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Chad W. Flanders

*Saint Louis University School of Law*, [cflande2@slu.edu](mailto:cflande2@slu.edu)

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## TOWARD A THEORY OF PERSUASIVE AUTHORITY

CHAD FLANDERS\*

*As a court attaches some weight to any of the matters herein described as of imperative authority or of persuasive authority or of quasi-authority, and as a court has it in its power to disregard even imperative authority, the question naturally arises whether the attempted distinctions between the kinds of authority are not wholly imaginary, or at least unimportant.*<sup>1</sup>

In the ongoing—and by now increasingly tired—debate over foreign authority, little attention, if any at all, has been paid to the idea of *persuasive authority*.<sup>2</sup> This is puzzling because so much in that debate seems, if only

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\* Assistant Professor, St. Louis University School of Law. J.D., 2007 Yale, Ph.D. (Philosophy), 2004 Chicago. Thanks to Will Baude, Steve Sachs, Josh Chafetz, Terri Davenport, John Fonstad, Sam Cohen, Jud Matthews, David Pozen, Robert Wiygul, Michael Bern, Adam Hobson, Andrea Gelatt, Alex Potapov, Eric Miller, Anders Walker, Jeff Redding, Sam Jordan, Kerry Ryan, Sam Bray, Charles Sullivan, Matt Hall and Michael McConnell for comments on previous incarnations. A very early version of this paper was presented at an Institute for Humane Studies workshop in April 2008, and I am grateful to the members of that workshop for their comments and encouragement. A much later version was presented to the faculty at St. Louis University School of Law, and I thank them for an extremely helpful (and lively) discussion. Angela Catapano provided excellent research assistance. The usual disclaimers apply.

I began this paper while serving as a Clerk to Justice Warren Matthews of the Alaska Supreme Court, and I would like to dedicate this article to him on the occasion of his retirement from the court.

1. EUGENE WAMBAUGH, *THE STUDY OF CASES: A COURSE OF INSTRUCTION IN READING AND STATING REPORTED CASES, COMPOSING HEAD-NOTES AND BRIEFS, CRITICIZING AND COMPARING AUTHORITIES, AND COMPILING DIGESTS* 109 (1894).

2. The latest round of this debate concerned the nomination of Harold Koh as legal advisor to the State Department. *See, e.g.*, Stuart Taylor Jr. & Evan Thomas, *The Long Arm of the Law*, NEWSWEEK, Apr. 27, 2009, available at <http://www.newsweek.com/id/194651> (asserting that “[w]ere [Koh’s] writings to become policy, judges might have the power to use debatable interpretations of treaties and ‘customary international law’ to override a wide array of federal and state laws affecting matters as disparate as the redistribution of wealth and prostitution.”); *The Opinionator: The Fight Over the Harold Koh Nomination: A Field Guide*, N.Y. TIMES, Apr. 14, 2009, available at <http://opinionator.blogs.nytimes.com/2009/04/14/the-fight-over-the-harold-koh-nomination-a-field-guide/> (citing Koh critics as claiming that Koh will “use American courts to import international law to override the policies adopted through the processes of representative government.”). *But see* Bruce Ackerman, *The Demonization of Harold Koh*, DAILY BEAST, Apr. 7, 2009, <http://www.thedailybeast.com/blogs-and-stories/2009-04-07/the-demonization-of-harold-koh/?cid=tag:all1> (“Conservatives should recognize that they lost the election, and that the State Department will indeed return the country to its traditional role as a leading advocate of international law.”). The debate is also renewed every

implicitly, to rely on assumptions about what persuasive authority is. Those who favor citing to decisions in foreign courts will often defend the practice by pointing to the established practice of citing authorities that are “merely persuasive.” The idea that some authority is “persuasive” is then contrasted with authorities that are mandatory or binding and which have their authority by virtue of something else besides their persuasiveness—for example, because they are the rulings of a higher court or are decisions made by the same court in the past. Foreign authorities, the argument goes, are merely “persuasive” and are not binding and as such can be cited insofar as they are helpful and illuminating to the issue. Because they do not bind, they do not raise the specter of being ruled by a foreign country, as some fear.<sup>3</sup>

But very little has been said to explicate the very idea of persuasive authority itself, in its own right: Why indeed should there be any such thing? Why shouldn’t there simply be the authority of higher courts and the court’s past opinions, plus the court’s own reasoning and interpretation?<sup>4</sup> Further, what entitles a source—whether it be a decision of a foreign court, a blog entry, a law review article, or a treatise—to count as a persuasive authority?

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time a Supreme Court Justice makes even a stray comment on the advisability or inadvisability of citing to foreign authorities, which seems to be every six months or so. Most recently, it has been Justice Ruth Bader Ginsburg. See Adam Liptak, *Ginsburg Shares Views of Influence of Foreign Law on Her Court, and Vice Versa*, N.Y. TIMES, Apr. 12, 2009, at A14 (quoting Justice Ginsburg as asking “Why shouldn’t we look to the wisdom of a judge from abroad with at least as much ease as we would read a law review article written by a professor?”). The Sotomayor confirmation hearings have also reignited the debate. See, e.g., Adam Liptak, *Analysis: Sotomayor on Foreign Law*, N.Y. TIMES, July 17, 2009, <http://thecaucus.blogs.nytimes.com/2009/07/17/analysis-sotomayor-on-foreign-law/> (collecting Sotomayor’s statements on the role of international law in judicial decision making).

3. See the spot-on assessment of the debate regarding the use of foreign authorities in Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63, 67 (2007) (“This particular debate is like two ships passing each other at night. One side accuses the Court of giving up our sovereignty; the other side simply denies it with a shrug, as if wondering why anyone would ever think such a silly thing.”); see also Melissa A. Waters, *Getting Beyond the Crossfire Phenomenon: A Militant Moderate’s Take on the Role of Foreign Authority in Constitutional Interpretation*, 77 FORDHAM L. REV. 635, 636 (2008) (“Like the old CNN news commentary program, the Crossfire debate on foreign authority that has developed since *Roper* is great fun to watch, but often completely unedifying from the perspective of learning anything substantive about the complex issues involved.”).

For a good expression of the worry that foreign authorities are being used as binding authorities, see Nicholas Q. Rosenkranz, *An American Amendment*, 32 HARV. J.L. & PUB. POL’Y 475, 476-77 (2009) (“When the Supreme Court declares that the Constitution evolves—and that foreign law effects its evolution—it is declaring nothing less than *the power of foreign governments to change the meaning of the United States Constitution.*” (citation omitted)).

4. It is certainly possible to imagine a regime where the court might, but only as a courtesy, cite those persons who influenced it in its reasoning.

Are some sources, either by virtue of their merit or their status as a kind of source, generally more persuasive than others? The obviousness of these questions, coupled with the lack of any clear answers to them—still less any theory that might generate answers to them—shows the extent to which we are still in the dark as to the nature of persuasive authority.

Fortunately, some recent scholarship in two areas has indirectly contributed to the understanding of persuasive authority. The first, as already noted, is the debate over the use of foreign authorities. Several commentators, including Jeremy Waldron and Youngjae Lee, have used this debate as occasion to discuss the grounding of persuasive authority.<sup>5</sup> But these discussions have been limited because the citation of foreign authority is, in many ways, a special case of the use of persuasive authority (if it is a use of persuasive authority at all, and not binding authority, as some have contended). Foreign authorities may be problematic in ways that other persuasive authorities, such as treatises or law review articles or other domestic courts, are not; at least there is the perception that there is a salient difference, which the commentators are eager to explain, or to explain away. Waldron, for instance, is concerned to see the citation of foreign authorities as part of citation to the “law of nations.”<sup>6</sup> Whatever merits this may have as an explanation for the citation of foreign authorities, it cannot serve as a general explanation of all instances of persuasive authority. And Lee’s essay focuses on the use of foreign authorities in an even more narrow context: the citation of foreign courts in the U.S. Supreme Court’s death penalty cases.<sup>7</sup>

A second body of scholarship relevant to the question of persuasive authority is the literature discussing judicial authority in general—such as the questions concerning the bindingness of precedent. Joseph Raz is widely cited and discussed in this context.<sup>8</sup> And Frederick Schauer has recently written at length and illuminatingly on the citation of “authority” in judicial opinions in the *Virginia Law Review*, where he includes a discussion of persuasive authority.<sup>9</sup> But this literature again fails to treat persuasive authority independently as a subject of interest in its own right, and instead views it as collateral to the main question of the nature of judicial authority in general. Although I frequently engage Schauer’s paper in my own essay, he is more interested than I am in the general question of citation of authority, and

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5. Lee, *supra* note 3; Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2006).

6. Waldron, *supra* note 5, at 129.

7. See, e.g., Lee, *supra* note 3.

8. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 35 (1986).

9. Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931 (2008) [hereinafter Schauer, *Authority*].

he does not focus solely on the unique challenges that persuasive authority presents. Still less does the literature on precedent and stare decisis (which I treat as a subset of the literature on legal authority) treat persuasive authority as anything other than a side show.<sup>10</sup> These papers investigate the question of what makes other opinions of the same court or higher courts “binding” and hence are less interested in what might make other sources merely “persuasive.” But the latter is no less of a puzzle, I submit, than the former. The latter puzzle has simply been less explored.

This essay is written in the belief that persuasive authority is an interesting phenomenon in its own right. But I also believe that focusing on persuasive authority separate from other debates can yield dividends in the debate over the citation of foreign authority as well as in the study of judicial authority.<sup>11</sup> The plan of this essay is as follows. In Part I, I express and explicate what I take to be the two major conventional beliefs about persuasive authority: that it includes all those sources that are not binding and that the “bindingness” of persuasive authority lies in its ability to persuade. In Part II, I try to problematize the accepted wisdom. In practice, there is a division of persuasive authority, beyond the simple “anything that is not mandatory or binding authority.” 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.

This descriptive insight yields a theoretical hypothesis, developed in Part III of my essay, which is that other courts tend to have an authority that is derived from something more than their mere persuasiveness. If this is correct, then it is also not true that persuasive authority has authority only by virtue of the merits of its reasoning. At least compared to other sources, some sources—like courts—may also be authoritative by virtue of what they are, as opposed to what they say.

