹⁸³ It does seem that heavy reliance on a few prominent treatises has been replaced by more widely dispersed citations to a much larger array.

¹⁸⁰ In 44 instances, a treatise was cited in some less direct way to support the analysis, for the purpose of policy, for example. In the remaining 10 instances, the treatise was cited for historical or factual information.

¹⁸¹ A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 633 (1981).

¹⁸² *Id.* at 677–78.

¹⁸³ *Id.* at 677.

While short treatlets survive on the margins of the American legal textbook market, neither students nor teachers, not to mention courts or practicing lawyers or, for that matter, legislators or their aides, feel the need to bury their noses in heavy tomes of treatise learning. The Great Treatise very much has gone the way of the Great Men of the Law.¹⁸⁴

Without longitudinal data on the use of treatises in the Tenth Circuit, I can't draw any definitive conclusions about trends in the use of treatises. But it is clear at least that the Tenth Circuit is regularly relying on treatises—realism may not have quashed formalism to quite the extent that in 1981 Simpson thought it might.

The treatise's link to formalism is one of the reasons the treatise data is interesting.¹⁸⁵ Regular citation to treatises reflects the current state of legal reasoning: it is much more doctrinal than analogical. As seen in my categorization of the citations above, treatises are frequently cited as a source of doctrinal propositions invoked as legal rules; judges quote doctrine in rule form from treatises just as they do from cases. Our current directive-rule form of judicial doctrine is not inevitable—past judicial decision-making was far more analogical than it is today, a very different form of legal expression.¹⁸⁶ For several decades now, scholars have been arguing that judicial opinions are becoming more rule-like. Peter Tiersma has argued that the language of holdings in judicial opinions is treated more and more like a statute,¹⁸⁷ describing this as “writing down the law in an authoritative way,” which he labeled “textualization.”¹⁸⁸ Treatises seem to be advancing the goal of textualization. In places where treatises are cited as representations of other judicial opinions they collect, organize, and synthesize the cases, essentially codifying that law—making unwritten law as much like written law as possible.

¹⁸⁴ Angela Fernandez & Markus D. Dubber, *Introduction: Putting the Legal Treatise in Its Place*, in *LAW BOOKS IN ACTION* 1, 20–21 (2012).

¹⁸⁵ Philip P. Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649, 651 (2006) (“[A]t the heart of the classic legal treatise is a formalist conception of law.”) (citing Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CAL. L. REV. 15, 16 (1987)).

¹⁸⁶ PIERRE SCHLAG & AMY J. GRIFFIN, *HOW TO DO THINGS WITH LEGAL DOCTRINE* 2 (2020).

¹⁸⁷ Tiersma, *supra* note 3, at 1248.

¹⁸⁸ *Id.* at 1188.

Are the treatises cited as evidence of law or as law itself? The line between the two may be a distinction without a difference. Presumably few people think that treatise authors ‘make’ law. But, if they synthesize judicial decisions or general law into rule form that is then cited by courts as a doctrinal rule, maybe they do make law, in a way. If, in fact, judges are routinely citing treatises as authoritative statements of rules, what is the difference if they are technically ‘not law’? To dismiss treatises as ‘not law’ is to ignore their use as a source of what most of us recognize as law. Rule-of-law principles require that a judge “maintain a steady connection with the law” even in cases where the law does not directly answer the question before her.¹⁸⁹ Perhaps unsurprisingly then, a treatise author has stepped in to fill the gap—to create written rules—as formal as they can be without being enacted.

A treatise appears to out-rank cases in some instances, showing that conventional descriptions of the hierarchy of authority are overly simplistic. Treatises are sometimes described as a research shortcut to more traditional authority – but if so, why not just cite to those cases? Contrary to conventional wisdom, a treatise (secondary authority) may have more weight or influence than a case (primary authority). In many of these instances, judges could have instead cited to a case, a source of primary authority. But they didn’t. The choice of a treatise over a case could indicate laziness or abdication of responsibility by the author, but it seems plausible that the treatise has a greater weight in the customary laws of the judiciary for other more legitimate reasons.

The treatise is often a proxy for numerous cases that have ruled on the issue, in both substantive and procedural realms, as representative, perhaps, of the majority view. When cited as a source of law in a particular jurisdiction, treatises seem to represent consensus, whether they cite to many cases across all circuits or just a single case. Treatises may serve as a proxy for the majority view for purposes of efficiency—judges or judicial clerks don’t have time to actually investigate the rule in every circuit. Or based on the theory that a majority opinion is more likely to be correct.¹⁹⁰ In some instances, the expertise of the author may provide the content-independent value, such as that

¹⁸⁹ Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 15 (2012).

¹⁹⁰ See Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 136 (2006) (discussion of the Condorcet Jury Theorem).

of Wayne LaFave, or the renowned original authors of *Federal Practice and Procedure*, Charles A. Wright and Arthur R. Miller.

The regular citation to treatises for principles of law shows that it is an acceptable practice among federal judges (or at least among those of the Tenth Circuit). Does it rise to the level of a prescriptive norm? Probably not. I saw nothing written about the use of treatises that might be deemed “doctrine,” in contrast to the many articulated statements in judicial opinions about the value of sister circuit opinions. Perhaps the most we could say in terms of a norm is that it is not taboo to rely on a treatise, and that reliance on a treatise is much better than reliance on nothing.

But even it is merely a common practice, without any explicit prescription or normative attitude, citing to treatises deserves notice. For one thing, we have no gatekeeping function to assure the quality of treatises cited. The wide array of treatises cited arguably suggests there isn't much quality control—any treatise will do. The collection of treatises is varied, with 80 different treatises cited in the span of three years in the Tenth Circuit.¹⁹¹ Over half (48) of the treatises were cited just once, and in only five of the 80 instances was a treatise cited more than five times. Just a few heavyweight treatises stand out as particularly influential, including Wright and Miller, Moore's Federal Practice, and Wayne LaFave's criminal law treatises. There is no way to ensure (other than perhaps market forces) that they accurately reflect current practices,¹⁹² or that their authors are unbiased. The Scalia and Garner treatise on statutory interpretation is a good example of that—it doesn't purport to offer an unbiased view but specifically affirms its normative purposes. The fact that Justice Scalia was widely known for his particular normative view of statutory interpretation does not seem to deter courts from citing to his book as an authoritative source, as if it were objective.

¹⁹¹ See *infra* Appendix A.

¹⁹² On the point of quality, see Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc., 37 N.Y.3d 169, 176 (N.Y. 2021). In this case, a law firm sued a publisher based on the incomplete content in a secondary source. *Id.* at 173–74. The court dismissed the complaint for failure to state a claim even though the book mistakenly omitted portions of New York rent control law. *Id.* at 175–76, 181. The court found it was “clear to a consumer that the Tanbook is not a completely accurate compilation of the law[,]” persuaded by the fact that materials in the book were subject to legislative amendment at any time, and that the contract between the parties provided for updates at an additional cost and included an express disclaimer. *Id.* at 179–81.

Treatise citations illustrate the ways in which reliance on unwritten law can cede power to third parties—"the very act of recordation and systematization is an exercise of power."¹⁹³ All unwritten law is vulnerable to outsourcing, but general law is even more susceptible than the law of a particular jurisdiction because an individual court doesn't have the authority to declare general law in the way that it can state the law of its own jurisdiction. But even with respect to particular jurisdictions, once a treatise citation appears in a case, the legal proposition gains authority and can become binding. Philip Frickey has recounted a story he'd heard about William Prosser, who, in the first edition of his 1941 torts treatise, allegedly included progressive principles of tort law, sometimes citing to cases which did not support the principles.¹⁹⁴ According to the legend Frickey heard, the second edition of the treatise in 1955 included new cases that did support the principles, relying on the first edition of the treatise as authority.¹⁹⁵

A combination of external factors like an overburdened judiciary, increased access to a huge variety of information, and a desire for objectivity all likely contribute to the practice, or norm, of reliance on treatises. That does not make the custom a good one, but more likely one of convenience. Like all weight of authority rules, this one needs evaluation in light of the broader principles and values we purport to uphold through the rule of law.

