ARTICLE

ON VACATION

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I. INTRODUCTION

Because I am, admittedly, pretty lazy, I have always given short shrift to vacated opinions.[1] They have, after all, been "vacated," which the Oxford English Dictionary reports means "[a]nnulled, made legally void."[2] Recently, however, I realized that vacated opinions have begun to play an increasingly significant role in the development of the law, a role that remains largely unappreciated and completely unexamined. Contrary to Gertrude Stein, there may be a there there after all.[3]

One of the most dramatic examples—if something can be called dramatic when no one seems to have noticed—is Judge Alex Kozinski's widely cited opinion in *Hart v. Massanari*,[4] which was devoted entirely to demolishing Judge Richard Arnold's opinion in *Anastasoff v. United States*,[5] which had held unconstitutional the Eighth Circuit's rule prohibiting the citation of certain "unpublished opinions."[6] As Judge Kozinski wrote, "*Anastasoff*, while vacated, continues to have persuasive force. It may seduce members of our bar into violating [the Ninth Circuit's analogous rule] under the mistaken impression that it is unconstitutional. We write to lay these speculations to rest."[7] Thus, a noted jurist writes a long and scholarly opinion simply to eradicate the pernicious effects not just of a vacated opinion but of a vacated opinion from another circuit. Apparently vacated opinions, like unloaded guns, may be dangerous. Ironically, *Hart* ends up actually according some authority to *Anastasoff*.[8]

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1. To be accurate, it is typically the judgment, not the opinion supporting it, that is vacated, but "vacated opinion" is a handy short-form. *See infra* notes 58–60 and accompanying text.

2. XIX THE OXFORD ENGLISH DICTIONARY 385 (2d ed. 1989); *see also* BLACK'S LAW DICTIONARY 1584 (8th ed. 2004) (defining "vacate" as "[t]o nullify or cancel; make void; invalidate" and "vacatur" as "[t]he act of annulling or setting aside" or "[a] rule or order by which a proceeding is vacated").

3. GERTRUDE STEIN, EVERYBODY'S AUTOBIOGRAPHY 298 (Exact Change 1993) (1937) ("[W]hat was the use of my having come from Oakland it was not natural to have come from there yes write about it if I like or anything if I like but not there, there is no there there.").

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

5. Anastasoff v. United States, 223 F.3d 898 (8th Cir.), *vacated as moot en banc*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

6. *Id.* at 900. *But see* Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 120 (2001) (discussing Judge Arnold's analysis in *Anastasoff* and doubting that "the founding generation would have viewed stare decisis as an inherent limit on judicial power . . . [or] intended for stare decisis to operate as part of the checks and balances" of the Constitution).

7. *Hart*, 266 F.3d at 1159 (citation omitted).

8. *See id.* at 1180 (recognizing that a reasonable attorney might be misled by *Anastasoff*).

Although extirpating Judge Arnold's analysis root and branch, Kozinski concludes by refusing to sanction the offending attorney, precisely because "*Anastasoff* may have cast doubt on [the Ninth Circuit's] rule's constitutional validity. [These] rules are obviously not meant to punish attorneys who, in good faith, seek to test a rule's constitutionality."[9]

Vacated opinions, then, are a force to be reckoned with—at least sometimes.[10] As I was puzzling over precisely how and when to reckon with them, another case from the Ninth Circuit raised new questions. In *Newdow v. Congress of the United States*,[11] the lesser-known sequel to the highly publicized Pledge of Allegiance case, the district court held itself bound by a prior circuit opinion precisely because that opinion had not been vacated, merely reversed, on other grounds.[12]

In earlier proceedings, the Ninth Circuit had invalidated "under God" in the Pledge of Allegiance recited by California school children,[13] a decision reversed by the Supreme Court on the grounds that the plaintiff lacked standing because of a dispute over his parental right to control his child's education.[14] When the case returned to the district court, however, other parents who claimed the same violation as had Mr. Newdow continued to press the suit.[15] The district court not only found these plaintiffs (who had full parental rights under California law) had standing but also believed itself bound by the Ninth Circuit's opinion holding the insertion of "under God" in the Pledge to violate the First Amendment.[16] In the process, the district court stressed that the circuit court's opinion had merely

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9. *Id.*

10. I thank my colleague, Howard Erichson, for pointing out literary parallels to vacated opinions. Lady McBeth vacillates between believing that "what's done, is done," act 3, sc. 2, and "what's done, cannot be undone," act 5, sc. 1; either "[a] little water clears us of this deed," act 2, sc. 2, or it doesn't: "Out damned spot—out I say," act 5, sc. 1. WILLIAM SHAKESPEARE, MACBETH, *in* 3 THE COMPLETE OXFORD SHAKESPEARE 1330 (Stanley Wells & Gary Taylor eds., Oxford Univ. Press 1987).

11. Newdow v. U.S. Congress, 383 F. Supp. 2d 1229 (E.D. Cal. 2005).

12. *Id.* at 1240–41.

13. Newdow v. U.S. Congress, 328 F.3d 466, 487–90 (9th Cir. 2003), *rev'd on other grounds sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

14. Elk Grove Unified Sch. Dist., 542 U.S. at 17–18 ("When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law. . . . We conclude that, having been deprived under California law of the right to sue as next friend, Newdow lacks prudential standing to bring this suit in federal court.").

15. *Newdow*, 383 F. Supp. 2d at 1239–40 (finding Plaintiff Roe has sufficient standing to bring suit following *Elk Grove Unified School District*).

16. *Id.*

been reversed, it had not been vacated: "It is established that there is a distinction between a case being reversed on other grounds and a case being vacated. A decision that is reversed on other grounds may still have precedential value, whereas a vacated decision has no precedential authority."[17]

Of course, *Newdow* can be easily squared with *Hart*: the district court was using "precedential" to mean binding.[18] In contrast, Judge Kozinski never thought the Ninth Circuit bound by the vacated *Anastasoff* opinion, although he feared pernicious consequences flowing from it.[19] However, *Newdow* cannot so easily be squared with an increasing tendency of federal courts to use "vacated on other grounds" to describe the subsequent history of a citation.[20] According to *Newdow*, an opinion's having been vacated provides all the information one needs to know that it no longer retains force as a precedent.[21] However, the numerous courts that cite a vacated opinion while adding the modifying "on other grounds" strongly suggest the contrary—the opinion retains some force precisely because that vacatur was predicated on grounds other than those for which the opinion is now being cited.[22] But is that force, contrary to *Newdow*, that of a precedent?

The difficulty arises because the law uses "precedent" in two very different ways. In the weaker sense, "precedent" merely refers to any authoritative pronouncement of a court that other courts have an obligation to respect; in this sense, any court

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17. *Id.* at 1240 (citing O'Connor v. Donaldson, 422 U.S. 563, 577 n.12 (1975) and Durning v. Citibank, N.A., 950 F.2d 1419, 1424 n.2 (9th Cir. 1991)). For a further discussion of the *O'Connor* decision, see *infra* note 141. At least one other Circuit also takes this view. *See* Cent. Pines Land Co. v. United States, 274 F.3d 881, 893 n.57 (5th Cir. 2001) (noting that one panel opinion did not bind a subsequent panel because it had been vacated, but a second panel opinion "binds us because only the *judgment* was reversed on other grounds").

18. *See Newdow*, 383 F. Supp. 2d at 1240–41 (stating that an opinion reversed on other grounds has precedential value and noting that the portions of the opinion that were not reversed bind the district court).

19. *See* Hart v. Massanari, 266 F.3d 1155, 1175–76 (9th Cir. 2001) (reporting the federal court policy "of limiting the binding effect of appellate decisions to the courts of a particular circuit").

20. The Bluebook requires certain "subsequent history" for any opinion cited. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.7, at 92 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005). It seems to suggest that some vacations are different than others, but does not explain why. After rule 10.7.1(b) states that one should "[g]ive the reason for a disposition if the disposition does not carry the normal substantive significance," it gives as an example: *"vacated as moot." Id.* R. 10.7.1(b), at 93.

21. *Newdow*, 383 F. Supp. 2d at 1240.

22. *See, e.g.*, Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 164 (2000) (distinguishing Second Circuit cases vacated "on other grounds").

decision[23] may be a "persuasive precedent," although precisely what that means—how respectful a court must be—is unclear.[24] The second, and stronger, sense is "binding precedent," which means that a lower court, subject to the appellate jurisdiction of the higher court, is required to follow[25] the decisions of that court,[26] or, more accurately, to follow the "holdings" of that court.[27] This is sometimes called the doctrine of vertical precedent;[28] "stare decisis" is also sometimes used to refer to binding precedent in this sense,[29] although it is often used to refer only to

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23. Court decisions might be contrasted with administrative agency decisions. Perhaps somewhat counterintuitively, agency decisions are not precedential, at least in the sense that a reviewing court will view departure from a prior agency decision as a basis for rejecting the decision being reviewed. *See generally* Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013, 1042 (2005) (unlike judicial decisions, administrative "agency 'precedents' do not bind later agency decision-making in any serious way"). Agency decisions may, of course, be persuasive precedents for the agency itself. *See id.* at 1042–43.

24. The source of any obligation to respect a persuasive precedent is unclear and may simply reflect a strong professionalism norm among lawyers and judges. *See infra* notes 268–72 and accompanying text.

25. In his article, *Precedent*, Professor Frederick Schauer writes pragmatically: "Some decisions, even within a given jurisdictional ambit, *must* be followed while others, hypothetically, might carry with them some lesser force. In this sense, a binding precedent is one that must either be followed or distinguished." Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 592–93 (1987).

26. *E.g.*, Hutto v. Davis, 454 U.S. 370, 374–75 (1982) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."). *But see* Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's* Justice Accused, 7 J.L. & RELIGION 33, 82 (1989) (arguing that a judge's oath is to follow the Constitution, not the Supreme Court's interpretation of the Constitution).

27. *See infra* notes 184–87 and accompanying text (regarding the distinction between holding and dictum).

28. The horizontal/vertical distinction was apparently coined by Professor Gary Lawson. *See* Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 61 n.79 (1993) (citing Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 24 (1993)). The duty of a lower court to follow a binding precedent is commonly viewed as following from the power of the higher court to reverse, but that explanation has been challenged as insufficiently theorized. *See generally* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 873 (1994) ("A pyramidal judicial hierarchy does not entail a rigid duty to obey; deference to hierarchical precedent must be permitted but is not required."); Erin O'Hara, *Social Constraint or Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis*, 24 SETON HALL L. REV. 736, 738 (1993) ("[W]here judges' normative views differ, an agreement to follow each other's precedents eliminates nonproductive competition that would result if judges were unconstrained in their efforts to have their own, rather than other judges', normative views define the legal consequences of individual behavior. As a result, judges are better off under a rule of *stare decisis*.").

29. *See* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1016 (2003) ("At its most basic level, however, stare decisis refers simply to a court's

what has been called horizontal precedent,[30] the obligation of a court to follow its own precedents.[31]

Perhaps, then, both Judge Kozinski and *Newdow* are correct: a vacated opinion is not precedent in the sense that it binds anyone; but such opinions may remain persuasive—or at least as persuasive as many other nonbinding judicial statements. Under this view, a court citing an opinion "vacated on other grounds" is merely noting that the views cited were not directly contradicted by the higher court's actions, much the same as would be true when a court's opinion was "reversed on other grounds."[32] The only surprise under this analysis would be the dictum in *Newdow* that a decision reversed on other grounds is not merely persuasive but also binding.[33]

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practice of following precedent, whether its own or that of a superior court.").

30. The duty of a court to follow the decisions of a higher court in the hierarchy is usually thought to be stronger than the duty of a court to follow its own precedents. *See* William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis: Casey, Dickerson and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 58 ("Historically, vertical stare decisis has been viewed as obligation, while horizontal stare decisis has been viewed as policy."); *see also* Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075, 1080 (2003) ("[C]ourts cannot constitutionally eliminate their obligation, deeply rooted in common law, to show measured (though not absolute) deference to their own precedents [although] Congress possesses power to release the courts from this constraint." (emphasis omitted)). *But see* John M. Rogers, *Lower Court Application of the "Overruling Law" of Higher Courts*, 1 LEGAL THEORY 179, 179 (1995) (disagreeing with the idea that "[t]he obligation of a court to follow the law of a superior court is commonly taken to be stronger than the obligation of the higher court to respect its own precedent").

31. The source and extent of the duty of a court to follow its own precedents is itself contested. *See* Richard H. Fallon, Jr., Essay, *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 577–78 (2001) ("Article III's grant of 'the judicial Power' authorizes the Supreme Court to elaborate and rely on a principle of stare decisis and, more generally, to treat precedent as a constituent element of constitutional adjudication. That constitutional authorization is itself part of 'the supreme Law of the Land' and adequately justifies the Justices in sometimes failing to enforce what otherwise would be the best interpretation of particular constitutional provisions." (footnotes omitted)); Healy, *supra* note 6, at 121 ("If stare decisis is constitutionally required, it is not because of original understanding, intent, or the structure of the constitution. Instead, it is simply because the courts have staked their legitimacy upon adherence to precedent."); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1537 (2000) (describing stare decisis as "rule of policy, not a rule of law").

32. *See, e.g.*, Action Alliance of Senior Citizens v. Sullivan, 930 F.2d 77, 83 (D.C. Cir. 1991) (stating that because an opinion was vacated not on the merits, the precedential value remained).

33. There was an extensive discussion of this on several listservs, including the Constitutional Law listserv, a nonpublic listserv, the etiquette of which precludes individual attribution. One line of commentary argued that the Ninth Circuit was not bound to follow a decision that had been reversed, even though on other grounds. While a court as a practical matter would often reach the same result in a subsequent case raising the same issues, the absence of any requirement to do so means that a different panel or a

The broader problem, however, is whether the *Newdow* distinction between the status of reversed and vacated opinions exists, and, if it does, whether there is any principled reason for that distinction. Indeed, it is not clear why any opinion survives the extinction of the judgment it supports (whether that extinction is by vacatur or reversal), but, if some opinions do survive, it seems strange that the distinction is drawn between judgments which are vacated and those that are reversed.

To this point, I have written as if the operative act of the higher court is dealing with the opinion of the inferior court. That is, of course, not true or, at least historically, was not.[34] The higher court deals with judgments, not opinions, and it is the judgment of the inferior court that is affirmed, reversed, or vacated.[35] From a historical perspective, opinions were a kind of by-product of a court's central function, which was deciding cases.[36] Indeed, in England, due to the erratic nature of the reporting system, the absence of a clear hierarchy of courts, and the practice of each jurist issuing his own views, opinions were seen not as the law per se but rather merely as "evidence" of the law.[37] A subsequent court, in such a system, was never bound to

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different reading of the tea leaves at the Supreme Court might yield a different result. And, if the Ninth Circuit were not bound, it followed that its district courts were not bound either. This line of thought stressed that the Supreme Court's determination of lack of standing necessarily meant that the Ninth Circuit should not have decided the case in the first place and, therefore, it would be anomalous for the case to be binding. *See also* Posting of Eugene Volokh to The Volokh Conspiracy, Precedential Effect of Reversed Decisions, http://www.volokh.com/posts/1126733019.shtml (Sept. 14, 2004, 17:23 EST).

The contrary argument was that the prior Ninth Circuit decision, being in legal contemplation the opinion of the court (not merely the opinion of the panel), was technically binding on the Ninth Circuit itself (and therefore on the district courts in that circuit) until overturned. *Id.* While the Ninth Circuit en banc (or perhaps even a panel) could reach a different result if the reversed case's trip to the Supreme Court had raised questions that it could not command a majority there, the absence of any such statement left the district court in *Newdow* bound. As for the anomaly of according binding power to a case that should not have been decided for lack of standing, these commentators stressed, as had the district judge in *Newdow*, that the Supreme Court found a lack of standing on prudential grounds. *Id.* Therefore, the Ninth Circuit had not exceeded its "case and controversy" jurisdiction in deciding as it did. This explanation falls short of explaining why an opinion that should not have been issued for prudential reasons should nevertheless bind lower courts.

34. Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 126 (1999) ("The operative legal act performed by a court is the entry of judgment; an opinion is simply an explanation of reasons for that judgment.").

35. *See infra* text accompanying notes 58–60.

36. *See* Peter A. Tiersma, *The Textualization of Precedent* 30 (Loyola Law Sch. (Los Angeles) Legal Studies Research, Research Paper No. 2005-6, 2005), *available at* http://ssrn.com/abstract=680901 (explaining that English judges felt bound by "the *decision* in the earlier case, not the *text* of one or more opinions").

37. *Id.*

follow the prior precedent since it might well have been misreported or simply have misunderstood the law.[38] In the United States, due in large part to the development of the single opinion speaking for the Supreme Court as a whole[39] and the relatively early emergence of effective reporting and search systems,[40] opinions increasingly came to be viewed as not merely evidence of the law but as being the law.[41] Within any jurisdiction, then, the rule of law requires a lower court to follow the higher court's pronouncements—although the rigors of such a system are admittedly mitigated by the distinction between holding and dictum and the ability of a court to "distinguish" the binding precedent. It is not surprising, therefore, that it is increasingly common in this country to treat opinions as the operative act of the court.[42] While judgments continue to concern the parties (both in resolving the immediate dispute and affecting future suits under doctrines of preclusion), the rest of us worry not about the judgment but about the law made in the opinion.[43]

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38. Murphy, *supra* note 30, at 1076 ("The major legal thinkers of the common-law tradition of [Madison's] day embraced the declaratory theory of precedent, which limited judicial discretion by requiring courts to treat their earlier opinions as 'evidence' of law. The evidentiary force of precedents creates a presumption that they should be followed. To justify overruling a precedent, a court must overcome this presumption by offering countervailing 'evidence' in the form of an explanation of why the target precedent was unreasonably and seriously mistaken." (footnote omitted)).

39. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 432–33 (1986) ("Chief Justice Marshall broke with the English tradition and adopted the practice of announcing judgments of the Court in a single opinion. At first, these opinions were always delivered by Chief Justice Marshall himself, and were virtually always unanimous. Unanimity was consciously pursued and disagreements were deliberately kept private. Indeed, Marshall delivered a number of opinions which, not only did he not write, but which were contrary to his own judgment and vote at conference." (footnote omitted)).

40. *See generally* Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CAL. L. REV. 1673, 1679–80 (2000) (tracing the development of the West National Reporter and key number system).

41. *See, e.g.*, James F. Spriggs, II, & Thomas G. Hansford, *The U.S. Supreme Court's Incorporation and Interpretation of Precedent*, 36 LAW & SOC'Y REV. 139, 139–40 (2002) (identifying the development of the law in any given case as "not solely, or even mainly, a function of case dispositions," but rather the law is "developed in its majority opinions").

42. *See id.*

43. An extreme example of judges fretting about the legal consequences of opinions is the *dubitante* opinion, a rare but long-established device. *See generally* Jason J. Czarnezki, *The* Dubitante *Opinion*, 39 AKRON L. REV. 1, 2 (2006) ("A *dubitante* . . . opinion indicates that 'the judge doubted a legal point but was unwilling to state that it was wrong.' Said Lon Fuller, '[E]xpressing the epitome of the common law spirit, there is the opinion entered *dubitante*—the judge is unhappy about some aspect of the decision rendered, but cannot quite bring himself to record an open dissent.'" (alteration in original) (footnote omitted)).

When viewed as discrete "pieces" of law, individual building blocks of legal rules, it is easy to see why the status of opinions is of such concern. The dispute between two such distinguished jurists as Judges Arnold and Kozinski, over unpublished opinions was framed in terms of whether the federal judicial function permitted nonprecedential opinions, but it was ultimately about what counted as law in the United States.[44] The ultimate jurisprudential question of "what is law"[45] underlies all of what courts (and other legal actors) do but appears in stark form only occasionally. Recently, it surfaced in the nomination hearing for now-Justice Samuel Alito on the question of whether foreign precedents had any place in American courts.[46] Less dramatically, the question of whether vacated opinions are law remains unresolved, and whether unpublished opinions are law did not reach the Supreme Court (perhaps because the vacation of *Anastasoff* prevented a circuit split).[47]

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44. *See* William R. Mills, *The Shape of the Universe: The Impact of Unpublished Opinions on the Process of Legal Research*, 46 N.Y.L. SCH. L. REV. 429, 439 (2003) (noting that as a consequence of *Anastasoff*, unpublished opinions would have been elevated to the status of "law" in the Eighth Circuit).

45. H.L.A. Hart might have described the issue as a "rule of recognition," one of the secondary rules necessary for a legal system to implement the primary rules that govern primary human conduct. H.L.A. HART, THE CONCEPT OF LAW 94–95 (2d ed. 1994); *see also* Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909, 1914–15 (2004) (exploring the debate over the extent to which nonlegal materials do, or should, influence the law). This Article does not explore that broader question, but patrols only with the borderlands at issue: are vacated opinions "law"? In that sense, this Article is an empirical effort to modestly follow in Professor Schauer's footsteps:

> [M]y project is not a semantic one, and I am not concerned here with defining the word "law." I am instead concerned with understanding a related set of seemingly differentiated (from the rest of society, but, importantly, not much from each other) social institutions—law schools, lawyers, judges, bar associations, law reviews, West Publishing, bar examinations, the Supreme Court, and most trial and appellate courts, to take the most obvious members of the group. To understand what the members of this group hold in common with each other but not with the members of most other social institutions is to try to understand not the meaning of the word "law," and perhaps not even the concept of law, but the practice (in the Wittgensteinian sense) of law as we know it and the institutions of the law as we know them. My inquiry is directed not to the concept of law but to the phenomenon of law.

Id. at 1955–56 (footnotes omitted).

46. *See infra* notes 255–58 and accompanying text (discussing the debate around the use of foreign precedent and Justice Alito's opinion on the matter).

47. Prior to December 1, 2006, with the exception of the Third and D.C. Circuit Courts, all federal courts of appeals limited the citation of unpublished opinions, except in rare circumstances, such as where 1) the cases were related; 2) the unpublished opinion was used to establish res judicata or estoppel; or 3) there was no better precedent available. *See* Lauren K. Robel, *The Myth of The Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 945 (1989). However, with the effective date of December 1, 2006 of FED. R. APP.

But both issues were presaged by the Supreme Court's resolution of another controversy involving when opinions are law. In the mid-1990s, a cottage industry had developed around the question of whether the settlement of a dispute after a judgment was rendered could properly require vacation of that judgment as a condition of the settlement.[48] In *United States Bancorp Mortgage Co. v. Bonner Mall Partnership*, the Court ultimately held that settlement vacatur was normally inappropriate in the federal courts.[49] While *Bonner Mall* has direct implications for the status of vacated opinions, the point here is that the resolution turned on the Court's view of the value of opinions as law, with its concomitant reluctance to allow parties to, in essence, dictate whether law would be made.[50]

On the scholarly front, a related development is the revived concern about the traditional distinction between holding and dictum.[51] The Supreme Court and the federal circuits, without erasing the distinction entirely, have moved away from traditional view that only the holding of a case has precedential power.[52] At least with respect to vertical precedent, there is an increasing tendency to hold inferior courts bound not merely by what the higher court *did* but by what it *said*.[53] Even in the Supreme Court, where the question is horizontal not vertical precedent, there is a tendency to take a broader rather than a

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P. 32.1, the issue of citing to unpublished opinions is moot, as the new rule clearly authorizes citation to unpublished opinions in the federal appellate courts—though giving no guidance regarding the precedential value of unpublished opinions. *See supra* note 102 and accompanying text (discussing the promulgation of Rule 32.1).

48. *See infra* notes 146–54 and accompanying text (discussing the scholarly debate surrounding settlement vacatur).