The underlying explanation for this “gravitational pull”<sup>12</sup> that courts can have on one another is similar to the pull a court’s own past decisions will have on it. Just as one court seeks to be united with its own past decisions, so

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10. See, e.g., Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 6 (1989); Anthony Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J. L. & PUB. POL’Y 23 (1994); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

11. I connect some of the themes in this essay to general questions of “judicial authority” in my review of Richard Posner’s *How Judges Think*. See Chad Flanders, *Review*, RICHARD POSNER, *HOW JUDGES THINK*, 3 LAW & HUMANITIES 118 (2009).

12. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 111 (1977) (explaining the idea of the “gravitational pull” of precedent).

too many courts generally seek to make their decisions consistent with other courts. I hope to demonstrate that the difference between the respect owed to precedential decisions and that owed to decisions with a merely persuasive authority turns out to be more a difference in degree than a difference in kind. In making this conclusion, I am in agreement with Frederick Schauer, who writes that “something as seemingly trivial as citation practice turns out to be the surface manifestation of a deeply important facet of the nature of law itself.”<sup>13</sup> Such is the case, I believe, with persuasive authority.

### *I. The Conventional Picture of Persuasive Authority*

#### *A. Binding Authority: Precedent and Stare Decisis*

It will be best to introduce the conventional wisdom on the subject of persuasive authority by rehearsing what I hope are some familiar facts about authority that is “binding.” Begin with the idea that decisions of a higher court in the United States constitutional system are binding on lower courts. Call this, following custom, “precedent.”<sup>14</sup> According to this familiar notion, lower courts *must* follow the decisions of the higher court on an identical matter.<sup>15</sup> Of course, it will often be difficult to discern when the higher court has ruled on an identical matter: problems regarding distinguishing holding and dicta emerge here,<sup>16</sup> but the basic principle is clear. At the very least, a lower court that does not follow the decision of a higher court on a similar matter will virtually guarantee that its decision will be overturned on appeal, should there be an appeal. But that is only to state the issue as a merely predictive (i.e., descriptive) matter.<sup>17</sup> This would surely understate the normative force that precedent is supposed to have in our system: a lower court that does not follow the higher court’s binding precedent has done something *wrong* as a legal matter. It has not discharged its role properly as a lower court. Thus, it is not simply that the court has done something which will, as a predictive matter, lead to the overturning of its judgment. A judgment which does not follow the higher court precedent is simply incorrect, even if it is not the subject of an appeal. By stressing this normative aspect, I mean to show how the higher court has authority over the lower court, and that this authority is not merely a matter of power, or at least it is not considered to be merely a matter of

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13. Schauer, *Authority*, *supra* note 9, at 1934.

14. *See, e.g.*, *Hart v. Massanari*, 266 F.3d 1155, 1175 (9th Cir. 2001).

15. *Id.* (“A district court bound by circuit authority, for example, has no choice but to follow it, even if convinced that such authority was wrongly decided.”).

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

17. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

power. It is a matter of following the law, or of “legality,” and legality is a normative principle.<sup>18</sup>

Closely related to this—at least in the conventional picture<sup>19</sup>—is the idea of stare decisis. On this picture, at least on a first approximation, a single court is bound by the past decisions on relevantly similar matters of the same court. So where the picture of precedent is one in which higher constrains lower, the picture of stare decisis is one of the past constraining the present. For the Supreme Court, there is no higher authority, so all that binds it is its past decisions. The idea is that the past court stands in the same relation to the present court as a higher court stands to a lower court.

This is not quite right, though, because a court can change its mind. The dead hand of the court’s own past<sup>20</sup> is not totally binding in the same way that the command of a higher court is binding on a lower court. The question of when and why it can change is a vexed and mysterious one (and we will consider some of its mysteries below, in Part III). In the case of stare decisis, we seem not to be dealing with metaphors of the inexorable command of a superior, but with a metaphor of weight: the past decisions of the same court on similar matters should be given great weight, so that strong reasons need to be brought to bear to depart from that decision. The somewhat shaky nature of the force of past decisions can be seen by the need to shore up the doctrine of stare decisis with considerations such as the desire for stability or uniformity across time.<sup>21</sup> Such considerations do not, and should not, apply in cases of applying precedent: the decision of the higher court may be cumbersome and awkward (not to mention false) and create confusion and uncertainty, but these factors do not give the lower court license to depart from the decision of the higher court.

We can say this, for now, knowing that we will return to this issue later: at least for the run of the mill case, the past decision of the same court will be binding on it *in much the same way* that the decision of a higher court would be. That is, it will function as if it were an inexorable command, simply to be followed and not revisited—not examined on the basis of its merits, but simply taken as given and as already decided. Even in the more complicated case, the

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18. See, for example, the discussion of legality in RONALD DWORKIN, *JUSTICE IN ROBES* 168-71 (2006).

19. I will suggest that this simple picture needs revision later in my essay. See *infra* Part III.

20. For a discussion of the “dead hand” problem, see Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127 (1998).

21. See *Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992) (“In this case we may enquire whether Roe’s central rule has been found unworkable; whether the rule’s limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it . . .”).

past decision exerts some weight, so that reasons will have to be brought to bear to show why departure from the past case is warranted. In short, *stare decisis* has a dual aspect: a court's own past decision (1) can be treated as absolutely binding and perhaps simply cited without comment,<sup>22</sup> or else (2) it can be treated as having a great weight.

But although *stare decisis* does have this dual aspect, at least one of those aspects shows it to be very clearly in the same category of "bindingness" as precedent is. And the second aspect, too, shows the strength of a past decision, even if that strength is not total, so that it simply forecloses any further discussion. There is at least some extra hurdle to be overcome if the court determines that the past decision should be departed from; it cannot simply be noted and then departed from, it must receive an acknowledgment and rebuttal, showing why the decision no longer has any force.<sup>23</sup> To fail to do so would also be a legal error: to fail to address a relevant and similar decision made earlier by the same court would render the decision at the very least defective and possibly mistaken—an inferior opinion, from the legal point of view.<sup>24</sup>

### B. Persuasive Authority

By contrast, persuasive authority has neither of these elements; persuasive authority does not "bind" nor does a court *need* to reckon with it because of the gravitational pull it exerts or the weight that it has.<sup>25</sup> Persuasive authority, to start, has no independent binding force; no court is bound to follow the dictates of an authority that is merely persuasive.<sup>26</sup> Nor does persuasive authority, unlike decisions that have been made by the same court earlier, have weight that needs to be acknowledged and addressed just because of the type

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22. This is perhaps most common in unpublished opinions, where the facts of the individual case are thought to be so governed by a prior decision of the court that it is sufficient to simply cite that past decision and add little in the way of discussion. For a discussion of this use of precedent in unpublished opinions, see Chad Flanders, *Sotomayor and the Art of the Judicial Deal*, ST. LOUIS POST-DISPATCH, July 15, 2009, at A13.

23. See, e.g., *State v. Hickman*, 68 P.3d 418, 426 (Ariz. 2003) (noting that respect for precedent demands that the court "not lightly overrule precedent" and only do so "for compelling reasons" and that "any departure from the doctrine of *stare decisis* demands special justification.").

24. It is not automatically a legal error because it could be assumed that the court has overruled the prior precedent *sub silentio*. I am grateful for discussions with John Fonstad and Michael Bern on this point.

25. Again, I am laying out only the received wisdom on the subject, which I will go on to challenge later in this essay.

26. See, e.g., *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001) ("[I]n the absence of binding precedent . . . a court may forge a different path than suggested by prior authorities that have considered the issue.").



of decision it is.<sup>27</sup> A court need not mention any contrary persuasive authority unless it wants to; whereas a court would be mistaken, perhaps even mistaken as a matter of law, if a previous decision is contrary to the present one.<sup>28</sup> And this gives us at least the beginnings of what I want to claim is the first accepted truth about persuasive authority: persuasive authority is any authority which is not binding on courts. Or as one commentator put it, “[t]he touchstone of persuasive authority is that the deciding court is not required to follow [the] result or reasoning of the referenced authority.”<sup>29</sup>

Here we are in a better position to see what this means because binding can mean being authoritative, as with precedent, or it can mean being required to give it consideration, as with *stare decisis*. Borrowing Ernest Young’s recent analysis of authority (which in turn borrows from Joseph Raz), we can say that cases that have a mandatory or binding authority are authoritative just by virtue of what they are, rather than what they say.<sup>30</sup> A court must follow a decision relevant and on point by a higher court, and a court must at least consider and weigh—if only ultimately to reject—a past decision it has made. Precedent and *stare decisis* bind a court by virtue of pedigree, not solely by virtue of the merits of the cases decided. Persuasive authority does not bind in this way, and this gives us its first definition: authority that does not bind intrinsically.<sup>31</sup>

Now, we will shortly get to what remains of persuasive authority’s “authority” when it is defined by not being binding: this may seem to indicate it is not an authority at all, if it is only authoritative by virtue of what it says

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27. In fact, persuasive authorities need not be decisions from another *court* at all.

28. Hence the rule in many jurisdictions that parties have to present authorities from the court that are directly contrary to their position. See MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(2) (2007) (“A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”).

29. Timothy Schwartz, Comment, *Cases Time Forgot: Why Judges Can Sometimes Ignore Controlling Precedent*, 56 EMORY L.J. 1475, 1479 (2007).

30. Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 156 (2005) (“The Court thus chooses to treat foreign law as *authoritative* in Joseph Raz’s sense: It treats the mere fact that foreign jurisdictions condemn the juvenile death penalty as a reason to condemn that practice in the United States.”); see also H.L.A. HART, *ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY* (1982); Vlad F. Perju, *The Puzzling Parameters of the Foreign Law Debate*, 2007 UTAH L. REV. 167, 179 (“The authority of a legal norm is content-independent when it does not depend on that norm’s background justification.”).

31. See, e.g., Christopher McCrudden, *Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499, 502-03 (2000) (arguing that persuasive authority is “material . . . regarded as relevant to the decision which has to be made by the judge, but . . . not binding on the judge under the hierarchical rules of the national system determining authoritative sources”).

rather than what it is.<sup>32</sup> But I want for the moment simply to focus on the negative aspect of persuasive authority—defining it by what it is not—and to provide some paradigmatic examples of authorities that are only persuasive.

In principle, subject to the constraints of being “authoritative” (whatever this turns out to mean), the set of persuasive authorities could be nearly limitless. The class of authorities that are binding is very small relative to the number of things that are non-binding. And what types of sources could be persuasive to a given judge is an open question.