III. EVALUATING THE NEED FOR REFORM

Weight-of-authority rules are part of a complex system that should be conceptualized holistically in order to interrogate its relationship to our larger goals for the legal system. Evaluating any particular judicial practice does not go far enough; we should also ask whether as a whole it is desirable to have a judicial system in which weight-of-authority rules are developed by judicial social practice and remain largely unwritten.

On one hand, the organic evolution of norms allows them to adapt to the changing needs of the judiciary (crushing workloads), and changing societal conditions (improved access to information). Norms can adapt to the circumstances and allow for experimentation. Yet, these norms can also be described as

¹⁹³ Steven Wilf, *Legal Treatise*, in THE OXFORD HANDBOOK OF LAW AND HUMANITIES 687, 690 (Simon Stern, Maksymilian Del Mar & Bernadette Meyler eds., 2020).

¹⁹⁴ Frickey, *supra* note 185, at 653–54.

¹⁹⁵ *Id.* at 654.

unwritten insiders' rules, foundational and yet largely inaccessible to the general public, and created without deliberation by an elite body of judges.

A. *Should judges determine the weight of authority?*

The idea that federal courts have some inherent authority to regulate their own procedure is not particularly controversial.¹⁹⁶ Inherent judicial power was recognized by the Supreme Court in 1812, when it stated that “[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution.”¹⁹⁷ But do weight-of-authority rules belong in this category? In some respects, it is intuitively sensible that judges should determine the foundational rules of the judiciary system, as part of the “judicial Power” vested in courts by the Constitution, and due to the structural independence of the judiciary branch. Judicial independence is critical for the rule of law,¹⁹⁸ as judges must be protected from undue influence.

But then again, too much independence runs counter to the rule of law. Foundational rule-of-law principles like equality, accountability, and predictability can be undermined by judicial independence.¹⁹⁹ There is a bit of cognitive dissonance in a rule-of-law system where the judges themselves choose what counts as law. Recognizing that judges themselves can change the rules about what counts as law can be disconcerting for those who perceive the law as distinct and immutable.

So, there is reason to question whether judges should have unfettered power to determine what counts as law. Is our current system somehow undemocratic? Federal judges are not elected; they are not democratically accountable. Federal judges have life tenure and compensation guaranteed by the Constitution; they have judicial immunity. They cannot be fired or forced to retire. There is no process for demotion, nor any raises for superior performance.²⁰⁰ Only the drastic act of impeachment is available

¹⁹⁶ Jordan Wilder Connors, *Treating Subdecisions Alike: The Scope of Stare Decisis as Applied to Judicial Methodology*, 108 COLUM. L. REV. 681, 682 (2008) (“The pervasive sentiment is that decisions about judicial methodology are left to the discretion of the individual Justice.”).

¹⁹⁷ *United States v. Hudson*, 11 U.S. 32, 34 (1812).

¹⁹⁸ William H. Pryor Jr., *Not-So-Serious Threats to Judicial Independence*, 93 VA. L. REV. 1759, 1763 (2007).

¹⁹⁹ Pamela S. Karlan, *Judicial Independences*, 95 GEO. L. J. 1041, 1041 (2007).

²⁰⁰ LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES* 33 (2013).

as a formal remedy. Moreover, federal judges are an elite, non-representative cohort: eighty percent white and seventy-three percent male; thirty-seven percent of them have at least one degree from an Ivy League school.²⁰¹ They hire clerks to help with opinion writing, but clerkships have similarly been “long the province of privileged white males.”²⁰² Lack of diversity undermines the legitimacy of the institution.²⁰³

Political scientists have shown that the Supreme Court., at least, is responsive to changes in public opinions, even if less immediately responsive than elected bodies.²⁰⁴ Justices are appointed and confirmed by elected officials (the President and Senators) for one thing, so the composition of the Supreme Court and other federal courts varies as different officials are elected. Some scholars have shown that “[c]ourt decisions do, in fact, vary in accord with current public preferences”²⁰⁵ due both to the composition of the Court and its “rational anticipation” of public opinion.²⁰⁶ Because Congress has not enacted weight-of-authority rules, judicial decisions on this front do not fit the classic definition of counter-majoritarian actions.²⁰⁷ Judges are not overturning any decisions by the representative branches of government; they are setting the ground rules for their own branch only.

For most scholars, the dispute about the extent of judicial power is focused on the distribution of power between Congress and the judiciary.²⁰⁸ Article I gives Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into

²⁰¹ *Biographical Directory of Article III Federal Judges: Export, Demographics*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/biographical-directory-article-iii-federal-judges-export> (last visited Apr. 25, 2023) [<https://perma.cc/QH6X-YV2Z>]

²⁰² Artemus Ward, *Law Clerks*, in THE OXFORD HANDBOOK OF U.S. JUDICIAL BEHAVIOR 105 (Lee Epstein & Stephanie A. Lindquist eds., 2017).

²⁰³ See Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?* 105 N.W. U. L. REV. 587, 590–91 (2011). Views on this point are contested.

²⁰⁴ See e.g., James A Stimson, Michael B. Mackuen & Robert S. Erikson, *Dynamic Representation*, 89 AM. POL. SCI. REV. 543, 555 (1995).

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 543; see also Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 585 (1993) (arguing that the judiciary is in dialogue with society on a daily basis).

²⁰⁷ See ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 257 (2d ed. 1986).

²⁰⁸ See e.g., Benjamin H. Barton, *An Article I Theory of the Inherent Powers of the Federal Courts*, 61 CATH. UNIV. L. REV. 1, 4–5 (2011) (summarizing varied views of commentators).

Execution”²⁰⁹ the powers vested by the Constitution, including, presumably, the judicial power. For some scholars, this means Congress can legislate judicial functions.²¹⁰ The extent of congressional power to regulate judicial adherence to stare decisis in particular is a matter of some debate, and mostly discussed as the flip side of whether the Constitution requires it.²¹¹ Can stare decisis trump the Court’s changed view of the “correct” interpretation of the Constitution? Those who envision Congress regulating stare decisis are only concerned with what is binding, not the use of optional sources.

Congress did address a choice-of-law issue in the Rules of Decision Act (“RDA”), first enacted in 1789. Under the RDA, “[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”²¹² This rule specifies to federal courts which general category of law (state law) is binding in particular circumstances.²¹³ Choice-of-law rules are in a category related to, but distinct from, weight-of-authority rules: they ask which jurisdiction’s laws should apply rather than which sources in that jurisdiction are valid. The RDA illustrates Congress’ willingness to address a choice-of-law issue at the heart of federalism; it is not a foray into legislating weight-of-authority rules.

Congress specifically delegated procedural rule-making powers to the Supreme Court under the Rules Enabling Act of

²⁰⁹ U.S. CONST. art. I, § 8.

²¹⁰ *Id.*; Barton, *supra* note 208, at 6 (“[A]s long as an inherent power has not been foreclosed by an existing act of Congress and is reflective of the judicial power (that is, helpful to the deciding of cases) federal courts are empowered to act.”).

²¹¹ U.S. CONST. art. I, § 8, cl. 18; Lawson, *supra* note 10, at 25–26; David E. Engdahl, *Intrinsic Limits of Congress’ Power Regarding the Judicial Branch*, 1999 B.Y.U. L. REV. 75, 93 (1999); See Paulsen, *supra* note 58, at 1541 (arguing Congress has power to eliminate stare decisis); Fallon, *supra* note 7, at 596; Kozel, *supra* note 9, at 792 (“[T]he Constitution implies a baseline presumption of deference that even Congress cannot remove.”).

²¹² Rules of Decision Act, 28 U.S.C. § 1652.

²¹³ Fallon, *supra* note 7, at 596 (“In light of longstanding acceptance and considerations of justice and prudence, stare decisis deserves recognition as a legitimate, constitutionally authorized doctrine beyond Congress’s power to control.”); Healy, *supra* note 58, at 1204 (explaining that the RDA “tells the courts what source of substantive law to apply[,]” but not “what methodology to use in interpreting that law”). In *Erie*, the Supreme Court determined that the “laws of the several states” includes state judicial decisions as well as legislative enactments. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 71, 78 (1938).