49. U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 29 (1994); *cf.* Neary v. Regents of Univ. of Cal., 834 P.2d 119 (Cal. 1992) (holding settlement vacatur normally appropriate under California law).

50. *See Bonner Mall*, 513 U.S. at 26 (reasoning that judicial opinions are valuable to the legal community, as a whole, not merely to the parties in interest).

51. *E.g.*, Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 958 (2005) ("There is no denying, however, the importance of understanding—both as a matter of theory and at the level of practice—how to approach such a central task as sorting holding and dicta."); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000 (1994) (defining dicta as statements unnecessary to support a court's opinion, while a holding is the rule plus the rationale used to decide a case).

52. *See, e.g.*, McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 19 (1st Cir. 1991) ("We think that federal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings . . . .").

53. *See* Frederick Schauer, *Opinions as Rules*, 53 U. CHI. L. REV. 682, 683 (1986) (reviewing BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT (1985)) (arguing that what is said, rather than what is held in a Supreme Court opinion, is often more important to lower courts).

narrower view of holding, thus expanding the notion of what counts as "law."[54]

In short, this Article follows the line of scholarship that tries to identify what counts as law in the federal system, but examines a facet of the question that has received little attention to date: Is a vacated opinion law, and, if so, what does that mean? In fact, contrary to *Newdow* but consistent with Judge Kozinski's felt need to put a stake through the heart of *Anastasoff* (vacated though it might have been), vacated opinions continue to exert a largely unrecognized influence in our legal system, influence that sometimes seems to operate as if it were binding precedent. Mark Twain is reputed to have said, "Reports of my death have been greatly exaggerated,"[55] and much the same may be true of many vacated opinions.

The claim is not that vacated opinions are necessarily binding precedent; like reversals, such opinions sometimes retain authority and sometimes not. This will be surprising to many lawyers and scholars, and appreciation of the fact may require revision of research habits and citation practices. Further, explicit recognition of this might affect the development of the law by, in effect, salvaging some precedents that would in the past have sunk under the weight of the word "vacated."[56] Perhaps

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54. *But see* Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 996 (2006) ("We acknowledge that statements in both the majority and the dissenting opinions in *Seminole Tribe of Fla. v. Florida* reflected an assumption that the holding in that case would apply to the Bankruptcy Clause. Careful study and reflection have convinced us, however, that that assumption was erroneous. For the reasons stated by Chief Justice Marshall in *Cohens v. Virginia*, we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated." (citations omitted)).

55. Although this is the usual quotation attributed to Twain, it appears that what Twain actually wrote was: "The report of my death was an exaggeration." Mark Twain Quotes, The Quotations Page, http://www.quotationspage.com/quotes/Mark_Twain/91 (last visited Nov. 11, 2006). The quote was originally written in a note by Twain to an unknown recipient responding to rumors of his death. *See* twainquotes.com, Mark Twain Quotations—Death, http://www.twainquotes.com/Death.html (last visited Nov. 11, 2006) (showing a copy of the note written by Twain in which the quotation appeared). It was reprinted in the New York Journal on June 2, 1897. *See* Mark Twain Quotes, *supra*. Twain may have been particularly attuned to premature reports of death in light of the "resurrection" described in his *The Adventures of Tom Sawyer*. MARK TWAIN, THE ADVENTURES OF TOM SAWYER 173–77 (Am. Publ'g Co. 1903) (1875).

56. This is the converse of the view of precedent described in Roger M. Milgrim, Sears *to* Lear *to* Painton*: Of Whales and Other Matters*, 46 N.Y.U. L. REV. 17, 17 (1971) (Milgrim analogized certain precedents to dead whales whose floating carcasses attract sea birds and thereby misled mariners into believing there are "*shoals, rocks, and breakers hereabouts beware!*" (quoting HERMAN MELVILLE, MOBY DICK 284 (Dodd, Mead & Co. 1942) (1851)). In the situations Melville and Milgrim describe, travelers are falsely warned away from a safe course. *See* Milgrim, *supra*, at 19–20 (praising courts for refusing "to be lured off course" by broad dicta in an earlier decision). Vacated opinions that nevertheless retain precedential value may be more analogous to shoals beneath the

more importantly, examining the vitality of vacated opinions provides a lens through which to examine some of the other practices that are developing in developing the system of federal lawmaking known as precedent.

This Article reaches the following conclusions:

- Numerous courts treat the vacation of a judgment as not necessarily casting any doubt on the vitality of the underlying precedent, which has created a kind of "shadow" precedent system.
- While courts are unwilling to formally accord vacated opinions binding power, such opinions do exercise persuasive power which in some cases is akin to bindingness and certainly stronger than the abstract strength of the arguments in the opinion.
- The difficulties of ascertaining whether a judgment was vacated "on other grounds" rather than on the grounds at issue are real but of the same nature as ascertaining the meaning of a precedent in general and therefore provide no additional basis for treating vacated opinions with suspicion.
- As the holding/dictum distinction has weakened and lower courts increasingly tend to follow what a superior court has said, not merely what it has held, vacated opinions have concomitantly tended to exercise more power.
- The elevation of dictum towards quasi-holding status, coupled with the elevation of vacated opinions to persuasive power has tended towards a kind of federal "common law" that increasingly mirrors the legislative approach. Rather than viewing precedents as a kind of connect-the-dots series of data points focused on the holding of the prior courts, superior courts (including the Supreme Court) are increasingly functionally making law far beyond the contours of the cases before them.[57]

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waterline that threaten to rip the bottom from legal cases.

57. This might be compared to the Supreme Court's use of its "supervisory power" over lower courts to achieve results different from what the "law" might require. *See generally* Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1434 (1984) (arguing that courts have interpreted their supervisory powers broadly "to promote what courts identify as the ends of justice and good public policy"); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 814 (2001) (tracing the roots of supervisory power to

To develop these points, this Article proceeds as follows. Part I, *Judgments & Vacatur*, situates vacatur in terms of the options available to an appellate court when reviewing a judgment below. Part II, *Opinions & Vacatur*, then turns to the increasingly blurred distinction between opinions and judgments as a preliminary to exploring the status of opinions whose underlying judgments have been vacated. Part III, *The Supreme Court on Vacation*, examines the extent to which the Supreme Court has resolved the precedential status of vacated opinions, concluding that such opinions are, as a matter of formal doctrine, not binding precedents. Part IV, *Binding & Persuasive Precedents*, then briefly summarizes the evolving notion of precedents, including renewed interest in the ancient holding/dictum distinction. Part V, *Vacated on Other Grounds*, seeks to determine the extent to which vacated opinions continue to influence the law, whether that influence is viewed as binding or merely persuasive. Part V, *What Does It Mean to Be Persuasive?*, then probes more deeply into an unanalyzed area, the meaning of "persuasive" in our law of precedent. Finally, Part VII confronts the eternal realist's question: *So What?*

II. JUDGMENTS & VACATUR

Although our citation system seems to suggest that what is being affirmed, reversed, or vacated is the opinion of the court being cited, what is formally at stake is the lower court's judgment, not its opinion.[58] "The operative legal act performed by a court is the entry of a judgment; an opinion is simply an explanation of reasons for that judgment."[59] That is, the judgment is the action the court takes to resolve the case before it; the opinion explains and justifies the court's action (and in the

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the King's Bench, which had both inherent authority and authority derived from prerogative writs codified by Parliament).

58. *See generally* Hartnett, *supra* note 34, at 126 ("Courts (or at least federal courts) do not sit to pronounce the law, but rather to decide cases and controversies.").

59. *Id.* Professor Hartnett continues:

> As valuable as opinions may be to legitimize judgments, to give guidance to judges in the future, or to discipline a judge's thinking, they are not necessary to the judicial function of deciding cases and controversies. It is the judgment, not the opinion, that "settle[s] authoritatively what is to be done;" and the only thing that the judgment settles authoritatively is what is to be done about the particular case or controversy for which the judgment was made.

Id. at 126–27 (footnotes omitted). *But see* Tiersma, *supra* note 36, at 62–63 (noting the tendency of courts to frame their opinions in terms of reversing the "holding" or part of the holding below).

process gives rise to what we call precedents) but is not central to dispute resolution.[60]

With respect to this core function of dealing with judgments, an appellate court[61] has very limited options. Whether the result is indicated by substantive or procedural law, the reviewing court has only five options: dismiss the appeal, which effectively affirms the judgment below; explicitly affirm that judgment; modify the judgment; reverse that judgment; or vacate it.[62] In choosing among these alternatives, the court must consider the immediate effects on the parties and the possible preclusive effects of the ultimate judgment rendered. And, of course, it must consider the precedential effects of its action. An affirmance will have significant effects on all three axes; but the decision to affirm itself normally justifies the immediate and preclusive effects, and precedential effects can be negated, as by issuing a not-for-publication opinion, or minimized, as by a summary affirmance.[63]

Matters become more interesting with the choice between vacating and reversing. Both methods nullify the judgment below, which raises the question as to why there are two methods of negation. There does not seem to be a definitive answer.[64] In

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60. *See infra* notes 88–91 and accompanying text.

61. For purposes of this discussion, "appeal" includes both appeals as of right and certiorari.

62. *See* 28 U.S.C. § 2106 (2000) ("The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review . . . ."). "If a court of appeals does not have appellate jurisdiction over the appeal, the appeal should be dismissed." Jon O. Newman, *Decretal Language: Last Words of an Appellate Opinion*, 70 BROOK. L. REV. 727, 732 (2005). A dismissal is also appropriate if an appellate court with discretionary jurisdiction reconsiders its decision to hear an appeal. *See, e.g.*, Nike, Inc. v. Kasky, 539 U.S. 654, 655 (2003) (per curiam) (dismissing a petition for writ of certiorari as "improvidently granted").

63. *See* Ward v. Rock Against Racism, 491 U.S. 781, 798 n.6 (1989) (noting that "'[a] summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment'" (quoting Anderson v. Celebrezze, 460 U.S. 780, 785 n.5 (1983))). However, under the rules of several circuits, it appears that a summary affirmance has no precedential value at all. *See* In Design v. K-Mart Apparel Corp., 13 F.3d 559, 567 (2d Cir. 1994) (explaining that the district court's reliance on a case in which the Second Circuit summarily affirmed a district court decision without opinion was misplaced (citing 2D CIR. R. 0.23)); *see also* Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 764 n.21 (1995) (reporting that a number of circuits have rules that summary dispositions are not precedential). *See generally* Mitu Gulati & C.M.A. McCauliff, *On* Not *Making Law*, 61 LAW & CONTEMP. PROBS. 157, 158–59 (1998) (exploring the use of dispositions without comment).

64. *See* Newman, *supra* note 62, at 728–29 (reporting a lack of uniformity among judges regarding when to vacate or reverse).

some cases, vacation is used to indicate less disapproval or finality of the subject judgment.[65] This seems to be the purpose of vacating the judgment issued by a panel when a circuit takes up the question en banc: while there may be reason to suspect that the panel's decision will ultimately be overturned on the rehearing, the panel's opinion is not disapproved because the full court has not yet reheard the case.[66] Similarly, the Supreme Court may vacate a decision not because it necessarily disapproves of the judgment below but to offer the court below the opportunity to reconsider the matter in light of some recent development, typically an intervening decision of the Court itself.[67]

Beyond situations where the act of vacation seems designed mainly to permit the court to punt on the ultimate validity of the judgment, the choice between vacation and reversal is often not clear. One Second Circuit judge reports disagreement among judges over when "vacated" should be used as opposed to "reversed": while there is "virtual unanimity" that reversal is appropriate when "the appellate ruling *orders the complete opposite* of what the district court has ruled," some judges would limit it to "complete opposite" situations and use "vacated" for any other disposition less than affirmed.[68] Other judges would reverse when the circuit rules in favor of the appellant on any point, even if the result is not the complete opposite of the district court judgment.[69]

The Supreme Court has offered guidance only in one situation, the case moot on appeal. While a judgment against a defendant cannot be affirmed if the case has become moot,[70] a judgment dismissing a moot complaint seemingly could be

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65. *See* Kelso v. U.S. Dep't of State, 13 F. Supp. 2d 12, 18 (D.D.C. 1998) ("Although the word reverse shares vacate's meanings of to annul and to set aside, it has an additional, more extensive definition: 'To reverse a judgment means to overthrow it by contrary decision, make it void, undo or annul it *for error*.'" (citations omitted)).

66. Vacating the panel's judgment will also revive the district court judgment, at least for the moment. This has the potential for preclusion because an unreviewed judgment is generally preclusive. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 13 cmt. f (1982) ("The better view is that a judgment otherwise final remains so [for purposes of res judicata] despite the taking of an appeal . . . .").

67. *See infra* notes 106–07.

68. Newman, *supra* note 62, at 728–29.

69. *Id.* at 729. Judge Newman finds no case law providing much guidance on the issue, but notes that the Supreme Court has often used "reversed" even though the disposition did not direct judgment for the appellant. *Id.* at 729–30.

70. *See* Mo., Kan. & Tex. Ry. Co. v. Ferris, 179 U.S. 602, 606 (1900) ("Moot questions require no answer.").

affirmed.[71] Looking at the case purely in terms of the matter at issue, affirmance (and, a fortiori, dismissal of the appeal as moot) seems appropriate, especially because affirmance is permissible on any ground available.[72] Indeed, dismissal seems to have been the Supreme Court's practice into the last century.[73]

However, leaving the judgment intact by either of these processes risks downstream consequences in terms of preclusion,[74] and in the early 1900s the Supreme Court began to vacate or reverse judgments rather than simply dismiss appeals. This practice was summarized and applied to the circuit courts in *United States v. Munsingwear, Inc.*,[75] where the Court wrote:

> The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. That was said in *Duke Power Co. v. Greenwood County* to be "the duty of the appellate court." That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure

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71. *See, e.g.*, Spencer v. Kemna, 523 U.S. 1, 6, 18 (1998) (affirming the court of appeals' affirmance of the district court's dismissal of the petitioner's claim as moot).

72. *See, e.g.*, Dupre v. Charter Behavioral Health Sys. of Lafayette, Inc., 242 F.3d 610, 616–17 (5th Cir. 2001) ("We may affirm a grant of summary judgment if there is any adequate basis in the record to do so on a ground properly raised below, regardless of the correctness of the trial court's ruling."); EEOC v. Aramark Corp., 208 F.3d 266, 268 (D.C. Cir. 2000) ("[B]ecause we review the district court's judgment, not its reasoning, we may affirm on any ground properly raised [even if the district court did not rely on it].").

73. Comment, *Disposition of Moot Cases by the United States Supreme Court*, 23 U. CHI. L. REV. 77, 79 (1956) (reporting that early in the twentieth century the Court "changed the general manner of disposition of moot appeals from federal and state decisions from dismissal of the appeal to a disposition which eliminated the entire proceeding").

74. Imagine a dispute over a long-term supply contract which has become moot by the time appeal is taken in terms of the matter at issue, but which might possibly recur in the future. This possibility is a basis for not declaring the appeal moot in the first place under the "'capable of repetition, yet evading review'" doctrine. Roe v. Wade, 410 U.S. 113, 125 (1973) (quoting S. Pac. Terminal Co. v. ICC, 219 U.S 498, 515 (1911)). However, the court may see no need to resolve a now-moot case while at the same time wishing to avoid having the rendered judgment exercise preclusive effects in the future. While the law of preclusion could be tailored to this possibility, rather than framing the judgment to avoid preclusion, it is safer for courts, especially if they are not the Supreme Court, to avoid at the outset giving a judgment more preclusive effect than necessary rather than hope that the law of preclusion will be appropriately applied when the time comes. *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1982) ("[R]elitigation of the issue in a subsequent action between the parties is not precluded [when]: (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action" because, for example, the dispute has been mooted).

75. United States v. Munsingwear, 340 U.S. 36 (1950).

> is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary.[76]

Munsingwear, however, seemed to limit the duty to situations where the losing party sought relief from the judgment.[77] Its thrust is that a decree should be nullified where failure to do so would, in effect, impose on the losing party an adverse judgment that it had no opportunity to appeal.[78] Thus, *Munsingwear* spoke of overturning a judgment that had become moot prior to review as a result of "happenstance."[79] Because the government, as the losing party below, failed to protect its rights by seeking reversal or vacatur, the judgment should be given effect.[80] This was made even more explicit in *Karcher v. May*,[81] where the losing party had abandoned efforts to overturn a decision after judgment was entered.[82]

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76. *Id.* at 39–40 (citation omitted) (quoting Duke Power Co. v. Greenwood County, 299 U.S. 259, 267 (1936)). While *Munsingwear* quoted *Greenwood County* for its language about "the duty of the appellate court to set aside the decree below," *Greenwood County*, 299 U.S. at 267, *Greenwood County* was a much more limited decision. In that case, the circuit court had remanded for more findings on changed circumstances without disturbing the judgment below. *Id.* at 262. In such circumstances, "the appropriate action of the appellate court is to vacate the decree which has been entered and revest the court below with jurisdiction of the cause to the end that issues may be properly framed and the retrial had." *Id.* at 268.

77. It may also have limited the duty to cases in the federal system. Because of the lessened case-or-controversy constraints on most state courts, the fact that a case becomes moot before the Supreme Court does not mean that the state court system cannot render a binding judgment. *See infra* note 140.

78. For that reason, there has been some question in the circuit courts about vacatur's appropriateness depending on exactly when during the appeals process the case became moot. *See, e.g.*, Clarke v. United States, 915 F.2d 699, 700, 706–10 (D.C. Cir. 1990) (en banc) (holding 7–4 that when an issue became moot by the time it reached the en banc court but had not been moot when the panel affirmed the district court ruling, the appropriate action was to vacate the panel opinion and remand the case to the district court for vacation as moot). The dissenters in *Clarke* contended that "a court of appeals has no duty to vacate *its own decision* once *postjudgment* contingencies arguably moot the case." *Id.* at 710 (Edwards, J., dissenting).

79. *Munsingwear*, 340 U.S. at 40.

80. *Id.* at 40–41.

81. Karcher v. May, 484 U.S. 72 (1987).

82. In *Karcher*, the president of the New Jersey senate and the speaker of the New Jersey house, acting in their official capacities, defended a "moment of silence" statute when the named defendants—the New Jersey Department of Education, its commissioner, and two local school boards—and the state attorney general refused to do so because they believed the statute to be unconstitutional. *Id.* at 74–75. The district court struck down the moment of silence, and the Third Circuit affirmed. *Id.* at 75–76. Before the Supreme Court heard the case, the plaintiffs lost their positions as presiding officers of the legislature in an intervening election, and their successors withdrew the appeal. *Id.* at 76. The Court held, first, that the named plaintiffs lacked authority to pursue the case on appeal, and, second, that the judgment below should not be vacated:

Thus, *Munsingwear* has traditionally been viewed "as a directive to purge mooted judgments of their preclusive effects" when a party seeks such relief.[83] Where, however, a party does not challenge the judgment, vacatur is normally not appropriate. Thus, as we will see in more detail shortly,[84] *United States Bancorp Mortgage Co. v. Bonner Mall Partnership* held that "[w]here mootness results from settlement, however, the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur."[85]

In sum, a judgment should not be nullified merely because it has become moot on appeal. Such a judgment should remain operative unless a party seeks to overturn it, in which case the courts have a duty to vacate or reverse.[86] While *Munsingwear* seemed largely indifferent to whether the judgment should be vacated or reversed so long as it was nullified, the practice since that opinion has been to vacate judgments when the case has become moot on appeal and a party so requests.[87] Reversing the

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"This controversy did not become moot due to circumstances unattributable to any of the parties. The controversy ended when the losing party—the New Jersey Legislature—declined to pursue its appeal. Accordingly, the *Munsingwear* procedure is inapplicable to this case." *Id.* at 81, 83.

83. Arthur F. Greenbaum, *Mootness on Appeal in Federal Courts: A Reexamination of the Consequences of Appellate Disposition*, 17 U.C. DAVIS L. REV. 7, 21 (1983). Professor Greenbaum identifies two principal justifications for preferring nullification of judgments when appellate review is pretermitted: (1) "appellate review assures that a judgment has a sufficient probability of correctness to justify its continued use," and (2) the "desire to honor the legislative scheme which affords the opportunity for appellate review." *Id.* at 15–16. Nevertheless, largely because of the simplicity of such a rule, he defends the *Munsingwear* approach even to situations where there can be no preclusive effect. *Id.* at 25–33 (elaborating on the difficulty of differentiating judgments that will have preclusive effect and those that will not and arguing that valuable judicial resources would be conserved if the *Munsingwear* doctrine were simply applied across the board, without regard to preclusive effects). He questions, however, whether *Munsingwear* should be universally applied when a case becomes moot at the Supreme Court. *Id.* at 44–47. Because review by the circuit court should be sufficient to ensure correctness, applying *Munsingwear* at the Supreme Court level would be justified only if the loss of right to a higher level of appellate review was problematic in terms of the applicable statutory scheme. *See id.*

84. *See infra* notes 146–70 and accompanying text.

85. U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 25 (1994). The Court did recognize an "exceptional circumstances" exception to its rule, but stressed that "exceptional circumstances do not include the mere fact that the settlement agreement provides for vacatur—which neither diminishes the voluntariness of the abandonment of review nor alters any of the policy considerations . . . ." *Id.* at 29.

86. *See* United States v. Munsingwear, Inc., 340 U.S. 36, 39–40 (1950) (determining that appellate courts have a duty to vacate or reverse the judgment of the lower court if the case has become moot so long as the party seeking vacation or reversal properly "avail[s] itself of the remedy it ha[s] to preserve its rights").

87. *See, e.g.*, Taylor v. FDIC, 132 F.3d 753, 767 (D.C. Cir. 1997) ("[A]fter finding no

judgment is rare, perhaps because of the reasons suggested at the outset—vacatur does not suggest as strongly as might reversal that the judgment was incorrect when issued.

III. OPINIONS & VACATUR

As we have seen, while the judgment is the action the court takes to resolve the case before it, the opinion explains and justifies the court's action[88] and in the process gives rise to what we call precedents.[89] An opinion cannot be central to dispute resolution because there is no requirement that an appellate court issue an opinion, and frequently such courts decide cases without any opinion.[90] While the issuance of opinions is such an engrained practice that many assume it is a fundamental part of the judicial process in a common law system, courts frequently separate the dispute resolution function (ultimately reflected in the judgment) and the lawmaking function (reflected in an opinion).[91] This is manifested when appellate courts decide cases without opinion or withdraw opinions without disturbing the underlying judgment,[92] and, perhaps most dramatically, in the

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standing, we may not affirm the district court's grant of summary judgment but must vacate and remand with instructions to dismiss.").

88. *See generally* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 635, 654 (1995) (explaining that the process of giving reasons necessarily requires judges to commit to principles broader than the outcome of the particular case—it is an exercise in generalization that has implications for resolving future questions that are often unpredictable when the generalization is made).

89. *See infra* Part V (discussing in more detail that precedents are "law" in the sense that they bind future courts). While it is generally accepted that judgments also bind the executive branch, it is less clear that precedents do. *See* Hartnett, *supra* note 34, at 148–49 (arguing that judgments—as opposed to opinions—are the operative judicial actions); *see also* Merrill, *supra* note 28, at 43–45 (outlining the scholarly arguments for and against judicial opinions having binding effect on the executive). *But see* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221–22 (1994) (contending forcefully that the executive has the "power to interpret the law . . . *independently* of the interpretations of other branches" and may even "refuse to execute (or, where directed specifically to him, refuse to obey) judicial decrees that he concludes are contrary to law"). Some have even questioned whether Supreme Court precedents on matters of federal law bind state courts, although the Supreme Court's ability to take the case and reverse provides an impetus towards compliance. *See* Tom Parker, *Alabama Justices Surrender to Judicial Activism*, BIRMINGHAM NEWS, Jan. 1, 2005, at 4B ("State supreme courts may decline to follow bad U.S. Supreme Court precedents because those decisions bind only the parties to the particular case.").