But in practice, things turn out to be different. Not anything and everything is cited as persuasive authority. To orient ourselves, we can make a preliminary list of sources that are cited that are nonetheless non-binding on courts. I offer this list in a rough order to indicate what I believe to be, as an empirical matter, the frequency of use of these sources. I will try to suggest later (in Part II) that there is more than simply an empirical grounding for this “ordering” of sources, and that it may also reflect a hierarchy of sorts among persuasive authorities. The important thing about this list, for the moment, is just that it contains those things which are not binding on courts, but to which courts, in the course of their reasoning, sometimes refer.

1. Other courts outside of the court’s own jurisdiction, whether other circuit courts or other state courts (majority and concurring opinions).<sup>33</sup>

2. The laws of other states or of the federal government and agency regulations.

3. Legislative history or debates, especially if the question is one of statutory interpretation.<sup>34</sup>

4. Restatements of the law, such as the Restatement of Torts or Contracts.

5. Treatises, such as Lawrence Tribe’s *American Constitutional Law*.<sup>35</sup>

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32. See HART, *supra* note 30; RAZ, *supra* note 8.

33. In their recent book, Justice Scalia and Bryan Garner suggest that dicta from the same court should have a higher place than this in a ranking of *persuasive* authority. ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 53 (2008). I disagree. Dicta is too close to binding authority—and may actually be binding authority, given the slippery distinction between dicta and holding. Wambaugh seems to be closest to the mark when he deems dicta as “quasi-authority.” WAMBAUGH, *supra* note 1, at 103 (dicta “does tend to affect the decision of a subsequent case”). A harder example is a decision by the same court on an analogous matter. Is this to be considered along the lines of a holding, or as only persuasive? (I am grateful to David Pozen for this example.) But for the time being, I can bracket such cases, as I am only interested in a hierarchy of what is conventionally agreed to be persuasive authority.

34. There may be disagreement on this point. For some, legislative history may not be persuasive, but something more than this: it may be authoritative on matters of interpretation. I put this possible disagreement to one side for now.

35. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (3d ed. 2000).

6. Law review articles, notes, and comments.<sup>36</sup>
  7. Other academic sources, such as book-length treatments of an issue (e.g., John Rawls's *Theory of Justice*<sup>37</sup>) or empirical or economic studies of a certain matter.
  8. General interest sources (books, periodicals, and possibly literary sources<sup>38</sup>).
  9. General news sources (newspapers and magazines).
  10. Internet sources, including blogs.<sup>39</sup>
  11. Moral principles themselves, such as the golden rule or the idea of equality.<sup>40</sup>
  12. Discouraged, but in principle possible sources: memorandum opinion and judgments, the Bible, the *National Enquirer*, the judge's father-in-law.<sup>41</sup>
- All of these are sources that courts might cite, but are not binding on the courts. Citations to other courts are not binding because they are from places other than the court's own jurisdiction.<sup>42</sup> The binding authority these decisions may have in their own jurisdiction (their own state or own circuit or own

36. We could make a further distinction here between articles authored by faculty, and notes and comments authored by students. I thank Jason Childress for this point.

37. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

38. See Lee, *supra* note 3, at 68 ("A quote from a Shakespeare play may sometimes be 'relevant' in a judicial opinion in some weak, uncontroversial sense."); see, e.g., *Doe v. State*, 189 P.3d 999, 1009 (Alaska 2008) (quoting Anatole France's dictum on "the majestic equality of the laws" (ANATOLE FRANCE, *THE RED LILY* 75 (The Modern Library 1917) (1894))).

39. See, e.g., *United States v. Kandirakis*, 441 F. Supp. 2d 282, 303, n.42 (Mass. 2006) (citing a blog posting by Dan Markel); *Crawford v. Marion County Election Bd.* 484 F.3d 436, 438 (7th Cir. 2007) (Wood, J., dissenting) (using statistics taken from Wikipedia).

40. Ronald Dworkin, interestingly, would likely put moral principles as part of "binding" law, rather than as merely persuasive. Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 45 (1967). Moral principles were, of course, part of the common law. See, e.g., *Commonwealth v. Mochan*, 110 A.2d 788, 790 (Pa. Super. 1955) ("Any act is indictable at common law which from its nature scandalously affects the morals or health of the community.").

41. The last three are suggested by Schauer in *Authority and Authorities*. Schauer, *Authority*, *supra* note 9, at 1947. I deliberately leave off this list foreign courts. This is an obviously controversial example, which some *might* put under "forbidden authorities," but which others might put very high on the list.

I have also left *dissenting* court opinions off of the list. These may be discouraged sources; on the other hand, in some cases, they may be as persuasive as the majority or concurring opinion of a court.

42. There is, of course, the exception of when a higher court cites a lower court as persuasive authority. These are in the same jurisdiction, but the lower court does not bind the higher court. See Akil Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 150 (2008) (discussing the use by Justice Stevens of the "persuasive authority" of the "general views of lower courts").

nation) does not extend to any other jurisdiction. Therefore, although they are binding authorities in one aspect, they are not binding authorities when a court from outside their jurisdiction cites them. The lack of bindingness of sources 4-12 is even more obvious. A restatement of the law is composed by people, some of whom may be judges, but the restatement itself does not establish or promulgate a rule over anyone. Nor does a treatise, however eminent the author. And articles, novels, or blogs have no power to bind.

Given our first statement about persuasive authority, we know what unites these sources, at least partly, is what they are not: all of them share the feature of not being binding on the courts who cite them. No court is required to obey or even to confront Rawls's *Theory of Justice*, or even an article written on a case in the same jurisdiction that is well-written, insightful, and on-point. But we can also say something positive about them according to the conventional understanding of persuasive authority. Even though these sources do not have any power over courts by virtue of what they are (a source that is intrinsically authoritative), they still can have a power by virtue of what they *say*, if they say it persuasively.<sup>43</sup>

In other words, if one of these sources makes an argument that a judge or court finds convincing, then to that extent, the source has some authority over the judge—whether that authority means that the judge should follow it because the reasoning is compelling, or merely that the judge has to take it into account.<sup>44</sup> The important thing about the source's authority is that it is not a matter of will or fiat, it is a matter of persuasiveness, or even of reasonableness.<sup>45</sup> In Habermas's winning phrase, the force of persuasive authority is the unforced force of the better argument.<sup>46</sup> Habermas's formulation is particularly apt because it manages to capture the somewhat paradoxical idea that an authority could be authoritative merely by virtue of

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43. See Schauer, *Authority*, *supra* note 9, at 1940 (“[H]ere a court is conventionally understood to be following only those decisions or conclusions whose reasoning the court finds persuasive.”).

44. See, e.g., WAMBAUGH, *supra* note 1, at 103 (“The weight given to *dicta* and the like is dependent largely upon the learning and reputation of the utterer. Some old text books have very great weight; and so have the *dicta* of some famous judges.”).

45. Waldron, *supra* note 5, at 152 (“The hallmark of persuasive authority is engagement with the *reasons* for a practice or a decision rather than the counting of noses.”).

46. HABERMAS: A CRITICAL READER 34 (Peter Dews ed., 1999); see also H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261, 263 (1987) (defining persuasive authority as “authority which attracts adherence as opposed to obliging it”). I should emphasize here that rational argument is not the only way something can persuade. A decision may make appeals to our emotions or our shared humanity. These appeals may not, strictly speaking, be “rational” and instead may work on a person’s emotions. So, too, might a book persuade by virtue of its aesthetic power, and not its purely rational power.

its persuasiveness—that there is something about a good argument that exerts control over us, even a control that is analogous (but perhaps only analogous) to the command of a superior officer.

Is it puzzling to speak of persuasive *authority*? Why not simply persuasive *sources*? Indeed, one might argue that the only persuasive authorities are the decisions of other courts because they at least have some authority over something—as opposed to the author of *A Theory of Justice*.<sup>47</sup> But even that is a bit of a stretch: one jurisdiction has no authority over another, so its decision has no more power to bind than the words of John Rawls.<sup>48</sup> So do we have persuasive authorities or persuasive sources, because persuasion and authority are opposed notions?<sup>49</sup> I am not sure that too much rides on this point, at least for the purposes of my argument now. There is a perfectly familiar way that we might feel ourselves compelled by a particularly good argument or way of phrasing something. It can feel—and this may only be a feeling—that we are somehow, if only subtly, coerced into accepting the argument. It can have the feeling of being subject to an imperative. We might feel that we are, in a sense, commanded by reason, and have no choice but to submit to it.<sup>50</sup> So to this extent it is not too far off to say that persuasive reasons can be authoritative, if only in a metaphorical and not a literal sense.<sup>51</sup>

But we should be careful to cabin the authority that persuasive authorities possess. Suppose that a judge or a court finds a decision of another court outside of its jurisdiction extremely persuasive, so much so that he finds that he must follow its logic in the case before him. Is that decision binding? However binding it is on the conscience of that judge, it cannot be binding as a matter of law. Such are the limits of persuasive authority. It can have all the logical, moral, and even emotional power you like, but it can never rise to the level of having any legal force. It can only have any legal force once it is

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47. I am grateful to Alex Potapov for stressing this point to me.

48. Being an authority, however, does become relevant when we see that the desire for uniformity can give actual authorities a greater weight. See the discussion *infra* Part III.

49. See Schauer, *Authority*, *supra* note 9, at 1941 (“[O]nce we understand that genuine authority is content-independent, we are in a position to see that persuasion and acceptance (whether voluntarily or not) of authority are fundamentally opposed notions.”).

50. See CHARLES LARMORE, *THE MORALS OF MODERNITY* 95 (1996) (discussing the feeling of “responding to reason”).

51. There is of course a deeper comparative question here which for the moment I am bracketing: how does authority function in philosophical or scientific reasoning, as opposed to legal reasoning? Richard Posner makes the blanket statement that “authority and hierarchy play a role in law that would be inimical to scientific inquiry.” RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 62 (1990). But this may rely on an over-idealized image of scientific inquiry and a skepticism about other forms of practical reasoning. See Schauer, *Authority*, *supra* note 9, at 1934 n.11.

adopted into a decision by the court. Prior to adoption, it is only as strong or as weak as its ability to persuade a court or a judge. Note that this means that even if the judge thinks that the argument is so powerful as to be unassailable, the judge makes no *legal* error if he disregards the argument in writing his own opinion.<sup>52</sup> The judge can be faulted for bad (or unpersuasive) reasoning, but not for making a legal mistake.<sup>53</sup>

So we are left with two basic conventional points about persuasive authority. First, it is not binding. It does not have the power to be authoritative over other courts such that courts must follow it or must give it weight in their deliberations, no matter what the non-binding decision says. Second, the authority it holds flows from the persuasive content of the authority. A book or article or judicial opinion only compels by what it says, not by what it is. To have any legal force, a persuasive authority must be adopted into a legal decision—and it does so only by persuading a judge or a court. I take these two points to be fairly straightforward, and nearly universally accepted in law review articles and books on legal writing and

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52. *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001) (noting that while it might “bad form” for a judge to ignore contrary authority “by failing even to acknowledge its existence,” the court is still free to “forge” its own path).