1934²¹⁴ (“REA”) rather than take up the task itself. Under the REA, Congress delegated to the Supreme Court the “power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals.”²¹⁵ In 1941, in interpreting the REA, the Supreme Court explained that “Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes of the Constitution of the United States.”²¹⁶ There is no dispute that federal courts have the power to develop federal rules of judicial procedure, at least when Congress has not done so.²¹⁷

Under the authority delegated to it by Congress in the REA, the Supreme Court—through a complex of set rule-making procedures involving advisory committees, proposed rules, and opportunity for public feedback—²¹⁸ has enacted the Federal Rules of Civil Procedure, Evidence, Appellate Procedure, and Criminal Procedure. Perhaps the REA gives the Supreme Court the power to enact weight-of-authority rules, or perhaps the Court has that power inherently. However, even presuming it has that power, it has not used it formally; none of the rules in this category purport to set the weight of any authority. As described in part I above, only in the local rules of the federal district and appellate courts can a very few such formal rules be found.

In my view, only two of all the federal rules promulgated by the Supreme Court even come close to addressing weight-of-authority concepts. Federal Rule of Appellate Procedure Rule 32.1 states that a court may not prohibit or restrict the citation of federal judicial opinions that have been designated as unpublished.²¹⁹ This rule does not affect what sources a court might use to determine the outcome of a suit; it leaves that

²¹⁴ Whether Congress does in fact legitimately have that power to delegate is not necessarily settled.

²¹⁵ Rules Enabling Act, 28 U.S.C. § 2072(a).

²¹⁶ *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9–10 (1941).

²¹⁷ *Barrett*, *supra* note 58, at 818; *Hanna v. Plumer*, 380 U.S. 460, 473 (1965) (“*Erie* and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts.”); *see also* *Shady Grove Orthopedic Assoc. v. Allstate Insurance Co.*, 559 U.S. 393, 407 (2010).

²¹⁸ *See generally* *About the Rulemaking Process*, U.S. CTS. (last visited Apr. 25, 2023), <https://www.uscourts.gov/rules-policies/about-rulemaking-process> (on the federal rulemaking process) [<https://perma.cc/4FXX-KMMW>].

²¹⁹ Fed. R. App. P. 32.1.

question to judges. It does prevent a judge from limiting the judicial decisions a party cites in support of an argument, but that's it.

And Federal Rule of Civil Procedure Rule 44.1 provides that "[i]n determining foreign law, the court may consider any relevant material or source."²²⁰ FRCP 44 ensures that judges retain the ability to choose which sources to rely on when "determining" foreign law—in other words, it preserves individual judicial power over weight of authority issues.²²¹ Neither of these rules purports to set the weight of any authority used in judicial decision-making.

While it is plausible to imagine Congress undertaking the task of dictating the suitability of particular sources, it has not done so—at least not successfully.²²² For the purposes of this paper, I put aside the question of whether Congress could legislate the weight of authority. I consider the current judicially controlled system and alternatives to that system that would keep weight-of-authority rules within judicial control.

B. Characteristics of informal norms

1. Lack of transparency

Perhaps the most obvious characteristic and consequence of unwritten rules is their lack of transparency, and resultant lack of notice to litigants. One of the most prominent principles of a rule-of-law system is that the law should be clear—knowable. Unwritten rules are more difficult to identify and access, harder to evaluate and challenge than enacted rules because they lack authoritative text. Unlike unwritten substantive rules of decision and some other unwritten procedural rules,²²³ unwritten practices of recognition are not ancillary to a large body of written rules; almost all such rules are unwritten.

²²⁰ Fed. R. Civ. P. 44.1.

²²¹ *Id.*

²²² See e.g., S. 520, 109th Cong. § 201 (2005) (The failed Constitutional Restoration Act of 2005 which, among other things, attempted to regulate the judiciary's interpretation of the Constitution: "In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law up to the time of the adoption of the Constitution of the United States.").

²²³ Barrett, *supra* note 58, at 819–20 (citing remittitur, preclusion, abstention, and forum non conveniens as examples of procedural common law).

It is true that some rules about the weight of authority are articulated by courts to the extent that the principles are enshrined as doctrine. These norms are more ‘knowable,’ as they can be found in third-party digests and are repeated in multiple cases. But other practices (which may or may not develop into prescriptive norms) are not.

One might argue that at least some of these underlying operational rules do not need to be as visible as substantive or traditional procedural laws, in that they are not outward facing. Weight-of-authority rules are internal rules addressed to judges rather than rules addressed to the general public, a long-recognized distinction in law.²²⁴ Meir Dan-Cohen argued that selective transmission of rules to the public is not necessarily incompatible with the rule of law. “The ability of decision rules to guide decisions effectively and thus to limit official discretion and arbitrariness does not depend on broad dissemination or easy accessibility of those rules to the general public.”²²⁵ However, Dan-Cohen’s argument rested on the distinction between “conduct rules” and “decision rules” in criminal law.²²⁶ Operational rules such as choice of sources and methodology also guide decisions and might limit judicial discretion and arbitrariness, but unlike Dan-Cohen’s criminal decision rules, they are created by the very officials they purportedly limit.

Moreover, unlike some criminal decision rules, such as the defense of duress, it is not clear that publicity would undermine the efficiency of weight-of-authority rules. Weight-of-authority rules serve to establish the parameters of legitimate judicial decision-making, in some instances specifying which conduct rules govern the public. There is a strong argument that the general public *does* need to know the sources that influence judges in the decision-making process; the rules that guide how judges resolve indeterminacies—or gaps—made visible when binding laws are applied to particular circumstances.

²²⁴ See, e.g., Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 625 (1984) (reviving the “old” idea of a distinction in law between “rules addressed to the general public and rules addressed to officials”).

²²⁵ *Id.* at 668 (focusing on the distinction between “conduct rules” and “decision rules” in criminal law, and conjuring an imaginary world in which “acoustic separation” serves to separate the two, so that the public only knows the conduct rules, while the officials know the decision rules).

²²⁶ *Id.* at 626.

Do rules of recognition differ that much from rules of evidence and procedure created through the national rule-making processes? One distinction might be that the rules of procedure and evidence are more directly addressed to attorneys involved in the litigation process. Weight-of-authority rules are more directly addressed to decisionmakers—judges, as the only actors needing to come to a legal conclusion. But this is a thin distinction. In order for attorneys to most effectively represent their clients, knowledge of all weight-of-authority rules is important, not just knowledge of what is “binding.” If the customary laws governing inputs to judicial decision-making are not widely known, some participants in the system—those with better resources—may be advantaged over others.

The effectiveness of an adversarial system is dulled if the parties do not know what sources the decisionmaker is going to rely on. Notably, judges do not appear to feel at all constrained by sources the litigating parties have cited. A 2020 study shows that 51% of the cases cited by federal circuit courts had not been cited by the parties in their briefs.²²⁷ Studies of other courts have found this to be true at a range of levels, from 25% in some courts, to as much as 65% in a 2010 study of First Circuit cases.²²⁸ And numerous scholars have drawn attention to widespread independent factual research by appellate judges.²²⁹ If judges are routinely finding their own sources of authority outside of the adversarial process, we need much more transparent practices of recognition. Parties can neither challenge nor distinguish sources they don't know the court is going to rely on.

We have no good understanding of how these norms are communicated, even among judges themselves. Do judges regularly read other opinions, or do they communicate with the peers in other ways? What role do law clerks play in selecting authority? Do prominent judges serve as norm entrepreneurs? What drives the adoption of a new source as one that judges

²²⁷ Kevin Bennardo & Alexa Z. Chew, *Citation Stickiness*, 20 J. APP. PRAC. & PROCESS 61, 84 (2020).

²²⁸ Brian Larson, *Endogenous and Dangerous*, 22 NEV. L. J. 739, 767 (2022) (collecting studies); Chad M. Oldfather, Joseph P. Bockhorst & Brian P. Dimmer, *Triangulating Judicial Responsiveness: Automated Content Analysis, Judicial Opinions, and the Methodology of Legal Scholarship*, 64 FLA. L. REV. 1189, 1238 (2012).