90. In contrast, the Federal Rules of Civil Procedure require federal district courts to explain their decisions when they sit as the trier of fact, at least to the extent that findings of fact and conclusions of law are mandated. FED. R. CIV. P. 52(a).

91. *See infra* note 95.

92. While an opinion is usually withdrawn in order to issue a substitute opinion, a new opinion is not always forthcoming. In some cases, the terms "withdrawn" and

widespread practice (at issue in *Hart* and *Anastasoff*) of the federal circuits in issuing "not for publication" opinions.[93]

Not-for-publication opinions, often called "unpublished opinions" (a clear but persistent misnomer given their availability on the electronic databases and now in printed form in the Federal Appendix),[94] constitute some 80% of circuit decisions.[95] Although recent developments have changed the landscape and the circuits differed on the details, a typical circuit rule provided that such an opinion may not be cited to the circuit

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"vacated" are used interchangeably. *Compare* Padilla v. Hanft, 432 F.3d 582, 583 (4th Cir. 2005) (issuing an order denying the government's motion to "withdraw" the opinion in Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005)), *with id.* at 588 (Traxler, J., concurring) (describing the motion as one to "vacate" that opinion). In the state systems, a scattering of cases describe the court's action as vacating an opinion rather than a judgment. *See, e.g.*, Denny v. Guyton, 57 S.W.2d 415, 417 (Mo. 1932) (finding that it was proper to vacate an opinion upon a motion to reconsider).

93. Questions about the constitutionality, policy, and practical implications of such opinions have generated an enormous amount of scholarly attention. *E.g.*, Jessie Allen, *Just Words? The Effects of No-Citation Rules in Federal Courts of Appeals*, 29 VT. L. REV. 555, 556, 560 (2005); Danny J. Boggs & Brian P. Brooks, *Unpublished Opinions & the Nature of Precedent*, 4 GREEN BAG 2D 17, 17–18 (2000); Jeffrey O. Cooper, *Citability and the Nature of Precedent in the Courts of Appeals: A Response to Dean Robel*, 35 IND. L. REV. 423, 423–25 (2002); Lawrence J. Fox, *Those Unpublished Opinions: An Appropriate Expedience or an Abdication of Responsibility?*, 32 HOFSTRA L. REV. 1215, 1215–19 (2004); Thomas R. Lee & Lance S. Lehnhof, *The* Anastasoff *Case and the Judicial Power to "Unpublish" Opinions*, 77 NOTRE DAME L. REV. 135, 140 (2001); Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119, 119–20 (1994); Murphy, *supra* note 30, at 1077–78; Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235, 1235–36, 1239–40 (2004); Polly J. Price, *Precedent and Judicial Power after the Founding*, 42 B.C. L. REV. 81, 81, 83–85 (2000); Edwin R. Render, *On Unpublished Opinions*, 73 KY. L.J. 145, 145–46 (1984); Robel, *supra* note 47, at 940–41; Lauren Robel, *The Practice of Precedent:* Anastasoff*, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399, 400–01 (2002); Amy E. Sloan, *A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule*, 79 IND. L.J. 711, 712, 715 (2004); J. Thomas Sullivan, *Unpublished Opinions and No Citation Rules in the Trial Courts*, 47 ARIZ. L. REV. 419, 419–21 (2005); Carl Tobias, Anastasoff*, Unpublished Opinions, and Federal Appellate Justice*, 25 HARV. J.L. & PUB. POL'Y 1171, 1171–72 (2002).

94. The *Federal Appendix*, which began publication in 2001, "contains cases that have not been selected for publication in the Federal Reporter Third Series." 1 F. App'x cover page (2001). Because these cases are headnoted and key-numbered, they are as easily searchable as those in the *Federal Reporter*. *See* Brian P. Brooks, *Publishing Unpublished Opinions: A Review of the Federal Appendix*, 5 GREEN BAG 2D 259, 259–60 (2002) ("As of late 2001, with the introduction of the *Federal Appendix*, the concept of the 'unpublished opinion' is no longer a legal fiction—it is *fiction*, pure and simple. Unpublished opinions are now published in every relevant sense. They are printed in bound volumes, are available on law library shelves, come complete with West Key Numbers, and even have their own citation format . . . .").

95. Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 757–58 (2003) ("[T]he number of non-precedential opinions currently outnumber by far the ones that count as authority, reaching a four-to-one ratio in the federal circuits as a whole.").

in a subsequent case except for law of the case or preclusion purposes.[96] That is, neither a subsequent panel of the circuit nor a district court is bound by the action of the panel deciding a case with such an opinion.[97] Not-for-publication is currently justified[98] in part by the claim that no meaningful law is made in such opinions because the case is a cut-and-dried application of established law to facts.[99] A second justification is in considerable tension with the first—such opinions should not be viewed as law, even when they announce new principles, because they do not entail the careful consideration that is appropriate for the law-giving function of the court.[100] Whatever the persuasiveness of such justifications, the not-for-publication phenomenon

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96. *See* Melissa M. Serfass & Jessie L. Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions*, 3 J. APP. PRAC. & PROCESS 251, 253–57 tbl.1 (2001) (listing the court rules on publication and citation of unpublished opinions for each of the federal circuit courts in table format).

97. Some circuit court rules had an escape hatch permitting a litigant move the court for permission to cite an unpublished opinion as persuasive authority, and some courts only allowed this if no applicable reported case exists. *See id.* And at least in one state, there is apparently some jockeying as to which opinions are approved for publication. *See* Henry Gottlieb, *Ruling Expands CEPA Liability for Retaliatory Action*, 180 N.J. L.J. 237 (Apr. 25, 2005) (reporting a lobbying effort to have an Appellate Division opinion published to counteract another published decision leaning the other way). New Jersey, however, has one fairly strange rule: unpublished opinions can be cited *to* courts (under not-very-restrictive conditions) but may not be cited *by* courts. N.J. CT. R. 1:36-3 (2006). Apparently, judges can find such opinions persuasive, so long as they don't tell anyone.

98. The original impetus was largely cost-driven. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 11 (1964) (recommending selective publication as a method of dealing with "the ever increasing practical difficulty and economic cost of establishing and maintaining accessible private and public law library facilities"). The digital age has rendered largely obsolete most concerns about preserving and finding precedents.

99. Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 190 (1999) ("[U]npublished decisions . . . tend not to include extensive renditions of the facts or exhaustive discussions of the law. Unpublished decisions tend to involve straightforward points of law—if they did not, they would be published. These types of cases are fact-driven. They involve settled law and variations on the facts. I give the facts to the extent necessary and then state the law."); *see also* Douglas A. Berman & Jeffrey O. Cooper, *In Defense of Less Precedential Opinions: A Reply to Chief Judge Martin*, 60 OHIO ST. L.J. 2025, 2026 (1999) (questioning "Chief Judge Martin's ultimate conclusion that, for unpublished opinions to play their proper role, those opinions must lack any precedential value and must never be cited by litigants").

100. *See* Sheree L. K. Nitta, Note, *The Price of Precedent:* Anastasoff v. United States, 23 U. HAW. L. REV. 795, 805 (2001) (quoting a state court judge as saying, "Somehow there has to be a system where you can decide a case without all the difficulty of a published opinion. Memo opinions are nice because you don't have to make sure that all your i's are dotted and t's are crossed"). Perhaps hidden in such statements is judicial concern about the ramifications of bad lawyering. As the case is presented to the court, the resolution might be obvious; a more thoughtful presentation, however, might suggest an opposite or at least different ruling.

established that courts feel they can decide cases without making law. Further, Judge Kozinski's opinion in *Hart* seems to have laid to rest any constitutional concerns about such a practice.[101] Ironically, however, Judge Arnold seems to have posthumously made some gains in the war even if he lost this battle: the Federal Rules of Appellate Procedure have just been amended to add Rule 32.1, which allows citation of such opinions in all circuits, although it does not define their precedential status.[102]

If the federal judicial system can have judgments without opinions, can it have an opinion without a judgment? At least on one level, the answer is no: Article III requires a case and controversy to be resolved by a judicial act, the judgment.[103] The federal courts may not issue advisory opinions, that is, opinions that are not in support of a judgment resolving a case or controversy before the court.[104] But in the case of either a vacated

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101. Hart v. Massanari, 266 F.3d 1155, 1180 (9th Cir. 2001) ("[W]e are unable to find within Article III of the Constitution a requirement that all case dispositions and orders issued by appellate courts be binding authority.").

102. FED. R. APP. P. Ct.R-328 (rules effective Dec. 1, 2006) (reproducing the transmittal letter from Justice Roberts to Mr. J. Dennis Hastert that accompanies the rules "adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code"), *available in* 126 S. Ct. No. 14 Ct.R-328. The Supreme Court has approved this amendment, which took effect when not disapproved by Congress by December 1, 2006. *Id.* at Ct.R-327, Ct.R-330; *see also* 28 U.S.C. § 2074(a) (2000) ("The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule . . . is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is transmitted unless otherwise provided by law."). It applies only to opinions issued after Jan. 1, 2007. Order Adopting Amendments to Federal Rules of Appellate Procedure, 126 S. Ct. No. 14 at Ct.R-332. *See generally* Niketh Velamoor, Recent Development, *Proposed Federal Rule of Appellate Procedure 32.1 to Require that Circuits Allow Citation to Unpublished Opinions*, 41 HARV. J. ON LEGIS. 561, 562 (2004). Thus, circuit court rules continue to govern most opinions, although one might anticipate amendments to those rules in light of the new regime.

103. *See supra* notes 58–60.

104. *See* Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 895–96 (2005). This doctrine becomes pivotal when the Supreme Court considers whether it lacks jurisdiction to hear an appeal from a state court because the judgment below rests on an adequate state ground which is independent of the federal question. While the general principle that the Court cannot hear such cases is well-established because of the ban on advisory opinions, the Court has employed varying approaches when considering a judgment below to be state-law based. When the Court decided the now-governing case of *Michigan v. Long*, however, it gave decisive effect to the supporting state court opinion rather than conducting a more intrusive inquiry into state law:

> Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need

judgment or a reversed judgment, the supporting opinion was rendered in the course of deciding a case or controversy. The opinion was not in any sense advisory when it was issued, although the subsequent nullification might (or might not) suggest that it was incorrect when handed down.

This seems evident in the case of a reversed judgment. A reversal almost always means error by the lower court, but not necessarily error on every aspect of that court's opinion. Suppose a circuit court affirms judgment for plaintiff, in the process deciding Point 1 and Point 2, both points being necessary to the decision. If the Supreme Court's reversal is on Point 1, it will not need to address, much less decide, Point 2.[105] There is certainly no reason to infer approval of Point 2 merely from the fact that reversal was warranted on Point 1, but neither is there reason to infer disapproval.

Much the same is true with a vacated judgment. Judgments may be vacated by either the entering court itself or by a higher court, and a judgment may in either instance be vacated for reasons that cast its premises into doubt. The most obvious example of this is when the Supreme Court renders an opinion in one case and then vacates one or more other circuit court judgments with express instructions to the issuing court to reconsider the matter in light of the guidance the Court has now provided.[106] The lower court is free to reaffirm its prior judgment,

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> only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

Michigan v. Long, 463 U.S. 1032, 1040–41 (1983). *But see* RICHARD H. FALLON, JR., DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 511 (5th ed. 2003) (arguing that vacating the judgment of a state court that is ambiguous as to whether it is predicated on state or federal grounds and remanding for clarification is the preferable solution for ambiguity because it avoids unnecessary constitutional decisions while respecting the independence of state courts on matters of state law).

105. *See, e.g.*, Pierce County v. Guillen, 537 U.S. 129, 148 n.10 (2003) (reversing the Washington Supreme Court on the first issue on which the Court granted certiorari and then stating: "in light of our disposition on this issue, we need not address the second question on which we granted certiorari"). If the Supreme Court had addressed Point 2, even if not necessary to its decision and therefore dictum, it is likely that the Court's opinion would be more influential than the circuit court's opinion. *See infra* notes 193–96.

106. *See, e.g.*, KAPL, Inc. v. Meacham, 125 S. Ct. 1731, 1731 (2005) ("Judgment vacated and case remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Smith v. City of Jackson*, 544 U.S. ___, 125 S. Ct. 1536, . . . (2005)."). *Smith* approved a modified version of the disparate impact theory in Age Discrimination in Employment Act (ADEA) cases, *Smith v. City of Jackson*, 125 S. Ct. 1536, 1540–41, 1544–46 (2005), and the Second Circuit's judgment in *Meacham*, which had been handed down before *Smith* was decided, had relied on a more traditional disparate impact analysis, *Meacham v. Knolls Atomic Power Lab.*, 381 F.3d 56, 71–76 (2d

but the original opinion should be re-rationalized in light of the Supreme Court's intervening precedent.[107] Similarly, a circuit court might vacate a panel decision pending en banc reconsideration.[108] Even if this does not necessarily signal that a majority of the court disapproves of the panel's opinion, it certainly raises that possibility, thus rendering the panel opinion suspect.[109] Indeed, the Ninth Circuit has formally recognized that with standard language in orders for rehearing en banc, providing "The three-judge panel opinion in [_____] shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court."[110] Such language generally aligns the status of a vacated opinion with a not-for-publication opinion.

However, such language is a relatively recent development in the Ninth Circuit and is not found in other circuits.[111] It does not follow, therefore, that an opinion supporting a vacated judgment is always suspect; further, like reversals, not every part of the vacated opinion would be suspect as a matter of logic even if some core issues (for example, the one triggering rehearing en banc) were. Finally, as with a reversed opinion, the en banc opinion may resolve the appeal on Point 1 and never address Point 2.

This leads to four objections to placing any reliance on a vacated or reversed opinion.[112] One argument is simply that,

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Cir. 2004). *See generally* Charles A. Sullivan, *Disparate Impact: Looking Past the* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911, 912–13 (2006) (exploring disparate impact analysis).

107. *See, e.g.*, Kukje Hwajae Ins. Co. v. M/V Hyundai Liberty, 408 F.3d 1250, 1252 (9th Cir. 2005) (affirming the court's original judgment after it was vacated by the Supreme Court for consideration in light of another case).

108. *See, e.g.*, Coast Fed. Bank, FSB v. United States, 320 F.3d 1338, 1339 (Fed. Cir. 2003) (granting a petition for rehearing en banc and vacating the original panel opinion).

109. *See* Kevin M. Scott, *Understanding Judicial Hierarchy: Reversals and the Behavior of Intermediate Appellate Judges*, 40 LAW & SOC'Y REV. 163, 184 (2006) (hypothesizing that, at least in some circuits, en banc review "may serve to correct errors made by panels that diverge from the circuit mean").

110. *E.g.*, United States v. Navarro-Vargas, 382 F.3d 920, 920 (9th Cir. 2004). This sentence is relatively common in the Ninth Circuit, first appearing in *Schell v. Witek*, 197 F.3d 1035 (9th Cir. 1999), and having since appeared in more than 100 orders, based on a Lexis search conducted on August 10, 2005.

111. *See, e.g.*, Bankwest, Inc. v. Baker, 433 F.3d 1344, 1345 (11th Cir. 2005) ("It is ordered that the above cause shall be reheard by this court en banc. The previous panel's opinion is hereby vacated.").

112. Before electronic databases, reliance on vacated opinions faced an even more fundamental obstacle: they were often removed from the final bound volume of reporters. Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589, 630 n.210 (1991) (noting that vacated opinions may actually disappear from the reports—they will not be bound in

because the point under consideration has not been given the full measure of appellate review, it should not function as precedent. This consideration has some bite when it comes to preclusion, especially for judgments that have been denied even one level of review; they are not accorded the same preclusive effect as fully-reviewed judgments.[113] The point has, however, little application to the precedential value of circuit court opinions. Whether a panel's judgment has been overturned en banc or by the Supreme Court, the disposition is truly exceptional considering the rarity of either action;[114] if the nullification says nothing about all or

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official reports if vacated before binding, and so may exist only in advance sheets). *E.g.*, TNT Ltd. v. TNT Messenger Serv., Inc., 724 F. Supp. 201, 209 (S.D.N.Y. 1989) (containing an editorial note that informs the reader that "*Mason Tenders Dist. Council Welfare Fund v. Akaty Construction Corp.*, published in the advance sheet at this citation, 724 F. Supp. at 209–24, was withdrawn from the bound volume because opinion was vacated and withdrawn by order of the Court").

This problem has almost, but not quite, disappeared in an era of internet databases such as Lexis, Westlaw, or Loislaw where most opinions remain available with the notation that they have been vacated. *See* Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1498–99 (1994) (reporting that "not all decisions placed on-line are printed"). Even in cyberspace, however, vacated opinions may sometimes vanish. While Lexis notes the vacation, it normally leaves the text. *Id.* Lexis removes vacated opinions from its database only if "specifically requested to do so by the court." E-mail from Patricia Hirt, Lexis U.S. Case Law Product Manager to Author (Oct. 31, 2005). In contrast, West may publish the original opinion and order vacating it or put the opinion and vacating order only on Westlaw. Resnik, *supra*, at 1498–99. Even if vacated opinions do not disappear, however, they may be hard to find. *See*, *supra* note 44, at 68 n.41 (reporting that West has "a very strong policy of stripping headnotes from vacated cases"). By contrast, Lexis does not remove its summaries or headnotes from vacated cases. E-mail from Patricia Hirt to Author, *supra*.

Opinions not in official reports or the major electronic databases are not totally unavailable. Presumably, the opinion remains part of the court's record and available to those with access to it although an opinion was not always viewed as part of the "record" reviewed by a court on appeal. *See generally* Edward Hartnett, *Why Is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 TEX. L. REV. 907, 922 (1997) (stating that the state court opinion was not considered part of the record on review by the Supreme Court). With the new E-Government Act of 2002, Pub. L. No. 107-347, § 205(a)(5), 116 Stat. 2899, 2913, all federal opinions are to be maintained in a searchable format.

113. Greenbaum, *supra* note 83, at 15–16.

114. The Supreme Court accepts in the neighborhood of seventy-five cases a year, which includes review of state court decisions. Margaret Meriwether Cordray & Richard Cordray, *The Calendar of the Justices: How the Supreme Court's Timing Affects Its Decisionmaking*, 36 ARIZ. ST. L.J. 183, 184 (2004) ("In the 1990s . . . the Court's caseload was almost halved, plummeting to fewer than 80 plenary decisions per term."). In the circuits, en banc rehearings occur in less than one percent of panel decisions rendered. Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. PITT. L. REV. 805, 831–32 (1993) ("[T]he overall percentage of cases heard en banc by the courts of appeals has been steadily decreasing since 1988, reaching a 20 year low in 1991 of .392% of total cases terminated on the merits." (footnote omitted)).

part of the panel's reasoning, the fact that consideration of that reasoning has not occurred would be a very formalistic basis to deny precedential effect.

A second objection is a pragmatic one: a court cannot be sure precisely why a judgment was overturned. This might also be true of reversed judgment, although it may have more application to vacated judgments since vacatur is often in very cryptic terms.[115] Professor Jill Fisch argues that, "A litigant citing a vacated decision cannot be sure that the court did not vacate based on second thoughts about the legitimacy of the legal rulings. No guidance exists for subsequent courts as to the reasons for vacatur, and accordingly, courts view vacated decisions with suspicion."[116] This seems wrong. While determining the meaning of any precedent is often difficult, refusing to view all vacated opinions as binding precedent on this basis would be unjustified. Just as with reversals, the ground of a vacation will sometimes be very clear,[117] and, indeed, upon remand after vacatur, a court will often be required to consider in what respect a prior opinion has been affected by the higher court's action.[118] If a court can ascertain the meaning of vacatur for purposes of deciding the case, it can do so for purposes of determining precedential status. Thus, it seems inappropriate to claim that an opinion cannot retain any authority merely because it has been reversed or vacated.

A somewhat broader argument is that, in some situations at least, it would frustrate the decision by the overturning court to accord any effect to a reversed or vacated opinion. For example, suppose a judgment were overturned because the rendering court lacked jurisdiction. It seems anomalous to invest authority in an opinion that, in retrospect, should not have been rendered. But in numerous instances, vacation of a judgment does not impugn the lower court's opinion, or, at least, does not impugn certain parts of that opinion.[119] Suppose, for example, a case becomes moot when it reaches the higher court. In such cases, the Supreme

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115. Fisch, *supra* note 112, at 630 (discussing the numerous bases for vacatur and the lack of guidance "for subsequent courts as to the reasons for vacatur . . . .").

116. *Id.*

117. *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 109–10 (1998) (vacating case due to lack of standing).

118. *See, e.g.*, Roe v. Anderson, 134 F.3d 1400, 1404 (9th Cir. 1998) (examining authority of a prior Ninth Circuit opinion which was vacated by the Supreme Court and concluding that the opinion retained persuasive authority and could be followed by district court).

119. *See infra* note 144 and accompanying text (suggesting that an opinion vacated by the Supreme Court may remain the governing law in the circuit).

Court might well vacate the circuit court judgment, but that action does not necessarily impugn the circuit opinion (unless perhaps the case was also moot when that opinion was rendered).

Newdow itself reflected a sophisticated application of this principle to a reversed judgment. The Supreme Court had reversed because Mr. Newdow lacked standing, which suggests that the Ninth Circuit should have never rendered its opinion.[120] However, the district court noted that the Supreme Court's decision on standing rested on prudential grounds, not case-or-controversy requirements.[121] It reasoned, therefore, that the Ninth Circuit was acting within its jurisdiction when it handed down its original opinion and that opinion (having been reversed on *other* grounds) therefore bound the district court when a case was pressed by plaintiffs with standing.[122] The point is not that the district court in *Newdow* was correct in its analysis (especially to the extent that the district court would have come out differently if the Supreme Court had vacated, not reversed, the Ninth Circuit) but rather that a higher court's action does not necessarily vitiate the lower court's opinion.

Unless it does. The most sweeping objection to using vacated opinions as binding precedents builds on the former one by arguing that, regardless of the grounds, the vacation of a judgment de-legitimates the opinion supporting that judgment. Once the judgment is gone, so is the opinion.[123] Under this view, lawmaking by courts is wholly a by-product of dispute

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120. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 5, 17–18 (2004) (reversing the Ninth Circuit's judgment after concluding that Newdow lacked standing and observing that "it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute").

121. Newdow v. U.S. Congress, 383 F. Supp. 2d 1229, 1237 (E.D. Cal. 2005) (applying the Supreme Court's decision that Newdow lacked prudential standing because he did not have custody of his daughter and could not sue as next friend).

122. *Id.* at 1241 ("[W]here an opinion is reversed on prudential standing grounds, the remaining portion of the circuit court's decision binds the district courts below.").