53. Frederick Schauer makes the interesting suggestion that sometimes a certain circuit will be regarded as more authoritative on a certain issue (his example is the Second Circuit on securities regulation). Schauer, *Authority*, *supra* note 9, at 1958. Relying on the expertise of the court, he intimates, is treating that source as a genuinely non-persuasive authority—that is, using it as a source without regard to the content of its reasoning. *Id.* First off, this does not distinguish court opinions from other persuasive sources courts may use in an “authoritative” way (a court may defer to an economist, say, without truly comprehending her methods). Second, it is not clear that the trust in this case is wholly divorced from the content of the reasoning. A court may hearken to the Second Circuit, but it will not follow it simply because it is the Second Circuit. In a similar way, a court may pay special attention to a decision by Richard Posner, but it will not defer to him *independently* of what he says. It just means that the court has previously found Posner a good judge to turn to when facing a difficult problem. See Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143, 1203 (2006) (noting that a “judge . . . may well have her own degree of persuasiveness as a result of her reputation.”). I do not think it is the best analysis of these cases that the court will be persuaded by the “fact that the authority is an authority.” Schauer, *Authority*, *supra* note 9, at 1949. Rather, the “authority” will be initially consulted because it/he/she is an authority; the decision to follow that authority, however, will be based on that authority’s reasons. See, e.g., *Charles v. Lundgren & Assocs., P.C.*, 119 F.3d 739, 742 (9th Cir. 1997) (“Because we have the benefit of the Seventh Circuit’s *cogent* analysis, we will not replot plowed ground. Instead we adopt the reasoning of the Seventh Circuit.” (emphasis added)).

Schauer also says that authorities can be non-persuasively “authoritative” insofar as they show that such a proposition is more likely because another source has said it first. Schauer, *Authority*, *supra* note 9, at 1947. I am not sure that this should count as authority in any sense.

research. I now want to try to introduce some nuances into them and to slowly encourage you, if not to reject them, at least to hold them somewhat qualifiedly and not uncritically.

## *II. Ranking Persuasive Authorities*<sup>54</sup>

In the previous section, I made a list—admittedly provisional and incomplete—about various persuasive sources that courts have and could refer to: other court decisions, law reviews, treatises, blog postings, etc. The list was placed in a rough ordering of frequency of use, based on no more advanced empirical evidence than my own rough sense of citation counts.<sup>55</sup> All else being equal, courts are more likely to cite other courts than law review articles. What I want to point out is that there is no reason given on the conventional picture I sketched in the previous part why some sources should be cited more often than other sources. On the conventional picture, as I shall put it, the sources of persuasive authority are *undifferentiated*: there is no reason why one kind of source should necessarily be cited more often than any other kind of source. Law review comments could have been cited more often than other court opinions, but they are not. This is just how it happens to be. There is no intrinsic reason why court opinions should be considered more “persuasive” than other sources.

This conclusion of course has to follow if the only reason why persuasive authorities have authority is because of their persuasiveness, rather than their pedigree. There does not seem to be any reason to assume that court opinions will always be more persuasive than other sources. A law review article might explain an issue and make an argument better than a Supreme Court opinion, especially one done under time pressure.<sup>56</sup> And indeed, there is no general reason, at least in the conventional story, why a dissent in a court opinion from another jurisdiction might not have greater persuasive authority than a majority

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54. Schauer puts the question that motivates this Part colorfully, in the conclusion to his article on authority:

Why the Supreme Court and the Congress of the United States but not the President and Fellows of Harvard College . . . or the editorial board of the *New York Times*? Why the Federal Trade Commission but not the board of directors of Wal-Mart? Why *Loss & Seligman* but not Marx and Engels? Why the *Harvard Law Review* but not the *Village Voice*? Why the writings of Thomas Jefferson but not of Jefferson Davis?

Schauer, *Authority*, *supra* note 9, at 1960.

55. Perhaps not coincidentally, this ranking of sources roughly mirrors the ranking found in *The Bluebook*. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.4, at 48-51 (Columbia Law Review Ass’n et al. eds., 18th ed. 2005).

56. This was supposedly the case in *Bush v. Gore*. See Chad Flanders, Comment, *Bush v. Gore and the Uses of “Limiting,”* YALE L.J. 1159, 1166-68 (2007).

or concurring opinion. Also, an empirical study by a sociologist might provide more insight than legislative history could. A book by Richard Posner could be more persuasive than an opinion by Judge Richard Posner. And so on and so forth.

The undifferentiated nature of the list—the fact that persuasive authority is any source that is persuasive—does not give us any reason to make a hierarchy of sources in any normative sense, but only in the sense that, as a matter of fact, some sources get cited more often than others. Indeed, as a matter of principle, the list should be somewhat fluid. In some cases, it will be better to cite an empirical study; in other cases, it will be better to cite a court opinion. It will all depend on the context, and we should not expect one type of source to be, as a general matter, more persuasive. Thus, in the conventional picture, the repeated citation to other courts is a little anomalous. Why should courts have a special priority, if not in any evaluative sense, but on the basis of the numbers? Why legal authorities and not “the latest book from Habermas?”<sup>57</sup>

But this may be too quick. Perhaps, contrary to the conventional picture strictly construed but still in the spirit of that picture, we can point to some general features of some types of sources that show why they tend to be more persuasive, or at least seem to be so. We can start near the bottom of the list, just to get an initial idea of how this could be so. Books on philosophy for instance, will less likely persuade, or be found to persuade, because they often will not directly address the issue that the court faces; or if it does address the issue, it will not approach it in not exactly the same way. A general treatise on justice, for instance, like Rawls’s *Theory of Justice*, will not always have much to say about whether one reading of a state regulation will be more correct than another interpretation. The considerations adduced by Rawls will simply be too abstract, and will not admit of any ready translation into the deciphering of the meaning of a state regulation. Rawls may at best simply be irrelevant. This is not to say that in some context Rawls will not be illuminating: for instance, there is a fair case to be made that Rawls is very useful in understanding the Equal Protection Clause.<sup>58</sup> But in the ordinary, banal statutory interpretation case, Rawls might not be of much use.

Now let us return to the top of the list, and examine the opinions of courts from other jurisdictions. There are a number of things we can say about why court opinions will likely be found to be more relevant and useful, and hence more persuasive, than other sources such as a novel or a treatise. For starters, we might imagine that courts will routinely face the same type of problems.

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57. Lee, *supra* note 3, at 71.

58. See, e.g., Frank I. Michelman, *Rawls on Constitutionalism and Constitutional Law*, in *THE CAMBRIDGE COMPANION TO RAWLS* 394 (Samual Freedman ed., 2003).



Whereas Rawls might only speak of justice in the abstract, courts repeatedly face questions concerning individual liability or questions of contract interpretation. Although one case from one court will probably never be exactly the same as a case from another, there will be certain situations that repeatedly arise and which parties will litigate in similar ways. So if one court is looking to find what another source will say in a similar situation, he may find it more likely that another *court*, as opposed to another book or article, will have faced that situation. To be sure, what another court says about what to do in that situation may not be very enlightening. But it will be more likely that what the court says could be relevant, and this relevancy would explain, at least partly, why courts cite other courts so much: they give insight on situations faced by courts on a regular basis.

More than this, we can say that courts will face like issues with the same sort of tools that another court has at its disposal. A court facing an issue, unlike an article or a book, will have to consider things such as canons of statutory construction, or questions of whether and when summary judgment is appropriate. Such terms are foreign to—taking my favored example—Rawls’s *Theory of Justice*. So a court looking to see whether summary judgment would be appropriate will not find much help in looking to works in philosophy or sociology. Those sources will not confront the issue with the same techniques, nor, to put it perhaps a better way, will they work under the same constraints. That means that the decisions of other courts will be speaking the same language as the court which seeks to learn from and be persuaded by it.

Of course, these last two points may not sufficiently narrow our inquiry to the decisions of other courts. Law review articles, and especially notes and comments, may simply be a legal analysis of a case. A law review article will also be dealing with a situation that many courts will face—indeed, it could be precisely because the issue is a common one that the law review article is seeking to explain it.<sup>59</sup> And the law review article could also try to deal with a case using legal tools and terminology.<sup>60</sup> This point is well taken, and serves to show again the truth in the idea that the realm of persuasive authority is a relatively fluid one: what kind of source is persuasive in one instance will not always be persuasive in another instance. A court opinion, for the reasons stated above, will sometimes be helpful to another court, but a law review article could be helpful for precisely the same reasons.

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59. It could also discuss a case because it is interesting from a theoretical standpoint. I am less interested in an article that approaches a case from this angle.

60. Again, a law review article may seek to explain the case from the perspective of economics or philosophy. But I am not interested in a article such as this.

Still, we should remind ourselves that here we are only looking at why citations to court opinions will likely be more frequent in the aggregate. We are not looking to show that courts will always or should always prefer courts to other sources. And surely it pays to point out that there are many more court opinions than law review articles. As a result, it is more likely that a court will find a closer analogy to its own case in another court's decision rather than a law review article, especially if the situation at issue is not all that common. So, if only by virtue of the fact that there are more court opinions than law review articles that deal solely with cases, there will be a greater reliance—in the aggregate—on opinions of other courts. Note, too, that the law review article is parasitic on the court opinion: the author of the article is seeking to explicate a case, not merely a hypothetical.<sup>61</sup>

But we can say more than this about court opinions and why other courts rely on them. Courts have to go through a process that law review authors do not encounter. Courts are presented with arguments from two competing sides (in most cases) and must weigh those arguments. Moreover, courts have to make a decision and that decision will actually have consequences in the real world.<sup>62</sup> So courts are concerned with the practical effects of their decisions, in a way that law review articles generally need not be.<sup>63</sup> In this way, being an authority actually matters, even if that authority is not over another court that may cite its opinion as a persuasive authority. A court will have to anticipate (and eventually deal with) the practical consequences of the decisions it makes.<sup>64</sup> Finally, a judge writing an opinion may have to persuade a majority of his or her colleagues to agree with her. This will entail modifying the judge's position to anticipate objections, or perhaps even moderating the decision in order to forge a winning coalition. An opinion that wins over one

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61. Although it is possible that a law review article imagines a hypothetical that will be useful to a court. Consider, for example, the famous "Rule 4" hypothetical in Guido Calabresi and Douglas Melamed's article on property and liability rules. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1120-21 (1972).