²²⁹ See, e.g., Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1259–60, 1262 (2012); Frederick Schauer, *The Decline of ‘The Record’: A Comment on Posner*, 51 DUQ. L. REV. 51, 52 (2013).

“ought” to cite? With no formal means of communication, there is a chance information in one court won’t make it to another, or it might simply take a long time for practices to become established. Most significantly, unless commentators take an interest in a particular practice and write about it, there is no means of communicating it to the stakeholders who are not judges. Lack of transparency is critical given the stakes for parties who are subject to the court’s decisions. There are no formal methods of communication to the world outside the judiciary, even though decision-making directly impacts the parties to the litigation.

Finally, leaving rules unwritten and not highly visible makes them more susceptible to outsourcing and possible manipulation.²³⁰ It creates a vacuum that cedes power to whoever makes the effort to ‘codify’ them. Looking at just one convention in part II above—reliance on treatises for legal principles—makes that clear.²³¹ The Tenth Circuit cited to 80 different treatises in the course of three years, with no known process for assuring their quality and objectiveness. At the same time, a few highly cited treatises may be the subject of prescriptive norms, in that they *ought* to be cited when applicable, such as the Wright & Miller treatise. The Tenth Circuit data showed two recently published treatises as quickly gaining traction as a reliable source. The act of recording a rule has power. Even if third parties occupy and control only a small corner of the ‘law,’ that is problematic.

2. Lack of deliberation

Unlike enacted law, norms related to the weight of authority are created by a non-deliberative, decentralized process.²³² Rules that arise in this fashion are different, in kind, from rules created with canonical text as a result of a deliberative group process. Perhaps most significantly, customary practices are less purposeful than enacted rules.²³³ Acceptance is often “less consciously aware or approving” than consent.²³⁴ The same is true of all sorts of norms: “The operation of norms is to a large extent blind, compulsive, mechanical, or even unconscious.”²³⁵ There is

²³⁰ Tiersma, *supra* note 3, at 1188.

²³¹ See *supra* Part II, Section B.

²³² Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1182 (2013).

²³³ GARDNER, *supra* note 38, at 70–71.

²³⁴ Fallon, *supra* note 7, at 589.

²³⁵ JON ELSTER, *THE CEMENT OF SOCIETY* 100 (1992).

no moment when judges gather to determine whether it is acceptable to cite to treatises, or to give greater weight to the dicta of the Supreme Court. In some respects, they can be characterized as accidental, developed inadvertently as they are applied by individual judges.

In the field of deliberative democracy, studies have shown that “properly structured deliberation can promote recognition, understanding, and learning.”²³⁶ According to some scholars, “[i]ntroducing deliberative elements may sometimes slow decision-making down but may also generate smart and sustainable solutions and creative moves.”²³⁷ In contrast, a customary rule-making process lacks a process through which a group of stakeholders examine the practices and rejects them or formalizes them. Instead, decisions are made by judges individually, without the benefit of any deliberation. Any judge can decide at any time to begin citing a new source as authoritative without any reflection at all.

Individual judges not only lack the resources of a rulemaking body, but are subject to different motivations and pressures. Some scholars have analyzed judges using a labor-economics model of judicial incentives and constraints,²³⁸ which can help to explain how judicial norms develop. For example, “effort aversion” is an important influence on judicial behavior,²³⁹ including both “leisure preference” and “conflict aversion.”²⁴⁰ The concept of “leisure preference” explains why judges often make rules that reduce their own workload, and publishing fewer cases fits this model.²⁴¹ Even respecting precedent can be viewed as a time saver—it’s easier to follow an existing decision than to start over with every new case.²⁴² These are factors, among many others, which likely influence the development of weight-of-authority norms, supporting the use of sources which are convenient, perhaps, and reducing the likelihood that judges will critique their colleagues’ use of sources.

²³⁶ John S. Dryzek et al., *The Crisis of Democracy and the Science of Deliberation*, 363 SCIENCE 1144, 1145 (2019).

²³⁷ *Id.* at 1146.

²³⁸ EPSTEIN, LANDES, & POSNER, *supra* note 200, at 7.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* at 38.

²⁴² *Id.* at 39.

The lack of deliberation risks the creation of conventions more responsive to less significant values or even negative forces. Take the treatise example from part II—it is quite possible that treatises are cited primarily for the sake of convenience. Cooperative activities are not necessarily beneficial.²⁴³ Once one judge starts to cite to a new source, it is quite possible others will follow, without any real evaluation of that source. Convergent social behavior, often called “herding,” has been defined by cognitive psychologists as “the alignment of thoughts or behaviours of individual in a group (herd) through local interactions rather than centralized coordination.”²⁴⁴ Group action without deliberation can be negative, as illustrated by the image of a lemming herd racing for a cliff²⁴⁵ or the phrase “herd mentality.” Again, more data is needed to track the use of sources and evaluate their quality; we cannot simply assume that current practices of recognition are sound.

The informality of a decentralized practice means there is no control over the pace of change. Norms are thought to be slow to change—“sticky.”²⁴⁶ Are norms related to the weight of authority evolving quickly enough to keep up with societal changes, such as access to information? Some argue that custom “tends to change very slowly. If economic or other social practices are changing rapidly, custom will often fail to keep up and will become a drag on progress.”²⁴⁷ Others argue that norms might not be too slow; it just might take longer for us to recognize them.²⁴⁸ We need more longitudinal data to determine and evaluate the pace of changing norms of authority. Formal rule-making processes are not known for their speed, and in fact might make it even more difficult for rules to be changed.

3. Lack of accountability

A significant accountability problem concerns responsibility for the creation of the norms (as opposed to their implementation).

²⁴³ Richard A. Posner, *Hayek, Law, and Cognition*, 1 N.Y.U. J. of L. AND LIBERTY 147, 151 (providing pollution and monopoly as examples).

²⁴⁴ Ramsey M. Raafat, Nick Chater, and Chris Frith, *Herding in Humans*, 13 TRENDS IN COGNITIVE SCIENCES 420, 420 (2009).

²⁴⁵ DAVID J. BEDERMAN, CUSTOM AS A SOURCE OF LAW 51 (2010).

²⁴⁶ BRENNAN ET AL., *supra* note 25, at 108.

²⁴⁷ Posner, *supra* note 243, at 152, 162 (“[C]ustom tends to lag behind social and economic change . . . Customs may in short be vestigial and dysfunctional.”).

²⁴⁸ BEDERMAN, *supra* note 245, at 178 (“What takes time . . . are the *external* recognitions of such altered practices.”).

Their informal, organic development—sometimes into formal doctrine—allows judges to distance themselves from the norms. In other words, this set of informal norms puts judges in the role of both governor and governed. Judges decide what sources they want to give weight to and then cite to sources as if they were constrained by them. Though these norms are internal to the judiciary, that is not how they presented. Instead, judges rely on authority norms as authoritative and even decisive—the discretionary nature is hidden.

With respect to creating weight-of-authority rules, judges are arguably even less constrained than when “making” substantive law. Judges can only address substantive legal issues when the parties to a suit involving that issue happen to end up in court. They cannot control when they will hear a particular issue, if ever. In contrast, weight-of-authority rules arise in every single case.

Perhaps just the possibility of congressional action serves as a sufficient constraint on this sort of rule-making. The constitutional phrase “judicial Power” might be interpreted as a limitation²⁴⁹ if judges were to start relying, for example, on exclusively non-legal sources. Judges are, of course, subject to impeachment and bound by oath to support the Constitution.²⁵⁰ But it seems extremely unlikely that such norms would be the trigger for these sorts of drastic actions, considering the status quo.

Authority norms are undoubtedly driven by concern for the legitimacy of the judiciary as an institution,²⁵¹ and perhaps that is a sufficient form of accountability. Most would agree that the judiciary is motivated to preserve its own legitimacy; its “principal political capital is institutional legitimacy.”²⁵² Citation to sources

²⁴⁹ Nelson, *supra* note 2, at 54 (“The Constitution probably is not *wholly* silent about techniques of statutory interpretation . . . [T]he Constitution would forbid federal courts” from using a method beyond “‘judicial Power.’”).