123. At least one judge has argued the reverse: precisely because it is the judgment that is vacated, the opinion supporting that judgment is not necessarily vacated. Retail Store Employees Union, Local 1001 v. NLRB, No. 76-2015, 1978 WL 4933, at *7 (D.C. Cir. Dec. 5, 1978) (Robinson, dissenting) ("My colleagues, on the other hand, say that the *Dow Chemical* decision [handed down by a different panel of the court] has no precedential value because the Supreme Court vacated the judgment in *Dow Chemical* when it appeared that the case had become moot while pending there on a petition for a writ of certiorari. That, I think, confuses vacatur of a judgment and vacatur of an opinion, two functionally distinct procedures." (footnote omitted)), *rev'd on other grounds en banc*, 627 F.2d 1133, 1148 (D.C. Cir. 1979), *rev'd*, 447 U.S. 607, 611 (1980). He stressed that the court sometimes vacated judgments and sometimes vacated only opinions, and that precedent is "dissolve[d]" only by vacating the opinion. *Id.* at *8–9.

resolution:[124] while an opinion is not necessary to dispute resolution, any opinion not issued in connection with resolving a dispute is not legitimate.[125] Carrying this logic to its conclusion, once a judgment has been vacated the opinion disappears along with it since it can have no life (as law, at least) separate from the judgment it justifies.[126] It would follow that, once a judgment was reversed, the opinion supporting it lost all authority simply because it no longer supported an operative judgment.[127]

I need to be clear that, under this view, what is vacated with the judgment is the binding effect of the opinion.[128] Even a staunch supporter of such an approach would not necessarily bar citation of the opinion. Much as a prosecutor can indict a ham

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124. *See* Stephen B. Burbank, *Judicial Accountability to the Past, Present, and Future: Precedent, Politics and Power*, 28 U. ARK. LITTLE ROCK L. REV. 19, 35 (2005) ("Richard Arnold believed that courts exist not to make law *simpliciter* but to do so only as a byproduct of resolving disputes. In other words, for him lawmaking was not the *summum bonum* of the exercise of judicial power. Lawmaking was instead a necessary consequence of the exercise of the power, and the performance of the duty, to resolve concrete disputes brought to the courts by litigants.").

125. The Court's resistance to allowing lower courts to assume their subject matter jurisdiction in order to reach the merits of a matter may be seen as one example that an opinion cannot have greater standing than the judgment it supports. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101–02 (1998) ("[No prior case] even approaches approval of a doctrine of 'hypothetical jurisdiction' that enables a court to resolve contested questions of law when its jurisdiction is in doubt. Hypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning."). *See generally* Jack H. Friedenthal, *The Crack in the* Steel *Case*, 68 GEO. WASH. L. REV. 258, 261 (2000) (discussing Justice Scalia's scathing attack on Steven's concurrence allowing courts to reach merits before deciding jurisdiction); Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235, 280–82 (1999) (explaining how hypothetical jurisdiction is contrary to the limitations imposed by the Constitution). *But see* Michigan v. Long, 463 U.S. 1032, 1042–44 (1983) (suggesting the Court need not refuse to hear a case merely because of the possibility that, on remand to the state court, the Supreme Court's decision on federal grounds might be rendered inoperative because the state court could justify its original result on state grounds).

126. It might even be unconstitutional. *Cf.* Dorf, *supra* note 51, at 2068 ("Nevertheless, while there may be a wide range of constitutionally permissible views of the scope of precedent, some must be ruled out. For example, a statute authorizing the federal courts to give advisory opinions, and then to give precedential weight to those opinions, would clearly violate the case-or-controversy requirement."). *See generally* Healy, *supra* note 104, at 895 (discussing the ban on advisory opinions). When a vacated opinion is given precedential weight, the result is arguably similar although, of course, the issuing court did not know when it issued that opinion that its judgment would cease to have effect.

127. *See, e.g.*, *supra* note 125 (explaining how the Supreme Court's treatment of hypothetical jurisdiction suggests that the legitimacy of an opinion rests on the underlying judgment).

128. *See infra* notes 139–40 and accompanying text (discussing the Supreme Court's intent when it suggested that vacating a judgment "erases" the lower court's opinion).

sandwich,[129] a judge can cite as persuasive anything that in fact persuades her: a novel,[130] a movie,[131] an op-ed,[132] a blog,[133] or perhaps even an obscure law review article.[134] It follows that such a judge could cite a vacated or reversed opinion.[135] Under this view an overturned opinion from, say, the circuit deciding the case is as persuasive (or as unpersuasive) as authority from another jurisdiction: neither binds, but both can persuade. Some citations of vacated opinions are explicitly justified on this ground.[136]

Thus, everything may be precedent (in a weak sense) of being able to persuade, but little is precedent (in the strong sense) of binding the present court. But where in this taxonomy

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129. *See In re* Grand Jury Subpoena of Stewart, 545 N.Y.S.2d 974, 977 n.1 (Sup. Ct.) ("[M]any lawyers and judges have expressed skepticism concerning the power of the Grand Jury. This skepticism was best summarized by the Chief Judge of this state in 1985 when he publicly stated that a Grand Jury would indict a 'ham sandwich.'"), *aff'd as modified*, 548 N.Y.S.2d 679 (App. Div. 1989).

130. *E.g.*, Coca-Cola Bottling Co. v. Coca-Cola Co., 696 F. Supp. 97, 99 n.3 (D. Del. 1988) ("One more skilled writer put it best: 'We do not fear being called meticulous, inclining as we do to the view that only the exhaustive can be truly interesting.'" (quoting THOMAS MANN, THE MAGIC MOUNTAIN 2 (H.T. Lowe-Porter trans., Vintage 1999) (1924))).

131. Stambovsky v. Ackley, 572 N.Y.S.2d 672, 675 (App. Div. 1991) ("From the perspective of a person in the position of plaintiff herein [seeking to rescind a real estate contract because the house is haunted], a very practical problem arises with respect to the discovery of a paranormal phenomenon: 'Who you gonna' call?' as the title song to the movie 'Ghostbusters' asks."); *cf.* Sherwood Partners, Inc. v. Lycos, Inc., 394 F.3d 1198, 1203–04 (9th Cir. 2005) (citing, using the signal "*Don't see*," Piranha (New World Pictures 1978)).

132. United States v. Navarro-Vargas, 367 F.3d 896, 901 (9th Cir. 2003) ("When New York was considering reinstating the death penalty, Morgenthau authored an op-ed declaring that the death penalty 'actually hinders the fight against crime.'" (quoting Robert M. Morgenthau, Op-Ed, *What Prosecutors Won't Tell You*, N.Y. TIMES, Feb. 7, 1995, at A25)), *vacated*, 382 F.3d 920 (9th Cir. 2004).

133. Harper v. Poway Unified Sch. Dist., 455 F.3d 1052, 1055 (9th Cir. 2006) (O'Scannlain, J. dissenting) (quoting Posting of Eugene Volokh to The Volokh Conspiracy, Sorry, Your Viewpoint Is Excluded from First Amendment Protection, http://www.volokh.com (Apr. 20, 2006, 19:53 EST), *available at* http://volokh.com/posts/1145577196.shtml, for the proposition that the majority decision constituted "a dangerous retreat from our tradition that the First Amendment is viewpoint-neutral").

134. *E.g.*, Rutherford v. City of Cleveland, 137 F.3d 905, 910 (6th Cir. 1998) (quoting Andrea Catania & Charles A. Sullivan, *Judging Judgments: The 1991 Civil Rights Act and the Lingering Ghost of* Martin v. Wilks, 57 BROOK. L. REV. 995, 1032 (1992)).

135. The limits on citation, at least citation as "law," are being tested with respect to the extent to which the Supreme Court can rely on decisions from foreign courts. *See infra* note 255 and accompanying text.

136. Roe v. Anderson, 134 F.3d 1400, 1404 (9th Cir. 1998) ("[O]ur prior affirmance of the district court's decision . . . remains viable as persuasive authority, notwithstanding the Supreme Court's vacatur [as unripe]."); *In re* Taffi, 68 F.3d 306, 310 (9th Cir. 1995) (following as persuasive authority a decision vacated by the Supreme Court on other grounds); Orhorhaghe v. INS, 38 F.3d 488, 493 n.4 (9th Cir. 1994) (following as persuasive authority a decision vacated by the Supreme Court as moot).

do vacated opinions fit? Since this is an article about precedent, the precedents on this point should be consulted. We have seen a scattering of lower court opinions reaching, as in *Newdow*, some counterintuitive conclusions. We now examine what the Supreme Court has had to say on the subject.

IV. THE SUPREME COURT ON VACATION

The Supreme Court has explicitly addressed the significance of a vacated opinion only once, and then cryptically. In *County of Los Angeles v. Davis*,[137] the majority vacated a Ninth Circuit judgment as moot: "[W]hatever might have been the case at the time of trial, the controversy has become moot during the pendency of this litigation."[138] It is not clear whether the Court meant that the case was moot when decided by the Ninth Circuit or became moot only thereafter. In any event, the majority added a footnote: "Of necessity our decision 'vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect.'"[139] This seems to suggest that a vacation effectively erases the lower court's opinion, perhaps regardless of whether the opinion was correct when issued.[140] The cases *Davis* quoted or

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137. County of Los Angeles v. Davis, 440 U.S. 625 (1979). The issue was the then-unresolved question of whether 42 U.S.C. § 1981, which prohibits race discrimination in contracts, reached practices with a disparate impact. *Id.* at 627. The Ninth Circuit below applied the disparate impact theory and then found that the County's hiring practices had a disparate impact on African Americans and Hispanics; the quoted language of the majority seemed at pains to erase that precedent. *Id.* at 630–31, 633–34. This seems odd since the majority opinion in *Davis* was written by Justice Brennan, and three years later, when the Court held that disparate impact was inapplicable under § 1981, Brennan dissented. Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 390–91, 407 (1982).

138. *Davis*, 440 U.S. at 634.

139. *Id.* at 634 n.6 (quoting O'Connor v. Donaldson, 422 U.S. 563, 577 n.12 (1975)).

140. *Davis* was dealing with vacatur in the federal system. In contrast, when an appeal from a state judgment become moot at the Supreme Court, the Court could dismiss the appeal or vacate the state court's judgment. *See* DeFunis v. Odegaard, 416 U.S. 312, 319–20 (1974) (vacating the judgment of the Washington Supreme Court because the case had become moot by the time of oral argument before the U.S. Supreme Court). On remand, the Washington Supreme Court, unfettered by the kinds of case-or-controversy constraints that mooted the case at the federal level, reaffirmed its ruling that the affirmative action plan at issue was constitutional. DeFunis v. Odegaard, 529 P.2d 438, 444–45 (Wash. 1974). According to Professor Greenbaum, *DeFunis* was the exception, not the rule: after 1966, almost all mooted cases from state court were simple dismissals of the appeal. *See* Greenbaum, *supra* note 83, at 49 n.201; *see also* William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 265 (1990) (recommending that, unlike current law, "State courts should be required to adhere to [A]rticle III 'case or controversy' requirements whenever they adjudicate questions of federal law"); Comment, *supra* note 73, at 93 (arguing that stare decisis should not affect the Supreme Court's decision whether to dismiss an appeal or vacate a judgment because "the force of the reasoning [in the opinion below] remains" and

cited to support this proposition do not cast additional light since they are concerned with preclusion rather than precedent.[141]

While this suggests that a vacated decision has been erased in terms of its legal effect,[142] Justice Powell's dissent in *Davis* staked out a different position: "Although a decision vacating a judgment necessarily prevents the opinion of the lower court from being the law of the case, the expressions of the court below on the merits, if not reversed, will continue to have precedential weight and, until contrary authority is decided, are likely to be viewed as persuasive authority if not the governing law of the Ninth Circuit."[143] This somewhat convoluted passage seems to mean that "precedential weight" includes persuasive power, and therefore may stop short of saying that vacated decisions continue to formally bind lower courts even in the same circuit. But Powell clearly anticipated significant impact from a vacated decision, however denominated, and seemed to at least hold open the possibility that a vacated opinion remained binding.[144] Powell's statement that this would be true when the judgment was vacated but "not reversed" is, of course, exactly the opposite of the view taken by the district court in *Newdow*.[145]

"cases which reach a state supreme court on the merits are full authority within that state, even though they become moot on appeal to the Supreme Court," but citing only cases in which an appeal was dismissed or the state supreme court reaffirmed its decision on remand).

141. Although *Davis* quoted from *O'Connor v. Donaldson*, the relevant passage from *O'Connor* stressed that the vacatur left the Supreme Court's "opinion and judgment as the sole *law of the case*," which may have been important given the remand to the district court. *O'Connor*, 422 U.S. at 577 n.12 (emphasis added). In addition, *Davis "see also"* cited *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 329–30 (1961), but the concern there also seemed to be with preclusion rather than with precedent.

142. Since this is an article about the niceties of precedent, it should be noted that, even under an expansive view of a holding as a statement relevant to the Court's analysis, see *infra* notes 184–96 and accompanying text, this language in *Davis* would not constitute a holding since literally nothing turned in the case before the Court on that statement.

143. *Davis*, 440 U.S. at 646 n.10 (Powell, J. dissenting) (citations omitted). Powell cited no authority for the continuing effects of a vacated decision. He cited *O'Connor* and *A.L. Mechling Barge Lines*, which had been cited by the majority, and added *United States v. Munsingwear*, 340 U.S. 36 (1950). *See supra* notes 75–85 and accompanying text (explaining how vacatur eradicates any effect of the law of the case).

144. *Davis*, 440 U.S. at 646 n.10 (suggesting that the vacated opinion is "likely to be viewed as persuasive authority if not the governing law of the . . . [c]ircuit").

145. Unsurprisingly, Professor Greenbaum finds the *Davis* opinions to be "hardly dispositive" on the issue of stare decisis effects. *See* Greenbaum, *supra* note 83, at 95 & nn.398–99. He also notes "[t]angential comments" in other Supreme Court cases supportive of the Brennan view. *Id.* at 95 n.398 (citing Goldwater v. Carter, 444 U.S. 996, 1005 (1979) (Rehnquist, J., concurring); Fortson v. Toombs, 379 U.S. 621, 633 (1965) (Goldberg, J., dissenting)). While none of these authorities discusses the question in any more detail than *Davis*, some circuit decisions take the "erasure" approach, since they

The Court's next encounter with the effects of vacatur was less explicit but perhaps more significant. As we have seen, in 1994 the Supreme Court held in *Bonner Mall* that settlement vacatur, that is, the vacation of a judgment as a result of the settlement of the dispute by the parties, is normally inappropriate in the federal courts.[146] The debate in the law journals and lower courts on this issue was largely fought on policy grounds rather than rule interpretation.[147] It was typically framed as a conflict between the dispute resolution function of the courts, which some argued pointed towards letting the parties decide the terms of any settlement,[148] and the courts' lawmaking function, which suggested not disturbing a judicial determination.[149] While parties had different reasons for seeking vacation of a judgment, often desiring to avoid preclusion in later proceedings,[150] some parties (especially potential repeat players)[151]

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describe the vacatur as depriving the district court decision of "any precedential effect." *See, e.g.*, Robert Stigwood Group, Ltd. v. Hurwitz, 462 F.2d 910, 914 n.8 (2d Cir. 1972) ("We consider it an appropriate exercise of our judicial power to vacate Judge Croake's order to insure that it can have no precedential value."); Swingline, Inc. v. I.B. Kleinert Rubber Co., 399 F.2d 283, 284–85 (C.C.P.A. 1968) ("[Vacating the judgment below] would effectively prevent the judgment below from becoming a precedent."). Because district court decisions have no binding effects in any event, the courts must have intended to foreclose reliance on such opinions for even their persuasive value.

146. U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 29 (1994).

147. The Federal Rules do not explicitly provide for vacatur. Nevertheless, a court has power to vacate its own judgment under Rule 60(b), which governs modification of judgments generally. FED. R. CIV. P. 60(b). The broader structure of the federal court system, however, has been said to cut against using settlement vacatur. *See Bonner Mall*, 513 U.S. at 27 ("Congress has prescribed a primary route, by appeal as of right and certiorari, through which parties may seek relief from the legal consequences of judicial judgments. To allow a party who steps off the statutory path to employ quite the secondary remedy of vacatur as a refined form of collateral attack on the judgment would—apart from any considerations of fairness to the parties—disturb the orderly operation of the federal judicial system.").

148. *E.g.*, Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2679–80 (1995) (recounting arguments for and against allowing the vacatur of a settlement). There were conflicting views about whether allowing the parties to vacate a judgment by agreement would actually encourage settlement. From an *ex post* perspective, such a settlement would save resources by avoiding an unnecessary appeal. But from an *ex ante* point of view, the possibility of later vacatur might well encourage parties to risk trial. *See* Fisch, *supra* note 112, at 637 ("Rather than encouraging settlement, vacatur in fact is operating to encourage speculative litigation because the potentially unfavorable results of litigation can be avoided.").

149. *See* Fisch, *supra* note 112, at 629–30 (noting that allowing vacatur following settlement had the potential to "sacrifice certain public values" derived from the judicial resolution of cases, including "the precedential value of the prior decision" and "the resolution of uncertainty in the law").

150. *See id.* at 610 ("The most significant cost associated with vacatur is the destruction of a judgment's preclusive effect.").

151. *See generally* Resnik, *supra* note 112, at 1488–89 ("[R]epeat players are more

seemed driven by the desire to eliminate an unfavorable precedent.[152] Those opposing settlement vacatur argued that the reasons parties sought vacation were precisely the reasons it should be denied.[153] Thus, vacating a judgment and thereby eliminating its preclusive effects would require cases to be reheard; similarly, eliminating a precedent would waste the resources expended by the court in its lawmaking function.[154]

The *Bonner Mall* Court agreed with the opponents of settlement vacatur and held in favor of preserving judgments.[155] *United States v. Munsingwear, Inc.*,[156] as explicated by *Karcher v. May*,[157] had limited nullification of a judgment as moot to situations where the losing party sought to overturn it. Where a party has simply lost below, *Bonner Mall* held, it cannot avoid the effects of that judgment by settling with the prevailing party and claiming that the dispute is then moot.[158] While a settlement might moot an appeal, it does not cast doubt on the judgment itself.[159] Thus, vacatur by settlement was normally inappropriate:

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likely than one-shotters to be proponents of vacatur. Evidence that this strategic option inures to the benefit of these litigants comes not only from some of the cases in which such settlements have been offered, but also from the identities of those who have urged its legality before the United States Supreme Court . . . ." (footnotes omitted)); Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 HARV. C.R.-C.L. L. REV. 109, 130 (1995) (claiming nonpublication practices including vacatur "favor institutional litigants over one-shotters. Institutional litigants can influence which decisions courts select for publication. Moreover, they have better access to the information contained in unpublished decisions").

152. Fisch, *supra* note 112, at 596. However, in the situation Professor Fisch was primarily addressing, vacating a district court opinion pending appeal, the precedent-altering effects were at their lowest because district court opinions have no binding power. *See infra* note 177.

153. *See generally* Slavitt, *supra* note 151, at 137–38 (describing cases where settlement vacatur was used to accomplish questionable litigants' goals).

154. *Id.* at 112–13 ("[A]t the very least, once precedents are established litigants should not have unequal opportunities to profit from or to erase them.").

155. U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 29 (1994); *see also* Cardinal Chem. Co. v. Morton Int'l, 508 U.S. 83, 89, 99 (1993) (disapproving Federal Circuit's practice of automatically vacating a declaratory judgment of patent validity when it determined there was no infringement; mootness as to the validity of a patent did not necessarily follow simply because there was a finding of no infringement).

156. United States v. Munsingwear, 340 U.S. 36, 39–40 (1950) (stating how vacatur eradicates any law of the case effect).

157. Karcher v. May, 484 U.S. 72, 82–83 (1987) (refusing to apply *Munsingwear* procedure where the losing party failed to appeal and therefore mootness was not "unattributable to any of the parties").

158. *Bonner Mall*, 513 U.S. at 26, 29 (denying vacatur where petitioner seeks remedy on only the basis that settlement mooted the judgment).

159. *Id.* at 25 ("Where mootness results from settlement . . . the losing party has voluntarily forfeited his legal remedy . . . . The judgment is not unreviewable, but simply unreviewed by his own choice.").

"Where mootness results from settlement, . . . the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur."[160]

The plaintiff in *Munsingwear* had seemed primarily concerned with the potential for preclusion if the judgment was not vacated,[161] but the effort to vacate in *Bonner Mall* was probably driven by the desire to eliminate an unfavorable precedent. At issue was a bankruptcy question, and the petitioner seeking vacatur was a large lender who might well have been more concerned about the effects of an adverse precedent from the Ninth Circuit than avoiding preclusion.[162] It may, therefore, be significant that, amid the discussion about preclusion, Justice Scalia's majority opinion stated, "[O]ur holding must also take account of the public interest. 'Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.'"[163]

Different concerns are involved depending on whether vacatur is sought to avoid preclusive effects of a rendered

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160. *Id.* The Court recognized an "exceptional circumstances" exception to its rule but stressed that "exceptional circumstances do not include the mere fact that the settlement agreement provides for vacatur—which neither diminishes the voluntariness of the abandonment of review nor alters any of the policy considerations . . . ." *Id.* at 29.

161. In *Munsingwear* the government sought to avoid the preclusive effect of the prior decision, which it claimed had become moot. *Munsingwear*, 340 U.S. at 39. The named plaintiffs in *Karcher* may have been so concerned but may instead have sought vacatur to avoid an award of attorneys' fees against them. *Karcher*, 484 U.S. at 76.

162. *See* Bradley T. King, Note, *"Through Fault of Their Own"—Applying* Bonner Mall's *Extraordinary Circumstances Test to Heightened Standard of Review Clauses*, 45 B.C. L. REV. 943, 982 (2004) ("After the settlement was final, the petitioner was displeased with the results of settlement—the continued viability of unfavorable lower court precedents—and sought to enlist the Court to vacate the unfavorable precedents and thus, to perfect its contractual expectations.").

163. *Bonner Mall*, 513 U.S. at 26 (quoting Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 40 (1993) (Stevens, J., dissenting)); *see also In re* Mem'l Hosp. of Iowa County, Inc., 862 F.2d 1299, 1302 (7th Cir. 1988) ("When a clash between genuine adversaries produces a precedent, however, the judicial system ought not allow the social value of that precedent, created at cost to the public and other litigants, to be a bargaining chip in the process of settlement. The precedent, a public act of a public official, is not the parties' property."); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) ("Adjudication uses public resources, and employs not strangers chosen by the parties but officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.").

judgment or to deprive a rendered opinion of precedential effect. While the judgment binds the parties and their privies entirely without regard to the opinion (although issue preclusion law requires a later court to determine what was necessarily decided in a prior case, which may be difficult absent an opinion), the opinion does more than resolve the case and explain that resolution to the parties. At least when issued by an appellate court, it makes law. Justice Scalia was clearly seeking to preserve the lawmaking function of opinions from vacatur.[164]

If vacatur in fact eradicates a piece of judicial lawmaking, it does so even when the legal system has at some point in time determined that the law is worth making. That is to say, when a judgment is vacated whose supporting opinion is well-developed enough to be "for publication," the legal system has determined that the law announced is worth promulgating. Indeed, an opinion in these circumstances may be viewed as public property and its promulgation a public act.[165] From an economic perspective, the public resources devoted to the court system are yielding not only a resolution of the underlying dispute but also a clarification of the governing law for those who may be affected by it.[166]

Bonner Mall, therefore, seems correct to have established a presumption against vacatur by settlement: even though the opinion focused on retaining the preclusive effect of a judgment, a desire to retain the value of the opinion supporting that

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164. California has what seems to be a cross between nonpublication and vacatur. In that state, not only may the intermediate appellate courts decide whether to publish an opinion but the California Supreme Court may, and frequently does, order a published opinion "depublished," essentially leaving the judgment intact but vacating the opinion. Resnik, *supra* note 112, at 1521. *See generally* Stephen R. Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 LOY. L.A. L. REV. 1033, 1034–35 (1993) (discussing depublishing practice and history). Some depublished opinions raise some of the most fascinating issues of today's law. *E.g.*, People v. Wu, 286 Cal. Rptr. 868, 887 (Ct. App. 1991) (holding that a defendant's cultural beliefs could be considered by the jury her trial for murder), *depublished by*, No. SO24083, 1992 Cal. LEXIS 310 (Cal. 1992). In other states, what intermediate appellate opinions are published sometimes itself can become a matter of controversy. *See supra* note 97.