62. Jeremy Waldron's defense of the *ius gentium* also refers to this aspect. See Waldron, *supra* note 5, at 134 (arguing *ius gentium* looks "not just to philosophic reason but to what law had actually achieved in the world").

63. Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J. L. & PUB. POL'Y 807, 811 (2000) ("A scholar, by contrast, is entirely free to offer whatever construct he chooses, constrained only by the requirements of candor and whatever ambition he may entertain that his analysis be relevant.").

64. *Id.* at 823 ("[O]ne substantial advantage the judge enjoys over the scholar comes from the fact that just because the judge exercises power, because her decision directly effects lives, she will have thought differently and perhaps more deeply, more responsibly.").

judge on a three-judge panel may be less persuasive than an opinion that garners unanimity.<sup>65</sup>

Again, we can minimize the actual difference these variances may make. Law review articles usually go through a process of review and revision and must (if they are any good) anticipate objections to their position. The process of having to defend an article may, in some instances, mimic the effect of the adversarial process and the obligation to win a majority for one's opinion. Also, a conscientious scholar will be interested not merely in the abstract theoretical virtues of her legal positions but in their practical consequences and their workability. Both of these things are true, and they show again how, in various contingent circumstances, a well written law review article will be more persuasive than a court opinion. But again we are only dealing now in *tendencies*. And given legal procedures and constraints, the tendency may be that a court's decision will be more persuasive to another court than a law review article more times than not. A judge may have to actually win votes for his or her position; a law review author need only convince a journal to publish her piece.

Further, note how this last tendency speaks not only to the fact that court decisions will be more relevant than law review articles or treatises most of the time, but that they actually may be *better* because they are the outcome of a process with constraints—hearing both sides of an argument and having to render a decision that can accommodate those arguments (or at least address them). This is not a claim that judges will be smarter than the average academic.<sup>66</sup> Rather, it is a claim that there are structural features of court systems that will make their decisions possibly more compelling, simply as a matter of presentation and argument, to other courts. By this time, I should not need to emphasize again that I am talking in tendencies, not in absolutes. The hypothesis I am now offering is that courts are more likely to be considered “persuasive” both because they are more likely to be relevant, but also because they are more likely to be well-reasoned or better argued or simply in a generic sense more “persuasive” given the constraints of the legal way of doing things.<sup>67</sup>

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65. See *Harris v. United States*, 331 U.S. 145, 156 n.2 (1947) (“Aside from the fact that a constitutional adjudication of recent vintage and by a divided Court may always be reconsidered, I am loath to believe that these decisions by less than a majority of the Court are the last word on issues of such far-reaching importance to constitutional liberties.”); Sullivan, *supra* note 53, at 1202 (noting that a factor in the persuasiveness of an opinion is “whether the opinion was unanimous or only the prevailing side of a split vote”).

66. *But see* WAMBAUGH, *supra* note 1, at 100 (“[I]t would be inevitable and right that a court would attach weight to the well-considered opinion of any court composed of learned men.”); *see also id.* at 96 n.2.

67. See Jeremy Waldron, “Partly Laws Common to All Mankind”: Foreign Law in

I said earlier that on the conventional way of looking at persuasive authority, the category of persuasive authority is undifferentiated. By that I meant that there was no pure ranking of the sources of persuasive authority, so that some authorities were automatically more persuasive than others. Indeed, this would be contrary to the animating idea of the conventional picture, which is that sources only have their authority to the extent that they are persuasive. And the “undifferentiated” thesis is that we cannot say, *a priori*, that some sources will be more persuasive than others. In some contexts, a novel or a philosophy book will be more relevant and useful, and hence, more persuasive than the decision of another court. Nothing I have said in this section has yet shown this to be false.

But the picture is, nonetheless, more complicated than this, because we can point to tendencies that explain why citation to other courts will be more frequent than citations to other authorities. We can say, as a general matter, that the decisions of other courts will be more relevant to courts because courts are routinely faced with similar situations and will have to resolve controversies using similar sorts of tools. And we can even hazard that courts have various checks and constraints that make their decision making better, and hence, more helpful to other courts. Again, these are generalizations. But they are generalizations that make the conventional picture more sophisticated, while still staying within the conventional picture. Nothing in what was said above requires that due to these features courts must defer to courts outside of their jurisdiction, or even that they have to refer to them at all. Importantly, I have not said in this section that some sources will be more persuasive than others because of their pedigree. I have only pointed to factors that show why courts might in more cases than not be more persuasive; I have not said that courts will be more persuasive *merely* because they are courts. A badly reasoned court decision will be less persuasive than a good law review article, even though it is the product of a court that has had arguments presented to it in an adversarial fashion and will have to produce an opinion that will win the votes of a majority of judges.<sup>68</sup> This is how the conventional picture says it

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American Courts, Colloquy at IILF Int’l Legal Theory Colloquium 46-47 (Jan. 17, 2008), (transcript available at <http://iilf.org/courses/documents/2008colloquium.session1.waldron.pdf>) (discussing the “lawyerly approach” as well as the “legal way”) [hereinafter Waldron, Partly Laws].

68. Indeed, there will even be distinctions between various courts being used as persuasive authorities. A recent court decision may be thought more persuasive than an older one. A court decision made by a higher level court may be thought to be more persuasive than the opinion of a lower level court (if only because the higher court has the benefit of the lower court’s decision). Unanimous opinions will be more persuasive than majority opinions, etc. I take these examples from Sullivan, *supra* note 53, at 1201-02 (explaining the phenomenon he calls “graded persuasiveness”).

should be. I want to suggest next that there are reasons for going beyond the conventional picture.

*III. The Intrinsic Persuasiveness of Some Persuasive Authorities: From Persuasive Authority to Super Persuasive Authority*

In the previous Part, I tried as best I could to stay within the conventional picture regarding persuasive authority, but at the same time attempted to give that picture much more nuance. That nuance included showing how some authorities, namely courts, could be seen as *generally* more persuasive than other authorities. But is this all we can say about the authority of courts that are outside of the jurisdiction of the deciding court? If so, it would still be a significant addition to the conventional wisdom. It would show that the conventional picture could be modified to depict a tier in sources of authority—not an absolute one, but still one that seems to matter in the day-to-day lives of courts.

I do not think, however, that this is all we can say about why courts cite other courts with a greater frequency than they do other persuasive sources. And to get to this conclusion, we have to depart from the traditional picture, which sees the authority of other courts as only persuasive authorities—that is, authoritative only insofar as they actually *persuade* the deciding court with their reasoning. In this section, I will suggest that other courts can have an authority just by virtue of being a *court* that decides, and not necessarily only because a judicial decision’s reasoning is particularly persuasive.<sup>69</sup> We might consider these to be “super-persuasive” authorities, in a bow to the newly discovered idea of “super-precedent.”<sup>70</sup> These authorities would have an additional weight, beyond their persuasiveness, just as super-precedents supposedly have a greater weight than (mere) precedents. We might wonder: how could there be such sources? But they exist, and I will argue that they are a familiar part of the legal landscape.

Of course, super persuasive authorities would still ultimately be *optional* authorities—to use Frederick Schauer’s helpful term<sup>71</sup>—because they are not binding in the sense that courts must follow them or risk being in legal error. I will not be arguing that these super persuasive authorities *must* be cited by

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69. Wambaugh expresses this point well: “[T]hough each of the kinds of authority is called by the one name, – simply authority, – every lawyer knows that as to authoritativeness . . . that a decision of any court, however humble or remote, differs not only in degree but in kind from a *dictum* or statement in a text book . . .” WAMBAUGH, *supra* note 1, at 109.

70. Michael Sinclair, *Precedent, Super-Precedent*, 14 GEO. MASON L. REV. 363, 369 (2007).

71. Schauer, *Authority*, *supra* note 9, at 1946.

other courts. But I will suggest that some persuasive authorities do have an authority ordinarily thought to be held only by mandatory authorities. Courts who looked to other courts as being “super persuasive” not only borrow reasons from the other court, but also looking to that court’s status *as a court* as a factor influencing their decision making.<sup>72</sup> In this respect, I hope to show that the power of courts as persuasive authorities sometimes more closely approximates the pull that the past decisions of the same court can have, or even a higher court: they are authorities by virtue of what they are, and not (only) by virtue of what they say.<sup>73</sup>

I proceed in this section by the use of three main examples of courts acting as super persuasive authorities. What these examples share is that they are each instances of courts citing other courts *because they are courts*, which brings the citation of these courts into territory outside of conventional persuasive authorities. In general, they cite other courts because they are trying to make their decisions consistent with the decisions of those other courts. Why this is thought to be necessary in any given case will differ. But we can say, as a general matter, that sometimes courts will want to harmonize their decisions in other courts either because (1) there is some right answer for courts facing the question, and disagreement between courts implies that at least one court is wrong; (2) there is some independent good achieved by uniformity with other courts, such as stability or predictability across jurisdictional lines; or (3) because not to reach the same result as another court would be to fail to treat “like cases alike” on some relevantly similar factual situation, thus violating the legal principle of fairness.

I am getting ahead of the argument, however. To set up the argument, we need some concrete examples. When does the court of another jurisdiction have authority just by virtue of being another court? I isolate three instances: First, when circuit courts cite other circuit courts, not merely for their informational or persuasive value, but because they seek to avoid a circuit split; second, when state courts aim to harmonize their interpretation of state “uniform acts” with other states based on the fact that those other states have

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72. See the discussion of the “reasoning-borrowing approach” in Rebecca Zubaty, *Foreign Law and the U.S. Constitution: Delimiting the Range of Persuasive Authority*, 54 UCLAL REV. 1413, 1441 (2007). As Zubaty notes, “For the purposes of the reason-borrowing approach, the mere existence of a foreign law is relatively insignificant without understanding how it has been enforced and whether the reasons for its enactment are transferable.” *Id.* at 1454. Here, I am interested in how the “mere existence” of a foreign decision or law becomes significant.