²⁵⁰ Pryor, *supra* note 198, at 1765.

²⁵¹ Knight & Epstein, *supra* note 59, at 1029.

²⁵² James L. Gibson, *Judging the Politics of Judging Are Politicians in Robes Inevitably Illegitimate?*, in *WHAT'S LAW GOT TO DO WITH IT*, *supra* note 59, at 284; Melvin A. Eisenberg, *The Concept of National Law and the Rule of Recognition*, 29 FLA. STATE L. REV. 1229, 1247 (2002) (“[T]he integrity of the legal system would be seriously threatened if the judiciary were drastically out of step with the bar and legal academics concerning what constituted a legal rule. If that were to occur, the judiciary would be held in contempt by the very groups to whom they are most accountable.”); see also Eileen Braman & Beth Easter, *Normative Legitimacy: Rules of Appropriateness in Citizens' Assessments of Individual Judicial Decisions*, 35 JUST.

in legal opinions serves at least in part, if not entirely, to demonstrate the impartiality of the judiciary—its adherence to the rule of law ideal. And, in fact, research has shown that “when legal authorities act according to the principles of the rule of law, they are viewed as just and trustworthy.”²⁵³ One of four critical factors is the belief that decisionmakers are neutral, that they make decisions based on “consistently applied legal principles.”²⁵⁴ If, to take an extreme example, a court decided to determine outcomes by consulting astrology charts, its legitimacy would quickly crumble, harming the reputation of the judicial community as a whole. It is in the interest of the entire judicial community for all judges to develop and follow norms that demonstrate that they are acting in accordance with legal principles.

It is worth questioning, however, whether current norms serve that purpose only in a performative way.²⁵⁵ In other words, do citation norms simply serve as cover for judicial discretion? The public is not qualified to evaluate (or even interested in evaluating) the sources cited in judicial opinions—the idea of judges calling balls and strikes seems to be all the narrative the public needs. Citation of any sort may serve that purpose. When judges rely on sources—any sources other than themselves—it allows them to distance themselves from the result. As I noted in part II, judges are generally not pointing out optional authority; they are not overt about the fact that binding law has not solved the problem. Citations can be viewed as masking judicial discretion.²⁵⁶ Even if the norms about which sources to cite were transparent, another layer of opaqueness would likely remain—whether those sources actually made any difference in the judge’s decision.

There is also the question of holding judges accountable for actually following existing norms. Adherence to norms is to the

SYS. J. 295, 315 (2014) (comparing financially motivated decision, politically motivated decisions, and legal motivations: “Motivations suggesting compliance with, and deviation from, normative rules of decision-making weighed most powerfully in participants’ assessments of the legitimacy of particular decisions.”).

²⁵³ Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 661 (2007).

²⁵⁴ *Id.* at 664.

²⁵⁵ Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. REV. 1619, 1678 (2020) (describing the problems of citations for the sake of citations as “performative judging”).

²⁵⁶ *Id.* at 1679.

benefit of all the actors—judges—in the community.²⁵⁷ Many practices of recognition are viewed normatively: judges who choose not to follow them are subject to reputational damage and criticism, perhaps in the form of reversal by a higher court, or theoretically by removal from office.²⁵⁸ Self-enforcement is a key characteristic of systems based on norms, “through decentralized mechanisms such as reputation and internalization.”²⁵⁹ Those sorts of decentralized constraints on judges include threat of reversal, reprimand, removal by impeachment, professional criticism, and public opinion.²⁶⁰ Scholars have explored the many reasons why judges adhere to prescriptive norms like *stare decisis*, arguing that judges conform to the norm of *stare decisis* for reasons of legitimacy.²⁶¹

Enforcement may not be a significant problem—it is not often one hears of a judge violating the norms of authority. That could be because the norms are so broadly permissive. And it does seem that self-policing by judges has at least some role in enforcing practices of recognition. In a recent Sixth Circuit case, two of the judges sparred over the legitimacy of particular sources cited.²⁶² One of the three on the panel wrote a concurring opinion criticizing the majority’s citation of prison-related data that was not part of the record. The majority opinion included a long footnote which chided the judge who wrote the concurrence in response:

Yes, this introduction cites two statistics that were not in the record of Mathews’s case. Luckily, The Marshall Project and The Associated Press’s reporting is of a higher pedigree than the extra-record sources that some embrace. *Cf. Chisholm v. St. Marys City Sch. Dist. Bd. of Educ.*, 947 F.3d 342, 345 (6th Cir. 2020) (Readler, J.) (quoting a blog post titled *When and how baseball became America’s Pastime* for the statement that

²⁵⁷ KNIGHT, *supra* note 20, at 98 (“The key feature of a social convention is that adherence to its rules is beneficial for the actors in a particular interaction.”).

²⁵⁸ Kenneth Einar Himma, *Understanding the Relationship Between the U.S. Constitution and the Conventional Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION*, *supra* note 6, at 97 (“The Conventionality Thesis explains the content and authority of the validity criteria in every conceptually possible legal system in terms of a social convention practiced by the persons who function as officials.”).

²⁵⁹ Eugene Kontorovich, *Inefficient Customs in International Law*, 48 WM. & MARY L. REV. 859, 867 (2006).

²⁶⁰ EPSTEIN, LANDES & POSNER, *supra* note 200, at 35.

²⁶¹ THOMAS G. HANSFORD & JAMES F. SPRIGGS II, *THE POLITICS OF PRECEDENT ON THE SUPREME COURT* 19 (2006).

²⁶² *United States v. Mathews*, 846 F. App’x. 362, 370 (6th Cir. 2021)

“[b]aseball may forever be considered ‘America’s pastime’”); *Perry v. Allstate Indem. Co.*, 953 F.3d 417, 424 (6th Cir. 2020) (Readler, J., concurring in part and dissenting in part) (paraphrasing a Grateful Dead song). Here, these sources did not pull their numbers from an agenda-stuffed hat; our prisons supplied these publicly available data.²⁶³

However, judicial discretion to choose any authority deserves more attention. It is not clear that self-policing provides adequate enforcement: explicit instances of policing by colleagues are rare, and the judiciary is too elite and insulated for this to be a solution. Judges—in positions with little opportunity for promotion and little chance of demotion—may overvalue collegiality as compared to the normatively desirable use of sources.

The more significant problem, in my view, is the creation of the norms, not their enforcement. If the norms remain largely invisible, they allow for the appearance of constraint where none may exist. Judges themselves decide what to cite to, but their role in the development of citation norms is rarely explicitly acknowledged. Citation norms serve to create the appearance of objectivity that is not warranted.

C. *A system of informal norms is not inevitable*

The realm of legal authority cited has been transformed by dramatic changes in access to information,²⁶⁴ and current norms allows judges to cite almost anything. At the same time, a foundational rule-of-law norm requires judges to cite to *something*. As a result, federal judges are citing sources in their opinions that litigants might be surprised by. As illustrated by the Tenth Circuit study, these optional sources are relied upon as law in many instances.

In many respects, these norms can be characterized as an essential part of judicial decision-making. Arguably, they are a component of decision-making that should never be put into the

²⁶³ *Id.* at 364 n.3 (majority opinion written by Judge Karen Nelson Moore, concurrence by Judge Chad A. Readler).

²⁶⁴ See e.g., Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495, 495 (2000); Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CAL. L. REV. 1673, 1691 (explaining that in 1899 authority issues were simple because the world of authority was much more restricted); Ellie Margolis, *Authority Without Borders: The World Wide Web and the Delegalization of Law*, 41 SETON HALL L. REV. 909, 909 (2011); Michael Whiteman, *The Death of Twentieth-Century Authority*, 58 U.C.L.A. L. REV. DISCOURSE 27, 28 (2010).

form of a rule because they are by definition discretionary. In other words, choices about the weight of authority are naturally informal unwritten practices that ought to be left to the discretion of each judge. But judges do in fact develop norms around authority—the selection of optional authority is not random. And because these norms exist, they should be transparent. Moreover, the legal system obviously includes prescriptive norms about authority that judges are expected to follow. As described above, those norms developed as social practices, and current descriptive norms could also become prescriptive. In the absence of any formalized rules, the informal system of norms is not going away.