165. "An untested law or legal theory may have a chilling effect on the actions of nonlitigants. Thus the cost of forgoing a judicial interpretation of that law may include the costs associated with restraint of conduct because of its uncertain legality." Fisch, *supra* note 112, at 630 n.207 (citing Don B. Kates, Jr. & William T. Barker, *Mootness in Judicial Proceedings: Toward a Coherent Theory*, 62 CAL. L. REV. 1385, 1429–31 (1974)).

166. Of course, an opinion is not solely financed by the public through the support of judges, law clerks, and associated systems. Obviously, most opinions reflect the resources the litigants bring to bear in explicating the law and developing the facts. Nevertheless, the opinion is the direct result of public funding. Indeed, to the extent that the dispute could be resolved without an opinion or by an unpublished opinion, it may be said that a precedential opinion is *entirely* the result of public funding.

judgment played a role. Whether this is framed in terms of the "integrity" of the legal system or in efficiency terms of conserving a public resource seems less important than the result that judgments and opinions should not be vacated merely because the parties to the dispute that generated the opinion agree to do so.

This thrust of *Bonner Mall* necessarily implies that vacation would eliminate the precedential effects of the opinion supporting the vacated judgment.[167] Indeed, perhaps the central objection to settlement vacatur was (to quote the title of a leading article) "the propriety of eradicating prior decisional law through settlement and vacatur."[168] Although some commentators had argued to the contrary,[169] the majority's statement in *Davis* coupled with *Bonner Mall*'s desire to protect precedents strongly suggest that vacated opinions are not binding.[170]

This is consistent with the position of the *Newdow* court, and is reflected in a scattering of other cases addressing the question.[171] But the notion that a vacated precedent is somehow erased, and cannot even be cited, seems extreme (at least absent some action such as express disapproval of the opinion by the higher court or the Ninth Circuit's prohibition by rule of citing a panel opinion when the matter is being reheard en banc[172]). A number of courts have explicitly approved the use of vacated opinions for their persuasive power.[173] Thus, Judge Easterbrook

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167. *Bonner Mall*, 513 U.S. at 26–27 (stating that allowing vacatur deprives the public of the "benefits that flow . . . from the resolution of legal questions").

168. Fisch, *supra* note 112, at 630.

169. Professor Greenbaum thought that "judgments vacated due to mootness should retain their precedential value" because such judgments reflect the court's considered views. Greenbaum, *supra* note 83, at 96–97. While vacated judgments are not accorded preclusive effect, he argued for a different rule of precedent for two reasons. *Id.* at 95. First, "stare decisis, in contrast [to preclusion], is more flexible . . ."; thus, according a vacated opinion precedential status does not significantly affect the problem of the incorrect decision. *Id.* at 97. Second, there is no general right to appeal an adverse precedent (as opposed to an adverse judgment), thus suggesting that the system does not presently value the right of a party to "correct" the lawmaking function of the courts. *Id.* at 97–98.

170. *See Bonner Mall*, 513 U.S. at 27; County of Los Angeles v. Davis, 440 U.S. 625, 634 n.6 (1979).

171. Newdow v. U.S. Congress, 383 F. Supp. 2d 1229, 1240 (E.D. Cal. 2005); *e.g.*, Chandler v. Sys. Council U-19, No. CV85-AR-1948-s, 1986 U.S. Dist. LEXIS 18832, at *6 (N.D. Ala. Oct. 20, 1986) (noting that "[a] decision which is vacated has no precedential value"); *see also* Fisch, *supra* note 112, at 597 & n.36 (quoting *Chandler* in support of the conclusion that "a vacated decision has no further force and effect").

172. *See supra* note 110 and accompanying text (detailing the Ninth Circuit rule that panel opinions "shall not be cited as precedent" when such panel opinions are being reheard en banc).

173. *E.g.*, Netzer v. City of Pasadena, No. 91-55540, 1992 WL 107058, at *1 (9th Cir.

wrote that some of the "persuasive force" of a vacated precedent "would remain as long as the court's opinion were available to read; it does not vanish on vacatur, although such an order clouds and diminishes the significance of the holding."[174] And we have seen that Judge Kozinski wrote *Hart v. Massanari* to counter the potential pernicious effects of *Anastasoff*.[175]

"Persuasiveness" then becomes the universal solvent for the problem of vacated opinions, and, perhaps, even of reversed opinions if *Newdow* is wrong. But persuasive is a concept that is itself under-theorized, and a conclusion that vacated opinions are "persuasive" raises at least as many questions as we encountered in arriving at it.

V. BINDING & PERSUASIVE PRECEDENTS

At the risk of oversimplification,[176] a court is bound by the decision of a court with the power to reverse it. This statement embraces the usual inferior/higher court distinction (e.g., the federal district courts and the circuit courts to which appeals from them may be taken), and explains why a decision of a federal district court is not binding as a matter of precedent on anyone[177] (although it will bind the parties as a matter of

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May 12, 1992) ("[A] decision vacated upon a ground independent of that for which it is cited may still have persuasive effect.").

174. *In re* Mem'l Hosp. of Iowa County, Inc., 862 F.2d 1299, 1302 (7th Cir. 1988); *accord* Fisch, *supra* note 112, at 629 n.204 ("To the extent that a decision represents a groundbreaking legal analysis, such a decision can be cited for its persuasive impact even if vacated.").

175. *See* Hart v. Massanari, 266 F.3d 1155, 1159 (9th Cir. 2001); *see also* Anastasoff v. United States, 223 F.3d 898, 900 (8th Cir.), *vacated as moot en banc*, 235 F.3d 1054 (8th Cir. 2000) (en banc).

176. The oversimplification arises in part because systems of precedent are possible that allow a lower court to assess whether the higher court would feel bound by its own earlier decision. If the lower court concludes not, it, too, is not bound. The Supreme Court has rejected this approach in the federal system. *See infra* note 197.

177. *E.g.*, *Hart*, 266 F.3d at 1163 ("[M]ost decisions of the federal courts are not viewed as binding precedent. No trial court decisions are; almost four-fifths of the merits decisions of courts of appeals are not."); *see also* Threadgill v. Armstrong World Indus., Inc., 928 F.2d 1366, 1371 (3d Cir. 1991) ("The doctrine of *stare decisis* does not compel one district court judge to follow the decision of another. Where a second judge believes that a different result may obtain, independent analysis is appropriate." (citation omitted)). Arguably, bankruptcy judges in a particular district are bound by district court decisions, but that is by no means clear. *See* Bernard Trujillo, *Self-Organizing Legal Systems: Precedent and Variation in Bankruptcy*, 2004 UTAH L. REV. 483, 492–94 (noting that, although bankruptcy courts are technically departments of federal district courts and are bound by vertical precedent originating in their particular district court, the bankruptcy appellate system generates few formal precedents).

Despite the general acknowledgement that district court opinions lack precedential power, the Supreme Court has occasionally gone out of its way to ensure that

preclusion). Similarly, this statement embraces the ability of a multimember court to bind its members by its own rules. For example, all circuit courts provide that the decision of a panel is binding on every other panel, unless the decision is overturned en banc or by later Supreme Court action.[178] This doctrine of "inter-panel accord" has raised some fascinating conceptual questions[179] and is policed by various mechanisms to prevent[180] and correct deviations from the original panel decision, including possible en banc review[181] and rules for treating subsequent panel

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its actions with respect to a district court decision are not read to validate aspects of the lower court's reasoning, and has even vacated a portion of the district court's opinion. *See, e.g.*, Branch v. Smith, 538 U.S. 254, 265–66 (2003) (vacating a portion of the district court's holding and stating, "The District Court's alternative holding is not to be regarded as supporting the injunction we have affirmed on the principal ground, or as binding upon state and federal officials," should a similar question arise in the future).

178. *E.g.*, *Hart*, 266 F.3d at 1171 ("Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court. . . . [A] later three-judge panel considering a case that is controlled by the rule announced in an earlier panel's opinion has no choice but to apply the earlier-adopted rule; it may not any more disregard the earlier panel's opinion than it may disregard a ruling of the Supreme Court."). This doctrine operates in all circuits. *See generally* Barrett, *supra* note 29, 1017–18 (describing the operation of the rule, common to all circuits, that a panel decision binds a subsequent panel).

179. As a matter of horizontal precedent, the en banc court does not view itself as bound by the panel decision it is reviewing, either under law of the case or stare decisis. *See, e.g.*, Van Gemert v. Boeing Co., 590 F.2d 433, 436 n.9 (2d Cir. 1978) (rejecting law of the case limitation on overturning a panel decision and stating, "sitting *en banc*, we may overrule any panel decision that a majority of the active judges believes was wrongly decided, unless a party would be seriously prejudiced as a result"), *aff'd*, 444 U.S. 472 (1980). Thus, in this sense at least it is not appropriate to view the panel decision as the decision for the full court. *See id.*

180. Perhaps the most obvious is circulation of panel opinions to the full court before they are issued. *E.g.*, Third Circuit Internal Operating Proc. 5.5.4 (2006). While circulation is obviously connected *ex post* the panel opinion to possible en banc review, it may operate *ex ante* to discourage intra-circuit conflicts.

181. This is not the only purpose of en banc review but is one of its principal justifications. *See* FED. R. APP. P. 35 (providing for en banc hearing or rehearing when such consideration "is necessary to secure or maintain uniformity of the court's decisions" or for questions "of exceptional importance"); *see also* United States v. Am.-Foreign S.S. Corp., 363 U.S. 685, 689–90 (1960) ("'The principal utility of determinations by the courts of appeals in banc is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions . . . .'" (quoting Albert Maris, *Hearing and Rehearing Cases in Banc*, 14 F.R.D. 91, 96 (1954))); EEOC v. Ind. Bell Tel. Co., 256 F.3d 516, 529 (7th Cir. 2001) ("But we do not take cases en banc merely because of disagreement with a panel's decision. . . . [W]e take cases en banc to answer questions of general importance likely to recur, or to resolve intra-circuit conflicts, or to address issues of transcendent public significance—perhaps even to curb a "runaway" panel—but not just to review a panel opinion for error."). *See generally* Arthur D. Hellman, *Maintaining Consistency in the Law of the Large Circuit*, *in* RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS 55, 70–78 (Arthur D. Hellman ed., 1990) (detailing the en banc process and concluding that the availability of such process contributes to the coherence and conformity of the law);

decisions when a split is identified.[182] But, for present purposes, the critical point is that there is a system of precedent that compels judges to follow prior decisions.[183]

However, one of the oversimplifications arising from the previous statement is that, even when issued by a court with the power to overturn the lower court, a prior decision may not be binding on a lower court because of doctrines that have evolved to limit the binding effect of decisions rendered. The distinction can be traced back to, at least, Chief Justice Marshall (ironically, in "dissing" some of his own statements in *Marbury v. Madison*). Marshall proffered a pragmatic rationale for according more weight to holdings than to dicta: "The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."[184]

Arthur D. Hellman, *Breaking the Banc: The Common-Law Process in the Large Appellate Court*, 23 ARIZ. ST. L.J. 915, 920, 979–86 (1991) (analyzing the question of "whether the common-law system can continue to work effectively in a court of twenty or more judges that hears and decides cases in panels of three"); Stein, *supra* note 114, at 807 (refuting statements that the institutional costs of en banc review outweigh the benefits provided by the en banc process and advocating an increase in the use of en banc review to promote consistency throughout the circuits). *Contra* Note, *En Banc Review in Federal Circuit Courts: A Reassessment*, 72 MICH. L. REV. 1637, 1646 (1974) (questioning the effectiveness of en banc review in avoiding inconsistent panel decisions).

182. Most circuits follow a first-in-time rule when an intra-circuit split is identified. *E.g.*, McMellon v. United States, 387 F.3d 329, 334 (4th Cir. 2004) ("[W]hen there is an irreconcilable conflict between opinions issued by three-judge panels of this court, the first case to decide the issue is the one that must be followed . . . ."). *Contra* Graham v. Contract Transp., Inc., 220 F.3d 910, 914 (8th Cir. 2000) ("[F]aced with conflicting precedents, [a panel is] free to choose which line of cases to follow . . . ."). The first-in-time rule deprives Panel 2's opinion of any binding effect beyond the parties. That is, to the extent that Panel 2 conflicts with Panel 1, the law of the circuit remains that announced by Panel 1. Panel 2's opinion becomes, in legal effect, an unpublished opinion—controlling only on the parties. *See McMellon*, 387 F.3d at 334 (holding that the first case decided should control in the event of a conflict).

McMellon has a fascinating passage in which the en banc majority first recognizes that "a three-judge panel has the statutory and constitutional power to overrule the decision of another three-judge panel," then states that, "as a matter of prudence, a three-judge panel of this court should not exercise that power," and concludes by seeming to order that "the first case to decide the issue is the one that *must* be followed." *Id.* (emphasis added). This passage is hard to parse except perhaps as a warning that, should panels exercise their "statutory and constitutional" right to ignore other panels, the other circuit judges will exercise their equal right to take the case en banc to reinstate the original panel's decision.

183. *See* KARL LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 5–7 (Paul Gewirtz ed., Michael Ansaldi trans., 1989) (describing the rise of the American system of precedent and explaining the rationale behind such a system).

184. Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 399–402 (1821). The full context of Justice Marshall's statement is as follows:

Recent commentators add to this rationale the justification of legitimacy. "According to this view, dicta have no precedential effect because courts have authority only to decide cases, not to make law in the abstract. This latter function is seen as the proper province of the political branches,"[185] a concern that "can be traced to the case-or-controversy requirement of Article III."[186] Thus, limiting the effect of judicial statements not connected closely enough with deciding the case before the court cabins the judiciary within a democratic system. Confining binding power to holdings also frees later courts from too much constraint by earlier courts, which has value, whether horizontal precedent or vertical precedent is involved, in keeping the law from becoming too rigid.[187]

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.
>
> . . . .
>
> . . . The general expressions in the case of *Marbury v. Madison* must be understood with the limitations which are given to them in this opinion, limitations which in no degree affect the decision in that case, or the tenor of its reasoning.

Id. See also Kent Greenawalt, *Reflections on Holding and Dictum*, 39 J. LEGAL EDUC. 431, 433–34 (1989) ("What counts as holding is what the earlier case establishes, and it carries very considerable authority. What counts as dictum has much less weight. It is sometimes said that dictum has only as much weight as the force of the reasoning behind it. This is probably wrong as a general matter; dictum by the court usually carries a little more weight in our system than the similar thought expressed by an obscure scholar and brought to the court's attention.").

185. Dorf, *supra* note 51, at 2000–01; *see also* EUGENE WAMBAUGH, THE STUDY OF CASES § 13 (2d ed. 1894) (noting that giving weight to dicta allows judges to resolve a mere hypothetical case and thus, it "would be a legislative power, and, still worse, a power exercised in the absence of full argument of the hypothetical case"); Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 559 (1989) ("In a democratic society, treating statements . . . as non-binding dicta helps to confine the lawmaking powers of judges to the minimum necessary to serve the values underlying the doctrine of precedent.").

186. Dorf, *supra* note 51, at 2001.

187. Beyond the holding/dictum distinction, at least one scholar has argued that freeing later courts from the constraints of earlier decisions is one of the primary justifications for the restrictive doctrines governing justiciability; by reducing the number of cases that a court decides, the constraint of stare decisis is less sweeping. *See* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 304 (1979) (explaining that, due to stare decisis, "[t]o allow a court to settle any matter it wished to address would give precedence to the preferences of earlier courts, who are able to tie the hands of the subsequent ones").

As traditionally conceived under the theory of vertical precedent, then, a lower court (or a panel in a circuit) is thought bound only by the holding[188] of the higher court (or previous panel or en banc decision).[189] It is free not to follow a "dictum" in the earlier opinion.[190] While dicta need not be followed, they should not be ignored—they are "persuasive" even though not binding, a distinction we will explore later.[191] This traditional view, however, is eroding in light of an increasing tendency[192] to view as binding not merely what courts *hold* but what courts *say* in their opinions.[193] This is certainly true as a matter of vertical

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188. *E.g.*, McClure v. First Nat'l Bank, 497 F.2d 490, 492 (5th Cir. 1974) ("We, of course, are bound only by the holding of other panels, not by the language of the opinions . . . .").

189. The holding is derived from the majority opinion. Where a Supreme Court decision lacks a majority opinion, the holding is the narrowest statement of the law that commands a majority of those voting for the disposition. *See* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (judgment of the Court and opinion of Stewart, Powell, and Stevens, JJ.))); Earl M. Maltz, *The Function of Supreme Court Opinions*, 37 HOUS. L. REV. 1395, 1414 (2000) ("*Marks* fits comfortably into the vision of the Supreme Court as an institution that establishes formal legal rules of general applicability that both guide the lower courts and provide standards on which nonjudicial actors may rely."). Dissenting votes cannot be aggregated with concurring opinions to form a majority on a given legal principle. *See, e.g.*, Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643, 661–63 (2002) (detailing the traditional practice of entering the judgment on which a majority agrees, regardless of the splintering of rationales, and also reporting and disapproving occasional exceptions).

190. This is *a fortiori* true for horizontal precedent. *Bonner Mall* also involved this distinction, coincidentally enough in discussing when a court should vacate its opinion:

> To begin with, the portion of Justice Douglas' opinion in *Munsingwear* describing the "established practice" for vacatur was dictum; all that was needful for the decision was (at most) the proposition that vacatur should have been sought, not that it necessarily would have been granted. . . . This seems to us a prime occasion for invoking our customary refusal to be bound by dicta, . . . and our customary skepticism toward *per curiam* dispositions that lack the reasoned consideration of a full opinion. . . . Today we examine vacatur once more in the light shed by adversary presentation.

U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 23–24 (1994) (citations omitted).

191. *See infra* Part VI (analyzing the question: "What does it mean to be persuasive?").

192. The current erosion is perhaps more a matter of formal admission than actual change in practice. The notion that there is a distinction between the formal power of precedent (limited to holdings) and its practical power ("*any* point or all points upon which it chose to rest a case, or which it chose, after due argument to pass"), was noted as early as 1930. KARL LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 76–77 (1951).

193. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989) ("Let us not quibble about the theoretical scope of a 'holding'; the modern

stare decisis,[194] although it has been critiqued on pragmatic grounds,[195] and may reflect a more general tendency of the

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reality, at least, is that when the Supreme Court of the federal system, or of one of the state systems, decides a case, not merely the *outcome* of that decision, but the *mode of analysis* that it applies will thereafter be followed by the lower courts within that system, and even by that supreme court itself. And by making the mode of analysis relatively principled or relatively fact-specific, the courts can either establish general rules or leave ample discretion for the future."). An even broader view of the holding can be gained from Justice Scalia's dissent in *Grutter v. Bollinger*, 539 U.S. 306, 351 (2003), which "agree[d] with the Court's *holding* that racial discrimination in higher education admissions will be illegal in 25 years." (emphasis added). It is hard to imagine that, under traditional views, the majority's statement that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today," was a holding. *Id.* at 343. Since literally nothing in the case before the Court turned (or could have turned) on the statement, it was at best dictum. *See id.* at 311 ("This case requires us to decide whether the use of race as a factor in student admissions by the University of Michigan Law School . . . is unlawful."). Indeed, since it was essentially a prediction, not reasoning or analysis, it should not even count as dictum.

194. A number of circuit court cases have elevated Supreme Court dicta to a status approaching law. Although the phenomenon may be traced further back, it became more dominant after 1991. *See, e.g.*, McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 19 (1st Cir. 1991) ("[F]ederal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when . . . a dictum is of recent vintage and not enfeebled by any subsequent statement."); *accord* Rossiter v. Potter, 357 F.3d 26, 31 & n.3 (1st Cir. 2004) (concluding that "when a statement in a judicial decision is essential to the result reached in a case, it becomes part of the court's holding," and further noting that "even if one were to categorize the Court's statement as dictum . . . that categorization would not shift our view" because courts are bound by Supreme Court dicta); United States v. Marlow, 278 F.3d 581, 588 n.7 (6th Cir. 2002) ("Appellate courts have noted that they are obligated to follow Supreme Court *dicta*, particularly when there is no substantial reason for disregarding it, such as age or subsequent statements undermining its rationale."); Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531, 1540 n.10 (10th Cir. 1995) (noting that appellate courts are bound by the rationale used by the Supreme Court); City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554, 557 (8th Cir. 1993) (relying on the language in *McCoy* in concluding that "deliberated dicta" from the Supreme Court required the court to overturn a previous panel decision); *cf.* United States v. Fareed, 296 F.3d 243, 247 (4th Cir. 2002) (following Supreme Court dictum but never explicitly stating that the court is bound to do so). *Contra* Int'l Truck & Engine Corp. v. Bray, 372 F.3d 717, 721 (5th Cir. 2004) (categorizing a statement as dictum and concluding that "dictum . . . does not bind us"). *See generally* Schauer, *supra* note 53, at 683 (noting that, when considering Supreme Court opinions, "[f]ine distinctions between holding and dicta are rarely relevant" and concluding that "in the pit of actual application . . . it is not what the Supreme Court held that matters, but what it *said*"); Tiersma, *supra* note 36, at 52 ("[T]he precedential value of a case is nowadays determined not so much by analysis of the facts, the issue, and the outcome, but increasingly by careful scrutiny of the written words of the opinion.").

195. Some commentators argue that even judicial *holdings* ought to be given respect on a sliding scale that takes into account the costs of path-dependent decisionmaking in varying settings. *See* Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 663 (2001) ("The theory of path dependence thus provides support for stricter adherence to an existing principle of law: Courts should rely only on those statements in previous opinions that are necessary to the decision and should avoid reliance on dicta. Moreover, it argues in favor of the somewhat more controversial practice of judicial minimalism, in the sense that it counsels judges to include in an opinion no more than what is necessary to decide the case

Supreme Court to view itself as a lawmaking body rather than merely one that decides cases.[196]

Nevertheless, the holding/dictum distinction continues to have bite,[197] and efforts to revive it may reflect the renewed interest in the topic by recent commentators. For example, building on the efforts to distinguish holding and dicta that preoccupied earlier generations of scholars,[198] Michael Dorf identified at least two competing views of what constitutes a holding.[199] One he labels the facts-plus-outcome view, the other rationale-focused:

> Under the [former view], however, a statement can be considered dictum so long as it is not essential to the outcome of the case, even if it appears to be part of the rationale of the case. One can classify a statement as [dictum] only by reference to the opinion in which it appears. By contrast, one may classify a statement as overly broad (and therefore dictum) without reference to the

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at hand thoroughly and completely.").

196. Professor Hartnett traces this shift back at least to 1925 and notes that "[certiorari] has encouraged Supreme Court Justices to think of themselves less as deciders of cases and more as final arbiters of controversial questions. Indeed, it has deeply shaped substantive constitutional law itself." Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1644, 1648 (2000).

197. *See, e.g.*, Wittmer v. Peters, 87 F.3d 916, 919 (7th Cir. 1996) (noting that "there is a reason that dicta are dicta and not holdings, that is, are not authoritative"); *see also* Agostini v. Felton, 521 U.S. 203, 217 (1997) (explaining that the fact that five justices had joined opinions stating that a prior precedent should be reconsidered cannot effect a change in the landscape of the law because the question of the case's propriety was not before the court, reducing the statement to dicta). *See generally* Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 5 (1994) ("[T]he overwhelming consensus reflected by judicial and academic discourse holds that lower courts ought to define the law merely by interpreting existing precedents, without considering what their higher courts would likely do on appeal.").