73. Jeremy Waldron has recently made a strong argument to this effect in the case of foreign law. My argument in many respects mirrors his. But here I am not primarily interested in the foreign context. See Waldron, *Partly Laws*, *supra* note 67. I am greatly indebted to these lectures in what follows, although, as will be clear, I go from the inside out (from domestic cases to foreign ones), whereas Waldron’s focus is almost entirely on foreign cases.

adopted the same uniform act; and third, in common law decisions, when states seek to harmonize their doctrines with the judicially crafted doctrines of other states. In the concluding Part of my Article, I briefly discuss a fourth, and much more controversial example: when United States domestic courts (either state or federal) cite to the decision of foreign courts. I will argue that the case of citing foreign courts is an instance, perhaps an extreme instance, of the familiar practice of relying on other courts as “super persuasive” authorities.

*A. Circuit Courts Citing Other Circuit Courts*

One obvious example of courts being more than merely persuaded by other courts is the case of circuit splits among the United States Courts of Appeals. It is commonplace, too familiar even to notice, for circuit courts to survey the decisions of other circuit courts on a similar issue before reaching their own decision. Here, the fact that another court in a different circuit—and therefore not a court in the same jurisdiction as the one deciding the matter—has ruled in one way becomes a relevant data point for the court considering the same issue. It seems that the mere fact that there is another circuit that has ruled on the issue makes its decision worthy of consideration, and not *only* because of the content of what was said.

The usual and rather familiar reason for this practice is the desirability of maintaining unity among the various circuits. A particularly strong statement of the rationale for the practice of circuit courts citing one another can be found in *Aldens, Inc. v. Miller*:

Although we are not bound by another circuit’s decision, we adhere to the policy that a sister circuit’s reasoned decision deserves great weight and precedential value. As an appellate court, we strive to maintain uniformity in the law among the circuits, wherever reasoned analysis will allow, thus avoiding unnecessary burdens on the Supreme Court docket. Unless our . . . courts of appeals are thus willing to promote a cohesive network of national law, needless division and confusion will encourage further splintering and the formation of otherwise unnecessary additional tiers in the framework of our national court system.<sup>74</sup>

In other words, circuit courts must be especially attentive to the decisions of their other circuit courts because to fail to do so would risk disunity.<sup>75</sup> This

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74. 610 F.2d 538, 541 (1979).

75. As Matt Hall has pointed out to me, however, the existence of a circuit split might ultimately end up creating a firmer unity in the law, by encouraging the Supreme Court to step in and resolve the matter.

risk of disunity provides circuit courts with an *extra* reason to be attentive to the decisions of their sister circuits, above and beyond the cogency of their reasoning.<sup>76</sup>

Two caveats must immediately be stressed about the present example. First, the fact that a court in a different circuit has ruled one way does not mean that all the circuits have to rule that way; indeed, even if every other circuit has ruled one way, this does not mandate the outcome for the remaining circuit. Second, the decisions of courts in other circuits on other matters can also be used for their purely persuasive value: they can be referred to because they are well-reasoned, for instance. And they often are. All I am trying to point out is that there is a presumption that circuit splits are a bad thing and that disharmony between the circuit courts is to be avoided. A consensus among other circuits on a relevantly similar matter is, as a matter of practice, entitled to some weight. The mere fact that other circuit courts have decided a matter one way is relevant. It exerts a pull towards that result—not an inexorable pull, but a pull nonetheless.

Why is this? Consider the case of circuit courts divided over the interpretation of a federal statute. There is an intuitive presumption that the statute only has one correct interpretation and that division in interpretation shows that someone must be wrong.<sup>77</sup> In addition, a circuit split invites review by the Supreme Court, which will determine the correct interpretation for all the circuits.<sup>78</sup> Thus, circuits might want to avoid splits because (1) a split shows that at least one of the circuits is wrong about the meaning of the relevant law, and (2) the circuits want to avoid review and possible correction by the Supreme Court. These are external factors pushing circuit courts to pay attention to courts in other circuits. But be that as it may, they are reasons for courts to pay attention to courts *as* courts, not for them to pay attention to the

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76. Circuit courts make no bones about the fact that they try to avoid circuit splits. *See, e.g.,* *Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 980 (8th Cir. 2005) (“By adopting the Tenth Circuit’s holding in *Smith*, our decision today avoids a circuit split.”); *Christina A. ex rel. Jennifer A. v. Bloomberg*, 315 F.3d 990, 997 (8th Cir. 2003) (“Finally, a finding that the plaintiff class was a prevailing party avoids a circuit split with the Eleventh Circuit.”); *Torre v. Brickey*, 278 F.3d 917, 919 (9th Cir. 2002) (“We agree with the Tenth Circuit’s analysis and follow it in order to avoid an inter-circuit split.”); *see also* *United States v. Cabaccang*, 332 F.3d 622 (9th Cir. 2003) (Kozinski, J., dissenting) (noting the majority’s “Sisyphean attempt to avoid a second circuit split”).

77. This intuition may be flawed, however. Should we automatically presume that there is *one* intention behind every piece of legislation? *See* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1575 (2008).

78. *See id.* at 1575 (“The emphasis on uniformity is most visible in the Supreme Court’s self-selected docket, which is dominated by cases raising issues over which the lower courts disagree.”).



content of the courts' reasoning (at least from this perspective). To that extent, these external factors make other courts "super persuasive" authorities in a fashion that actually permits them to serve more like mandatory authorities: other courts are forced to be concerned about the decisions of other courts just because they are the decisions of other courts. This is because, to hazard a more abstract explanation, the courts are striving for unity in interpretation of (in our example) a federal statute.

But this example might seem a bit of a cheat. In cases where circuit courts cite one another for more than their mere persuasive value, the Supreme Court is acting as the *de facto* unifier.<sup>79</sup> In following other circuits, a circuit court is in a sense merely anticipating the actions of the Supreme Court, and the authority of the Supreme Court *is* binding on the circuits. Other circuits are not being viewed as authorities in their own right, but merely as reflections of what the ultimate authority—i.e., the Supreme Court—might say.<sup>80</sup> In this way, the Supreme Court unites all the circuits, and gives them the role of checking on one another. The different circuits are not wholly separate jurisdictions, the objection runs, because they are all under the ultimate jurisdiction of the Supreme Court.

This is a fair objection, but does not diminish entirely the force of the example and the point I want to make. Even though the quasi-mandatory authority of other courts in other circuits may be merely an authority borrowed from the ultimate authority of the Supreme Court, it is still a sort of authority that nearly all persuasive authorities do not have. A law review article does not get any additional force by being a law review article: the only force it has is the power to persuade. But courts in other circuits, once they have ruled on an issue, have given other courts something to consider merely by virtue of the fact that *another circuit court* has rendered a decision on that issue. There is a pull towards conformity with other courts, and courts who drift from that pull are usually thought to have to explain why, or at least to acknowledge the disagreement. A court is not obligated in any way to respond to even an exceptionally compelling law review article or book.

The practice could have developed otherwise; it could have been the case that uniformity was not valued among circuits, and so circuit splits would not be viewed as *prima facie* bad because there might be a good in the diversity

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79. See, e.g., *Kansas v. Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring) (stating that the primary responsibility of Supreme Court "is to ensure the integrity and uniformity of federal law"); see also H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 251 (1991) (acknowledging that a circuit split is "probably the single most important criterion" in deciding whether to grant certiorari).

80. This may make the example seem more like the case where a district court is bound by the decisions of the relevant circuit court.

of interpretation of federal laws.<sup>81</sup> It is significant that the practice could have been otherwise because it shows the extent to which uniformity (agreement between circuits) is being sought as a good in its own right and not merely simply by force of judicial fiat or the presumed will of the national legislature. The desire to create an *actual* uniformity in the law transforms some authorities into “super persuasive” ones.

Note, finally, that it is important that circuit courts actually make the law in their circuit. The good of uniformity across the circuits can only be achieved by coordinating with other real, live judicial authorities and not with mere suggestions and hypotheses in law reviews. So here is where it matters that some persuasive authorities are actually authoritative (that is, they have authority in a jurisdiction), rather than merely persuasive and rhetorical like law journal articles. The only way we can get uniformity in a circuit (in a nation, in a world) is by matching up with the actual governing law of another jurisdiction. In addition to the considerations adduced in the previous part about how having to actually make a decision may improve the reasoning of a court, we can say: it is only by looking to the decisions that have been *laid down* by another court and that *really are the law* that a circuit court can hope to achieve the good of uniformity across circuits.

### B. Uniform Acts

Now consider another example, one which removes the Supreme Court as an ultimate arbiter, and Congress as the author of laws: state courts interpreting their own state’s enactment of a uniform act. Here again, state courts will be inclined to look to the interpretation of other courts in order to determine how they should interpret the uniform act.<sup>82</sup> The uniform act, after

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81. See, in this regard, the interesting argument by Frost that circuit splits are not bad and that currently we “overvalue” uniformity by seeking to eliminate them. Frost, *supra* note 59, at 1605-06; see also Hart v. Massanari, 266 F.3d 1155, 1173 (9th Cir. 2001) (stating that different interpretation among different circuits “allows experimentation with different approaches to the same legal problem”).

82. That is, the legislature is saying, “We do not really know what our Uniform Act means until we see what the Uniform Acts of other states have been construed to mean. Look at those, and then figure out what we mean; and in looking at the other courts, try your best (within reason) to make our law uniform with theirs.”

See, e.g., *People ex rel. LeGout v. Decker*, 586 N.E.2d 1257, 1260 (Ill. 1992) (“To further the goal of uniformity in such laws, courts generally defer to decisions of other states and will construe the statute in accordance with the construction given to the same statute in other jurisdictions.”); *Lake Motor Freight Inc. v. Randy Trucking Inc.* 455 N.E.2d 222, 226 (Ill. App. Ct. 1983) (“To further the goal of uniformity in such laws courts generally defer to decisions of other states and will construe the statute in accordance with the construction given to the same statute in other jurisdictions.”); *State v. Westeen*, 591 N.W.2d 203, 208 (Iowa 1999) (“Although the interpretation placed on this statute by other states is not binding on us, a review

all, was designed to bring some uniformity in a certain area of law, and state courts will try to sustain this uniformity even across jurisdictional lines.

Like the previous example, this is a bit of a cheat. There is still some body, in this case either the state legislature itself or an imagined national legislature<sup>83</sup> (the presumed “author” of a national act) that is imposing uniformity. And courts are deferring to either their own state legislature’s desire for uniformity or an imagined legislature and its intention to impose uniformity across the states by “enacting” a uniform law. The “pull” of the decisions of other state courts is being derived from these extrinsic forces.