Presuming that the power to determine the weight of sources remains in the hands of judges, I briefly discuss some of the possible alternative modes we might consider. I do so not to promote one as a solution to the issues that I have raised here, but to show that our current system is not inevitable and to encourage healthy debate about the values we want to prioritize. It is possible that the system of social judicial norms is the best possible system. Leaving weight-of-authority norms unwritten gives them the advantages of traditional common law—they are simultaneously stable but flexible, they can evolve.²⁶⁵ “Social conventions evolve as responses to numerous kinds of social needs,”²⁶⁶ and the Tenth Circuit’s reliance on sister circuits may be a perfect example of this. When the parent court can’t provide the uniformity that lower courts desire, they turn to another source. Norms that are not valued can simply fall out of use (in the context of customs: “desuetude”).²⁶⁷

Decentralized weight-of-authority decision-making has positive characteristics, despite the lack of deliberation. We might think of it as allowing individual courts to experiment with the use of different sources while the best practices slowly emerge. Decentralized decision-making “increases the scope and diversity of the opinions and information in the system.”²⁶⁸ Customary rules can avoid some of the risks of codification, such as special-interest

²⁶⁵ Shyamkrishna Balganesh and Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 UNIV. PA. L. REV. 1241, 1243 (2015) (“The persistence of the common law and its continu[ed] vitality is in large measure attributable to the subtle balance that it achieves between stability and change.”).

²⁶⁶ ANDREI MARMOR, *SOCIAL CONVENTIONS: FROM LANGUAGE TO LAW* 25 (2009).

²⁶⁷ 82 C.J.S. Statutes § 334 (2022).

²⁶⁸ JAMES SUROWIECKI, *THE WISDOM OF CROWDS* 71 (2004).

lobbying.²⁶⁹ The collective, organic nature of this process, not on any artificial timetable, has its benefits. “Decentralization’s great strength is that it encourages independence and specialization on the one hand while still allowing people to coordinate their activities and solve difficult problems on the other.”²⁷⁰

Any sort of formalization would decrease judicial autonomy, which may be the driving force behind the status quo.²⁷¹ Justice (then Third Circuit Judge) Samuel Alito stated in 2002 hearings on the propriety of unpublished opinions that “it is the overwhelming sentiment of the judiciary that this development [of the doctrine of *stare decisis*] should continue in this manner in the common law tradition and should not be regulated by the national rules process.”²⁷² Similarly, Justice (then D.C. Circuit Judge) John Roberts observed in 2004 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.²⁷³

Nevertheless, we should at least explicitly consider whether the system of norms is best left as is. Possible alternative systems range from formal to informal. Formal rules prioritize uniformity, transparency, clarity, precision, and possibly compliance, while informal rules allow for organic evolution in response to societal changes. I begin with the most formal: we could address all the weaknesses described above by using the same rule-making processes used for rules of evidence and procedure, established by the REA,²⁷⁴ perhaps creating “Federal Rules of Authority” alongside the Rules of Evidence and Procedure. Under the REA,

²⁶⁹ Eisenberg, *supra* note 252, at 1236.

²⁷⁰ SUROWIECKI, *supra* note 268, at 71.

²⁷¹ Connors, *supra* note 196, at 682 (“The pervasive sentiment is that decisions about judicial methodology are left to the discretion of the individual Justice.”).

²⁷² Unpublished Judicial Opinions Before the Subcomm. on Cts., the Internet, and Intell. Prop. of the H. Comm. on the Judiciary, 107th Cong. 17 (2002) (statement of Hon. Samuel A. Alito, Jr., U.S. Ct. App. 3d Cir.).

²⁷³ Admin. Off. of the U.S. Ct., Advisory Comm. on App. Rules 52–53 (Comm. Print 2004).

²⁷⁴ PROC. GOVERNING THE RULEMAKING PROCESS § 440 <https://www.uscourts.gov/rules-policies/about-rulemaking-process/laws-and-procedures-governing-work-rules-committees-0> (last visited Apr. 25, 2023) [<https://perma.cc/6ZFF6-DABX>].

the Judicial Conference must appoint a standing committee and may also appoint advisory committees to recommend new and amended rules. The Judicial Conference, created in 1922 as the Conference of Senior Circuit Judge and renamed in a 1988 amendment of the REA, is the national “policymaking body for the federal courts.”²⁷⁵ Members include the Chief Justice of the Supreme Court as the presiding officer along with the chief judge of each judicial circuit, the Chief Judge of the Court of International Trade, and a district judge from each judicial circuit. District judge representatives are elected by majority vote of all circuit and district judges in the circuit.²⁷⁶ This kind of committee creation results in much greater accountability for the rules.

And more stakeholders would be represented in such a process, rather than complete reliance on the judiciary. The Standing Committee on Rules of Practice and Procedure is made up of members appointed by the Chief Justice. “Unlike other Judicial Conference committees, the rules committees include not only federal judges, but also practicing lawyers, law professors, state chief justices, and high-level officials from the Department of Justice and federal public defender organizations.”²⁷⁷ The Chief Justice appoints a “reporter” to each committee, a law professor deemed a leading expert in their field.

The REA process provides many opportunities for deliberation. The reporters suggest rule changes, “develop proposed drafts of rules for committee consideration, review and summarize public comments on proposed amendments, and generate the committee notes and other materials documenting the rules committees’ work.”²⁷⁸ Using the REA process for rules of recognition or would increase transparency and accountability and would provide a deliberative process to serve as gatekeeper. Perhaps this process would lead to an “official” set of sanctioned treatises, for example. And maybe they would lead to the development of guidance for evaluating non-legal sources, such as scientific studies.

²⁷⁵ UNITED STATES COURTS, GOVERNANCE AND THE JUD. CONF. <https://www.uscourts.gov/about-federal-courts/governance-judicial-conference> (last visited Apr. 25, 2023) [<https://perma.cc/ZE2U-FU52>].

²⁷⁶ 28 U.S.C. § 331

²⁷⁷ UNITED STATES COURTS, COMM. MEMBERSHIP SELECTION <https://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection> (last visited Apr. 25, 2023) [<https://perma.cc/7N2P-C4EF>].

²⁷⁸ *Id.*

But there are obvious drawbacks to the REA system. The fixedness of Federal Rules enacted via the REA is problematic—the pace of change might end up even slower than organic evolution. Others have critiqued existing Federal Rules for their stagnancy.²⁷⁹ Federal Rules are difficult to amend—not only is the bureaucratic process long, de facto three years or so, but any changes sought have been modest.²⁸⁰ Reasons for this are not simple, but the existence of divided government is likely a significant factor.²⁸¹ And the composition of REA committee members seems hardly less elite than the entire body of federal judges—it is hard to say which is more exclusive.²⁸²

Next, slightly less formal, we might consider the local rules enacted by each court, where the few written rules on the weight of authority already reside. For both federal district courts²⁸³ and federal appellate courts,²⁸⁴ creating local rules requires public notice and an opportunity for comment without all the bureaucracy associated with national federal rules. Courts are institutions with varying responsibilities and expertise. We have different rules for courts at different levels of the judicial hierarchy, and there are many other distinctions between judicial institutions, including, most notably, subject matter. Thus, rules related to the operation of precedent not only do vary from court

²⁷⁹ See e.g., G. Alexander Nunn, *The Living Rules of Evidence*, 170 U. PA. L. REV. 937, 944 (2022) (“The positivist turn that culminated in the codification of the Federal Rules of Evidence has led evidence law into a period of stagnancy; broad, structural evidentiary reform seems all but impossible.”); Adam Steinman, *The End of an Era: Federal Civil Procedure after the 2015 Amendments*, 66 EMORY L. J. 1, 5 (2016) (2015 amendments for FRCP “seem to confirm the view that the rules amendment process is unlikely to yield significant changes to the Federal Rules of Civil Procedure (for better or worse)”); Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 UNIV. PA. L. REV. 1543, 1601 (2014) (discussing dynamics that resulted in “entrench[ing] the status quo and to render consequential reform by Federal Rules more difficult than it had been in the era of ‘undemocratic legislation’).