198. *E.g.*, JOHN SALMOND, JURISPRUDENCE 190–92 (10th ed. 1947) (defining what comprises the "ratio decidendi" of a case as opposed to mere dicta and explaining that "[t]he only judicial principles which are authoritative are those which are . . . relevant in their subject-matter and limited in their scope"); *see also* LLEWELLYN, *supra* note 183, at 14–15 (defining "holding" and "dicta" and detailing the relationship between the two); Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 179–80 (1930) (explaining how to identify whether a case is binding precedent). Earlier generations of scholars sometimes distinguished between the "holding" of a case and its "ratio decidendi"; they also sometimes distinguished between dicta and obiter dicta, the latter being even less worthy of respect than dicta. *See* Abramowicz & Stearns, *supra* note 51, at 1047–49 (detailing the older, more formalistic distinction between holding and dicta).

199. Dorf, *supra* note 51, at 2049, 2053–54 (advocating that courts and scholars adopt a "rationale based" distinction between holding and dicta and addressing critiques by advocates of the facts-plus-outcome view and the "natural model").

> opinion in which it appears, but merely by considering the facts and outcome of the case in which it appears. Treating the question whether a statement is dictum as a feature of the opinion in which it appears will result in a broader view of holdings than will treating that question as a feature of the facts and outcome of the case in which it appears.[200]

Professor Dorf is critical of the facts-and-outcome approach, and most courts and commentators look to the rationale of the opinion in order to determine its holding, although even here, there is debate about exactly what parts of the rationale constitute the holding.[201] Michael Abramowicz and Maxwell Stearns more recently attempt to pin down the distinction,[202] arguing that "a holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment."[203]

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200. *Id.* at 2008–09. Professor Dorf cites Chief Justice Rehnquist's plurality opinion in *Webster v. Reproductive Health Services*, as taking this limited view of the holding of *Roe v. Wade*. *Id.* (citing Webster v. Repro. Health Servs., 492 U.S. 490, 521 (1989)). "The Texas statute unconstitutionally infringed the right to an abortion derived from the Due Process Clause." *Id.* (internal quotation marks omitted). Dorf goes on to note that

> [A]ccording to Chief Justice Rehnquist, the remainder of the opinion in *Roe*, including the Court's rationale for and scope of the right in general, was merely dictum. The narrow principle which suffices to explain the case is that the Texas statute goes too far; thus, whatever else the Court *said*, that is all that the case *held*.

Id. at 2008. Dorf criticizes the Rehnquist view:

> For the law to consist of more than an arbitrary collection of facts and outcomes, judges must be permitted to distinguish between what they deem relevant and what they deem irrelevant. Thus, far from exhibiting a callous disregard for the case-or-controversy requirement, a judicial opinion that focuses on some facts while ignoring others fulfills the requirement of any precedent-based legal system that judges give principled justifications for their decisions.

Id. at 2032–33 (footnote omitted); *see also* Caminker, *supra* note 197, at 15 (describing a holding as "[b]oth the disposition and the doctrinal reasoning justifying it" and labeling "this sort of doctrinal reasoning [as] 'dispositional rule' because it justifies the disposition. Thus, all articulations contained in a single-judge opinion can be classified as either dispositional rules, which enjoy precedential status, or dicta, which do not").

201. *See* Dorf, *supra* note 51, at 2032–33; *see also* Healy, *supra* note 104, at 915–16 (arguing that the Article III "case or controversy" requirement constrains courts only "when a judge makes a statement that, by virtue of being treated as precedent, has the force of law"). This position may go too far. Most of the states permitting state supreme courts to issue advisory opinions also provide that such opinions are not precedents. *See infra* note 254. It seems unlikely that the Supreme Court would view the issuance of an opinion outside of the case-and-controversy context as permissible merely because the Court declared that that opinion was not binding, even on the parties.

202. *See* Abramowicz & Stearns, *supra* note 51, at 1065–68 (seeking a clear and easily applicable distinction between dictum and holding).

203. *Id.* at 1065. The authors argue that the Supreme Court's decision in *United States v. Marks*, which defined the rule of law emerging from a case in which no opinion

These distinctions are significant because a holding is binding on a lower court within the same system under the doctrine of vertical precedent; it is also binding, although less absolutely, on the issuing court under the doctrine of horizontal precedent.[204] Conversely, once a statement is found to be dictum, even when written by a higher court within the same system, it is not binding on lower courts, much less the issuing court, although it is entitled to some degree of deference, often expressed incompletely by the term "persuasive."[205] Such dicta, then, are akin to holdings of judicial decisions rendered elsewhere: such decisions, even when the court is in some sense a higher court and the point at issue is indisputably its holding, are only "persuasive."[206]

We will soon return to the question of what it means for an opinion to be persuasive; for the moment, it is enough to stress that much is hidden in this word. Why a piece of text should be persuasive, and whether the power of that text is influenced by whether it was rendered by a court and vacated (or not) by the same court or an even higher one, are core questions for our enterprise.

VI. "VACATED ON OTHER GROUNDS"

To this point, we have considered the formal status of vacated opinions, concluding that they are unlikely to be considered binding precedents although they may have persuasive value. Indeed, Judge Kozinski's opinion in *Hart* was written to set straight anyone who might have been led astray by Judge Arnold in *Anastasoff*. But this is, so far, a matter of theory, not practice. How do the courts, in fact, treat vacated opinions?

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commands a majority, implies that the rationale is part of the holding. *See id.* at 1059 (citing United States v. Marks, 430 U.S. 188 (1977)) (arguing that the "narrowest grounds rule" necessarily implies that "when the Supreme Court [issues a unanimous or majority decision], . . . the holding is expressed in the majority opinion . . . . [T]his is so *even if* a Justice concurring in the judgment would have preferred instead to resolve the case on a narrower ground.").

204. *See* Caminker, *supra* note 28, at 818, 823–24 (explaining that "[t]he duty to obey hierarchical precedent tracks the path of review followed by a particular case as it moves up the three federal judicial tiers: A court must follow the precedents established by the court(s) directly above it," and further describing the less absolute duty of a federal court to follow its own prior decisions).

205. *See* Abramowicz & Stearns, *supra* note 51, at 957 (explaining that the distinction between holding and dicta is crucial because, under the doctrine of stare decisis, only holdings are binding).

206. *See* Caminker, *supra* note 28, at 824 (noting that, although a court is bound to obey precedents from the courts directly above it, "a court can ignore precedents established by other courts so long as they lack revisory jurisdiction over it").

Commentators have noticed a few instances in which courts justified their reliance on vacated opinions,[207] and there are certainly other instances of this,[208] but no one seems to have studied systematically how often courts cite a vacated opinion without any apparent concern about the vacation.[209] Indeed, the subsequent history description "vacated on other grounds" suggests that the opinion continues to have force on the grounds not implicated by the vacatur.

Using this search term, it is possible to identify instances in which significant legal doctrines can be traced back to a vacated opinion. For example, take *Lowery v. Circuit City Stores, Inc.*,[210] a Fourth Circuit opinion rendered in 1998 and vacated by the Supreme Court in 1999. Despite the vacation (and the red stop sign for those who do their research on Lexis), *Lowery* has been cited 107 times,[211] most notably for the rule that "pattern and practice" claims cannot be pursued by a private person in a non-class action[212] but also for propositions related to class

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207 Professor Resnick cited two district court cases stressing that a vacated opinion has whatever persuasive value future readers find in it. *See* Resnik, *supra* note 112, at 1473 (citing IBM Credit Corp. v. United Home for Aged Hebrews, 848 F. Supp. 495, 497 (S.D.N.Y. 1994) ("Once a decision has been filed and in the public domain, its influence beyond any effect on the parties is based solely upon future readers' views of its merit, whether vacated in connection with a settlement or not so vacated."), and *In re* Finley, 160 B.R. 882, 898 (Bankr. S.D.N.Y. 1993) ("[A] logical and well-reasoned decision, despite vacatur, is always persuasive authority.'")).

Professor Fisch cites *United States* ex rel *Espinoza v. Fairman*, in which the court concluded that an opinion vacated on one ground remains persuasive as to the other, nonvacated grounds. Fisch, *supra* note 112, at 629 n.204 (citing United States *ex rel* Espinoza v. Fairman, 813 F.2d 117, 125 n.7 (7th Cir. 1987)). She also cites *Christianson v. Colt Industries Operating Corp.*, in which the court noted that, while the Supreme Court vacated a Federal Circuit decision because it was inappropriate for that court to decide a case over which it lacked jurisdiction, "there is no indication that the Supreme Court found any error in the Federal Circuit's decision. Thus, although vacated, the decision stands as the most comprehensive source of guidance available on the patent law questions at issue in this case." *Id.* (citing Christianson v. Colt Indus. Operating Corp., 870 F.2d 1292, 1298 (7th Cir. 1989)).

208. *E.g.*, Berkley v. United States, 48 Fed. Cl. 361, 370 n.3 (2000) ("Although [a prior case] was eventually vacated . . . and is no longer binding precedent in the Eleventh Circuit, it still provides sound guiding analysis.").

209. Professor Greenbaum comes closest. *See* Greenbaum, *supra* note 83, at 100 n.416 (cases citing vacated cases without discussion of their precedential effect) and n.417 (cases citing vacated cases as persuasive only). The author concludes that "[t]his last approach seems best." *Id.* at 101.

210. Lowery v. Circuit City Stores, Inc., 158 F.3d 742, 759–61 (4th Cir. 1998) (holding that the pattern-or-practice principles and rules of proof are not applicable to plaintiffs in a private, nonclass lawsuit), *vacated*, 527 U.S. 1031 (1999).

211. Shepardized July 20, 2005 on Lexis.

212. *Lowery* is often cited for the proposition that in a private, nonclass suit the pattern-or-practice method may not be used to prove discrimination. *See, e.g.*, Bacon v. Honda of Am. Mfg., Inc., 370 F.3d 565, 575 (6th Cir. 2004) (citing *Lowery* and agreeing

certification.[213] The extent to which vacated opinions like *Lowery* continue to have influence, however, must be examined, and, to the extent the phenomenon exists, it remains to be seen whether it is problematic.

To explore this question, I conducted a number of Lexis searches. The first, a search for citations to opinions "vacated on other grounds," revealed that such citations have grown substantially over time, certainly more than could be accounted for by the general increase in the decisional output of the federal courts.[214] The growth of such citations, however, does not necessarily imply a similar increase in the influence of vacated opinions because the reference may have other purposes than to rehabilitate a vacated precedent. To explore the current significance of "vacated on other grounds" in the federal courts, I undertook two additional studies.[215]

The first was of the Supreme Court's use of the phrase "vacated on other grounds." As might be expected from a court that does not often cite authorities other than its own prior decisions, the Court's use was relatively rare, having occurred

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with "the rationale that a pattern-or-practice claim is focused on establishing a policy of discrimination; because it does not address individual hiring decisions, it is inappropriate as a vehicle for proving discrimination in an individual case"); Celestine v. Petroleos de Venez. S. Am., 266 F.3d 343, 355 (5th Cir. 2001) (citing *Lowery* and concluding, "While the Supreme Court has not explicitly stated that the pattern and practice method of proof may never be used in private, nonclass suits, other courts have reached this conclusion.").

213. *E.g.*, Shook v. El Paso County, 386 F.3d 963, 973 (10th Cir. 2004) ("We agree with the *Lowery* Court. Elements of manageability and efficiency are not categorically precluded in determining whether to certify a . . . class.").

214. The results of a Lexis search in the Federal Courts database for the term "(vacated or vac'd) w/s other grounds" for each year at five year intervals is reflected in the following table:

Year	# of "Vacated on Other Grounds"
1960	5
1965	24
1970	65
1975	153
1980	288
1985	339
1990	514
1995	599
2000	592
2005	624

Search conducted on Feb. 24, 2006. During the periods in question, the number of cases decided by the federal courts increased from roughly 8,000 decisions to roughly 70,000.

215. *See infra* notes 165–76 and accompanying text (explaining that the first study involved the Supreme Court's use of the phrase "vacated on other grounds" and the second examined all federal cases decided in 2004 in which the court described a precedent as "vacated on other grounds").

only 54 times and, in recent years, averaging about once per year.[216] In the overwhelmingly majority of these instances, the Court merely indicated the diversity of views below, not citing any of the cases as even persuasive precedent.[217]

However, the Supreme Court has accorded one of its own vacated precedents more authority. *Zap v. United States*,[218] for example, has been cited in Supreme Court opinions fourteen times since its vacation[219] and given respected treatment at least twice.[220] More surprisingly, several Supreme Court citations do not mention the vacatur,[221] thus treating *Zap* as valid precedent. Even more strangely, Justice Frankfurter's dissent in *Harris v. United States* questioned the authority of *Zap* on the ground that it had not been decided by a majority of the Court,[222] even though it had already been vacated at the time and could have more easily been dismissed on that basis. In light of this, it is not surprising that *Zap* continues to have a life after vacation in the lower courts. Although decided in 1946 and vacated in 1947, *Zap* has been cited 101 times by lower federal courts.[223] Indeed, as in the Supreme Court, the fact of vacation seems to have been lost in the shuffle. Further, the law reviews seem to be taking their lead from the courts and, despite the supposed thoroughness of review cite-checking, *Zap* has often been cited without indication that it was ever vacated.[224]

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216. Search conducted October 21, 2006.

217. *See, e.g.*, Alabama v. Shelton, 535 U.S. 634, 660 (2002) (citing various circuit and state cases and noting the "divi[sion]" among the courts but refusing to recognize any as authoritative or persuasive).

218. Zap v. United States, 328 U.S. 624 (1946) (affirming the lower court's decision to allow into evidence a document seized by FBI agents without a warrant), *vacated*, 330 U.S. 800 (1947).

219. Search conducted October 21, 2006.

220. United States v. Edwards, 415 U.S. 800, 806 (1974) (ruling that police "are normally permitted to seize evidence of crime when it is lawfully encountered" (citing *Zap*, 328 U.S at 624)); Coolidge v. New Hampshire, 403 U.S. 443, 515 (1971) (White, J., dissenting) (noting *Zap* indicates the Supreme Court would allow evidence seized "during the course of an otherwise lawful search").

221. *E.g.*, Texas v. Brown, 460 U.S. 730, 735–36 (1983) ("Our cases hold that procedure by way of a warrant is preferred, although in a wide range of diverse situations we have recognized flexible, common-sense exceptions to this requirement." (citing *Zap*, 328 U.S. at 630)).

222. Harris v. United States, 331 U.S. 145, 156 n.2 (1947) (Frankfurter, J., dissenting) ("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.").

223. Shepardized on Lexis July 24, 2005.

224. *E.g.*, David A. Koplow, *Arms Control Inspection: Constitutional Restrictions on Treaty Verification in the United States*, 63 N.Y.U. L. REV. 229, 315 n.544 (1988) (omitting

The second study looked at all federal cases decided in the calendar year 2004 in which the citing court tagged "vacated on other grounds" to a cited precedent; it then attempted to assess whether the vacated opinion had any effect on the citing court's decision.[225] The latter task was obviously less certain than the former. The term appeared 371 times in the Lexis Federal Courts database for that year.[226] No decisions were from the Supreme Court; 128 citations appeared in circuit court opinions; the remaining cases were from district courts with a scattering from bankruptcy courts or specialized courts such as the Court of Veterans Appeals.[227]

Of the study's citations, most reflected instances in which the citation was not offered as authority but served some other purpose. For example, the citation was sometimes merely part of a historical record,[228] and in some of these cases the vacated opinion had, in fact, been formally re-instated by the same court later.[229] In another group of cases, the vacated opinion was cited

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reference to the vacatur and also misspelling the case name as "Zapp").

225. The search, performed October 21, 2006, retrieved 371 cases. Fifteen cited the vacated cases as a secondary authority. *See infra* notes 227–29 and accompanying text (discussing the uses of vacated cases as a nonprimary authority).

226. *See supra* note 225.

227. Excluded from analysis were decisions that did not directly cite a vacated authority in the year 2004. For example, a 2004 opinion (opinion 3) citing or quoting a prior opinion (opinion 2) that in turn cited or quoted a vacated opinion (opinion 1). *E.g.*, Cazarez-Gutierrez v. Ashcroft, 382 F.3d 905, 913 (9th Cir. 2004). While vacated opinion 1 may well have influenced the law by influencing opinion 2, it did not directly influence opinion 3 in 2004 and, therefore, was excluded from the study.

228. For example, *Getty Petroleum Marketing, Inc. v. Capital Terminal Co.*, 391 F.3d 312, 328–29 (1st Cir. 2004), cited a vacated opinion as one of three cases taking different positions: "Melton v. City of Oklahoma City, 879 F.2d 706, 724 & n.25 (10th Cir. 1989) (court may take judicial notice of local ordinances), *vacated on other grounds*, 928 F.2d 920 (10th Cir. 1991) (en banc)," to show that "the Tenth Circuit changed positions three times in a fifteen-year period before finally deciding that a court may take judicial notice of local ordinances."

229. For example, *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 948 F.2d 90 (2d Cir. 1991), *vacated*, 505 U.S. 1215 (1992), was vacated for reconsideration in light of a Supreme Court decision, but, upon reconsideration, the Second Circuit found that the proposition in question had not been affected by the intervening Supreme Court opinion.

A particularly confusing example of this in 2004 is *Village of Milford v. K-H Holding Corp.*, where the panel seemed to disagree with the vacated opinion, *Donahey v. Bogle*, but nevertheless indicated it was bound by it. Vill. of Milford v. K-H Holding Corp., 390 F.3d 926, 934 n.1 (6th Cir. 2004) (citing Donahey v. Bogle, 987 F.2d 1250, 1255 (6th Cir. 1993)). In reality, while *Donahey* had been vacated by the Supreme Court, it was ultimately reinstated by the Sixth Circuit in an opinion that *Village of Milford* did not cite. Donahey v. Bogle, 16 F. App'x. 283 (6th Cir. 2000), *reinstating* 512 U.S. 1201 (1994). Perhaps it did not cite that opinion because it was unpublished. But whether vacated or unpublished, the result seems to have been a panel considering itself bound by an opinion that should not have bound it under conventional views.

merely to note the diversity of judicial views on a subject.[230] In still other instances, the vacated opinion was cited for factual information,[231] as one might cite a newspaper article. In yet other instances, the court cited the vacated authority more for its felicitous phrasing[232] or summary of other precedents than for any authority it might provide.[233]

Beyond cases where vacated opinions are not cited for precedential effect in any sense of the term, there are instances where the citation seems used as a precedent, but of a very weak nature. That is, the vacated opinion is cited for its authority, but seems more or less superfluous to that point. The most obvious example is when the opinion appears in a string citation: presumably the proposition supported by the vacated opinion is also supported by sufficient other authority that the vacated opinion is unnecessary, being added mostly as a flourish.[234]

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230. *E.g.*, Dippin' Dots Inc. v. Frosty Bites Distrib., LLC, 369 F.3d 1197, 1204 (11th Cir. 2004).

> One category of adjudicative facts subject to judicial notice (and the only category relevant in this case) is facts that are "generally known within the territorial jurisdiction of the trial court." Fed. R. Evid. 201(b). Such judicially-noticed facts are of breathtaking variety. *See, e.g.*, Friend v. Burnham & Morrill Co., 55 F.2d 150, 151–52 (1st Cir. 1932) (noting the method for canning baked beans in New England); Seminole Tribe of Fla. v. Butterworth, 491 F. Supp. 1015, 1019 (S.D. Fla. 1980), *aff'd*, 658 F.2d 310 (5th Cir. 1981) (noting that bingo is largely a senior citizen pastime); . . . Colourpicture Publishers, Inc. v. Mike Roberts Color Prods., Inc., 272 F. Supp. 280, 281 (D. Mass. 1967), *vacated on other grounds*, 394 F.2d 431 (1st Cir. 1968) (noting that calendars have long been affixed to walls by means of a punched hole at the top of the calendar).

Id. at 1204.

231. For example, *United States v. Emmenegger*, 329 F. Supp. 2d 416, 420 n.2 (S.D.N.Y. 2004), cited *United States v. Shonubi*, 895 F. Supp. 460, 474–75 (E.D.N.Y. 1995) (collecting cases), *vacated on other grounds*, 103 F.3d 1085 (2d Cir. 1997), for the fact that, "in many fraud cases, . . . the extent of the loss presents extremely complex questions, and in many instances, the loss amount must simply be estimated."

232. *See, e.g.*, Robey v. Shapiro, 434 F.3d 1208, 1211 (10th Cir. 2006) ("'Although Congress may not "create" an Article III injury that the federal judiciary would not recognize, . . . Congress can create a legal right (and, typically, a cause of action to protect that right) the interference with which will create an Article III injury.'" (quoting Akins v. Fed. Election Comm'n, 101 F.3d 731, 736 (D.C. Cir. 1996) (en banc), *vacated on other grounds*, 524 U.S. 11 (1998))).

233. *See, e.g.*, Seippel v. Jenkens & Gilchrist, P.C., 341 F. Supp. 2d 363, 383 (S.D.N.Y. 2004) ("Motions to strike are generally disfavored and will be denied unless it is clear that under no circumstances could the demand succeed." (citing Salcer v. Envicon Equities Corp., 744 F.2d 935, 939 (2d. Cir. 1984), *vacated on other grounds*, 478 U.S. 1015, (1986)).

234. *E.g.*, Ambort v. United States, 392 F.3d 1138, 1140–41 (10th Cir. 2004) (citing United States v. Cheek, 882 F.2d 1263, 1268 n.2 (7th Cir. 1989), *vacated on other grounds*, 498 U.S. 192 (1991), as one of several cases rejecting various claims that the plaintiffs were not subject to federal income tax); Alwan v. Ashcroft, 388 F.3d 507, 511 (5th Cir. 2004) ("Permanent inadmissibility to the United States is a 'concrete disadvantage'; it is imposed as a matter of law and is not contingent upon any future event. As such, Alwan's

Nevertheless, the recurrent citation of vacated opinions suggests that courts do not view them as "erased" by vacatur.

More significantly, the study revealed 116 instances in which the citing court cited only a vacated opinion for a particular proposition and in which the vacated opinion was rendered by the circuit in question. Since the district courts in a given circuit are bound by the decisions of the circuit in which they sit,[235] and a subsequent panel is bound by the decisions of a prior panel in the same circuit, it is these 116 cases that are the focus of any study as to the effect of vacated opinions.

While some of these cases can be otherwise explained, such as the circuit having reaffirmed the proposition later,[236] most reflect instances in which vacated opinions seem to have exercised considerable influence. We have already encountered *Lowery v. Circuit City Stores, Inc.*[237] Another example from 2004 is the thirteen District of Columbia Circuit court opinions citing *Hohri v. United States*,[238] for the proposition that a court is not limited to the allegations in the complaint in deciding a rule 12(b)(1) motion.[239] *Hohri* is an especially odd case as precedent since the Supreme Court vacated because the appeal in question from the District Court for the District of Columbia should have been to the Federal Circuit, not to the District of Columbia Circuit.[240] *Hohri*, therefore, exerts a substantial influence over district court judges in District of Columbia Circuit even though the circuit court had no jurisdiction to decide the case. Further, since the Supreme Court remanded the case to the District of Columbia Circuit with instructions to transfer it to the Federal

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claim is not moot and, accordingly, the case or controversy requirement of Article III is met." (citations omitted) (citing Max-George v. Reno, 205 F.3d 194, 196 (5th Cir. 2000), *vacated on other grounds sub nom.* Max-George v. Ashcroft, 533 U.S. 945 (2001), as well as cases from several other circuits)).