But note that in this case, unlike in the previous example, there is no national body that actually *exists* to impose that unity. Even the state legislature can only declare its intention that the act be uniform across states. But in the process of trying to achieve this unity, state courts will treat the decision of the other state courts interpreting a uniform act as authoritative, not necessarily because of the cogency of their interpretation (though they also may also treat them as authoritative in this way), but because they are state courts that have decided in one way rather than another. Looking to other states that have adopted the uniform act in these cases is looking to them not merely in their capacity as reasoners, but also in their capacity simply as courts deciding cases one way rather than another way. And this is a type of authority that purely persuasive authorities are not meant to have. They are not supposed to have an authority, even if it is a borrowed authority, that derives from their capacity as courts simply deciding.

So far we have looked at two examples of court decisions having an authority that goes beyond being merely “persuasive” because other courts may look to those decisions and cite them, not because of the content of the courts’ reasoning, but merely because courts made the decisions. However, in both of these cases, the authority could be seen as derivative. In the circuit court example, courts from other circuits may get a derived authority from the possibility that they might follow the circuit that the Supreme Court will uphold. In the case of a state uniform act, the state courts interpreting the act in conformity with other state courts are *really* looking to the authority of the

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of decisions from other jurisdictions is instructive in light of the legislature’s goal of achieving uniformity with states adopting the uniform act.”); *Gallaudet Univ. v. Nat’l Soc’y of the Daughters of the Am. Revolution*, 699 A.2d 531, 549 (Md. Ct. Spec. App. 1997) (“Finally, we are mindful of the notion that Maryland courts, when construing Uniform Acts, should generally seek uniformity with decisions of other states construing the same law.”); *Spaeth v. Srinivasan*, 959 A.2d 290, 294 (N.J. Super. Ct. App. Div. 2008) (“In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.”).

83. Or a real ABA Committee acting as an imaginary legislature.

state legislature that passed the act. In both cases, there was a move towards unity with other courts, just for the sake of being in unity with them—but this move towards conformity may be artificially forced, either because of the Supreme Court’s ultimate say or the commands of the state legislature.

### C. State Common Law

But we need not look much further to find purer examples of states looking to other courts as authorities because they seek to be in unity with those other courts for reasons other than simply a belief that those other courts ruled correctly.<sup>84</sup> In interpreting common law cases, state courts will frequently look to other states, and especially trends in other states, to see how they should decide tort cases. This especially seems to be the case when it comes to rules regarding negligence.<sup>85</sup>

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84. Cass Sunstein and Eric Posner have recently discussed in great detail the phenomena of state courts citing other state courts, but they do not focus on the pull towards uniformity as one of the reasons for the citation practice. Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 142 (2006). Instead, they emphasize the possibility that when a number of courts have ruled one way on an issue, those decisions have a “high probability of being correct.” *Id.*; see also Comment, *State Law as “Other Law”: Our Fifty Sovereigns in the Federal Constitutional Canon*, 120 HARV. L. REV. 1671 (2007).

I am not interested here in the prospect that more courts deciding one way rather than another is an indicator of truth, because I am not certain that it is, and citing other courts because of the truth value of what they say is being persuaded for a substantive, and not a formal reason. That is, one is being persuaded to decide a certain way because so many courts have thought x, so they must be right; one is not being persuaded by the mere fact that many courts have thought x. It is the latter phenomenon I am most interested in.

Consider the difference between being persuaded to listen to Elvis because “Elvis has millions of fans, and that many people could not be wrong about the quality of his music,” and being persuaded to listen to Elvis because “a lot of people listen to his music, and I just like going along with the crowd.” The latter judgment is independent of any judgment about the quality of Elvis’s music. Cf. ELVIS PRESLEY, 50,000,000 ELVIS FANS CAN’T BE WRONG (RCA Victor 1958).

85. See, e.g., *Samuelson v. Lord, Aeck & Sergeant, Inc.*, 423 S.E.2d 268, 272 n.2 (Ga. App. 1992) (“This result is consistent with the general trend in other states toward abolishing the privity requirement for negligence actions against architects involving personal injury and replacing it with the rule of foreseeability.”); *Gratzle v. Sears, Roebuck and Co.*, 613 N.E.2d 802, 804 (Ill. App. 1993) (“The Wisconsin Supreme Court interpreted their comparable statute to include assumption of risk, and other similar modified comparative negligence statutes and court decisions from other States indicate a trend toward abolishing the distinctions between different types of fault in the context of negligence verdict setoffs.”); *Russell v. Striker*, 635 N.W.2d 734, 739 (Neb. 2001) (“As we noted in *Wheeler*, there has been a ‘strong, if not overwhelming, recent trend away from the blindfold rule in comparative negligence states.’”); *Dirksing v. Blue Chip Architectural Prods., Inc.*, 653 N.E.2d 718, 730 (Ohio App. 1994) (“[T]he trend in most states, including Ohio, is to apply exclusivity provisions expansively to bar any negligence claim, even those of third parties, against a complying employer.”); H.E. Butt

Of course one reason courts will look to other courts on common law matters is that consensus may be, in their opinion, indicative of truth.<sup>86</sup> But another reason may be that uniformity across state lines may be an independently good thing that states will want to achieve. And the only way to achieve this harmonization is to give some weight—but not necessarily an absolute weight—to other state courts and to follow the direction that their decisions are trending in a certain area. When courts seek uniformity and look to other state courts to determine what that uniformity should look like, they are using the authority of those courts in a way that goes beyond being merely “persuasive.” They are treating them as authorities by virtue of what they are, not only by what they say, and hence as “super persuasive.”<sup>87</sup>

Moreover, in this case, there is no further authority—whether it be the Supreme Court or a state legislature—that lends its authority to the other courts. There is only the pull of the good of unity (or uniformity) itself that binds courts to other courts not in the same jurisdiction. As Richard Posner puts it, this is the case when

[a]part from the intrinsic persuasiveness of the decision, just the fact that it *is* a decision by such a court carries some weight. If many sister courts have converged on a particular rule or doctrine, *the fact of convergence* will push a court confronted with the question for the first time toward the same result unless it has strong contrary feelings.<sup>88</sup>

Or, as an older source puts it, “It is inevitable that jurisdictions practising similar systems of law should wish their systems to be harmonious with one

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Grocery Co. v. Bilotto, 985 S.W.2d 22, 27 (Tex. 1988) (“Today, there is a clear trend, among the comparative negligence states that have considered the issues, to permit the jury to know the ultimate effect of its percentage findings.” (citation omitted)); Crosby v. Cox Aircraft Co., 746 P.2d 1198, 1200 (Wash. 1987) (“The modern trend followed by a majority of states is to impose liability only upon a showing of negligence by either the aircraft owner or operator.”). For an especially clear instance of a state court observing and then choosing to follow the trend of other states, see *Sowinski v. Walker*, 198 P.3d 1134, 1153 (Alaska 2008) (“A reexamination of the persuasive precedents from Iowa, Louisiana, Minnesota, and Florida on which *Loeb* relied reveals a general erosion of support for the position we adopted in *Loeb*. A broader canvassing of jurisdictions confirms that our holding in *Loeb* now represents the minority view.” (footnote omitted)).

86. See Posner & Sunstein, *supra* note 84.

87. So, too, might Restatements be valuable as guides for states who seek uniformity in a certain area of law. Among persuasive authorities, Restatements may be the closest to being “super persuasive,” precisely because of their role in acting as a potential unifier of the law across jurisdictions.

88. RICHARD A. POSNER, HOW JUDGES THINK 349 (2008) (emphasis added).

another.”<sup>89</sup> Here, it is simply the bare desire for conformity that leads state courts to cite one another, and to agree with them—not the external pressure of a Supreme Court, or of a real or imagined legislature.

*D. Why Uniformity?*

This pull towards conformity, present to a greater or lesser extent in all three examples cited above, should not strike us as a foreign or mysterious value in law—far from it.<sup>90</sup> In addition to the above instances, uniformity is at the core of the doctrine of stare decisis. Stare decisis seeks uniformity across time and recognizes that there is a good to stability and uniformity in the same court. It is good that legal expectations be settled, and it is a legal imperative that like cases be treated alike, perhaps even at the risk of a substantive injustice.<sup>91</sup> A court that simply disregarded its past decisions would disturb legitimately formed expectations, and it would also introduce unfairness, showing its rules to be arbitrary and ad hoc.<sup>92</sup> Uniformity acts as a meta-constraint on a deciding court, but it is a constraint informed by substantive values that are uniquely legal. A court may, and should, decide each case on the merits. But it also must look at its own past and make sure that it is deciding each case in conformity with its own past. There is no mystery here in the bare legal value of uniformity, or as we might also put it, of consistency.<sup>93</sup>

If stare decisis involves a uniformity across time, then the citation of other courts as authorities involves uniformity across space with other courts. In the same way that a court looks to its own past decisions to try to bring its present self into conformity with its past self, courts may look to other courts to make their decisions congruent with one another. To be sure, courts do not have to cite other courts, or bring their own caselaw into conformity with the law of other circuits, or of other states. But neither is stare decisis an “inexorable

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89. WAMBAUGH, *supra* note 1, at 100.

90. *See, e.g., id.* at 97 (“[C]ertainly every one perceives without argument that uniformity is essential to law.”).

91. *See* *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (“[I]n most matters it is more important that the applicable rule of law be settled than it be settled right.”).

92. Evan Caminker emphasizes the same value in arguing against circuit splits: “[N]ational uniformity of federal law ensures that similarly situated litigants are treated equally; this is considered a hallmark of fairness in a regime committed to the rule of law.” Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 39 (1994).

93. *See* Waldron, *Partly Laws*, *supra* note 67.

command”<sup>94</sup>: an old decision can be overturned if it is no longer applicable, if circumstances have changed, or if few people rely on the decision any longer. All of these are relevant considerations. But they do not stop stare decisis from dictating that the past decision of a court is something that the court should consider and assign weight. In a like manner, some court decisions may not always be very persuasive. The decisions of even a majority of courts can be wrong, and not useful, and should be departed from. Nonetheless, the decisions of other courts may deserve recognition and even consideration if the cases are very closely related or on point, and there are strong reasons for uniformity or consistency in that area of law.<sup>95</sup>

Indeed, the more courts that have decided a matter in a certain way, the greater weight those decisions may be said to have, and not necessarily because consensus is a measure of truth.<sup>96</sup> The reason decisions from other jurisdictions might deserve recognition is the same as the reason that the past decisions of the same court deserve recognition: to achieve uniformity to avoid the appearance of a checkerboard of legal principle across jurisdictions.<sup>97</sup> The same values of settling expectations and of treating like cases alike are as much at play between courts as they are within the same courts. As one court put it, courts have an obligation to “promot[e] predictability and stability through satisfaction of mutual expectations.”<sup>98</sup> There is no a priori reason why this interest in predictability and stability should stop at jurisdictional borders.