²⁸⁰ Nunn, *supra* note 279, at 958.

²⁸¹ Steinman, *supra* note 279, at 45.

²⁸² See, e.g., Brooke D. Coleman, #SoWhiteMale: Federal Civil Rulemaking, 113 NW. UNIV. L. REV. ONLINE 52, 52 (2018).

²⁸³ Local rules are authorized for U.S. District Courts by Rule 83 of the Federal Rules of Civil Procedure. “After giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice.” FED. R. CIV. P. 83.

²⁸⁴ For the U.S. Circuit Courts per Rule 47 of the Federal Rules of Appellate Procedure, “[e]ach court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice.” FED. R. APP. P. 47.

to court, but arguably *should* vary.²⁸⁵ But the possibility of thirteen sets of local rules on the subject obviously undercuts goals of uniformity.

Another possibility would be reliance on a private institution like the American Law Institute (ALI). At the times of its creation in the early 1920's, ALI's founders described a "general dissatisfaction with the administration of justice," based on the idea that "the law is unnecessarily uncertain and complex."²⁸⁶ ALI is currently self-described as a "leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law."²⁸⁷ Its members include judges, lawyers, and law professors. ALI has produced Restatements on some twenty or so subjects,²⁸⁸ along with the Uniform Laws such as the Uniform Commercial Code and the Model Penal Code. A Restatement seeking to capture current practices would provide greater visibility—notice to litigants. But it isn't clear that the bureaucracy associated with the creation of model rules under the ALI would be any more responsive than formal rules. It also isn't clear that ALI membership is any less elite than the federal judiciary.

Finally, as the least formal kind of reform, we might simply commit to public reporting on current practices of recognition. In this digital age, third parties (publishers) code every published opinion and many unpublished opinions. It does not require much imagination to conceive of a system in which every source cited in an opinion is coded for easy tracking. Public reporting on the sources judges rely upon might be enough to constrain "bad" choices.²⁸⁹ It could lead to forums for conversations among judges

²⁸⁵ Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 U. CHI. L. REV. 1551, 1598 ("[A] particular court's rules of precedent should be sensitive to the court's capabilities, obligation, and institutional context.").

²⁸⁶ Report of the Committee on the Establishment of a Permanent Organization for the Improvement of Law Proposing the Establishment of an American Law Institute, 1 A.L.I. PROC. 1, 3 (1923). ALI was initiated by a "Committee on the Establishment of a Permanent Organization for the Improvement of the Law," which came out of a AALS meeting in 1921.

²⁸⁷ See *About ALI*, AM. L. INST., <https://www.ali.org/about-ali/> (last visited Apr. 25, 2022) [<https://perma.cc/L3YB-MJVZ>].

²⁸⁸ *Id.*

²⁸⁹ In the related sphere of judicial fact finding, Alison Orr Larsen's work has attracted quite a bit of attention, so much so that she testified on the subject before Congress on April 27, 2021. David F. Morrill, *Professor Allison Orr Larsen Offers Senate Testimony on Supreme Court Fact-Finding*, WM. & MARY L. SCH. (Apr. 29, 2021), <https://law.wm.edu/news/stories/2021/professor-allison-orr-larsen-offers-senate-testimony-on-supreme-court-fact-finding.php>.

about what sources they use. It is possible that this sort of tracking would only increase the citation path-dependency among judges, but at least it would be visible, providing notice to litigants and a kind of accountability.

Even if these norms were to become entirely transparent, reported and commented on, that would hardly be the end of the story. Publicity might nudge judicial citations in one direction or another, but it's a blunt tool. Transparency might simply reveal troubling authority practices that can only be changed from the inside. It may be that choosing authority remains in the hands of elite groups no matter what. And if citations are simply a cover—if performative formalism is an accurate description of current opinion writing—then perhaps none of this makes any difference at all. Recognizing these norms, however, is a critical first step toward even deeper evaluation.

CONCLUSION

We take judicial norms and practices of recognition for granted, and we shouldn't: they are far more than a matter of curiosity. They play an important role in the resolution of every case litigated, even if we cannot quantify their influence. Judicial norms regulating the rules of authority should be transparent in fairness to all who participate in the judicial system, not a veiled set of customs known only to insiders. The lack of visibility, accountability, and deliberation surrounding the unwritten laws of the judiciary should give us pause, especially when current norms place virtually no limitations on what a judge can rely on while simultaneously insisting that judges cite to something.

Conceptualizing these rules as norms is a necessary step on the path to full normative evaluation. Much more work remains to be done to thoroughly evaluate the merits of the institution and the value of each of its norms. But in considering the effectiveness of a system that rests on social practices, some trends are already clear. First, these informal practices have led us to a place where almost any source can be cited as authoritative. This is almost certainly due in part to the current information age, and it might also reflect entrenched notions of judicial autonomy. Suffice to say that current norms are broadly permissive; the set of appropriate sources has expanded to include just about everything. It is far easier to list what judges shouldn't cite than what they can.

At the same time, as described above, it is well-known that nationally the percentage of federal appellate cases designated as

binding is shrinking—from 41 percent of decisions on the merits in 1985²⁹⁰ to only about 13 percent in 2020.²⁹¹ Meanwhile, it appears that some federal courts of appeal may be giving more weight to the decisions of sister circuits, and that courts may be giving more weight to dicta, though more research needs to be done to confirm both of these trends.²⁹² We gain much better insight by examining these sorts of trends as they relate to one another than if we do so independently. For example, perhaps with a more selective pool of binding cases to choose from due to the low “publication” rate, judges are inclined to increase the content-independent weight of optional but published cases and parts of published cases, as in the instances of sister circuit decisions and dicta. Perhaps the decreased publication trend (apparently not simply the result of increased case load)²⁹³ and the increase in citation to any and all sources are both indicative of a movement toward greater judicial autonomy and control over the law. And perhaps the increased weight for non-binding parts of published cases is part of a broader movement towards textualization and prioritization of precedent as a source. Understanding the institution of authority norms allows us to better evaluate the content of the norms.

Making these norms transparent will not solve all the problems related to the current use of authority. We still have no gatekeeping mechanisms to assure the quality of sources cited, and the power to choose authority remains in the hands of elite groups. Transparency might only show us that our system of authority is deeply flawed. Nevertheless, it is a prerequisite for further reform. We cannot effectively change a system until we can truly comprehend how it works. Understanding weight-of-authority rules as organic social norms is a critical piece of that puzzle.

The primary goal of this article is to spark a much needed and overdue conversation about authority. We should be asking hard questions about a system in which those who apply the law are the same actors who determine what counts as law. A system in which

²⁹⁰ Merritt E. McAlister, “Downright Indifference”: Examining Unpublished Decisions in the Federal Courts of Appeals, 118 MICH. L. REV. 533, 549 (2020).

²⁹¹ Admin. Off. U.S. Cts., *Data Tables: Table 2.5-U.S. Courts of Appeals Judicial Facts and Figures (September 30, 2020)*, U.S. CTS. (Sept. 30, 2020) <https://www.uscourts.gov/statistics/table/25/judicial-facts-and-figures/2020/09/30>.

²⁹² See discussion *supra* I.

²⁹³ See McAlister, *supra* note 290, at 549.

those same actors largely invoke authority without acknowledging their own role in creating it. A system in which unwritten and sometimes nebulous norms are clothed in authoritative status and accepted by all of us without any serious reflection.