235. While there are exceptions to this rule, including direct appeal to the Supreme Court and district court decisions in certain kinds of intellectual property cases being appealed to the Federal Circuit, such exceptions did not appear to influence any of the cases in the study. *See, e.g.*, 15 U.S.C. § 29(b) (2000) (providing direct appeal to the Supreme Court of certain antitrust decisions); 28 U.S.C. §§ 1292, 1295 (2000) (providing for the appeal of all patent cases to the Federal Circuit).

236. *See supra* note 229.

237. Lowery v. Circuit City Stores, Inc., 158 F.3d 742, 759–61 (4th Cir. 1998), *vacated*, 527 U.S. 1031 (1999); *see also supra* text accompanying notes 210–14.

238. Hohri v. United States, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 646 (1987).

239. *E.g.*, Jerome Stevens Pharms., Inc. v. FDA, 319 F. Supp. 2d 45, 49 (D.D.C. 2004) (explaining that, in the context of a Rule 12(b)(1), as compared to a Rule 12(b)(6) motion for failure to state a claim, "the court is not limited to the allegations contained in the complaint"), *aff'd in part, rev'd in part*, 402 F.3d 1249 (D.C. Cir. 2005).

240. United States v. Hohri, 482 U.S. 64, 75–76 (1987).

Circuit, the District of Columbia Circuit had no opportunity to reaffirm the propositions at issue.[241] Nevertheless, not only did *Hohri* garner eighteen citations in 2004, it has been cited 186 times overall for a variety of propositions.[242] Not bad for an "erased" opinion!

Beyond *Hohri*, the 2004 survey also reveals a wide variety of propositions for which the only citation was a vacated opinion, including:

- "'[A]brogation of a rule of procedure is generally inappropriate in the absence of a direct expression by Congress of its intent to depart from the usual course of trying "all suits of a civil nature" under the Rules established for that purpose.'"[243]
- "[A] missing witness instruction is not appropriate when a witness is equally available (or equally unavailable) to both parties."[244]
- "[District courts should take] 'a restrained approach' to disqualification motions . . . ."[245]
- "'A fraud-on-the-market is any deceit that successfully disseminates false or misleading information into the securities market or withholds vital information from that market.'"[246]

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241. The vacation changed the result: the district court's dismissal of claims by the Japanese-American plaintiffs challenging their World War II internment had been reversed in part by the D.C. Circuit but was affirmed by the Federal Circuit. Hohri v. United States, 847 F.2d 779, 779 (Fed. Cir. 1988) (affirming the district court's original opinion); *Hohri*, 782 F.2d at 256 (reversing in part the district court's finding).

242. Search conducted Nov. 10, 2006.

243. Cal. Pub. Employees' Ret. Sys. v. Chubb Corp., 394 F.3d 126, 161 (3d Cir. 2004) (quoting Weiss v. Temp. Inv. Fund, 692 F.2d 928, 936 (3d Cir. 1982), *vacated*, 465 U.S. 1001 (1984)).

244. United States v. Henries, 98 F. App'x 164, 166 n.1 (3d Cir. 2004) (citing United States v. Vastola, 899 F.2d 211, 235 (3d Cir.), *vacated*, 497 U.S. 1001 (1990)). However, *Henries* also found any district court error harmless. *Id.*

245. Hempstead Video, Inc. v. Inc. Vill. of Valley Stream, No. CV 94-3659(ETB), 2004 WL 62560, at *4 (E.D.N.Y. Jan. 12, 2004) (citing Armstrong v. McAlpin, 625 F.2d 433, 444 (2d Cir. 1980) (en banc), *vacated*, 449 U.S. 1106 (1981)). *Armstrong* was also cited to substantially the same effect by two other district court decisions in 2004, and overall has survived its vacation quite nicely: it has been cited 337 times, influencing the law far beyond the Second Circuit.

Another vacated opinion from the Second Circuit, has also had an influence on disqualification law. Cheng v. GAF Corp., 631 F.2d 1052, 1059 (2d Cir. 1980), *vacated*, 450 U.S. 903 (1981). *Cheng* was cited four times in 2004 for propositions relating to disqualification and has been cited 185 times overall.

246. Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Dynegy, Inc. (*In re* Dynegy, Inc. Secs. Litig.), 226 F.R.D. 263, 288–89 (S.D. Tex. 2004) (quoting Abell v. Potomac Ins. Co., 858 F.2d 1104, 1120 (5th Cir. 1988), *vacated sub nom.* Fryar v. Abell,

- An antitrust complaint need only meet an "exceedingly low" threshold of sufficiency in order to state a claim for relief and survive a motion to dismiss.[247]

- The principle of specialty "'requires that the requesting country not prosecute for crimes . . . for which an extradition was not granted.'"[248]

- "A defendant's delay in filing a *forum non convienens* motion will not result in waiver, but delay does weigh heavily against granting the motion."[249]

- "'A motion to strike an affirmative defense under Rule 12(f), Fed. R. Civ. P. for legal insufficiency is not favored and will not be granted unless it appears to a certainty that plaintiffs would succeed despite any state of the facts which could be proved in support of the defense.'"[250]

- Eligibility rules promulgated by the NCAA are not "trade or commerce" within the meaning of § 1 of the Sherman Act[251]

- Failure of a defense attorney to investigate and present evidence of mental retardation is not a basis for habeas when "'the upper borderline of mild

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492 U.S. 914 (1989)). *Abell* was also cited by another district court in 2004 for another proposition; overall *Abell* has been cited 341 times.

247. Spanish Broad. Sys. of Fla. v. Clear Channel Commc'ns, Inc., 376 F.3d 1065, 1077 (11th Cir. 2004) (citing Covad Commc'ns Co. v. BellSouth Corp., 299 F.3d 1272, 1279 (11th Cir. 2002), *vacated*, 540 U.S. 1147 (2004)). *Covad* was also cited in 2004 for another proposition and, overall, it has been cited 53 times.

248. United States v. Garrido-Santana, 360 F.3d 565, 577 (6th Cir. 2004) (quoting Demjanjuk v. Petrovsky, 776 F.2d 571, 583 (6th Cir. 1985), *vacated*, 10 F.3d 338 (6th Cir. 1993)) (omission in original) (discussing the defendant's claim that the doctrine of "specialty" limited the grounds upon which he could be sentenced).

249. Brokerwood Prods. Int'l, Inc. v. Cuisine Crotone, Inc., 104 F. App'x 376, 384 (5th Cir. 2004) (citing *In re* Air Crash Disaster Near New Orleans, La. on July 9, 1982, 821 F.2d 1147, 1165 (5th Cir. 1987) (en banc), *vacated sub nom.* Pan Am. World Airways, Inc. v. Lopez, 490 U.S. 1032 (1989)).

250. EEOC v. Bay Ridge Toyota, Inc., 327 F. Supp. 2d 167, 170 (E.D.N.Y. 2004) (quoting Salcer v. Envicon Equities Corp., 744 F.2d 935, 939 (2d Cir. 1984), *vacated*, 478 U.S. 1015 (1986)); *accord* DGM Invs., Inc. v. N.Y. Futures Exch., Inc., No. 01 Civ. 11602(RWS), 2004 WL 635743, at *1 (S.D.N.Y. Mar. 31, 2004). *Salcer* is cited 132 times overall.

251. Pocono Invitational Sports Camp, Inc. v. NCAA, 317 F. Supp. 2d 569, 581 (E.D. Pa. 2004) (citing Smith v. NCAA, 139 F.3d 180, 185 (3d Cir. 1998), *vacated*, 525 U.S. 459 (1999)); *see also* Worldwide Basketball & Sport Tours, Inc. v. NCAA, 388 F.3d 955 (6th Cir. 2004).

> retardation' does not amount to 'any significant organic damage or mental illness.'"[252]

These propositions vary substantially in their obviousness and appeal, but at least some of them are not self-evident and therefore suggest that vacated opinions exercise an influence on the law, perhaps not in dramatic ways, but on a continual basis.[253] Whether or not they can be said to have influenced the court because they were viewed as binding or merely as persuasive is usually unclear, but, of course, that reality may itself be meaningful. As a practical matter, then, vacated opinions often have appreciable importance.

VII. WHAT DOES IT MEAN TO BE PERSUASIVE?

If vacated opinions may be at least "persuasive," what does that mean? This label has been applied by the legal system to a variety of contexts—including describing the value of dictum from higher courts in the same jurisdiction and of both holding and dictum from courts in other jurisdictions.[254] Mostly, the term is unanalyzed, but occasionally its meaning stirs controversy. Most recently, the suggestion by several Justices that the Supreme Court could look to foreign precedent for its

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252. Riley v. Dretke, 362 F.3d 302, 307 (5th Cir. 2004) (quoting Smith v. Black, 904 F.2d 950, 977–78 (5th Cir. 1990), *vacated*, 503 U.S. 930 (1992)).

253. No vacated opinions were cited for a proposition contrary to that adapted by the citing court but nevertheless rejected as not authoritative because of the vacation. While this might suggest that vacated opinions are sufficiently important to cite, at least in the jurisdiction in question, such evidence is profoundly ambiguous. A court faced with a contrary but vacated opinion could not be faulted for simply not citing it.

254. Another example is advisory opinions in those states that permit them. In most such states, such opinions are advisory not only in the sense that there need not be a case or controversy generating the opinion but also in the sense that they are said not to bind even the issuing court. Indeed, they are often viewed not as opinions of "the court" at all but rather as opinions of the individual justices. *See generally* Mel A. Topf, *State Supreme Court Advisory Opinions as Illegitimate Judicial Review*, 2001 LAW REV. M.S.U.-DETROIT C. L. 101, 102 (arguing against the legitimacy of advisory opinions because they are nonbinding and lack "precedential force or effect on future advisory opinions or on litigated cases"). Whatever the formal status of such opinions, however, they seem to be frequently cited by the rendering court as authoritative. *Id.* at 137 ("The authorities requesting advisory opinions, the justices giving them, the legal community participating in or observing the advisory process, and the media reporting on advisory opinions all presume advisory opinions' precedential and binding force, and they respond accordingly. For all important purposes, then, advisory opinions have that force. The doctrine holding they are nonbinding is thoroughly unpersuasive."). *But see* Jonathan D. Persky, Note, *"Ghosts That Slay": A Contemporary Look at State Advisory Opinions*, 37 CONN. L. REV. 1155, 1232–33 (2005) ("In contrast to the anecdotal evidence offered by opponents of the advisory opinion system, the data shows that the vast majority of litigated cases that reference advisory opinions merely use them persuasively, rather than dispositively.").

"persuasive" force[255] has generated debate in both public forums and scholarly literature.[256] For example, Judge Posner weighed in against viewing such opinions as authority,[257] and the issue surfaced most saliently at the confirmation hearings for Justice Samuel Alito, where the nominee stated "I don't think that foreign law is helpful in interpreting the Constitution. . . . We have our own law, we have our own traditions, we have our own precedents, and we should look to that in interpreting our Constitution."[258]

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255. Justice Sandra Day O'Connor, Keynote Address, 96 AM. SOC'Y INT'L L. PROC. 348, 350 (2002) ("[C]onclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts."); *see also* Anne E. Kornblut, *Justice Ginsburg Backs Value of Foreign Law*, N.Y. TIMES, Apr. 2, 2005, at A10 (reporting that Justice Ginsberg embraces the idea of consulting foreign legal decisions).

256. *E.g.*, John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303, 306–07 (2006) (stating that international and foreign law should not be used as authority because they "shed no light on the original understanding of the Constitution"); *see also* Steven G. Calabresi, Lawrence, *The Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097, 1102 (2004) (concluding that foreign constitutional law has only minimum relevance to American constitutional law and in *Lawrence* the court erred in relying too heavily on foreign constitutional law); David Fontana, *The Next Generation of Transnational/Domestic Constitutional Law Scholarship: A Reply to Professor Tushnet*, 38 LOY. L.A. L. REV. 445, 448 (2004) (taking issue with Mark Tushnet's article, *Transnational/Domestic Constitutional Law*, 37 LOY. L.A. L. REV. 239 (2003) for what Fontana describes as Tushnet's treatment of the role of transnational law as persuasive authority, although Tushnet never uses that term); Diarmuid F. O'Scannlain, Speech, *What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law?*, 80 NOTRE DAME L. REV. 1893, 1901 (2005) (arguing that judges in various countries should be cautious in using comparative constitutional analysis because each country has different cultural, political, and economic features, which are distinct in important ways).

257. Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFF., July/Aug. 2004, at 40.

258. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 370 (2006) (statement of Judge Samuel A. Alito). The judge was answering a question by Senator John Kyl (R. Ariz.). *Id.* He elaborated that foreign law was not helpful in dealing with either of two broad constitutional questions—governmental structure and individual right:

> The structure of our government is unique to our country, and so I don't think that looking to decisions of supreme courts of other countries or constitutional courts in other countries is very helpful in deciding questions relating to the structure of our Government.
>
> As for the protection of individual rights, I think that we should look to our own Constitution and our own precedents. Our country has been the leader in protecting individual rights.

Id. Justice Alito went on to state that it would be "legitimate to look to foreign law" in other instances, including treaty interpretation, where "[he] wouldn't say that that is controlling, but it is something that is useful to look to." *Id.* at 370–71. Presumably, then, foreign interpretations are persuasive, even if not binding, on treaty interpretation but not even persuasive on constitutional issues. He also recognized that in some cases the

What, then, does it mean to be persuasive—and does it matter that what persuades is "law"? The most obvious approach, of course, would be to take the term literally—something is persuasive only in terms of its power to persuade—and many individuals seem to understand the term this way. Under such a reading, however, any nonbinding judicial opinion is of equal status to an article in, say, the New York Review of Books or the National Review. On its face, however, this appears implausible—the words "New York Review of Books" appear only twenty-nine times in the Lexis Federal Court database, while "National Review" appears in seventy-eight opinions; in both cases most of the appearances are not in any sense authority.[259] Perhaps more telling is the paucity of citations in judicial opinions to law review articles. While these are cited far more often than, say, the Atlantic Monthly, judicial reliance on scholarship is still relatively rare and apparently decreasing.[260] Although legal scholarship may be increasingly removed from the everyday work of the courts,[261] a vast amount of un-cited learning bears directly on legal questions.[262]

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rule of decision was based on foreign law, as under a contractual choice of law clause.

Similar inquiries were raised during the nomination process of Chief Justice Roberts. *See, e.g.*, *Confirmation Hearing on the Nomination of John G. Roberts to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 199–201 (2005) (statement of Judge John G. Roberts).

259. Search conducted Nov. 2, 2006.

260. *See* Louis J. Sirico, Jr., *The Citing of Law Reviews by the Supreme Court: 1971–1999*, 75 IND. L.J. 1009, 1010 (2000) (noting that updated "findings generally mirror . . . earlier ones," reflecting a "continuing decline in number of times the Court cited legal periodicals and a noticeable decrease in citations to the top tier of law journals," and attributing the "latter phenomenon [as] primarily due to a remarkable decline in the number of citations to the *Harvard Law Review*"); Louis J. Sirico, Jr. & Jeffrey B. Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131, 134 (1986) ("The number of citations to legal periodicals decreased from 963 in the 1971–73 period to 767 in the 1981–83 period."); *see also* Deborah J. Merritt & Melanie Putnam, *Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles?*, 71 CHI.-KENT L. REV. 871, 876 (1996) ("[C]ourts cite law review articles at a relatively low rate. The 1989–1991 article most frequently cited by the courts has gathered only forty-five judicial citations, while a mere seven judicial citations qualified an article for our 'most cited' list of 1990." (footnote omitted)).

261. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992) ("[I]t is my impression that judges, administrators, legislators, and practitioners have little use for much of the scholarship that is now produced by members of the academy.").

262. *See* Schauer, *supra* note 45, at 1935. In fact, Professor Schauer frames the question pithily: to determine what counts as "law" for the legal community, we should study actual inputs into legal argument and decision. *See id.* ("As a starting point, we could examine actual sources used, perhaps believing that something of deep importance about law was captured by the fact that, seemingly, well over ninety-nine percent of all legal arguments are buttressed only, at least explicitly, by that remarkably small set of

Of course, the strong preference for citing other court decisions rather than other, potentially equally or more persuasive (in the sense of convincing) authorities could be explained as mere reflexive path-dependence:[263] lawyers and judges are habituated to look for arguments in traditional sources, mainly case law,[264] and, as a result, systems of information retrieval have developed which make that task easier and easier. Conversely, other materials are not only unfamiliar to the mine-run of lawyers and courts but also comparatively inaccessible or inconvenient—even in this era of the internet.[265] There is, for example, no Google equivalent of the West Key Number system.[266] And, as with any path-dependent system, the very familiarity of certain kinds of sources of information may make other sources inherently suspect by contrast.[267] For example, if other sources are perceived to have a bias (e.g., The New York Review of Books

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norms contained in books published by the West Publishing Company.").

263. Hathaway, *supra* note 195, at 603–04 ("In broad terms, 'path dependence' means that an outcome or decision is shaped in specific and systematic ways by the historical path leading to it. It entails, in other words, a causal relationship between stages in a temporal sequence, with each stage strongly influencing the direction of the following stage. At the most basic level, therefore, path dependence implies that what happened at an earlier point in time will affect the possible outcomes of a sequence of events occurring at a later point in time." (internal quotation marks omitted)); *see also* Lewis A. Kornhauser, *Modeling Collegial Courts I: Path-Dependence*, 12 INT'L REV. L. & ECON. 169, 170 (1992) (concluding common law path dependence is "benign"). Path dependence can be distinguished from precedent, but it may be hard to untangle the two unless path dependence is confined to cognitive biases rather than more error-free rational responses.

264. Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 CORNELL L. REV. 583, 638–39 (2003) ("[T]he use of precedent is an example of the omission bias. Judges will often accept the current state, which is represented by precedent, because to do otherwise would require significant cognitive effort.").

265. This is true despite the fact that law has become substantially more interdisciplinary over the last several decades. *See* Kathleen M. Sullivan, *Interdisciplinarity*, 100 MICH. L. REV. 1217, 1218 (2002) ("[C]urrent trends towards interdisciplinarity in legal scholarship are cause for excitement, not lament.").

266. Ubiquitous as Google has become, the vast majority of users are still unsophisticated as to both its methods and the limitations of the information (or disinformation) available on the web. *See generally* TARA CALISHAIN & RAEL DORNFEST, GOOGLE HACKS (2005).

267. Path-dependence reduces the costs of reaching a decision by narrowing the sources examined. But it is problematic to the extent that decisions are influenced, perhaps determined, by decisions made at a different time and place to fit different circumstances. Stare decisis necessarily creates a path-dependent system, but the tendency to maximize the effect of past precedents (for example, by broadening the notion of holding or looking to vacated opinions) may increase this risk. *See* Hathaway, *supra* note 195, at 606 ("[W]here the costs of path dependence are expected to be especially significant, courts should consider relaxing the doctrine of stare decisis. This prescription not only supports modifying existing practices of reliance upon precedent, but also provides a theoretical basis for some existing distinctions in the degree that judges rely on certain categories of precedent.").

is "liberal" and the National Review "conservative"), judicial decisions are a superior source because they appear to be neutral.

But path dependence seems much too simple an explanation for viewing court opinions as persuasive—or perhaps it could be said that legal reasoning is so path dependent that judicial decisions, even if not binding, should be looked to simply because they are judicial decisions. Judges are expected to look to precedents—even merely persuasive ones. As Judge Kozinski succinctly phrased it, failure to take even nonbinding precedent into account is "bad form."[268] This judging norm[269] can be functionally justified by the expectation that decisions, the result of a presumably effective adversary process[270] and presumably considered deliberation by several judges, all of whom are neutral at least in the sense of being personally disinterested in the outcome, are more likely to be

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268. Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001) ("Citing a precedent is, of course, not the same as following it; 'respectfully disagree' within five words of 'learned colleagues' is almost a cliche. . . . While we would consider it bad form to ignore contrary authority by failing even to acknowledge its existence, it is well understood that—in the absence of binding precedent—courts may forge a different path than suggested by prior authorities that have considered the issue. So long as the earlier authority is acknowledged and considered, courts are deemed to have complied with their common law responsibilities.").

269. The claim here is not that attention to precedent is sufficient evidence of judgecraft, but only that it is necessary for those who are viewed as good or great judges not to exhibit bad form too often. And this is true whether one accepts an incentive-based system of judicial behavior or a more traditional view. *See, e.g.*, Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 84 (2002) (noting that "the tools of new institutional economics (bounded rationality, transaction costs, and agency costs [better explain] recent doctrinal developments in the lower federal courts in the area of securities class actions" than do standard theories of adjudication); Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 946 (1995) ("Ironically, understanding these incentives leads to the conclusion that formal considerations generally have far greater explanatory power with respect to judicial decision-making than do incentive-based explanations."); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 1 (1993) (concluding that any effort to remove significant economic incentives "has not rendered judicial behavior immune to economic analysis").

270. *See* HENRY W. JONES, JOHN H. KERNOCHAN, & ARTHUR W. MURPHY, LEGAL METHOD: CASES & TEXT MATERIALS 114 (1980) ("The critical word is 'disputed' and therein lies the reason for the distinction between holding and dictum: Dicta are pronouncements on points which need not be considered in order to reach a decision and are, therefore, in most cases, pronouncements on points on which the court has not had the benefit of argument."); *see also* Bob Jones Univ. v. Simon, 416 U.S. 725, 740 n.11 (1974) (finding a summary affirmance "lack[ing] the precedential weight of a case involving a truly adversary controversy" because one party reversed its position before the Court affirmed).

correct and well-reasoned[271] than, say, an op-ed in the local newspaper.[272]

But, of course, this view endows precedents with a kind of "authority" in an old sense of the word: A precedent is not persuasive because it persuades; it is persuasive because it is authoritative.[273] Such a view is not foreign to the law. After all, a common synonym for precedent is "authority."[274] In this sense, a binding precedent is authoritative since those bound may not agree (or even bother with deciding whether they agree). For a persuasive precedent to be authoritative, however, it involves something more (or less) than persuasion—it involves some degree of ceding decisionmaking to another because of the authority of the other. This is clearly the concern of some opponents of the citation of foreign law. For example, Judge Posner argues that "[p]roblems arise only when the foreign decision is believed to have some (even if quite attenuated) persuasive force in an American court merely by virtue of [its] being the decision of a recognized legal tribunal. This occurs, in short, when it is treated as an *authority*, albeit not a controlling one . . . ."[275]

The notion of authority being "persuasive" beyond its inherent power to persuade also explains what is otherwise mysterious—the phenomenon that might be called "graded persuasiveness." Indeed,

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271. Professor Frederick Schauer has recently suggested that cognitive biases might actually impair the ability of judges to decide concrete cases. Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 884 (2006) (noting that a preference for concrete cases may rest on a fundamentally mistaken premise if in fact concrete cases are more distorting than illuminating). *But see* Emily Sherwin, *Judges as Rulemakers*, 73 U. CHI. L. REV. 919, 926 (2006) (arguing that following precedent tends to limit courts in modifying sound rules because of particularly compelling facts and that "attention to precedent serves secondary, indirect functions that can help correct bias at the time judges first consider and announce rules," including the exposure to a wider array of facts entailed in reviewing past decisions).