The only difference (and it is a major one) is that it may be harder to see cases as “similar” across jurisdictions, and so it may be harder to see uniformity across jurisdictions as a good to be achieved, because it is simply not a good to be had. There may be different laws, even different legal traditions, across jurisdictions.<sup>99</sup> And this will prevent exactly similar cases

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94. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (stating that stare decisis is a “principle of policy” and not an “inexorable command”).

95. *See, e.g., PNC Fin. Servs. Group, Inc. v. C.I.R.* 503 F.3d 119, 136 (D.C. Cir. 2007) (stating that avoiding a circuit split is particularly important in a case “involving federal tax law, where ‘uniformity among the circuits is particularly desirable . . . to ensure equal application of the tax system,’ . . . and to further maintain consistency” (internal citation omitted)).

96. *Cf. Posner & Sunstein, supra* note 84, at 135-36 (emphasizing the relationship of consensus to truth, and suggesting that “if the majority of states believe that X is true, there is reason to believe that X is in fact true”).

97. RONALD DWORKIN, *LAW’S EMPIRE* 178-79 (1986).

98. *Laker Airways, Ltd. v. Sabena Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984); *see also, e.g., Sinclair, supra* note 70, at 369.

99. *See Posner & Sunstein, supra* note 84, at 149. Jeremy Waldron seems to take it as a given that if two laws “are not administered by a single over-arching entity, then we cannot complain that anyone has treated like cases in a disparate way. The cases have been treated differently, but no one or no system has violated the precept: ‘Treat like cases alike.’” Jeremy Waldron, *Lucky in Your Judge*, 9 *THEORETICAL INQ. L.* 185, 193 (2008). I am not sure this is

from springing up across jurisdictions. It will tend to diminish the possibility that there was any uniformity of expectations to be preserved across the jurisdictions in the first place. Even among states in the United States, there will be a diversity of laws and legal cultures, and a court's duty should be to attend to the distinctiveness of its own jurisdiction. Moreover, uniformity is not a good above all else. The point that some make in objecting to the citation of foreign authorities has special weight when it is made in this spirit, emphasizing differences and distinctiveness, and opposing an unthinking uniformity achieved by following other courts.<sup>100</sup>

However strong this point, and it is strong, it does not prevent us entirely from seeing the past decisions of the same court and relevant decisions of other courts as, at times, merely a matter of degree, and not as absolute difference in kind. A past decision of the same court may be so poorly reasoned or so out of date that the past decision is like one of another country, not having any real pull on the court.<sup>101</sup> It may not even deserve consideration in the court's decision; it may even be ignored.<sup>102</sup> But at the other extreme, it may be that there is no compelling reason not to treat a case from another jurisdiction exactly like the case before the court. To do so would be morally arbitrary. In both cases, the "pull" that *stare decisis* or a particular persuasive authority can exert on the court is not irresistible: persuasive authorities can be disagreed with or distinguished, past decisions of the same court can be overruled. But in both cases, the pull exists not only towards the intrinsic persuasiveness of an authority but also toward uniformity in the law, and the good that uniformity brings and embodies (such as stability, reliability, and fairness). If this is right, then it shows how consensus among courts of different jurisdictions might be a good thing, and specifically a good thing legally—that is, it realizes a good internal to law.

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true; moreover, I am not sure it is consistent with Waldron's other work on the *jus gentium*. Cf. Waldron, *Partly Laws*, *supra* note 67.

100. See Nicholas Rosenkranz, *Condorcet and the Constitution*, 59 STAN. L. REV. 1281, 1301 (2007) ("In short, the Constitution itself furnishes an answer to whether it should be interpreted by reference to foreign law. It evinces a clear vision that most questions of law and policy are inherently local.").

101. Frank Cross and Les Green suggest this analogy in their reply to a blog posting by Richard Posner. See *Leiter Reports: A Philosophy Blog: Citing Foreign Courts*, Comments of Frank Cross & Les Green, [http://leiterreports.typepad.com/blog/2004/12/citing\\_foreign\\_html#comments](http://leiterreports.typepad.com/blog/2004/12/citing_foreign_html#comments) (last visited Apr. 17, 2009).

102. See the interesting argument in Schwartz, *supra* note 29, at 1479, on this possibility.



#### IV. Conclusion: The Real Debate Over Foreign Authorities

The case of citation to foreign authorities is perhaps the limiting case of the good of unity—if it is even an instance of that at all. How can unity have a pull between jurisdictions governed by different law, connected by no higher authority? How can there be a comity of courts that would somehow transcend the comity of the nation?<sup>103</sup> How can we see various courts of different nations as engaged in a “common enterprise” of crafting a uniform law between nations?<sup>104</sup> In the case of diverse circuit court rulings, we still have the sense that the states are part of a national system, ultimately subject to the Federal Constitution. We may even retain that sense with state courts, who nonetheless serve separate sovereigns.<sup>105</sup> They may be separate, but they still interconnect as part of the United States. How could there be a unity of expectations that unites different *countries*? At this point, there is no higher body to govern them, but only the legal pull of unity itself: the idea that courts, whatever sovereign they work under, are part of a common judicial enterprise.

Those who support the citation of foreign courts point to the existence of a transnational “judicial community.” They point to globalization and the increasing socialization of judges of different countries.<sup>106</sup> They are, in fact, arguing for a greater *unity* in the law.

We are now in a position to contextualize this claim. Those who support the citation of foreign authorities are claiming, in part, that there is a good case to be made that, being part of this same judicial enterprise, courts simply *qua* courts should aim towards increasing uniformity with other courts. Why? For the same reasons that a court might want to be in conformity with its past self: continuity, stability, and treating like cases alike.<sup>107</sup> We are back to those same

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103. See the helpful discussion on this point in Ann-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1112, n.36 (2000).

104. See Waldron, *Partly Laws*, *supra* note 67.

105. See Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993), for a particularly strong statement of this position.

106. Vicki Jackson points to this idea in some of her work. She argues that “[r]eferences to transnational sources may relate not only to the place of the court’s nation in the community of nations, but also to the status and relationship of courts to each other in the development of the law, thus fostering an autonomous professionalism of independent courts.” Vicki C. Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 LOY. L.A. L. REV. 271, 283 (2003) (emphasis added); see also *id.* at 280 (speaking of the “joint venturing” implicit in the citation of other courts as persuasive authority); *id.* at 305 n.119 (noting the “sense of obligation” judges feel to judges in other foreign courts as “an obligation to the law”); Waters, *supra* note 3, at 638–39 (describing the increasing dialogue between domestic and foreign courts and the emergence of a “world community of courts”).

107. For an instance of like cases influencing an opinion, see *Miranda v. Arizona*, 384 U.S.

values, although with the foreign courts, it becomes more difficult to make a compelling case that there *are* expectations of continuity across jurisdictions or that cases in different jurisdictions are really “alike.”<sup>108</sup> But it is not an impossible case to make, and it may be increasingly easier to make this case as time goes on and as countries tend to become more intertwined and more like one another. We may come to see the values that we want preserved when we refer to *stare decisis* (which Dworkin helpfully catalogs under the general heading of “integrity”<sup>109</sup>) as values we also want preserved when we refer to courts in general. To continue in the Dworkinian vein, one might wonder to what extent the international community (and its courts) is the proper community to which courts should be faithful in interpreting the law.<sup>110</sup> But I leave this debate to another occasion.

The point I wish to conclude with is that, once we realize that citations to other courts may have a pull, even an “authority” that other merely persuasive authorities lack, the debate over the citation of foreign courts and laws becomes more interesting, and we begin to grasp what all the fuss is really about. On the one hand, those who favor the citation of foreign authorities are, implicitly and perhaps without knowing it, asserting the similarity of foreign and domestic courts. They are saying that certain legal goods may emerge from being in uniformity with those courts, and in so doing, they are saying that the courts (foreign and domestic) are similar enough to make that uniformity meaningful. On the other hand, those who fear the citation of foreign authorities have some legitimate basis for their worry. As my examples in Part III demonstrated, there are some uses of ostensibly “persuasive authorities” that show them to have force beyond their mere persuasiveness, so that they are “super persuasive.” Those who question the practice of citing foreign persuasive authorities may legitimately wonder

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436, 489 (1966) (“Moreover, it is consistent with our legal system that we give at least as much protection to these rights as is given in the [foreign] jurisdictions described.”).

108. It may be easier to make the argument that reliance interests would compel uniformity. See Les Green’s comment, *supra* note 101 (“I note in passing that [Posner’s] proposal that *stare decisis* should depend on reliance interests makes it possible for foreign legal norms to become binding on American judges.”).

109. See, e.g., DWORKIN, *supra* note 97, at ch. 7. Waldron advances this claim in the context of the citation of foreign law. Waldron, *Partly Laws*, *supra* note 67. The U.S. Supreme Court has similarly invoked the value of integrity when speaking of *stare decisis*: “*Stare decisis* is the preferred course because it . . . contributes to the actual and perceived integrity of the judicial process.” *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

110. Dworkin usually speaks of judicial decisions having to “fit” with the legal practice of the nation, not the world. See Michael McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 *FORDHAM L. REV.* 1269, 1272-73 (1997).

whether the fact that foreign authorities are being used shows them to have a pull on us that is greater than the intrinsic force of their reasoning. Those who fear this are not entirely unjustified in this fear, as in many cases, persuasive authorities *are* being treated as more than merely persuasive.

In short, once we grasp that persuasive authorities are of many types, and that some authorities (namely courts and laws of other jurisdictions) can have force beyond their persuasive value, the debate over the use of foreign authorities becomes more focused and more interesting. To what extent are foreign and domestic courts similar, and thus, engaged in a similar project? Is it an independently good thing to want our own courts to be in harmony with courts from other jurisdictions?

These are the types of substantive questions we should be asking. It is my hope that this essay has gone some of the way toward showing the stakes involved in weighing the alternative answers and then choosing correctly among them.