Appendix A

	Treatises cited by the Tenth Circuit in published opinions 2017-2019	# times cited
1.	BRYLE M. ABBIN, INCOME TAXATION OF FIDUCIARIES AND BENEFICIARIES (2006)	1
2.	MARTA ADAMS ET AL, AMERICAN INDIAN LAW DESKBOOK (2015)	1
3.	AMERICAN JURISPRUDENCE 2d Reformation of Instruments; Conversion; Mines and Minerals	2
4.	APPLEMAN & J. APPLEMAN, INSURANCE LAW AND PRACTICE (1981).	1
5.	PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW (3d ed 2003)	4
6.	BANKRUPTCY DESK GUIDE (2019)	1
7.	BANKRUPTCY LAW MANUAL (5th ed. 2019).	1
8.	JOEL PRENTISS BISHOP, BISHOP ON CRIMINAL LAW (John M. Zane & Carl Zollmann eds., T. H. Flood & Co. 1923)	1
9.	BITTKER & EUSTICE, FED. INCOME TAXATION OF CORP. AND S'HOLDERS (1954)	1
10.	BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND (1768)	1
11.	GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES (2d rev. ed. 1995 & Supp. 2013)	2
12.	PHILIP L. BRUNER, ET AL., CONSTRUCTION LAW (2017)	1
13.	CANBY, WILLIAM C. JR., AMERICAN INDIAN LAW IN A NUTSHELL (6 th ed 2015)	1

14.	RICHARD B. CAPPALLI, FEDERAL GRANTS AND COOPERATIVE AGREEMENTS: LAW, POLICY, AND PRACTICE (1991 Cum. Supp)	1
15.	ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (5th ed. 2015).	3
16.	ERWIN CHEMERINSKY, FEDERAL JURISDICTION (7th ed. 2016)	2
17.	58 C.J.S. Mines and Minerals (2018)	2
18.	FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW Nell Jessup Newton ed., 2012)	5
19.	EDW, COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON AND CRIMINAL CAUSES (1680)	1
20.	WALTER B. CONNOLLY & DONALD R. CROWELL, PRACTICAL GUIDE TO THE OCCUPATIONAL SAFETY AND HEALTH ACT (2011)	1
21.	CORBIN ON CONTRACTS (Joseph M. Perillo ed 2010)	1
22.	STEVEN PLITT ET AL., COUCH ON INSURANCE (3d ed 2017)	3
23.	1 DISABILITY DISCRIMINATION IN THE WORKPLACE, Westlaw	1
24.	DOBBS' LAW OF REMEDIES 2d ed. 1993	1
25.	DAN B. DOBBS ET AL, DOBBS' LAW OF TORTS (2d ed)	3
26.	MARTIN DOMKE, <i>THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION</i> (1968)	1
27.	HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL STANDARDS OF REVIEW (2007)	2
28.	RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES (3d ed. 2017).	1

29.	MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW (2011)	1
30.	WILLIAM MEADE FLETCHER, ET AL., CYCLOPEDIA OF THE LAW OF CORPORATIONS (Sept 2016 update)	1
31.	ANTONIN SCALIA AND BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)	10
32.	BRYAN A. GARNER ET AL, THE LAW OF JUDICIAL PRECEDENT (2016)	8
33.	CHARLES GARDNER GEYH, JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW (2d ed 2010)	1
34.	CATHARINE M. GOODWIN, FEDERAL CRIMINAL RESTITUTION Westlaw (database updated Aug. 2017)	1
35.	KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE (2d ed. & Apr. 2016 Update).	2
36.	ROBERT L. HAIG, BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS, (3d ed. 2011)	1
37.	RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (6th ed. 2009),	1
38.	JOHN G. HAWLEY & MALCOLM MCGREGOR, THE CRIMINAL LAW (5 th ed. 1908)	1
39.	RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE (7 th ed. 2016) (6 th ed 2011)	3
40.	THOMAS W. HUTCHISON ET AL., FEDERAL SENTENCING LAW & PRACTICE (Westlaw, database updated 2019)	1
41.	JONES ON EVIDENCE (7 th ed. 2019)	1

42.	CHARLES H. KOCH, JR. & RICHARD MURPHY, ADMIN. L. & PRAC. (Feb. 2017 update);	2
43.	WAYNE R. LAFAVE, SEARCH AND SEIZURE (5 th ed. 2016)(5 th ed. 2012)(4 th ed. 2016 update)	8
44.	WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW (2d ed. And Oct 2016 update)(2d ed and 2015 update)	6
45.	WAYNE R. LAFAVE, et. al, CRIMINAL PROCEDURE (4 th ed. 2016 update)	3
46.	DAVID W. LEE, HANDBOOK OF SECTION 1983 LITIGATION (2019-3 Supp.)	1
47.	DONALD S. MALECKI, COMMERCIAL GENERAL LIABILITY COVERAGE GUIDE	1
48.	MCCORMICK ON EVIDENCE (7 th ed. 2013) (Kenneth S. Broun ed., 7 th ed 2016)	3
49.	MEADE, FLETCHER LAW OF CORPORATIONS	1
50.	BRIAN R. MEANS, POSTCONVICTION REMEDIES (2016 ed.)	2
51.	BRIAN R. MEANS, FEDERAL HABEAS MANUAL (database updated May 2017)	4
52.	MERTENS LAW OF FEDERAL INCOME TAXATION (2007) (Eric D. Spoth ed., Dec 2017)	2
53.	JUSTIN MILLER, HANDBOOK OF CRIMINAL LAW	1
54.	THOMAS E. MILLER, ET AL, THIRD PARTY COVERAGE, HANDLING CONSTRUCTION DEFECT CLAIMS: WESTERN STATES (2018)	1
55.	ALAN W. PERRY & MARTIN H. REDISH, MOORE'S FEDERAL PRACTICE (2019) (3d ed. 2011)(3d ed 2019)	3
56.	CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE (4 th ed. 2013)	1

57.	GRANT S. NELSON ET AL., REAL ESTATE FINANCE LAW (6 th ed 2014)	1
58.	WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS (5 th ed 2017) (5 th ed 2016)	4
59.	NY Jur. 2d Trade Regulation (Aug. 2017)	1
60.	W. BLAKE ODGERS, THE COMMON LAW OF ENGLAND (2d ed. 1920)	1
61.	ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW (3d ed 1982)	1
62.	RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE, 2010)	2
63.	W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS (5 th ed. 1984)	3
64.	WILLIAM LLOYD PROSSER, The Borderland of Torts and Contract, in SELECTED TOPICS ON THE LAW OF TORTS (1953)	1
65.	PAUL H. ROBINSON, CRIMINAL LAW DEFENSES Westlaw (database updated June 2018)	1
66.	MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY & HEALTH LAW (2018)	1
67.	ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS (4 th ed. 2016)	2
68.	MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION CLAIMS AND DEFENSES (4th ed. 2019-1 Supp.).	1
69.	JEFFREY W. STEMPEL, INSURANCE CONTRACTS (3d ed Supp 2007)	1
70.	J. LARRY STINE ET AL., OCCUPATIONAL SAFETY AND HEALTH LAW: COMPLIANCE AND PRACTICE (2017)	1
71.	W.L. SUMMERS THE LAW OF OIL AND GAS (3d ed. 2008)	1

72.	CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT Westlaw (updated June 2018)	1
73.	SCOTT C. TURNER, INSURANCE COVERAGE OF CONSTRUCTION DISPUTES	1
74.	MARK S. BRODIN ET AL., WEINSTEIN'S FEDERAL EVIDENCE (2d ed. 1997 & 2019 update. JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE (2d ed 1997).	3
75.	FRANCIS WHARTON, CRIMINAL PLEADING & PRACTICE, (8 th ed 1880)	1
76.	ROGER PARK & TOM LININGER, THE NEW WIGMORE: A TREATISE ON EVIDENCE: IMPEACHMENT AND REHABILITATION (2012).	1
77.	HOWARD R. WILLIAMS AND CHARLES J. MEYERS, OIL AND GAS LAW (2011)	1
78.	SAMUEL WILLISTON ET AL., WILLISTON ON CONTRACTS (4 th ed).	1
79.	CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE (multiple editions)	41
80.	CHARLES ALAN WRIGHT ET. AL., FEDERAL PRACTICE & PROCEDURE CRIMINAL Westlaw (database updated Apr. 2017)	2