272. This is true even if the op-ed was not written by a paid lobbyist, which sometimes happens. Eamon Javers, *Op-Eds for Sale*, BUS. WK. ONLINE, Dec. 16, 2005, http://www.businessweek.com/bwdaily/dnflash/dec2005/nf20051216_1037_db016.htm.

273. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 233 (1980) ("A person treats something (e.g., an opinion, a pronouncement, a map, an order, a rule . . .) as authoritative if and only if he treats it as giving him sufficient reason for believing or acting in accordance with it *nothwithstanding* that he himself cannot otherwise see good reason for so believing or acting . . . .").

274. *See generally* BLACK'S LAW DICTIONARY 1214 (8th ed. 2004) (elaborating upon the definition and stating "precedent is an adjudged case or decision of a court of justice, considered as furnishing rule or authority" (internal quotation marks omitted)).

275. Posner, *supra* note 269, at 41; *see also* McGinnis, *supra* note 256, at 310 ("Material only has dispositional value when the authoritativeness of its material comes from its status. . . . Precedent has intrinsic weight by virtue of its status as precedent, regardless of the merits of the arguments (about text or other matters) that it contains. It is the disposition value of international or foreign law that is objectionable.").

it is so common for both judges and lawyers to rank judicial decisions that are admittedly nonbinding on a kind of sliding scale that they may not always be aware that they are doing it. The relevant factors are many, but not often contested: date of the opinion (more recent is generally better than older), level of the court (higher is better than lower), standing of jurisdiction (the more prestigious the jurisdiction the better the authority),[276] whether the statement is dictum or holding,[277] if dictum whether "well-considered,"[278] and even whether the opinion was unanimous or only the prevailing side of a split vote.[279] A holding in a recent decision of the U.S. Supreme Court, for example, even if not binding on a state, is as persuasive as a decision can possibly be.[280] Conversely, dictum from a trial level court handed down more than a few years ago is likely not worth citing unless there is nothing

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276. Charles Fried, *Scholars and Judges: Reason and Power*, 23 HARV. J.L. & PUB. POL'Y 807, 809 n.8 (2000) ("Constitutional common law is much less like the general common law of those subjects in the United States, where the courts of any one state will treat the decisions of respected courts across the country as something more than just illustrative or persuasive, though less than authoritative precedent.").

277. *See supra* text accompanying note 212; *see also* Rafael Gely, *Of Sinking and Escalating: A (Somewhat) New Look at* Stare Decisis, 60 U. PITT. L. REV. 89, 137 (1998) ("In several recent decisions, various members of the Court have modified the basic *stare decisis* model by adding an additional factor to those described above. In particular, attention has been focused on the distribution of votes in the precedent case; that is, the margin of victory."). While these authorities deal with horizontal precedent, the observation also applies to persuasive precedent. *See* State by and Through the Road Comm'n v. Parker, 368 P.2d 585, 589 (Utah 1962) (separate opinion of Henriod, J. responding to the dissent of Wade, C.J.) ("The Michigan decision, with its questionable reasoning, and its bitterly divided court, offers little argument to dispose of precedents of this jurisdiction, and to fly in the teeth of the majority rule.").

278. Caminker, *supra* note 197, at 47–48 (noting that the concerns with dicta in general "may not be implicated by a particular dictum" since the opinion may demonstrate the author carefully considered his position and there may be reason to believe the author's views were shared by the other judges and there may be no question of the issue of law being dependent on an undeveloped factual record: "Thus, the probative value of dicta turns on a nuanced assessment of the statements in the context of a particular case. Courts have a long history of assessing the probative value of dicta, relying to some extent on those that they find well considered").

279. *See supra* text accompanying note 222.

280. An example might be a Supreme Court decision on a federal statute with a state law analog, such as Title VII and a state fair employment practices law. Although the Supreme Court's construction of Title VII would in no sense be considered binding on, say, the New Jersey Supreme Court's construction of the state's Law Against Discrimination, it is likely to be highly influential. *E.g.*, Peper v. Princeton Univ. Bd. of Trs., 389 A.2d 465 (N.J. 1978). More generally, the parallel construction of state and federal constitutional decisions was one of the problems with defining an adequate and independent ground of state law for purposes of Supreme Court jurisdiction. *See* Healy, *supra* note 104, at 854 (arguing that "the Court's approval of unnecessary constitutional rulings can be seen, to some degree, as an effort to preserve opportunities for the federal courts to develop constitutional norms").

better—and maybe not then.[281] But these are not the only factors in a complicated grading system—the judge who authored the opinion may well have her own degree of persuasiveness as the result of her reputation.[282]

Such notions, however, are strikingly at variance with the concept of "persuasive" as that word is used in non-legal settings. If we are truly concerned with the persuasiveness of a nonbinding precedent, it should not matter what court decided it or whether the arguments in question were holding or dicta. What should matter is the light such opinions shed on the question before the present court. Thus, if persuasiveness means persuasiveness, a precedent would be as effective (or ineffective) regardless of the court that decided it.

Since this is clearly not how either lawyers or judges approach our system of persuasive precedent, "persuasion" does not accurately express the role such precedent plays. But what concept does? The legal system is replete with rules by which one decisionmaker cedes some authority to another rather than make a *de novo* determination.[283] These include such commonplaces as the

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281. It remains to be seen how persuasive "unpublished" opinions will be. Even before the recent amendment to the Federal Rules of Appellate Procedure, there was an increasing tendency to allow such opinions to be cited for their persuasive value. *See* Anne Coyle, Note, *A Modest Reform: The New Rule 32.1 Permitting Citation to Unpublished Opinions in the Federal Courts of Appeals*, 72 FORDHAM L. REV. 2471, 2474 (2004) ("Currently only the Third and Eleventh Circuits allow citation of unpublished opinions without restriction. The D.C. Circuit allows unrestricted citation of unpublished opinions issued after January 1, 2002, but prohibits citation of unpublished opinions issued prior to that date. Four circuits forbid citation in unrelated cases. Five circuits disfavor citation, but allow reference when an unpublished opinion has 'precedential' or 'persuasive' value on a material issue and no published opinion would serve as well." (footnotes omitted)).

The recent amendment to the Federal Rules of Appellate Procedure, Rule 32.1, "allow[s] unrestricted citation to unpublished opinions." *Id.*; *see also* Velamoor, *supra* note 102, at 562 ("Although offered principally to foster inter-circuit uniformity regarding litigants' ability to cite unpublished opinions in the federal courts of appeals, ambiguities in the rule's construction and the Advisory Committee's refusal to require that unpublished opinions be considered binding authority would likely result in a regime subject to inconsistency, and therefore unpredictability, on a host of other, equally important issues.").

282. *See* Stephen Choi & Mitu Gulati, Essay, *A Tournament of Judges?*, 92 CAL. L. REV. 299, 304 (2004) (concluding that an objective "tournament of judges" would allow judges to compete against each other for the chance of achieving a promotion or enhanced reputation); Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23, 24 (2004) (stating that a standard set of criteria for judges will produce a more objective nomination system); William P. Marshall, *Be Careful What You Wish for: The Problems with Using Empirical Rankings to Select Supreme Court Justices*, 78 S. CAL. L. REV. 119, 120 (2004) (arguing that Choi & Gulati's "tournament of judges" criteria may produce only one type of candidate in the nomination process).

283. At its broadest level, the structure of the federal government reflects an allocation of decisionmaking, one whose borders are constantly being disputed in the

allocation of decisionmaking power between judges and juries and between appeals courts and trial courts. Such allocations also include doctrines of preclusion (which limit the ability of a subsequent court to revisit an issue decided, or which could have been decided, by a prior court) and notions of "discretion,"[284] which in a variety of legal areas operates to cede a wide range of authority to the lower courts (although "abuse of discretion" confines that range). Similarly, the recurrent disputes about the extent of "deference" accorded administrative agencies under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[285] and its progeny[286] illustrate the difficulties of dividing lawmaking power.[287]

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courts and elsewhere.

284. The areas entrusted to a lower court's discretion are too numerous to list, but one example is the decision by the Supreme Court to commit reliability determinations in the admission of expert testimony to the discretion of the trial judge. Gen. Elec. Co. v. Joiner, 522 U.S. 136, 143 (1997) (holding that courts of appeals must apply an "abuse of discretion" standard to a district court's reliability determination). I am indebted to my colleague D. Michael Risinger for his explication of the under-analyzed notions of discretion at play in our legal system.

285. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 838, 843–44 (1984); Murphy, *supra* note 30, at 1076 n.6 (arguing that the notion of precedent resembles the *Chevron* doctrine: "There are, of course, a number of ways to express the rough idea that courts should show substantial but not absolute deference to precedents. Insofar as the declaratory-theory requires courts to follow precedents with which they can 'agree to disagree,' as it were, it resembles the *Chevron* doctrine that courts must defer to 'reasonable' agency interpretations of their organic statutes"); *see also* Allen, *supra* note 93, at 558–59 (arguing that no citation rules significantly effect judge's decisions).

286. There is vast literature on the rationale and limits of the *Chevron* principle, which has been justified not only by democratic values and the proper relationship between legislative and executive branches but also as achieving national uniformity in a nation whose judicial decisions cannot be effectively reconciled by the Supreme Court. *See* Murphy, *supra* note 23, at 1042; Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1100 (1987); *see also* Allen, *supra* note 93, at 561 (discussing the value of consistency in administrative decisions).

287. *See generally* Murphy, *supra* note 23, at 1042 (explaining that, unlike judicial decisions, administrative "agency 'precedents' do not bind later agency decision-making in any serious way"). As currently formulated, the Court requires strong deference, usually called *Chevron* deference, in some situations, and weak deference, usually called *Skidmore* deference, in others. *See* Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944). Even strong deference is not absolute since an agency interpretation may not contradict the statute it is administering. *See, e.g.*, Gen. Dynamics Land Sys. v. Cline, 540 U.S. 581, 600 (2004) ("Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent."). But *Skidmore* deference is less than *Chevron* deference and typically framed in terms very like nonbinding precedent. For example, "interpretations contained in formats such as opinion letters are 'entitled to respect' under [*Skidmore*], but only to the extent that those interpretations have the 'power to persuade.'" Christensen v. Harris County, 529 U.S. 576, 587 (2000) (quoting *Skidmore*, 323 U.S. at 140). What, exactly, *Skidmore* deference requires is contested. *See* Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *Within the Architecture of* Chevron, 42 WM. & MARY L. REV. 1105, 1111 (2001)

While the word "deference" is usually limited to the administrative law context, all allocations of decisionmaking to one body could be viewed as deference, and, as in the administrative context, a deference that could be near-absolute or, more commonly, limited. Deference is justified by a variety of values, including the need for closure, efficiency, legitimacy, and the presumed greater competence of the deferred-to body.[288] But the hallmark of all such allocations is that one body will not trump another merely because it views the other decisionmaker as incorrect.[289] Although courts do not typically speak in terms of deference when describing precedents, this system, too, can be conceptualized in such a fashion. While horizontal precedent accords no deference to a lower court's law-announcing function—the higher court decides legal questions *de novo*,[290] and its holding binds the lower court—the holding-dictum distinction has historically deferred to lower court rule-announcing authority (at least in the first instance).

But it is in the area of persuasive precedent that the notion of deference reasserts itself most strongly. The norms of judgecraft require that persuasive authorities be dealt with appropriately, which means that, at least those that grade high enough on the scale of persuasion, must be confronted precisely because the authority is an authority.[291] A court facing such a

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("The majority and two dissenting opinions in *Christensen* take no fewer than three distinct approaches to applying *Skidmore* 'deference.'").

288. Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 205 n.58 (2001) (distinguishing "between *legal deference*, which gives weight to the views of another actor simply because of that actor's status, and *epistemological deference*, which gives weight to the views of another actor because there are reasons to believe that that actor's views are good evidence of the right answer. Epistemological deference can shade into legal deference if an actor's status is, by itself, reason enough to think that the actor is more likely than the court to get the right answer").

289. For example, a circuit court may not overturn a district court's findings of fact unless the finding is "clearly erroneous." Anderson v. Bessemer City, 470 U.S. 564, 573 (1985). The "clearly erroneous" standard of Rule 52 "plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Id.*; FED. R. CIV. P. 52.

290. *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 126 S. Ct. 1211, 1219 (2006) ("We review the District Court's *legal* rulings *de novo* . . . ." (first emphasis added)).

291. The role of authority outside the legal realm has driven much human thinking. Three major Western religions have taken dramatically different approaches to the authority of their sacred texts. Professor Erichson cites the Jewish notion of yeridat hadorot, the decline of the generations, which suggests that those closest to Mount Sinai are closer to the truth and are more authoritative. In contrast, Catholic teaching embraces a more evolving notion of authority, its magisterium, or teaching authority, draws not merely upon sacred texts but also upon oral traditions and reasoned analysis of

high-value persuasive precedent will often go to great lengths to distinguish it, although there is no formal requirement to do so. And, when such prior authority cannot be distinguished (at least in a way that is intellectually satisfying to the court), it will usually feel compelled to explain why it has reached a different result.[292]

In short, persuasive precedents can be rejected, but they cannot be ignored. Where persuasive authority accumulates in a particular direction (which, of course, is likely) the result may well be to strongly influence the course of the law in a way not indicated by its formal status. It is in this setting that vacated authority must be placed—it is "only" persuasive, but that means it is beginning to emerge as one of the sources which a judge attuned to the norms of the profession may, and perhaps should, take into account. Indeed, to the extent that dicta from a superior court, however defined, are beginning to be treated more like holdings,[293] it is possible that vacated decisions from a higher court will be treated as were dicta previously (and perhaps as "unpublished" opinions will be when new Rule 32.1 goes into effect).[294] In both cases, of course, the lower court might anticipate ignoring the vacated decision at the risk of being reversed for failing to conform to whatever the higher court said—even if it was not technically flouting any established law by ruling otherwise.

VIII. SO WHAT?

Some (many?) might object that the previous discussion is overly formalistic since they question the importance of even

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modern conditions. Protestantism, in still another approach to authority, has traditionally stressed the individual's reading of the Bible over other exegesis.

292. A striking example of this is what Charles Knapp, Nathan Crystal, and Harry Prince describe as Justice Traynor's "coy" citation in his path-breaking promissory estoppel opinion, *Drennan v. Star Paving Co.*, 333 P.2d 757, 760 (Cal. 1958). CHARLES L. KNAPP, NATHAN M. CRYSTAL, HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW 197 (5th ed. 2003). Justice Traynor cited to *James Baird Co. v. Gimbel Brothers,, Inc.*, 64 F.2d 344, 345 (2d Cir. 1933), an opinion by Learned Hand, merely with a "*cf.*," although it has been forcefully argued that Traynor's entire opinion was structured to rebut Hand's analysis. *See also* Alfred S. Konefsky, *Freedom and Interdependence in Twentieth-Century Contract Law: Traynor and Hand and Promissory Estoppel*, 65 U. CIN. L. REV. 1169 (1997) (mentioning that comparisons of Traynor and Hand's opinions have overlooked "the evidence that Traynor deliberately targeted and rejected the Baird decision and Hand's reasoning").

293. *See supra* note 192 (noting that this traditional view is eroding in light of an increasing tendency to view as binding not merely what courts "hold" but what courts *say* in their opinions).

294. *See supra* notes 102, 281 and accompanying text (discussing the amendment to the Federal Rules of Appellate Procedure and its probable effects).

supposedly binding precedents in our legal system. Traditionalists, who believe that doctrine matters in the sense of usually influencing judges to reach results inconsistent with their personal preferences, square off with "attitudinalists," who view judicial results as often shaped by the political attitudes of the deciding judges. Rational choice theorists stick an oar in by arguing that judges act to maximize their preferences—ideological and personal, and a group sometimes called the "new institutionalists" argue that judicial decisions are often best understood as the product of the judges as part of an institution whose interests they are advancing.[295]

A pure attitudinalist might find this Article amusing, if she got this far: since even so-called binding precedent rarely constrains judges to reach decisions contrary to their preferences, such a person would hardly think that weaker forms of authority would have any effect at all. However, the question of the role of precedent versus preference is to a large extent a dispute over degree, and varies with the position of the court at issue in the judicial hierarchy.[296] No school completely denies the influences of the others, and all recognize that various influences are more or less important in various kinds of cases.[297] For our purposes, one need not be a dyed-in-the-wool realist to believe that, at least at the margins of our precedent system, a judge's proclivities are more likely to determine a result than is a vacated precedent.

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295. Richard Posner, for example, recently set forth his judicial method which seems to combine preference and constraint: "The way I approach a case as a judge—maybe you think it heresy—is first to ask myself what would be a reasonable, sensible result, as a lay person would understand it, and then, having answered that question, to ask whether that result is blocked by clear constitutional or statutory text, governing precedent, or any other conventional limitation on judicial discretion. That is how I would proceed if asked to decide a case challenging the legality of the NSA surveillance program." Posting of JB on Balkinization, Feb. 1, 2006, http://balkin.blogspot.com/ (Feb. 1, 2006, 9:38 EST) (quoting Richard Posner & Phillip B. Heymann, *Tap Dancing*, NEW REPUBLIC ONLINE, Jan. 31, 2006, *available at* https://ssl.tnr.com/p/docsub.mhtml?i=w060130&s=heymannposner013106). Interestingly, this statement begins with common sense but ends by acknowledging constraint, without really addressing how constraining the sources of law are.

296. *See* Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 330 (2005) ("[P]ositive theory need not—and typically does not—deny the influence of law; it only raises questions about how much law serves to constrain judges in the strict sense demanded by some normative theory.").

297. *Id.* at 301 (reporting "panel effects" studies showing that the composition of a panel may be as much or more important than an individual judge's own ideology); *see also* Michael A. Perino, *Strategic Decision Making in Federal District Courts: Evidence from Securities Fraud Actions*, St. John's Legal Research Paper No. 05-013 (May 2005), *available at* http://ssrn.com/abstract=727905 ("[L]iberal and conservative judges sitting in ideologically dissimilar circuits were significantly more likely to adopt the intermediate standard [for securities fraud] than other judges.").

Nevertheless, the system acts as if judges are constrained by precedent,[298] and this seems often true, even if not as often as our official ideology would require.[299] For one thing, precedent is generally conceded to be far more powerful in the circuit and district courts than in the Supreme Court, and studies discounting the effect of precedent tend to focus on that Court.[300] The power of precedent in inferior courts may well be magnified by judicial fear of reversal,[301] an influence that is nonexistent in the Supreme Court.

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298. *See generally* Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989) (stating that the test of the power of precedent is those situations "in which a subsequent court believes that, though a previous case was decided incorrectly, it must, nevertheless, through operation of the practice of precedent following, decide the case confronting it in a manner that it otherwise believes is incorrect").

299. *See generally* Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 289 (1998) (critiquing social science methodology but also arguing that legal scholarship gives inadequate attention to such research showing that "attitudinal" factors are better predictors of judicial outcomes than is precedent); Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 905 (2005) (commenting that precedent exerts more path dependency in constitutional law than social scientists acknowledge, but less path dependency than legal scholars presume); Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743, 746 (2005) ("The growing body of empirical research on the lower federal courts . . . reveals that ideology explains only a relatively modest part of judicial behavior and emerges on the margins in controversial and ideologically contested cases. Moreover, empirical research, with its inherent limitations in study design and qualifications in measurement, nearly always requires treating conclusions as tentative, context-specific, imperfect, and incomplete in coming to an understanding of human behavior." (footnote omitted)). Outside legal academia, an extensive political science literature in this area generally supports the attitudinal view. *See, e.g.*, SAUL BRENNER & HAROLD J. SPAETH, STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946–1992, at 2 (1995); HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OF MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT 7 (1999) (exploring the evidence on both sides of the issue as to the influence of stare decisis at the Supreme Court); Emery G. Lee, III, *Horizontal Stare Decisis on the U.S. Court of Appeals for the Sixth Circuit*, 92 KY. L.J. 767, 768 (2004) (concluding that for the most part circuit judges in the court of appeals comply with horizontal precedent); Emery G. Lee, III, *Precedent and Compliance: Horizontal Stare Decisis on the U.S. Court of Appeals for the Sixth Circuit*, 1 SETON HALL CIRCUIT REV. 5 (2005). *But see* DAN PINELLO, GAY RIGHTS AND AMERICAN LAW 143 (2003) (studying appellate court treatment of lesbian and gay rights and finding "precedent is alive and well in intermediate appellate courts, was pivotal in courts of last resort over a quarter of the time, and suppressed potentially conservative votes at a much higher rate than liberal ones").

300. *See* Cross, *supra* note 299, at 289 (arguing that precedent is less likely to meaningfully constrain the Supreme Court because that Court tends to hear only cases for which precedents do not provide a clear answer).

301. Judges' dislike of being reversed on appeal is attributed to a number of factors, including "(1) fear that their professional audience, including colleagues, practitioners, and scholars, will disrespect their legal judgments or abilities; (2) fear that a high reversal rate might reduce opportunities for professional recognition and advancement (including promotion to a higher court or appointment to judicial or other commissions); and (3) the perception that reversal undercuts their de facto judicial power, both in a

In any event, the significance of what counts as precedent is a continuing preoccupation of judges and lawyers, reflected perhaps most dramatically in the long-simmering dispute about "unpublished" opinions,[302] and the new rule that permits citation of such opinions while punting on their precedential status. Further, the recent revival of interest in the holding/dictum distinction, perhaps triggered by the increasing tendency of lower federal courts to treat as law that which a higher court said, not merely what it held,[303] is another example of our continuing preoccupation with "what is law."

While this Article is an attempt to continue that conversation on a somewhat different track, it does not assume that "law" is merely what judges say it is. Ultimately, if law (in the sense of what judges do and say) is to have any effect outside of the closed system of the courts, it is because other human beings will conform their conduct to the decisions issued by judges. Further, except for the parties to a particular case whose conduct will be directly influenced (often dictated) by the judgment, human beings will conform their conduct to current decisions only if they predict that future judges in future cases will follow them.[304] Precedent becomes critical not merely for legitimacy in terms of respect for judgments being enforced, but in the broader sense that the power of the judiciary depends on an expectation that precedents will be followed. While it is not necessary that precedents be invariably followed, the power of the judiciary depends on them being usually followed.

Some may doubt whether these broader concerns are seriously implicated in the precedential status of vacated opinions, but these possible implications explain the cluster of recent concerns about what counts as law. Together these concerns reveal a deep interest in the building blocks of our legal system. Formalist questions continue to engage us, even if we are all realists now.[305]

IX. CONCLUSION

Nearly a decade ago, Larry Alexander and Frederick Schauer considered the extent to which elected officials should comply with Supreme Court decisions. They concluded that "at

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tangible and intangible sense." Caminker, *supra* note 197, at 77–78.

302. *See* Allen, *supra* note 93, at 560.

303. *See supra* notes 190–98 and accompanying text.

304. Humans may, of course, conform to nonlegal norms; the focus of this discussion is on law as it influences human conduct.

305. *See generally* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 382 (1973).

times good institutional design requires norms that compel decisionmakers to defer to the judgments of others with which they disagree. Some call this positivism. Others call it formalism. We call it law."[306]

This Article has explored a different aspect of the "what is law" question. Numerous courts treat the vacation of a judgment as not necessarily casting any doubt on the vitality of the underlying precedent. The result is to create a kind of "shadow" precedent system. While courts do not accord vacated opinions formal binding power, such opinions do exercise considerable persuasive power, beyond the abstract strength of the arguments in the opinion, power which it may be appropriate to call law.

306. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1387 (1997) (arguing that the Supreme Court is in the best position to serve as an authoritative interpreter, whose interpretations will bind all others).